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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN PORTUGAL

-- 2013 --

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ANNUAL REPORT ON COMPETITION POLICY IN PORTUGAL

1. This Report covers the activities of the Portuguese Competition Authority (“PCA”) from 1 January 2013 to 31 December 2013. It therefore includes some of the activities already covered in the 2012 Annual Report on Competition Policy Developments in Portugal, which was submitted to the OECD Competition Committee meeting of October 2013, referring to the period from 1 July 2012 to 30 June 2013. This is due to the fact that the PCA has since decided to align the period covered by its Annual Reports to the OECD Competition Committee with the civil year, as is its practice in the scope of its reporting obligations under Portuguese Law.

1. Changes to competition laws and policies, proposed or adopted

1.1 Institutional changes

2. **Appointment of the new Board of Directors.** On 16 December 2013, the Portuguese Government appointed two new members to the Board of the PCA, having chosen to maintain the three-member structure of the Board which has been in place since the PCA’s creation in March 2003. The replacement of the third member of the Board was postponed to 2014, in order to ensure that individual members’ terms do not all end simultaneously, as set forth in the Framework Law on Regulatory Authorities mentioned in paragraph 0 below.

3. **New internal organisation.** The PCA’s internal reorganisation undertaken in October 2013 led to the creation of a new Anti-Cartel Unit within the PCA’s Restrictive Practices Department, reflecting the priority placed by the PCA on prosecuting this particularly serious kind of infringement of competition rules, as well as the specific nature of the investigation procedures these prosecutions entail. A Special Unit for Competition Assessment of Public Policies was also created in order to tackle the considerable impact that legal norms and sectorial regulations can have on competition.

1.2 Summary of new legal provisions of competition law and related legislation

4. **Framework Law for Regulatory Authorities.** In 2013, a new Framework Law on Regulatory Authorities was enacted pursuant to the publication of Law No. 67/2013, of 28 August 2013. This Framework Law aims to provide an overarching set of principles and rules regarding the governance, management and powers of the PCA and a wider set of independent administrative authorities, namely those which are legally endowed with regulatory powers. This piece of legislation came about pursuant to specific measures envisaged in Portugal’s Economic Adjustment Programme, which set out, as a key structural reform, the adoption of a new legal framework aimed at strengthening the role of sector regulators and the PCA, and ensuring their independence and adequate financing. The Framework Law sets forth rules which affect the PCA’s legal and institutional setting, strengthening its administrative and financial autonomy. The enactment of the Framework Law has, in turn, required an amendment to the Bylaws of the PCA which was not approved until 2014.

5. **New legislation on unfair trading practices.** On 27 December 2013, new legislation on unfair trading practices was adopted by way of the enactment of Decree-Law No. 166/2013, which replaced Decree-Law No. 370/93, of 29 October 1993. This Decree-Law attempts to overcome some of the

difficulties and limitations of previous legislation, by clarifying the notion of ‘below-cost sales’ and of abusive/unfair negotiating practices, with a more detailed characterisation of the latter. Moreover, it defines minimum and maximum values for the pecuniary sanctions associated with the different violations which increase with the size of the offending undertaking, from a single person to a large firm. The new Decree-Law transfers the legal power to initiate sanctioning procedures targeting unfair trading practices, which hitherto was within the remit of the PCA, to the Authority for Food and Economic Safety.

1.3 Other relevant measures, including new guidelines

6. After the 2012 Portuguese Competition Act came into force, the PCA published several regulations, guidelines and other documents with the objective of increasing legal certainty, predictability and transparency. All guidelines were subject to public consultation prior to approval.

7. **New Portuguese Leniency Programme.** After assessing the comments received during the public consultation period, the PCA approved a new Regulation on procedural rules for leniency applications and explanatory guidelines. The new PCA Regulation No. 1/2013 and Guidelines aim to ensure that the Portuguese leniency program is predictable and attracts applicants. PCA Regulation No. 1/2013 contains rules on the submission of leniency requests (legally referred to as requests for immunity or reduction of fine), which may be submitted either in written or oral form. The Regulation further deals with the submission of summary applications, which may now also be presented in either written or oral form, in either Portuguese or English, in accordance with the template which is attached to the ECN Model Leniency Programme. The new Regulation also sets forth clearer rules on the marker system for leniency applications, as well as the treatment afforded to incomplete or rejected applications.

8. **New Guidelines on Prioritisation.** In 2013, the PCA also approved Guidelines regarding the prioritisation of investigations. Under article 7 of the 2012 Portuguese Competition Act, the PCA now has the ability not to open proceedings in cases where it deems there is no reasonable public interest in bringing up charges. In order to make this assessment, the PCA must take into consideration not only the priorities set out in terms of competition policy but also the merit of elements on the file (in terms of the facts and the applicable law), the seriousness of the alleged infringement, the likelihood of meeting the burden of proof and the extent of investigations required in order to do so. Further to this, Article 7 also allows the PCA to confer different degrees of priority to its ongoing investigations. The PCA has issued guidance on the scope of each of the grounds that may justify the opening of formal infringement proceedings and on how to prioritise investigation case files, enhancing transparency in its decision-making process.

9. **New Guidelines on the Handling of Antitrust Proceedings.** The drafting of the new Guidelines on the handling of antitrust proceedings have taken into account nearly ten years of enforcement practice under the previous 2003 Portuguese Competition Act. The guidelines bring together both the PCA’s administrative practice and national case law on procedural issues, taking into account the changes which have since been introduced by the 2012 Portuguese Competition Act. The guidelines cover all major aspects of an investigation, namely: the handling of complaints, the rights of parties, the statement of objections, settlements, commitments during the investigation, the final decision, business secrets and access to file. The PCA took the comments it received during the public consultation into consideration, and used similar guidelines of the European Commission and of other Competition Authorities within the European Competition Network as benchmarks.

10. **Simplified Merger Notification Form.** In February 2013, Regulation No. 60/2013 of the PCA, which establishes the forms for pre-merger notification, was published. The Regulation includes a new simplified notification form as envisaged in the 2012 Portuguese Competition Act, which provides that

notification mergers which, pursuant to a preliminary assessment, do not pose a significant threat of creating impediments to competition, may be submitted by means of a simplified form.

11. The simplified notification form can therefore be used in the following cases:

- Mergers with no horizontal overlap or vertical relationships, provided there is no presence in neighbouring markets (i.e., a conglomerate relationship);
- Mergers with a horizontal overlap, but where the parties' combined market share is either lower than 15%, or of between 15% and 25%, provided that the market share being acquired is no higher than 2%;
- Mergers within a vertical relationship, but where the individual or combined market shares, at any of the vertical levels (upstream or downstream) are no higher than 25%;
- Mergers between undertakings which have a presence in neighbouring or related markets, but where the individual or combined market shares are no higher than 25%;
- Mergers whereby there is a change from joint control to sole control, provided the party acquiring control has neither an interest (in the sense that it does not even own a non-controlling minority stake) in the markets where the joint venture is present, nor in a market which is upstream or downstream of those markets or in any neighbouring or related markets;
- Mergers whereby there is a change from sole control to joint control, provided the party acquiring control is not an effective or potential competitor in the market where the acquired party or its parent company is present and has neither an interest in the markets where the joint venture is present, nor in a market which is upstream or downstream of the said markets, or in any neighbouring or related markets.

2. Enforcement of competition laws and policies

2.1 *Action against anticompetitive practices, including agreements and abuses of dominant positions*

12. The enforcement activity of the PCA during the period under analysis was mainly focused on the following sectors: electronic communications and media, banking, comfort foam and fish tank products and accessories.

13. **Case statistics.** Prohibition decisions were adopted in the following cases:

- Abuse of dominant position case initiated following a formal complaint made by the pay-tv operator CaboVisão – Televisão por Cabo, S.A. against the sports channel provider Sport TV Portugal, S.A.;
- Vertical restraints case, in particular, a resale price maintenance agreement by a German supplier in the market for fish tank products and accessories, aimed at preventing the lowering of prices by online retailers *vis a vis* traditional retailers;
- Horizontal restraints/cartel case (concerted market behaviour, in particular, fixing of prices and other commercial conditions) in the Portuguese comfort foam market.

14. In 2013, five proceedings were closed due to a lack of sufficient evidence.

15. Five proceedings were also initiated in respect of practices that are likely to appreciably prevent, distort or restrict competition, in the entirety or a part of the national market, in accordance with the Portuguese Competition Act.

16. **Fines.** During the period in question, fines totalling over 4 million euros (€ 4,734,188.67) were imposed with regard to the abovementioned cases.

17. **Inspections.** In March 2013, the PCA undertook inspections in the banking sector, under its new powers set out in the 2012 Portuguese Competition Act. The inspections, which involved several undertakings, were conducted at 25 sites in the Lisbon area and took place on a single day, following approximately two months of preparation. Due to banking secrecy issues, they were supervised by criminal investigation judges who were present at each location, in accordance with Portuguese criminal procedural law. Over 30 case handlers and staff from the PCA were involved in the inspections, as well as public prosecutors, court clerks and police officers. This was the largest inspection conducted by the PCA as of yet and involved an unprecedented level of coordination with judicial and prosecutorial authorities.

Table I: Summary of antitrust cases in 2013

	No. of cases
Infringement decisions	3
Investigations closed (for lack of sufficient evidence)	5
Investigations launched	5

2.1.1 Abuse of dominant position

2.1.1.1 Case No. PRC-2010/02 - Pay-TV market

18. In July 2010, the Portuguese Competition Authority opened proceedings against Sport TV Portugal, S.A. (“**Sport TV**”) regarding alleged anticompetitive practices adopted by that firm.

19. These proceedings were opened as a result of a formal complaint made by the pay-TV operator CaboVisão – Televisão por Cabo, S.A. against the sports channel provider Sport TV, related to an alleged abuse of a dominant position in the premium sports pay-TV market, consisting in price discrimination with vertical effects in the downstream audio-visual markets, especially in the pay-TV market.

20. At the time of the investigation, there was only one pay-TV premium sports channel provider in Portugal, Sport TV. Sport TV is jointly-owned (50%/50%) by Sportinveste, SGPS, S.A., which indirectly owns broadcasting rights regarding matches of the Portuguese Football League and the Portuguese Cup, and by the multimedia group ZON, which is the incumbent pay-TV operator and an important player in triple-play and other media and electronic communications markets in Portugal.

21. In Portugal, as in most EU Member States, premium sports channels, which broadcast the games of the main football leagues, constitute a “must have” media product for any pay-TV operator.

22. The PCA issued a Statement of Objections, in February 2012, charging Sport TV Portugal, S.A. with an abuse of its dominant position in the premium sports pay-tv market, in breach of Article 6 of the Portuguese Competition Act. The practices in question affect the competitive structure of the pay-TV market in Portugal and could also lead to the isolation of the national market and, consequently, the partition of the single market, thus infringing Article 102 of the Treaty on the Functioning of the European Union (“**TFEU**”).

23. On 14 June 2013, the PCA adopted the Decision to fine Sport TV Portugal, S.A., for an abuse of its dominant position in the premium sports pay-tv market, imposing a fine of € 3,730,000.00.

24. Sport TV lodged an appeal against the decision before the Court of Competition, Supervision and Regulation. The Court has since confirmed the decision of the PCA against Sport TV but reduced the fine to € 2.7 million.

2.1.2 *Horizontal Restraints - Cartels*

2.1.2.1 *Case No. PRC-2011/01 - comfort foam market*

25. In July 2013, the PCA concluded its investigation into the concerted practices adopted by three undertakings operating in the Portuguese comfort foam market: FLEX 2000 – Produtos Flexiveis, S.A. (“**Flex**”), FLEXIPOL – Espumas Sintéticas, S.A. (“**Flexipol**”) and EUROSPUMA – Sociedade Industrial de Espumas Sintéticas, S.A. (“**Eurospuma**”).

26. Following the investigation, the PCA found that, from 2000 to 2010, the undertakings concluded an agreement and participated in an exchange of sensitive information in view to fixing their prices of their products in the Portuguese comfort foam market.

27. This investigation started in 2011, after some of the undertakings involved in the infringement applied for leniency, under the 2006 Portuguese Leniency Programme.¹

28. The PCA’s final decision imposed fines on the undertakings totalling € 993,000, plus fines to five individual directors totalling € 7,000, as a result of their infringement of Article 4 of the 2003 Portuguese Competition Act and Article 101 of the TFEU.

29. Flex was granted full immunity, as it was the first undertaking to apply for leniency. Both Flexipol and Eurospuma benefited from a reduction in the amount of the fine, which therefore was set at a total of € 498,000 in the case of Flexipol and € 495,000 in the case of Eurospuma.

30. The PCA further accepted settlement submissions presented by Flexipol, Eurospuma and four of the individual directors involved in the infringement under the terms established under the 2012 Portuguese Competition Act, which was considered applicable to this case in accordance with the principle whereby laws should be retroactively applicable if they are more favourable to the defendant.

31. The decision became final as no appeals were filed against it.

2.1.3 *Vertical restraints*

2.1.3.1 *Case No. PRC-2009/12 - Fish tank products and accessories*

32. On 21st March, 2013, the PCA imposed a fine of € 4,188.67 on Sera GmH and Sera Portugal Unipessoal Lda. for the breach by the said undertakings of Article 4 of the 2003 Portuguese Competition Act and of Article 101 of the TFEU, arising from a concerted practice in the national market for fish tank products and accessories.

¹ The 2006 Leniency Programme was subsequently revoked and replaced by the provisions dealing with leniency set out under the 2012 Portuguese Competition Law.

33. This decision was issued after the launch of an investigation following a complaint lodged by a retailer which sold fish tank products and accessories online.

34. Following the investigation, it was found that, since 2008, the mentioned undertakings imposed recommended retail prices, as minimum prices for branded “Sera” products to their retailers which operated exclusively online, in breach of Article 4 of the 2003 Portuguese Competition Act and of Article 101 of the TFEU.

35. Based on the seriousness of the infringement, the PCA ordered the publication of an extract of the decision in the Portuguese Official Journal, at the expense of the participating undertakings, as well as the publication of a summary of the decision in a national newspaper.

36. The concerned undertakings, Sera GmbH and Sera Portugal Unipessoal, Lda., did not appeal the decision handed down by the PCA and duly paid the fine on 22 May 2013.

2.2 Judicial review of decisions of the PCA

2.2.1 Decision by an association of undertakings and abuse of dominant position – Portuguese Association of Chartered Accounts

37. In a decision dated 7 May 2010, the PCA had held that the “Training Credits Regulation” of the Portuguese Association of Chartered Accounts (known under its Portuguese acronym “**OTOC**”) had distorted competition on the market in compulsory training for chartered accountants in Portugal, in breach of national and EU law regarding prohibited decisions taken by an association of undertakings and abuse of dominant position. Accordingly, a fine was imposed on OTOC.

38. The Lisbon Commercial Court upheld the PCA’s decision, in what it regarded to the decision by an association of undertakings restricting competition. According to the Court, OTOC’s Regulation had both an anticompetitive object and effect, and infringed not only upon national competition law but also Article 101 of the TFEU. The Court condemned OTOC to pay a fine of € 90,000.00 and to publish a summary of the Court’s decision, at its own expenses.

39. OTOC sought the annulment of that judgment and lodged an appeal before the Lisbon Court of Appeals, which accepted OTOC’s request for the Court of Justice of the European Union (“**CJEU**”) to give a preliminary ruling concerning the interpretation of Article 101 of the TFEU, namely whether this provision applies to professional associations and to its activity of regulating compulsory training to its members.

40. By judgment delivered on 28 February 2013, the CJEU declared, firstly, that a regulation adopted by a professional association such as OTOC must be regarded as a decision adopted by an association of undertakings within the meaning of EU competition law. Moreover, the CJEU clarified that the fact that a professional association is required by law to put into place a system of compulsory training for its members cannot remove the rules adopted thereby from the scope of EU competition law.

41. Secondly, the CJEU declared that a regulation adopted by a professional association putting into place a system of compulsory training for chartered accountants in order to guarantee the quality of their services constitutes a restriction on competition which is prohibited under EU law, to the extent that it eliminates competition within a substantial portion of the relevant market to the benefit of that professional association and in so far as it imposes discriminatory conditions on the remaining portion of that market, to the detriment of the association’s competitors.

42. On 7 January 2014, following the CJEU's judgment, the Lisbon Court of Appeals upheld the Lisbon Commercial Court's decision.

2.2.2 *Vertical restraints in the market of dairy products distribution – Lactogal -Produtos Alimentares, S.A.*

43. On 15 June 2012, the PCA had imposed a fine of € 341,098.00 on Lactogal – Produtos Alimentares, S.A. (“**Lactogal**”) for retail price fixing (vertical restraint) in the out-of-home market of dairy products at the downstream level of distribution.

44. In the aforementioned decision, the PCA had found that, between 2003 and 2006, Lactogal had entered into 59 agreements with 55 distributors operating in the distribution of dairy products to hotels, restaurants and cafés. Under these agreements, Lactogal fixed the resale prices and the retail margins. According to the PCA, Lactogal's behaviour qualified as a vertical restraint that seriously restricted competition.

45. Lactogal appealed this decision in 2013, but the Competition, Regulation and Supervision Court upheld the PCA's decision, in what it regarded to the vertical restraints and the amount of the fine.

46. Lactogal lodged an appeal before the Lisbon Court of Appeals, which confirmed the first instance judgment on 29 January 2014.

2.2.3 *Cartel and exchange of information in the Catering Services Market - Eurest, Sodexo, Uniself, Trivalor Holding and ICA/Nordigal*

47. In July 2012, the PCA had imposed fines on five undertakings (Eurest, Sodexo, Uniself, Trivalor Holding and ICA/Nordigal), and on five individuals (directors) in a total amount of € 14,741,283.27, for a cartel and the exchange of sensitive information in the catering services market. The PCA's investigation had been triggered by a leniency application.

48. The undertakings and directors lodged an appeal against this decision before the Competition, Regulation and Supervision Court.

49. On 19 July 2013, the Court confirmed the PCA's decision in respect of the exchange of sensitive information, but declared that the statute of limitations had run out on the cartel. For this reason, the Court reduced the amount of the fines imposed by the PCA.

50. The undertakings and directors lodged appeals before the Lisbon Court of Appeals, which are still pending.

2.2.4 *Decision by an association of undertakings - Portuguese Association of Parking Companies*

51. In December 2010, the PCA had imposed a fine of € 1,971,397.17 on the Portuguese Association of Parking Companies (known under its Portuguese acronym “**ANEPE**”) for recommending price increases and price fixing as regards parking services provided by its members. The Lisbon Commercial Court upheld the PCA's decision, albeit with a reduction of the amount of the fine to € 969,000.00.

52. ANEPE lodged an appeal with the Lisbon Court of Appeals, which, on 4 April 2013, upheld the decision of the Lisbon Commercial Court. Consequently, ANEPE lodged another appeal before the Constitutional Court. On 12 June 2014, the Constitutional Court declared that the legal requirements for such an appeal had not been fulfilled and that the Court could therefore not rule on the merits of the appeal. This decision is not subject to appeal.

2.3 Mergers and acquisitions

2.3.1 Statistics

Table II: Merger control decisions adopted in 2013

	No. of Cases
Transactions notified	40
Total decisions	46
Pending	6
Phase I	No. of Cases
Non-notifiable transactions	2
Clearance	40
Clearance with commitments	1
Withdrawn cases	
Non Clearance	
Decisions to move to in-depth investigation	2
Referral to the European Commission	
Tacit approval	
Phase II	
Clearance	
Clearance with commitments	1
Non Clearance	
Withdrawn cases	
Tacit approval	
Total final decisions adopted*	44

*does not include the Phase I decision to proceed into Phase II

Table III: Breakdown by nature of transaction (Final Decisions)

Nature of the transaction	Cases	%
Horizontal	16	36
Vertical	5	11
Conglomerate	23	52
Total	44	100%

Table IV: Breakdown by geographic scope of transaction (Final Decisions)

Geographic scope of transaction	Cases	%
Multi-jurisdictional filings (within EU)	5	11
Multi-jurisdictional filings (outside EU)	5	11
National with involvement of undertakings from other EU member states	7	16
National with involvement of undertakings from countries outside EU	3	7
Completely national	24	55
Total	44	100%

Table V: Breakdown by type of transaction (Final Decisions)

Type of transaction	Cases	%
Sole control	29	66
Joint control	9	20
Acquisition of assets	6	14
Total	44	100%

2.3.2 *Summary of significant merger cases decided*

2.3.2.1 *Arena Atlântida/Pavilhão Atlântico*Atlântico - Phase II Clearance Decision with Remedies*

53. On 21 March 2013, the PCA issued a clearance decision subject to remedies concerning a transaction whereby Arena Atlântida proposed to acquire sole control over Pavilhão Atlântico, a multi-purpose indoor arena in Lisbon, and the company Atlântico - Pavilhão Multiusos de Lisboa, S.A. (“**Atlântico**”).

54. Arena Atlântida is a vehicle company incorporated on 2 August 2012 for the purpose of the acquisition of Pavilhão Atlântico and Atlântico, that is jointly controlled by Mr. Luís Montez (a live music promoter, through his company Música no Coração, S.A.), Ritmos & Blues – Produções Lda. (also a live music promoter) and BES PME Capital Growth (a financial entity).

55. Prior to the transaction, Atlântico was owned by Parque Expo 98 S.A., a state-owned company. Its main activity is the provision of rental services for the organisation of shows and other events (sporting events, concerts, conferences and congresses) at Pavilhão Atlântico. Atlântico is also present, through its subsidiary Blueticket – Serviços de Bihética, S.A. (“**Blueticket**”), in the provision of ticketing services.

56. Based on the parties’ activities, the analysis undertaken by the PCA focused on (i) the market for the operation of indoor venues for shows and large events, (ii) the market for the provision of ticketing services, and (iii) the market for the promotion of shows and large events. All markets were considered to be national in scope.

57. The transaction, as it was notified to the PCA, raised vertical issues as a result of two main aspects. On the one hand, the fact that Arena Atlântida would gain a significant market power in the upstream market, in the determination of the commercial conditions associated with the use of Pavilhão Atlântico, taking into account the fact that Pavilhão Atlântico represents a unique infrastructure for the staging of large musical events. On the other hand, the fact that two of the acquiring entities (Mr. Montez and Ritmos & Blues) were both promoters of live music events. Mr. Montez was also active in the provision of ticketing services through a minority stake in a ticketing operator, Ticketline S.A..

58. In this context, the PCA was called to analyse the extent to which the companies that operated in the downstream market for the promotion of shows and large events and, in particular, those promoters which represented the main competitors of the acquiring firms, could be subject to a strategy of input foreclosure as a result of the transaction. The PCA also analysed the extent to which the transaction could result in higher prices for consumers in the downstream market, as a result of the implementation by the acquiring firms of market foreclosure strategies.

59. Concerning the strategies for partial or selective foreclosure, the PCA identified five possible routes through which Arena Atlântida could constrain the competitiveness of music promoters wanting to stage an event in Pavilhão Atlântico: (i) by changing the fees and commercial conditions applicable to rent Pavilhão Atlântico as a venue for large-scale musical events; (ii) by changing the commissions charged for the ticketing services provided by Blueticket, given its exclusivity to issue tickets for events organised at Pavilhão Atlântico; (iii) by reducing the promotional efforts for events promoted by competitors of the acquiring firms; (iv) by increasing the time during which ticket revenues were retained and/or by altering security policies, thus increasing the financing constraints and costs associated with the activity of promoting musical events; and (v) by gaining access to confidential commercial information regarding competing music promoters for the benefit of the shareholders of Arena Atlântida.

60. The PCA could therefore not exclude, in the 1st phase of the proceedings, that the transaction might raise significant barriers to effective competition as a consequence of the possible implementation of foreclosure strategies by the merged firm.

61. The remedies offered in the first phase of the proceedings presented a set of risks that could render them unenforceable and were therefore deemed inadequate and insufficient to guarantee the maintenance of effective competition in the relevant markets identified.

62. Consequently, the PCA concluded that there was a need to further pursue the investigation and decided to initiate a 2nd phase in the proceedings.

63. In the beginning of 2nd phase, the parties submitted a new set of commitments which allowed the PCA to issue a clearance decision, thus eliminating the need to pursue a further investigation. The clearance decision was namely subject to (i) the divestiture by Luís Montez of his share capital in Ticketline; (ii) the elimination of the exclusivity held by Blueticket for the issuance of tickets for events in Pavilhão Atlântico; and (iii) the implementation of measures to prevent access to sensitive commercial information regarding competitors.

64. The PCA concluded that the commitments undertaken by the acquiring parties translated into a set of conditions and obligations that were sufficient, appropriate and proportionate to overcome the competition concerns that had been raised. In particular, the PCA considered that the appointment of a Monitoring Trustee with powers of approval in respect to various documents that determine the relationship between Arena Atlântida and its clients, to monitor the behavioural commitments undertaken and with a role in implementing a resolution mechanism for commercial disputes, were an immense contribution to addressing the risks that could potentially hinder the effective implementation of the commitments.

*2.3.2.2 Kento*Unitel*Sonaecom/ZON*Optimus – Phase I Clearance Decision with Remedies*

65. On 1 February 2013, Ms. Isabel dos Santos and Sonae SGPS, SA - the latter indirectly through the company Sonaecom, SGPS, SA - notified the PCA of their intention to acquire joint control of the vehicle company ZON Multimedia – Serviços de Telecomunicações e Multimédia, SGPS, SA (“**ZON**”), by means of a merger through the incorporation of the company Sonaecom’s subsidiary Optimus, SGPS, SA (“**Optimus**”) into ZON.

66. Prior to the merger, ZON was a provider of electronic communications services (mainly broadband internet access, fixed telephony and pay TV services). ZON is also active in the production, distribution of audio-visual content and in cinema exhibition.

67. Optimus was also active in electronic communications markets including, namely, fixed and mobile services, broadband internet access and Pay TV services.

68. This transaction required an extensive analysis of the electronic communications markets, including the Pay TV, triple-play and quad-play markets, as well the audio-visual content markets vertically related with aforementioned markets.

69. The analysis concluded that, despite Optimus’ small market share in most of the relevant markets, the transaction would likely result in significant impediments to effective competition in those areas where Optimus had access to a fibre-optic network due to the fact that (i) Optimus and ZON were close competitors in those areas; and that (ii) the transaction would likely reduce Optimus’ incentives to keep granting Vodafone (a competitor) access to its fibre-optic network and thereby result in a decrease of

Vodafone competitiveness, particularly in geographic areas where the provision of services for this company is based on Optimus' fibre network.

70. In order to address and remove competition concerns raised by the merger in those areas where Optimus had access to a fibre-optic network, the parties submitted the following set of commitments to the PCA:

- The extension of the duration of the network-sharing agreement between Optimus and Vodafone Portugal;
- The removal of caps on possible contractual liability resulting from the unjustified termination by Optimus of the network-sharing agreement;
- The negotiation with interested third parties of wholesale access to Optimus's fibre-optic network;
- The negotiation of a contract with Vodafone Portugal for an option to purchase Optimus's fibre-optic network; and
- The suppression, for a six-month period, of any loyalty clauses applicable to Optimus' triple-play customers with fibre access.

71. On 26 August 2013, the PCA issued a clearance decision subject to conditions and obligations. This decision was therefore accompanied by several remedies, including (i) the extension of the timeframe in which Vodafone may access Optimus' fibre network, (ii) the offer by Optimus to Vodafone of a call option agreement for the purchase of Optimus's fibre network, (iii) Optimus' renunciation to any compensation from triple play fibre customers which would have been due pursuant to loyalty clauses, and (iv) an agreement by Optimus to provide non-discriminatory access to its fibre network on a wholesale basis.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

3.1 PCA Recommendation to the Government on stranded cost compensations in the energy sector

72. In November 2013, the PCA issued a Recommendation to the Government on stranded cost compensations in the electricity sector in Portugal, the so called "**CMEC compensations**".

73. The PCA carried out an investigation which concluded that, in secondary reserves auctions, the participation of the power plants included in the compensation scheme ("**CMEC power plants**") was much lower than that of market-based power plants. The lower revenues of these CMEC power plants generated from secondary reserves services led to an increase in the CMEC compensations due to their owner, which are ultimately borne by consumers. The investigation showed that, in theory, the dominant firm could increase its profits by lowering the usage of CMEC power plants in what regards the provision of secondary reserves while increasing the use of its market based power plants for the same end.

74. Before liberalisation, the Portuguese electricity industry was mostly organised on a single-buyer framework, whereby all generators sold their energy through Power Purchase Agreements ("**PPAs**"). CMEC compensations were granted at the onset of the creation of the wholesale market in 2007 in order to compensate power plants for the termination of their PPAs earlier than originally set out. These compensations, which are borne by consumers through network access tariffs, are thus top-up payments to generators designed to preserve the levels of revenue set up in the previous PPAs. All CMEC power plants are owned by the dominant player in secondary reserves, which also owns other market-based power plants built after 2004.

75. Following the conclusions of this investigation, the PCA issued a Recommendation to the Government, proposing that it modify the CMEC revision mechanism in order to allow ex-post profits to be calculated in a way that optimises both production and balancing services.

3.2 *The Portuguese Competition Authority's Special Unit for Competition Assessment of Public Policies*

76. Within the context of the reorganisation of its internal structure carried out by the current Board of Directors, the PCA created a Special Unit for Competition Assessment of Public Policies.

77. This Special Unit is entrusted with the mission of implementing, within the PCA, a competition impact assessment procedure applicable to public legislative and regulatory activities, thus contributing to a more pro-competitive approach to market regulation. The launch of a Competition Impact Assessment project with the OECD is also envisaged.

78. With the creation of this Special Unit, the PCA acknowledges that its role in competition policy is not restricted to enforcement, but also involves competition advocacy and the promotion of more efficient practices in the markets and in the regulation of those markets.

79. The responsibilities assigned to the Special Unit were set forth as follows:

- To promote the competition impact assessment of public policies;
- To follow legislative initiatives of Parliament or the Government with an impact on competition;
- To address recommendations to the Government, sector regulatory authorities and other public entities, on measures with an impact on competition;
- To contribute to the dissemination of a culture of continuous competitive impact assessment of public policies;
- To establish relationships with national and international institutions regarding the topic of competition impact assessment.

3.3 *The implementation of Competition Impact Assessment in Portugal*

80. The PCA intends to conduct a number of initiatives that will contribute to the creation of competition impact assessment capacities within the PCA, and to raise public and private awareness of the benefits of a pro-competitive public intervention on markets.

81. Considering the expected positive impact of pro-competitive regulation on the efficiency and competitiveness of the Portuguese economy, the PCA wants to turn this initiative into a national project involving governmental institutions at all levels (central, regional and local), as well as sector regulators.

82. The PCA is willing to take a pivotal role in a capacity-building process in respect of competition impact assessment, both internally and within the Portuguese public regulatory system.

83. Internally, the PCA wants to acquire the competences that will allow it to conduct *ex ante* and *ex post* competition impact assessment on a permanent basis. These competences should include the training of a specialised team with the knowledge and the tools to perform competitive impact analyses in an efficient and effective way.

84. Externally, the PCA aims to raise awareness of public entities of the importance of pro-competitive interventions as well as to create assessment capacities where their implementation may be needed.

85. In order to attain the described objectives, the PCA has defined a plan consisting of the following stages, to be implemented in parallel:

- **Policy formulation:** this will encompass:
 - Drafting Competition Assessment Guidelines, drawing on the OECD Toolkit and on the experience of other EU competition authorities, as well as the experience reflected in the ongoing work at the ICN Advocacy Group.
 - Internal capacity-building at the PCA with the setting up of an internal unit for competition assessment.
- **Advocacy:** establishing the basis for communicating effectively with stakeholders:
 - Institutional: promoting awareness of competition assessment as part of a more efficient regulation and as a means of enhancing public policies impact on economic efficiency, which may also involve capacity-building on competition assessment within Government and Parliament, as well as other specific public institutions, such as sector regulators;
 - Private stakeholders: involving business associations and consumer organisations to promote awareness of competition assessment and develop partnerships in identifying possible areas of interest for analysis/intervention;
 - Internal: building on the knowledge of different sectors in the context of antitrust and merger enforcement, and creating internal communication channels to identify possible areas of intervention.
 - Submitting draft guidelines to public consultation, so as to raise awareness in public opinion and to obtain input from relevant stakeholders.
- **Intervention:** at this stage, intervention will focus on the development of institutional capabilities for competition assessment both in knowledge, skills and human resources; this will be achieved through:
 - Intervention in specific instances: a small number of appropriate cases will be selected to illustrate the use of competition assessment in the Portuguese context, taking into account the likely impact on competitive conditions;
 - *Ex post* intervention by conducting competition assessment analysis of the regulatory framework in two selected sectors.

Both of these stages will be instrumental in the development of guidelines and the formation of the internal unit, providing hands-on experience for testing and demonstrating the advantages of the competitive assessment procedure.

- **Strategic Planning:** the development of the project will form a team with substantial experience in competition assessment that will be able to continue carrying out these functions on an ongoing basis, conducting competition impact assessment on both existing legislation and draft legislation.

3.4 Conferences, Workshops and Seminars

3.4.1 Training Course in Competition Law organised for Judges and Public Prosecutors

86. On 21 January 2013, the PCA and the Centre for Judicial Studies signed a Cooperation Protocol, whereby both institutions undertook to jointly organise training sessions in the field of Competition Law. The first initiative took place in January and February of 2013, by means of a Training Course in Competition Law for Judges and Public Prosecutors. The speakers at the Training Course included judges of the Supreme Court of Justice, judges of the Lisbon Commercial Court, PCA staff and lawyers. The program included sessions on the PCA institutional setting, restrictive practices, procedures, due process and rights of defence, the setting of fines, judicial appeals, leniency, private enforcement and the application by national Courts of articles 101 and 102 TFEU.

3.4.2 Research Seminars

87. On 20 June 2013, the PCA hosted a public seminar given by Rosa Abrantes Metz, Principal, Global Economics Group and Adjunct Associate Professor at the Stern School of Business, NYU, on “LIBOR, Euribor, TIBOR and Other Financial Benchmarks: Detection, Antitrust and Reform”.

3.5 Cooperation

3.5.1 ECN – European Competition Network

88. The PCA actively participated in all formal and informal cooperation mechanisms within the European Competition Network (“ECN”). In this regard, the PCA attended Oral Hearings and Advisory Committee meetings regarding antitrust and merger issues. Moreover, the PCA provided substantive input to all ECN working groups, including cartels, fines, food, energy and telecommunications.

89. In September 2013, the PCA hosted a meeting of the ECN Working Group on Cooperation Issues and Due Process in Lisbon, as co-chair of this Working Group.

3.5.2 The ECA Network

90. The PCA participated in the Annual Meeting of ECA that took place in Bucharest, Romania, on 30-31 May, 2013.

91. In 2013, the PCA notified 6 merger cases to the ECA Network. All these cases referred to multijurisdictional transactions within the EEA. The ECA Network proved to be an excellent platform for the exchange of information and experience regarding particular merger cases analysed by the PCA during the referred period.

3.5.3 Council of the European Union

92. Under the coordination of the Ministry of Foreign Affairs and with contributions from the Ministry of Justice, the PCA represented the Portuguese Republic at the EU Council Working Party on Competition, in the technical discussions regarding the proposed Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (commonly referred to as the “private damages directive”).

3.5.4 *Bilateral Cooperation*

- **Singapore.** In March 2013, a delegation from the Competition Commission of Singapore, led by its Chairman, Mr. Lam Chuan Leong, and its Chief Executive, Ms. Yena Lim, was welcomed at the PCA for a bilateral meeting. Among the topics under discussion were strategies for attracting and retaining highly talented staff, IT tools and the new legal framework for competition in Portugal.
- **Mozambique.** In September 2013, the PCA organised a week-long training for a delegation of members of the Commission in charge of setting up the future Competition Authority of Mozambique. The training was particularly focused on institutional and organisational issues, as well as best practices in the promotion and enforcement of competition. The PCA has a long-standing cooperation relationship with Mozambique, following the Protocol signed between the two countries in 2010 which created the framework for technical assistance in the field of competition.
- **Spain.** In November 2013, the PCA and the Spanish Comisión Nacional de Mercados y Competencia (CNMC) held a meeting in Lisbon for the presentation of the new Spanish competition agency and the discussion of topics of mutual interest.
- **China.** In mid-November 2013, the PCA and the State Administration of Industry and Commerce (“SAIC”) of China signed a Memorandum of Understanding which aims at promoting and strengthening the co-operation between the two agencies in the field of competition law and policy, through exchanges of information and best practices, as well as capacity-building activities.

3.5.5 *Multilateral Cooperation*

3.5.5.1 *International Cooperation Network (“ICN”)*

93. During the period under review, the PCA was active in all ICN working groups: Advocacy, Agency Effectiveness, Cartels, Mergers and Unilateral Conduct.

94. The PCA attended the ICN Annual Conference in Warsaw in April of 2013, where the President of the PCA spoke in a plenary session regarding Advocacy. The PCA also participated in the second ICN Advocacy Workshop, held in Rome, in December of 2013, in addition to acting as Co-Chairs of the host working group. The President of the PCA participated in the Plenary Session on “Advocacy as a Driver for Change: Strategies and approaches of Advocacy for shaping the future”.

95. Having been nominated as Co-Chair of the Advocacy Working Group at the Hague Annual Conference in 2011, the PCA was active as the coordinator of the Project on Raising Awareness of the Benefits of Competition, which seeks to provide ICN members with knowledge, strategies and arguments for explaining the benefits of competition to support their competition advocacy efforts with government and non-government stakeholders, as well as on the evaluation of competition interventions.

96. In the period under review, the PCA led the drafting of a chapter on “Explaining the Benefits of Competition to Government and Legislators”. The PCA also participated in various teleseminars held within the various working groups of the ICN.

3.5.5.2 *Organisation for Economic Co-operation and Development (“OECD”)*

97. The PCA actively participated in the three meetings of the Competition Committee that took place in 2013, contributing with its experience and know-how, namely on the role and measurement of

quality in competition analysis, competition in road fuel and competition issues in the food chain industry. The PCA also took part in the Global Forum on Competition of February 2013.

98. In addition to its activity in the Competition Committee, the PCA also participated in the annual meeting of the OECD-BID Latin American Competition Forum, which took place in Lima, Peru, in September of 2013.

3.5.5.3 UNCTAD

99. The PCA participated in the 13th Intergovernmental Group of Experts on Competition Policy, held in Geneva in July of 2013, where topics such as the impact of cartels on the poor and modalities and procedures for international cooperation were discussed.

3.5.5.4 Ibero-American Competition Forum

100. As a founding member of the Ibero-American Competition Forum, the PCA was present at the annual meeting of the Forum in Lima, Peru, in September 2013, where high level discussions took place on issues of regional interest, namely the enforcement of sanctioning decisions and the effects on competition of public sector acting as an economic agent.

4. Resources of the PCA

4.1 Annual budget

101. The Annual budget of the PCA for 2013 was of c. € 8.4 million.

4.2 Number of employees (on 31 Dec 2013)

Specialisation	No. of Staff
Economists	26
Lawyers	32
Others and support staff	30
Total	91

* Includes management; does not include Board

** includes 3 Board members

4.3 Human resources applied to:

Area of activity	No. of Staff
Enforcement against anticompetitive practices	22
Merger review and enforcement	12
Judicial Affairs	8
Advocacy efforts	15
Administrative duties	31

* Includes management

5. Summaries of or references to new reports and studies on competition policy issues

5.1 Technical Reports and Economic Studies

5.1.1 Analysis of the Impact on Competition from Network-sharing in Telecoms

102. Network-sharing in telecoms, through co-investment and cooperation agreements, has gained an increased relevance in the last few years due to the high levels of investment required to build new generation network, together with the significant economies of scale they exhibit, in particular for smaller investors with lower financial capabilities.

103. On the other hand, network-sharing agreements in telecoms allow the co-investors or the parties to the agreement to share the risk resulting from an uncertain demand for services they offer using the network and make it easier to achieve a wider geographical coverage. These network-sharing agreements have become even more appealing at a time when access to capital markets by telecoms operators has become more difficult.

104. Different types of network-sharing agreements have already been entered into in Portugal, such as the one established between telecoms operators Optimus and Vodafone in respect to the sharing of a fibre network.

105. Notwithstanding the potential benefits arising from such investment-sharing agreements, they may be conducive to the adoption of collusive behaviour or to the discrimination of third parties in the access to the network, which might be facilitated by the sharing of sensitive information and the homogenisation of cost structures between the parties to the agreement.

106. The PCA's analysis was published in January 2013 and aimed at identifying (i) the different types of fixed or mobile network-sharing and cooperation agreements that can be established between different operators; (ii) the main benefits such agreements can bring about; and (iii) the potential anti-competitive effects they can produce. This is in line with the concerns reflected in the European Commission Guidelines on Horizontal Agreements.

107. The PCA's Final Report recommends that a competition assessment of partnerships between firms operating in the telecom sector, including cooperation agreements and joint ventures, should pay special attention to the following elements: (i) aim and geographic area where network-sharing will take place; (ii) each party's responsibilities in terms of inputs; (iii) the amount of each party's financial contribution and return collected from allowing access to the network; (iv) the possible compensation mechanisms agreed between the parties; (v) the type of information exchanges agreed between the parties; (vi) how to characterise the decision-making process and limits imposed on each party's autonomy when defining prices, quality levels and variety of services being provided; (vii) the conditions for third party access; and (viii) the mechanisms agreed upon to solve conflicts between the parties and to terminate the partnership.

108. The Report cautions that list is not intended to be exhaustive nor should it be applied in a mechanical way, with disregard for the specificities that characterise each partnership. Moreover, these types of partnerships need to be framed in the context of the relevant markets involved, as well as the market power held by each party and jointly by both parties.

5.1.2 Report on the Digital Terrestrial Television in Portugal

109. The deployment of Digital Terrestrial Television ("DTT") in Portugal was initiated by the launch of two public tenders in February 2008. Subsequently to these tenders, the national telecommunications regulator, ICP-ANACOM, awarded PT Comunicações, S.A. ("PTC") the rights to use both the frequencies corresponding to the free-to-air ("FTA") DTT platform (at the end of 2008) and the frequencies corresponding to the Pay DTT platform (in mid-2009). PTC was also granted an authorisation to act as a Pay DTT distribution operator by the national media regulator, ERC.

110. The model implemented in Portugal also provided for the licencing of a "5th channel", enabling the licensee to exercise "television activity" consisting in the organisation of a national, generalist programme service, broadcast on a FTA and 24-hour basis. However, in March 2009, ERC decided to exclude both applications submitted to the tender for the mentioned license, on the grounds that they failed to fulfil the legal and regulatory requirements for admission to the tender.

111. The high-definition channel envisaged in the Portuguese DTT model, to be shared by existing broadcasters using Mux A in non-simultaneous mode until the switch-off of analogue television, was never made available due to the lack of agreement between TV operators RTP, SIC and TVI.

112. The implementation of the Portuguese DTT model, as it was originally conceived, would likely have introduced significant changes in the retail FTA and Pay-TV markets as well as in the wholesale television broadcasting markets supporting these retail services.

113. The PCA's analysis that indicates TVI is the television operator with the greatest market power in FTA television, whereas ZON remains the market leader in the Pay-TV market even though PTC has been the fastest growing operator since 2007. Meanwhile, FTA television has been losing audience share to Pay-TV since 2002 and particularly after 2009. The introduction of DTT in Portugal does not appear to have triggered any slowdown in this declining trend.

114. As a result of the tender held in February 2008, PTC is the only operator active on the wholesale broadcasting market which allows for the provision of retail FTA television. This somewhat limits the countervailing buyer power of television operators. The market power enjoyed by operators in the upstream Pay-TV wholesale market is equivalent to that enjoyed at a retail level, since these networks are mainly used for purposes of internal supply.

115. In the context of the European Union, as of November 2012, Portugal had the lowest number of national channels, with only four channels (RTP 1, RTP 2, SIC and TVI). This is significantly below the EU25 average of about 30 channels per Member State considering both FTA and Pay-TV platforms (the average was around 16 channels considering FTA television channels only). This situation did not change with the launch of ARtv (the Parliament's TV channel) on a FTA basis by the end of 2012.

116. The DTT offer in Portugal is a long way from making the most of the advantages associated with this technology, and has not even implemented the model defined by the Government with a view to inducing voluntary migration to digital, which included the creation of a 5th channel, the introduction of high-definition broadcasting and the provision of a Pay-TV platform. The DTT platform is essentially limited to a replication of the offer supported by the old terrestrial analogue system.

117. While the PCA recognises that it falls upon market players to offer services likely to stimulate consumer interest in taking up DTT, it is still important to identify key factors critical to its success.

118. As such, in accordance with article 62 of the 2012 Portuguese Competition Law, the PCA made the following recommendations:

- The development of actions to enable the provision of a greater number of FTA channels on DTT, both public and private, and at a national and regional level, given that the present offer of channels appears to fall widely short of the possibilities of the broadcast network and what would be deemed desirable. In this context, resumption of the 5th channel licensing process is essential;
- An increased involvement of the public television operator in this process, especially through the provision of FTA thematic channels produced by RTP which are currently only available on Pay-TV platforms (e.g. RTP Memória and RTP Informação);
- An assessment of the potential interest in the setting up of pricing conditions, possibly by regulatory means, which might ensure access to the broadcast network, particularly by local entities, in order to encourage an increase in the number of FTA channels;
- An assessment of the current quality of service provided by DTT, with a view to finding solutions which overcome the shortcomings identified and improve users' satisfaction levels;

- The promotion of the transmission of high definition (HD) channels over the DTT platform;
- The fostering of the emergence of interactive services on the DTT platform; and, finally,
- The examination of whether there is an interest in the existence of a Pay DTT platform or the provision of pay-per-view services.

119. Some of the proposed measures would naturally entail changes to the current legal framework and require the coordination of authorities with competence in this area. Only a FTA offer which is appealing to users can ensure the real success of the DTT platform in Portugal and provide free and universal access which could make television a driver of social inclusion. Furthermore, a DTT offer under these terms may also act as a source of competitive pressure on Pay-TV, even where this service is provided as a component of bundled offers. Such pressure could have positive effects on pricing and quality of services, especially in scenarios of increased market concentration.

5.1.3 *Other Reports and Studies*

120. In 2013, the PCA initiated an inquiry into the maritime port sector aimed at identifying the main competition constraints in the sector, regarding both inter-port and intra-port competition. The study also aims at identifying measures and recommendations that may mitigate or eliminate such potential competition constraints, thus contributing to an improvement of the way this sector functions.

5.1.4 *Other Ongoing Market Monitoring Activities*

121. During the period under review, the PCA published two more quarterly Newsletters on Motor Fuel and Bottled Gas Sectors in Portugal. These publications analyse the consumption, production and imports patterns and also include price trends in the crude markets, international refining markets, local wholesale markets and local retail markets for gasoline and diesel, providing comparisons with the situation in the remainder of the European Union. The publication of these newsletters, launched in 2004, was terminated in 2013 pursuant to the creation by the Government of a national entity in charge of providing this data. The PCA also published twelve more monthly Liquid Fuel Statistics Bulletins, a regular publication started in September 2009.

122. In December 2013, the PCA published its 7th Monitoring Report on the Electronic Communications Markets, covering the year 2012. The Report analyses the development of competition in the electronic communications markets in Portugal, in particular with regard to the landline telephone service, the mobile telephone service and the broadband internet service, including bundled offers. The report benchmarks the position of Portugal in relation to the then 27 EU Member States.

123. The PCA maintained its monitoring activities over the energy sector (electricity and natural gas). The PCA has also issued several opinions regarding energy tariffs and prices, access tariffs to energy networks, and the operating rules concerning the electricity network in the context of the regular consultation procedures initiated by the energy sector regulator, ERSE.

124. The PCA continues to participate as a member in the activities of PARCA (“*Plataforma de Acompanhamento das Relações na Cadeia Agroalimentar*”), a Working Group created by the Portuguese Government in November 2011 which brings together different stakeholders in the food industry, including producers’ associations, retailers, the PCA and other government agencies. This Working Group has been tackling different issues on regulation and self-regulation along the vertical chain, including the creation of a new Code of Good Practices to replace the one signed in 1997. Relevant legislation has been revised including the one on restrictive commercial practices mentioned in paragraph 4 above.