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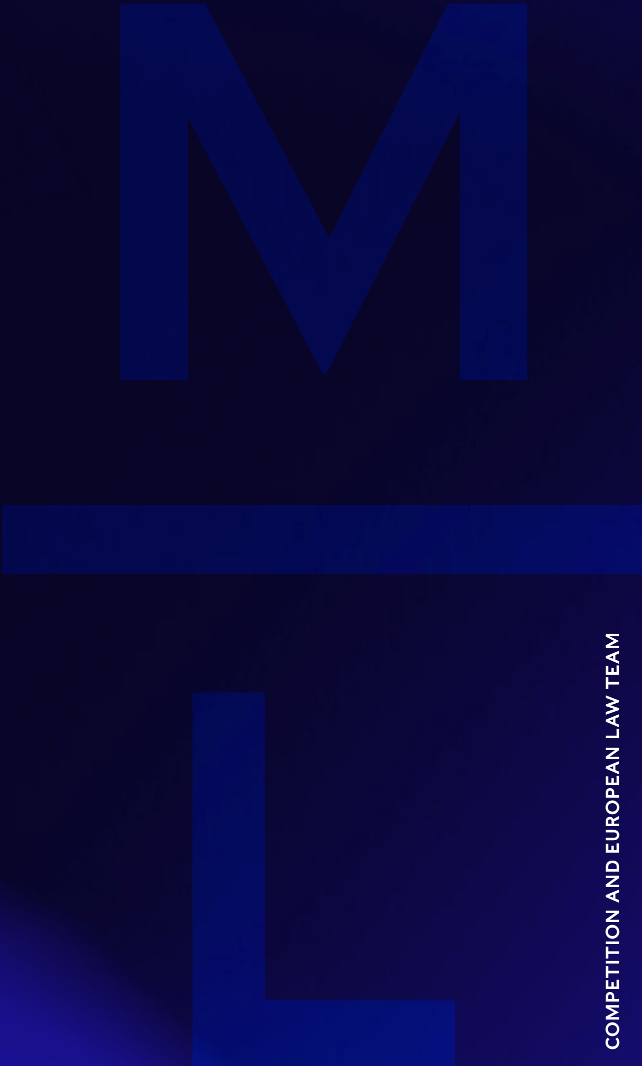
COMPETITION IN REVIEW 2024

AND PERSPECTIVES FOR 2025



COMPETITION AND EUROPEAN LAW TEAM

INTRODUCTION

The year 2024 proved to be particularly dynamic and challenging in the area of competition law, marked by relevant decisions, significant developments in case law and the emergence of new matters that shaped the national and European competition landscape.

In Portugal, the Portuguese Competition Authority (PCA) has adopted several relevant condemnatory decisions on anti-competitive practices. One of the highlights is the case of SAP Portugal, who was sanctioned in around EUR 29 million for restrictive vertical practices in the business software market. This is one of the cases that underlined the risks associated with the so-called "leniency regime" in contexts where the legal qualification of a conduct as horizontal is unclear.

In terms of case law, there have been important rulings on the seizure of electronic communications in competition related cases. The Constitutional Court confirmed the need for prior judicial authorization for such seizures, a position reinforced by the Supreme Court of Justice (SCJ) in its judgement harmonizing conflicting case law from the Lisbon Appeals Court. This is an issue that will continue to be on the agenda in 2025.

In the area of abuse of dominant position, the PCA imposed a significant fine on the SIBS Group (EUR 13.9 million) for abuse of dominant position in the payment services' sector. The Court of Justice of the European Union (CJEU) clarified key concepts in two emblematic cases: Google Shopping (self-preferencing) and Intel (conditional discounts), defining strict criteria for the economic analysis of abusive practices. The European Commission (EC) has also published draft guidelines on exclusionary abuses, reviewing the criteria for assessing these practices, following recent case law.

In the area of private enforcement, the year was marked by a great deal of litigation before the Portuguese courts, which maintained a favourable approach to plaintiffs in actions for damages resulting from competition infringements. For example, the extended presumptions regarding the existence and repercussions of the damage suffered by end consumers are noteworthy. The application of the European concept of economic unit in private actions was also the subject of relevant jurisprudential analysis.

Regarding merger control, 2024 was a record year for the PCA, who analysed more than 80 merger notifications. The prohibition of Vodafone's acquisition of Nowo due to the competitive risks identified in the telecommunications market, as well as the adoption of approval decisions subject to commitments in several cases, such as *Palavras de Prestigio/VASP*, *Yilpost Iberia/Sotagus* and *Live Nation/Arena Atlântico*R&B*, were particularly noteworthy.

At European level, it is worth noting an important ruling by the CJEU that annulled the EC's decision on the *Illumina/Grail* merger, thus limiting the possibility of ex-post control of mergers that do not meet the legal merger control criteria and ending a saga that has marked recent years.

In terms of State aid, there have been important changes to European regulations: the thresholds for "de minimis" aid have been raised and transparency requirements have been strengthened. The EC also approved significant schemes aimed at energy transition in Portugal (over a billion euros in total). The CJEU also confirmed the recovery of tax aid granted to Apple in Ireland (EUR 14.3 billion), in a landmark ruling.

Sustainability has emerged as a central theme in the EC's horizontal guidelines on agreements between competitors. Despite the positive progress in terms of clarification of regulation, challenges remain in the practical application of these rules for companies seeking to balance environmental objectives with traditional competition demands.

In the digital area, the entry into force of the Digital Services Act, the Digital Markets Act and the AI Act has profoundly changed the European regulatory paradigm in the digital sector, adopting a preventive logic in the enforcement of these rules, with specific obligations for digital players considered gatekeepers. The application of these regulations will continue to set the agenda for the coming years.

The first full year of the Foreign Subsidies Regulation was marked by the first in-depth investigations involving Chinese and United Arab Emirates companies. At the same time, a significant revision of the European framework regime on the screening of foreign direct investment is underway to strengthen European economic security.

The Portuguese Competition Authority has been particularly active investigating restrictive agreements in the labour market (no-poach and wage fixing), given the potential negative effects on labour mobility and wages that can result from such agreements (and the consequent effects on competition).

Important court rulings on the application of competition rules to sports organisations are also noteworthy. Cases involving the FIFA football agents regulations or the CJEU's Diarra ruling have clearly shown that sports organisations must adapt their regulations to the requirements of European competition law.

Significant new challenges are anticipated for 2025: more incisive action is expected to prevent so-called "killer acquisitions", especially in the digital sector, a strict application of the Digital Markets Act, a significant strengthening of European mechanisms to control foreign investments and subsidies, and greater attention to restrictive practices in the labour market.

The following articles focus on these various topics and have been prepared by our European and Competition Law Team which is available for any questions you may have.

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RESTRICTIVE PRACTICES: THE YEAR OF 2024 IN PORTUGAL

In 2024, the Portuguese Competition Authority issued a number of decisions concerning restrictive practices, both horizontally and vertically, which focused on practices such as price fixing in the context of association (audiovisual services and property management services), a multifaceted collusion in the health sector (clinical analysis, including COVID-19), limitations on distribution and market sharing (in the business software services sector and in the heating equipment sector) and RPM (resale of food supplements and health food products).

Some of the decisions and/or the associated case law allow us to draw relevant conclusions regarding aspects such as the scope of leniency in dual distribution scenarios, the (mis)use of leniency on a preventive/tactical basis, the interaction between state action promoting intermediated negotiation between competitors and collusion between the latter, and the scope of attorney-client privilege. There have also been important developments in national case law regarding the seizure of electronic communications in competition investigations, while discussions are underway at the Court of Justice of the European Union on the compatibility of national practices with European law.

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Introduction

In the course of 2024, more than a number of sanctioning decisions were adopted by the Portuguese Competition Authority (PCA), some of which not are yet final, as they have been challenged in Court.

For that year, the PCA had announced as one of its priorities the *strengthening of its capacity to identify and investigate cartels*. Cartel *identification* is critical, as it is a type of conduct typically secret. For this reason, competition authorities largely rely on their leniency programs as a way of identifying and investigating cartels while benefiting from the evidentiary cooperation of those involved, with significant savings in authorities' time and resources. For leniency applicants the advantage is the possibility of benefiting from a fine exemption or at least from a reduction.

Two of the sanctioning decisions adopted by the PCA in 2024 following investigations prompted leniency applications serve as examples of how a leniency programme is not a risk-free solution for those who use it or how it can, on the contrary, fall short of its potential.

SAP Portugal case

In case PRC/2022/6, SAP Portugal, the Portuguese subsidiary of the worldwide renowned business software provider SAP wanted to benefit from the leniency regime in relation to illicit practices in the context of public and private procedures for the procurement of Enterprise Application Software (EAS) products and associated services.

To that effect, SAP Portugal submitted a leniency application in which it characterised the practices in question as horizontal in nature, involving both SAP and some of its distributors as competitors in the downstream market, specifically, in the supply to end customers.

The PCA accepted the request for leniency and initially indicated to SAP Portugal that a fine exemption might be available. However, following the investigation measures subsequently carried out, the PCA concluded that that the practice in question was a vertical agreement devised and imposed by SAP Portugal with the aim of limiting distribution and dividing customers between itself and its distributors, preventing them from submitting bids in public and private procurement procedures.

To the extent that leniency is available only for horizontal conducts (between competing undertakings) this different legal qualification of the facts was sufficient (although not the only reason)[1] for SAP Portugal to be refused the exemption conditionally granted. For the same reason, a reduction in the fine was not available either.

In the end, the PCA closed the case against the other companies investigated and issued a statement of objection (and, subsequently, a sanctioning decision) against SAP Portugal and its parent company, the German-based company SAP SE, which were sanctioned for a total of around EUR 29 million.

The events described above are a good example of the risks associated with submitting clemency requests in factual scenarios where the legal qualification for the behaviour in question is not clear cut.

[1] The PCA also concluded that SAP Portugal had played a particularly responsible role in the offence, assuming a specific coercive role in the architecture, imposition and execution of the agreement. As such, even if the practice in question was horizontal in nature, SAP Portugal could not benefit from the leniency regime, as it did not fulfil the criterion of Article 77(2)(c) of the Competition Act (Law no. 19/2012, of 8 of May).

In this case, the existence of a dual distribution system, in which SAP Portugal acted both as a supplier of licences/subscriptions for EAS products and associated services to its network of distributors, and as a direct supplier of these same products and services to end customers, may have provided scope for some "plasticity" in the classification of the behaviour in question.

The PCA took the view that the existence of a horizontal dimension in the relationship between SAP Portugal and its distributors where they compete against each other, is not enough to qualify the behaviour as horizontal. In this regard, it is essential to take into account the specific level at which the conduct in question took place: it was in the upstream market that the restrictive collusive behaviour (of market sharing and distribution limitation, articulated between SAP Portugal and its distributors) was operationalised and, in this (upstream) market, SAP Portugal and its distributors were not competitors, but rather, had a supplier-customer relationship.

One might argue that, because the law relegates the PCA's final decision on leniency to the sanctioning decision (which concludes the administrative offence proceeding), the assumption by the applicant of a certain level of risk as to the final outcome of the procedure is inherent to the leniency system.

In most cases, this uncertainty will be dependent on aspects that are under the direct control of the applicant, in particular the conduct adopted during the course of the investigation procedure. However, that might not always be the case as shown above.

What's more, the choice to pursue a purely vertical investigation may not even be based on a disagreement as to the different legal qualification of the facts, but rather, on an investigative option of the PCA. This may be the case, for example, in *hub-and-spoke* cartels, which contain both horizontal and vertical elements. In such cases and as some decision-making practice in other Member States shows, when faced with difficulty or greater cost of demonstrating the horizontal element of the practice in relation to all the competitors involved, an authority may choose to pursue the conduct in question based only on its vertical elements – as a rule by means of a Resale Price Maintenance infringement.

Portuguese Association of Audiovisual Technicians case

In another case also decided in 2024 – PRC/2023/3 – the PCA investigated (and ended up sanctioning) the Portuguese Association of Audiovisual Technicians (APTA) for the setting of minimum prices in the provision of services in the audiovisual production sector, in areas such as: lighting, cameramen, photography, sound technicians, make-up artists, hairdressers, characterisers, among others.

The APTA approved minimum fee lists for the different categories of professionals/services provided by its members. Those lists were then sent to the Portuguese Association of Film Producers (APPF) and, in some cases, to production companies individually. The lists were also published on the APTA website.

As acknowledged by the PCA in its sanctioning decision, the above referred practice occurred in a legal context characterised by the absence of legal protection on the working conditions of the professionals at stake. These are mostly self-employed working mainly on a project-by-project basis, having to work for very long hours daily, among other aspects. The sector is also characterised by the absence of specific social protection for those service providers. The facto of the case also coincided in part with COVID-19 restrictive measures which limited or prohibited cultural activities.

Despite the above, the PCA concluded that the behaviour amounted to illegal price fixing, especially as it could not be established that the decision had been adopted in the context of a collective agreement for the working conditions of independent service providers nor in the context of a collective agreement with its counterparts.

On this last point, it is interesting to note that the investigation was triggered by a request for leniency by APPF even though – as far as can be seen from the facts described in the decision –APPF members do not compete with APTA members, APPF was merely the recipient of the price lists in question and was not involved in their preparation. Instead, the relationship between professionals from one association and another seemed to be characterised by a vertical (rather than horizontal) relationship as APPF members act on the demand side for those services provided by APTA members.

In this case – and unlike the previous one – there is no doubt that the practice investigated by the PCA was horizontal in nature. However, in its horizontal aspect, the practice did not involve the organisation that presented the request for leniency.

If that is indeed the case, then the use of leniency by the APPF might have been an option dictated simply by extreme caution but with a positive effect on the side: that of putting an end to the attempts of its negotiating counterparties to exercise (albeit unlawfully) some negotiating power.

"*Clinical analysis*" case

Also in 2024, the PCA issued three decisions that ended the investigation carried out in case PRC/2022/2, concerning illegal practices in the clinical analyses market.

This a so-called "hybrid case", *i.e.*, partially concluded on the basis of settlement decisions and a final condemnatory decision for non-settling parties.

A wide range of companies providing clinical analysis services in Portugal were investigated, as well as the sector's association (*Associação Nacional dos Laboratórios Clínicos* – ANL).

The practices sanctioned by the PCA concerned the fixing of prices and/or of other transaction conditions, boycott on the provision of services, the exchange of sensitive commercial information and, in some cases, market sharing. These practices (or parts of them) took place in relation to clinical analysis services agreed between the clinical analysis companies and public health systems such as the SNS, the ADSE and also, with regard to testing during the pandemic period, the SRSA (for the Azores Region) or with private insurance companies.

The ANL was sanctioned for having acted as a facilitator of collusion between the companies involved, operating the entire interface with the public and private entities to which it passed on the agreements entered between the companies, disclosing commercially sensitive information, enabling discussions on prices/other transaction conditions and on plans to agree on common behaviour (including collective boycotts) and the conclusion of agreements that would restrict competition.

Although there is evidence that public authorities themselves took the initiative of consulting or engaging with ANL for negotiations with its members or agreed to negotiating initiatives by the association, the PCA took the view that the choice to involve the ANL in the negotiations as an interlocutor representing the sector did not exclude nor justified the unlawfulness of the agreement between the parties.

For the PCA, the consultation carried out by the public authorities with ANL was only intended to gauge the possible market value of certain clinical analyses and would constitute a mere demonstration of the commitment of the aforementioned authorities to the success of the negotiations with the aim of obtaining general price levels acceptable to ANL's members. On the contrary, it could never be seen as a public incentive for collusion between the laboratories (indirectly) consulted.

The final fines imposed totalled more than EUR 57 million (considering all the companies sanctioned).

Other infringement decisions by the PCA

The other investigations concluded in the course of 2024 and focusing on so-called "multilateral" restrictive practices (*i.e.*, involving more than one company) involved the following companies and practices:

- Associação Portuguesa de Empresas de Gestão e Administração de Condomínios (APEGAC), sanctioned with EUR 1.170.000,00 for setting minimum prices to be charged as fees for the management and administration of residential condominiums, by expressly and tacitly recommending prices and their increase, as well as by creating and publicising a price calculation model, between 2015 and 2023;

- BAXI – Sistemas de Aquecimento, Unipessoal, Lda., sanctioned with EUR 103.000,00 for territorially restricting the market in which its official dealers operate and for fixing prices for the services they provide to end customers. The practices in question were based on contractual clauses in force, in some cases since 2006. The PCA concluded the case early due to the co-operation of the company, which took part in a settlement procedure, refraining from contesting the infringement in question and enjoying a reduction in the amount of the fine that would otherwise have been applicable to it;

- Dietmed – Produtos Dietéticos e Medicinais, S.A. sanctioned with EUR 1.040.000,00 for setting and imposing retail prices (PVP) to be observed by its distributors between at least 2016 and 2022, supported by a system for controlling and monitoring compliance with the resale prices it set.

Seizure of documents protected by attorney-client privilege

During the course of the administrative offence proceedings in case PRC/2022/2, this case gave rise to several interlocutory appeals, one of which leading to a **judgement by the Lisbon Court of Appeal (LCA) on the seizure of documents covered by attorney-client privilege**. Seizure occurred in the context of surprise inspections carried out in one of the clinical analysis companies that were subject to the investigation referred to in PRC2022/2.

The issue in dispute was whether certain electronic correspondence exchanged between the legal representative of one of the inspected and its external lawyer could be eligible for seizure under the exceptional regime established in Article 20 of the Competition Act, which limits the possibility of seizure of documents subject to confidentiality privilege to situations where the document in question constitutes "*the object or element of the offence*".

The PCA argued that the seizure was legitimate because it believed that the exchange of messages in question evidenced and embodied the existence and implementation of a non-soliciting agreement between two competing companies. This understanding was initially validated by the investigating judge but was rejected by the LCA on appeal.

In its judgement, the LCA begins by clarifying that the special regime for seizing documents subject to legal privilege cannot be limited to seizures made in a lawyer's office but also applies to documents subject to legal privilege, which are not seized in a "lawyer's office" (but as was the case here, on the premises of the company targeted by the inspection). What is important to establish for this purpose is that the document in question is effectively covered by attorney-client privilege – which the LCA undoubtedly considered to be the case.

Next, regarding the requirement that the document in question is in itself *the object or element of the infringement*, the LCA clarifies that such requirement must be understood as meaning that the document itself must embody an agreement between companies prohibited by competition law or a part or component of such an agreement. This was not the case with the messages in question, which might constitute *evidence* of a reality that could possibly be subsumed in an agreement between companies restricting competition, but not the object or even an element of that offence. To that extent, the emails in question were considered prohibited evidence.

Seizure of electronic communications by the PCA

The seizure of emails in competition law administrative offence proceedings has been the subject of extensive discussion in the administrative and judicial stages of proceedings since at least 2017. However, it was only in 2023 that the matter came before the Constitutional Court (CC).

In the first case in which it was called upon to assess the issue – Judgment no. 91/2023 – the CC began by acknowledging that the seizure of emails in competition law administrative offence is not contrary to the Constitution (a finding which is still opened to debate and not unanimous within the CC itself). However, the CC also ruled that the provision of Competition Law that allows the examination, collection and seizure of emails in competition law infringement proceedings upon authorisation by the Public Prosecutor's Office, *i.e.*, without the need for a prior Court order (issued by an Investigating Judge) was contrary to the Portuguese Constitution insofar as it violated the constitutional regime protecting the secrecy of correspondence. This judgement of unconstitutionality was confirmed shortly thereafter in two subsequent judgements by the same court (Judgements no. 314/2023 and no. 510/2024, the latter confirming Summary Decision no. 277/2024). The current constitutional case law (for now mandatory only in the specific proceeding in which it originated) thus supports a minimum level of protection and guaranties to be respected in the seizure of emails in this kind of proceeding, via the previous authorization of an Investigating Judge.

The subsequent judgement, still in 2024, that went against above decision (Judgement no. 533/2024) should not be considered as a reversal of previous case law. Even though this judgment rules on the constitutionality of the provisions found contrary to the Constitution several times before, it mirrors the position of one single judge in a panel of five judges, while all other four favoured a finding of unconstitutionality (even though the diverging grounds for substantiating such finding prevented a majority between them). At the end of the year, the CC once again considered the issue following an appeal by the PCA against a judgement by the Lisbon Court of Appeals that had implemented Judgement no. 91/2023. In this judgement – no. 937/2024 – the CC reiterated what had been decided in the initial judgement, regarding the positive judgement of unconstitutionality.

The issue took on new features and renewed strength in the course of 2024, following a judgment by the Portuguese

Supreme Court of Justice (SCJ) (ruling no. 12/2024) issued to harmonise conflicting case law of the Lisbon Court of Appeals on the matter. The SCJ determined that in competition administrative offence proceedings, it is up to the investigating judge to order or authorise the seizure of emails or other records of communications of a similar nature, regardless of whether they are open (read) or closed (unread), under the terms of the Cybercrime Law.

Therefore, under the general provisions of ordinary law, the procedural regime applicable to the seizure of emails in competition administrative offence proceedings is that of Cybercrime Law (not Competition Law), the former establishing the need for prior authorisation by the investigating judge. This decision by the SCJ is very relevant, not only due to the particular strength of a judgment that unifies diverging case law, but also because if the CC where to shift its position in the future towards a finding of conformity with the Constitution, such shift would not automatically affect the (higher) level of protection granted by ordinary law.

A final note to point out that the Court of Justice of the EU (CJEU) is also hearing preliminary rulings from the Competition, Regulation and Supervision Court on the seizure of emails, part of which in the context of appeals in cases PRC/2022/2 and PRC/2020/5 referred to above.

The questions put before the CJEU refer in essence to assessing whether the seizure of emails in the course of a surprise inspection carried out by a competition authority and which has been authorised by an entity such as the Public Prosecutor's Office is compatible with the level of protection required by Article 7 of the Charter of Fundamental Rights of the EU (Charter) (Joined Cases C-258/23, C-259/2023 and C-260/23).

In the opinion issued on the joined cases, Advocate-General Laila Medina considered that Article 7 of the Charter does not preclude such a solution, provided that there is a strict legal framework for the powers of such entity, as well as adequate and sufficient guarantees against abuse and arbitrariness, including a full *ex post* judicial review of the measures in question.

The referred opinion should not affect the domestic case law referred, which establishes a higher level of protection, possible also in light of the Charter. Also, and as recognised by the Advocate-General, the ECN+ Directive clearly wanted to leave the choice for a prior authorisation mechanism by a judicial authority within the competence of the Member States. Ultimately, this is a matter of national law.

Furthermore and as referred in the same opinion, "*the fact that, in accordance with the Constitution of a Member State, as interpreted by the Constitutional Court of that State, the search or seizure of e-mails, even open/read ones, by the national competition authority in the course of inspections at the business premises of an undertaking suspected of anti-competitive practices must first be authorised by an investigating judge is not in itself liable to call into question the effective application of Articles 101 and 102 TFEU*".

Finally, the Advocate-General issues some considerations in reply the PCA's argument that an exclusion (due to invalidity) of the evidence seized without the authorization of an investigation judge would breach the effectivity of Articles 101 and 102 of the Treaty on the Functioning of the EU. Those considerations must nonetheless be understood in due context. While the Advocate-General does state that European Union law might require national case law not to apply if said application would generate a systemic risk of *impunity for breaches of competition law* said statement is issued by reference to *(i)* retroactive effects, hence, for potential disputes over cases which have been finally decided and not to pending cases; also *(ii)* its considerations are assumedly limited to a scenario where a *systemic risk of impunity* would occur, a concept which is, according to European case law, reserved for cases other

than those which the PCA has brought to the attention of the CJEU.

In any case, even this limited scope should not ignore the other content of the conclusions, clearly pointing to the procedural autonomy of the Member States in the matter.

ABUSE OF A DOMINANT POSITION: 2024 IN REVIEW

2024 was a significant year for the area of abuse of dominance. Key developments included new policy guidelines, landmark court decisions and important enforcement actions that shaped the legal framework for assessing the behaviour of dominant companies.

The European Commission's draft guidelines introduced a structured approach to exclusionary abuses, while rulings by the Court of Justice of the European Union in cases involving Google and Intel clarified the legal rules on self-preferencing, loyalty discounts and access restrictions. At a national level, competition authorities, such as the Portuguese Competition Authority, continued to act against anti-competitive behaviour.

These developments provide important information on how competition law is evolving and what companies should consider when evaluating their behaviour in the market.

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Guidelines on exclusionary abuses of dominance

On 1 August 2024, the European Commission (EC) published its draft Guidelines on exclusionary abuses of dominance[2] and initiated a public consultation until 31 October 2024.

These guidelines are based on the case law of the European Union (EU) courts and aim to ensure an effective application of Article 102 of the Treaty on the Functioning of the European Union (TFEU), giving guidance to national courts and national competition authorities on how to apply this article and helping undertakings to assess whether their conducts constitute an exclusionary abuse.

The draft Guidelines establish a two-step approach to determine whether a conduct constitutes an exclusionary abuse:

- Departure from competition on the merits; and
- Capability to generate exclusionary effects.

In addition, the draft Guidelines provide for different standard of proof and legal presumptions depending on the category of conduct of the dominant undertaking:

- **Category 1 – General Principles**: Applies to conduct not covered by any of the other categories. The EC must demonstrate both a departure from competition on the merits and the capability to generate exclusionary effects;
- **Category 2 – Specific legal tests**: Includes practices like exclusive supply or purchasing agreements, exclusivity rebates, predatory pricing, margin squeeze, and certain forms of tying. Such conduct is presumed to depart from competition on the merits and to have exclusionary effects, though this presumption can be rebutted by the dominant company;
- **Category 3 – Naked Restrictions**: Encompasses conducts with no economic rationale other than restricting competition, such as paying customers to delay or cancel the launch of competing products. These are presumed abusive, with limited scope for rebuttal.

The draft Guidelines also provide that dominant undertakings may defend their conduct by demonstrating that it is objectively justified or that its pro-competitive efficiencies outweigh its anti-competitive effects.

The EC aims to adopt the final guidelines towards the end of 2025.

Decisions of the Court of Justice of the EU

On 10 September 2024, the Court of Justice of the EU (CJEU or Court of Justice) upheld the fine of EUR 2.42 billion imposed by the EC to Google in the Google Shopping case.

The Court of Justice rejected Google's appeal and confirmed that it has abused its dominant position by favouring its own comparison shopping service over its competitors' services on the results pages of its general search engine.

The CJEU confirmed that proving illegal access restrictions does not always require applying the strict refusal-to-supply test. Instead, it distinguished between:

[2] Draft Guidelines on the application of Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings.

- Passive refusals – where a dominant firm denies access to infrastructure developed for its own needs (subject to the strict test);

- Active discrimination (self-preferencing) – where access is granted under unfair conditions, assessed under a more flexible standard.

The CJEU ruled that self-preferencing can be a standalone abuse of dominance if certain factors are met, including market power, market characteristics, and lack of objective justification. While dominant firms are not obliged to treat rivals equally, they must not distort competition unfairly.

Additionally, the Court of Justice reaffirmed that proving a causal link is an essential element of competition law infringement, with the burden of proof resting on the Commission. While counterfactual analysis is a useful tool for establishing causality, the court acknowledged that in some cases constructing a credible counterfactual may be arbitrary or even impossible. In such instances, the EC may rely on alternative evidence to prove causality.

Regarding the proof of anti-competitive effects, the EC has broad discretion in its analysis, needing only to prove potential harm. The as-efficient competitor test is not always required, but all assessments must be comprehensive and evidence-based.

On 24 October 2024, the CJEU delivered its final ruling in Commission *v.* Intel, concluding a 24-year legal battle over anticompetitive loyalty rebate schemes in the x86 CPU market.

The case began in 2009, when the EC fined Intel EUR 1.06 billion for two types of abusive conduct:

- Loyalty rebates – conditional discounts granted to computer manufacturers, that allegedly restricted competition;

- Naked restrictions – payments made to delay or block the launch of competing x86 CPU products.

Following years of litigation, the Court of Justice upheld the General Court's annulment of the loyalty rebate fine. The court ruled that the EC had failed to properly consider Intel's economic evidence, particularly in relation to the as-efficient competitor (AEC) test. The CJEU confirmed that when a dominant company presents credible evidence that its conduct does not restrict competition, the EC must conduct a thorough economic analysis rather than relying solely on presumptions of anticompetitive effects.

The judgment provides critical guidance on assessing loyalty rebates under Article 102 TFEU, emphasizing that:

- The EC must carefully consider dominant firms' counterarguments;

- The AEC test is not decisive if contested by the company;

- A full analysis must examine factors such as market share, rebate conditions, duration, and exclusionary strategy.

Importantly, the ruling casts doubt on the EC's August 2024 draft guidelines on exclusionary abuses, which take a presumption-based approach to loyalty rebates.

While the loyalty rebate case is now closed, Intel's appeal against the fine for 'naked restrictions' remains pending.

Decisions of the Portuguese Competition Authority

In 2024, the Portuguese Competition Authority (PCA) adopted a decision imposing a fine of approximately **EUR 13.9 million** to the SIBS Group for abuse of dominance in the payment services sector.

In Portugal, the SIBS Group is the entity responsible for managing domestic electronic payment schemes, namely the MULTIBANCO network and the MB scheme, which includes the MB cards and the MB WAY app.

According to the PCA, the SIBS Group abused its dominant position in the payment services sector by implementing a tying practice under which card issuers and acquirers seeking access to the SIBS Group's payment schemes had to also acquire its processing services.

The PCA concluded that the practice lasted for about three years and prevented the entry and expansion of competing processors of the SIBS Group in the market.

MERGER CONTROL: BALANCE AND PROSPECTS

In Portugal, one of the highlights in merger control in 2024 is the record appraisal by the Portuguese Competition Authority of more than 80 mergers, the majority of which were cleared. Relevant decisions include the Portuguese Competition Authority's decision to block Vodafone's acquisition of Nowo due to concerns about price increases and reduced competition in the telecoms sector; and four clearance decisions with commitments (in the *Palavras de Prestígio/VASP*, *Live Nation/Arena Atlântico*R&B*, *EDPR/EDPR PT* and *Ylport*Grupo Sousa/Sotagus* cases), confirming the PCA's policy to accept behavioural commitments.

At Eueopean Union level, the main developments in 2024 included case law and legislative updates. The Court of Justice of the European Union ruled against the European Commission's attempt to expand *ex-post* merger control in the Illumina/GRAIL case, limiting the European Commission's ability to control unnotified transactions after they have taken place. In addition, the EC has updated its guidelines on the definition of the relevant market, incorporating digital market dynamics and R&D considerations into this determination. For 2025, the new Commissioner is expected to focus on preventing "killer acquisitions", especially in the digital space, while the EC continues to review its guidelines on horizontal mergers. In Portugal, the Portuguese Competition Authority intends to strengthen its control of gun-jumping practices and restrictive ancillary clauses in merger assessments.

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Overview in Portugal

In 2024, the Portuguese Competition Authority (PCA) was called to assess more than 80 mergers and cleared the overwhelming majority. We highlight those that went in a different direction.

In the first place, the prohibition of the acquisition of Nowo by Vodafone[3], in relation to which the PCA considered that there was a high likelihood of significant barriers to competition being created in the telecoms markets in Portugal.

Specifically, the PCA estimated that the merger between these two players had the potential to significantly increase the prices of both Nowo's and, to a lesser extent, Vodafone's products and, ultimately, the products offered by the other market players. The PCA also considered that the operation increased the likelihood, sustainability and degree of coordination of behaviour in the market.

Vodafone submitted four sets of commitments to address the concerns identified by the PCA, in particular proposing the sale to a new market entrant (Digi) of the radio spectrum usage rights belonging to Nowo and the provision of a wholesale offer to Digi over the fibre optic network owned by Vodafone, in order to compensate for the 'exit' of Nowo's offer.

However, the PCA concluded that the remedies were not effective in relation to the barriers they were intended to resolve. In particular, the PCA stressed that Digi's entry into the market was not dependent on the implementation of the wholesale offer proposed by Vodafone. In this context, the PCA rejected the proposed Nowo-Digi substitution, even considering Digi's presence on the market as a counterfactual (in the absence of the operation), which demonstrated greater benefit to consumers.

Thus, after a process that lasted almost 22 months, on 4 July 2024, the PCA adopted a decision to prohibit the operation (for the first time since 2020).

On the other hand, in 2024, the PCA **approved four mergers subject to commitments**, mostly behavioural, in different sectors.

In July, the PCA, taking into account the commitments submitted by EDPR PT – Promoção e Operação, S.A., approved its acquisition of EDPR PT – Parques Eólicos, S.A..[4] Although the notifying party already had control over the target company prior to the transaction (which, as a rule, excludes the existence of competition concerns), the PCA argued the risk of potential use of the wind farms by the EDP Group with the aim of maximising its own profits, limiting energy production and ultimately creating an increase in prices in the ancillary services market. To address this concern, EDP Group undertook to maximise energy production and, at the same time, not to use the farms in such a way as to influence the ancillary services markets. In light of this remedy, the PCA gave the green light to the operation.

Also in July, the PCA approved the acquisition of VASP, a company active in the wholesale trade of books, magazines and newspapers, by Palavras de Prestígio, a company belonging to the Bel Group, which holds a stake in the Global Media Group, active in various sectors of the press

[3] "AdC prohibits Vodafone/Nowo merger for presenting significant obstacles to competition and harming consumers". The case file can be accessed at https://extranet.concorrencia.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=Ccent_2022_55.

[4] PCA (2024) "PCA approves operation to acquire control of wind farms, after EDP makes commitments". The case file can be accessed at https://extranet.concorrencia.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=Ccent_2024_8.

and radio.[5] This link was a cause for concern for the PCA, which considered that there was a risk of discrimination against the publications of the Global Media Group's competitors. Authorisation was therefore conditional on the acquirer's commitment to guarantee adequate access for all publishers to VASP's newspaper and magazine distribution network, ensuring the necessary stability of prices and other commercial conditions applied by VASP.

In November 2024, at the end of a procedure that lasted around 18 months, the PCA adopted a decision not to oppose Live Nation's acquisition of control over Arena Atlântico, the company that owns and operates MEO Arena, and the show promoter Ritmos & Blues Produções (R&B). As the PCA identified competition concerns in the market for venues for large-scale live events and in the market for ticketing services, the notifying party submitted a set of commitments, audited by an independent monitoring trustee, which significantly reinforced the commitments that had been in place since the approval of the acquisition of MEO Arena by Arena Atlântico in 2013.[6] Among the commitments made, we highlight the obligation to guarantee conditions of effective freedom of choice of ticketing company by the promoter wishing to hold shows at MEO Arena, the application of a price freeze, safeguards to ensure that MEO Arena prices remain based on fair and non-discriminatory conditions, and also the definition of a maximum limit for the use of MEO Arena by Live Nation and R&B each year, in order to allow other producers to have access to the venue.

The commitments include the obligation to guarantee conditions of effective freedom of choice of ticketing company by the promoter that wishes to hold shows at the MEO Arena and the application of a price freeze and safeguards to ensure that MEO Arena prices remain based on fair and non-discriminatory conditions, as well as setting a maximum limit on the use of MEO Arena by Live Nation and R&B, to allow other producers accessing the venue.

Finally, in December 2024, the PCA approved with commitments the joint acquisition of Sotagus by Yilport and the Sousa Group.[7] According to the PCA, with the acquisition of Sotagus, the Sousa Group would control (together with other companies) the two competing container terminals in Lisbon, a situation which not only represented a horizontal overlap, but also the risk of one of the terminals being closed to the Sousa Group's competitors in maritime transport between Lisbon and the Azores and Madeira. In order to mitigate this risk, the Sousa Group undertook to divest its stake in the *Santa Apolónia Terminal*, with a view to eliminating the structural link that would result from controlling two terminals and, on the other hand, the Notifying Parties undertook to guarantee tariff conditions for access to the terminal for third parties under non-discriminatory conditions compared to those applicable to the Sousa Group, in order to avoid the aforementioned risk of closure of access to the Sotagus terminal.

EU case law developments

At European level, there were important developments in case law during 2024.

In the field of *gun-jumping*, the Towercast and Illumina GRAIL decisions marked 2023 and seemed to have left the

[5] Autoridade da Concorrência (2024) "AdC clears the acquisition of VASP by Palavras de Prestígio, subject to commitments". The case file can be accessed at https://extranet.concorrencia.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=Ccent_2023_41.

[6] Case Ccent. 38/2012, Arena Atlântida/Pavilhão Atlântico*Atlântico.

[7] Autoridade da Concorrência (2024) "AdC does not oppose the acquisition of Sotagus by Yilport and Grupo Sousa after proposal of commitments". The case file can be accessed at https://extranet.concorrencia.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=Ccent_2023_82.

way open for *ex-post* merger control. However, in September 2024, with the judgement that concluded the discussion of the Illumina/GRAIL case, the Court of Justice of the European Union (CJEU) put a stop to the trend towards *ex-post* control as it seemed to have been initiated by the European Commission (EC).[8]

The Illumina/GRAIL saga was a case of firsts, not only *(i)* for the imposition of a penalty for *gun-jumping* on the target company, but *(ii)* for the imposition of a fine on the acquiring company close to the maximum threshold of 10 per cent of its turnover. Later, in October 2023, the Commission applied provisional and restorative measures to dissolve the concentration.

The review of this concentration, which had not been notified either to the EC or to any Member State (MS) because it fell below the notification thresholds, had initially been justified through the referral mechanism of Article 22 of Regulation 139/2004 or the "EU Merger Regulation" (EUMR). However, the CJEU rejected the EC's interpretation that this mechanism allowed a MS with national merger control legislation to refer to the EC a request for review of a concentration that did not meet the national notifiability thresholds.

Following the Court's ruling, the EC quickly recognised the annulment of the decision, withdrawing the record fine of 432 million for violating the obligation to suspend the merger. Even so, given that the divestment of the concentration had been completed by July 2024, it is to be expected that the saga will continue for the companies involved, particularly with regard to the damages potentially suffered as a result of the EC's decisions.

New notice on relevant market definition

In February 2024, the EC adopted an updated Communication on the definition of the relevant market,[9] in which the EC integrated decision-making practice on digital markets and dynamic innovation.

With regard to merger control, it should be noted that:

- The EC takes into account the competition parameters that consumers consider relevant for defining markets, since the relative importance that consumers attach to certain parameters can change over time, such as the price of the product, the degree of innovation, sustainability and durability, and the resilience of supply chains;

- Although the EC recognises potential competition as one of the three main sources of competition, along with demand and supply substitution, the Communication reaffirms the EC's practice of not taking potential competition into account when defining markets;

- According to the EC's recent decision-making practice on mergers, the mere existence of imports in a geographical area is not necessarily sufficient to extend the geographical scope of the relevant market to all areas from which exports originate, if the relevant customers are not easily supplied in those areas;

- The EC may take into account frequent and significant R&D in highly innovative sectors when defining product markets. Depending on the level of visibility of R&D processes and the ability to predict the goods or services with which a product in the

[8] Judgment of the Court of Justice of 03.09.2024 (Illumina v. Commission, joined cases C-611/22-P and C-625/22 P).

[9] European Commission (2024) "Communication from the Commission on the definition of the relevant market for the purposes of EU competition law".

design phase may compete, the EC may conclude that the product in the design phase belongs to an existing product market or that it constitutes a new product market. In cases where the R&D process may give rise to several products, the EC can then identify the limits within which companies compete in these R&D endeavours and assess whether there may be a loss of competition in terms of innovation;

- The communication also explains the principles that the EC applies to digital ecosystems by reference to aftermarkets and packaged goods. As with aftermarkets, primary and secondary products in digital ecosystems are linked by technological connections or interoperability. The Communication states that if the secondary product is offered together as a bundle, the EC can assess whether the bundle constitutes a relevant market on its own.

Outlook for 2025

In 2024 a new Competition Commissioner took office. In Ursula von der Leyen's mission letter to the new Commissioner, Teresa Ribera Rodríguez,[10] the President emphasises the importance of the EC's fight against 'killer acquisitions'. The introduction of the Digital Markets Act was a step towards preventing this type of predatory acquisitions when *gatekeepers* are involved, but the CJEU's decisionin case *Illumina/GRAIL* took away the EC's wider possibility of reviewing them *ex post*.

Although the CJEU was clear that it was limited to the circumstances described in the *Illumina/GRAIL*[11] case, the ruling has prompted several Member States over the last few months to amend their national laws so that they can require the reporting of mergers below the mandatory notification thresholds ('call in powers'), which will allow the application of Article 22 of the EUMR in accordance with the CJEU's guidelines. On the other hand, Ursula von der Leyen also emphasises the work of revising the EC guidelines for horizontal mergers as something that the new Commissioner will have to take on in her new term.

In Portugal, the PCA was committed to continue analysing notified mergers in a timely manner by 2025 and emphasises the investment in investigating gun-jumping practices and the focus on restrictive ancillary clauses.

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[10] Ursula Von der Leyen (2024) "Mission Letter to Teresa Ribera Rodríguez".

[11] *Illumina/Grail*, §218.

STATE AID: 2024 IN REVIEW

2024 saw significant changes to European Union State aid regulations, increasing aid ceilings and strengthening transparency measures. The European Commission extended aid provisions under the Temporary Framework for Crisis and Transition to specific sectors and approved substantial aid schemes to support Portugal's transition to a net-zero economy. In terms of litigation, the Court of Justice of the European Union upheld the European Commission's recovery decision against Apple, overturning the judgment of the General Court of the European Union and confirming that Apple's tax arrangements in Ireland constituted incompatible state aid.

EDUARDO MAIA CADETE
PARTNER

BEATRIZ LOPES DA SILVA
ASSOCIATE

Introduction

Subsidies in the European Union (EU) are regulated through State aid rules, monitored by the European Commission (EC) and 2024 was a year of significant developments in this legal field.

Three of the main regulations in the State aid toolbox that underwent significant modifications, the General Block Exemption Regulation(GBER),[12] and two new *de minimis* regulations, the *de minimis* Regulation,[13] and the SGEI *de minimis* Regulation,[14] entered into force in 2024.

Additionally, the EC amended the Temporary Crisis and Transition Framework (TCF)[15] to address the specific needs of the agricultural, fisheries, and aquaculture sectors. The EC extended the provisions allowing Member States to grant limited aid to businesses in these sectors until 31 December 2024.

Several aid schemes to support Portugal's transition to a net-zero economy have also been approved by the EC.

All these material developments will have to be factored in the State aid law in 2025.

[12] Commission Regulation (EU) 2021/1237, which amends Commission Regulation (EU) 651/2014 (General Block Exemption Regulation, GBER).

[13] Commission Regulation (EU) 2023/2831 (*De minimis* Regulation).

[14] Commission Regulation (EU) 2023/2832 (SGEI *de minimis* Regulation).

[15] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023/C 101/03 (Temporary Crisis and Transition Framework).

New *de minimis* aid regulations

On 13 December 2023, the EC adopted two new regulations: the ***de minimis* Regulation** (general rules for small amounts of aid) and the **SGEI *de minimis* Regulation** (small amounts of aid for Services of General Economic Interest).

Both regulations entered into force on 1 January 2024 and will remain in force until 2030.

Regarding the ***de minimis* Regulation**, the **new rules** concern the **increase in the aid ceiling** per company from EUR 200.000 to EUR 300.000 within a 3-year period, in order to cater for inflation; the introduction of an obligation for Member States to register *de minimis* aid in a **central register** set at national or EU level as of 1 January 2026, and the introduction of **safe harbours** for financial intermediaries to further facilitate aid in the form of loans and guarantees.

Regarding the ***SGEI de minimis Regulation***, the new regulation also includes the **increase of the aid ceiling** per company from EUR 500.000 to EUR 750.000 over a 3-year period, to cater for inflation and the introduction of Member States obligation to register *de minimis* aid in a **central register** set at national or EU level as of 1 January 2026, with the aim of augmenting State aid transparency.

Additionally, on 10 December 2024, the EC has adopted an amendment to the **Agricultural *de minimis* Regulation**.

The amendment adopted includes the following changes:

- The increase in the maximum *de minimis* ceiling per company over three years, from EUR 25.000 to EUR 50.000;
- The adjustment of "*national caps*" from 1.5% to

2% of the national agricultural output and the reference period is extended from 2012-2017 to 2012-2023;

- The elimination of the "*sectorial cap*" which precluded Member States from granting *de minimis* aid exceeding 50% of the national cap to the same product sector;

- The introduction of a mandatory central register of *de minimis* aid at national or European level.

The validity of the revised Agricultural *de minimis* Regulation was extended until 31 December 2032.

The Temporary Crisis and Transition Framework

With the outbreak of Russia's war against Ukraine and in the context of its direct and indirect effects on the EU economy in 2022, the EC adopted the **Temporary Crisis Framework for State Aid** on 23 March 2022, which was subsequently amended in July and October 2022, and replaced on 9 March 2023 by the **TCF**, which deals with support measures in sectors which are key for the transition to a net-zero economy.

On 2 May 2024, the EC amended the TCF considering the vulnerability and a particular need in the agricultural, fisheries and aquaculture sectors for more time to implement effective support measures. The EC adopted a limited prolongation of the provisions enabling Member States to continue to grant limited amounts of aid (section 2.1 of the Framework) until 31 December 2024 for undertakings in these sectors.

However, this amendment did not affect the expiry of Section 2.1 of the Framework for undertakings in all other sectors as of 30 June 2024.

State Aid Decisions regarding Portugal

On 1 March 2024, the EC, in case SA.110254 – RRF: *Agendas for business innovation*, approved a **EUR 350 million aid scheme** under the TCF **to support investments for the production of equipment necessary to foster the transition towards a net-zero economy**, in line with the Green Deal Industrial Plan.

The aid will be provided in the form of direct grants, with aid intensities varying according to the size of the beneficiary and the location of the investment.

The measure will apply to companies involved in the production of relevant equipment, such as batteries, solar panels, wind turbines, heat-pumps, electrolysers, equipment for carbon capture usage and storage, as well as key components designed and primarily used as direct input for the production of such equipment or related critical raw materials necessary for their production.

On 27 September 2024, the EC also approved in case SA.113456 – *TCTF: Investments in strategic sectors*, a **EUR 1 billion aid scheme to support investments for the production of equipment necessary to facilitate the transition to a net-zero economy**, under the TCF. The aid intensity may vary depending on the location of the investment.

This measure is aimed at inducing investments in sectors strategic for the transition to a net zero economy, namely the production of relevant equipment such as batteries, windmills, heat pumps, solar, electrolysers, carbon capture and storage technologies.

On 2 July 2024, the EC approved in case SA.107166 – *Scheme to support rail freight transport*, a **EUR 45 million aid package to encourage rail freight transport, namely, to promote modal shift of freight transport from road to rail.**

The aid scheme was open to railway undertakings, authorised by the Portuguese Mobility and Transport Agency to provide rail freight services on the existing public rail infrastructure in Portugal and the EUR 45 million budget in direct grants is broken down into a maximum annual budget of EUR 9 million over the five-year duration of the scheme until 2029.

In 2024 the Regional Aid Map for Portugal (1 January 2022 – 31 December 2027), was also altered, through case SA.115173, increasing the aid intensities for investments covered by the STEP Regulation (Regulation (EU) 2024/795, establishing the Strategic Technologies for Europe Platform). Hence, the maximum aid intensities in the 'a' areas of the regional aid map for Portugal (as amended) were increased by 10 percentage points and the maximum aid intensities in the 'c' areas of the regional aid map for Portugal (as amended) were increased by 5 percentage points in the period from 1 March 2024 to 31 December 2027. These increases are added to the aid intensities identified in the Table[16] below of the Portugal Regional Aid Map.

'a' areas

NUTS code	Name of NUTS region	Maximum aid intensity (large enterprises) 1.1.2024 – 31.12.2027
PT11	**Norte** (partially: excluding 1308 Matosinhos)	30 %
PT11	**Norte** (partially: only 1308 Matosinhos)	40 %
PT16	**Centro (PT)**	
PT16B	Oeste	30 %
PT16D	Região de Aveiro	30 %
PT16E	Região de Coimbra	30 %
PT16F	Região de Leiria	30 %
PT16G	Viseu Dão Lafões	30 %
PT16H	Beira Baixa	30 %
PT16I	Médio Tejo	40 %
PT16J	Beiras e Serra da Estrela	40 %
PT18	**Alentejo**	
PT181	Alentejo Litoral	40 %
PT184	Baixo Alentejo	30 %
PT185	Lezíria do Tejo	30 %
PT186	Alto Alentejo	40 %
PT187	Alentejo Central	30 %
PT20	**Região Autónoma dos Açores**	50 %
PT30	**Região Autónoma da Madeira**	***50 %***

Non-predefined 'c' areas

NUTS code	Name of NUTS region	Maximum aid intensity (large enterprises) 1.1.2024 – 31.12.2027
PT150	Algarve (partially)	15 %
	Only the following parts of the NUTS 3 region are eligible as non-predefined 'c' area: São Brás de Alportel, Alferce, Boliqueime, Cachopo, Ferreiras, Loulé (São Clemente), Loulé (São Sebastião), Mexilhoeira Grande, Monchique, Paderne, Pechão, Quelfes, São Bartolomeu de Messines, São Marcos da Serra, União das freguesias de Algoz e Tunes, União das freguesias de Conceição e Estoi, Vaqueiros.	
PT170	Área Metropolitana de Lisboa (partially)	15 %
	Only the following parts of the NUTS 3 region are eligible as non-predefined 'c' area: Alcochete, Gâmbia-Pontes-Alto da Guerra, Moita, Pinhal Novo, Quinta do Anjo, Sado, São Francisco, União das freguesias de Atalaia e Alto Estanqueiro-Jardia, União das freguesias de Gaio-Rosário e Sarilhos Pequenos, União das freguesias de Palhais e Coina, União das freguesias de Pegões, União das freguesias de Poceirão e Marateca.	

[16] Source: case SA.109212 – Portugal - Amendment to the Regional aid map for Portugal (1 January 2022 – 31 December 2027) for the period 1 January 2024 to 31 December 2027 (mid-term review).

State aid litigation in EU courts

The most relevant 2024 ruling in State aid law was adopted by the Court of Justice of the EU (CJEU) in case C-465/20 P, *European Commission vs. Apple*, were the highest EU court overturning the General Court of Justice judgment upheld the recovery Decision (2017/1283) adopted by the Commission. The Court of Justice also pondered the Opinion of Advocate-General Pitruzella.

The EC's decision had found that, conferring a selective advantage, the profit allocation methods within the Apple group endorsed by two Irish tax rulings constituted incompatible State aid to Apple and ordered the recovery of EUR 14,3 billion by Irish authorities before Apple. According to the CJEU reasoning, the General Court of the EU (GCEU) erred when it ruled that the EC had not proved sufficiently that the intellectual property licences held by Apple and related profits, generated by sales of Apple products outside the United States, should have been allocated, for tax purposes, to the Irish branches. In particular, the GCEU erred when it ruled that the EC's primary line of reasoning was based on erroneous assessments of normal taxation under the Irish tax law applicable in the case, and when it upheld the complaints raised by Ireland and by Apple regarding the EC's factual assessments of the activities of the Irish branches of Apple and of activities outside those branches.

RECENT DEVELOPMENTS IN PRIVATE ENFORCEMENT IN PORTUGAL

The recent case law of the Portuguese courts on competition law private enforcement has been favourable to plaintiffs, namely through: *(i)* the application of the legal presumption of damage to infringements that do not constitute hardcore cartels; *(ii)* applying the presumption of passing on damages to indirect customers, even if the relevant rules were not applicable ratione temporis); *(iii)* the non-recognition of a presumption of passing-on by the plaintiff; and *(iv)* the considerable reduction in the plaintiffs' burden of proof.

There have also been relevant developments regarding the application of the economic unit theory by European Union case law in the context of private enforcement.

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Looking back at 2024 and the outset of 2025, the way Portuguese courts conducted and ruled on damages claims arising from competition law infringements continued to favour claimants.

Firstly, even in damages proceedings relating to infringements that did not consist of transaction price fixing (but, for example, a mere exchange of information on gross list prices), the courts presumed the existence of damage, even though the legal presumption of damage provided under Article 17(2) of Directive 2014/104/EU (Directive) and Article 9(1) of Law no. 23/2018, of 5 June (Law), transposing the Directive did not apply *ratione temporis*. Courts have done so by deducing a legal presumption directly from Article 101 of the Treaty on the Functioning of the European Union (TFEU), without seeking prior confirmation from the Court of Justice of the European Union (CJEU) on this innovative interpretation, or by establishing a judicial presumption based on the perception that, in the typical course of events, it would have been normal for the offence to have resulted in damage to (direct) customers. In some cases, the courts have gone further and found that the existence of damage was a direct consequence of the *public enforcement* decision, even though the decision in question declares a "by object" infringement and contains no analysis, let alone conclusions, regarding the possible effects of the infringement (in the above example: on gross prices, let alone on the transaction prices actually paid by customers).

Secondly, in cases where the claimant was an indirect purchaser, *i.e.*, had not purchased the product directly from the defendant but from an independent third party (*e.g.*, a retailer) who had purchased it from the defendant (the direct purchaser), even though the legal presumption provided for in Article 14(2) of the Directive and Article 8(3) of the Law did not apply *ratione temporis* either, the courts again presumed that the damage allegedly suffered by the direct purchaser had been passed on to the indirect purchaser and thus to the claimant. The courts did so despite the fact that the direct customer was an independent entity from the defendant and, therefore, had autonomously determined the price and other terms and conditions of sale of the product to the claimant. For the same reason (the independence of the direct customer), the main justification for the presumption of damage at the level of the direct customer (the existence of an asymmetry of information between the claimant and the defendant) did not seem applicable, since information and documentation concerning the direct customer were equally difficult (or easy) to access for both parties. Finally, the question of passing on is no longer whether the infringement has caused damage and whether the defendant is obliged to pay any compensation, but rather who has suffered that damage and who should be compensated, which is equally important. This is because if the damage had been absorbed by the direct customer and thus not passed on to the claimant, the success of the claim would not compensate the injured party (the direct customer) for the infringement but would result in the unjust enrichment (windfall profits) of the claimant.

Thirdly, the presumption of transfer of damages from the direct customer to the claimant is even more striking when compared to how courts have treated the potential transfer of damages by the claimant to its own customers (a defence to be proven by the defendant). Although in the ordinary course of events such passing-on is no less likely than passing-on from the direct customer to the claimant, the courts have not recognised a presumption of passing-on by the claimant. As a result, while the passing-on from the direct customer to the claimant was systematically considered to be proven (with the courts considering that the defendants had failed to rebut the presumption), the passing-on from the claimant to its customers was consistently (with just one exception) not considered to be proven. This was also because, in the vast majority of cases, courts took this defence away from the defendants and delegated it to court-appointed experts with little or no relevant experience in such assessments. This matter

is of importance because if the damage was not absorbed by the claimant but passed on to its customers (as is presumed in the relationship between the direct customer and the claimant), the success of the claim would not compensate the injured parties (the claimant's customers) for the infringement but would result in unjust enrichment (windfall profits) for the claimant.

Fourthly, in light of the foregoing, in follow-on damages actions for cartel infringements, claimants are left with the task of quantifying the damages they have suffered. In order to obtain the necessary information for this purpose, the Directive and the Law grant them extensive rights to request disclosure of documents in the possession of defendants and third parties. According to the case law of the CJEU, if the claimant does not make use of these rights and does not make a reasonable effort to quantify the damage, the claim for damages should be considered to be unsuccessful. However, even in this respect, the Portuguese courts have significantly reduced the procedural burden on claimants and have rescued their actions. In a case where the claimant did not request any disclosure and submitted a quantification report based on flawed data and methodology, the court held that since the claimant had already incurred costs for the initial (flawed) report, it was not financially feasible for the claimant to submit another (more robust) report (*e.g.*, based on the defendant's data). Considering that it was too difficult for the claimant to quantify the damage in these circumstances within the meaning of Article 17(1) of the Directive and Article 9(2) of the Law, the court resorted to a judicial estimate and ordered the defendant to pay the resulting amount. In a different case, where the claimant had not submitted a quantification report, the court issued a basic judgment and ordered the defendant to pay an amount to be determined in a subsequent quantification procedure (liquidation), thus giving the claimant a second opportunity to quantify the damage allegedly suffered.

Lastly, courts also faced the question of how to apply the concept of an economic unit, originally developed by the CJEU in public enforcement jurisprudence, in damages actions. The courts deferred proceedings against a parent company that had been held liable for an infringement in a public enforcement decision solely on the basis of the control it exercised over its subsidiaries directly involved in such infringement (see further discussion of this specific issue below).

In summary, recent case law has continued to favour claimants to such an extent that it appears that the courts are essentially rubber-stamping follow-on damages actions, overly easing the procedural burden on claimants, and failing to adequately determine with a reasonable degree of scrutiny whether the infringement has actually caused harm and whether such harm has actually been suffered by the claimant and not by another party in the supply chain. Looking ahead, barring the unexpected, it is likely that case law will continue to move in this direction.

However, as the EU legislator intended a more balanced application of the rules when drafting the Directive, the ECJ should use upcoming preliminary rulings on the interpretation of the Directive to provide guidance to national courts in order to restore some balance in the procedural relationship between claimants and defendants. To the same end, the EU legislator itself should intervene and revise the existing legal framework. Otherwise, if developments continue whereby public enforcement decisions lead almost automatically to the award of damages presumed to have been suffered by claimants, the Directive will not only fail to achieve its objectives, but will further reduce the already diminished incentives for companies to disclose infringements under the leniency program, thereby undermining public enforcement of competition law and ultimately competition itself.

The concept of undertaking in private enforcement: recent developments

In the *Skanska* case (C-724/17, 14 March 2019), the CJEU gave an affirmative answer to the intensely debated question of whether the concept of undertaking or economic unit, developed in the context of public enforcement, should also apply in the context of civil liability actions for antitrust infringements. In the words of the Court, "*the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines* […] *as compared with actions for damages for infringement of EU competition rules*." (par. 47).

The issue is of crucial importance since the concept of undertaking, within the meaning of Article 101 TFEU, as developed in EU case law in the context of public enforcement, covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (ETI and *Others*, C-280/06, 11 December 2007, par. 38). In other words, the CJEU does not equate the concept of undertaking with that of an entity with legal personality. The company, as an economic unit, can be made up of several natural or legal persons (*Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, 14 December 2006, par. 40). The CJEU reasons that the authors of the Treaties chose to use the concept of undertaking to designate the perpetrator of an antitrust infringement and argues that, since the liability for damage caused by infringements of EU competition rules is personal in nature, the undertaking which infringes those rules must answer for the damage caused by the infringement (*Skanska*, par. 29-31).

In practice, the concept of undertaking allows the Commission or National Competition Authorities to impute liability to parent companies for antitrust infringements committed exclusively by their subsidiaries. The attribution of liability is possible, despite the separate legal personality, as long as the parent company and the subsidiary form part of the same economic unit, which is presumed to be the case whenever the parent company holds all, or almost all, of the subsidiary's shares.

Importing the concept of undertaking into the private enforcement field gives rise to various problems and questions, many of which have yet to be answered. Firstly, the overwhelming majority of cases of attribution of liability, in public enforcement, concern cases of vertical upward liability (*i.e.*, attribution of liability for an infringement committed by the subsidiary to the parent company), as such the criterion developed by the CJEU to determine whether two entities belong to the same economic unit was designed with this type of situations in mind. In particular, the subsidiary is considered to belong to the same economic unit as the parent company whenever the latter exerts decisive influence on the subsidiary's behaviour on the market. In the words of the CJEU, whenever the subsidiary "*does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company* […] *having regard in particular to the economic, organisational and legal links between those two legal entities*" (*Akzo Nobel*, C-97/08, 10 of September of 2009, par. 58) the two entities must be considered as a single economic unit and therefore as a single undertaking.

It is understandable that cases of vertical upward liability predominate in the field of public enforcement given that fines in competition law are calculated by reference to the turnover of the economic unit. Thus, attributing liability to the parent company for a subsidiary's behaviour allows the imposition of considerably higher fines. However, this concern is non-existent (as long as the subsidiary is not insolvent) in the context of private enforcement, where the aim is to repair the damage rather than impose a fine, as EU law prohibits the award of punitive damages.

Whereas in the context of private enforcement one is much more likely to find cases dealing with attribution of downward vertical liability (*i.e.*, can the subsidiary be held liable for the behaviour of the parent company?) or horizontal liability (*i.e.*, can a subsidiary be held liable for an infringement committed by another subsidiary belonging to the same economic group?). Consider the following example: a company, in Spain, buys a truck from a subsidiary of a multinational group. Later, the Commission imposes a fine on the group's parent company, based in Germany, for having participated in a price-fixing cartel. The buyer, wishing to be compensated for the overcharged price, will find it easier to bring a claim against the subsidiary established in its Member State then against the foreign mother-company. Unlike the Commission or national competition authorities in public enforcement, in the context of private enforcement the victim has no interest in the circumstance that the mother company has a higher turnover than the subsidiary. The victim's only objective is to obtain compensation for the damages he or she has suffered. Claiming compensation against the subsidiary domiciled in the same Member State as the victim will be, with great probably, less costly and less time consuming than suing the mother company established in a different Member State.

In *Sumal* (C-882/19, of October 6, 2021), the CJEU was confronted precisely with these questions. It had to decide whether an injured party can claim damages from a subsidiary when the infringement was committed by the parent company, and both entities belong to the same economic unit, and define the criteria needed to determine whether the different legal entities are part of the same economic unit. Logically, the criterion used in public enforcement in cases of ascending liability (*i.e.*, the exercise of decisive influence by the parent company over the behaviour of the subsidiary) cannot be applied in this case. Given the absence of control of subsidiaries over parent companies, it would not have been surprising if the CJEU had chosen to deny the injured party the possibility of claiming compensation from the subsidiary. In cases such as this, compensation does not fulfil any deterrent or preventive role. Nevertheless, in *Sumal*, the CJEU decided, in deference to the principle of effectiveness and placing the emphasis on the right to compensation, to recognise the possibility for victims of anti-competitive practices to hold subsidiaries liable instead of the parent company. In other words, it recognised, for the first time, a form of vertical downward liability. However, according to the CJEU, this does not mean that the injured party can automatically hold liable any subsidiary belonging to the same economic group as the offending parent company. According to the CJEU, the concept of undertaking is a functional concept, and the economic unit that constitutes it must be identified from the point of view of the object of the agreement in question (*Sumal*, par. 46).

Therefore, the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies (*Sumal*, par. 47). Thus, the ECJ limited the possibility of automatically holding liable any subsidiary belonging to the same economic group as the infringing entity. A subsidiary cannot be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which it was in no way involved, even indirectly (*Sumal*, par. 47). However, if the claimant is able to prove that both entities are part of the same economic unit, it can claim damages from a legal person other than the offending one (*Sumal*, par. 50). In order to prove that they belong to the same economic unit, the victim must demonstrate the existence of economic, organisational and legal links between the two entities and the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the other entity was held responsible (*Sumal*, par. 51 and 52).

In 2024, the CJEU adopted two other interesting preliminary rulings on this topic which deal with the problem of transposing the concept of economic unit into private enforcement actions.

The first case deals with the question of whether a parent company which is the subject of an action for compensation for damage caused by an infringement of competition law is validly served with a summons where service of the document instituting the proceedings was effected at the address of its subsidiary, domiciled in another Member State, even if the parent company forms an economic unit with that subsidiary.

In theory, it could be argued that the concept of economic unit, as developed in *Sumal* to identify what entities might be held liable for an antitrust infringement, is transferrable to the procedural context. In other words, given that a subsidiary and a parent company are jointly and severally liable for the damages caused whenever they constitute a single company, then the subsidiary may also be the addressee of the act served on or notified to the parent company.

However, the CJEU, in line with the conclusions of Advocate General *Szupnar*, decided not to adhere to this thesis (*Volvo*, C-632/22, 11 July 2024). The Court highlights that the 'undertaking' or 'economic unit' has no legal personality of its own and is autonomous in relation to the legal entities of which it is composed, so that the victim of the anticompetitive practice concerned cannot bring an action for damages against the undertaking as such, but must necessarily bring an action against one of the legal entities of which it is composed (par. 49). The circumstance that the two different entities compose an undertaking does not automatically imply that the subsidiary has been expressly authorised or designated by the parent company as a person empowered to receive on its behalf judicial documents intended for it. Such authority cannot be presumed, otherwise there is a risk of prejudicing the parent company's rights of defence (par. 50). If the alleged victim of a cartel chooses to direct his or her action for damages against the parent company rather than against the subsidiary established in the victim's Member State, he or she cannot then rely on the existence of an economic unit in order to summon or serve judicial documents intended for that parent company at the address of that subsidiary (par. 52). Even if the obligation to notify judicial acts in the parent company's Member State might represent higher costs for the victim, the *effet utile* of Article 101(1) of the TFEU cannot justify a different solution (par. 53).

The CJEU also points out the EU legislator has adopted a number of acts which apply to cross-border disputes in civil and commercial matters (such as Regulations no. 1215/2012 and no. 1393/2007) which aim to facilitate the free movement of judicial decisions and to improve the transmission between Member States of judicial and extrajudicial documents for the purposes of service, thereby promoting access to justice (par. 55). Moreover, according to the CJEU, EU case law affords cartel victims the possibility of choosing between bringing their damage claims against the parent company which has been penalised by the Commission or against the subsidiary, even if the latter is not the subject of that decision, thereby enabling them to avoid having to bear any costs of translation or service of judicial documents in another Member State (par. 69).

Another question recently debated by the CJEU is whether the economic unit concept is also applicable to the victim of the anticompetitive practice. In the *MOL* case (C-425/22, 14 of July 2024), the appellant alleged that given that competition law infringements trigger joint and several liability of the entire economic unit, a mirror (or reverse) image of the same principle should apply in the case of a claim of compensation for the damage arising from an infringement affecting a member of the economic unit.

In particular, under discussion in this preliminary ruling was the interpretation of Article 7(2) of Regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Regulation establishes the general principal that jurisdiction is based on the defendant's domicile. However, article 7 (2), which foresees cases of special jurisdiction, provides that a person domiciled in a Member State may be sued in another Member State, in matters relating to tort, delict or quasi-delict, *in the courts for the place where the harmful event occurred*.

The appellant, a company established in Hungary with a controlling interest in several subsidiary companies domiciled in other Member States, relying on the concept of economic unit, argued that, even though the damages had been directly suffered by its subsidiaries and that it did not suffer direct harm as a result of the infringement, the place of the registered office of the parent company should be considered as the *place where the harmful event occurred* for the purposes of the application of Article 7(2) of Regulation no. 1215/2012.

However, the ECJ and Advocate General *Emiliou* disagreed with the appellant's theory and held that the concept of economic unit cannot affect the scope of the place where the damage occurred. In their view, the appellant's theory is at odds with the principles underlying the rule of jurisdiction laid down in Article 7(2), namely with the objectives of proximity and predictability and of consistency between the forum and the applicable law. Therefore, *the place where the harmful event occurred* should not be interpreted as covering the registered office of the parent company that brings an action for damages for the harm caused solely to its subsidiaries (par. 37-46).

Nonetheless, it should be noted that even if the ECJ denies the possibility of using the concept of economic unit for the purpose of interpreting rules of jurisdiction, its reasoning shows that it accepts the applicability of the concept in order to recognise the legitimacy of the parent company to bring a claim for damages for losses suffered exclusively by its subsidiaries.

All in all, as in the context of public enforcement, the case law on the application of the concept of economic unit in actions for damages reveals a constant tension between, on the one hand, the effort to translate the economic reality and, on the other, respecting the procedural and substantive rights of the various legal entities that make up the undertaking.

SUSTAINABILITY AGREEMENTS IN LIGHT OF THE EUROPEAN COMMISSION GUIDELINES: AN OVERVIEW

Sustainability agreements are ring-fenced in a new chapter of the European Commission's 2023 Horizontal Guidelines. Despite the advantages of specific attention to agreements between competing companies aimed at achieving one or more sustainability objectives, the European Commission maintains the focus of the analysis on the consumer(s) in the relevant market(s), which, in addition to other difficulties, hinders the valuation of collective benefits.

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SUSTAINABILITY AGREEMENTS IN LIGHT OF THE EUROPEAN COMMISSION GUIDELINES: AN OVERVIEW

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The emergence of ESG (*Environmental, Social and Governance*) factors in company practice and in the *Corporate Governance* dictionary, along with the perception of sustainability – whether as an objective value to be protected, or as an element of demand or competitive advantage, or as a principle that cuts across all national and European actions and policies – can't help but reawaken the question on the *soul of* competition law.

Competition rules prohibit agreements and concerted practices that restrict competition, in other words, agreements that can (negatively) affect parameters such as price, quantity, quality or innovation. Naturally, it is not the role of competition law to penalise every agreement, commitment or limitation of contractual freedom. And so, any sustainability agreements related to internal social responsibility factors (such as reducing the volume of printing or lighting hours), or aimed at complying with binding human rights standards, will not even be covered by competition rules. There is no restriction of competition here.

The framework is more nebulous when the pursuit of sustainability standards is (potentially) associated with some restriction of competition or when it could have a negative impact on consumers in the relevant market for the product or service. For example, when the pursuit of a goal of reducing the fat or sugar levels of a certain product implies limiting production. Or when adherence to food welfare standards means a reduction in supply and therefore choice. Or when the adoption of more sustainable processes results in higher (final) prices.

It is precisely for these scenarios in which competition can or is even restricted, and in which its potential scope of application is triggered, that the dispute over its role in the pursuit of the Sustainable Development Goals (SDGs) becomes more pressing.

Two conflicting positions tend to be adopted in this regard. The first (position) sees competition as a driver of sustainable development for *what it is* – a 'policeman' of agreements or concerted practices between companies. In this sense, it would not be up to competition policy to relax the framework for agreements that restrict competition, or even to adopt a more permissive stance in this regard. On the contrary, because individual action is the best way forward, and because rivalry will be the key to higher levels of sustainability, competition law should intervene, precisely in its role of inhibiting co-operation, thus guaranteeing the potential for sustainability.

This (conservative, traditional, economistic and perhaps reductive or restrictive) interpretation of competition objectives and policy contrasts with a second one, which gives competition rules and authorities a more active and broader role in the pursuit of sustainability objectives (albeit with different densities or in the pursuit of different paths). This is a position that reads competition in the light of *what it should be* (if necessary, interpreting its rules in line with other objectives, resolving conflict scenarios and trying to ensure some *regulatory osmosis*). For this second approach, without prejudice to (preferred) action of public authorities and the importance of individual-unilateral action, co-operation between companies may be necessary (*e.g.*, indispensable) for resolving negative externalities and responding to market failures, integrating the gaps in public policies and regulatory-sector frameworks, and complementing the shortcomings of individualism. All of this, even when cooperation concerns competing companies. And even when competition parameters are or can be restricted.

The binomial of positions just described is not just a doctrinal delight. Similar polarisation has also been supported by the different approaches adopted by national

competition authorities – sometimes more avant-garde[17], sometimes more conservative or skeptical – with regard to sustainability agreements, which is reflected or could be reflected in different levels of *enforcement* between Member States, with a possible danger, more than for the unity of EU law, for legal certainty and equality between companies.

Without prejudice to the advantages of discussion and dissent, which precisely make it possible to reach a *more democratic* result, the current *status quo* is one of undeniable uncertainty for companies and, by extension, undeniable uncertainty for *the future of sustainability*, or, to rephrase, for *sustainability as a future*.

Companies today are faced with truly contradictory messages. On the one hand, they *have to be and appear to be sustainable, making sustainability the priority of their mission and the hallmark of their offer*. On the other hand, *they need to realise that sustainability does not justify everything, and that it cannot override or jeopardise either economic efficiency or consumer primacy in the relevant market*.

This uncertainty is particularly acute in the context of competition law, where the principle is for companies to self-assess their agreements and practices in the market.

The European Commission (EC) did not want to be left out of the discussion. There are several possible reasons. It is aware of the pioneering action of some national competition authorities in this area and *does not want to be left behind*. On the one hand, it is aware of its self-binding to the green transition by the European Green Deal and *cannot be behind* of the game. On the other hand, it anticipates the emergence of questions and doubts surrounding sustainability agreements *and must be ahead of* the game. Even if the *future* is far from certain. Regardless of the motivation, what is certain is that the EC has tried to lead the way, materialising it in the adoption of general guidelines on sustainability agreements.

Without detracting from the work that has gone before, 2023 can rightly be catalogued as *the year of the sustainability guidelines*. Firstly, with the inclusion in the new EC guidelines on horizontal cooperation agreements of 1 June 2023 (Horizontal Guidelines) of a new ninth chapter dedicated precisely to sustainability agreements, with a particular focus on standardisation agreements. Then, on 7 December 2023, with the adoption of guidelines specifically addressed to Article 210a of the Regulation establishing a common organization of the markets in agricultural products (Agricultural Guidelines),[18] which excludes from the scope of the prohibition of agreements restricting competition, sustainability agreements concluded by agricultural producers, relating to the production of and trade in agricultural products.

The year 2024 was marked by the anticipated but troubled adoption of the Corporate Sustainability Due Diligence Directive (Directive),[19] binding the companies concerned (large companies) to a set of *due diligence* obligations in relation to the actual or potential negative impacts resulting from their activities, as well as those of their subsidiaries and business partners in the respective chain of activities. As well as reinforcing the will (accompanied by the need) to integrate the protection of human rights and the fulfilment of environmental transition goals into business practices, the Directive provides for the need to collaborate and share information between business partners and with other entities in order to identify, prevent, cease, mitigate and repair any negative effects.

[17] This group includes the Netherlands, Greece and Austria, the latter not only adopting *soft law*.

[18] Regulation (EU) no. 1308/2013.

[19] Directive (EU) 2024/1760.

This is a not insignificant development which, as well as attesting to the will of the European legislator to fulfil and realise the objectives of the European Green Deal and the SDGs, also proves the undeniable role that competition law is also playing in this regard.

As such, the Horizontal and the Agricultural Guidelines are, as one might expect, different in meaning, in scope and therefore (also) in density. In the first case, there is no exclusion applicable to sustainability agreements. There are greater uncertainties and fewer examples. In contrast, the latter, due to their stricter personal and material scope, are more developed, including references to a system of opinions that allows producers and producer associations to ask the EC for an assessment of the compatibility of their sustainability agreements with Article 210a of the Regulation, thus greatly reducing any shred of uncertainty as to the lawfulness of their initiative.

Given its more *enigmatic* nature and the doubts it raises (more than the ones it solves), it is useful to describe the characterising principles of the new chapter of the Horizontal Guidelines dedicated to sustainability agreements.

The EC starts with the obvious: there are sustainability agreements that have nothing to do with competition. These are agreements that do not restrict competition, either *(i)* because they aim to ensure compliance with and respect for legally binding national or international regulatory frameworks on sustainability and human rights, or *(ii)* because they refer to internal business conduct, or *(iii)* because they seek to ensure transparency in the value chain without affecting the parties' freedom of action (for example, the creation of a database containing information on operators with sustainable behaviour and practices), or *(iv)* because they are aimed at organising awareness campaigns (distinct from a joint advertising scenario). The simplicity of the list contrasts with a very diverse colour palette in practice. In fact, by referring to all the scenarios *in their pure state*, it is possible to think of sub-hypotheses in which the absence of a restriction on competition is no longer evident. One example is the agreement on the creation of the database, which cannot, for the purposes of this 'exclusion', be linked to a prohibition or obligation for the parties to source or buy from operator *x* or *y*, depending on their adherence to sustainability standards.

Once the application of any of the *pure scenarios has* been ruled out, the dialogue between Article 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU) must be convened. Paragraph 1 prohibits agreements and practices that restrict competition by object (more serious) or by effect (lacking substantial proof of actual harmfulness). Paragraph 3, in turn, contains the famous *(economic) balance*, which allows certain agreements restricting competition to be justified in the light of their *(i)* efficiency gains, *(ii)* indispensability, *(iii)* impact on consumers and *(iv)* non-elimination of competition.

The pursuit of sustainability objectives is relevant at both levels. On the first level – that of prohibition – it will serve either to justify a retreat from the application of Article 101 of the TFEU in favour of the pursuit of an overriding public interest (the Commission doesn't say this, but we take it from the *Wouters* case law),[20] or to frame the *distinction between* restriction by object and restriction by effect, thereby *softening* the harmfulness associated with the restriction. A *softening* that naturally needs to be applied to the specific case because, as the EC points out, restrictions competition by object can also be found in sustainability agreements. This is the case with agreements aimed at exerting direct pressure on competing third-party companies to adhere to a sustainability standard or, in the wake of the *AdBlue* case, agreements between competitors

[20] Cf. judgment of the Court of Justice of 19 February 2022, *Wouters and Others*, Case C-309/99, ECLI:EU:C:2002:98, in particular, §97.

to limit technological development to the minimum sustainability standards required by law.

It is at the second level – that of justifying a sustainability agreement that restricts competition – that the analysis becomes particularly problematic. The doubts don't really concern data or principles that can be taken for granted. Examples include That sustainability agreements can contribute to a very wide range of objective efficiency gains; The fact that efficiency and speed in achieving the SDGs may qualify a particular agreement as *indispensable*, or that consumers may realise the impact of their choices (more or less sustainable) on others, plus the fact that, in many cases, consumers in the relevant market (potentially affected by an increase in prices or a reduction in supply) are also recipients of the collective benefits that the agreement results in for present or future society.

The doubts and the problem relate, however, to the bizarre and, in our view, truly inimical way in which the Horizontal Guidelines specify the various requirements of Article 101(3) of the TFEU, which are necessary for the justification of an agreement.

Firstly, efficiency gains must be objective, concrete and verifiable, which puts the onus on the parties to demonstrate a certainty or truth which, with regard to sustainability objectives in particular, may and certainly will not be within their reach. At least not without the cost of discouraging any attempt at measurement. The question is: is intergenerational justice even quantifiable?

Secondly, the Horizontal Guidelines state that, in any scenario, consumers in the relevant market should be able to receive a fair share of the benefits resulting from the agreement. The (limiting) WTP ('*willingness to pay*') test then comes into play. This means that collective benefits (*i.e.*, those that are felt outside the relevant market, in favour of society in general) will only be valued *(i)* if there is a substantial overlap with consumers in the relevant market, and *(ii)* if they are sufficiently compensated for the damage suffered. Moreover, the overlap and compensation (not merely marginal) must also be demonstrable by the parties.

The Commission's Horizontal guidelines on sustainability are, of course, welcoming. And they should be welcomed with openness and receptivity. First of all, the non-binding safeguard they provide for standardisation agreements for sustainability is built in relatively clear terms. Of course, it could be argued that the guidelines will be more restrictive than necessary and, in some cases, as hazy as the analysis applicable to agreements not covered by this *soft safe harbour*. In any case, they will certainly facilitate the dissemination of labels or brands associated with compliance with minimum sustainability requirements, contributing to the creation of new products or markets for sustainable products, empowering consumers to make informed (and sustainable) purchasing decisions and also promoting a level playing field between producers subject to different regulatory requirements. And, as we already know, *the road is travelled*.

As we reach 2025, and especially in the light of the Competitiveness Compass presented by the EC on 29 January 2025, it will be important to prevent the transition to more sustainable production and consumption practices from being blocked, either by frameworks that are complex to understand and apply, or by contradictory expectations about what is expected of companies. To this end, and to ensure that the changes being implemented in the European legal framework are put into practice, the time may have come for a *new approach* to competition policy.

The green transition is not an objective that can only be achieved from a *public policy* perspective, sector by sector or by adopting an acetic view of competition. Competition and its rules also have a role to play. An *all-hands-on-deck* approach is therefore necessary. And for it to be effective, national competition authorities must not settle into the

security of their mandate, reassured that the legislator will do everything or reach everything. Inertia is, in this case, an obstacle to being green. Silence will continue to be the enemy of legal certainty.

In short, if green is to be prioritised, companies need to be sure that it can be.

CHALLENGES FOR TRANSACTIONS: CONTROL OF FOREIGN INVESTMENT AND REGULATION OF FOREIGN SUBSIDIES

A growing concern for the European Union's economic security has led to the strengthening of control mechanisms over transactions involving investments and subsidies from third countries.

In 2024, the first full year of application of the Foreign Subsidies Regulation, the European Commission opened the first in-depth investigations and carried out the first dawn raid. The enforcement of the Foreign Subsidies Regulation by the European Commission is expected to be intensified in 2025.

A proposal for a significant revision of the European Regulation on the screening of foreign direct investments is also under discussion, which, if approved, will have significant implications for the national foreign investment control regimes of the Member States and for the operating regime of the national competent authorities.

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The year 2024 was marked by important developments at European level aimed at safeguarding the essential interests of the European Union (EU) in terms of economic security. Of particular note in this context is the first year of full application of Regulation (EU) 2022/2560 on Foreign Subsidies (Foreign Subsidies Regulation – FSR) and the revision of the European foreign investment screening regime, currently established in Regulation (EU) 2019/452.

Start of application of the FSR

The FSR aims at addressing distortions in the internal market caused by subsidies from third countries granted to companies active in the European internal market.

The FSR, which became fully applicable in October 2023,[21] gives the European Commission (EC) broad powers to investigate financial contributions granted by third countries to companies active in the EU. Firstly, concentrations between undertakings and public procurement procedures exceeding the notification thresholds set out in the FSR are subject to mandatory prior notification. The EC also has the power to initiate investigations of its own motion and has wide-ranging investigative and sanctioning powers.

In the first 12 months of application of the FSR, the EC received more than 120 cases for pre-notification, of which more than 100 were formally notified, which shows a more intense activity than initially expected. In the preparatory work for the FSR, the EC estimated receiving only 33 notifications of M&A cases per year. Most of the notified cases were subject to a parallel assessment under the EU Merger Regulation.[22]

In order to respond to the number and complexity of cases, the Commission significantly strengthened the team responsible for the FSR, and a new department (Directorate K) was created within the Directorate-General for Competition (DG COMP), which in March 2024 took over the functions of the previous FSR Task Force, whose resources were limited. The new directorate, with three operational units, includes officials with significant experience, particularly in state aid cases, including the new director.

In February 2024, the EC launched its first in-depth investigation under the FSR,[23] in the context of a public procurement procedure involving a bid submitted by CRRC, a Chinese state-owned railway equipment manufacturer, as part of a procedure opened by the Bulgarian government for the purchase and maintenance of electric trains. The EC's doubts stemmed not only from the value of CRRC's bid, which was "substantially lower" than that of the other bidder, but also from the fact that the company had received foreign financial contributions five times higher than the value of the bid, which had not been mentioned in the FSR notification form submitted to the EC. The failure of the notifying party to provide complete information thus seems to have contributed to the opening of the in-depth investigation.

In March, the EC also launched two in-depth investigations into the bids submitted by the Chinese companies ENEVO Group and Shanghai Electric, in

[21] Legal Alert Morais Leitão, *The Foreign Subsidies Regulation Becomes Applicable*, 13.07.2023.

[22] Cf. conference on the application of the FSR, October 2024, as well as the European Commission's Policy Brief, *The Foreign Subsidies Regulation - 100 days since the start of the notification obligation for concentrations*, February 2024.

[23] Summary concerning the opening of an in-depth investigation in case FSP.100147 pursuant to Article 10(3)(d) of Regulation (EU) 2022/2560, C/2024/1096.

the context of a public procurement procedure for the design, construction and operation of a photovoltaic park in Romania, with an installed capacity of 455 MW, partly financed by the European Modernization Fund. In both cases, the EC found sufficient evidence of foreign subsidies distorting the European internal market.[24]

All three cases were closed by the EC after the companies informed the Commission that they had withdrawn their bids.[25]

On the subject of mergers, in June 2024 the EC opened its first in-depth investigation into the proposed acquisition by Emirates Telecommunications Group of the United Arab Emirates of PPF Telecom BV, a telecommunications company based in the Czech Republic with activities in Bulgaria, Hungary, Serbia and Slovakia. The transaction was approved with commitments in September 2024, after the acquiring company undertook to remove the unlimited guarantee granted by the United Arab Emirates and not to receive any foreign subsidies for activities in the EU.[26]

In 2024, the EC also carried out its first inspections under the FSR, with dawn raids in the premises of the Chinese company Nuctech in the Netherlands and Poland. The General Court of the EU rejected Nuctech's request for interim measures, confirming that companies carrying out commercial activities on the European market cannot, in principle, invoke the rules of a third country to oppose the application of EU law to which they have intentionally submitted.[27]

Finally, the EC also published preliminary guidelines on the analysis of the existence of a distortion in the European market and the balancing test between the negative effects of a distortion and the positive effects of the investment operation.[28]

The developments outlined above and the European Commission's priorities to strengthen the economic security of the EU indicate that in 2025 the EC will step up enforcement of the FSR.[29] In this context, in addition to assessing the applicability of the FSR to concrete transactions, it is important to ensure that the notifications submitted to the EC reflect, from the outset, correct and complete information, in particular as regards the categories and amounts of foreign financial contributions received by the companies concerned. To this end, it is essential to implement safe and effective procedures for collecting the relevant information.

Revision of the European regime on the screening of foreign investment

The regime for screening foreign direct investments in the EU, currently established in Regulation (EU) 2019/452, provides for the possibility for Member States to adopt a regime for examining these investments for reasons of security or public order and establishes a mechanism for cooperation between Member States and the EC when the national authorities of one or more States decide to examine a particular foreign investment.

[24] European Commission press release of 03.04.2024, IP/24/1803.

[25] Communication from Commissioner Breton of 26.03.2023, STATEMENT/24/1729.

[26] Case FS.100011, EMIRATES TELECOMMUNICATIONS GROUP / PPF TELECOM GROUP.

[27] Order of the President of the General Court, 12.08.2024, Case T-284/24 R, ECLI:EU:T:2024:564.

[28] Commission Staff Working Document Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, 26.7.2024.

[29] Speech by Executive Vice-President Ribera at the Forum Europa Brussels Breakfast Brussels, January 20, 2025.

The reports published annually by the EC[30] show that national foreign investment screening regimes have been enforced more intensively. According to the most recent data available, for 2023, Member States received 1,808 notifications of foreign investment operations, 56% of which were formally screened. Of the cases subject to a formal examination process, the majority (85%) were authorised without conditions, with 10% of cases subject to commitments or conditions. National authorities prohibited operations in only 1% of cases, as in previous years.

There has also been a steady increase in the number of cases notified to the EC under the cooperation mechanism between the Member States and the EC. In 2023, the EC received information on 488 cases, most of which were closed within the initial 15-day period, and only 8% were subject to detailed analysis. Only 2% of the cases notified were the subject of an opinion by the EC. In 2023 there was also an increase in the number of multi-jurisdictional transactions.

Nevertheless, the current regulation suffers from limitations that reduce its effectiveness in addressing risks to security and public order. The voluntary nature of the regulation means that there are no control mechanisms in place in six Member States, and there is also some inconsistency between the existing national regimes, particularly as regards the scope of application and the concepts used.[31]

The limitations of the current regulation were also highlighted in the Court of Justice's judgment of July 13, 2023 in the *Xella Magyarország* case (C-106/22), concerning a decision by the Hungarian government to prohibit the acquisition of a raw materials extraction company indirectly owned by a company registered in Bermuda, on grounds of public security. The Court of Justice ruled that Regulation (EU) 2019/452 was not applicable, since it only addressed operations directly carried out by entities from third countries, and in the case in point the acquisition was carried out by a company based in the EU.

In this context, the EC announced in January 2024 a proposal to revise Regulation (EU) 2019/452 (Proposal),[32] which aims to correct the inefficiencies detected in its application, profoundly changing the current regime.

The Proposal seeks to ensure the existence of a screening mechanism in all Member States, to standardise national regimes, in particular as regards their sectoral scope and the criteria for evaluating investments, and also to extend the scope of application to EU investors controlled by investors from third countries.[33]

We highlight the following significant changes in the proposal:

- Firstly, in order to ensure a coherent approach in the EU, the existence of a national screening mechanism in all Member States is now mandatory;

- The proposal establishes minimum requirements for these mechanisms, in order to mitigate compliance costs for companies and investors that may result from different national regimes. In this sense, transactions in which the acquired companies are active in strategic sectors relevant to security and public order

[30] See the Fourth Annual Report on the screening of foreign direct investments in the Union, of 17.10.2024, COM(2024)464.

[31] European Court of Auditors Special Report No. 27/2023, p. 37.

[32] Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, COM/2024/23 final.

[33] Memo on European Economic Security, European Commission, 24.01.2024, QANDA/24/364, and Legal Alert Morais Leitão, Proposal for a new EU Regulation on the screening of foreign investments – Implications for Portugal, 05.02.2024

(among others, semiconductors, artificial intelligence, biotechnology, digital communications, new energy technologies) or participate in EU programs of European interest will now be subject to mandatory prior authorization. In the case of transactions not subject to a notification obligation, the national authority must have the power to initiate investigations up to 15 months after the conclusion of the transaction;

- Following the *Xella Magyarország* ruling, the Proposal extends the scope of the regulation to cover operations carried out by entities "controlled, directly or indirectly" by a third country entity;

- One of the novelties of the Proposal concerns the criteria for assessing whether the investment "adversely affects security or public order": the impact on critical infrastructures, critical technologies, the supply of critical production factors, the protection of sensitive information or the freedom and pluralism of the media. These criteria are now mandatory rather than optional, although they are not intended to be exhaustive;

- The cooperation mechanism between the Member States and the EC are also substantially strengthened. Specific rules are created for the procedure regarding investments that affect several Member States, both for the notifying investor (who must notify all the affected states at the same time) and for the national authorities, who must coordinate with each other in taking the decision (for example, in cases where several states decide to open an in-depth investigation into a particular operation, the decision must be taken on the same date). The Proposal also breaks new ground by stipulating that the Member State in which the investment takes place must organise a meeting to discuss the planned decision with other Member States and the EC and, subsequently, inform the Commission and the other Member States of the final decision it has taken, justifying it in the light of the previous positions transmitted by them.

The proposal to revise the current European Regulation must be approved by the European Parliament and the Council, which brings together national governments. Considering that the Member States have traditionally been zealous with their competences in terms of public security, it is expected that the Proposal will undergo changes before it is approved. Nonetheless, it already signals the Union's willingness to significantly step up the control of investment operations involving companies from third countries, which have an interest in following the evolution of the legislative procedure and the terms in which the final act will be approved.

If approved according to the proposal, the new regulation will have significant implications for all Member States and will change the powers and operating regime of the current competent national authorities. In particular, the Portuguese foreign investment control regime, approved by Decree-Law no. 138/2014, of September 15, will have to be profoundly altered in several respects.

NAVIGATING THE PLAYING FIELD: SPORTS GOVERNANCE AND COMPETITION LAW

The intersection between sports regulation and competition law has become increasingly contentious and the years 2023 and 2024 highlighted the delicate balance between the two dimensions. It is likely that 2025 will see continued scrutiny and debate on this issue. The relevant stakeholders in the sports world will have to adapt to the changing legal and regulatory landscape in order to defend the integrity and competitiveness of sport in the years to come.

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Introduction

In the dynamic realm of sports, the intricate interplay between the regulations set forth by sports associations and the legal framework governed by European Union (EU) competition law has emerged as a pivotal juncture. The coexistence of sports organizations' regulations with competition law principles has become a subject of more scrutiny in 2023 and 2024, raising fundamental questions about the preservation of fair competition within the sporting domain.

This text briefly delves into the intersection of sports regulations and competition law, exploring the challenges and implications that arise when the courtroom, or arbitration tribunal, becomes a crucial arena for competition in the world of sports.

Decisions on FIFA's Football Agent Regulation

FIFA Football Agents Regulations (FFAR) has sparked discussion throughout 2023 over its new rules on players' agents, focusing on: *(i)* remuneration limits on agents' fees; *(ii)* requirements on payments over the life of the player's contract; *(iii)* prohibition of payment to agents on behalf of the player; and *(iv)* prohibition of an agent to act for all three of the releasing club, the engaging club, and the player.

These rules have been in the centre of disputes across Europe that oppose FIFA to football agents, and the main arguments are grounded on competition law.

In the EU, a district court from **Germany** (Mainz) has rejected an injunction to prevent the implementation of the FFAR but has requested, on 31 March 2023, a preliminary ruling to the Court of Justice of the European Union (CJEU) regarding these rules and their conformity with EU competition law.[34]

However, the district court of Dortmund accepted the agents' claim and issued an injunction against FIFA and the German Football Association, blocking FFAR while Case C-209/23 is pending before the CJEU.[35]

The **Netherlands** took a different approach and a central court (Utrecht), when faced with a similar request, rejected the injunction and instead of immediately blocking FFAR chose to wait for the CJEU decision.[36]

In **Spain**, the Commercial Court no. 3 of Madrid also approved an injunction request against the FFAR until the ruling of the CJEU.[37]

There is another request for preliminary ruling by the German Federal Court of Justice, regarding the Deutscher Fußballbund e. V.'s player agent regulations, which will surely be relevant for the FFAR.[38]

Outside the EU, an arbitral tribunal in the UK has already decided, on 30 November 2023, that the provisions of the FFAR concerning the Fee Cap and Pro Rata Payment Rules infringe competition law,[39] which is a relevant decision that counters the award of the Court of Arbitration for

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[34] Case C-209/23 - *RRC Sports*. The hearing for this case was held on 12.02.2025.

[35] See FIFA Circular no. 1873 of 30 December 2023 and the information published at Information update on the preliminary injunction granted by the Landgericht Dortmund.).

[36] See *So near, so far - How legal challenges to FIFA's new football agent regulations are playing out in Europe - Lexology*.

[37] See *Spanish Judges Grant Injunction for FIFA Football Agents Regulations in Spain - Football Legal (football-legal.com)*.

[38] See Case C-428/23 - ROGON and Others. The hearing for this case was held on 12.02.2025.

[39] See FIFA's agent fee cap breaches British competition law: FA Tribunal | Reuters and FIFA suffers setback on agents' fee cap with English arbitration decision | MLex Market Insight. The arbitral award is available at FA Rule K arbitration award published following proceedings by football agencies (thefa.com).

Sport (CAS) that dismissed a similar case brought by a Switzerland-based agents' association.

In the meantime, FIFA publicly announced that it will suspend the FFAR until a final decision is adopted by the CJEU.[40]

Triad of rulings of the Court of Justice of the EU

The CJEU delivered a triad of judgements – cases C-333/21, *European Superleague Company;* C-124/21 P, *International Skating Union v. Commission*; and C-680/21, *Royal Antwerp Football Club* – where it reaffirmed that **sport might entail an economic activity** and, to that extent, is **subject to the application of EU competition rules**.

In its rulings, the CJEU has confirmed that the regulation of sporting activities adopted by sports associations must fully respect European competition law, even though in some cases exceptions might apply.

Considering the social and cultural importance of sport, (auto)regulation by sports associations is admissible, but they must ensure that such regulatory framework is transparent, objective, non-discriminatory and proportional – otherwise they might be acting in breach of competition law and subject to sanctions.

The rules sanctioned by the CJEU mainly relate to the prerogative of sport organisations to authorise competitions and participation of athletes in those competitions, in particular if such competitions are organised by competitors. These CJEU rulings would certainly play a decisive role in the FFAR cases and, in particular, in the appeal of the award issued by the district court of Dortmund.[41]

The Diarra case

On October 2024 the CJEU delivered a ruling in the Diarra case,[42] **questioning FIFA's rules that foresee joint and several liability of football clubs** that hire players who terminated their employment contracts with the previous club without just cause (contained in the Regulations on the Status and Transfer of Players (**RSTP**)).

The CJEU concluded that these rules **breach the free movement of workers and may restrict competition in the players' market**. Although the final decision rests with the Belgian courts, the judgement has already created uncertainty about the compensation regime at stake, prompting FIFA to consider changes to its regulations. Following this decision, FIFA has suspended the application of new disciplinary measures and existing disciplinary measures against players applied under the relevant rules,[43] announced the opening of a global dialogue with key stakeholders from the football ecosystem and adopted an interim regulatory framework concerning the RSTP.[44]

[40] See footnote 35.

[41] See *Oral Hearing in the Preliminary Injunction Proceedings Concerning the FIFA Football Agents Regulations (FFAR) - Kluwer Competition Law Blog*. The appeal filed by FIFA was rejected, as per German Court Upholds Injunction Against FIFA's Fee Restrictions for Player Agents - Football Legal.

[42] See Case C-650/22 – *FIFA*.

[43] See *FIFA Suspends All Pending Cases Before the FIFA Disciplinary Committee in Relation to Article 17! - Football Legal*.

[44] See *Bureau of the Council adopts interim regulatory framework concerning RSTP*.

Perspectives for 2025

The intersection between the rules of sports organisations and competition law has become increasingly contentious, and 2023 and 2024 highlighted the delicate balance between those two frameworks.

The UK arbitral tribunal award sets a precedent that carries weight across jurisdictions and underscores the necessity for sports' governing bodies to align their regulations with competition law.

In addition, there is great expectation as to what the CJEU decision will be on the lawfulness of the FFAR, as it will define the implementation of this regulation within the EU. Similarly, the rulings of the CJEU mentioned herein will likely influence the drafting and enforcement of rules by sports' governing bodies to ensure compliance with EU and national competition law.

Looking ahead for the months to come, in 2025 the sports field may witness a paradigm shift in the perception of organisations like FIFA, whose authority is once again questioned under competition law. This year will be pivotal as sporting associations adapt to the changing dynamics and strive to meet the demands of both regulators and stakeholders.

It will also be interesting to follow the complaint to European Commission over FIFA's imposition of international match calendar filed by FIFPRO and some European leagues, accusing FIFA of abuse of dominance and breach of EU law in connection with men's international match calendar, including the FIFA World Cup 2026 and the decisions relating to the FIFA Club World Cup 2025. This complaint apparently highlighting recent CJ's caselaw (mentioned above).

Additionally, advancements in technology and changes in consumer behaviour may introduce new challenges and opportunities for regulating the sports industry. As the sports industry becomes increasingly globalised and commercial, ensuring a level playing field for athletes, clubs, and other agents will be paramount. Sports organisations will need to navigate these complexities while balancing the economic interests of stakeholders with the broader principles of competition and fairness, ensuring more transparency and proportionality in the governance of sport.

In summary, 2025 is likely to see continued scrutiny and debate surrounding the intersection of sports regulations and competition law. Stakeholders across the sports industry will need to adapt to changing legal and regulatory landscapes to uphold the integrity and competitiveness of sports in the years to come. It is also possible that the sport activity and regulation of sport governing bodies will attract additional scrutiny from the national competition authorities, considering the precedents of the CJEU's rulings.

THE OPPORTUNITIES OF DIGITAL REGULATION: IMPACT ON DATA ACCESS AND AVAILABILITY

In recent years, the European Union has implemented significant regulations in the digital sector, such as the Digital Services Act, the Digital Markets Act and the AI Act, which aim to respond to the challenges of digital markets. These regulations change the regulatory paradigm from a sanctioning approach to a preventive logic, establishing prohibited or conditioned behaviours to quickly adjust the offer of digital platforms. Although they bring complexity and additional costs for companies, they also offer opportunities in this area. The European Commission and National Regulatory Authorities play crucial roles in the implementation and supervision of these standards, with the European Commission taking a more active role in designating gatekeepers and imposing obligations on them.

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In recent years, several regulations focused on the digital sector have been the approved. Given the significance and importance that many digital companies hold in markets and for users, these legislative packages are the European regulator's response to the challenges and tensions experienced within this sector.

These regulations inevitably impact on companies' operations, requiring them to adapt their processes, offerings, and control mechanisms to meet the new obligations. The regulations also add a layer of complexity to these operations, especially when it comes to larger operators. However, they also bring opportunities, as operators can use the new regulatory mechanisms to open up new supply channels, improve their access conditions and explore new market segments.

More precisely, the *Digital Services Act* (DSA), the *Digital Markets Act* (DMA) and the *AI Act* change the paradigm of current regulatory intervention from sanctioning abusive behaviour to a preventive logic, establishing a menu of prohibited or conditioned behaviours, which aims to cause a faster adjustment in the offer of digital platforms.

These regulations represent an important test, not only for companies, but also for the European Commission (EC) and the National Regulatory Authorities (NRAs), that will now implement a new regulatory model for digital markets, that favours preventive action and is procedurally flexible.

However, this model is not without its risks for the European market, as it could potentially lead to market fragmentation, an increase of regulatory costs, and may damage the reputation of the European regulator if the legislative package fails to address the main problems of the digital sector.

The EC is now taking a more active role in these markets, appointing *gatekeepers*,[45] establishing more direct conduct and procedural control mechanisms, imposing demanding obligations for certain digital service intermediaries, and requiring a more rigorous conformity assessment of systems.

The NRAs will also have an active role depending on the specific law in question and will have to maintain a high level of cooperation with the EC in these matters.

European companies and users also bear a greater responsibility. It is up to them to make active and informed use of regulation, taking advantage of the opportunities it generated to create or improve their products and services, thereby mitigating contextual costs.

The recent Report on the Future of European Competitiveness, prepared by Mario Draghi, pointed out that regulation is a factor that limits the growth of innovative companies, if it is too restrictive or inconsistent. It is true that it is not possible to have an open and competitive common market without regulation. However, a consensus seems to be forming that the regulatory burden is becoming excessive, and it is not focused on promoting investment and reducing barriers to accessing the single market. Correcting these inconsistencies, as well as a renewed focus on creating a true single market that allows European companies to gain scale in their natural market, is one of the major themes of the coming years, especially in the face of the competitiveness of the American and Chinese economies.

Although these regulations have different objectives – some more focused on consumer protection and others

[45] The EC designated the following gatekeepers: Alphabet Inc., Amazon.com Inc., Apple Inc., Booking, ByteDance Ltd., Meta Platforms, Inc., and Microsoft Corporation.

more market-oriented – they contain several obligations that affect the way data is presented, stored or made available. The obligations for data storage and organization, access and transparency vary depending on the specific companies involved, and have consider the following variables:

- Recipients: regulators, companies or researchers, general public;

- Type of data concerned: for example, information on advertising data, customer verification, data analysis or procedures or activity reporting;

- Data access period: whether limited or continuous; and

- Access mode: for example, via a specific API or a web portal.

Access to and disclosure of this information may result in conflicts of rights when different interests and concerns are at stake. Therefore, we believe that, notwithstanding the strict compliance with the obligations of these Regulations, the storage, access and provision of data should always be based on principles of proportionality and necessity, the principle of data minimization and respect for the spirit of the obligation in question.

These principles are embodied in other Regulations, which must not be forgotten when applying the DSA, DMA and AI Act. In particular, we refer to Article 5 of the General Data Protection Regulation, which requires data to be:

- Collected for specific, explicit and legitimate purposes and may not be further processed in a manner incompatible with those purposes;

- Adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed;

- Accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay.

Articles 7 and 8 of the Charter of Fundamental Rights of the European Union also establish a more general right to respect for private and family life and the protection of personal data. According to Article 52 of the Charter, "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*."

These provisions have been directly applied by European courts, notably in the case of interim measures brought by Facebook against the EC[46] regarding the release of a series of documents containing purely private information, containing personal or political opinions, private security measures or sensitive commercial information.

Although this case concerns the application of Regulation 1/2003, which lays down procedural rules on competition, the decision of the General Court of the European Union seems to have a broader scope, since the Court makes it clear that the EC's investigative powers cannot fail to respect principles of proportionality and adequacy when collecting information.

These guidelines should also apply to other types of data access, without forgetting the necessary balance with intellectual and industrial property rights, business secrets and security requirements. Thoughtful and balanced implementation of these Regulations is essential to their success.

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[46] See Decision of the General Court of the European Union in case T-451/20 R - Facebook Ireland v. Commission.

NO-POACH AND WAGE FIXING: 2024 IN REVIEW AND THE FUTURE AHEAD

In 2024, competition authorities around the world intensified their scrutiny of no-poach and wage-fixing agreements, considering that such conducts restrict worker mobility and negatively affect wages. Given the various developments in this area (including in Portugal and the European Union), this type of agreements is expected to draw particular attention in 2025. Training and preventive compliance in this area will be key factors in reducing the risk of non-compliance.

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Introduction

Labour market restrictions, such as no-poach and wage-fixing agreements, have come under increasing scrutiny by national competition authorities (NCA).

These types of conducts may include: *(i)* “no-hire” agreements, where employers agree not to hire actively or passively employees of other parties to the agreement; *(ii)* “non-solicit“ (also called “no-cold-calling”) agreements, where employers only agree not to actively solicit employer’s employees with a job opportunity; and *(iii)* wage-fixing agreements, where employers agree to fix wages or other types of compensation or benefits applicable to their employees.

According to several competition authorities, these conducts can limit workers’ mobility and suppress wages, therefore raising concerns under competition legislation.

Recent precedents, including cases initiated by several competition authorities across the globe and guidance from the European Commission (EC), highlight the growing focus on ensuring fair competition in employment markets.

As authorities continue to investigate and regulate these agreements, their legal and economic implications remain a key area of debate.

Relevant precedents

Portugal

On 27 May 2024, the Portuguese Competition Authority (PCA) issued a Statement of Objections against the Inetum Group, a multinational technology consulting group, for anticompetitive behaviours in the labour market. According to the PCA, these companies entered into no-poach agreements with competing companies in the area of IT consultancy services in Portugal, following an investigation launched on 22 March 2022.

On 19 February 2025, the PCA adopted its final decision, imposing a fine of EUR 3.092.000 to three companies of the Inetum Group, for being involved in bilateral non-poach agreements, between March 2014 to August 2021.

These decisions follow the first ever case of anti-competitive practices in the labour market, the so-called *Caso Liga*, where the PCA sanctioned 31 professional football clubs due to an agreement that allegedly prevented clubs from hiring footballers who unilaterally terminated their employment contract due to COVID-19 pandemic. On 16 February 2024, the Portuguese Competition Regulation and Supervision Court referred three questions to the European Court of Justice regarding the compatibility of the agreement with EU competition law. The hearing on this case was held in February 2025, and it is possible that the ruling will be adopted later in 2025.

Belgium

The Belgian competition authority (Autorité belge de la Concurrence/Belgische Mededingingsautoriteit) fined companies in the private security sector for anti-competitive practices, including no-poach agreements, stating the unlawfulness of such conducts under competition rules. In this case, several companies in the private security industry allegedly agreed not to hire each other’s employees, preventing them from moving between companies.[47]

[47] 20240703_Press_release_27_BCA_0.pdf.

Poland

The Polish competition authority (UOKIK) initiated an investigation into potential anti-competitive practices involving retail chains and associated transport companies,[48] suspecting no-poach agreements that limited job flexibility and wage growth for drivers.

United Kingdom

The Competition and Markets Authority (CMA) recently applied fines of GBP 4.2 million after an investigation involving major broadcasting/production companies in the United Kingdom. The CMA concluded that the companies at stake unlawfully shared sensitive information on rates of pay for freelancers including sound technicians and camera operators. According to the CMA, the objectives of these conducts included coordination on pay.

United States

On 23 April 2024, the Federal Trade Commission (FTC) proposed a ban on non-compete clauses between employers and employees nationwide.

However, on 20 August 2024, the FTC suffered a legal setback. A Texas district court ruled in the case of *Ryan LLC v. FTC* that the FTC had exceeded its statutory authority[49] in attempting to ban non-compete clauses. The court's decision effectively suspended the proposed rule, meaning that for now, non-compete clauses remain enforceable in many states, including Texas. The FTC has already appealed the court's decision.

[48] Collusions on the labor market – stop! It is illegal!.

[49] Judge Blocks F.T.C.'s Noncompete Rule - The New York Times.

Diarra case

On 4 October 2024 the European Court of Justice (ECJ) delivered a ruling in the Diarra case examining certain FIFA's rules contained in the Regulations on the Status and Transfer of Players.

The ECJ concluded that some of those provisions breach the freedom of movement of workers and may restrict competition in the players' market.

According to the ECJ, FIFA's transfer rules, which foresee a joint and several liability of football clubs that hire players who terminated their employment contracts with the previous club without just cause, would function like a no-poach agreement by discouraging clubs from signing those players.

EC's guidance on Labour Markets

In 2024, the EC also focused on the no poach and wage fixing conducts and published the Competition Policy Brief on Labour Markets. According to this document:

- Both wage-fixing and no-poach agreements are likely to qualify as restrictions by object under Article 101 of the Treaty on the Functioning of the European Union (TFEU) and should be regarded as "buyers' cartels";
- The legitimate objectives of this type of agreements and/or the pro-competitive effects that may result from them are unlikely to be sufficient to rule out the respective unlawfulness;
- The majority of cases involving these conducts are more likely to be investigated by national competition authorities, although the EC has been actively

investigating this type of conducts and has recently carried out raids related to competition in labour market;[50]

- While these conducts may be admissible as ancillary restraints to a legitimate main transaction (*e.g.*, in the context of the creation of a research joint venture or supply of certain goods or services), it will be up to the parties to demonstrate that the necessary (and demanding) requirements are met.

With this policy brief, the EC adopted a very restrictive and not very tolerant stance on wage-fixing and no-poach agreements, leaving very limited scope for potential justifications.

Perspectives for 2025: enforcement and compliance hand in hand!

2025 will certainly be a busy year and developments are to be expected on this front.

In Portugal, the PCA already included labour markets in its priorities for this year and is keen to direct "its investigation activity towards [these] anticompetitive practices", which the authority considers to be among "most harmful [conducts] to the economy and consumer welfare".

Additional news might be expected in the EU front as well. Restrictive conducts in labour markets were given particular attention by the EC and it already launched investigations involving this type of practices. Moreover, considering EC's restrictive approach in relation to wage-fixing and no-poach agreements, more investigations might be expected, including from national competition authorities in the EU who certainly might thank the *comfort* provided by the European watchdog with its guidance.

In the US, on 16 January 2025, the Department of Justice and the FTC jointly issued Antitrust Guidelines for Business Activities Affecting Workers, that replaced the 2016 Antitrust Guidance for Human Resource Professionals. These Guidelines identify new conducts that may constitute antitrust violations if same undermine competition, such as non-compete agreements, franchise no-poach agreements, expansive non-disclosure agreements, training repayment provisions, non-solicitation agreements, and liquidated damages provisions.

With that in mind, particular care is required from organisations when negotiating contracts with its commercial partners and participating in discussions over collective bargaining agreements (namely to avoid exchange of sensitive information and collusion exceeding the scope of the bargaining).

Specific training is also advisable to equip organisations with the necessary knowledge and tools to mitigate competition risk, and preventive compliance might be key to review past practices and identify areas of improvement.

[50] Commission opens investigation into possible anticompetitive agreements in the online food delivery sector and Commission carries out unannounced antitrust inspections in the data centre construction sector.

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