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European and Competition Law

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I. The Portuguese Competition Authority's priorities for 2019

On 21 December 2018, the Portuguese Competition Authority ("*Autoridade da Concorrência*" or "AdC") issued a brief statement naming its top policy priorities going into the New Year. The publication is available here.

Pursuant to the aforementioned statement, we can expect the AdC to keep the focus on detecting and investigating anti-competitive practices, in particular cartels. That being the case, the AdC expects to see a significant growth in the incentive for certain at-risk undertakings to resort to cooperation programs, such as the Leniency Program.

This priority is in line with the most recent practice of the AdC, where it condemned undertakings in the fields of railway maintenance (22 December 2018) and insurance in two different hybrid settlement decisions (28 December 2018).

In line with its main objective of reinforcing its investigative abilities, the AdC claims it will make the most out of the cooperation agreements signed with several institutions, which, for example, will enable the AdC to access certain data it would otherwise be unable to access.

While asserting to double-down on fighting anti-competitive practices, the AdC also vows to keep upholding the principle of due process to the fullest extent of the law, all the while remaining rigorous and impartial in its work. In order to achieve those goals, the AdC will choose to reinforce its internal procedures of checks and balances, in particular in complex cases which are put under greater scrutiny.

In what regards abuse of dominance and new methods of coordination between competitors, the AdC claims it will, namely, devote its resources to learn more about the use by undertakings of new methods, such as algorithms or artificial intelligence, which may enable new types of anticompetitive practices to arise.

The AdC also adds it will work to deliver faster and more effective decisions regarding merger control, all the while trying not to place too heavy a burden on companies or to compromise the efficient functioning of the markets under analysis.

Some sectors of the economy have been the target of recommendations issued by the AdC in 2018. That was the case for the liberal professions, as well as for the transportation sector. In 2019, we can expect the AdC to implement measures in line with the aforementioned recommendations.

The AdC claims it will also prioritize the analysis of legislative barriers and anticompetitive behavior on the part of undertakings in sectors where innovation is particularly beneficial to consumers. This is in line with the conclusions reached by the AdC in 2018 on innovation in the financial sector.

Finally, initiatives such as the campaigns recently developed to fight bid-rigging in public procurement and to raise awareness for business associations will also be maintained, for the positive results the AdC considers they have delivered.

In this light, the bet on detecting anticompetitive practices in sectors in which the AdC has signed cooperation protocols with sectorial regulators will likely be maintained throughout 2019. That will, in all likelihood, be the case for the pharmaceutical sector, following the cooperation protocol signed between the AdC and Infarmed, in September of 2018, with view to promoting further coordination and information exchange between the two entities.

In conclusion, the AdC will hold the same standing it has held in the past few years in relation to the fight against anticompetitive practices, now with a special focus on cartels.

II. The AdC invests in the fight against cartels

In December of 2018, the AdC convicted a number of insurance providers for anticompetitive practices of market-sharing through the allocation of customers.

In May of 2017, the AdC had opened an investigation into insurance contracts purchased by large corporate clients, in the segments of occupational, health and car accident insurances. The opening of this investigation was triggered by a number of leniency applications by companies involved in the cartel. As a reminder, the Leniency Program motivates undertakings, which were involved in a certain illegal practice, to cooperate with the AdC, through the reduction of the amount of the fine to be paid by the undertaking, or even by waiving payment of a fine altogether.

The Statement of Objections was issued by the AdC in August of 2018, and the insurance providers at stake were charged with having participated in a market-sharing and price-fixing cartel. The Statement of Objections also charged 14 members of the Board of Directors of the undertakings in question.

According to the AdC, the agreement lasted for seven and a half years, and considering the undertakings in question make up approximately 50% of the market, it had a significant impact on the cost of insurances purchased by large corporate clients from the undertakings involved, namely, in what regards the purchase of workplace insurance, health insurance and car insurance.

The conviction of two of the undertakings concerned came about through a settlement deal with the AdC, pursuant to which the undertakings concerned will have to admit to certain facts and take responsibility for the illegal practices with which they were charged.

Further, the penalty imposed on the same two undertakings totals € 12 million, in spite of the acknowledgement by the AdC that the undertakings in question cooperated during the course of the investigation and that there were no particular gains or efficiencies resulting from the proceedings under analysis.

The proceedings continue in respect to the remaining undertakings and Board members.

Also in December of 2018, the AdC convicted a railway maintenance company, as well as one of its Board members, to the payment of a penalty totaling € 365.400, through settlement proceedings.

The aforementioned decisions adopted by the AdC are an example of the AdC's focus point on the fight against cartels (as a reminder, the cases mentioned were the result of extensive raid operations led by the AdC in 2017). They also demonstrate the AdC's willingness to accept hybrid solutions for each particular case, seeing as in both cases, the AdC acceded to closing the proceedings in regard to some of the targets, but chose to proceed in relation to others.

III. ECN+ Directive - empowering national competition authorities to become more effective enforcers of EU Competition Law

On 11 December 2018, the European Parliament and the Council approved the ECN+ Directive (Directive (EU) 2019/1), which envisages the empowerment of national competition authorities ("NCA") of Member States, allowing them to be more effective enforcers in insuring the proper functioning on the internal market.

This Directive was approved following a proposal presented by the European Commission, which recommended the adoption of new rules within the European Competition Network, or "ECN", which would vest NCA with further powers to restrict anticompetitive practices.

Pursuant to the press release issued of 22 March 2017, the ECN fights for the coherent application of EU antitrust rules by all enforcers. Since 2004, the Commission and NCA have adopted over 1000 decisions, investigating a broad range of cases in all sectors of the economy. From 2004 to 2014, over 85% of all the decisions that applied EU antitrust rules were adopted by NCA.

However, NCA have, in several occasions, lacked sufficient legal instruments in order to effectively enforce EU Competition Law, which they vow to protect. The ECN + Directive looks to solve this particular issue.

Once implemented by Member-States, the rules introduced by the ECN + Directive will equip NCA with a common set of means and effective powers, in order to insure the application of EU Competition Law, and will eventually lead to a harmonization of the powers held by the NCA, which at the moment still vary greatly depending on the jurisdiction. For instance:

- NCA may now act completely independently in the enforcement of EU Competition Law rules, without being subject to guidelines issued by public or private entities;

- NCA are now equipped with the necessary financial and human resources to fully undertake their duties in the enforcement of EU Competition Law;

- NCA are now legally empowered to obtain new means of evidence from suspected undertakings, in the context of an investigation. For example, the Directive expressly states that NCA are now legally able to gather relevant evidence from mobile phones, laptops and tablets belonging to undertakings and natural persons which are suspects of having infringed EU Competition Law;

- The means of evidence at the disposal of NCA may take up a written for or an audio format, and both may be electronic or physical. The NCA's power to examine books or records should also cover all forms of correspondence, including electronic messages, irrespective of whether they appear to be unread or have been deleted;

- NCA are now also equipped with the necessary tools in order to impose proportionate and deterrent sanctions, in cases in which EU Competition Law has been breached. In that light, the Directive enables NCA to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit (this rule does not yet exist in the Portuguese Competition Act - Law no. 19/2012, of May 8th - but it does reflect extensive jurisprudence of the Court of Justice of the European Union);

- Similarly, NCA may, pursuant to the ECN+ Directive, apply penalties on undertakings which have infringed Competition Law, even if the undertakings in question are not present in the territory of the State in which that NCA acts. This amounts to a very effective reinforcement of NCA's roles as agents of deterrence, given that a growing number of companies operate at an international level;

- NCA may now apply coordinated leniency programs, which will likely motivate undertakings to come forward with evidence of the existence of and their participation

in illegal cartels. Such a measure is intended to reinforce the incentive upon infringing companies to take part in leniency programs and to communicate the existence of such cartels.

To sum up, the ECN+ Directive aims to ensure that, through the existence of one common legal framework, NCA will, in future, be equipped with the necessary legal instruments to coherently apply EU Competition Law across all Member-States. This reinforcement of the competences held by the NCA is accompanied by a declaration ensuring that the general principles of European Union Law will be fully respected, as will the dispositions of the Charter of Fundamental Rights of the European Union. Namely, the right to a good and loyal administration and any and all procedural defense rights held by the undertakings, such as the right to a fair hearing, will be guaranteed.

The ECN+ Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union (3 February 2019) and Member-States must proceed to its transposition by 4 February 2021.

In this aspect, it will be interesting to follow the transposition of the ECN+ Directive into the Portuguese legal order, namely in what concerns the harmonization of powers granted to the AdC, which have, to date, been repeatedly challenged.

We anticipate that, in Portugal, among the main questions up for debate will be the follow:

- Issues relating to the means of evidence now available to the AdC;
- The concept of undertaking which was adopted;
- The possibility to apply a penalty with reference to the global sales volume of the group.

IV. Vertical restraints – a new focus point for public enforcement?

The last few years saw large steps being taken in innovation, such as the emergence of new ways of doing business, and, mainly, the creation of new instruments and methods of implementing certain practices, well known to Competition Law. The focus point of the European Commission and of NCA has also been changing for some time. In this paragraph, we highlight a point of focus, which, until recently, would not be found in the TOP 5 priorities for public enforcement: vertical restraints.

Many years have passed now since the focus point of the Commission was directly related to resale price maintenance ("RPM") – namely, 15 years since the Yamaha case (COMP/37.975 – Po/Yamaha). Given the growing importance of online retail in the European economy, and

given the constant evolution of the digital sector, NCA have been paying particular attention to the practices lead by market agents, and have demonstrated their concern with the undertakings' compliance with EU Competition Law as they develop their economic activity.

The emergence of such a standing by the Commission echoes back to 2018, with some cases of convictions being adopted by both the Commission and the AdC.

In fact, in July of 2018, the Commission applied a fine totaling € 111 million to Asus, Philips, Pioneer and Denon & Marantz, for the imposition on their online retailers of minimum resale prices, under penalty of interrupting or even ceasing completely the supply of products if the online retailers failed to comply with the prices set by the aforementioned undertakings.

Pursuant to the Commission's understanding, Pioneer also blocked its retailers from selling Pioneer products to consumers located outside of the retailer's Member-State. This limitation was applied in Portugal, among other Member-States.

It is worth noting the Commission's concern with the employment of new ways to fix and control prices, namely through the use of software and algorithms specifically designed to allow the undertaking to effectively monitor the prices set by the retailers on the products in question. This technology also generates alerts each time the price set by the retailer for a specific product (be it hardware, electronics, audio, video, kitchen appliances or personal care) is lower than the one imposed by the undertaking.

Recently, in accordance to a press release issued on 17 December 2018, the European Commission imposed a fine of € 40 million on Guess for placing a number of restrictions on retailers within its selective distribution network. Pursuant to the Commission, in addition to the more 'traditional' restrictions such as restrictions on online resale prices, geo-blocking, cross-selling between authorised retailers and online sales limitations, Guess had, allegedly, also restricted retailers from using its brand names and trademarks for the purposes of online search advertising.

Similarly, in Portugal, the AdC set up the detection and investigation of anticompetitive practices as a priority going into the New Year.

Back in 2017, the AdC had already conducted a number of raid operations in the retail and distribution sectors. In August of 2018, the AdC issued a Statement of Objections against Superbock Bebidas, S.A. and six of its Board members, for, allegedly, fixing minimum resale prices on its products. The AdC made its concerns clear about this kind of practices, which, in its understanding, constitute a serious violation of the contractual freedom between distributors and clients, and impact the consumers directly, insofar as such practices may eliminate competition, narrowing the spectrum of choices available to consumers.

Going further back in time, in 2014, the AdC analyzed a supposed case of RPM (PRC/2014/03, Dia Portugal), which ended with a decision to close the proceedings with commitments binding upon the target company.

Other NCA have followed suit. For example, in December 2018, the *Autorité de la Concurrence* applied a penalty fine totaling € 189 million to several manufacturers of kitchen appliances (Whirlpool, BSH Home Appliances, Candy Hoover, Indesit, among others) for fixing minimum resale prices.

In conclusion, after several years centered on horizontal restraints, namely cartels, it looks as if the Commission and the NCA have been resensitized to vertical restraints relating to price-fixing. In this light, given the constant evolution in negotiation techniques, methods of price setting and maintenance systems, as well as the consequences these developments may have on consumers, it is advisable to pay a closer look at the business practices implemented by undertakings and to have them fully comply with these rules of EU Competition Law.

V. *Gun jumping* – suspensory effects of merger notifications and *gun jumping* under discussion

At the 130th Meeting of the Competition Committee of the OECD, in November 2018, a roundtable was held by the participants in order to discuss the suspensory effects of merger notifications and gun jumping practices.

This subject had been the target of much discussion, not just for the legal uncertainty it carries, but also as a result of the attention NCA had been awarding it in the past few years. In fact, in 2010, 3 cases of gun-jumping were opened in OECD states. In 2017, however, the number grew to 13.

Most jurisdictions include merger control systems that require a prior notification in transactions exceeding certain thresholds.

In accordance with the discussion held at the Meeting, three different types of infractions are related to this issue: i) closing of a merger operation without the existence of the required prior notification; ii) disrespect for the stand-still obligation; and iii) anticompetitive agreements or exchange of sensitive information before the transaction is final.

The penalties applied following these infractions vary significantly from jurisdiction to jurisdiction. Within the European Union Member-States, the States which hold the highest records for penalty fines are Austria, France and Germany. In Portugal, the fine may go up to 10% of the turnover generated in the year prior to the adoption of the decision, which carries the application of the penalty fine.

Following the 130th Meeting of the Competition Committee of the OECD, the Secretariat of the OECD published a background note containing contributions from various States, as well as the main topics discussed and relevant case-law. The background note is available here.

The discussion which took place at the aforementioned event eventually led to the conclusion that, in spite of this issue regularly being thought of as a priority by NCA, undertakings today are subject to higher scrutiny by those same NCA, and are forced to pay higher penalties as a result.

In addition, the note suggests that, even though the factual background of each case makes it difficult for the emergence of clearer guidelines, which may aid in the reduction of the legal uncertainty present, the decisions on part of the NCA have proven to be a helpful tool in that regard.

Finally, the background note suggests that the notification thresholds should be established in a clearer, more objective way, capable of adapting to situations of merger control which are more likely to lead to anticompetitive scenarios. In addition, the body of rules applicable to the pre-notification phase and to the stand-still period in each jurisdiction must be further clarified.

This is a hot topic, for sure, ensuring that both the Commission and the NCA are taking a particularly closer look at these situations. In fact, in the last few years, there has been a significant growth in the market for M&A operations, which inevitably results in a higher number of operations and a higher number of undertakings/investors with access to sensitive commercial information relating to target companies within the scope of due diligence operations. In this light, it will be important to closely follow this issue, and equip the legal professionals with the knowledge necessary for the anticipation of possible Competition Law contingencies.

VI. Personalized pricing – participation of the AdC in the OECD's Competition Committee

In November 2018, the AdC took part in the Joint Meeting OECD Competition Committee and OECD Committee on Consumer Policy Roundtable, in which the participants discussed the topic of personalized pricing, i.e., the action by which undertakings set different prices for one particular client or group of clients, pursuant to their personal needs or overall behavior.

In this context, both the risks and the effects brought about by personalized pricing practices were discussed, as well as the existence of potential Competition Law instruments employable for consumer protection.

Following this initiative, the AdC submitted a paper on the issue of personalized pricing, *Personalized Pricing in the Digital Era*, evaluating the conditions under which personalized pricing may be harmful for consumers and for normal competition conditions. The paper is available here.

The AdC highlighted that a negative stance *per se* in relation to personalized pricing is not adequate. A rule of reason approach is preferable. In addition, the paper presented by the AdC also stressed that the personalizing of prices by an undertaking in a dominant position may amount to a situation of abuse of a dominant position (i.e. excessive pricing, predatory behavior or price discrimination). Finally, the AdC stressed that the powers legally conferred upon itself do not allow it to protect consumers by resorting to methods other than through the coercive application of competition law.

This position demonstrates the AdC's preference for a competition policy centered around consumer welfare, which may only be achievable through the respect of the competitive process, in place of a more formal position in what regards the protection of certain groups of interests.

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