CUATRECASAS

# European and Competition Law

## Newsletter Portugal

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## I. 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.

Once implemented by Member-States, the rules introduced by the ECN + Directive will provide 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:

- the NCA may now act completely independently in the enforcement of EU Competition Law, without being subject to guidelines issued by public or private entities;
- the 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 lays down that the 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 the NCA may take up a written or an audio format, and both may be electronic or physical.
- the 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 the NCA to apply the notion of undertaking to find a parent company liable, whenever the parent company and its subsidiary form a single economic unit. This rationale also means that the NCA may now impose fines upon parent companies, merely as a result of the conduct of one of its subsidiaries.
- Similarly, the 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 the NCA's roles as agents of deterrence, given that a growing number of companies operate at an international level;

- the 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.

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.

On July 2nd 2019, the Portuguese Competition Authority (AdC) organized a workshop with view to obtaining the point of view of various stakeholders on its proposal for the transposition of the ECN+ Directive. Cuatrecasas participated in this event and made its positions clear, mainly with regards to the need of harmonizing certain aspects of the Directive with the Portuguese Constitution, namely certain basic dictates of the rule of law and the principle of legality.

## II. Portuguese Competition Authority launches "hub and spoke" legal proceedings against companies in the retail sector

The AdC has recently accused four major food retail distributors of participating in practices susceptible of restricting competition in three different legal proceedings.

In each of these proceedings, three suppliers are also accused (Super Bock; SCC – Sociedade Central de Cervejas, which controls the beer brand Sagres; Primedrinks, which controls the distribution of the gin brand Hendricks and of the wine brands Esporão and Ermelinda Freitas). In the most recent of the aforementioned proceedings, the distributors E.Leclerc and Lidl were also accused for participating in the restrictive practices in question.

According to the press release issued by the AdC, the companies are guilty of being involved in an infringement of Competition Law commonly known as a "hub and spoke". Both the case-law and the legal literature see this type of infringement as equivalent as cartel.

The distinguishing factors of a "hub and spoke" infringement are: i) on the one hand, the fact that retailers are at a different point of the distribution chain than the suppliers; and, ii) on the other hand, the retailers do not communicate directly amongst themselves, using, to that effect, a "hub" – the aforementioned suppliers.

This anticompetitive practice essentially aims at maintaining the market aligned, in terms of the resale prices that each distributor may set for those products. To that end, the retailers use their vertical relationship with the different suppliers (as well as the vertical relationship

of those suppliers with competing retailers) to promote an horizontal alignment of the resale prices in the retail market, during a significant time frame (the Portuguese Competition Authority claims to have evidence of such practices spanning from 2003 until 2017).

In practical terms, during certain periods of time, which will have been previously agreed by the companies, the average consumer will find the same products being sold at exactly the same price at each of the aforementioned retail stores.

These conducts are naturally very relevant in the formation of resale prices, since they allow retailers to know exactly how much its competitors will charge for a given product, thus drastically reducing the risk associated with fair competition between supposedly independent market players.

In fact, the retailers have real time detailed access to the commercial strategies of their competitors, allowing them to promote and maintain an alignment of resale prices in the market.

Because of these practices are very difficult to detect by national competition authorities (and the Commission itself), there is not yet a high number of "hub and spoke" cases in the decision-making practice of these authorities or in the case law of the European Courts.

In Portugal, this is the first time that companies and members of their Boards of Directors are being investigated and accused of having participated in a hub & spoke infringement. This fact clearly shows that the AdC is taking serious steps towards the monitoring of more sophisticated ways of collusion, even if there are no findings of direct contacts between competing companies.

In that sense, it is worth mentioning that in a recent press release, the AdC expressly stated these three legal proceedings do not extinguish the on-going investigations in the retail sector, some of which are still subject to legal confidentiality. The same press release also states that in 2017 the AdC has carried out several raids in facilities operated by 44 different companies. The relevant findings are now being investigated in 16 legal proceedings, more than ten in the retail sector.

## III. Recent developments in the case of the cartel between insurance providers

In August 2018, the AdC accused the major insurance providers operating in Portugal (Fidelidade, Lisitânica, multicare, Zurich and Seguradoras Unidas, S.A., former Tranquilidade and Açoreana), as well as 14 members of its Board of Directors, for participating in a cartel.

According to the AdC, these companies (which are direct competitors and, when considered together have c. 50% of the market) have entered into an agreement to market partitioning and fix prices of the services provided (in this case, insurance premiums). The cartel allegedly had a duration of 7 years and mainly affected the cost of insurance premiums paid by large corporate clients, particularly regarding work accidents, health and motor insurance contracts.

The legal proceedings were formally launched in May 2017, following a leniency request presented to the AdC by Seguradoras Unidas, S.A. Some relevant developments are worth mentioning.

In the beginning of 2019, the AdC confirmed that Seguradoras Unidas S.A. gain full exemption of a fine for having been the first of these companies to inform the AdC of the cartel's existence, and for having presented relevant evidence of its active participation in the infringement.

A few months before, Fidelidade and Multicare were fined a total of EUR 12 million for participation in the cartel. Nonetheless, these two companies beneficiated from a reduction of fine following a settlement procedure with the AdC, in which these insurance companies confessed the facts present by the AdC, admitted their participation in the cartel and agreed to waive their judicial rights.

To date, these proceedings continue against Lusitânia and Zurich, and a final decision is expected in the next few months.

Moreover, despite the fact that the AdC acknowledged that no specific advantages had been quantified in terms of potential supracompetitive profits arising from their participation in the cartel, it is still worth noting that some litigiousness may be expected on part of the corporate clients which were directly harmed by these practices, namely aiming at the recovering the losses they might have incurred.

It is important to recall that Law no. 23/2018 establishes the Portuguese legal framework for private enforcement actions for damages, by transposing Directive 2014/104/EU, of the European Parliament and of the Council. In that context, it may be expect the first private enforcement actions in Portugal in the following months.

## IV. European Commission fines Google EUR 2.42 billion for abusing dominance as a search engine

On 20 March 2019, the European Commission adopted a decision concluding that Google had abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites, which prevented Google's rivals from placing their search adverts on these websites.

In particular, the Commission found that, from 2006 onwards, Google included exclusivity clauses in its contracts. This meant that publishers were prohibited from placing any search adverts from competitors on their search results pages.

Subsequently, as of March 2009, Google gradually began replacing the exclusivity clauses with the so-called "Premium Placement" clauses. These required publishers to reserve the most profitable space on their search results pages for Google's adverts and also requested a minimum number of Google adverts.

As a result, Google's competitors were prevented from placing their search adverts in the most visible and clicked on parts of the websites' search results pages.

The Commission found that Google is dominant in the market for online search advertising intermediation in the EEA since at least 2006. This is based, in particular, on Google's very high market shares, often exceeding 85%. Google provides these search adverts to owners of "publisher" websites through *AdSense for Search*.

Based on a broad range of evidence, the Commission found that Google's conduct harmed competition and consumers, and stifled innovation. In fact, Google's rivals were unable to grow and offer alternative online search advertising intermediation services to those offered by Google. As a result, owners of websites had limited options for monetizing space on these websites and were forced to rely almost solely on Google.

Additionally, the Commission concluded that Google did not demonstrate that the clauses created any efficiencies capable of justifying its practices, and decided that, alongside with the imposition of a heavy fine, Google was to immediately bring the infringement to an end and, in future, refrain from adopting any act or conduct having the same or equivalent object or effect.

## V. European Commission fines Nike EUR 12.5 million for restricting cross-border sales of official club and federation products

On 25 March 2019, the European Commission announced the imposition of a fine of EUR 12.5 million on Nike, for restricting the cross-border sales of official merchandising of some European football clubs and federations over which Nike holds license.

This decision is the result of an investigation initiated in June 2017, which concluded that Nike imposed on its licensees a ban on the sale of products to other EEA States between 2004 and 2017.

In particular, Nike imposed a number of measures on its licensees, restricting out-of-territory-sales, threatening them with termination of contract and refusal to supply, compelling them to stay within their territories, and obliging them to pass on these prohibitions.

Hence, Nike's distribution agreements infringed Article 101 of the Treaty on the Functioning of the European Union, which prohibits agreements between undertakings, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

The calculation of the fine was based on Nike's turnover in relation to the infringement, its gravity and its duration, and the fact that the company cooperated with the Commission during the investigation.

For the time being, any person or company affected by Nike's behavior may bring the matter before the courts of the Member States and seek damages.

## VI. CNMC convicts companies operating in the railway sector for participating in a cartel and prohibits them from participating in public procurement proceedings

On March 27, 2019, the CNMC ("*Comisión Nacional de los Mercados y la Competencia*"), the Spanish Competition Authority, convicted 15 companies and 14 members of its Board of Directors for participating in a cartel, involving bid rigging in public procurement proceedings in the railway sector.

Along with the imposition of a fine in the global amount of EUR 118,000,000.00, the CNMC activated a procedure prohibiting the companies in question from taking part in public procurement proceedings launched by the Spanish Public Administration. The application of this sanction was previously unheard of in the decision-making practice of the CNMC.

This sanction, in a few words, consists of placing a ban on convicted companies from participating in public procurement proceedings, such as public tenders, during a set period of time.

The Portuguese Competition Authority is also entitled to impose prohibition sanctions on non-compliant companies, pursuant to the Portuguese Competition Act. Nonetheless, there is no record of the aforementioned Authority having had applied this sanction in its decision-making practice.

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