Public consultation on the Draft Proposal transposing Directive 2019/01/EU by the Portuguese Competition Authority

Cruz Vilaça Advogados welcomes the Draft Proposal transposing Directive 2019/01/EU[1] (hereinafter "**Draft Proposal**") which has been submitted for public consultation by the Portuguese Competition Authority.

The Portuguese Competition Act (hereinafter "**Competition Act**")[2], which has been in force since 2012, already provides for a set of investigative powers which is close to what is foreseen in the Directive 2019/01/EU (hereinafter "**Directive**" or "**ECN+ Directive**"). We observe that the Portuguese Competition Authority has notwithstanding taken the opportunity for streamlining the Competition Act and welcome this general intention.

We would like to focus our observations on the necessary balance between the investigative powers provided by the Directive and the protection of the rights of the investigated entities or natural persons. In our view there are some points which need to be adjusted in order to provide a fair balance.

Article 2(4) and (5) of the Competition Act

The Draft Proposal adds to the Competition Act references to the principles of effectiveness and uniformity of EU law (Article 2(4) of the Competition Act) and to the respect for the general principles of that law and the EU Charter of Fundamental Rights (Article 2(5) of the Competition Act). One might consider the explicit introduction of these references as unnecessary since the application of all national legal acts in the EU has to respect these principles. However, we consider these references to be a valid and useful reminder of the balancing exercise foreseen by the ECN+ Directive regarding Articles 6 ff. on the one hand and Article 3 on the other. NCAs are provided by the Directive with a minimum set of investigative powers (Articles 6 ff.) and the exercise of these powers has to respect the general principles of EU law and the EU Charter of Fundamental Rights (Article 3).

[1] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

[2] Law no 18/2012, of 8 May.

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Despite not being formulated in the EU Treaties, the principle of effectiveness (or in French "effet utile") has evolved over the past 60 years of Court jurisprudence into a strong and overarching principle of EU law. On the one hand, it contains the obligation of national courts and authorities to respect the effectiveness of EU law in the application of national law according to the principle of loyal cooperation (Article 4(3) TEU). To be more precise, a Member State is bound to take into account any EU primary or secondary legislation which has a an impact on the interpretation or application of national law. On the other hand, the principle of effectiveness also requires that the rights of individuals stemming from EU primary and secondary law are protected by the national courts. As the principle of effectiveness is to date not always respected or enforced, the proposed reference is a welcome reminder: first, for the individuals to rely on it; second, for the national judges to uphold and respect it and, in case of doubt, request the Court of Justice of the EU for a preliminary ruling.

Article 13(3) of the Competition Act

Regulation (EU) 1/2003[3], in its Article 3(1), orders national competition authorities in EU Member States (hereinafter "**NCAs**") to apply Articles 101 and 102 TFEU together with national competition provisions whenever trade between Member States may be affected. The ECN+ Directive follows this approach (see Article 1(2)) with the exception of the provisions concerning the protection of leniency statements, which shall apply also in purely national cases (Article 1(2) and Article 31(3) and (4)).

Against this background, the Draft Proposal foresees the application of all the rules included in the ECN+ Directive also to purely national situations. Recital 7 of the "Exposicão de Motivos" ("**Explanatory Statement**") clarifies that this goal is attained with the introduction of a new paragraph 3 to Article 13 of the Competition Act. The intention of the Portuguese Competition Authority to ensure a uniform system (where the same set of rules apply to purely national cases as well as in cases involving also EU competition provisions) is to be welcomed. However, the new paragraph 13 in itself is not clear because it only states that references to the national provisions (Articles 9, 10 and 11 of the Competition Act) "should be understood as including the possibility that" the EU Treaty competition provisions (Articles 101 and 102 TFEU) are applied in parallel. This formulation does not explain that the intention is to apply the EU rules according to their current interpretation standards to purely domestic situations.

Article 18A of the Competition Act

The Draft Proposal foresees in Article 18A(2) two alternative bases for the investigation. Either the consent of the parties or the authorization by the competent judicial body. We do consider that it reaches too far to place these two alternatives at the same level. Investigations based on the consent of the party should only be carried out in exceptional cases. The rule should be a judicial review to make sure that the rights of the investigated parties are safeguarded. We therefore propose to delete the reference to investigations upon consent in paragraph (2) and suggest to draft a separate paragraph (e.g. after paragraph (9)) stating that in exceptional circumstances the investigations under point (a) to (c) can be carried on without the authorization of the competent judicial body if the investigated parties agree to the investigation.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

Article 20(6) of the Competition Act

The Draft Proposal provides for a change regarding the status for legal professional privilege (hereinafter "**LPP**") for in-house counsel. According to the new Article 20(6) of the Competition Act, contacts involving in-house lawyers should not fall under LPP. To date in-house lawyers have been protected under Portuguese law if they were members of the Portuguese Bar Association. The Directive does not require this change, neither do other EU law provisions. The main argument included in the Explanatory Statement to support this change is that the investigative powers of the Portuguese Competition Authority have to be reinforced (recital 185). Admittedly, in-house counsels are tied to the undertaking they represent by an employment relation. However, they are still independent legal professionals which are bound by all the requirements of a bar association. And in practical terms there is also no difference between an internal lawyer and an external lawyer which has only one client. Given the increase in investigative powers provided by the Directive and proposed by the Draft Proposal we see even more need to provide a company with the possibility to seek counsel from an in-house lawyer without the fear of losing the protection of this communication afforded by LPP. Besides, this has also economic implications. Even basic questions would have to be outsourced to external lawyers before raising them in a written form. The obligation to involve outside lawyers in all circumstances will change the legal landscape and make it even more difficult for smaller companies to remain economically viable. The removal of LPP with respect to in-house lawyers goes beyond the scope of the Directive and should not be supported in the further implementation process.

Articles 22(8) and 27(6) of the Competition Act

The Draft Proposal intends to remove the information of the settlement applicants on the percentage of the reduction of the fine they would receive if they agreed to the settlement. This removes transparency and makes it significantly more difficult for settlement applicants to decide whether they want to settle. It also leaves it to the discretion of the authority to determine the reduction at any time of the process. We do not see any benefit in this removal since it will reduce the willingness of parties to settle and therefore also the opportunity for the Authority to close straightforward cases in an efficient manner.

Article 30-A of the Competition Act

The balancing act between investigative powers and protection of the individuals should be at equal level on both sides. We therefore cannot support the proposed exclusion of protection of personal data amongst investigated companies as proposed in Article 30-A of the Competition Act in the Draft Proposal. This exclusion is contrary to Article 26(1) of the Portuguese Constitution, as well as the Regulation on Data Protection 2016/679/EU[4]. The Portuguese Competition Authority also does not provide any reasoning as to an overarching need to share this data which justifies such a strong intervention into the sphere of individuals. This change goes beyond the scope of the Directive and affects the equilibrium in a negative manner to the detriment of individuals.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Article 32(5) of the Competition Act

Paragraph 5 of Article 32 provides for the disclosure of documentation which falls under "judicial secrecy" ('segredo de justiça'). The proposed new option for the Portuguese Competition Authority to disclose documentation based on the very vague ground of advocacy for the cause of competition is contrary to the fundamental rights of the investigated parties. Both at EU and national levels the protection of the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights, Article 80c) of the Portuguese Constitution) would be significantly harmed if it was left to the discretion of a regulatory body (without any judicial intervention) to disclose documentation which falls under judicial secrecy to third parties for the mere purpose of promoting its activities. The entire paragraph 5 leaves it to the discretion of the Portuguese Competition Authority whether parts of the file are provided to the public while other parts remain in its premises and are also not made accessible to the defence. Such an option should be submitted to a careful scrutiny in light of the general principles and rules applying in Portuguese (including constitutional) law to procedures of a criminal (or 'quasi criminal') nature. We therefore strongly recommend to remove at least the proposed insertion from the provision, if not the entire paragraph 5.

Article 71

The Portuguese Competition Authority proposes to extend the prohibition to participate in public tenders during 2 years from the infringing entity to any person that creates an economic unit with the infringing entity or which keeps ties of interdependence with the infringing entity. This leads to an enlarged number of companies that are prohibited to participate in a public tender. It is an artificial extension of the concept of undertaking under EU law which does not fit into the national legal context which requires in this case the clear attribution of liability. The formulation is also not clear because it does not specify that the sanction only concerns the companies active in a sector related to the infringement. The Directive does not foresee such extension, which does not seem to be proportionate to the protection of freedom of economic activity. The extension of the sanction is tantamount to inflicting a death penalty to a whole group of companies. Given the size of the Portuguese market this can lead to the creation of an artificial monopoly which is to the detriment of competition.

Article 74(6)

Concerning the new Article 74(6) of the Draft Proposal, the Directive foresees in Article 29(2) the suspension while proceedings are pending before a review court. The insertion of the new paragraph (6) in the Draft Proposal goes far beyond by foreseeing no temporary limitation whatsoever. To date Article 74 of the Competition Code foresees in paragraphs (7) and (8) an absolute limitation period of 10.5 years. The proposed changes paralyse investigated companies over non-predictable time periods by accusations which may in the last instance turn out to be unfounded. They also bear the risk that review courts push competition matters to the last of their priorities. The proposal has the unwelcome effect of removing the procedural rules specifically concerning investigations under competition law from the entire Portuguese system of limitation without a strong rationale. We therefore propose to remove the last 4 words of paragraph 6 of Article 74.

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To conclude, the Draft Proposal is a welcome update of the Competition Act. However, it would be important to fine tune the Draft Proposal in order to ensure a proper balance between investigative powers and rights of defence, therefore avoiding serious issues of constitutionality and compatibility with the EU Charter of Fundamental Rights and the European Convention.