Autoridade da Concorrência

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What are the most efficient enforcement tools for preventing and combatting anti-competitive agreements?

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Introduction: Portugal's experience on criminal sanctions, sanctions on individuals & interplay with leniency

Let me start by saying how thrilled I am to welcome you all in Lisbon. It is just wonderful to be in this panel *in person* and in such great company.

The criminalization experience in Portugal is a cautionary tale as to the drawbacks of criminal sanctions, perhaps because it came too soon.

The roots of competition rules can be traced back at least as far as 1852, when the first Portuguese Criminal Code was enacted. Following the success of the liberal movement over absolutism, it laid down several antitrust provisions: it outlawed price fixing together with wage fixing cartels, as well as bid-rigging in public tenders. Therefore, it considered the effects of economic power not only on prices or output, but also on labor and wages. These provisions were remarkably modern and remained in force for around 130 years until the early 1980s. However, there is no record of anyone actually being put behind bars for cartel participation throughout that period.

Competition policy only became visible and effective when an administrative enforcement system was established

This is not only the case of Portugal. I think it is fair to say that, with a few notable exceptions, in most jurisdictions where cartels are a crime, the level of criminal enforcement is relatively low, which defeats the purpose of criminalizing and undermines the deterrence effect.

More importantly, criminalizing cartels requires a proper interplay between criminal sanctions and leniency, that is to say, it becomes imperative to protect individuals which cooperate under leniency programs from criminal prosecution. This is one of the key goals envisaged by ECN+ Directive. But this interplay may not be easy to reach, at least within jurisdictions, like the Portuguese, which do not accommodate a similar immunity program in the criminal sphere.

More importantly, decriminalization in Portugal therefore seems to have been prompted not by the idea that cartels are less harmful to society than other forms of business crime, but more by the perception that incarcerating individuals was insufficient to deter this type of antitrust evil. We know that criminal sanctions bring an additional layer of complexity to the proceedings, due for example to coordination issues between different responsible authorities, which may lead to lengthier investigations, more administrative costs and, ultimately, to under enforcement.

Instead, there are other enforcement tools or intermediate solutions that may achieve similar results in terms of deterrence, because of their reputational effects on individuals, but without the drawbacks of criminalization, notably monetary sanctions on companies and individuals.

In Portugal, managers and board members, i.e. those that are in a position of leadership within their organization, may be subject to individual fines, not only when they personally commit an infringement, but also if they knew or ought to know of the existence of the infringement in their organization and did not take measures to terminate it immediately. Such as in the case of undertakings, individuals may be fined up to 10% of their annual income.

The AdC has been consistently using this deterrence tool in recent times. We have already imposed fines on a total of 36 board members and managers in 10 different antitrust cases.

Though our competition law does not provide for directors' disqualification and therefore the AdC does not hold the power to remove or suspend individuals from their functions, directors are not immune from this type of outcome when they work in a sector that is subject to financial supervision, such as banking or insurance. Indeed, financial regulators have already considered in fit and proper assessments the fines the AdC has imposed on companies and individuals.

Therefore, even though this administrative sanction is merely monetary in nature, it also carries obvious negative reputational effects and may, under certain circumstances, entail disqualification of the persons concerned by financial supervisors.

Considering that individuals may face administrative sanctions, our leniency program also contemplates the possibility for individuals to come forward and file for leniency to benefit from immunity or a fine reduction. And we find this angle of the leniency

program to be useful. It has been resorted to in the past, typically by disgruntled employees, that had been fired and hold precious information and evidence on the infringement perpetrated by their former employer.

Conversely, when companies themselves file for leniency, their managers and board members may also benefit from immunity or a fine reduction if they fully cooperate with the AdC throughout the investigation. Even when a company is the second to come in, and a fine could in theory be applied to its managers or directors, we have in the past exercised our discretion not to issue charges against these individuals (working for companies that have applied for leniency but did not receive full immunity).

The fact that individuals may face administrative sanctions also creates interesting incentives when it comes to settlements. Once individuals are sent a charge sheet/ statement of objections, we have found that this encourages companies to volunteer for settlement talks, in order to reduce fines and mitigate reputational effects, both with regard to the companies themselves and their managers.

In short, we find that the possibility to impose administrative sanctions on individuals renders or competition law toolbox more complete, in that it provides additional deterrence also while creating further incentives for companies to resort to leniency and settlements.

Parental liability as complementary or alternative tool to sanctions on individuals

Parental liability can also be an important enforcement tool that may be used *in tandem* or as an alternative tool to sanctions on individuals.

It is a well-known fact that antitrust rules refer to the activities of undertakings – these are the subjects of competition law. One single undertaking, within the meaning of EU competition rules, may be comprised of several legal entities, namely, in the quite common case of a group of companies. This is an economic notion, sometimes called "single economic unit" or "enterprise entity" doctrine.

However, when the undertaking is a group of companies, one needs to identify which legal entities within an undertaking can be held liable. Because it was important to fix this sort of mismatch between the subjects of competition rules, which is an economic notion, and liability, which is imputable to legal persons, the European Court of Justice (ECJ), developed the **parental liability doctrine**, according to which both the legal entity whose employees have directly committed an antitrust infringement and any of its parent companies that have exercised decisive influence over that entity's business during the infringement may be held joint and severally liable for such an infringement and the payment of the resulting fine.

Additionally, there is a rebuttable presumption that a parent company holding all or almost all the share capital in a subsidiary exercises decisive influence over this entity's business and therefore may also be held liable. In effect, the parent and/or the subsidiary will be in a much better position than a competition agency to provide evidence on the internal organization links within a group, in order to refute that presumption.

In this regard, the creativity and activism of the ECJ are noteworthy, because this doctrine was developed on the basis of this simple word "undertaking". This legal theory is equally valid, pursuant to the ECJ's case law, when it comes to private enforcement and is codified I Portugal's private enforcement regime.

There sound policy reasons underlying parental liability, which are important to recall:

First, there is a need to ensure appropriate levels of deterrence, particularly for larger conglomerates, because the legal caps of the applicable fines will be calculated on the basis of worldwide turnover of all the legal entities that comprise the undertaking in question, which is the logical approach when we are referring the same "undertaking.", and not on the basis of the turnover of one legal entity alone;

Second, by expanding the group of companies that can be held liable, society will avoid difficulties and additional costs in collecting fines, besides limiting the risks of insolvency, which would obviously be socially undesirable, since fines may be enforced against parent companies as well, that have deeper pockets than its subsidiaries.

Third, parental liability mitigates the risk that companies engage in opportunistic behavior by circumventing fines through internal restructuring or internal shifts of turnover or assets, which would lead to under enforcement or under deterrence.

Fourth, parent companies will usually reap the benefits of wrongdoing by their subsidiaries, thus making it only fair that they should also share the consequences. Indeed, a strict corporate separateness approach would entail a 'moral hazard' problem.

Finally, and more importantly, parent companies are more willing to effectively supervise their subsidiaries' activities if they are also called to feel the pain. In effect, parental liability leads to an increased risk of recidivism in subsequent decisions, and to more exposure to damage claims. Hence, parental liability encourages effective compliance programs to be applied across organizations, which to a certain extent also reduces monitoring costs for enforcers and society in general.

In light of these reasons, our policy approach in Portugal in recent years has consisted in involving parent companies in antitrust cases whenever feasible and appropriate, on the basis of the notion of undertaking and the ECJ's case law and despite the lack of a clear-cut legal provision detailing the existence of joint and several liability of parent companies for antitrust infringements committed by their subsidiaries.

We have been more or less successful in making this case in courts but never giving up... It has been a challenge for certain national courts to accept this doctrine in view of the idea of corporate separateness, together with the principle of personal responsibility of criminal law, which are deeply rooted in the Portuguese constitutional and legal traditions.

The good news is that this doctrine has now been clearly codified in EU legislation, namely in the ECN+ Directive,[1] which is meant to empower the national competition authorities to become more effective enforcers and create a truly common competition enforcement area in the Union.

One aspect that may discourage agencies from resorting to this tool is often the more burdensome "logistics" associated, in that it may require for ex. cross border notifications, which can raise difficulties in practice and lead to lengthier investigations.

However, the ECN+ Directive, besides requiring Member States to establish parental liability in their own national legal systems, it also sets out certain rules on mutual assistance and closer cooperation within the European Competition Network. This includes requests for the notification of documents on a cross-border basis in the course of antitrust investigations, or for the enforcement of decisions imposing fines or periodic penalty payments where the undertaking against which the fine is to be enforced does not have legal presence or sufficient assets in the Member State that has imposed the fine and needs to be enforced in another jurisdiction, for ex. Ireland, Luxembourg or the Netherlands.

The ECN+ Directive is thus meant to ensure the smooth seamless functioning across the Union of the decentralized but articulated system of enforcement, which is the European Competition Network, therefore rendering parental liability in the case of multinational companies not only an abstract concept but a material reality.

The importance of proactive detection tools - whistleblower tool, dawn raids, effective investigation powers

Leniency is a key detection tool, but it is insufficient by itself.

Our leniency numbers are appropriate considering that, unlike other jurisdictions outside the EU, the AdC works together with the European Commission and other European agencies within the ECN, meaning that many leniency applications we receive and which do impact Portuguese consumers, then feed cartel cases that are pursued by the European Commission, when it is considered that the Commission is better positioned to take matters further.

[1] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018.

Since the leniency programme came into force in Portugal in 2006 we have received a total of 35 leniency applications, 20 of each relating exclusively to the Portuguese markets. This means that around 16% of eligible cases pursued by the AdC have been prompted or supported by leniency applications.

Therefore, we have always used a range of **proactive articulated tools** to complement leniency and increase the likelihood of cartel detection. Our consistent approach throughout the years has been about getting out of our comfort zones, leaving the comfort of our offices and literally hit the road to find that hard evidence. I will give you some examples of what we have been doing:

First and foremost, the best incentive for firms to come forward and file for leniency is **vigorous enforcement – of course that is the most powerful deterrent of all.**

Second, **outreach initiatives,** which have become a sort of trademark of the AdC. we always had an ongoing advocacy campaign, including our Fair Play campaign, our Guidelines for Business Associations, Fighting Bid-Rigging in Public Procurement campaign, our rounds of seminars with sector regulators and other public entities, our Report on Digital Ecosystems, Big Data and Algorithms, our recent Report and Guide on anticompetitive agreements in the labor market, etc. etc. These outreach initiatives are helpful (i) not only in raising awareness and engaging stakeholders on the benefits of competition and its rules (ii), but also in feeding our enforcement pipeline.

By **creating open communication channels** between stakeholders and the AdC, this field work has proven to be an important source of solid **tipoffs**, which together with other sources of intelligence – such as **running targeted screens on e-procurement data or information gathered in the course of sector inquiries –** has enabled us to actually build cases, target, investigate and sanction anticompetitive behavior, in particular cartels.

By **bringing together different sources of intelligence** has enable us, *without leniency,* to build consistent narratives to bring to the public prosecutor and obtain the necessary warrants to raid a number of companies.

To strengthen **our actions on the ground with regular dawn raids every year is important** in creating a culture of leniency and fear of detection**.**

We have continued to carry out dawn raids, even during the pandemic. And once you are out there, anything can happen. For example, in some of these occasions we have seized a body of compelling evidence allowing us to open new different investigations. Other times, dawn raids also trigger new leniency applications.

Another fundamental aspect is to **interact efficiently with complainants**. We have just revamped our website together with our complaints portal which had already been streamlined a few years ago, but we feel we need to go deeper in **improving our whistleblower tool**. This is one of our objectives KPIs for next year.

In our experience, the best intelligence can either come from business partners (such as clients or distributors) or disgruntled employees, former or current, who as insiders know quite well about the wrongdoing in their organizations.

We routinely protect the identity of these informants to encourage tipoffs, but we need to go further in designing a more secure, encrypted system that enables us to interact with them, obtain clarifications and further intelligence, while offering truly confidential communication channels. The goal is to build the necessary trust, so that informants feel safe enough, protected enough to be able to come forward without fear of retaliation. This is one of the key objectives pursued by the EU **Whistleblower Directive**[2] the protection of persons who report breaches of EU Law, including in the competition law field.

It goes without saying that the use of **smart IT forensic tools to facilitate the seizure and assessment** of large amounts of digital evidence, together with regular staff training on the use of those tools is key in ensuring the success of any investigation.

And this takes me to my final point in this respect which is **the importance of holding effective investigative and fact-finding powers**, – because these have a deterrence value *per se*: they **help to destabilize cartels by creating a credible threat of detection.**

This is one of the main goals of the ECN+ Directive, to empower competition agencies in the EU with the necessary resources, independence, decision-making and investigative capabilities so as to exercise their missions effectively.

These powers must enable agencies to meet the challenges of the digital age, including powers to seize all information and digital evidence related to the undertakings under investigation in whatever format, shape or form, including e-mails and instant messaging irrespective of the medium where it is stored, such as laptops, smartphones, other mobile devices or cloud storage.

The AdC assisted the Portuguese government in preparing the draft legislation to reform our Competition Act and implement this Directive. We carried out this project through an open and participated process, engaging all stakeholders to contribute, in order to reach a well-balanced policy reform. The draft is currently under discussion in Parliament to be hopefully approved soon.

It will be a key milestone in stepping-up our enforcement and bringing it more in line with the challenges of the digital age.

Interim Measures and anticompetitive agreements

I believe that interim measures can be an effective enforcement tool not so much to fight secret cartels – for the obvious reasons that they are clandestine – but to immediately

[2] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019.

prevent the harm caused by clear-cut anticompetitive agreements or decisions by associations of undertakings. Because sometimes these are not kept secret.

The usefulness of this tool is more obvious when it comes to digital markets because the length of antitrust investigations is often incompatible with the fast pace of tech industries. Interim measures provide an enforcement fast track to tackle specific concerns when the anticompetitive harm is clear-cut.

The trend was inaugurated with the Broadcom case, but I am convinced that it will be increasingly used by competition agencies, despite the DMA. Of course, if the DMA is approved European agencies will need to cooperate even closer within the European Competition Network (ECN) to avoid for example conflicting remedies on gatekeepers – but of course this is a topic for a different conference…

Anyway, **interim measures go well beyond abuse of dominance in digital markets**.

Last year, in light of the economic and social challenges arising from the pandemic, **we felt the need to prioritize competition concerns in labor markets**. In this respect, we opened a **first ever investigation into a no-poach agreement**, targeting the Portugal's Professional Football League (LPFP) and the the clubs of the first and second leagues.

In this case, the clubs agreed not to hire football players who terminated their contracts for reasons related to the COVID-19 outbreak and this decision was rendered public by the Leagues.

Therefore, besides opening an investigation against the league and the clubs, we decided to impose interim measures ordering the immediate suspension of the agreed decision, in view of the irreparable harm it would cause. Furthermore, we decided that the football League should communicate to all its member clubs the suspension of the no-poach decision and issue a press to the same effect.

Our preliminary view was that that the decision constituted a naked no-poach horizontal agreement, leading to a reduction of workers' bargaining power and wage level, besides depriving them of labour mobility (note that we are not talking about "Cristiano Ronaldos" here).

We found that the agreement could also harm competition between rival clubs in the hiring of 'inputs' that are relevant for the quality and competitiveness of their teams, therefore also having the potential of depriving consumers of sports events of greater quality.

The football sector actually continued to provide reasons for intervention, when the Football Federation submitted to public consultation, also last year, a draft Regulation establishing the rules on the functioning of the feminine Football league, which included a wage fixing provision, i.e. a cap on the wages to be paid to female football athletes

supposedly to attract new entries by clubs in this league further to the pandemic (Needless to say no such cap exists in other Leagues).

Of course, this project gave rise to a major social outcry for obvious discrimination reasons, and we also added the competition angle – which was actually gender neutral –, warning the Federation about the anticompetitive nature of the draft of the serious antitrust liability that it might incur if such a clause or other equivalent provision was ever approved.

This time, because the regulation was not yet in force, we did not impose interim measures and a recommendation to the federation was sufficient. Therefore, the provision in question never saw the light of day.

But these types of cases illustrate that interim measures are a useful tool that (i) in the face of serious and irreparable harm to competition and (ii) based on a *prima facie* clear-cut antitrust infringement - these are the basic requirements – can and *should* be used beyond abuse of dominance cases.

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