

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Competition Issues in Labour Markets – Note by Portugal****5 June 2019**

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Portugal

1. Introduction

1. Awareness of the potential applicability of competition law to labour market practices carried out by undertakings in their role as employers, which may harm employees (through restrictions on their mobility and limits on their wages) and consumers, has been brought to the spotlight in face of a number of cases recently brought by the competition authorities, in particular in the United States.

2. To date, the *Autoridade da Concorrência* (AdC) has not adopted any decision condemning undertakings in their role as employers for prohibited practices (agreements, concerted practices and decisions by associations of undertakings) involving no-poach or wage-fixing agreements. That is there is no decisional precedent with regards to the potential applicability of Article 9 of the Portuguese Competition Act¹ and of Article 101 of the Treaty on the Functioning of the European Union (TFEU) in Portugal.

3. This note also addresses the conceptual issue of whether labour market effects should be reflected in merger control analysis. Under the current legal framework, the AdC has never prohibited a merger because of its impact on worker welfare, neither has it taken into account such impact as a criterion for merger appraisal (Article 41(1)(2)(4) of the Portuguese Competition Act). The substantive assessment of mergers carried out by the AdC is guided solely by competition considerations, as set out in the legal framework.

4. A further issue pertaining to labour markets and the competition legal framework relates to the potential application of the Portuguese Competition Act to collective bargaining agreements established between trade unions (in representation of workers) and undertakings or associations of undertakings. There is no generic prior exemption from application of the Portuguese Competition Act. Therefore, in line with EU jurisprudence (namely the *Albany* judgement case)², the AdC's approach to agreements that are not collective agreements by nature, and therefore not covered by labour legislation, is that they may infringe competition law if their aim or effect is to restrict competition. This approach is illustrated by a decision in which the AdC concluded that the adoption of a fees schedule by a trade union amounted, in fact, to an anticompetitive conduct by an association of undertakings³.

5. With regard to “false self-employed workers” and competition enforcement, the AdC's approach is that Article 9 of the Portuguese Competition Act, which mirrors Article

1 Law No. 19/2012, of 8 May.

2 Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, CJEU, of 21 September 1999.

3 AdC's decision of 2 December 2010, in Case PRC/2007/04 - SNATTI (Sindicato Nacional de Atividade Turística, Tradutores e Intérpretes), available at

http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisooes_da_AdC/Paginas/PRC200704.aspx

101 of TFEU, shall apply only to agreements involving truly “self-employed workers”. This is in line with EU jurisprudence (namely the *Dutch Musicians* judgement case)⁴.

6. This note further addresses the use of non-compete covenants between employers and employees. These covenants are not prohibited in Portugal and are regulated by the Portuguese Labour Code.

2. An overview of Portuguese key labour market indicators

7. The fall in labour income as a share of GDP is a widespread phenomenon among industrialized countries. The empirical study of Karabarbounis and Neiman (2014) estimates that, over the past 35 years, there was a five percentage point decline in labour income as a share of global corporate gross value added.⁵ There is an ongoing debate as to the potential drivers to this empirical observation. Within this discussion, the strengthening of the bargaining power of employers vis-à-vis employees has been put forward as one of the potential contributors for this empirical observation.

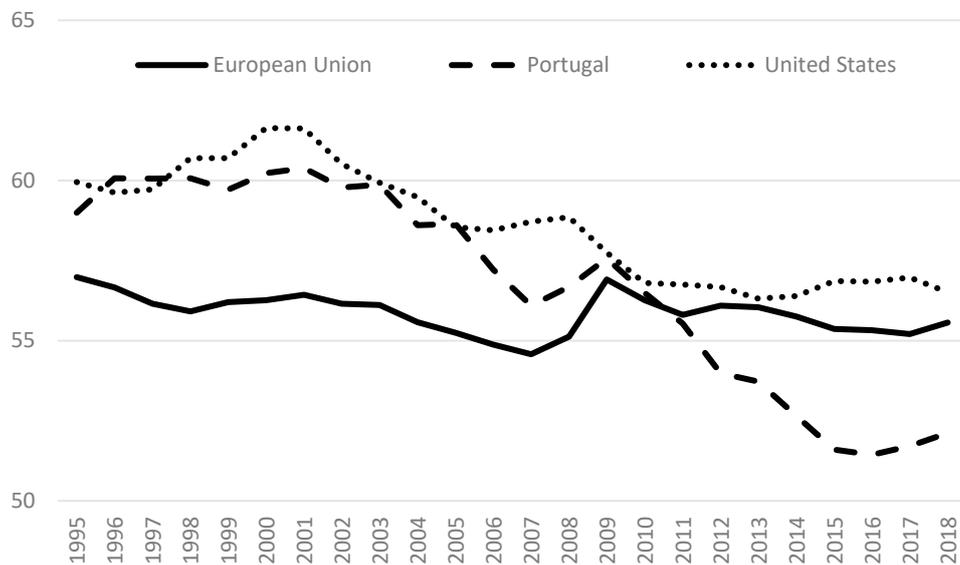
8. In Portugal, the labour income share has declined steeply in the period 2010-2015, and has slightly recovered since (see Figure 1). Historically, the labour income share in Portugal has been above the EU average. The reversal that can be observed in Figure 1 around 2010 coincides with the beginning of the period in which labour productivity grew faster than real wages.⁶

4 Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, CJEU, of 4 December 2014.

5 Karabarbounis, L., and B. Neiman (2014), “The global decline of the labor share”, *The Quarterly Journal of Economics*, 129(1): 61-103.

6 International Labour Organization (2018), “Decent work in Portugal 2008–18: From crisis to recovery”, International Labour Office, Geneva, available at https://www.ilo.org/global/publications/books/WCMS_646867/lang--en/index.htm

Figure 1 - Adjusted Labour Income Share



Source: AMECO/EU. Adjusted wage share, total economy, as percentage of GDP at current prices (ALCD0).

9. Some economists have suggested that the simultaneous increase in employment and the minimum wage might be consistent with monopsony power in some sectors.⁷ The minimum wage in Portugal, which is set by the Government and applies to all sectors and occupations⁸, has experienced a 19% increase between 2015 and 2019. Employment increased 7% between 2015 and 2018 and the unemployment rate kept its downward trend.

10. Some studies have addressed the degree of monopsony power in the Portuguese labour market.⁹ Félix and Portugal (2016) use employer-employee matched data, covering the period 2006-2012, to estimate labour-supply elasticities. The authors combine it with total factor productivity data to estimate the impact of monopsony power on firms' wage-setting policy. They show that firms' labour supply elasticity is positively and significantly correlated with wages. That is, firms with monopsony power pay lower wages, all else equal. In terms of magnitude, the authors estimate that a one standard deviation-increase in the labour supply elasticity increases wages by approximately 1.5%. The authors do not analyse how the estimated degree of monopsony power compares with other international studies, as that falls outside the scope of their study.

11. Martins (2018) uses the same employer-employee matched dataset to investigate the relationship between wages and local labour market concentration (which is measured

7 Luís Aguiar-Conraria, "Salário mínimo aumenta e emprego também? Pode ser poder de monopsonio" [The minimum wage increases and so does employment? It may be monopsony power], *Observador*, 10 January 2018.

8 Portuguese Labour Code, Law No. 7/2009, of 12 February (Article 273(1)).

9 Félix, S., & Portugal, P. (2016), "Labor Market Imperfections and the Firm's Wage Setting Policy", IZA Discussion Paper No. 10241, Institute for the Study of Labor; and Martins, P. S. (2018), "Making their own weather? Estimating employer labour-market power and its wage effects", CGR Working Paper 95, Queen Mary University of London.

using the method proposed by Azar et al., 2017).¹⁰ The estimated wage-concentration elasticities are moderate but negative, and imply that workers at the top quartile of the labour market concentration distribution earn 3 to 7% less than workers at the bottom quartile. The reported elasticities are substantially lower than the ones estimated by Azar et al. (2017) using US data, for which the same comparison implies a 17% drop in salary.

3. Competition Enforcement and Labour Market Issues

3.1. Monopsony power and horizontal agreements

12. Awareness as to the enforcement of competition law regarding labour market practices carried out by undertakings in their role as employers has been raised by the recent number of cases brought by the competition authorities in the United States, as well as in a number of European Union (EU) Member States.

13. The joint Guidelines issued in 2016 by the Department of Justice and the Federal Trade Commission clearly state that naked non-poaching and wage-fixing agreements are *per se* violations of the Section 1 of the Sherman Act.¹¹ The theory of harm underlying this position assumes that employers are competing buyers in the labour market and employees are the sellers. When employers agree not to poach each other's employees, the harm inflicted on employees is analogous to the harm caused by market sharing or client allocation agreements.¹² The theory of harm underlying wage-fixing agreements is analogous to the one that applies to price-fixing agreements.¹³

14. To date, the AdC has not adopted any decision condemning undertakings, in their role as employers, for prohibited practices that involved wage fixing or no-poach agreements. This is to say that there is no decisional precedent with regards to the potential applicability of Article 9 of the Portuguese Competition Act and of Article 101 of the TFEU to these agreements, in Portugal.

3.1.1. Wage-fixing agreements

15. Wage-fixing agreements, which can be used by competitors to formally or informally harmonize the wages or other forms of compensation paid to workers, may

10 Azar, J., Marinescu, I. and M. Steinbaum (2017), Labor Market Concentration, NBER Working Paper 24147.

11 DOJ/FTC Antitrust Division, "Antitrust Guidance for Human Resource Professionals", October 2016.

12 Case No. 1:10-cv-01629, U.S. District Court for the District of Columbia, "U.S. v. Adobe Systems, Inc. et Al." (17.03.2011); Case 1:10-cv-02220-RBW, U.S. District Court for the District of Columbia, "U.S. v. Lucasfilm Ltd." (03.06.2011); Case No. 12-CV-05869-EJD-PSG, U.S. District Court for the Northern District of California San Jose Division, "U.S. v. eBay, Inc." (02.09.2014); Case 1:18-cv-00747-CKK, U.S. District Court for the District of Columbia, "U.S. v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation" (11.07.2018).

13 Case No. Civil Action So. 94C282G, U.S. District Court for the District of Utah, Central Division, "U.S. v. Utah Society for Healthcare Human Resources Administration, et al." (27.10.1994).

harmonize firms' cost structures and reduce uncertainty regarding the price paid by competitors for the labour input.

16. Therefore, competition may be harmed because labour is an input to business activity and the hiring of workers is a parameter of competition between firms, namely through its impact on the costs of production downstream. These agreements aim at eliminating the risk of competition between rivals downstream, through a coordination of their business strategies on at least some cost components. This theory of harm is analogous to an agreement between competitors which *directly or indirectly fixes purchase or selling prices or any other trading conditions*.

17. At the EU level, the European Commission (EC) has recently fined three undertakings for fixing prices for purchasing of inputs¹⁴, in breach of Article 101 of the TFEU. The EC concluded that the undertakings colluded to reduce the price paid to input suppliers, thus disrupting the normal functioning of the market and softening price competition. The EC has stated that the decision aims at ensuring that firms compete for inputs on the merits and that input prices are set competitively.

18. Competition authorities in some EU Member States have also analysed agreements that fixed wages or other compensations for professional models. These practices were evaluated for their role in the price-fixing of management fees paid by end-consumers, which was considered the competition infringement.¹⁵

19. In line with the decisional practice of competition authorities of other EU Member States with regard to wage-fixing agreements, as well as with the decisional practice of the EU concerning input price fixing cartels, wage-fixing agreements between undertakings may be considered void and condemned under Article 9(1)(a) of the Portuguese Competition Act and, if applicable, of Article 101(1)(a) of TFEU. These norms prohibit agreements between undertakings, concerted practices and decisions by associations of undertakings which directly or indirectly fix purchase or selling prices or any other trading conditions.

3.1.2. No-poach agreements

20. No-poach agreements, which preclude competing firms from hiring each other's employees, thus limiting the pool of workers available to each competitor, may hurt competition through a variety of dimensions.

21. The effects of no-poach agreements are wide and are not solely confined to competition. As documented by a growing literature in labour economics, no-poach

14 Case AT.40018 – Car battery recycling (Campine, Eco-Bat Technologies and Recylex), C(2017) 900 final, 08.02.2017; Press Release, “Antitrust: Commission fines three companies €68 million for car battery recycling cartel”, 08.02.2017, http://europa.eu/rapid/press-release_IP-17-245_en.htm

15 Competition and Markets Authority (CMA), Case CE/9859-14, “Conduct in the modelling sector” (16.12.2016); Autorité de la Concurrence, « Décision n° 16-D-20 du 29 septembre 2016 relative à des pratiques mises en oeuvre dans le secteur des prestations réalisées par les agences de mannequins » (29.09.2016); Autorità Garante della Concorrenza e del Mercato, I789 – « Agenzie di modello », (11.11.2016).

agreements have effects in the labour market, namely in terms of the impact that lower mobility has on earnings.¹⁶

22. No-poach agreements can have an impact on the degree of competition in downstream markets, where labour is used as an input. The literature has shown that, if the monopsonist cannot wage discriminate, lower wages paid by firms will not translate into welfare gains for consumers, regardless of the market structure in the downstream market, when reductions of input prices are achieved through demand withholding.¹⁷ Theoretically, in situations where input buyers manage to pay lower input prices, the resulting cost savings may be passed on as benefits to consumers. This will happen whenever the strengthening of buyer power countervails the market power that sellers may have. However, in the case of a monopsony in the labour market, outside the collective bargaining context, workers will be atomistic sellers without market power.

23. Moreover, if no-poach agreements lead to lower salaries for workers, the quantity of labour supplied may be lower than the one that what would result in the absence of these agreements. Distortions in wages may discourage human capital investment, leading to a reduction in the quantity and quality of labour supply in the future. Additionally, if labour and other inputs are imperfect substitutes in the production process, labour market distortions may lead firms to employ an inefficient input mix in downstream production.¹⁸

24. Conceptually the strengthening of the monopsony power may lead to a reduction of output in the downstream market, namely if the monopsonist has market power downstream or their competitors are not able to expand production in a way that makes up for output reduction, harming consumer welfare.¹⁹

25. No-poach agreements may also entail allocative inefficiency for downstream markets, through the distortion of the allocation of the labour input. This loss of efficiency may entail that the market downstream delivers a quantity/quality pair that falls short from an efficient solution, with an unrestricted labour market.

26. No poach agreements may soften competition downstream by artificially limiting the pool of the labour input available to each competitor, at a given moment in time, thus restricting their ability to expand production as a strategic reaction in the market. This may be particularly relevant if the labour market cannot quickly adjust to the increase in demand (for example, due to the high specialization of the workers, such as surgeons or aviation pilots).

16 Gibson, M. (2019), “Employer market power in Silicon Valley”, mimeo.

17 Blair, R. D. and J. L. Harrison (1990), “Antitrust policy and monopsony”, *Cornell Law Review* 76: 297-340; Office of Fair Trading (1998), “The Welfare Consequences of the Exercise of Buyer Power”; OECD, DAF/COMP (2019)2, *Competition Concerns in Labour Markets – Background Note*; and Hemphill, C. S. and N. L. Rose (2017), “Mergers that harm sellers”, *Yale Law Journal*, 127: 2078-2109.

18 Noll, R. G. (2005), “‘Buyer power’ and economic policy”, *Antitrust Law Journal*, 72(2): 589-624.

19 Office of Fair Trading (1998), “The Welfare Consequences of the Exercise of Buyer Power”; and Blair, R. D. e J. L. Harrison (2010), *Monopsony in Law and Economics*, New York: Cambridge University Press.

27. In sectors where labour mobility is a relevant element in the innovation process downstream, namely when employee's contribution to innovation is particularly relevant (e.g., some IT industries), no-poach agreements may result in a decline in the quality and variety of products and services supplied to consumers. To that regard, the economic literature has produced relevant conclusions when examining how restrictions to mobility, as a result, for example, of non-covenant clauses, can under certain circumstances reduce the rate of innovation in the market (e.g., Motta and Rønde, 2002)²⁰.

28. No-poach agreements could also have an instrumental role in implementing a market sharing strategy in downstream markets. In particular, if the firms' business model relies on client portfolios and in which there is a relevant relationship between clients and the client portfolio manager, a no-poach agreement over the client managers responsible for those portfolios may be instrumental to a market sharing agreement according to which competitors agree not to poach each other's clients (e.g., some areas of banking and financial advice). In a similar manner, if client portfolios have a geographic dimension, a no-poach agreement may facilitate geographic market sharing.

29. No-poach agreements may also be instrumental to market sharing if they assist firms in softening competition as an agreement to "staying out" of each other's area of specialisation by refraining from poaching their respective specialised workforce. A no-poach agreement may thus serve an ultimate purpose of sustaining specialisation and product differentiation between potential rivals to soften competition (e.g., hospitals specializing on different areas of practice and agreeing not to poach each other's specialists).

30. Within this regard, pursuant to Article 41 (5) of the Portuguese Competition Law, a decision authorizing a concentration also covers restrictions directly related to and necessary to the realization of the concentration. The qualification as an ancillary restriction must take into account the decision-making practice of the AdC and the European Commission, which is further clarified by the Commission Notice on restrictions directly related to and necessary to concentrations (the "Notice on ancillary restraints", OJ, C-56/24, 5.3.2005). In several decisional precedents²¹, the AdC limited the effects of its decision, in a merger transaction, containing a non-solicitation clause, to the key-employees, expressly mentioning that the extension of those type of clauses to any type of employee was not covered by the authorization decision. Hence, in line with § 7 of the Notice on ancillary

20 On the relationship between mobility and incentives to innovate, see, e.g., Motta, M. and T. Rønde (2002), "Trade Secret Laws, Labour Mobility and Innovations", CEPR Discussion Papers No. 3615; Franco, A. M. and M. F. Mitchell (2008), "Covenants not to compete, labor mobility, and industry dynamics", *Journal of Economics & Management Strategy* 17(3): 581-606; and Andersson, F., Brown, C., Campbell, B., Chiang, H., and Y. Park (2008), "The effect of HRM practices and R&D investment on worker productivity", in *The analysis of firms and employees: Quantitative and qualitative approaches* (pgs. 19-43), University of Chicago Press.

21 See, as one example, the Non-Opposition Decision of the AdC, of 4 October 2018, in Case Ccent. 35/2018 – Amplifon / Grupo Gaes, http://www.concorrenca.pt/FILES_TMP/2018_35_final_net.pdf. The contract that frames the concentration establishes a non-solicitation obligation for all employees, limited to a period of less than 2 years from the date of conclusion of the transaction. In its Decision (§ 88), the AdC limited the effects of its authorization decision only to the part corresponding to key employees, as a necessary restriction to the business. The extension of that clause to any type of employee was not covered by the decision.

restraints (2005), Article 9 of the Portuguese Competition Act (similarly to Article 101 of the TFEU) remains potentially applicable where an agreement or provisions are not considered to be ancillary to a concentration. This, however, does not, as such, affect its legal status. Such agreements or provisions shall be assessed in accordance with the Portuguese Competition Act.

31. Additionally, no-poach agreements may signal a nature of interaction among competitors that is at odds with independent and competitive market behaviour. The implementation and monitoring of these agreements may require frequent contact between competitors, which is one of the factors that may facilitate collusive behaviour.

32. No-poach agreements may thus be one of the building blocks of a wider horizontal agreement that interplay to ensure a collusive outcome in the downstream market. In some EU Member-States, no-poach agreements have also been analysed by competition authorities, in the context of a wider cartel, as one of the agreements that contributed to the implementation of hard-core cartels.^{22,23}

33. Furthermore, no-poach agreements, insofar as they may indirectly affect the prices of the input in question (wages), could also be analysed as an indirect wage fixing strategy discussed above.

34. No poach agreements may thus be addressed as agreements to share *input sources or sources of supply*. Supply source sharing (of workers) among competing firms may limit downstream competition and prevent suppliers from playing input acquirers against each other, as would result in the absence of agreements that restrict or coordinate competitors in their input acquisition strategies.²⁴

35. Supply source sharing agreements through no-poach agreements may soften competition if a competitive response requires firms to hire a higher quantity of workers (e.g., to increase the supplied quantity or product quality). To that extent, a no-poach agreement becomes a barrier to expansion and, thus, a barrier to competition.

36. At the EU level, there are a few cases dealing with agreements that implemented a strategy of collusion amongst undertakings in the acquisition of inputs^{25,26}. In two cases

22 Autorité de la Concurrence (France): «Décision n° 17-D-20 du 18 octobre 2017, relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilientes» (19.10.2017); Comisión Nacional de la Competencia (Spain): “Resolución (EXPTE. S/0120/08, Transitarios) - Clemencia, Existencia de práctica prohibida” (31.07.2010); “Resolución (EXPTE. S/0086/08, Peluquería Profesional) - Clemencia, Existencia de práctica prohibida” (02.03.2011).

23 In addition to the EU Member States case law on non-poach agreements that is mentioned above, it is furthermore relevant to refer, as a side note, that a Dutch Court of Appeal has ruled that a no-poach agreement was void as it violated national competition law Dutch of Court of Appeal: LJN: BM3366 (Court of Gerechtshof's - Hertogenbosch) HD 200,056,331, 05.04.2010.

24 Barr, F. (2008), “Common Horizontal Agreements: Market-sharing and Customer Allocation”, in Bellamy, C. & G. D. Child (Eds.), European community law of competition (6th Edition, pp. 342-54), New York: Oxford University Press.

25 V.g., COMP/C.38.281/B.2, Italian Raw Tobacco, of 20 October 2005, upheld on appeal Case T-12/06 Deltafina SpA v Commission [2011].

26 V.g. COMP/C.38.238/B.2, Spanish Raw Tobacco, of 20 October 2004, substantially upheld on appeal Case T-24/05 Alliance One International v Commission [2010]; Case T-29/05 Deltafina SpA

concerning the acquisition of raw tobacco, the EC considered that agreements among competitors to fix the shares of available supply of an input and supplier allocation amongst themselves restricted competition for market share downstream²⁷. The cases were brought as violations by object of Article 81(1) of the TFEU [actual Article 101(1) of the TFEU] as “*agreements on purchasing eliminates the autonomy of strategic decision-making and competitive conduct, preventing the undertakings concerned from competition on the merits and enhancing their position vis-à-vis less efficient firms*”²⁸.

37. Under the Portuguese Competition Act, Article 9 of the Portuguese Competition Act, which is the counterpart to Article 101 of TFEU, prohibits agreements between undertakings, concerted practices and decisions by associations of undertakings which directly or indirectly fix purchase or selling prices or any other trading conditions (Article 9(1) (a)), or share markets or sources of supply (Article 9(1)(c)).²⁹ Both wage-fixing and no-poach agreements impair firms’ independent input acquisition behaviour and may fall under these provisions, and if applicable, of those corresponding ones of Article 101 of the TFEU.

38. In terms of the legal status of no-poach agreements in Portugal, Article 138 of the Portuguese Labour Code³⁰ addresses agreements among employers that may restrict workers’ freedom. This article posits that all agreements among employers that prohibit them from hiring a worker who has previously worked for them, or to impose the payment of a damages as a condition for hiring, should be considered void. It is important to note, however, that no other sanctions - namely, fines - are imposed on the employers that enter into such agreements, in the Portuguese Labour Code. These may be caught by Article 9 of the Portuguese Competition Act.

3.2. Merger control analysis and worker welfare

39. One of the ongoing discussion relates to how merger control regimes consider labour market concerns when the merging entities are actual or potential acquirers in the same labour market, regardless of whether the merging entities also compete in downstream markets.³¹

40. Merger control within the AdC’s jurisdiction is framed by Article 41 of the Portuguese Competition Act. Mergers are evaluated in order to determine “*their effects on the structure of competition, taking into consideration the need to preserve and foster, in*

v Commission [2010]; and Case T-37/05 World Wide Tobacco España v Commission [2011]; and Case C-537/10 P was withdrawn.

27 Barr, F. (2008), “Common Horizontal Agreements: Market-sharing and Customer Allocation”, in Bellamy, C. & G. D. Child (Eds.), *European community law of competition* (6th Edition, pp. 342-54), New York: Oxford University Press.

28 Whish, R. e D. Bailey (2012), p. 528, *Competition Law* (Seventh Edition), New York: Oxford University Press.

29 Portuguese Competition Act bilingual version, available at: http://www.concorrenca.pt/vPT/Noticias_Eventos/Noticias/Documents/Lei19_2012_Bilingue.pdf

30 Law No. 7/2009, of 12 February.

31 Marinescu, I. E. e H. Hovenkamp (2019), “Anticompetitive Mergers in Labor Markets”, *Indiana Law Journal*, 94: 1-32.

the interests of intermediate and final consumers, effective competition in the domestic market or in a substantial part of it” (Article 41(1)). A number of factors should be taken into consideration (Article 41(2)), but no mention is made of the impact on workers’ welfare, namely with regard to potential job or wage losses. In fact, the AdC applies the substantive test according to which it shall not authorize “*concentrations which are likely to create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant position*” (Article 41(4)). Its assessment is thus driven by competition considerations solely.

41. As such, the AdC has never assessed a merger’s impact in the labour market, and has never taken into account a merger’s impact on worker welfare as a criterion for merger appraisal (Article 41(1)(2)(4) of the Portuguese Competition Act).

42. It is also important to highlight that, under Article 41 of the AdC’s By-laws,³² an extraordinary appeal to the Government can be filed by the notifying parties against a prohibition decision by the AdC. The Council of Ministers’ decision must be grounded on fundamental strategic interests of the national economy, which specifically outweigh the detriment to competition stemming from the merger. This aspect of the legal framework for merger control thus creates some scope for other public interest considerations.³³

3.3. Considerations on the application of the Portuguese Competition Act to collective bargaining agreements

43. In what regards the potential application of the Portuguese Competition Act to collective bargaining agreements established between trade unions (in representation of workers) and undertakings or associations of undertakings, there is no generic prior exemption from the application of the Portuguese Competition Act.

44. Therefore, in line with EU jurisprudence (namely the above mentioned *Albany* judgement case)³⁴, the AdC approach to agreements that are not collective agreements by nature, and therefore not covered by labour legislation, is that they may infringe competition law if their aim or effect is to restrict competition. This being the case, will analyse them under Article 9 of the Portuguese Competition Act and, if applicable, Article 101 of TFEU.

45. This approach is illustrated by a decision in which the AdC concluded that the adoption of a fees schedule by a trade union amounted, in fact, to an anticompetitive conduct by an association of undertakings. In case PRC/2007/04 – SNATTI³⁵ the AdC adopted a decision condemning SNATTI (formally, a trade union) as a decision of association of undertakings, in violation of the Portuguese Competition Act (currently

32 Decree-Law No. 125/2014, of 18 August, Article 41.

33 OECD - DAF/COMP/WP3/WD (2016)29 - Public Interest Considerations in Merger Control, Note by Portugal.

34 See footnote 2. The CJEU has stated in several other judgments that agreements entered into within the context of collective bargaining between management and labour, intended to improve employment and working conditions, should not be considered included, in view of their nature and object, within the scope of application of Article 101 of TFEU. Therefore, if these requirements are not met, they are included in the scope of application of Article 101 of TFEU.

35 See footnote 3.

Article 9) and Article 101 of TFEU. The AdC considered that SNATTI acted as an economic operator, namely as an association of undertakings, approving and disseminating price lists for the services provided by tourism information professionals. The AdC considered that tourism information professionals were not workers, but rather self-employed professionals and therefore undertakings.

3.4. “False self-employed workers” and competition enforcement

46. With regards to “false self-employed workers” and competition enforcement, changes in the workforce globally may blur the difference between employees and self-employed. If they are truly employees, then Article 9 of the Portuguese Competition Act, which mirrors Article 101 of TFEU, shall not apply.

47. The application of the Portuguese Competition Act is determined by whether an undertaking is concerned. According to the Article 3 of the Portuguese Competition Act, an undertaking can be a natural person, or one or more private or public legal persons who engage in economic activity. The concept of undertaking corresponds to the concept under EU competition law and CJEU case-law.³⁶

48. Traditional self-employed workers, such as doctors,³⁷ dentists,³⁸ veterinarians,³⁹ and certified accountants,⁴⁰ have been considered undertakings by the AdC. The AdC has adopted several decisions condemning the Professional Associations of these liberal professionals in their role as undertakings. These associations engaged in fixing the prices applicable to the services offered by the professionals in question or by artificially segmenting markets associated with the access to and pursuit of the professions in question.

49. The AdC’s approach to “false self-employed workers” is in line with EU jurisprudence (namely the *Dutch Musicians* judgement case, above quoted).⁴¹ In that case, the CJEU stated that “false self-employed” are not to be considered as undertakings when applying competition rules. Criteria to appraise the status of a “worker” *versus* a “false self-employed worker” include his ability to determine independently his own conduct on the market and to bear the financial or commercial risks arising out of the activity. A “false self-employed” would be under the direction of another person in return for which he receives remuneration. From that point of view, the CJEU has previously held that the classification of a “self-employed person” under national law does not prevent that a person from being classified as an “employee” within the meaning of EU law if his independence

36 C-41/90, Klaus Höfner and Fritz Eiser v Macrotron GmbH, of 23 April 1991; C-180/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, of 12 September 2000.

37 AdC’s decision of 26 May 2006, in Case PRC/2005/07 – Ordem dos Médicos, http://www.concorrenca.pt/vPT/Praticas_Proibidas/Decisoos_da_AdC/Paginas/PRC200507.aspx

38 AdC’s decision of 30 June 2005, in Case PRC/2004/29 – Ordem dos Médicos Dentistas, http://www.concorrenca.pt/vPT/Praticas_Proibidas/Decisoos_da_AdC/Paginas/PRC200429.aspx

39 AdC’s decision of 19 May 2005, in Case PRC/2004/28 – Ordem dos Médicos Veterinários, http://www.concorrenca.pt/vPT/Praticas_Proibidas/Decisoos_da_AdC/Paginas/PRC200428.aspx;

40 AdC’s decision of 7 May 2010, in Case PRC/2009/03 - Ordem dos Contabilistas Certificados, http://www.concorrenca.pt/vPT/Praticas_Proibidas/Decisoos_da_AdC/Paginas/PRC200903.aspx

41 See footnote 4, paragraphs 33-36.

is merely theoretical, thereby disguising an employment relationship.⁴² The CJEU reiterated its reasoning that the status of “worker” within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer with respect to, in particular, his freedom to choose the time, place and content of his work,⁴³ does not share in the employer’s commercial risks,⁴⁴ and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.⁴⁵

4. Non-compete clauses between employers and employees

50. A non-compete agreement is a contract between an employee and an employer, where the employee agrees not to join a rival employer or to launch a competing business for a certain period after the current employment contract ends.

51. Non-compete agreements may be detrimental to competition. Detrimental effects on market entry and innovation may occur if their use is widespread without objective and proper justifications, as they prevent workers from changing their jobs and joining other firms or even starting other businesses.⁴⁶ If workers are prohibited from working for any other firm in the same industry, new entrants might find it hard to find the workers they need to enter the market. Furthermore, if a non-compete agreement prohibits workers from starting a firm that competes with their former employer’s, market entry will be lower than it would be in the absence of non-compete clauses. Additionally, in sectors where innovation depends on knowledge spill-overs, non-compete clauses may restrict the labour market mobility necessary to produce innovation.⁴⁷

52. These non-compete agreements do not fall under the Portuguese Competition Act, as they are not agreements between undertakings. Nevertheless, non-compete agreements might be ancillary to a merger deal, in which case they are evaluated by the competition authority within the adequate framework.

42 C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, of 13 January 2004, paragraph 71.

43 See footnote 42, paragraph 72.

44 C-3/87, *Agegate*, of 14 December 1989, paragraph 36.

45 C-22/98, *Becu and Others*, 16 September 1999, paragraph 26.

46 Kräkel, M., and D. Sliwka (2009), “Should you allow your employee to become your competitor? On non-compete agreements in employment contracts”, *International Economic Review*, 50(1): 117-141; Motta, M. and T. Rønde (2002), “Trade Secret Laws, Labour Mobility and Innovations”, CEPR Discussion Papers No. 3615; U.S. Department of the Treasury - Office of Economic Policy (2016), “Non-compete Contracts: Economic Effects and Policy Implications”, Washington, DC: Office of Economic Policy; and Marx, M. (2011), “The firm strikes back: non-compete agreements and the mobility of technical professionals”, *American Sociological Review*, 76(5): 695-712.

47 In the US, there has been empirical work on the subject. See Marx, Matt, Strumsky, Deborah, and Fleming, Lee, “Mobility, skills, and the Michigan non-compete experiment”, *Management Science* 55, 6 (2009), pp. 875-889.

53. It is also important to note that the Portuguese legal framework introduces limits to the use of non-compete agreements. Non-compete agreements between an employer and an employee are legal under the Portuguese Labour Code, as long as they fulfil a number of conditions.⁴⁸ These conditions limit the extent to which non-compete agreements might create an entry barrier through the reduced mobility that is imposed on the employment pool, or their negative impact on innovation in certain sectors.

54. More specifically, under the Labour Code, a non-compete clause is only valid if it does not exceed a 2-year period and is laid down in the work contract or in the document that terminates it. Furthermore, in order for these clauses to be valid, the worker's future activity must cause economic losses to the former employer, and the worker should receive a compensation from the former employer while the non-compete applies.

55. It is worth noting that the compensation level is not objectively defined in the law. This characteristic of the legal text has led to proceedings being brought to court. Highlighting two decisions of the Courts of Appeal that ruled on this subject,⁴⁹ these judicial decisions stated, in sum, that the criterion must be interpreted as meaning that, *“where the compensation in the non-competition pact is not established, the validity of the non-compete pact depends on the establishment of objective and operational criteria that enable it to be determined immediately or in the future. In the absence of criteria that allow this operative process and, therefore, the quantification of the compensation, the benefit cannot be considered determinable and, therefore, the non-compete pact is null”*.

48 Article 136.

49 Decision of the Lisbon's Court of Appeal, in Case 5738/16.8T8SNT.L1-4, dated of 28 of June 2017; and Decision of the Oporto's Court of Appeal, in Case 3526/15.8T8OAZ.P2, dated of 8 of June 2017; both referred in http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=1047A0136&nid=1047&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo