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Interim Measures in Antitrust Investigations – Note by Portugal

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This document reproduces a written contribution from Portugal submitted for Item 2 of the 135th OECD Working Party 3 meeting on 21 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

Sabine ZIGELSKI
Sabine.Zigelski@oecd.org, +(33-1) 45 24 74 39.

JT03498098

Portugal

1. Introduction

1. Interim measures can be an important tool to ensure that, during an antitrust investigation, the potential infringement does not seriously and irreparably harm competition. The use of interim measures may also avoid market developments that could be difficult to reverse by a decision at the end of the proceedings.¹

2. This contribution provides an overview concerning the imposition of interim measures under the Portuguese competition law framework. It assesses the powers of the Portuguese Competition Authority (hereinafter “AdC”) and analyses the AdC’s recent practical experience in imposing interim measures.

2. Legal framework in Portugal

2.1. Portuguese Competition Act

3. Under the Portuguese Competition Act², the AdC has the power to impose interim measures concerning an anticompetitive practice under investigation in order to prevent serious competition harm, which may be irreparable or difficult to repair, whenever the evidence available indicates that the practice is about to cause such harm.³

4. The interim measure may be adopted at any time during the proceedings. It may consist in the immediate suspension of the investigated practice or in any other measure necessary to reinstate competition immediately or indispensable to preserve the effectiveness of the decision to be adopted at the end of the proceedings.⁴

5. The AdC may impose interim measures on its own initiative or at the request of any interested party. The measures may be in force during up to 90 days or for a shorter period if they are revoked by the AdC. Based on a substantiated decision, the AdC may extend their duration for additional periods of 90 days.⁵

¹ See Recital 38 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, OJ L 11, 14.1.2019, p. 3–33. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001>.

² Law no. 9/2012, of 8 August. The possibility of imposing interim measures was already foreseen under the previous Portuguese Competition Act (Article 27 of Law no. 18/2003, of 11 June). The Portuguese Competition Act is available at: https://www.concorrenca.pt/sites/default/files/documentos/legislacao/Lei_19_2012-Lei_da_Concorrenca.pdf (only in Portuguese). Courtesy English translation available at: https://www.concorrenca.pt/sites/default/files/documentos/legislacao/Law_19_2012_bilingual_en_0.pdf. The power of the AdC to impose interim measures is also foreseen in Article 6(2)(c) of the Statutes of the AdC (Law-Decree no. 125/2014, of 18 August). Available at: <https://www.concorrenca.pt/sites/default/files/2021-05/Decreto-Lei-n13-A2014-Estatutos-AdC.pdf>.

³ Article 34(1) of the Portuguese Competition Act.

⁴ Article 34(1) of the Portuguese Competition Act.

⁵ Article 34(2) of the Portuguese Competition Act.

6. In addition, when the AdC imposes interim measures during the investigative phase (i.e. before adopting a statement of objections), it must adopt a decision concerning the investigative phase within a maximum of 180 days since the opening of proceedings.⁶

7. The AdC must hear the parties concerned by the investigation before adopting the interim measures, unless this seriously jeopardises “*the aim or the effectiveness*” of the measures, in which case the parties are heard after the measures have been adopted.⁷

8. Furthermore, before the adoption of an interim measure, and whenever a market subject to sector regulation is involved, the AdC shall request the opinion of the relevant sector regulator within a maximum of five days.⁸

9. In case of urgency, the AdC may decide to adopt interim measures which are “*indispensable for reinstating or maintaining competition*” before hearing the interested parties. In such case, the parties concerned are heard after the AdC’s decision.⁹ Nevertheless, if the relevant market is subject to sector regulation, the AdC shall request the opinion of the respective sector regulator before taking the decision to impose interim measures.¹⁰

10. The AdC decision to impose interim measures may be appealed to the Competition, Regulation and Supervision Court.¹¹

2.2. European Union legislation

11. The European Union legislators have also provided national competition authorities in EU Member States with the power to impose interim measures.

12. Under Regulation (EC) 1/2003,¹² the competition authorities of the EU Member States (hereafter national competition authorities, or NCAs) are granted the power to apply Articles 101 and 102 of the Treaty in individual cases. The Regulation provides that, for this purpose, NCAs may order interim measures on their own initiative or following a complaint.¹³

13. More recently, the Directive (EU) 2019/1,¹⁴ which aims at empowering NCAs to be more effective enforcers, also required Member States to ensure that NCAs have the power to impose interim measures, at least when there is “*urgency due to the risk of serious and irreparable harm to competition*” and “*on the basis of a prima facie finding of an infringement of Article 101 or Article 102 TFEU*”.¹⁵

⁶ Article 34(2) of the Portuguese Competition Act.

⁷ Article 34(3) of the Portuguese Competition Act.

⁸ Article 34(4) of the Portuguese Competition Act.

⁹ Article 34(5) of the Portuguese Competition Act.

¹⁰ Article 34(6) of the Portuguese Competition Act.

¹¹ Articles 84 to 86 of the Portuguese Competition Act.

¹² 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, OJ L 1, 4.1.2003, p. 1–25. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001>.

¹³ Article 5 of Regulation (EC) 1/2003.

¹⁴ See footnote 1. This Directive is also referred to as the “ECN+ Directive”, given that it aims at reinforcing the powers of the NCAs in EU Member States, which are part of the European Competition Network (ECN).

¹⁵ Article 11(1) of Directive (EU) 2019/1.

14. According to the Directive, the decision of the NCA needs to be proportionate and apply until the final decision is taken or for a specified period, which may be renewed if “*necessary and appropriate*”.¹⁶ The Directive also requests that Member States ensure that the legality and proportionality of the interim measures can be reviewed in expedited appeal procedures.¹⁷

15. The transposition of the Directive into national legislation is still ongoing in Portugal.

3. The AdC’s recent experience – the Football League case

16. The AdC does not have extensive experience in imposing interim measures.¹⁸ In 2020 the AdC adopted interim measures in a case concerning an anti-competitive agreement in the labor market.¹⁹

17. The case concerned an agreement between football clubs not to hire football players under certain conditions, in what is commonly referred to as a “no-poach” agreement. No-poach agreements are horizontal agreements whereby undertakings commit not to make spontaneous job offers to, or hire, workers from the other undertakings party to the agreement. Therefore, through these agreements, undertakings renounce competing for the acquisition of human resources. This practice not only limits the autonomy of undertakings to define strategic commercial conditions but also deprives workers of labor mobility.

18. The case was opened *ex officio* by the AdC in May 2020, following two press releases issued on 7 and 8 April by the Portuguese Professional Football League (hereinafter “Football League”), which mentioned a decision adopted by agreement between the football clubs competing in the First League,²⁰ which are members of the Football League. The President of the Football League also took part in the decision and the clubs of the Second League also adhered to the decision.

19. The decision consisted of an agreement between football clubs not to hire players who unilaterally terminated their employment contract with other clubs invoking issues related to the Covid-19 pandemic.²¹ As a result of the agreement, a player who took the initiative to terminate his contract due to issues caused by the Covid-19 pandemic, would not be hired by another club in the First or Second Professional Football Leagues in Portugal.

20. Given the nature and characteristics of the agreement, as well as the potential harm to competition, its seriousness and irreparability – or difficult reparation –, the AdC

¹⁶ Article 11(1) of Directive (EU) 2019/1.

¹⁷ Article 11(2) of Directive (EU) 2019/1.

¹⁸ Before 2020, interim measures were applied by the AdC only in one instance, in 2009, concerning a potential abuse of dominant position in the cinema exhibition market ([PRC/2008/12](#)). Between 1984 and 2003, the former Competition Council applied interim measures in a single case, in 2001 ([Case 4/01 – Brisa, Briser e Outras](#)).

¹⁹ Decision (only in Portuguese) and press release (in Portuguese and English) available at: https://extranet.concorrenca.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?Ref=PRC_2020_1&isEnglish=True.

²⁰ The First League is the top tier competition of professional football in Portugal.

²¹ The football clubs of First and Second Leagues are part of sports companies.

imposed interim measures on 26 May 2020. Before adopting the decision, the Football League was notified by the AdC in order to exercise its right to be heard.

21. In particular, the AdC ordered the immediate suspension of the no-poach agreement, in due respect to the principles of necessity and proportionality. The AdC further decided that the Football League should communicate to all its member clubs the suspension of the decision and issue a press release giving notice of the same fact. Finally, the AdC decided to impose a periodic penalty payment, as for each day of delay in adopting the interim measure, the Football League would have to pay EUR 6,000.

22. The interim measures were considered necessary as they were deemed the most effective way of ensuring a timely intervention of the authority in order to prevent that the anticompetitive effects and resulting harm of the agreement would materialize, and which would be impossible or very difficult to repair.

23. The AdC continued its investigation and, following a statement of objections in April 2021, it adopted a final decision in April 2022, imposing fines on the Football League and the football clubs amounting to a total of 11.3 million euros. The AdC concluded in the final decision that the agreement would reduce the quality of football matches and thereby harm consumers, by reducing the competitive environment and pressure between the sports companies concerned and preventing the recruitment of players who could fill gaps in national football teams, resulting in the loss of players in national competitions. The AdC also concluded that the practice had ceased upon the imposition of the interim measures.

24. Therefore, the AdC's swift approach and decision to order the immediate suspension of the agreement was necessary to effectively prevent the reduction of competition between clubs and associated consumer harm.

4. Final remarks

25. The power to adopt interim measures is an important tool for competition authorities. This has been recognized by both the Portuguese and EU legislators.

26. While so far the AdC's experience in imposing interim measures has been limited to a few instances, the AdC will continue considering the application of this type of measures whenever they are deemed necessary and appropriate.