

# International Conference

## Directive 2014/104/EU on antitrust damages actions and beyond

---

*Opening Session*

*Universidade Católica, Porto, 6 April 2019*

*By Maria João Melícias*

*\*Check against delivery\**

### *Introduction*

Good morning Ladies and Gentlemen.

Thank you to the organisers for the kind invitation to open this conference, together with judge João da Silva Miguel and Professors Manuel Fontaine and Sofia Pais. I am, as always, delighted to be here.

Let me start by congratulating the Catholic University of Porto for its steady advocacy role in the field of competition. Over the years, this university has consistently organized multiple initiatives with a view to promote a legal culture of competition in the country, for example through the training of judges.

Competition advocacy, that is, to engage society on the virtues of competition is one of the key missions of the AdC. It is therefore very reassuring to have the Catholic University of Porto as one of our “informal” partners, helping us to advance this mission in the country.

### *AdC’s role in the implementation of the Damages Directive*

Second, I would like to say a few words on the Damages Directive, in light of the AdC’s role in its implementation in Portugal.

As you may be aware, we were entrusted with the mission of preparing a draft legislation for the purposes of this implementation. We found this to be a sound

policy decision because the AdC is well placed to fine-tune appropriate solutions in order to safeguard one of the key goals of the Damages Directive, i.e. to strike a proper balance between public and private enforcement, with a view to maximize the effectiveness of competition policy.

### ***Strategic goals of the transposition process***

We took this challenge as the perfect opportunity to encourage the public debate at national level and engage stakeholders on the topic. We thus strategically decided that the transposition process should be open, transparent and inclusive. In light of this goal, we essentially carried out three initiatives:

First, we invited external experts to join us in the discussion, by creating a working group comprised with representatives from the judiciary, academia and legal practice that functioned as a ‘sounding board’ on our ongoing legislative work;

Second, we organized a consultative workshop with representatives of around thirty organizations -, including, courts, public prosecutor, government, consumer and business associations – in order to ‘market test’ some of the proposed solutions that had already been discussed within the working group, before they went public.

Third, we submitted the draft legislation to public consultation.

Finally, building on all of the many contributions received throughout more than six months we concluded the draft legislation that was submitted to the government.

All main work products of this project are posted on the AdC’s website for future study and reference.

This was a very fruitful and, I have to say, fun intellectual exercise. Our key goal here was to engage national stakeholders in the discussion; so that they might feel the new private enforcement regime as their own and actually be encouraged to use it, so that the regime would gain traction once implemented.

Following our kick-off, there have been a variety of roundtables, conferences and workshops held on the subject, so I feel that this objective has been accomplished.

Though we submitted a draft Legislation to the Government already in June 2016, it is common knowledge that for reasons that were beyond our control, there was a delay in the legislative process. But rather than focusing on the when, it is important to focus on the how: we have designed a legal framework that was really the outcome of collective team work with the community. That is why I think it is fairly balanced.

Another silver lining of the legislative delay was the fact that both the Government and the Opposition proposed in Parliament two laws on private enforcement – both based on the AdC's draft legislation – which meant that competition policy was debated, not only once, but twice in the plenary of the national Parliament in a matter of a few months – which is something quite interesting that you do not witness everyday. Indeed, there were no material differences between the AdC's draft legislation and these proposals. So, it can be fairly said there was a wide political consensus on the milestones of this regime.

### *Ongoing process of implementation of ECN+ Directive*

Finally, please allow me this opportunity to tell you about another important challenge that lies ahead of us: the ongoing implementation work of yet another Directive, the so-called ECN+ Directive.<sup>1</sup>, which will be a key milestone for the development of competition policy across the Union and in Portugal.

ECN stands for European Competition Network, a network which brings together the European Commission and the national competition authorities of Member States. It was created in 2004, following Regulation 1/2003, which gave national authorities and courts the power to apply Articles 101 and 102 in full.

---

<sup>1</sup> 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

Because consistent enforcement is sometimes difficult to achieve merely through informal cooperation, one of the objectives of the ECN + Directive is, therefore, to harmonize EU competition law across Europe, bringing national systems more in line with the EU's, in order to ensure uniformity and predictability in the enforcement process.

More importantly, as protectionist populisms emerge across the world, since citizens feel neglected and start distrusting the benefits of the free market system, I find that one of the major challenges of our time for the antitrust community as whole is to regain peoples' trust on the social benefits of open markets with free competition for all, as an engine for prosperity, opportunity and choice.

In this context, empowering competition agencies to become more effective enforcers becomes key, because they are asked more than ever to provide the "elixir of capitalism" (to borrow a quote from "The Economist" magazine). Enforcers must thus be granted the necessary guarantees of independence, resources, investigation and sanctioning tools, to be able to rise up to the challenge.

These are the main goals of the ECN+ Directive.

It goes without saying that the credibility of competition policy as a whole relies to a decisive extent on striking the right balance between effective enforcement and due process. So, for us, rest assured, effective enforcement also means due process. And I am not saying this just because I stand before an audience full of judges...

In a similar fashion to what happened in the case of the Damages Directive, the AdC is now in charge of preparing the draft legislation for the purposes of implementing the ECN+ Directive in Portugal.

Building on the same principles followed before, we have created a working group of external experts that is already working full speed and plan to hold a workshop as well as a public consultation in the near future, to make sure that the transposition process is balanced, consensual as far as possible, and takes

into account the views of all interested stakeholders, because this will help to define the effectiveness of competition policy in Portugal in the years to come.

We hope that this process, which is meant to be transparent and open to all, engages all the competition ecosystem and encourages the debate about the topics covered by the Directive.

Everybody is invited to contribute!

Thank you for your attention.

\*\*\*