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CONFERENCE ON CONTEMPORARY COMPETITION DEVELOPMENTS

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Address given on the "Enforcers Roundtable: Shaping Contemporary Competition Policy"

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1. On the AdC's Enforcement Priorities for 2017

First and foremost, I would like to congratulate you, Chair, on your wonderful w@competition initiative. Well done and thank you for having me. It is indeed a pleasure to be here.

We believe that in order to create proper incentives for companies to compete on the merits, you need the right interplay between advocacy initiatives and vigorous enforcement. So our priorities for 2017 are based on this hybrid approach.

On the enforcement side, we have had already a very busy start. Since the beginning of January, we have carried out a series of dawn raids: four so far, covering a wide range of sectors (we are actually in the middle of the fourth right now). I suspect these will keep us busy for the near future. And this is still mid-February.

We want to supplement our leniency program, by proactively detecting anticompetitive behaviour. One of the Key Performance Indicators included in our activity plan for 2017 entails initiating precisely between 15 and 20% *ex officio* investigations.

We will interact better with complainants, the victims of anticompetitive behaviour, by streamlining and modernising our electronic complaints website, together with a dedicated phone line.

We will carry out targeted screening of public procurement data, in sectors more prone to collusion, together with our advocacy campaign on best practises in fighting bid rigging, whereby we have been engaging with procurement officers, by holding training sessions on how to identify signs of collusion and on efficient tender design. This campaign actually started back in 2016 following the release of guidelines on the subject and it has proved to be an important source of solid tipoffs, which do help cartel detection, so we think it is worth continuing our efforts there.

Furthermore, we plan to raise awareness on our Guidelines on Rules of Conduct for Business Associations, which were recently released. For a number of reasons, trade and industry associations are pervasive in the Portuguese economy. Though they may have a relevant social function, they are often at the roots of serious anticompetitive conduct. Therefore, we intend to hold a series of outreach workshops at heart of the business community, notably at the more representative national sector associations, also with a view to promote our leniency program.

And because some of the more pernicious obstacles to competition do not stem from firms' behaviour but actually flow from the State, even if involuntarily, we are carrying out an in-depth Competition Impact Assessment Project, in partnership with the OECD, whereby we are identifying barriers to competition in existing legal and administrative frameworks of a wide

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range of sectors, including transport services – namely, road, sea, ports – and twelve self-regulated liberal professions.

The key objective here is to help either the government or other public entities to take informed decisions when designing economic policies, by identifying the costs of interventions and also by seeking to find alternative ways in which the State can pursue its social and economic goals without unnecessarily distorting competition. As part of this project, we are also building capacity within the government on how to do this for the future, that is, on how to carry out a competition impact assessment of legislation, either *ex ante* or *ex post*. The ultimate goal is to help to shape the design of the country's legal and economic landscape, in a way that will, in time, promote growth and the country's overall competitiveness.

Last but not least, we are hosting the International Competition Network Annual Meeting in Porto, next May, which will bring together around 600 delegates from over 120 jurisdictions, in order to discuss recent developments in competition policy and exchange best practices. So it's going to be exciting.

As to whether we have been influenced by Brussels in setting our priorities, although we keep track with global trends in the antitrust world, our priorities are market specific. They are tailor made to the particular needs we perceive exist in our jurisdiction. That being said, ECN's regular meetings, which are usually participated by our case handlers, are always a source of inspiration as to how to handle specific cases.

And it is a two-way relationship. Through the ECN, NCAs have more opportunities to influence decision-making in Brussels as well, with regard to both the enforcement agenda and competition policy in general. The ECN+ project on empowering national agencies to become more effective enforcers provides a good example of this fruitful cooperation and exchange of best practices. I believe it were the difficulties, of either institutional or procedural nature, felt by many NCAs on the ground that have led the European Commission to carry out this project on enhancing competition enforcement within Member States.

2. On how authorities are adjusting to the digital world

As it occurred in many other jurisdictions, we also experienced the Uber phenomenon, which led us to issue a report in mid-2016 to stir the Government in the right direction before it passed new legislation to address the issue, whereby we made several recommendations.

We urged the Government, first and foremost, not to ban innovation, but to embrace it. Moreover, we advised it, on the one hand, not to replicate in relation to new entrants the existing excessive regulatory framework, which currently applies to taxi services and, on the other hand, to take the opportunity to render the existing regulatory net on taxi services more flexible in order to enable traditional service providers to strategically react to the rise of new business models. As such, we advocated for a regulatory review that did not pick winners, but rather one that promotes a level playing field amongst players, capable of eliciting the benefits of competition.

[Our recommendations included *inter alia*: (a) eliminating barriers to entry (quantitative restrictions in the provision of taxi services and the corresponding territorial restraints); (b) gradually evolve towards price deregulation. However, in particular for hailing and taxi stands, market failures may justify, in the short run, some form of regulatory intervention that should nonetheless be confined to the minimum required (e.g., price cap) to address the identified problems; (c) limiting quality requirements to the level necessary to address market failures, so as to enable differentiation between service providers.]

But let me offer you a different perspective. Besides providing examples on how we are using our competition toolbox to address the concerns brought about by the digital world, it is

interesting to notice how, as an organisation, we are also taking advantage of new technologies and the digital ecosystem to enhance our effectiveness and boost our enforcement record and advocacy work. I will give you a few illustrations:

In merger control, we have introduced, for some years now, a fully paperless work chain**,** based on an online platform, from beginning to end, enabling *inter alia* electronic merger fillings, automatic distribution to case handlers, access to file by the notifying parties while ensuring the protection of confidential information, automatic publication of merger decisions etc.. We would like to replicate it in the antitrust field.

Our internal workflows and case management are also enabled by technology. They totally run on digital platforms. For example, the weekly meetings of the AdC's board are based on a platform that, amongst other things, allows commissioners to be remotely connected, without having to physically meet.

Another good example is e-procurement. Portugal is at the forefront of e-procurement, which is mandatory in the country, meaning that every bid in a public tender needs to be submitted via online platforms. All the data resulting therefrom is then stored and partially disclosed to the public in a central government website. This enables us to run targeted screens on the data collected and uploaded by the public procurement portal, in order to help cartel detection, something that would have been impossible or at least very costly and time consuming just a few years ago. As cartels become increasingly more sophisticated, agencies need to follow, by modernising methods of detection.

These are just a few illustrations on how "disruptive technologies" can also facilitate our day to day business and bring us greater operational efficiency.

3. On key challenges faced by National Competition Authorities and the importance of the European Commission's initiative aiming to empower NCAs to become more independent and effective enforcers

I will explain a couple of those challenges, one related to substantive aspects of the law and another concerning institutional issues.

It is a well-known fact that competition rules typically refer to the activities of undertakings or enterprises. This is a quite trivial notion of competition law. Indeed, it enjoys an autonomous meaning under EU competition law: it is an economic concept rather than a legal one, sometimes referred to as an "economic unit" or "enterprise entity". An undertaking, within the meaning of competition rules, may thus be comprised of several legal entities, notably, in the quite the common case of a group of companies. Hence, "undertakings" or "associations of undertakings" commit antitrust infringements and are supposedly liable for those breaches. However, "undertakings" do not exist in the legal world. You cannot impose a fine on an undertaking, in the same way as you cannot sue an undertaking. You need to sue or impose a fine on a person, either a legal or natural one.

Therefore, it is important to fix this mismatch between the economic world and the legal world, by bridging the gap between the subject of competition rules, which are economic agents or undertakings, and liability, which is imputable to persons. Particularly in the case of a group of companies, one needs to identify which legal entities within an undertaking will be liable and whose turnover is to be taken into account for the purposes of setting a fine. The whole group or just the company whose employees committed an infringement?

This is basically, in other words, the problem of parental liability. The theory is perfectly established at EU level[1] and there are sound policy reasons underlying parental liability, *inter*

[1] Pursuant to the ECJ's established case law, both the legal entity that has directly committed the infringement and any of its parent companies that have exercised decisive influence over that entity's

alia, the need to ensure appropriate levels of deterrence, because the legal caps of the applicable fines will be calculated on the basis of the combined turnover of the subsidiary and the parent company, rather than that of the subsidiary alone, which is the logical approach when we are referring the same undertaking. Furthermore, by expanding the group of companies that can be held liable, agencies avoid difficulties in collecting fines, limit the risks of insolvency and the risk that companies circumvent fines through internal re-structuring or internal shifts of turnover, which would lead to under enforcement or under deterrence. More importantly, when parents can be held liable and for higher fines, they are more willing to effectively supervise their subsidiaries' activities. Hence, parental liability encourages effective compliance programs to be applied across an entire organization.

But despite these sound policy reasons, some jurisdictions may still face legal obstacles when it comes to parental liability, or when it comes to presuming, in practical terms, that a parent company may be liable for an infringement committed by a subsidiary. These obstacles may be related to the idea of corporate separateness, to the principle of personal responsibility or even to the presumption of innocence, which are deeply rooted in some national constitutional and legal traditions.

In addition, where parental liability is in theory possible, but the standard of proof is set too high – for example requiring evidence that the managers of the parent were somehow involved in the wrongdoing, gave instructions or knew about it – which could require internal documents more likely available to the parent (such as minutes of board meetings; instructions from the parent to the subsidiary), this could lead agencies, involuntarily, to actually impose heavier fines on groups whose parents are located in their territories, because the evidence required to show parental liability will be more readily available; and conversely to be more lenient towards multinationals operating in their jurisdictions whose parents are located elsewhere, given the difficulties in collecting evidence. This could therefore create risks of unequal treatment.

It is true that the ECJ's case law on the notion of undertaking and parental liability are concepts of EU substantive law which thus apply directly against conflicting national provisions, pursuant to the primacy principle. However, some national courts may be reluctant to apply EU law and comply with the primacy principle under those circumstances: when the source of the law is not a Treaty provision or an EU legislation but rather stems from a court decision. Particularly in continental Europe, the possibility for courts to lay down legal rules is something that may be more difficult to grasp or accept.

As a result, in the interests of legal certainty, deterrence and of a consistent enforcement of antitrust rules throughout the EU, we believe that these substantive issues should be clearly spelled out in EU legislation.

On the institutional side, I would stress out the importance of agency independence.

Independence is a precondition for effective competition enforcement, so that enforcement decisions are solely based on legal and economic grounds, rather than on political considerations and thus only guided by the pursuit of consumer welfare protection.

Independence is key in ensuring transparency, predictability and credibility in the decision-making process. Actually, insulating agencies from political interference can also be said to contribute to protect the political power and democracy from economic power.

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business may be held liable. There is a rebuttable presumption that a parent company holding 100% or almost 100% of the share capital of a subsidiary exercises decisive influence over this entity's business.

An agency's independence is a dynamic and reversible process. It should not be taken for granted. It is crucial to bear in mind that independence is more than a formal legal status, it is more than ensuring merit-based and transparent appointment procedures of board members or operational autonomy (in the sense that the government may not be allowed to give you instructions).

These aspects are important of course, but not sufficient. There can still be an important gap between design and practice. For example: being actually autonomous in managing your human resources and budget is also a fundamental limb of "independence". If an authority needs permission to hire staff or incur in any new expenses, if an authority is prohibited from promoting existing staff, increasing salaries, granting performance based bonuses, etc, it will be seriously constrained in its day-do day business, in its ability to attract and retain qualified staff, which will directly impact its effectiveness and enforcement record.

At the end of the day, a society will have the competition agency that is willing to pay for. And it is understandable that governments need to prioritize and rationalize public expenditure. However, genuinely empowering competition agencies to be effective enforcers by means of sufficient and stable human and financial resources should be high on the priority list, so that competition delivers the expected results for society.

Governments may sometimes need a gentle reminder of this self-evident truth, which is why we fully support this Commission's initiative. We believe that this goal should be explicitly encapsulated in EU legislation.

4. On what matters the most in shaping contemporary competition policy

Engaging the common citizen on the importance of competition, by bringing our work to the public eye, for example, by prioritizing antitrust cases that are more meaningful to the public.

Transparency: being as transparent as possible in communicating your activity, not only as a tool for deterrence, in order to amplify the impact of enforcement, but also as matter of accountability. By submitting your performance to public scrutiny, you will create pressure within the organization to deliver results; ultimately, this will enhance your credibility, your standing in society, which in turn will strengthen your independence.

A proper interplay between advocacy initiatives and vigorous enforcement: if you want to your stakeholders to listen to you with attention, if you want to be respected by the business community and the public at large, you need to engage, to be approachable, to advise and raise awareness on the benefits of competition, but you also need to be feared.

That is how, in a "tweet-size statement", you create proper incentives for companies to compete on the merits, thus delivering price, quality, innovation and choice to society: with transparency and the right mix between advocacy and vigorous enforcement.

Brussels, 16 February 2017

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