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The Role of Competition Policy in Promoting Economic Recovery – Note by Portugal

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/promoting-economic-recovery.htm>

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1. Introduction

1. We are living in unprecedented times, which have raised countless challenges to societies and to the respective competition authorities all around the globe. The current Covid-19 crisis presents unique features due to its speed, severity, cross-sectoral and worldwide nature. As such, it is still too early to take any conclusions: the main challenges are yet to come.

2. Since the early stages of this crisis, the Portuguese Competition Authority (Autoridade da Concorrência, AdC) has taken a swift approach to address the impact of Covid-19, with interventions in the field of competition advocacy and competition enforcement, while also ensuring its business continuity.

3. These interventions are crucial for the society and the national economy, ultimately benefitting consumers. A vigorous and effective competition policy brings significant benefits such as more productivity and competitiveness, products and services with better quality, innovation, variety and lower prices, that is, greater consumer welfare. Conversely, an ineffective competition policy harms consumers, the competitiveness of businesses and the economy as a whole.

4. In this contribution, we will explore how the Covid-19 crisis led the AdC to adapt its internal organization and procedures to ensure business continuity. We will share some examples of the AdC's recent interventions on competition enforcement (both on mergers and antitrust) and advocacy. In addition, we will explore the role for advocacy of the AdC in the context of the economic recovery. Finally, we will provide some concluding remarks, emphasizing how the AdC's vigorous activity has played and will continue to play a key role, alongside other policies, in the recovery phase of this crisis.

2. Internal reorganization and business continuity

5. On 18 March 2020, with the Covid-19 pandemic quickly escalating across the world, a state of emergency over Covid-19 was declared in Portugal¹. The declaration of a state of emergency in Portugal was followed by a set of measures, which included constraints on public circulation, the suspension of commercial activities, remote work whenever possible, and the closure of certain public services, among others.

6. For instance, between 13 March 2020 and 3 June 2020, deadlines for parties and statute of limitations were suspended, except in urgent court proceedings (e.g. interim measures). Also, during the state of emergency procedural acts were carried out remotely, including via tele- or video- conferencing, when feasible. Courts have resumed their regular activity on 3 June 2020, notwithstanding certain Covid-19 related limitations (e.g. health safeguards), and procedural acts are carried out both remotely and in-person.

¹ The Presidential Decree No. 14-A/2020, of 18 March, was approved in accordance with Articles 19, 134 (d) and 138 of the Portuguese Constitution and in accordance with Law No. 44/86, of 30 September, as amended by Organic Law No. 1/2011, of 30 November, and by Organic Law No. 1/2012, of 11 May, after a hearing with the Portuguese Government and obtaining the necessary authorisation from the Portuguese Parliament in its Resolution No. 15-A/2020, of 18 March.

7. In the aftermath of the declaration of a state of emergency, the AdC was quick to draft a Contingency Plan, designed to mitigate public health risks with regard to both its staff and other stakeholders, and to adopt a number of measures that guaranteed the safety of its staff while ensuring business continuity.

8. Telework has become the rule for most of the period² and the various policies adopted by the AdC have allowed the authority to remain fully operational and open for business throughout the different stages of the Covid-19 crisis.

9. Regarding antitrust, for example, the AdC has already carried out unannounced inspections since the pandemic started³, while adapting procedures to the specific circumstances of the sanitary crisis.

10. With respect to mergers, the AdC has continued to receive and assess notified mergers throughout the pandemic, with documents related to merger deals filed through an online dedicated platform that was already in place prior to the Covid-19 crisis.

3. Competition enforcement and advocacy action during the Covid-19 pandemic

3.1. Antitrust

11. Regarding antitrust, the AdC issued a statement⁴ early in March 2020, informing the market that, in the period of great collective effort that the country was going through, it remained particularly vigilant in its mission, including in the detection of possible anticompetitive practices that exploited the pandemic situation to the detriment of people and the economy, through price fixing or market sharing. This was meant to create incentives for goods and services to remain available at competitive prices.

12. In addition, the AdC subscribed to similar statements from the European Competition Network (ECN)⁵, which gathers the European Commission and the competition authorities from the EU Member States, and the International Competition Network (ICN)⁶, which gathers over 130 competition authorities.

13. Also, at the EU level, the AdC coordinated its action with the European Commission regarding any matters which could potentially be relevant in other EU Member States.

14. At operational level, the AdC acknowledged that the pandemic context could trigger the need for temporary business cooperation in order to avoid scarcity, for instance, in the supply of essential goods or to address other market failures. As such, the AdC signalled to the market its availability to provide individual guidance to companies

² With the exception of the period between 14 September and 4 November, during which staff worked both remotely and in-person, rotating shifts every 15 days.

³ See http://www.concorrenca.pt/vEN/News_Events/Noticias/Pages/AdC-conducts-unannounced-inspections-in-Madeira.aspx?lst=1&Cat=2020.

⁴ See Press Release 03/2020 http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx?lst=1&Cat=2020.

⁵ See Press Release 05/2020 http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202005.aspx?lst=1&Cat=2020.

⁶ See http://www.concorrenca.pt/vEN/News_Events/Noticias/Pages/SG-Covid19-Statement-April2020.aspx?lst=1&Cat=2020.

regarding certain types of cooperation in different sectors, when appropriate and under certain conditions⁷. In particular, the AdC provided guidance in the banking, financial, pharmaceutical and sports sectors.

15. In the banking and financial sector, the AdC issued written guidance to the Portuguese Banking Association and to the Association of Specialized Credit Institutions related to the adoption by these associations of the main conditions of private *moratoria* to be applied by their members – banks and other credit institutions – on loan operations⁸.

16. While these type of joint operations were encouraged by the European Banking Authority and by the Portuguese Central Bank in order to allow banks to help the economy without disregarding their prudential duties, the AdC indicated that these associations should refrain from providing exchanges of information between members that were not strictly essential, adequate and proportionate for the definition of the temporary credit *moratorium* regime. In addition, the AdC recalled the importance of ensuring that banks and credit institutions remained free to grant their clients more favourable conditions than the ones set under the *moratoria*.

17. In the pharmaceutical sector, the AdC issued guidance addressed to the National Association of Pharmacies (ANF). Following the sudden price increase of face masks, alcohol gel, certain medicines and medical devices, the ANF recommended that pharmacies should comply with a specific maximum resale margin for these products⁹.

18. While under normal circumstances such type of recommendation could serve as a focal point and, therefore, lead to price alignment in the market, besides discouraging innovation, in the pandemic context the AdC decided that the investigation of such behaviour was not a priority¹⁰ since, in the meantime, the Portuguese Government approved legislation establishing, on a temporary basis, maximum retail margins for these products. In any case, the AdC signalled that it would continue to closely monitor the behaviour of the various economic agents concerned.

19. With respect to the sports sector, the AdC issued a recommendation targeting the Portuguese Football Federation (FPF) in regard to a draft Regulation which established rules on the functioning of the Portuguese Women's Football League¹¹. This draft included a wage fixing provision, *i.e.*, a salary cap, on the wages to be paid to female football athletes, allegedly to attract new entries by clubs in the league in the context of the Covid-19 crisis. In this regard, the AdC warned the FPF about the anticompetitive nature of such proposal and recommended the FPF to refrain from enacting such Regulation.

20. With respect to enforcement, the AdC imposed interim measures in the sports sector against the Portuguese Professional Football League (LPFP), regarding a decision involving the clubs of the first and second leagues, whereby they agreed not to hire football

⁷ See Press Release 07/2020 http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202007.aspx?lst=1&Cat=2020.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ According to Article 7(1) of the Portuguese Competition Act (Law No. 19/2012, of 8 May), “*in carrying out its responsibilities, the Competition Authority shall be guided by the criterion of public interest in competition enforcement and advocacy, and to this end it may define priorities in the handling of issues that it is called on to analyse.*”

¹¹ See http://www.concorrenca.pt/vPT/Noticias_Eventos/Noticias/Documents/Recomenda%C3%A7%C3%A3o%20a%20FPF.pdf (available only in Portuguese).

players who terminated their contracts for reasons related to the Covid-19 crisis. In the interim measures decision, the AdC ordered the LPFP to immediately suspend this no-poach agreement¹².

21. Based on the AdC's preliminary assessment, there was a potential serious and irreparable impact of a practice that could harm competition rules, as the no-poach agreement could lead to a reduction of workers' bargaining power and wage level, besides depriving them of labour mobility. In addition, the no-poach agreement could also harm competition between rival clubs in the hiring of workers that are relevant 'inputs' for the quality and competitiveness of their teams, therefore also having the potential of reducing the quality of the sports events available to consumers of sports events of greater quality.

3.2. Mergers

22. Since the start of the Covid-19 pandemic, the AdC has closed a gun-jumping case for failure to notify a merger in the hospital sector, settling with the acquirer while taking into account the circumstances of the pandemic¹³. In particular, there were potential liquidity constraints relating to the pandemic argued by the notifying party, which the AdC duly considered. Given that the sanction involved a company in the health sector, in the midst of the Covid-19 crisis, the AdC accepted the payment of the fine in several instalments in order to mitigate an impact on the provision of the company's health services.

4. 4. The role for advocacy of the AdC in the context of economic recovery

23. At the beginning of the Covid-19 pandemic it was important for competition authorities to address any pandemic-related issues in the short- and medium-term. Looking forward it will also be key to ensure that competition policy is a valuable tool for the economic recovery process.

24. More than ever, it is vital to ensure that consumers may benefit from competitive markets, eliminating existing barriers to entry and expansion. This means that competition authorities should focus their advocacy efforts not only on State measures designed to avoid the collapse of the economy but also on those adopted in order to help the economy grow in the aftermath of the pandemic.

25. On 19 March 2020, the European Commission adopted a Temporary Framework¹⁴ to enable EU Member States to have more flexibility under State aid rules to support their economies and help overcome the challenges raised by the Covid-19 crisis.

26. Under this Temporary Framework, the Portuguese Government has adopted, so far, an array of measures to help the national economy to recover from the impact of the Covid-19 crisis, which include guarantee schemes, credit line schemes, schemes to support

¹² See Press Release 08/2020 http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202008.aspx?lst=1&Cat=2020.

¹³ The AdC fined Hospital Particular do Algarve, SA (HPA) in 155,000 euros for acquiring sole control of Hospital de S. Gonçalo de Lagos S.A. (HSGL) without prior notification of the acquisition and, consequently, without obtaining prior approval by the AdC. See Press Release 04/2020 http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202004.aspx?lst=1&Cat=2020.

¹⁴ See https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_29_june_and_13_oct_2020_en.pdf.

investment in research, development, testing and production of Covid-19 relevant products, schemes to preserve jobs and support companies affected by Covid-19 in specific regions, as well as schemes to support SMEs¹⁵. These capital injections in the national economy by the Portuguese Government are considered important to mitigate and alleviate the social-economic impact of the Covid-19 crisis and to help research and development related to Covid-19.

27. In addition, other measures were put forward designed to help the economy recover from the crisis. The AdC has recently used its regulatory power for issuing recommendations under Article 6(4)(b) of the AdC Statutes concerning draft legislation related to the economic recovery.

28. For example, the AdC made recommendations regarding a proposal of the Government designed to stimulate the demand in restaurants, hotels and cultural events, a measure aiming at offsetting the effects of the current economic crisis. The Government proposed allowing consumers to save the VAT amount paid in one quarter for this type of services by using that amount to pay similar services in the next quarter.¹⁶ Since the mechanism underpinning the proposal would involve payment services and payment terminals, and given the closed nature of the payments ecosystem in Portugal, the AdC has recommended that the proposal should respect the principle of technologic neutrality, e.g. allowing for the use of alternative payment systems and methods. This recommendation was taken on board by the Government, which has announced its plan to open an international tender for the provision of the payment services in question.

29. Beyond this specific recommendation, the AdC has engaged in advocating for regulatory change in key sectors of the economy, such as telecommunications, financial services and transport.

30. As protectionist trends develop across the world, national economies may become less exposed to international competition and the respective consumers more reliant on suppliers at national level. This reinforces the importance of national competition authorities pursuing advocacy efforts and maintaining an effective enforcement activity, creating incentives for companies to compete and deliver innovative products and services at competitive prices.

5. Concluding remarks

31. The Covid-19 crisis has triggered unprecedented social, economic and political challenges. From the AdC's perspective, and considering the lessons learned from the 2008

¹⁵ See [Coronavirus Outbreak - List of Member State Measures approved under Article 107\(2\)b TFEU, under Article 107\(3\)b TFEU, under Article 107\(3\)c TFEU and under the Temporary State Aid Framework](#). In addition, the Portuguese Government also adopted a set of aid measures under a different legal basis - Article 107(3)(c) of the Treaty of the Functioning of the European Union (TFEU) - targeting the aviation industry, which included an urgent liquidity support to TAP Air Portugal (flag carrier airline) and an urgent liquidity support to SATA Air Açores. In this context the Portuguese State also acquired exclusive control over TAP, a transaction which was notified to the AdC under the merger control procedure and approved without conditions. See case Ccent. 20/2020 – República Portuguesa / TAP SGPS. See http://www.concorrenca.pt/vPT/Noticias_Eventos/Noticias/Paginas/CCENT_2020_20_Dec.aspx?lst=1&Cat=2020 (in Portuguese).

¹⁶ Article 249 of Law Proposal no. 61/XIV, of 11 October 2020, relating to the 2021 State Budget. See <https://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679595842774f6a63334e7a637664326c756157357059326c6864476c3259584d7657456c574c33526c6548527663793977634777324d533159535659755a47396a65413d3d&fich=ppl61-XIV.docx&Inline=true>.

financial crisis, the AdC has continued to assume its enforcer role as vigorously as possible and avoided the narrative that competition law could be suspended during the pandemic: on the contrary, the AdC signalled to the market that competition rules remained fully in force.

32. Notwithstanding, the AdC acknowledged that the unique circumstances of the Covid-19 crisis required an adjustment of its internal organization and procedures and a prioritization of its intervention on competition enforcement and advocacy in certain sectors particularly relevant during the pandemic.

33. However, the AdC has also unequivocally shown that it would not tolerate opportunistic behaviour by companies that, under the pretext of the Covid-19 crisis, might seek to exploit the current situation by abusing their market power or colluding to the detriment of consumers. In this regard, the AdC has ensured business continuity, opening investigations, conducting unannounced inspections and adopting decisions.

34. In addition, the AdC will pursue its advocacy action, issuing recommendations necessary to promote competition and protect consumer welfare.

35. Looking forward, it will be essential to recover the economy. The AdC will continue to play its role in this regard, remaining vigilant and maintaining a vigorous advocacy and enforcement activity, thus ensuring that competition policy becomes one of the pillars of the economic recovery.