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Case Prioritisation and Prosecutorial Discretion – Note by Portugal

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1. Introduction

1. Case prioritisation is essential to ensure the efficient allocation of resources, particularly in the current context of increasingly complex business practices and the growing volume of data associated antitrust investigations. In Portugal, this topic arises within a framework that combines administrative independence, an express legal basis for prioritisation, procedural safeguards and judicial review.

2. Under the Law no.19/2012 of 8 May (Competition Act), the Portuguese Competition Authority (Autoridade da Concorrência – AdC) is not subject to a strict principle of legality requiring it to initiate proceedings whenever it becomes aware of a potential infringement.¹

3. Instead, the AdC enjoys a margin of discretion in determining whether proceedings should be opened and in defining the degree of priority assigned to each matter brought before it.

4. In the Portuguese system, the notion of discretion is therefore intrinsically linked to case prioritisation and to the allocation of finite public resources in accordance with the public interest in the promotion and protection of competition.

5. This framework is expressly recognised in Article 7 of the Competition Act. Article 7(1) provides that the AdC shall be guided by the public interest in the promotion and protection of competition and may assign different levels of priority to the matters submitted for its consideration. Article 7(2) further establishes that the AdC shall exercise its sanctioning powers whenever reasons of public interest in the prosecution and punishment of infringements justify the opening of proceedings, taking into account, in particular, competition-policy priorities and the seriousness of the alleged infringement in light of the factual and legal elements submitted to it.

6. The Portuguese model therefore reflects a logic of “*bound organisational efficiency*”. Although the AdC retains a degree of latitude in allocating its limited resources, setting its institutional organization accordingly and defining the order in which matters should be pursued, the exercise of those powers remains constrained by objective criteria, transparency requirements and judicial review.

2. Legal Framework and Guiding Principles

7. The Competition Act provides an explicit legal basis for case prioritisation and for the organisation of the AdC’s enforcement activity.

8. Under its Article 7(1), the AdC must be guided by the public interest in the promotion and protection of competition and may assign different levels of priority to the

¹ Under the Portuguese Competition Act, infringements of competition rules are deemed to be administrative offences and not criminal offences. Therefore, the AdC may impose fines and decide to apply other ancillary administrative sanctions in response to competition infringements, but not criminal sanctions. In certain circumstances, namely in the context of a cartel involving public procurement the facts may be investigated by the Public Prosecutor’s Office as a crime of disruption of public tenders and such conduct could result in criminal sanctions.

matters submitted for its consideration. This criterion reflects the constitutional importance attributed to competition in Portugal. Article 81(f) of the Constitution of the Portuguese Republic requires the State to ensure the efficient functioning of markets, safeguard balanced competition and prevent abuses of dominant positions and other practices harmful to the general interest. Article 99(a) further identifies healthy competition among economic operators as an objective of commercial policy.

9. The Competition Act does not define the concept of public interest in the promotion and protection of competition. However, guidance may be drawn from Article 1(3) of the AdC's Statutes², which provides that the AdC's mission is to ensure the application of competition rules to guarantee the efficient functioning of markets, the optimal allocation of resources and the protection of consumer interests.

10. The AdC is also responsible for ensuring the application in Portugal of EU competition rules, namely Articles 101 and 102 TFEU and Regulation (EC) no. 1/2003³. The interpretation and application of the Portuguese rules on prioritisation must therefore also be understood in the broader context of EU competition enforcement.

11. The public interest in the promotion and protection of competition is closely linked to the understanding that effective competition contributes to economic efficiency, innovation and consumer welfare. Competitive pressure encourages undertakings to improve products and services, optimise production and adopt innovative technologies. Conversely, the absence of effective competition may generate inefficiencies, reduce consumer choice and distort the allocation of resources.

12. Against this background, the AdC is expected to focus its activity on conduct capable of causing significant harm to the competitive process and to the economy more broadly. The public-interest criterion therefore performs a dual function: it serves as the benchmark for determining enforcement priorities and simultaneously guides the substantive mission of the AdC.

13. Article 7(2) of the Portuguese Competition Act provides that the AdC shall exercise its sanctioning powers whenever reasons of public interest in the prosecution and punishment of infringements justify the opening of proceedings, considering competition-policy priorities and the seriousness of the alleged infringement in light of the factual and legal elements submitted to it.

14. Pursuant to Article 7(3) of the Portuguese Competition Act, the AdC publishes its competition-policy priorities annually, thereby providing an *ex ante* indication of the factors guiding its activity.

15. Moreover, Article 22(1)(a) and (b) of the AdC's Statutes expressly provide that the President is responsible not only for establishing the priorities, but also for determining the degree of priority to be assigned to matters submitted to the AdC.

16. The priorities are subsequently reflected in the activity plan and in the budget. The activity plan sets out the strategic objectives, as well as the targets and performance indicators by reference to which implementation is monitored.

² Approved by Decree-Law No. 125/2014 of 18 August.

³ 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, pp. 1–25.

17. This framework reflects the practical need to allocate limited enforcement resources efficiently while remaining bound by objective and reviewable criteria. The AdC is therefore not required to investigate every complaint or indication of anticompetitive conduct brought to its attention. At the same time, the AdC ensures that serious and sufficiently substantiated infringements are adequately pursued.

18. The framework is complemented by procedural provisions governing the handling of complaints. Under Article 8 of the Competition Act, complaints must be registered but do not automatically result in the opening of proceedings.

19. Where the AdC considers that there are insufficient grounds to proceed or that the matter shall not deserve priority treatment, the complainant must be informed and granted the opportunity to submit observations before a final decision is adopted. Such decisions may subsequently be challenged before the Competition, Regulation and Supervision Court (Tribunal da Concorrência, Regulação e Supervisão - TCRS).

20. Article 17 of the Competition Act further provides that investigations may be initiated either *ex officio* or based on complaints or other information available to the AdC. This allows the AdC to act proactively and not solely in response to external submissions.

21. The Portuguese approach is broadly consistent with the case law of the EU Courts, particularly the *Automec* judgment⁴ according to which the European Commission may establish different levels of priority among complaints based on the “Community interest”.

3. Case Prioritisation Methodology

22. The AdC uses case prioritisation both in the selection of new matters for investigation and in the management of ongoing proceedings. Resource constraints and the increasing complexity of investigations require the careful allocation of resources across competing enforcement demands.

23. Prioritisation therefore operates at different stages of the decision-making process. At the intake stage, the AdC assesses whether incoming information justifies the opening of formal sanctioning proceedings, a supervisory procedure or no further action, considering the statutory criteria laid down in Article 7 of the Portuguese Competition Act.

24. The assessment of whether proceedings should be initiated is based on a case-by-case analysis of the factual and legal elements available. It encompasses both the assessment of the seriousness of the alleged infringement and the likelihood of proving the infringement.

25. In practice, the AdC may also consider broader contextual elements, including the strategic relevance of a case for the development of decisional practice, the need to clarify the application of competition rules in emerging sectors or the desirability of reinforcing deterrence in areas where anticompetitive practices appear to be particularly prevalent.

26. Annual competition-policy priorities also play an important role in the organisation of enforcement activity. In recent years, those priorities have consistently focused on the detection and sanctioning of harmful horizontal practices, particularly cartels and conduct affecting public procurement, labour markets and liberal professions, while also

⁴ *Automec v Commission* – Judgment of the Court of First Instance, *Automec v Commission*, Case T-24/90, ECR 1992, p. II-2223, paras. 71–86.

maintaining attention on abuses of dominance, vertical restraints, merger control and *ex officio* detection.

27. The publication of annual priorities contributes to transparency and predictability. At the same time, those priorities are not exhaustive and do not prevent the AdC from pursuing matters falling outside the expressly identified areas whenever the factual and legal elements of a specific case justify intervention.

28. The AdC's procedural guidance on antitrust proceedings, updated in 2023, reflects these principles in day-to-day practice. It clarifies the possible sources of case initiation, including complaints, *ex officio* detection, information exchanged within the European Competition Network and leniency applications in cartel matters, and identifies the procedural options available following a preliminary assessment.

29. In practical terms, the AdC handles a significant number of complaints, reports and submissions each year while operating with limited organisational resources. Prioritisation therefore constitutes an essential mechanism for ensuring the effective and timely enforcement of competition law and for concentrating investigative efforts on matters capable of producing the greatest benefits for the competitive process and consumer welfare.

4. Prioritisation Based on the Seriousness of the Infringement

30. The seriousness of the alleged infringement constitutes one of the central criteria guiding the opening and prioritisation of proceedings.

31. The AdC assesses seriousness by considering the potential or actual effects of the conduct on market functioning, the economy and consumer welfare, together with the economic relevance of the undertakings and sectors concerned. This assessment necessarily depends on the factual and legal circumstances of each case.

32. The analysis generally begins with the identification of the type of conduct concerned and the clarification of the risks that such conduct may pose to competition. The AdC then considers whether the practice is likely to distort the competitive process, reduce consumer welfare or negatively affect the efficient allocation of resources.

33. The AdC may rely on economic theory, empirical evidence and the factual elements submitted by complainants or otherwise available to it. Particular attention is paid to whether the conduct appears capable of appreciably affecting competition within the meaning of the Competition Act.

34. The economic relevance of the practice is likewise important. The AdC may consider the relative weight of the undertakings involved, the significance of the affected sector to the Portuguese economy and the broader economic impact potentially associated with the conduct.

35. The AdC is not required to quantify the precise economic effects of the conduct or to undertake a complete counterfactual analysis. The purpose is rather to determine whether the practice is capable of appreciably affecting competition and whether intervention is justified in view of the public interest.

36. The seriousness criterion also allows the AdC to focus on practices that are particularly harmful by their very nature. Cartels and other hardcore restrictions of competition are therefore regarded as enforcement priorities, particularly where they affect public procurement or other economically sensitive sectors.

37. At the same time, the AdC carries out an assessment of the factual and legal elements available in each case. The decision whether to open proceedings is not based on abstract or automatic criteria, but rather on a concrete evaluation of the public interest in intervention in the specific circumstances of the case.

5. Procedural Safeguards and Accountability

38. The exercise of case prioritisation by the AdC is accompanied by a number of procedural safeguards designed to ensure transparency, accountability and effective judicial protection.

39. Where complaints are not pursued, complainants must be informed of the reasons supporting the AdC's preliminary assessment and granted an opportunity to submit observations before a final decision is adopted. Decisions not to proceed may be challenged before the Competition, Regulation and Supervision Court.

40. Additional safeguards apply in sanctioning proceedings, including rights of defence, access to the file and full judicial review of the AdC's decisions. The courts therefore retain the ability to scrutinise whether the AdC has acted within the limits of the law and respected the applicable procedural guarantees.

41. Transparency is further reinforced by the publication of annual competition-policy priorities, activity plans and reports and procedural guidance.

42. Institutional arrangements equally contribute to accountability. Although the AdC is an independent administrative authority and is not subject to governmental instructions regarding individual cases or enforcement priorities, it remains subject to broader mechanisms of institutional and parliamentary scrutiny.

43. In this context, the budget and the activity plans and reports are subject to Government approval, which may be refused only by means of a reasoned decision based on illegality or harm to the purposes of the AdC or to the public interest⁵.

44. Conversely, following the issuance of the annual report on the exercise of its powers, a dedicated hearing is held before Parliament⁶.

45. Taken together, these mechanisms seek to ensure that prioritisation decisions remain connected to objective criteria and the public interest in the promotion and protection of competition, while simultaneously preserving the effectiveness and flexibility necessary for modern competition enforcement.

6. Conclusion

46. The Portuguese framework provides an express legal basis for case prioritisation in competition enforcement. It combines administrative independence and flexibility in the allocation of resources with procedural safeguards, transparency obligations and judicial review.

47. The AdC is not subject to a strict principle of legality requiring it to investigate every potential infringement brought to its attention. However, the margin of assessment

⁵ Cf. Article 40(3) of the AdC's Statutes.

⁶ Cf. Article 6 (2) of the Portuguese Competition Act and Article 42(3) of the AdC's Statutes.

discretion conferred upon the AdC is not unlimited. The exercise of its powers remains governed by objective criteria laid down in Article 7 of the Competition Act, including the public interest in the promotion and protection of competition, competition-policy priorities and the seriousness of the alleged infringement in light of the factual and legal elements available.

48. In practice, prioritisation enables the AdC to focus its resources on the most harmful forms of anticompetitive conduct, particularly cartels and practices with significant impact on the economy and consumer welfare, while maintaining a case-by-case assessment grounded in transparency, proportionality and judicial accountability.

49. The Portuguese model therefore seeks to reconcile effective competition enforcement with the efficient allocation of limited public resources. The system operates through the articulation of statutory criteria, institutional practice and judicial oversight, allowing the AdC to pursue the matters considered most relevant to the protection of the competitive process while remaining subject to accountability and review mechanisms.