A FISH OUT OF WATER – CRITICAL ANALYSIS OF THE ADC'S DRAFT PROPOSAL FOR THE TRANSPOSITION OF THE ECN+ DIRECTIVE INTO PORTUGUESE LAW

Nuno Salazar Casanova, Tânia Luísa Faria, Duarte Peres & Margot Lopes Martins, em representação da Uría Menéndez – Proença de Carvalho*

Abstract *The Portuguese Competition Authority has been heading the transposition of the ECN+ Directive into Portuguese law, having already submitted to the Portuguese Government the final draft transposition proposal, also taking advantage of this opportunity to propose some adjustments to the existing Portuguese competition law framework. Further to its contribution within the public consultation held by the Portuguese Competition Authority, the authors of this article aim to provide a brief critical analysis of the ongoing work on the transposition of the ECN+ Directive, in order to contribute to ensure that the right balance is struck between the efficient application of Competition Law and the fundamental rights of the undertakings and individuals targeted by antitrust investigations in Portugal.*

Key words Competition Law – ECN+ Directive – Portuguese Draft Transposition – Portuguese Competition Authority – Restrictive Practices – Handling of Complaints – Dawn Raids – Evidence Seizure – Confidentiality Issues – Judicial Appeals

---

* *Uría Menéndez – Proença de Carvalho lawyers: Nuno Salazar Casanova is a partner in the Litigation Practice Area, Tânia Luísa Faria is a counsel and head of the Competition and EU Law Practice Area, Duarte Peres is a senior associate in the Competition and EU Law Practice Area and Margot Lopes Martins is a junior associate in the Competition and EU Law Practice Area.* *The authors would like to thank and acknowledge the contributions of Amanda Fabbri Barelli, senior associate at BMA – Barbosa Müssnich Aragão, and Guilherme Neves Lima and Manuel Franqueira Dias, both trainee lawyers at Uría Menéndez-Proença de Carvalho.*

1. INTRODUCTION

The open-ended tale of the transposition of Directive (EU) 2019/1 ("ECN+ Directive")[1] into Portuguese law starts with the appointment of the Portuguese Competition Authority (*Autoridade da Concorrência,* "AdC") by the Ministry of Economy to come up with a first draft transposition proposal (the "Draft Proposal"). The initial act of the transposition – the attribution of a central role to the AdC – was immediately criticised. Indeed, having as the spearhead of transposition efforts – which include the definition of what are admissible investigative techniques and what is admissible proof – the entity responsible for investigating competition law infringements in Portugal, was perceived as being contradictory and counterproductive.

In any event, irrespective of the criticism on the methodology, on 25 October 2019, the AdC submitted to public consultation its transposition proposal, including amendments, mainly, to Law no. 19/2012 of 8 May 2012 ("Competition Act") ("Preliminary Draft")[2]. The Preliminary Draft was subject to comments by several stakeholders, including the authors of this article and, on 3 April 2020, the AdC submitted the Draft Proposal to the Government, with adjustments compared to the Preliminary Draft, based, to a large extent, on the comments received during the public consultation.

Regardless on the methodological issues already mentioned, which we understand could be prejudicial to the necessary balance between the investigative powers of the National Competition Authorities ("NCA") and the fundamental protection of the rights of the investigated entities and individuals, we have adopted a constructive approach throughout the transposition procedure and, further to having participated in all the relevant public debates on the topic[3], we have also provided, according to our experience, input during the public consultation.

In this regard, Uría Menéndez – Proença de Carvalho, through the input of the authors of this article, submitted, on 15 January 2020, its observations

1 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, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001.

2 But also proposes amendments to the Statutes of the AdC, approved by Decree-Law no. 125/2014 of 18 August; to the Code of Public Procurement (*Código dos Contratos Públicos*), approved by Decree-Law no. 18/2008 of 29 January 2008, to the Budgetary Framework Law (Law no. 151/2015 of 11 September) and to the Criminal Procedure Code (*Código de Processo Penal*), approved by Decree-Law no. 78/87 of 17 February.

3 Which included, among others, the participation in a consultative workshop promoted by the AdC which took place in Hotel Eurostars, in Lisbon, on 2 July 2019.

during the public consultation ("Observations"), including the comments below, aiming to ensure that the transposition of the Directive contributed to improving the Portuguese competition legal framework, without creating exceptional and incompatible solutions if compared to the remaining sanctioning law applicable in Portugal, to the applicable legal principles deriving from the Portuguese Constitution, which are generally common to the tradition of the several EU Member States.

In this context, this article aims to provide a brief critical analysis of the ongoing work on the transposition of the ECN+ Directive, focusing on the main issues that have been subject to the authors' comments during the public consultation, which we understand are still relevant, in view of the current Draft Proposal[4]:

(i). the scope of application of the Competition Act, insofar as it alters the terminology used in respect of investigated companies;
(ii). amendments to provisions concerning the processing of complaints;
(iii). increased jurisdiction of the AdC concerning the scope of dawn raids and other investigative powers;
(iv). power of the AdC to reclassify the confidentiality of the information;
(v). amendments to procedural deadlines;
(vi). amendments to the methodology to set fines and other pecuniary sanctions; and
(vii). effects of judicial appeals.

2. SCOPE OF APPLICATION OF THE PORTUGUESE COMPETITION ACT

2.1 Removal of the term "*visado*"

The AdC proposed, as a necessary amendment for the transposition of the Directive, the removal of the term "*visado*" from the Competition Act, preferring the term "undertaking" and "investigated undertaking"[5] instead or,

4 For additional, more comprehensive, comments aiming to provide a potential overall review of the Portuguese Competition Act please refer to Faria, 2019:104-114.

5 In Portuguese, "*empresa*" and "*empresas investigadas*".

where appropriate, the term "natural person"[6] and "investigated association of undertakings"[7]. Even if, in some cases, such as article 89 (related to judicial appeals against decisions of the Competition Court), the AdC only refers to "investigated undertaking" and thus excludes natural persons and associations that are defendants in the proceedings from the persons entitled to bring an appeal.

According to the AdC's Explanatory Memorandum[8] which accompanied the Preliminary Draft, said change aimed "*to stick* [the terminology of the Competition Act] *as much as possible to the terminology and wording used in the Directive, with appropriate adaptations to national culture and legal tradition*"[9].

However, as explained in the Observations, the indiscriminate replacement of the term regrettably has consequences that transcend theoretical or purely terminological dimensions.

Indeed, the term "*visado*", which can be translated as "targeted entity", designates the entity subject to an investigation/accusation for an infringement of competition law and basically corresponds to the procedural status of the "defendant" ("*arguido*"). Bearing in mind that the expression "*arguido*" is the term commonly used in the Portuguese criminal system and in various legal frameworks applicable to administrative offences/misdemeanours sanctioned with fines and systematically comparable to the legal framework applicable to competition law infringements[10], to define rights and duties applicable to an individual or company under criminal investigation.

Formally designating the subject as a defendant is related to various procedural and constitutional guarantees. To this end, the Competition Act refers to the "*visado*" as the subject of specific rights and duties in sanctioning proceedings. Since specific rights are recognised to the "*visado*", not only in the Competition Act, but also within the provisions applicable to administrative

6 In Portuguese, "*pessoa singular*".

7 In Portuguese, "*associação de empresas investigadas*".

8 Available at http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Proposta%20de%20Anteprojeto%20apresentada%20ao%20Governo%20-%20Exposição%20de%20Motivos.pdf.

9 In Portuguese, "*seguir de perto, na medida do possível, a terminologia e fórmulas redaccionais empregues na Diretiva, com as devidas adaptações à cultura e tradição jurídica nacionais*".

10 *i.e.*, under the administrative offence pursuant to the General Administrative Offence Proceedings Regime (*Regime Geral das Contraordenações*), approved by Decree-Law no. 433/82 of 27 October, the Environmental Administrative Offences Framework Act, approved by Law no. 50/2006 of 29 August, the Credit Institutions and Financial Companies Framework Act, approved by Decree-Law no. 298/92 of 31 December and the Communications Sector Administrative Offences Framework Law, approved by Law no. 99/2009 of 4 September.

offences/misdemeanours and, in general, to sanctioning law in Portugal, we consider that it is essential and (should be) legally mandatory to officially designate the entity that is the subject of a procedure as "*visado*" and specifically attribute to it the status of defendant.

In fact, the unlawful degradation of the status of the entities targeted by a restrictive practices investigation seems to continue to be endorsed by the successive amendments to the Competition Act, increasing the notion of the competition law framework as an exceptional set of rules, a fish out of water within the Portuguese sanctioning regime.

In this sense, contrary to the previous version of the Competition Act (Law no. 18/2003 of 11 June), the legislator, in the current version of the Competition Act, already opted for the omission of the notion of "defendant" ("*arguido*") in favour of the term "*visado*", which was a new procedural subject in the Portuguese legislative framework on administrative offences, and was not specifically defined. Only after several years of debate did it become clear that the status of the "*visado*" benefits, further to article 32(10) of the Portuguese Constitution[11], from the set of rights and obligations attributed to the defendant ("*arguido*") in administrative offence proceedings[12].

The fact that the Draft Proposal introduces (again) an expression that does not reflect any commonly referred procedural status in the context of administrative offence proceedings may very well bring about negative recollections for companies of lengthy administrative and judicial crusades aimed to see recognised to the "*visado*" the application of the procedural rights commonly recognised to the "*arguido*".

The justification provided by the AdC for this change, that is, the need to ensure terminological consistency with the ECN+ Directive – as seems to stem the AdC's Explanatory Memorandum – is, in our view, neither adequate nor sufficient.

11 Which states that "*accused persons in proceedings concerning administrative offences or in any proceedings in which sanctions may be imposed are assured the right to be heard and to a defence*", thus imposing equal treatment of defendants irrespective of the type of administrative offence procedure in question.

12 Which benefits from, among others: (i) the possibility to express, by written request to the AdC, its intention to enter into discussions with a view to possibly proposing a transaction (article 22(2) of the Competition Act); (ii) the right to propose commitments which are likely to eliminate the effects on competition arising from alleged infringements of competition law with a view to having the investigation terminated (article 23(1) Competition Act) (iii) require the AdC to keep the case secret until a final judgment is rendered (iv) the possibility of consulting the file and at their own expense obtaining extracts, copies, certificates (article 33(1) Competition Act).

First of all, terminological consistency should not be an objective of the Directive, since different Member States and the European Union ("EU") present a significant degree of heterogeneity as regards the legal classification of competition law infringements (be they a misdemeanour or of a criminal or merely administrative nature)[13]. In any case, it is clear from the provisions related to fundamental rights applicable to sanctioning law, common to all Members States and deriving from the Charter of Fundamental Rights and from the case law of the Strasbourg Court ("ECtHR"), that an entity targeted by an antitrust investigation should be protected by a certain procedural status that translates the severity of the consequences of the infringement of such rules. In fact, the ECtHR has already stated that fines imposed for infringing competition law, because of their severity, are of a "*criminal*" nature within the distinct meaning of article 6 of the European Convention on Human Rights ("ECHR") and, as such, are likely to entail the application of the guarantees provided for in criminal matters[14]. The ECJ has, moreover, agreed that, insofar as the amount of the fine is significantly high and the competition procedure is likely to lead to a penalty, competition law must be regarded as being of a criminal law nature[15].

In Portugal, competition law infringements are administrative offences that are sanctioned with fines, to which the General Administrative Offence Proceedings Regime (*Regime Geral das Contraordenações*) and the Criminal Procedure Code (*Código de Processo Penal*) apply on a subsidiary basis (both of which refer to the "*arguido*")[16]. As such, the proposed terminological amendment also ultimately affects the coherence of the Portuguese legal system, insofar as it introduces a regulatory divergence between subjects sued or charged with infringements of the same nature.

In any case, is needing to ensure alleged "terminological consistency" with the ECN+ Directive, through a mere terminological change that, in Portugal,

---

13 Indeed, EU law, and in particular Regulation no. 1/2003 of 16 December, allows Member States to qualify competition law infringements differently than at an EU level.

14 See, for example, ECHR Judgment no. 43509/08, *Menarini Diagnostics S.R.L. v Italy*, §42; ECHR Judgment no. 53892/00, *Lilly France, S.A. v France*; Opinion in ECHR case no. 11598/85, *Société Stenuit v France*, Report of 30 May 1991, Series A, no. 232-A.

15 Case no. T-348/94 – *Enso Española v. Commission,* ECLI:EU:T:1998:102.

16 As Jorge de Figueiredo Dias and Nuno Brandão highlight, even if competition law infringements are administrative offences, the maximum limit of up to 10% of the turnover of the sanctioned undertaking may result in amounts exceeding the maximum fine abstractly applicable to legal persons for crimes, which, taking into account the combined reading of article 77(2) and article 90-B of the Criminal Code, must not exceed EUR 30 million. See Figueiredo Dias & Brandão, 2014: 452-453.

has material consequences, more important than recognising a procedural status and equivalent rights of defence? We very much doubt so.

Notwithstanding the fact that the AdC ultimately ignored the calls of various stakeholders, pursuant to the public consultation (including the authors of this paper[17]), to refrain from changing the terminology in the current Competition Act. The authors of this paper believe that it is both necessary and fundamental to maintain a specific procedural status of the "*visado*" (e.g. through its autonomisation in a single provision in the Competition Act, rather than its outright removal). This is also necessary to avoid that the competition law regime becomes a third type of sanctioning procedure in which more stringent sanctions are applicable than in criminal proceedings and where companies have fewer guarantees of defence than in other administrative offence proceedings (which would undoubtedly be the case, even if only on a temporary time basis, if the term "*visado*" is replaced by "undertaking under investigation"[18]).

We therefore believe that the concept of "*visado*" must remain in the Competition Act, to refer to each natural or legal person that is the subject of an investigation and may be held liable for a given infringement. Besides, a possible amendment within this context should be to reintroduce the concept of "*arguido*", previously used and common to comparable legal frameworks in Portugal, in order to better reflect the seriousness of the consequences at stake within antitrust investigations that require a reinforced procedural status.

2.2 Extending the concept of undertaking

Despite not following from the ECN+ Directive, further to article 3(2) of the Draft Proposal[19] the AdC proposes to replace the term "group of

17 See, for example, the Observations of APED – Portuguese Association of Distribution Companies; ICC Portugal; Luís Silva Morais, Sérgio Gonçalves do Cabo & Associados; Morais Leitão, Galvão Teles, Soares da Silva & Associados; PLMJ; Sérvulo & Associados; Telles Advogados and Vieira de Almeida & Associados.

18 In Portuguese, "*empresa investigada*".

19 Article 3(2) of the Draft Proposal amends the notion of undertaking for the purpose of the Competition Act and reads, in the amended proposal, "*for the purposes of this Act, a single undertaking is considered to be all entities* [entidades] *that, although legally distinct, constitute a single economic entity or are all in a position of interdependence*".

undertakings"[20], as it is set out in the current Competition Act[21], with the term "group of entities"[22]. This suggestion, according to the Explanatory Memorandum, seems to seek to cover all the legal entities that are part of the infringing company, including associations of undertakings.

In the Preliminary Draft submitted to public consultation, the AdC proposed to replace the term "undertaking" with "persons"[23]. After widespread criticism, including from the authors of this paper, the AdC refrained from including the reference to "persons" in the notion of undertaking for the purpose of the Competition Act. The term "persons", without further explanation, contributes to the lack of clarity of the definition and deviates from the definition set out in EU case law. In fact, such proposal shows that the AdC is seeking solutions that not only exceed national law, but also transcend consolidated EU case law[24].

Although such retour merits recognition, for reasons not entirely understandable, the term "persons" has managed to stick (or was forgotten about) in other segments of the Competition Act in replacement of what was previously a reference to "undertaking": article 69 is a clear example of this. Indeed, while on the one hand, the term "person" is referred to in a generic way in paragraph 3 (in reference to background), on the other, paragraph 4 refers to the term "person" to designate "undertakings" in the sense of legal person, since it also refers to "turnover". In addition, paragraph 9 uses the term "natural person"[25] to refer to an individual.

The generic use of the word "person", without properly framing its meaning within the Competition Act (as is the case further to the Draft Proposal,

---

20 In Portuguese, "*conjunto de empresas*".

21 Which currently reads: "*A group of undertakings is deemed to be a single undertaking, even if the even if the undertakings themselves are legally separate entities, where such undertakings make up an economic unit or maintain interdependence ties*". In Portuguese, "*Considera-se como uma única empresa o conjunto de empresas que, embora juridicamente distintas, constituem uma unidade económica ou mantêm entre si laços de interdependência*".

22 In Portuguese, "*conjunto de entidades*".

23 In Portuguese, "*pessoas*".

24 Over the years, EU case law has established the single economic entity doctrine according to which delimiting each undertaking depends essentially on legal and economic criteria (namely, the existence of autonomy in defining each company's business activity). Such definition is clearly provided, for example, in the Béguelin case – Case no. C-22/71 – *Béguelin Import Co. v. SA G.L. Import Export*, ECLI:EU:C:1971:113, §8 – in which the European Court of Justice ("ECJ") defined "undertaking" as a group of companies "*which, although having separate legal personality, enjoys no economic independence".*

25 In Portuguese, "*pessoa singular*".

which no longer refers to "persons" within the meaning of an undertaking), makes the law unclear as to who the subjects and/or addresses of the its provisions are or may be.

Therefore, we are of the opinion that, without proper and express equivalence of the term "person" to the term "undertaking" for the purposes of the Competition Act – something that does not occur expressly further to article 3 – the term "persons" should not be used to generally refer to undertakings. In this context, there is no need to change the current version, other than to standardise the reference to "undertaking" pursuant to article 3 of the Competition Act and pursuant to consolidated EU case law[26].

3. PROCESSING COMPLAINTS

Concerning the prerogative/possibility for the AdC to set its competition policy priorities – which already follows, to an extent, from article 7(1) of the current Competition Act[27] – and unlike what follows from the current Competition Act, the Draft Proposal amends article 7(1) of the Competition Act so as to confer on it the possibility to *refuse* addressing issues which it considers not to be a priority. The possibility of not processing complaints on the grounds that they are not priority (see proposed amendments to article 8 of the Competition Act) is also proposed in the Draft Proposal[28].

In addition, the amendments proposed to article 7(2) limit the criteria to be considered by the AdC when deciding whether to accept or reject a complaint: under the Draft Proposal, these now refer exclusively to "*the priorities of the competition policy*" and "*the seriousness of the possible infringement*". Thus, excluding from the mandatory scope of assessment of complaints (i) *the probability of proving the infringement* and (ii) *the extent of the measures required to investigate the potential case*. In our view, such limitation does not follow expressly from the ECN+ Directive and is ill-fated, to say the least.

---

26 See, among others, Case no. C-724/17 – *Skanska Industrial Solutions and Others* – ECLI:EU:C:2019:204, §§19 and 29; Case no. C-516/15 P – *Akzo Nobel and Others* v *Commission* – ECLI:EU:C:2017:314, §46; Case no. C-501/11 P – *Schindler Holding and Others* v *Commission*, ECLI:EU:C:2013:522, §102.

27 Where under the current Competition Act it also has to consider "*the likelihood of being able to prove [the] existence [of an infringement] and the extent of investigation required to fulfil as well as possible its mission to ensure compliance with articles 9, 11 and 12 of this law and articles 101 and 102 of the Treaty on the Functioning of the European Union.*"

28 To a certain extent, the possibility of not considering complaints on the grounds that they are not priority cases was already provided for in the Competition Act; in this respect, see case no. 11/15.1YQSTR.S1 (Judge Rapporteur: Helena Moniz).

If anything, the limitation of criteria proposed in the Draft Proposal is *contrary* to the purposes set out in the ECN+ Directive, in particular the need to ensure effective use of the NCA's resources: indeed, the need to consider the probability of proving an infringement allows for better and more efficient use of the NCA's resources; it also limits the existence of "fishing expeditions" based on ill-founded complaints that ultimately use up the NCA's and exhaust the investigated companies' resources.

However, the amendments to the regime for processing complaints do not end here. Indeed, further to the proposed wording of article 8(5) of the Competition Act, if a complainant fails to submit observations after the AdC's communication of absence of grounds to pursue the complaint, the complaint will be considered as having been withdrawn; this ultimately allows for the complaint to be submitted again relating to the same facts on an *ad eternum* basis (that is, within the applicable limitation period) – whereas the current wording of the Competition does not[29] –, favouring practices of sham litigation and very likely "clogging up" the AdC's complaint processing services. Ultimately, the AdC's capability to exercise its functions is also seriously affected.

Therefore, it is the authors' view that, much like it suggested in its Observations, the possibility of submitting complaints again relating to the same facts should be expressly removed.

4. REQUESTS FOR INFORMATION WITHIN RESTRICTIVE PRACTICES INVESTIGATIONS

4.1 General "clarification" requests

Further to the Draft Proposal, and in an amendment which goes far beyond what article 8 of the ECN+ Directive[30] sets out, the AdC proposes to amend article 15 of the Competition Act (*requests for information*) so as to be able to request to (i) investigated undertakings and (ii) third parties, all information, data or clarifications it deems necessary for an investigation, in any physical or digital format, namely documents, files and emails or instant messages,

29 Only allowing complaints to be submitted again if new facts arise, therefore preventing complaints related to the same facts from being submitted persistently.

30 Which allows for the request of "*all necessary information for the application of Articles 101 and 102 TFEU within a specified and reasonable time limit*" without detailing the exact support and location in which the information may be found.

regardless of where they are stored (*i.e.* computer system or other system to which legitimate access is allowed from servers, laptops, mobile phones or other mobile devices) and provided that they are accessible to the addressee of the request for information.

Moreover, further to the amendment to article 15(5) of the Draft Proposal, the addressee of a request for information is obliged to provide all information, data or clarifications required, provided that such obligation is not disproportionate to the investigation requirements or entails the confession of an infringement.

Thus, under the proposed amendments, undertakings undergoing an investigation – as well as *third parties* – may only refuse to provide the information and documents requested if doing so would entail admitting to an infringement. Otherwise, undertakings may be subject to a fine of up to "*1% the total worldwide turnover in the financial year immediately preceding the final decision by the group of persons included in each of the offending companies*"[31].

We take the view that this is not, by any means, compatible with the constitutionally-protected fundamental rights to remain silent and the privilege against self-incrimination[32], which are not only intended to prevent a person from confessing to the crime/infringement, but also to prevent the defendant from being obliged to contribute to its incrimination[33]. Indeed, and particularly as regards third parties, the possibility to request "clarification", and not objective information or documents, but rather actual statements about alleged facts, not only goes beyond the scope of the Directive[34], but is also contrary to the essence of the right against self-incrimination.

Any effective amendment to the current Competition Act should take this into consideration, and the possibility of requesting generic information should be substantially limited or excluded, as the AdC currently has sufficient powers in that respect.

---

31 Article 68(6) of the Competition Act, as amended in the Draft Proposal.

32 Article 6 of the ECHR; articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union; articles 1, 18(2), 26 and 32(10) of the Portuguese Constitution.

33 See, for example, Judgment of the Portuguese Constitutional Court of 17 June 2011, case no. 340/11, (Judge Rapporteur: Cura Mariano) and Judgment of the Portuguese Constitutional Court of 11 October 2011, case no. 461/11, (Judge Rapporteur: Catarina Sarmento e Castro), regarding the conformity with the Portuguese Constitution of (current) article 15 of the Competition Act.

34 The Directive only provides for the possibility to require a natural or legal person that is not under investigation to provide relevant information within a specific and reasonable period of time.

4.2 Access to digital evidence through requests for information

As mentioned, the AdC proposes to amend the Competition Act so as to be able to request to the investigated undertakings information in any physical or digital format, namely documents, files and emails or instant messages, regardless of where they are stored (*i.e.* computer system or other system to which legitimate access is allowed from servers, laptops, mobile phones or other mobile devices, including apps)[35].

However, under the applicable law to administrative offences in Portugal, it is clear that the AdC has no powers to seize digital evidence, such as emails and messages. Firstly, administrative offences are considered less serious than criminal offences, as they generally only apply to less significant conduct from an ethical and social standpoint[36]. In other words, in administrative offences, the prohibited conduct is ethically neutral, in the sense that, although the illicit act is not axiologically neutral – hence being sanctioned – the conduct itself in no way entail less adherence to the ethical values on which the legal order is based[37]. Because of these differences, the procedural regime of administrative offences is, in Portugal as in most EU sanctioning traditions, subject to its own autonomous rules, although the rules of criminal procedure apply on a subsidiary basis. Thus, contrary to criminal procedural law, in administrative offence proceedings it is not possible to remand in custody, to interfere in correspondence or telecommunications, or to use evidence that entails a violation of professional secrecy[38].

In addition, according to article 34(1) of the Portuguese Constitution, the secrecy of correspondence and other private means of communication are inviolable and article 34(4) restricts the intrusion of public authorities in correspondence, except in cases provided for by law regarding criminal proceedings.

To this end, the ECtHR has also confirmed that the right to respect for correspondence (article 8(1) ECHR) aims to protect the confidentiality of

35 Article 15(2) of the Draft Proposal.

36 See Pinto de Albuquerque, 2011:27.

37 See de Figueiredo Dias, 1983:331.

38 Article 42 of the General Administrative Offence Proceedings Regime and article 34 of the Portuguese Constitution.

communications in a wide range of situations, including emails[39] and also covers data stored on computer servers[40].

Moreover, under the Cybercrime Act[41], email, text messages and any records of communications of a similar nature cannot be treated as mere documents and benefit from the legal protection afforded to correspondence (article 17 of the Cybercrime Act)[42]. Such qualification requires that any correspondence can only be seized in criminal proceedings by a court order (article 34 of the Portuguese Constitution and 18 of the Cybercrime Act) and are not admissible in administrative offence proceedings (article 42 of the General Administrative Offence Proceedings Regime)[43].

In this context, the question here, once again, is not whether the format of the evidence is analogue or digital, but its nature. Regardless of the means used, what should be borne in mind is that evidence obtained through interference with telecommunications and correspondence is expressly prohibited.

Therefore, requiring the defendant to deliver emails or text messages is a way of circumventing the prohibition of seizure of correspondence, in violation of the secrecy of correspondence (article 34 of the Portuguese Constitution). As far as text messages and instant messages (e.g. WhatsApp) are concerned, ethically, this prerogative of the AdC constitutes an more serious intrusion, which should be circumscribed in the same way as phone tapping, which is absolutely forbidden in the case of administrative offences[44].

As such, this amendment is not compatible with existing constitutional and legal principles in the national legal system; therefore, it should be removed.

---

39 Case no. 62617/00 – *Copland v. Reino Unido*, 3 April 2007.

40 Case no. 74336/01 – *Wieser v. Bicos Beteiligungen GmbH v. Austria*, 16 October 2007.

41 Law no. 109/2009 of 15 September.

42 Given the controversial uncertainty related to digital evidence and the extensive use of the administrative bodies' investigative powers beyond the terms expressly provided for by law, courts and scholars have looked for regulatory elements that could clarify the rules to apply to such concept. To this end, in recent years, the Cybercrime Act has served as a support to understand the concept of digital evidence and respectively the applicable regime. See for example Anastácio & Alfafar, 2017: 340-341.

43 As Paulo Pinto de Albuquerque clearly explained: "*Communications already received by the addressee and stored in digital form fall within the scope of the legal prohibition, as provided in article 189 of the Code of Criminal Procedure. For example, emails (whether read or not) filed on the computer or messages filed in a mobile phone card cannot be used as evidence of an administrative offence*" (Pinto de Albuquerque, 2011:159).

44 Article 42(1) of the General Administrative Offence Proceedings Regime.

5. SEARCH AND SEIZURE OF DOCUMENTS TO BE USED AS EVIDENCE

The proposed transposition of the ECN+ Directive has suggested relevant changes within the AdC's powers of search and investigation. Indeed, the proposed amendments outlined in the Draft Proposal extend the AdC's powers to conduct search procedures, to request information, to order the application of interim measures and to strengthen the binding nature of proposed commitments in response to the competition concerns identified by the AdC. Although some of these principles are, in fact, incorporated in the ECN+ Directive, the Draft Proposal ultimately expands their scope in a way that the authors consider not to be entirely in accordance with the Portuguese legal framework and the general legal principles.

5.1 Searches on "any support"

The Draft Proposal extends the scope of the AdC's investigative powers to electronic means; this is justified, according to the AdC's Explanatory Memorandum, on the need for effective application of competition law to be updated in line with the reality of the undertakings' *modus operandi*.

Further to this argument, the amendments are intended to ensure that the AdC has access to, or can collect, *all* information, data or clarifications on any format, whether physical or digital (namely, documents, files and emails or instant messages), irrespective of the support, condition or location in which they are stored, as long as they are accessible to the undertaking under investigation. The amendment has resulted in rather wide-ranging wording being used in article 18(1)(b).

However, administrative offence proceedings must assure the absolute inviolability of correspondence or telecommunications[45]; therefore, it is forbidden in such proceedings to resort to phone tapping (article 187 of the Criminal Procedure Code), seizing correspondence (article 179 of the Criminal Procedure Code) and seizing emails (article 17 of the Cybercrime Act and article 189 of the Criminal Procedure Code).

In this context, on the topic of seizure of emails – and the reasons why it breaches the fundamental principle of secrecy of correspondence, as protected by article 8 of the ECHR – please refer to section 4.2 above.

As for the seizure of instant text messages – insofar as these have replaced, to a great extent, telephone communications – grants the AdC a power which, in practice, is equivalent to seizing correspondence and phone tapping. Further

45 Article 34(4) of the Portuguese Constitution.

to the ECHR, as well as the Portuguese Constitution, unless expressly permitted by *criminal procedure law* (which the Competition Act does not do), public authorities are prohibited from tapping communications[46]. Therefore, the possibility for the AdC, further to the Competition Act, to seize instant messages, is ultimately contrary to the Portuguese Constitution and should not be introduced in the Competition Act.

On the other hand, the amendments proposed to article 18 of the Competition Act not only exceed what is required by the ECN+ Directive[47] but fail to incorporate important gatekeeping mechanisms therein established in order to ensure that NCA's do not disproportionately make use of their investigative powers. Indeed, further to article 6 and recitals 30 to 32 and 35 of the ECN+ Directive (on which the amendments to article 18 are based) a principle of proportionality is established limiting the NCA's investigative powers to what is strictly necessary for the investigation.

In other words, and further to the ECN+ Directive, the AdC's right "*should not result in an obligation on the part of the undertaking or association of undertakings which is disproportionate to the requirements of the investigation. For example, it should not result in excessive costs or efforts*". The transposition of such guarantee is not, yet should be, reflected in the proposed article 18 of the Competition Act.

Moreover, article 18(1)(*b*) gives rise to related reflections in respect of the impact of the seizure and analysis of the volume of information potentially involved; the absence of objective limits; and harmonisation with the Portuguese legal system, which reflects EU rules, in particular with regard to the right to privacy and data protection.

In relation to the volume of information, failing to delimit the AdC's powers of investigation to what is *strictly necessary* for the proceedings results in the possibility of searching, examining and collecting large and disproportionate volumes of emails and information which not only breaches the right to privacy of their owners but also the principles of efficiency, effectiveness and economic use of resources which, even more further to the ECN+ Directive, should govern the AdC's actions.

If adapting to the reality of economic agents includes accessing electronic files, such right cannot be granted without the imposition of filters and limits

46 Article 8(2) of the ECHR and article 34(4) of the Portuguese Constitution.

47 Article 6 of the Directive makes no reference, in particular, to emails or unread emails, other than what is stated in its recitals.

on the data collected, subject to the breach of the constitutional principle of proportionality; indeed, the AdC should not be allowed to search on all or any document stored on a particular server, but only to elements related to the case, to be determined according to the communication subject, the recipient and limited to the period of the conduct being investigated. Furthermore, it becomes even more essential for judges to strictly delimit search warrants, as the analysis of exorbitant quantities of electronic documents would be excessively lengthy, compromising the timing of the process and violating the defendant's rights of defence and right to fair and due process[48].

Extending the AdC's investigative powers is also prompted by the need for harmonisation with the guarantees provided for in Law no. 59/2019 of 8 August on the processing of personal data for the purpose of the prevention, detection, investigation or prosecution of criminal offences or the enforcement of criminal penalties, which transposed Directive (EU) no. 2016/680 of the European Parliament and of the Council of 27 April 2016. Therefore, considering the wide scope of the AdC's investigative powers provided in the Draft Proposal, it would be necessary to ensure that the processing of personal data is in accordance with Portuguese law.

However, based on our understanding, the Draft Proposal does not reflect the guarantees in the processing of personal data, in particular those provided for in article 4 of Law no. 59/2019, such as: (i) processing of data that is adequate, relevant and limited to the minimum necessary for the purposes for which they are processed; (ii) storage of data in such a way as to ensure that inaccurate data are erased or rectified without delay; (iii) protection against unauthorised or unlawful processing and against their accidental loss, destruction or damage, using appropriate technical or organisational measures.

To this end, access to data must be limited to personal documents, to the extent necessary for the exercise of this right. It would therefore be advisable for article 18 to state that if the information collected in any format contains personal data, these should be kept in the file within the limits of what is

48 Indeed, unless further determination in search warrants is provided (e.g. with judges validating up-front the search words to be used during dawn raids), the AdC's typical *modus operandi* in conducting searches – commonly using very broad search words, at times unrelated to the investigated practices but just to the identity of the investigated companies – with the possibility of seizing even more types of information will result, in all probability, in the seizure of an even greater amount of information, making it almost impossible for both the investigated companies to treat that information and the AdC to carry out its functions.

strictly necessary for the investigation and ensuring at all times that such data is processed as provided for in Law no. 59/2019.

On a more positive note, between the Preliminary Draft and the Draft Proposal, the AdC decided to include, as proposed by the authors of this paper, the reference in article 30-A of the Draft Proposal that access to personal data be granted when necessary to exercise the rights of defence of another defendant[49].

Finally, an additional concern that should be included in the Draft Proposal concerns the need to ensure the reliability of information obtained by electronic means. As important as the content of the document – even more so – is the guarantee that the information in said document has not been altered in any way. In this respect, the inclusion of the possibility of searching, examining, collecting and seizing data in electronic format should be backed by requirements relating to the preservation of the chain of custody of the data collected and its authenticity.

5.2 Request for information in the course of a dawn raid (*diligências de busca e apreensão*)

Further to article 18(1)(*d*) of the Draft Proposal, the AdC proposes to include a right to request information on the object and purpose of the search or related to documents therein to "*any representative, worker or collaborator of the company or the association of companies*"[50]. From the outset, such prerogative contradicts the wording of the Directive, in recital 35, which states that any requests from the authority "*should not compel an undertaking or association of undertakings to admit that it has committed an infringement, which is incumbent upon the NCAs to prove*".

Considering the context in which the searches often occur – where companies are often not accompanied by a legal representative –, the information obtained from employees and collaborators amidst a dawn raid scenario is very likely not to accurately reflect the context in which a given document was produced and/or in that, a certain fact has occurred. The fact that, under the Draft Proposal, the AdC will be entitled to record such inquiries and keep them in the file may, ultimately, contribute to influence the investigation

49 The previous version provided in a disproportionate manner that "*any personal data contained in documents of the case do not require the protection of their confidentiality vis-à-vis the undertakings investigated*".

50 In Portuguese, "*solicitar, no decurso das diligências a que se referem as alíneas anteriores, a qualquer representante, trabalhador ou colaborador da empresa ou da associação de empresas, esclarecimentos necessários ao desenvolvimento da diligência*".

from an early stage. In this regard, we consider that it is advisable to completely remove article 18(1)(*d*) of the Competition Act due to its potential breach of the rights of defence of the defendants to the extent that it reduces their right to appropriate legal representation and breaches the privilege to avoid self-incrimination.

5.3 Interviews[51]

The changes proposed by the AdC result in the autonomisation of the interview process as a means of gathering evidence (article 17-A of the Draft Proposal). In addition, the AdC has given more emphasis to some aspects of the interview procedure, such as (i) the elements to include in the notice for the interview; (ii) the possibility of this type of interview being carried out outside the AdC's premises by duly identified agents of the AdC; (iii) the drafting of a report from the interview; the (iv) the continuation of the procedure even if the interviewee does not attend and, relevantly, (v) the express indication that the interviewee's failure to turn up to a regularly called interview is an administrative offence that may be penalised with a fine.

Although the Draft Proposal is silent in this respect, we believe it would be valuable, in relation to the information required to call the interview, for the notice to include a description of the facts relating to the object of the interview, especially when the events took place at a much earlier date.

5.4 Document Seizure[52]

Without prejudice to the additional prerogatives contemplated in the Draft Proposal, which we will examine in general below, it would be useful to specifically incorporate in the competition legal system the principle resulting from the joint interpretation of articles 124 and 186 of the Criminal Procedure Code (*Código de Processo Penal*), namely the provisions that entail that the AdC is not allowed to seize and keep information in case files that is unrelated to the subject matter of the investigation and that this type of information should be immediately excluded from the case and returned to the addressees (in the case of hard copies) or destroyed (in the case of digital files). Indeed, the authors' personal experience shows that once the AdC seizes a document – regardless of whether or not it is connected with the

51 In Portuguese, "*inquirições*"

52 "*Apreensão de documentos*".

investigation – it is very difficult to ensure that the document is removed from the case file.

5.5 Access to documents held by in-house lawyers

The AdC proposes the inclusion of a new paragraph in article 20 of the Competition Act (proposed paragraph 6) in order to allow the AdC to seize documents from company employees who hold the professional title of lawyer, namely in-house lawyers, provided that such documents do not constitute the practice of an act that is exclusive to lawyers.

On this issue, irrespective of having modified the Preliminary Draft by removing the initial expression "*not covered by professional secrecy*" in relation to the seizure of information from in-house lawyers, the fact is that even the prerogative now being conferred on the AdC does not stem from the wording of the Directive, which, in any event, aims to reduce the professional secrecy prerogatives inherent to lawyers who are also employees of the company. This should be reason enough to stop the AdC from experimenting with unnecessary and precipitated changes.

Even more importantly, lawyers' professional secrecy prerogatives are a fundamental right under the Portuguese Constitution (article 208) and the Statute of the Bar Association (article 92) – which apply regardless of whether the lawyer is acting as in-house counsel – and a cornerstone of the Portuguese legal and judicial system as it ensures the correct exercise of the defendants' rights of defence, which in turn is essential for their effective judicial protection.

Indeed, the lifting of professional secrecy for the use of certain documents/information as evidence is only possible if it is absolutely necessary and indispensable to discover the truth and is proportionate to the facts sought to be proven[53]. It is therefore, "*a mechanism of an exceptional nature exclusively, (…) aimed at situations of a gravity that goes far beyond the classic situations of cartel or abuse of a dominant position*" [54].

Moreover, under the terms of article 20(5) of the Competition Act (which we note have not been amended), "*no documents may be seized which are covered by the professional secrecy of a lawyer or doctor on the grounds that this is a*

53 Judgment of the Lisbon Court of Appeal, case no. 246/14.4TELSB-A.L1-3.

54 Anastácio & Alfafar, 2017:346: "*um mecanismo de natureza totalmente excecional, tal como as buscas domiciliárias, vocacionado para situações de uma gravidade que vai muito além das situações clássicas de cartel ou de abuso de posição dominante".*

sine qua non condition of the existence of said professions"[55] and, in the case of the secrecy of lawyers, a fundamental condition for an effective system of justice, which guarantees access to it and effective judicial protection.

Therefore, the mere possibility for the AdC to assess if an in-house lawyer communication amounts to an act exclusively carried out by lawyers allows it to, ultimately, (i) review the documents, in breach of privilege prerogatives and (ii) make judgements based on the information reviewed, irrespective of the impossibility of seizing documents which effectively amount to lawyers' acts.

This alone is completely contrary to the Portuguese legal system. As far as the Constitution is concerned, article 208 guarantees to all professionals the immunity necessary for the exercise of their activity and does not make any exception to the status under which such professional works. Article 92 of the Statute of the Bar Association imposes a "universal" right (and duty) to lawyer privilege, irrespective of the lawyer being an external or in-house lawyer; therefore, any distinction in how they are regulated is unlawful. Unfortunately, this is exactly what follows from the Draft Proposal, particularly if you consider the indiscriminate treatment proposed for dawn raids targeting the house or offices of external lawyers. Indeed, further to the new article 19(8), documentation can be seized from the home of an in-house lawyer without a judge being present, the mere presence of a representative of the Bar Association being sufficient to this end, while this is required for a dawn raid conducted in the office of an external lawyer.

In addition, it is inconsistent with other provisions of the Competition Act, that is, article 69 which lists which criteria should be taken into account in determining the extent of the fine for anti-competitive infringements. These include "*the conduct of the investigated company in eliminating restrictive practices*" and "*the cooperation with the AdC until the end of the proceedings*"[56]. Both require the involvement of the legal department, either in implementing an effective compliance programme (in the former scenario), or in gathering initial information on the possible existence of an anti-competitive conduct (in the latter scenario). In this context, the prerogatives now conferred on the AdC are capable not only of undermining the trust between the undertaking's

55 Anastácio & Alfafar, 2017:347: "*não poderão ser apreendidos documentos que se encontrem abrangidos pelo segredo profissional de advogado ou médico, pelo facto de este se tratar de uma condição sine qua non da existência das referidas profissões".*

56 In Portuguese, "*o comportamento da empresa investigada na eliminação das práticas restritivas*" and "*a colaboração prestada à AdC até ao termo do procedimento*".

lawyer and his client (the undertaking itself) but also undertaking's activity, the in-house lawyer's duties and, to a certain extent, the administration of justice.

For (all) the above reasons, the authors' of this paper believe that said provisions should not be included in the Competition Act.

6. CONFIDENTIALITY ISSUES

6.1 The AdC's prerogative to review the confidentiality of the evidence gathered

Even though the ECN+ Directive's is silent on the matter, the Draft Proposal contemplates the inclusion of article 30(5), according to which the AdC can provisionally accept a certain confidentiality qualification but, later, and even after the final decision, unilaterally change the confidentiality status. According to the Explanatory Memorandum, the purpose for such amendments lies in the need to "*create a circle of confidentiality for strictly intra-procedural purposes, allowing full access to the process only by lawyers or economic advisers of the undertakings concerned, without prejudice to further treatment in greater detail of confidentiality for access by third parties*"[57].

It is indeed necessary to ensure that ancillary issues do not jeopardise the reasonable duration of the proceedings. However, the absence of a time limit to review confidentiality, in accordance with the wording of the Draft Proposal, creates an unacceptable degree of legal uncertainty for those concerned, who may see business secrets disclosed even after the final decision has been handed down.

Therefore, we believe that the possibility of reviewing a confidentiality qualification should only be allowed until either (i) the moment before the final decision is issued or (ii) the moment the final decision has *res judicata* effect.

6.2 Access to the case files versus personal data protection

Again in a matter on which the ECN+ Directive is silent, the AdC suggests, in the Draft Proposal, to include article 30-A, which provides for the possibility

57 In Portuguese, "*criar um círculo de confidencialidade para efeitos estritamente intra-processuais, permitindo-se o acesso na íntegra ao processo apenas por advogados ou assessores económicos das empresas em causa, sem prejuízo de um ulterior tratamento em maior detalhe das confidencialidades para efeitos de acesso por terceiros.*"

of the defendant accessing all documents available in the file, regardless of whether it contains any personal data belonging to other defendants. Under the terms of the Explanatory Memorandum, expanding access is a necessary measure to enforce rights of defence and it would no longer "*be limited to consultation, without the possibility of reproduction, on the premises of the AdC*"[58].

Although the previous consultation system in the premises of the AdC was indeed counterproductive (as it failed to protect personal data and, due to its limitations, considerably limited the exercise of the rights of defence), the current system appears to grant absolute priority to the exercise of the rights of defence over the protection of personal data.

In a context in which holding information entails an asset that is becoming increasingly important, due caution is required to identify personal data; that said, and irrespective of the AdC having amended the Preliminary Draft so as to include that access is granted "*for the purpose of exercising their rights of defence*", we believe that the provision could be even more precise and state that access to personal data in case files is guaranteed *as long as the information is proven to be necessary for the exercise of the rights of defence* and *upon a well-founded request*.

7. PROCEDURAL DEADLINES

Several parts of the ECN+ Directive generally provides for the specific and reasonable nature of deadlines within antitrust investigations. For example, it states that undertakings must provide information within a specific and reasonable time limit (see article 8) and that the NCAs have the power to set a reasonable time limit for the applicant undertaking to submit the full leniency application (see article 22(5)). There are also other examples that, to a lesser or greater extent, extend or set time limits for companies to practice certain acts, with the aim of rendering the process secure and expeditious.

In addition to the obligations imposed on undertakings, the obligation of reasonable deadlines also applies to national competition authorities. This dual function of reasonableness of deadlines, in particular as regards their predictability, is apparent, for example, in article 3(3) of the Directive, which provides that proceedings must be conducted within a reasonable time.

58 In Portuguese, "*deixa de estar limitada à consulta, sem possibilidade de reprodução, nas instalações da AdC*".

Considering these obligations, the following contributions seek to indicate to what extent the amendments contained in the Draft Proposal seem incompatible with one of the clear objectives of the Directive: to provide greater certainty and reasonableness in conveying deadlines.

7.1 Purely indicative deadlines

Article 14 of the Competition Act provides for the general rule applied to deadlines, which remains unchanged in the Proposal. While maintaining a general rule is appreciated, some important time limits would benefit from more precision in the context of the Draft Proposal, all for the sake of better legal certainty, full exercise of the rights of defence, the principle of equality of arms and reasonable duration of the procedure.

The first amendment that merits attention is the removal of the two-year time limit for the AdC to reopen a case which has been concluded with commitments, in accordance with article 23 of the Competition Act. The new wording proposed leaves open the possibility for the AdC to reopen the procedure not only if the commitments (offered to remedy the infringement identified) have not been complied with, but also in the event that "a *substantial change has occurred in the concrete circumstances on which the decision was founded*".

The possibility of the AdC being able to indefinitely review a decision to close the case based on a change in the circumstances on which it was based (which may not even result from the investigated undertaking's actions) infringes the principle of legal certainty and is not supported by the text of the ECN+ Directive. Much to the contrary: the ECN+ Directive sets as its goal to ensure and impose further predictability and reasonableness in setting deadlines, which is why we believe it is necessary to maintain the two-year period currently set in the Competition Act as the time limit for reviewing filling decisions by the AdC.

7.2 Reasonableness of deadlines applicable to the defendants

In view of the need for reasonableness in providing deadlines, it seems necessary to review certain time limits laid down in the Competition Act on the grounds that they are incompatible with the complexity and intricacy of the investigations often conducted by the AdC.

To this end, we positively acknowledge the change proposed by the AdC between the Preliminary Draft and the Draft Proposal, which aimed to increase the time limit for the undertaking under investigation to submit its

defence after notification of the statement of objections (see article 25(1)), from 20 to 30 working days. Indeed, this amendment was necessary to allow the correct (and possible) exercise of the defendant's rights of defence.

Similarly, it is necessary to reconsider the deadline provided in article 25(5), since the minimum time needed to process all the evidence related to an anticompetitive infringement – even if straightforward – is clearly more than ten working days. We would recommend that, in compliance with the concept of reasonable deadlines, the period for submitting a probative statement in response to the presentation of probative elements would be, at least, 20 working days.

7.3 Determination of deadlines applicable to the AdC

Although the deadlines imposed on the defendants are, in most cases, preclusive, the deadlines applicable to the AdC are merely indicative. Indeed, the deadline for the completion of prosecution proceedings (established in article 29(1) of the Competition Act) is "*whenever possible*" 12 months but, if not sufficient, the AdC may inform the defendant of the period required to complete it (article 29(2) of the Competition Act). There is also no time limit for the AdC to provide an answer (of either acceptance or rejection) to a proposed transaction during prosecution proceedings (further to article 27(6) of the Draft Proposal).

Therefore, we believe that the rules establishing deadlines for the AdC to conclude the investigation, before and after the issuance of the statement of objections – probably inspired by the Spanish legal framework[59] – does not confer particularly added value to the AdC's practice. In fact, unlike Spain, these deadlines are not mandatory and there are no limits to their unilateral extension by the AdC. In our experience, the AdC regularly extends the deadline three to four times (sometimes even after the deadline has elapsed) without justification other than the complexity of the case. In our opinion these provisions would only serve their purpose if they were mandatory or at least if the number of extensions was limited.

In respect of deadlines for the AdC to respond to a request or a complaint, uncertainty is also king. Indeed, on several occasions, we have been faced with the lack of a clear deadline for the AdC to respond: first responses usually

59 Article 36 of the Spanish Competition Act provides for the deadlines for any administrative resolution of the CNMC, see, for example, article 36(1), that gives the CNMC a maximum of 18 months to issue and notify the decision ending the sanctioning procedure for conducts that restrict competition; these deadlines can only be extended or suspended in very limited cases, as provided for mainly in article 37.

take place within two weeks in the best case scenario but can easily also take one month. Although the general deadlines resulting from the Administrative Procedure Code apply to the Competition Act[60] – where the latter is silent – it would be useful, in practical terms, to avoid unnecessary delays, at the expense of the defendant's right to a fair trial. To this end, it would be helpful to establish a subsidiary deadline for the AdC within this context, namely a maximum of ten working days (which is the general deadline for undertakings), and applicable to all matters for which the Competition Act does not provide a specific deadline.

Ultimately, ensuring a relative degree of certainty as to the duration of a given investigation would not only be in line with the Directive – which, as mentioned above, allows to deal with the cases in due time – but would also be in line with the principles of legal certainty and would help the defendant manage their internal resources more efficiently.

7.4 Deadlines for appeals

Entering into uncharted territory until now – due to the silence of the current Competition Act on the matter – the Draft Proposal proposes to amend article 85(1) of the Competition Act so as to set the deadline for appealing AdC's interlocutory decisions to 20 working days; positively, this proposal ends an interpretative discussion which, on several occasions, has resulted in interlocutory appeals being filed within ten working days[61]. However, if the definition of the exact deadline that should be considered upon appealing one of the AdC's preliminary decision is certainly positive, the fact that the Draft Proposal also sets out the impossibility of further extensions of said deadline, irrespective of the matter involved and the complexity of the case, is most certainly negative. Indeed, considering the size and complexity of the procedures commonly investigated by the AdC and the authors practice regarding (long and complex) interlocutory procedures, lodging an appeal – even if of an interlocutory nature – within 20 business days is inclined to limit the correct exercise of the defendants' defence rights.

Additionally, the Draft Proposal suggests amending article 87(1) of the Competition Act so as to extend this term to 40 working days (instead of the current 30 working days provided in the Competition Act) to appeal a final

60 Decree-Law no. 4/2015 of 7 January, *Código de Procedimento Administrativo.*

61 Further to article 74 of the General Administrative Offence Procedures Framework, which applies on a subsidiary basis to the Competition Act.

sanctioning decision. Although such amendment is generally positive and allow the adjustment of Portuguese law to the EU standard and other Member States' rules, we believe that it is crucial to eliminate the already existing deadline extension prohibition so as to include the possibility for the defendant to request, at least, one extension to said deadline when the complexity and volume of documentation in the case file justifies so.

7.5 Limitation period deadlines

Under the Draft Proposal and further (at least to an extent) to article 29 of the ECN+ Directive, the AdC also promotes relevant changes with regard to the deadlines provided for in article 74 of the Competition Act on limitation periods.

The first relevant amendment concerns the possibility of the interruption of the limitation period as a result of the notification to any of the undertakings under investigation (even to companies that are part of the same economic entity or are in a position of interdependence with the defendant) of any act that may affect it.

However, despite the fact that the proposed wording follows the ECN+ Directive[62], the provisions being proposed are ultimately not in line with Portuguese law, which acknowledges that the general principles of law apply to all areas of law.

Indeed, according to article 323(4) of the Civil Code, the interruption of the limitation period occurs when "*knowledge of the act is given to the person against whom the right may be exercised*"[63]. In other words, the knowledge of the existence of the proceedings by the individual or undertaking under investigation, of the facts involved and of any deadlines for carrying out the acts, is a fundamental element for the interruption of the limitation period to occur.

Therefore, it seems to us manifestly incompatible with the provisions of the Civil Code that the notification to any of the defendants – including group companies not directly involved in the infringement – results in the interruption of the limitation period for other defendants in the proceedings without them having any knowledge of the existence of the proceedings.

62 In particular, article 29, which states that the suspension or interruption of the limitation period "s*hall take place from the notification of the first formal investigative measure to at least one undertaking subject to the enforcement proceedings".*

63 In Portuguese, *"é equiparado à citação ou notificação, para efeitos deste artigo, qualquer outro meio judicial pelo qual se dê conhecimento do ato àquele contra quem o direito pode ser exercido".*

It should also be highlighted that the AdC proposes that it is sufficient for the purpose of interrupting the limitation period to notify companies that they are in a "*position of interdependence*"[64] (article 74(3)). Considering that this position of interdependence (broadly outlined in article 3(2) of the Competition Act) can (and most likely will) be considered at the time of the infringement and that, most times, investigations of a sanctioning nature take place years after the investigated events, the wording as proposed leads to the possibility for the limitation period to be suspended/interrupted with the notification to a company that does not belong to the same economic entity as the defendant at the time of the investigation.

This solution affects in an inconceivable manner the sphere of rights of third parties.

Considering the clear incompatibility of this solution with the existing legal system, we see no other option but to propose the removal of the addition introduced by the AdC to article 74(3) of the Competition Act.

Additionally, the AdC also proposes, in article 74(9) of the Competition Act, the possibility of suspending – unlimitedly – the limitation period of the proceedings while the AdC's decision is subject to judicial appeal, "*including interlocutory appeal or appeal to the Constitutional Court*".

This inclusion reflects article 29(2) of the Directive that provides for the interruption or suspension of the limitation period in the event of the existence of pending appeals. Notwithstanding this provision, the wording "*without any time limit*" was included by the AdC in addition to what would be necessary for the transposition of the ECN+ Directive. In fact, the wording proposed by the AdC goes beyond what the Directive states and becomes manifestly incompatible with the Portuguese legal system, since it eliminates the limit for the suspension of the limitation period indefinitely in a clear deviation from the constitutional principles of legal certainty and predictability[65]. This is a clear example of the lack of balance between the interests of the investigation and efficient application of competition law, and the fundamental rights of the defendants.

In fact, the Portuguese legal system provides for more balanced solutions, and often in cases that typically impose equally high penalties. The first example is the General Framework for Credit Institutions and Financial

64 In Portuguese, "*manterem entre si laços de interdependência*".

65 Article 2 of the Portuguese Constitution.

Institutions[66], which allows the provision of a guarantee as a rule for an amount corresponding to 50% of the fine. The General Regime for Administrative Offences in the Telecommunications Sector[67] is another example, as article 32(3) provides that the appeal of any decisions issued by ICP-ANACOM that, in administrative offence proceedings, impose fines or ancillary sanctions or concern court secrecy causes the suspension of the relevant limitation period. Besides, article 407 of the Portuguese Securities Market Code refers to the General Regime for Administrative Offences, which in turn refers to the suspensive effect of final sanctioning decisions provided for in article 408 of the of Criminal Procedure Law.

In this context, we are of the opinion that this rule should be removes and replaced by a more balanced solution, as has already been done for other administrative offence regimes.

8. FINES AND OTHER FINANCIAL PENALTIES

The AdC proposes several amendments to article 69 of the Competition Act concerning setting the amounts of fines.

Firstly, it proposes adding a paragraph 3 on assessment of legal precedents for the purposes of setting the amount of a fine. In this respect, the AdC proposes considering any infringements – declared so in a final and binding decision of the European Commission or of a national competition authority – by any person or persons "*provided that they constitute a single economic entity*" with the undertaking under investigation at the time of the infringement.

The AdC amended its preliminary draft on this point, in order to be more consistent with the Directive, namely recital 47, and limited the consideration of legal precedents only in cases where the entity continues to commit the same or similar infringement to the one under investigation. Such amendment to the Preliminary Draft was necessary to ensure the proportionality of such rule.

Secondly, article 69(4) of the Draft Proposal states that "*the total worldwide turnover in the financial year immediately preceding the AdC's final decision, by all the persons who constitute a single economic entity with each of the*

66 Decree-law no. 298/92 of 31 December.

67 Law no. 99/2009 of 4 September.

infringing undertakings"[68] should be taken into account to determine how the fines should be calculated.

The Draft Proposal appears to reflect the provisions of article 15(1) of the Directive that are, in themselves, incompatible with the general principles applicable to sanctioning law at the EU level. However, the adoption of the worldwide turnover seems disproportionate and incompatible with both Portuguese law and the general principles of law.

Indeed, further to article 18(2) of the Portuguese Constitution, the restriction of rights, freedoms and guarantees may only occur in cases allowed by the Portuguese Constitution itself and to the extent necessary to safeguard rights or constitutionally-protected interests. Moreover, the legal asset that the Competition Act seeks to protect is, in general, competition, but it may, in particular, be segmented into several other assets: protecting consumer welfare, market competitiveness and small businesses, among others. Regardless of the public policy adopted to interpret and pursue the legal assets protected by the Competition Act, the protection must, in any event, be limited to the Portuguese market.

Therefore, the AdC proposes that the maximum limit of the fine be calculated based on a parameter that extrapolates this circumscription. In other words, by providing that the turnover is considered for the purpose of determining the maximum amount of the fine and is calculated from the overall turnover there is a clear discrepancy between the legal asset protected and the penalty resulting from the violation. This leads to the imposition of clearly disproportionate sanctions, such as an undertaking with limited activities in Portugal facing a huge penalty due to its global presence when this is unrelated to the infringement.

Therefore, the amendment does not comply with the fundamental provisions of the Portuguese Constitution under which penalties must be limited to safeguarding constitutionally-established rights and interests. Thus, the criteria included in article 69(4) should be removed[69].

Moreover, similar to the debate which took place in Spain and Germany, questions of unconstitutionality arise in relation to the higher limit of 10%

---

68 In Portuguese, "*volume de negócios total, a nível mundial, realizado no exercício imediatamente anterior à decisão final proferida pela AdC, pelo conjunto de pessoas que integrem cada uma das empresas infratoras*".

69 As highlighted by Jorge de Figueiredo Dias and Nuno Brandão, the maximum limit of up to 10% of the turnover of the sanctioned undertaking may result in amounts exceeding the maximum fine abstractly applicable to legal persons for offences, which, taking into account the combined reading of article 77(2) and article 90-B of the Criminal Code, must not exceed EUR 30 million. See Dias Figueiredo & Brandão, 2014: 452-453.

established to a heterogeneous set of infringements, which are very different in terms of seriousness and impact. Indeed, it is important to ensure that these provisions are fully compatible with the principles of legality, liability and harm[70].

Besides, as with other administrative offences, we are of the opinion that that specific ranges should be established within the 10% limit depending on the impact and seriousness of the infringement.

Furthermore, the ancillary sanction which prohibits the infringing entity from participating in tenders as provided for in article 71(1)(*b*) of the Competition Act is another example of a provision that would need to be reviewed. Indeed, this prohibition is likely to have negative effects on competition itself, in particular by limiting the number of participants in tenders and subsequent bids and, consequently, in the relevant markets.

However, we do acknowledge that the AdC has eliminated the wording proposed to article 88(2) in the Preliminary Draft, which provided for "*the amount of the fine fixed by the Court shall be updated by applying a rate equivalent to the legal interest calculated from 30 working days after notification of the AdC's sanctioning decision until actual payment*"[71], as this provision would only have reinforced the unpredictability and uncertainty of the penalty measure applicable to infringements of competition law. Indeed, even in the current Competition Act, the methodology for setting fines (article 69(2)) makes the maximum limit of the penalty to be imposed unpredictable and is out of touch with the economic reality of the infringing undertaking at the time of the infringement. In fact, this criterion is not even indicative of the potentially benefit obtained through the infringement. Thus, according to the criteria set out in article 69(2) of the Competition Act, the scope of the fine is not directly tied to the economic benefit obtained as a consequence of the alleged infringement.

9. EFFECTS OF JUDICIAL APPEALS

While determining the suspensive effect of appeals against final decisions imposing fines (see article 84(4)) in the Preliminary Draft was praiseworthy

70 Articles 2 and 8 of the General Regime of Administrative Offences and articles 18 and 29 of the Portuguese Constitution.

71 In Portuguese, "*o montante da coima fixado a final pelo Tribunal será atualizado mediante a aplicação de taxa equivalente aos juros legais, calculados desde 30 úteis dias após notificação da decisão sancionatória da AdC e até efetivo pagamento*".

– in response to regular criticisms – unfortunately the AdC, in the Draft Proposal, ultimately decided to reinstate the current legal solution under which appeals, including those of an interlocutory decision, do not suspend the effects of the AdC's decisions.

Indeed, the regime provided in article 84(4) and (5) of the Competition Act, which determines that appeals in competition law proceedings have no suspensive effect, by requiring the advance payment of very significant fines, but not allowing the provision of a guarantee or the constitution of an escrow deposit as in the EU, is clearly unconstitutional.

Such system breaches (i) the principle of presumption of innocence, (ii) the right to effective judicial protection, discouraging the right to an appeal, which is made worse by its combination with the possibility of a being fine being imposed – *reformatio in pejus* – also enshrined in the current version of the Competition Act, and (iii) the principle of proportionality, given the existence of more appropriate alternatives.

Additionally, the solution provided by the AdC diverges from legal regimes applicable in other areas of law within the Portuguese legal system and possibly in other jurisdictions, in violation of the principle of equality of procedural arms and leads to the unjust enrichment of the regulatory body at the expense of the sanctioned undertaking, while the legal proceedings are ongoing.

The unconstitutionality of this rule (and of other identical rules in other areas of law) has been repeatedly and contradictorily discussed by the Portuguese Constitutional Court, reflecting the important shortcomings of the rule contained in article 84(4) and (5) of the Competition Act.

Recently – between the date of publication of the Preliminary Draft and the Draft Proposal (which may explain the aforementioned twist) –, the Plenary of the Constitutional Court held that the effect enshrined in article 84(5) of the Competition Act is not contrary to the principles of effective judicial protection and the presumption of innocence[72].

However, this decision cannot be considered to have resolved, or responded to, all the shortcomings of the rule, inasmuch as the judgment did not rule on, *inter alia*:

(i). the disproportionate nature of the requirement that all provisional payment of the fine be made, excluding the possibility of a guarantee

72 Case no. 776/2019, (Judge Rapporteur: Rodrigues Ribeiro).

been provided in lieu, without having to prove that the early payment of the fine causes the defendant considerable harm;

(ii). the limitation of effective access to justice as there is no provision that allows the appeal court to grant a waiver or reduce the amount to be paid;

(iii). the existence of alternatives that ensure in a more equitable way the interests of the administrative authority and those of the defendant, as for example legal regimes drafted in different terms but which apply in similar cases in other areas (and jurisdictions), raising the issue of violation of the principle of equal procedural treatment[73];

(iv). unjust enrichment of the administrative authority at the expense of the sanctioned entity, without adequate guarantee for the protection and compensation in the event of annulment or subsequent reduction of the fine;

(v). the fundamental differences between the system established under the Competition Act and that applied in the EU, thus threatening the coherence and unity of the national and European systems.

We therefore recommend that appeals against decisions imposing fines or other penalties have, as for decisions imposing structural measures, suspensive effect. Additionally, we believe that the list of appeals with suspensive effect should be extended to include other appeals, namely of interlocutory decisions. Indeed, in such cases the non-suspensive effect would irreparably compromise protected interests and would in time become futile and, in this way, undermine the application of articles 407 and 408 of the Criminal Procedure Law in relation to administrative offence proceedings in competitive matters[74].

10. CONCLUSIONS

In conclusion, and as mentioned throughout this piece, there is ample room for improvement in the Draft Proposal and the AdC, without prejudice to its efforts to adjust some debatable issues (for instance, in providing further

73 For example, the European Commission's repeated decision practice has been to refrain from promoting the enforcement of decisions by allowing the provision of a bank guarantee (possibly for a lesser amount than the fine and that is less restrictive than having to deposit an amount of the fine), irrespective of any "considerable harm" eventually caused by the early enforcement of the fine.

74 For further developments, see Faria, 2017:147-166.

clarity in respect of the deadlines to file appeals), in particular in as regards the unjustified extension of the AdC's investigative powers and sanctioning alternatives, is at risk of gravely damaging the defendant's rights of defence and proper access to justice in a way that is contrary to the remainder of the Portuguese legal framework, and to the applicable general principles of law common to the legal traditions of other Member States. Even more importantly, some of these very debatable changes, such as interfering with in-house lawyers' scope of protection, are not even required by the Directive, as shown, and, therefore, should be cast aside at this stage.

Indeed:

(i). the terminological changes proposed in the Draft Proposal – in particular, the removal of the term "*visado*" from the Competition Act – may have serious consequences for undertakings' rights of defence before the AdC and courts;

(ii). the generic use of the word "person" – without proper and express equivalence of the term "person" to the term "undertaking" and the framing of its meaning within the Competition Act – makes the law unclear as to who are, or may be, the subjects and/or addressees of the provisions therein;

(iii). the limitation of the criteria to be considered by the AdC when deciding whether to accept or reject a complaint, if anything, is c*ontrary* to the purposes set out in the ECN+ Directive, in particular the need to ensure effective use of the NCA's resources: indeed, the need to consider the probability of proving an infringement allows for better and more efficient use of the NCA's resources; it also limits the existence of "fishing expeditions" based on ill-founded complaints that ultimately use up the AdC's and investigated companies' resources;

(iv). under the Draft Proposal, undertakings subject to an investigation – as well as *third parties* – may only refuse to provide the information and documents requested by the AdC if such entails the admission of an infringement; this is not compatible with the constitutionally-protected rights to remain silent and the privilege against self-incrimination, which are not only intended to prevent a person from confessing to a crime, but also to prevent the defendant from being obliged to contribute to its own incrimination;

(v). requiring the defendant to submit emails and/or text messages is a way of circumventing the prohibition to seize correspondence, in breach of the principle of secrecy of correspondence set out in the Portuguese Constitution;

(vi). the Draft Proposal expands the AdC search and seizure powers in a way that is not in accordance with the Portuguese legal framework. Indeed, the possibility of conducting searches for all information, data or clarifications on any format, whether physical or digital (namely, documents, files and email or instant messaging systems), irrespective of the support, condition or location they are stored in, as long as they are accessible to the undertaking being searched, is contrary to the principle of secrecy of correspondence and telecommunications and the principles of proportionality and necessity;

(vii). no delimiting the AdC's powers of investigation to what is *strictly necessary* for the proceedings results in the possibility of searching, examining and collecting large and disproportionate volumes of emails and information which not only breaches the right to privacy of its holders but also the principles of efficiency, effectiveness and economic use of resources;

(viii). the extension of the AdC's powers to access documents held by in-house lawyers – even if to determine whether they qualify as acts typically carried out by lawyers – breaches the fundamental right to professional secrecy constitutionally and legally afforded to lawyers, regardless of their contractual status;

(ix). the possibility for the AdC to provisionally accept a certain confidentiality qualification but, at a later stage, and even after the final decision has been issued, change its stance unilaterally, creates an unacceptable degree of legal uncertainty for those concerned, who may see business secrets disclosed even after the procedure has ended with the issuance of the final decision;

(x). the possibility for the defendant to access all documents available in the case file, regardless of the existence of any personal data belonging to other defendants, appears to grant absolute priority to the exercise of the rights of defence over the protection of personal data. To avoid such a radical change, the provision should be more explicit and state that access to personal data in the case file

is protected *to the extent that the information is proven to be necessary for the exercise of the rights of defence* and *upon a well-founded request*;

(xi). the possibility of the AdC indefinitely reviewing a decision to close the case based on a change in the circumstances on which it was based infringes the principle of legal certainty and is incompatible with one of the clear objectives of the Directive: to provide greater certainty and reasonableness in setting deadlines;

(x1i). to this end, it is necessary to reconsider the deadline to file an objection in response to the submission of evidence from 10 to, at least, 20 business days;

(xiii). to provide greater certainty and reasonableness in setting deadlines, the rules establishing deadlines for the AdC to conclude its investigation should be mandatory or, at least, the number of extensions should be limited;

(xiv). still regarding the deadline for the defendant to appeal against a final sanctioning decision, the already existing deadline extension prohibition should be removed so as to include the possibility for the defendant to request, at least, one extension where this is justified by the complexity and volume of documentation in the case file;

(xv). the possibility of interrupting the limitation period as a result of any of the undertakings under investigation (even to companies that are part of the same economic entity or in a position of "interdependence" with the defendant) being notified of any act that may affect it, is not in line with Portuguese law;

(xvi). the possibility of interrupting the limitation period by notifying companies that are in a position of "interdependence" with the defendant, considering that such may entail notifying a company that does not belong to the defendant's same economic entity at the time of the investigation, affects in an inconceivable manner the sphere of rights of third parties;

(xvii). using worldwide turnover to determine the fine is disproportionate and not coherent with neither Portuguese law nor the general principles of law: indeed, it could result in an undertaking with limited activities in Portugal facing an excessive penalty due to having a significant global presence that is in no way related to the infringement;

(xviii). for the sake of legal certainty and proportionality, specific ranges should be established within the 10% limit of the fine, the impact and seriousness of the infringement being used as criteria;

(xix). the ancillary sanction determining the inability of the infringing entity to participate in tender processes should be reviewed, as such sanction is likely to have negative effects on competition itself, in particular by limiting the number of participants in tenders and subsequent bids and, consequently, in the relevant markets; and

(xx). the appeals against decisions imposing fines or other penalties and against interlocutory decisions should have, as for decisions imposing structural measures, suspensive effect.

For the reasons set out above, the authors hope that the Portuguese Parliament critically reviews the Draft Proposal when it is submitted by the Government with a view to re-balancing its provisions according to their observations and comments, which will thus ensure not only the effective transposition of the ECN+ Directive goals, but also its necessary coherence with the solutions of the Portuguese legal system and with the general principles of law applicable at the EU level, common to the traditions of the Member States and set out in the Fundamental Rights Charter and in the ECHR.

Even though the Competition Act is the apple of competition lawyers' (and competition law enforcers') eye, this emotional bond cannot justify establishing exceptional solutions and granting exceptional investigative powers, and the Draft Proposal, in the authors view, could benefit from a more rational systematic approach in terms of its solutions being more coherent with the applicable sanctioning law framework.

BIBLIOGRAPHY

Anastácio, Gonçalo & Alfafar, Diana

2017 "Anotação e Comentário ao artigo 20.º da Lei n.º 19/2012 – Regime Jurídico da Concorrência", in Carolina Cunha, Miguel Gorjão-Henriques, José Luís da Cruz Vilaça, Gonçalo Anastácio, Manuel Lopes Porto (Coord.) Miguel Gorjão-Henriques (Dir.), *Lei da Concorrência, Comentário Conimbricense*, 2.ª ed., Edições Almedina, pp. 335-349.

Faria, Tânia Luísa
2017 "Os efeitos dos recursos judiciais em processo de contraordenações da Autoridade da Concorrência: uma interpretação sistemática", in *Revista de Concorrência e Regulação*, n.º 32, pp. 147-166.
2019 "Review of the Portuguese Competition Act – The Seven Year Itch", in *Revista de Concorrência e Regulação*, n.º 39, pp. 104-114.
Figueiredo Dias, Jorge de
1983 "O Movimento da Descriminalização e o Ilícito de Mera Ordenação Social", *in Jornadas de Direito Criminal: O novo Código Penal Português e Legislação Complementar, I,* Centro de Estudos Judiciários, p. 331.
Figueiredo Dias, Jorge de & Brandão, Nuno
2014 "Práticas Restritivas da Concorrência pelo Objeto: Consumação e Prescrição – Anotação ao Acórdão do Tribunal da Relação de Lisboa de 29 de Janeiro de 2014", in *Revista Portuguesa de Ciência Criminal*, Ano 24, julho-setembro.
Pinto de Albuquerque, Paulo
2011 *Comentário do Regime Geral das Contra-Ordenações*, Universidade Católica Editora.

Case law

European Court of Human Rights

Judgment of the ECHR of 6 December 2002, case no. 53892/00, *Lilly France, S.A. v France.*
Judgment of the ECHR of 3 April 2007, case no. 62617/00 – *Copland v. United Kingdom*.
Judgment of the ECHR of 16 October 2007, case no. 74336/01 – *Wieser v. Bicos Beteiligungen GmbH v. Austria*.
Judgment of the ECHR of 27 September 2011, case no. 43509/08, *Menarini Diagnostics S.R.L. v Italy*.
Opinion in case no. 11598/85 of 30.05.1991, *Société Stenuit v France*, Report Series A, no. 232A.

Case-Law of the Court of Justice of the European Union

Judgement of the Court of Justice of 25 November 1971, case no. C-22/71 – *Béguelin Import Co. v. SA G.L. Import Export*, ECLI:EU:C:1971:113.
Judgement of the Court of Justice of 18 July 2013, case no. C-501/11 P – *Schindler Holding and Others v Commission*, ECLI:EU:C:2013:522.

Judgement of the Court of Justice of 27 April 2017, case no. C-516/15 P – *Akzo Nobel and Others v Commission* – ECLI:EU:C:2017:314.
Judgement of the Court of Justice of 14 March 2019, case no. C-724/17 – *Skanska Industrial Solutions and Others* – ECLI:EU:C:2019:204.
Judgement of the Court of First Instance of 14 May 1998, case no. T-348/94 – *Enso Española v. Commission*, ECLI:EU:T:1998:102.

Portuguese case law

Judgement of the Constitutional Court of 10 February 2020, case no. 776/2019.
Judgement of the Constitutional Court of 11 October 2011, case no. 461/11.
Judgement of the Constitutional Court of 17 June 2011, case no. 340/11.
Judgment of the Supreme Court of Justice of 19 January 2017, case no. 11/15. 1YQSTR.S1.
Judgment of the Lisbon Court of Appeal of 31 May 2017, case no. 246/14. 4TELSB-A.L1-3.