Report

Portugal

Business Secrets, Access and Rights of the Defence

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Antitrust public enforcement in Portugal has recently been mired by procedural obstacles associated to the protection of confidential information and to the protection of the rights of the defence. This paper looks at how the national competition authority, courts and undertakings have responded to these challenges, searching for a balance between the conflicting interests.

I. Introduction

The enforcement of competition law by the Portuguese Competition Authority (*Autoridade da Concorrência*, or AdC), in cartel cases, has recently been faced with significant procedural obstacles arising from the protection of confidential information, and from controversies regarding access to such documents and the rights of the defence.

After a string of cases, that caused one particular cartel to be bogged down in procedural roadblocks, the AdC implemented a two-fold solution: revising the Portuguese Competition Act (PCA), and changing part of its own evidentiary procedure. It is unclear, however, whether such changes will be enough, as recent litigation suggests.

II. National Legal Framework

In Portugal, as across the European Union, the National Competition Authority is required to safeguard undertakings’ legitimate interests in the protection of their business secrets. To that end, whenever it seizes, or orders the production of documents, it grants undertakings the opportunity to identify the information deemed to be confidential and asks them to provide a non-confidential version thereof. The undertakings’ failure to do so results in the documents being deemed wholly non-confidential.

As a rule, third parties who demonstrate a legitimate interest are entitled to access all non-confidential information. But confidential information was, in principle, out of bounds. Let us sidestep the need to complete this framework with the rules and principles applicable to antitrust private enforcement, and focus specifically on the exercise of the rights of the defence.

The PCA includes a special rule on access to confidential information. Until recently, it referred only to evidence used by the AdC in the statement of objections or final decision (hereinafter ‘used evidence’). Such confidential information could be accessed only by external counsel in a data-room, subject to obligations of non-reproduction, non-disclosure and limited use.
The law was silent, however, on ‘unused evidence’. This had far reaching consequences. In Portugal, all documents seized or obtained by the AdC, in the framework of a cartel investigation, remain within the file until the end, regardless of whether or not they are used by the AdC. They may still be used as evidence, by either side, even if singled out for the first time during the appeal before the Competition Court.

Under the PCA, undertakings are allowed to appeal interlocutory decisions of the AdC, prior to its final decision (eg, on qualification of a document as confidential, or on access to evidence), but, as a rule, such appeals do not suspend the AdC’s proceedings. This has led to a great number of interlocutory appeals relating to evidence gathering and access issues.

The practical difficulties which arose from this legal framework expressed themselves and were being tackled by the AdC, the undertakings and the courts on three different fronts: (i) greater degree of control over the confidential nature of information; (ii) amendment to the rules on access to evidence; and (iii) removal of unused evidence from the file.

III. Confidential Nature of the Information

There is significant uncertainty in Portugal as to the type of information which merits protection. The AdC launched a public consultation on its draft Guidelines of 4 May 2017, on the protection of confidentiality in sanctioning and supervision procedures. Paragraph 12 of these draft guidelines follows closely the definition of business secrets as established by the Industrial Property Code (IPC). Thus, an information is deemed to be confidential whenever it: (a) is secret, not generally known or readily accessible, to persons who normally deal with the type of information in question; (b) has commercial value because it is secret; (c) has been subject to considerable diligence by the person in charge of keeping it secret.

The AdC’s position in these draft Guidelines seems to be stricter than the definition of business secrets under EU case-law and by the European Commission (‘information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter’s interests’) and soft law, and stricter than its own position in earlier guidelines.

The final version of the Guidelines has not yet been adopted. But even this would not provide legal certainty on the boundaries of the concept of business secrets under Portuguese competition law. Nor is a piecemeal approach in (non-precedent setting) judgments of national courts likely to be very helpful. It has been suggested that this problem should be tackled by revising the PCA to include a definition of the concept.

If some argue that the AdC is overly lenient with undertaking’s claims of confidentiality and puts little effort into reviewing the nature of the information, others state that it fails to comply with its duty to adequately protect business secrets. The draft Guidelines were intended to signal a turn in the AdC’s approach. But the non-adopt of the final version of the Guidelines and the fact that few decisions have since been adopted, or have only just been so (and several are in the pipeline), means it is still too early to assess whether a change has already taken place.

This being said, it seems fair to add that a trend can be observed throughout the EU lately, whereby decisions adopted in the context of leniency or settlements are scarce in information. The fear of private enforcement has motivated undertakings to negotiate the content of decisions and the confidentiality of information mentioned therein, and competition authorities seem, so far, to be willing to compro-

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8. PCA, arts 84(4) and 85.
mise on that front, for the sake of the effectiveness of public enforcement.

Portuguese courts have not often expressed their opinion on the confidential nature of documents in antitrust cases.

In the *Tabaqueira* case, wholesalers complaining of an abuse of dominance by the Philip Morris group in Portugal were denied access to confidential information. They filed an injunction before the Administrative courts, which was denied. They appealed this judgment, arguing the court should have analysed each document to confirm its confidentiality. The second instance court quoted a broad definition of business secrets included in the specialised national doctrine (data relating to an undertaking’s activity whose dissemination may cause it serious damages), followed by examples. It said the first instance court had provided a global justification for the confidentiality, by type, suggesting it had looked at the documents individually, but no individual justification was required. Noting its approach was tempered by the specific circumstances (this was not a rights of the defence case, but a challenge to the dismissal of a complaint), it allowed exclusion of whole documents, based on the fact that they contained, at least in part, information on the ‘internal life’, ‘activity’ and ‘commercial strategy’ of the undertaking, and that access by competitors (the plaintiffs) would provide them with a competitive advantage on the market.

This broad approach to the concept of confidential information seems to be shared by the Competition Court, which has emphasized the need to identify both a non-public nature of the information and a potential damaging effect of its dissemination, requiring individualised justification. That being said, and although the issue was not specifically under dispute in this case, involving banking activities, the Court was satisfied to conclude for confidentiality on the basis that the very large number of documents in question (globally) concerned relations between a bank and its clients.

It follows that, so far, Portuguese courts have seemingly applied a low threshold for confidentiality, and, while requiring others to do so, have not gone into a detailed analysis of individualised justifications for the confidential nature of each document. As a result, they have also not discussed the possibility of partial disclosure of such documents. It seems reasonable to expect a greater degree of control to be exercised by the Competition Court, when faced with challenges to the confidential nature of a few specific documents, but no test case has yet come before the Court.

### IV. Change to Access Rules

As mentioned above, until recently, the PCA only regulated the defendant’s access to confidential information in used evidence. It was silent on the right and conditions of access to confidential unused evidence, which remained in the file.

Some authors argued that the access regime had to be the same, since it would be wrong to make assumptions about the nature and relevance of the content of unused evidence. Such a distinction would require trusting the AdC’s understanding and classification of a document when regulating the defendant’s right of access to it.

However, the Competition Court insisted on the distinction, starting with the banking cartel case. This case, still waiting for a final AdC decision, led to a number of interlocutory appeals focusing on access to the file.

Following a leniency application, the AdC conducted dawn raids in over a dozen banks, collecting hundreds of thousands of pages of evidence. The Statement of Objections quoted only a small portion of these documents. Some banks asked for access to all unused confidential evidence, but were refused. The AdC asked them to justify their claim, but they found this request impossible to comply with, given the absence of a sufficiently detailed description of
the documents’ content. In the appeals, the Competition Court stated that access to unused confidential documents, to exercise the rights of the defence, is dependent on a reasoned request by the claimants. It added that, in order for this to be possible, the AdC must provide them with a sufficient description of the documents, by drawing up descriptive lists which enable a better understanding of whether the documents are inculpatory or not. However, the burden for the drafting of these descriptions can be shifted to the owners of the documents who claim their confidentiality. This required undertakings to prepare individualised summary descriptions for thousands of documents (when wholly confidential, or when the non-confidential version was not self-explanatory), in sufficient detail to allow the effective exercise of the rights of defence, which the Court deemed a proportional burden.18

After the initial ruling of the Court, the AdC gave full access to the unused evidence under the terms of Article 33(4) of the PCA. This decision was also annulled, with the Court stressing that this solution infringed its previous ruling and the AdC’s duty to protect the confidentiality of information.

In the framework of the transposition of Directive 2014/104/EU by Law No 23/2018, of 5 June, Article 33(4) of the PCA has been revised to apply a single regime of access by defendants to confidential information included in the file. The previous solution is now applicable ‘regardless of whether or not the documents were used as evidence’ (ie, the solution implemented by the AdC and rejected by the Competition Court under the rules previously in force).

Surprisingly, however, this may not have definitively settled the issue. One of the Competition Court judges has suggested that, at first glance, as far as unused evidence is concerned, the new rule may still require justification and case-by-case assessment before granting access19. The issue has not yet come before the Court.

V. Removal of Unused Evidence

Unlike what happens with the European Commission, there is no legal obligation or customary practice in Portugal under which the AdC removes unused evidence from the file. The possibility of, and competence and procedure for, such removal have been controversial.

The Competition Court has clarified that such removal is an exclusive competence of the AdC. It is up to the AdC to determine the relevance of the evidence, and it is free, but not obliged, to order the removal of unnecessary documents. The Court found, contrary to the AdC’s view, that this is so even when the evidence included in the file was validated by a criminal court, which occurs, for example, when confidentiality is claimed on grounds of banking secrecy or professional privilege. Crucially, the Court also affirmed that, if the AdC wishes to remove evidence from the file, it must first grant undertakings the right to exercise their rights of defence by verifying the (ir)relevance of those documents.20

The Court has actually indicated a preference for removal, mainly in large files, since it may contribute to decreasing interlocutory litigation.21

Following the lessons learned in the banking cartel, the AdC has already returned unused evidence in other cases. However, no issues were raised before the Court, in this regard, in the respective appeals.22 So we must wait for further cases to clarify the full meaning and consequences of the Competition Court’s jurisprudence on this issue.

18 However, it was unclear that this would entirely solve the problem, since undertakings could still find descriptions to be incomplete or insufficient to duly reason their requests for access. The AdC would then have to draft or request more detailed descriptions, and the degree of detail could become a matter for litigation in itself, as a precondition for the exercise of the right of access to unused evidence.

19 Sérgio Martins P de Sousa, ‘Reflexões “soltas” sobre a jurisprudência do Tribunal da Concorrência, Regulação e Supervisão em matéria de confidencialidade e acesso à prova’ (2018) 35 Revista de Concorrência e Regulação 120. See also the issue raised, but unanswered, by another judge of the Competition Court, in Alexandre Leite Baptista, “Problems and solutions to access to documents in sanction proceedings: judicial ruling in the Competition, Regulation and Supervision Court of Santarém, Portugal” (2018) 4(1) UNIO - EU Law Journal 133, at 143.

20 Competition Court, Ruling of 11 January 2017 (194/16.3YUSTR); Competition Court, Ruling of 25 October 2016 (195/16.3YUSTR). It is unclear how the Court intended this to be done, since it also noted that the rules on access to confidential information would have to be respected, which would arguably mean that, under the Court’s own interpretation, parties should not be granted access to the documents themselves, if they contained others’ confidential information, but only to their description.

21 Competition Court, Ruling of 16 March 2017 (2016.3YUSTR; 21/16.1YUSTR; 37/16.8YUSTR; 38/16.6YUSTR).

22 See, eg, the railway maintenance cartel – Competition Court, Ruling of 14 November 2018 (249/18.0YUSTR).