THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

The proceedings of the XXX FIDE Congress in Sofia in 2023 are published in four volumes. This book (Vol. 2) contains the reports of the General Rapporteurs (Jean-François Bellis and Isabelle Van Damme), the Institutional Rapporteur (Ben Smulders) and the National Rapporteurs on Topic 2: The New Geopolitical Dimension of the EU Competition and Trade Policies

Editor: *Alexander Kornezov*
General Rapporteurs: *Jean-François Bellis and Isabelle Van Damme*
Institutional Rapporteur: *Ben Smulders*

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THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

LA NOUVELLE DIMENSION GÉOPOLITIQUE DE LA POLITIQUE DE CONCURRENCE ET DE LA POLITIQUE COMMERCIALE DE L'UE

DIE NEUE GEOPOLITISCHE DIMENSION DER WETTBEWERBS- UND HANDELSPOLITIK DER EU

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FOREWORD FROM THE EDITOR

The second main topic of the XXX FIDE Congress (Sofia, Bulgaria, 31st May – 3rd June 2023), "***The new geopolitical dimension of the EU competition and trade policies"***, is cutting-edge, transformational and timely.

Today, the EU is at a cross-roads: at a time of significant and sustained international tensions which threaten to undermine the international legal order, the EU is in the process of reconsidering its decades-long stance on free markets, open competition and rule-based international trade. The various risks to European security stemming from foreign investment, from foreign-based digital giants or, yet, from foreign-controlled supply chains have all pushed the EU to revisit the very foundations of its competition and trade policy.

This topic is, moreover, a focal point for several different branches of EU law concerning competition, trade and investment examined through the prism of industrial policy. In that context, the objective of achieving the strategic economic autonomy of the Union has recently taken centre stage. At a time when EU competition and trade policy are being redefined, some key notions may need to be revisited in order to take the new realities into account. Issues such as the existence or the fostering of "European champions" or the lack thereof and finding the most appropriate balance between industrial policy considerations and competition policy concerns, killer acquisitions, security issues linked to foreign direct investment, foreign subsidies and the securing of strategic value chains, the application of EU policies by the national competition authorities (including sustainability considerations) are discussed in some detail in the reports contained in this volume. Those reports can be readily described as visionary.

Most of the issues debated in the present volume may be classified in the following sub-topics: the design of the Union's search for strategic autonomy and whether that blurs the lines between its internal market, competition, industrial and trade policies; the change of paradigm in EU merger control, State aid, and regulating foreign subsidies – from the 'invisible hand' to overt industrial policy; sustainability agreements and Article 101 TFEU; building European champions through competition law; the geopolitics of regulating supply chains and corporate sustainability, as well as the future of FDI control and the need to clarify EU and Member States' competences.

In particular, several recently adopted acts by the EU institutions are discussed in detail: the new Industrial Strategy for Europe[1], the EU Green Deal Industrial Plan[2], the Digital Markets Act[3] and the Digital Services Act[4], the new Climate, Energy and Environment Aid Guidelines[5], the revision of the General Block Exemption Regulation[6], the rules on important projects of common European interest[7], Regional State Aid Guidelines[8] and the proposal for a Single Market emergency instrument[9], the FDI Screening Regulation[10], the Foreign Subsidies Regulation[11] and the proposal for a Corporate Sustainability Due Diligence Directive[12].

This topic therefore has the potential to address and shape the new dawn in European policies on competition, trade and foreign direct investment. It raises fundamental questions about the economic physiognomy of the Union. Is "a new economic constitutionalism" gradually emerging – a concept which reflects a constitutional shift in the EU integration process? Can we thus identify the elements of a new 'political economy' of the Union ?

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[1] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Industrial Strategy for Europe, COM(2020) 102 final (10 March 2020).

[2] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final (1 February 2023).

[3] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265, p. 1-66 (12 October 2022).

[4] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 227, p. 1-102 (27 October 2022).

[5] European Commission, Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, OJ 2022 C 80, p. 1-89 (18 February 2022).

[6] See consolidated text of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L 187, p. 1-78 (26 June 2014).

[7] European Commission, Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2021 C 528, p. 10-18 (30 December 2021).

[8] European Commission, Communication from the Commission – Guidelines on regional State aid, OJ 2021 C 153, p. 1-46 (29 April 2021).

[9] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98, COM(2022) 459 final (19 September 2022).

[10] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 79I, p. 1-14 (21 March 2019).

[11] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330, p. 1-45 (23 December 2022).

[12] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (23 February 2022), 2022/0051 (COD).

I express my gratitude to the general rapporteurs for this topic *Jean-François Bellis*, a veteran of EU competition and trade law, who teaches at several universities and is a founding partner of Van Bael & Bellis and *Isabelle Van Damme*, visiting professor at the College of Europe and partner at the same law firm. Their perspective as practitioners and academics is immensely valuable. I am also grateful to the institutional rapporteur *Ben Smulders*, Deputy Director General of the Directorate General for Competition of the European Commission, who has been personally involved in shaping EU's new competition and trade policies in an ever-more polarising world. Last but not least, I thank the authors of the national reports who give us the perspective of national authorities and stakeholders and which form the backbone of all FIDE congresses.

In conclusion, I believe that the present volume of FIDE's work will profoundly impact the Union's economic policies and will inform policy makers for years to come.

Assoc. Prof. Dr. Alexander Kornezov
Judge, President of the Eighth Chamber
of the General Court of the European Union,
Principal Scientific Coordinator for the XXX FIDE Congress

PORTUGAL

Miguel França, Margarida Rosado da Fonseca

INTRODUCTION

Preliminary remarks: EU law, domestic order and institutional national framework

From the outset, it is important to recall some important issues regarding the relationship between the Portuguese legal framework and EU law.

First, the principle of the primacy of EU law is expressly recognised in the Portuguese Constitution (CRP)[1] and accepted by the Portuguese Constitutional Court (PCC). Article 8 (4) of the CRP provides that "The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law".

In 2017[2], the PCC submitted it its first question for preliminary review to the Court of Justice of the European Union (CJEU). On 15 July 2020, the PCC delivered its judgment 422/2020, expressly dealing for the first time with the relationship between European Union law and the CRP. More precisely, the PCC considered itself incompetent to rule on the validity of an EU rule in the light of the CRP.

The primacy of secondary EU law is also provided for by the CRP: Article 8(3) determines that "The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties". This means that, for example, block exemption regulations issued by the European Commission (Commission), implementing Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) and specifying the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) TFEU have primacy over national law.

[1] The CRP was adopted by Decree of 10 April 1976 and was last amended by Law n.º 1/2005, of 12 August, its 8th amendment. The text has 296 provisions.

[2] In case n.º 528/2017, before the plenary court.

Second, pursuant to the CRP[3], "the fundamental tasks of the State" include the following: "a) to guarantee the national independence and create the political, economic […] conditions that promote it; b) to guarantee the fundamental rights and freedoms and respect for the principles of a democratic state based on the rule of law; […] d) to promote the people's well-being and quality of life […]". The CRP contains an "economic Constitution" given that it draws up objective limits to the freedom of competition, stemming from: (i) the powers of the State to frame the private economic activity and (ii) the balance of conflicting rights regarding freedom of competition in the market (such as the workers and the consumers' rights).

Third, in line with the provisions of the CRP enabling the discipline of the "economic activity and investment by foreign natural and legal persons, with the aim of ensuring that they contribute to the country's development and defending national independence and workers' interests" to be undertaken by secondary legislation[4], the Parliament has passed a Law regulating the access to certain economic activities[5].

Fourth, in the economic and social fields, the State has the obligation to "*to ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest*". In the context of the designing of the institutional architecture of the Public Administration, the CRP grants the State the faculty to set independent administrative entities by law[6].

The Competition Act (or CA)[7] entrusts the Portuguese Competition Authority (Autoridade da Concorrência, AdC) with the task of promoting competition and guaranteeing both the functioning of the market economy and consumer protection. The Competition Act and the AdC's bylaws were latest amended by Law n.º 17/2022, of 17 August[8]. While the first aim of that amendment was to transpose the ECN+ Directive[9] into the national legal order, the amendments went far beyond that and provide in particular for the exercise of the new powers of the AdC in purely domestic situations (in addition to restating the primacy of EU law).

[3] Article 81 – Priority duties of the state, indent f) CRP.

[4] Article 87 (Foreign economic activity and investment) CRP.

[5] Law n.º 88-A/97, of 25 July as amended.

[6] Article 267 (3) CRP.

[7] Law 19/2012, of 8 May as amended.

[8] The AdC's bylaws adopted by Decree-Law 125/2014, of 18 August.

[9] 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 (Directive ECN+).

Articles 9 and 10 of the Competition Act concern respectively "Agreements, concerted practices and decisions by associations of undertakings" and their justification and are equivalent respectively to Article 101(1) and (2) and Article 101(3) TFEU[10]. As for Article 11 of the CA ("Abuse of a dominant position"), the underlying substantive test is equivalent to the one of Article 102 TFEU (despite of the fact that the non-exhaustive list of conducts is not identical).

Furthermore, it should be noted that the Competition Act provides that restrictions to competition prohibited under a provision equivalent to Article 101(1) and (2) TFEU may be considered justified "where, although they do not affect trade between Member States, they do fulfill all the other requirements for application of a regulation adopted in accordance with the provisions of Article 101(3) of the TFEU"[11].

The AdC is an independent administrative entity with administrative and financial autonomy, management autonomy and organic, functional and technical independence, disposing also of its own assets[12]. Its primary statutory mission is to ensure the application of rules to promote and defend competition in public and private, cooperative and social sectors, "in the respect for the principle of free market economy and freedom of competition, having the aim of the efficient functioning of the markets, the optimal allocation of resources and the interests of consumers"[13]. Decisions by the AdC are subject to judicial review.

The AdC is thus a single purpose entity that might need to interact with other public entities when it exercises its competences. In this context, the AdC is legally bound to interact with sectoral regulators, which are also independent administrative entities (without prejudice to its exclusive competence to enforce competition rules[14]). This is particularly relevant for merger control and investigation proceedings.

In 2011[15], the legislature set up a lower court dealing specifically with competition related cases (*Tribunal da Concorrência, Regulação e Supervisão*, the *Competition,*

[10] This is without prejudice to one of the examples of conducts in the non-exhaustive list contained in the same provision concerning specifically the intermediary platforms in the tourism sector, which does not exist in 101 TFEU.

[11] Article 10(3) of the Competition Act.

[12] Article 1 of the AdC's bylaws.

[13] Article 1 of the AdC's bylaws.

[14] The main rules for this interplay are set in Law n.º 67/2013, of 18 August, the Framework Law on independent administrative entities with competences to regulate the economic activity in the private, public and social sectors. The bylaws of the sectoral regulators under the scope of this Framework Law are bound to comply with its contents.

[15] Law n.º 46/2011, of 24 June as amended.

Regulation and Supervision Court)[16], which started working the following year[17]. That jurisdiction is competent to rule on the appeals lodged against the AdC administrative and sanctioning decisions, as well as to rule on private enforcement actions for damages[18]. The rulings of that court can be appealed to the High Court (*Tribunal da Relação*) in Lisbon, which already has a specific section for competition related appeals.

In line with EU law, any Portuguese court (whether lower court or appeal court) is competent to rule on competition matters in the context of a judicial action which also concerns that matter and may ultimately request the AdC or the Commission to act as *amicus curiae*[19].

As regards specifically prohibition, decisions adopted by the AdC in merger control proceedings, the notifying parties may submit an "extraordinary appeal" to the Minister in charge of the sector of economy in question[20]. The grounds for the appeal consist in the benefits of the projected merger for the promotion of fundamental strategic interests of the national economy that supersede, in concrete terms, the disadvantages for competition inherent to its implementation. On the basis of a proposal from the Minister, the Council of Ministers may authorize the projected merger by adopting a reasoned decision and can impose conditions and obligations "aiming at minimizing the negative impact on competition".

COMPETITION

Green competition policy

Question 1

a)

There is currently neither available decisional practice nor any published guidance from the AdC regarding how it will assess sustainability aspects of agreements containing restrictions to competition.

[16] Article 112 of Law n.º 62/2013, on the Organization of the Judiciary System, as amended.

[17] Decree n.º 84/2012, of 29 March.

[18] Law n.º 23/2018, of 5 June has transposed Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[19] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

[20] Article 41 of the AdC's bylaws, as amended.

Notwithstanding, recent speeches and declarations from the President of the AdC, Margarida Matos Rosa, can already provide some insight.

For example, on 4 February 2021 and when addressing the question whether competition policy should seek to achieve even more, the President of the AdC admitted that "more results are expected to come from State aid policy". That is seen to be "the preferred vector for a strong contribution to the Green Deal objectives"[21].

Also on 30 May 2022 and when discussing the relationship between competition and sustainability, the President of the AdC underlined that "competition authorities must take a closer look at claims of indispensability[22]. She further detailed that these claims must be supported by tangible evidence showing that: 1) Under the existing competitive set up (i.e., with unilateral action), it is not feasible for firms to achieve sustainability benefits; 2) The proposed agreement does achieve the alleged benefits; and 3) There are no alternative less restrictive agreements that could achieve those benefits". In addition, the President of the AdC highlighted that "there is a risk of negatively affecting the so-called "administrability" and the legal certainty of competition law enforcement. What we expect is that, in assessments of sustainability effects, economic analysis will be put at the front and centre, whether quantitative or qualitative. Decisions by competition authorities and by courts will rely on sound economic analysis".

Finally, in June 2022, when discussing the role that competition policy can play to achieve the society's important goals, such as sustainability, the AdC President's speech briefly mentions that enforcers should preserve the incentives for firms to compete and innovate "by preventing incumbent entrenchment and by fostering contestability". And "Competition is thus a strong catalyser for the green transition"[23].

Overall, it would seem that the AdC would favour a more conservative approach and would prefer not to "go beyond the current competition policy mandate and practice".

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[21] Speech about "What the current antitrust and merger rules deliver and what they don't", of 4 February 2021. Text available at https://www.concorrencia.pt/en/articles/what-current-antitrust-and-merger-rules-deliver-and-what-they-dont-margarida-matos-rosa.

[22] Speech about "Pros and Cons of Sustainability Considerations". Text available at https://www.concorrencia.pt/sites/default/files/documentos/intervencoes/Margarida%20Matos%20Rosa%20-%20Pros%20Cons%20of%20Sustainability%20Agreements.pdf.

[23] Speech about "Competition as an enhancer of fundamental values" in the Congress on Economic Governance, Regulation and Administration of Justice. Text available at:

https://www.concorrencia.pt/sites/default/files/documentos/intervencoes/Margarida%20Matos%20Rosa%20-%20Competition%20as%20an%20Enhancer%20of%20Fundamental%20Values.pdf.

b)

As referred above, the CA includes legal provisions that are equivalent to Articles 101 and 102 TFEU (see above Preliminary remarks).

In the context of its judiciary powers or review, national courts can provide an independent scrutiny in respect of the administrative approach adopted by the AdC. This is without prejudice to the boundaries set by Article 3 of Council Regulation n.º 1/2003 as regards the relationship between national competition laws and Articles 101 and 102 TFEU.

Therefore, they can consider sustainability arguments. However, there are currently no solid elements to predict whether Portuguese judges would be willing to take up those arguments.

Question 2

The substantive test to be applied in merger control proceedings concerns the likelihood of "creation of significant impediments to effective competition in the domestic market or a substantial part of it"[24].

Moreover, the CA provides that the "concentration is assessed so as to determine its effects on the structure of competition, taking into account the need to preserve and develop, in the interests of intermediate and final consumers, effective competition in the domestic market or in a substantial part of it"[25]. Amongst the illustrative list of factors to be considered by the AdC in this assessment of the "evolution of the technical and economic progress as long as the concentration results directly in efficiency gains which benefit consumers"[26].

The economic analysis concerning horizontal concentrations was the subject of a Guidance published in 2013 but that does not address this topic. Though there is no further guidance by the AdC, in its decisional practice it has been applying the Commission's guidance concerning the assessment of the horizontal and non-horizontal concentrations.

a)

The assessment of any sustainability benefits is part of the overall competition assessment.

[24] Article 41(3) CA.
[25] Article 41(1) CA.
[26] Article 41(2)(k) CA.

As referred above, in her speech of 30 May 2022, the President of the AdC weighed the pros and cons of sustainability considerations[27]. She submitted that, when assessing the sustainability effects, "economic analysis will be put at the front and center, whether quantitative or qualitative. Decisions by competition authorities and by courts will rely on sound economic analysis".

b)

As pointed out above in the Preliminary Remarks, the AdC is a single purpose entity, part of the independent public administration. Merger control proceedings must follow what is provided primarily in the CA, notably as regards the substantive test to assess the lawfulness of concentrations. More precisely, concentrations that are not likely to create significant impediments to effective competition in the domestic market or a substantial part of it shall be authorised.

During merger control proceedings, the AdC is bound to interact with public entities pursuing other policy goals and in particular with several sectoral regulators. Article 55 of the CA provides that when there is a concentration in a market that is subject to sectoral regulation, the Competition Authority, prior to taking a final decision, shall request the opinion of the sectoral regulatory authority, setting up a reasonable time limit for such purpose (no less than 15 days).

Only if the opinion requested is binding will the time limit for the AdC to adopt a final decision be suspended. Until the present moment, no public entity regulating has been requested to issue such an opinion. Nevertheless, it should be pointed out that this is without prejudice to the fact that the regulator on waters and waste, ERSAR – *Entidade Reguladora dos Serviços de Águas e Resíduos*, might be requested to provide non-binding opinions on projected concentrations in that field.

In any event, detrimental effects to the environment, if they are likely to result into competitive harm, as established by the CA, can be considered as impediments to effective competition.

Question 3

Again, any assessment of sustainability benefits should be substantiated on the basis of sound economic analysis.

The President of the AdC has already pointed out that the solution for the trade-off would require a case-by-case analysis. In the same speech of 30 May 2022, she

[27] See above note 22.

addressed the risk that firms cut costs at the expense of the environment. It was stated that if competition authorities were to adopt a total welfare rather than a consumer welfare approach, they could go "beyond the current competition policy mandate and practice", usurping the role of the legislature[28].

European strategic autonomy, the promotion of "European champions" and competition law enforcement

Question 4

a)

There is no information available in the context of the referred merger proceedings[29].

Nonetheless, in a speech made a week later[30], the President of the AdC specifically addressed the reactions of the French and German governments and the call for the creation for European champions (as well as the echo of national champions).

While defending that the relevance of industrial policy should not be disregarded, she affirmed that such industrial policy "is highly distortionary of competition and may bring harm to the functioning of markets in the vectors of price, quantity, quality, choice and innovation […] at the expense of consumers or the competitiveness of other firms supplied by the "national" or "European champion"".

The President of the AdC sustained that "industrial policy must remain horizontal and, as such, economies must be attractive because of their stable macroeconomic environment, their competitive and stable fiscal policy, the availability, quality and competitiveness of their infrastructure, of utilities provision and of their workforce, because of their effective framework of economic regulation and their effective judicial system. All of this is what makes a country attractive. It is on these grounds that each economy may spawn firms capable of competing on equal terms in international markets while bringing significant benefits to consumers. Those are the real Champions".

Later, on 25 September 2019[31], the President of the AdC again mentioned the *Siemens/Alstom* transaction when sharing her views on initiatives aimed at

[28] See above note 22.

[29] The Commission's decision to prohibit the projected concentration was adopted on 6 February 2019.

[30] Conference Economia Viva 2019 – Nova SBE, 15 February 2019. Available at: https://www.concorrencia.pt/sites/default/files/imported-media/The%2520Impact%2520of%2520Trade%2520Agreements%2520on%2520Competition.pdf

[31] Speech available at https://www.concorrencia.pt/sites/default/files/imported-media/Concorr%C3%AAncia%2520e%2520Atratividade%2520do%2520Investimento%2520-%2520Margarida%2520Matos%2520Rosa.pdf

promoting European industries ("European Champions") in defiance of the principles of competition, under the alleged need to respond to the challenges of the global economy. "The solution cannot be obtained at the expense of specific rules for some companies and at the end of the line at the expense of consumers", said Margarida Matos Rosa. This is because "there is no guarantee that it will necessarily result in benefits for consumers, the economy and the society. The same reasoning applies to the creation of "national champions"". And further stated that "competition, without recourse to subsidies and State aid, is the best way to boost the creation of true champions of the economy" at domestic or European level. Understandably, Margarida Matos Rosa acknowledged that "naturally there may be exceptions, market failures which need regulation from the State" but "it should be strictly limited to what is necessary".

In the same line, during a speech on 20-21 January 2020[32], another board member of the AdC stated that "bringing other public policy considerations or non-competition goals into the competition assessment carried out by enforcers may raise other types of risks, inter alia, unpredictability in the decision making". It was also noted that "a competition enforcer may not be in the best position to provide the optimal answer to a problem involving other public policy concerns", besides lacking democratic legitimacy and there is also a risk of jeopardizing its independence.

Already during the COVID 19 economic crisis, in a speech on 10 March 2021[33], the President of the AdC stated that it "seems like an ill-choice to ask competition policy, in some instances, to relax merger control". And reiterated that "Competition authorities must remain focused on their institutional purpose", which is to promote competition and consumer welfare. Thus, she further claimed that "the process must be based on the accumulated experience of competition authorities, on evidence and on the economic literature. Enforcers have built, over the years, robust best practices based on these principles. So a merger should not be allowed if there are anti-competitive concerns with no countervailing efficiencies accruing to consumers. Allowing other considerations to be factored in competition authorities' decisions may compromise the technical quality of competition analysis, and the objectives of competition policy".

[32] Speech of Board Member Maria João Melícias "In the line of fire: the interplay between consumer welfare and other public interest considerations in competition policy" for the Asian Competition Forum 15th Conference "Europe – Asia Trade, Investment and Antitrust: Challenges and Opportunities". Available at: https://www.concorrencia.pt/sites/default/files/imported-media/In%2520the%2520line%2520of%2520fire%2520-%2520Maria%2520Jo%C3%A3o%2520Mel%C3%ADcias.pdf

[33] What's new in merger control: theory and policy Panel discussion – "Whither merger control? Recent debates on digital and foreign acquisitions" Toulouse School of Economics. Available at: https://www.concorrencia.pt/sites/default/files/imported-media/Whats%2520New%2520in%2520Merger%2520Control%2520-%2520Theory%2520and%2520Policy%2520%2520Margarida%2520Matos%2520Rosa.pdf

b)

There is no public information on this matter.

c)

There is no public information on this matter.

Question 5

As referred above, the AdC is a single purpose entity in charge of enforcing competition rules and currently the set of factors provided for in the CA for the competition assessment do not include non-competition factors. More precisely, the CA no longer provides expressly for the international competitiveness factor (detailed explanation hereunder in answer to question 6 on the historical background). Consequently, industrial policy considerations as such are not aimed by the legislature to be applied by the AdC.

There are no guidance notes on the inclusion of industrial considerations in merger control assessment in general and, to the best of our knowledge, no administrative or judicial decisions to consider.

In addition to what has been mentioned above in answer to question 4. a), the President of the AdC again addressed this topic from the perspective of antitrust enforcers in her speech of 26 September 2019[34].

While acknowledging that the EU and its companies – including Portuguese companies – face challenges of competitiveness at a global level, for the President of the AdC the solution cannot be obtained through special rules for some companies an ultimately at the expense of consumers. By promoting "European champions" and protecting only certain companies depending on its size or sector, there is no guarantee that the outcome will benefit consumers, the economy and the society. Thus, the AdC applies the same reasoning to the creation of "nationals champions".

This rebuttal of industrial policy concerns in the assessment of mergers is reinforced by the following statements made in the same speech: "empirical studies show that using competition as a tool of industrial policy, allowing the creation of European or national giants, harms companies that buy products and services from these giants, as well as citizens, reducing choice and raising prices.

There may of course be exceptions, market failures that require regulation by the State.

[34] See above note 31.

In any case, as a rule, to allow political interference in the activities of competition authorities would jeopardize the independence and technical quality in the application of competition rules".

Without prejudice to what has been mentioned above, the extent of the CA and the AdC's powers under merger control coexists with the "extraordinary appeal to the Minister". As referred to in the Preliminary Remarks, this exceptional mechanism grants the Government the faculty to authorize a concentration prohibited by the AdC. Because that concentration might bring about fundamental strategic interests to the national economy. Such Government's decision is subject to judicial appeal to the Competition, Regulation and Supervision Court (which is also competent to assess the appeals against AdC's decisions). In practice, such appeal has not been used (since 2006) and it remains to be seen how the judiciary would in practice ascertain whether the Government's decision (and notably the remedies and conditions imposed) would be lawful.

In line with has been mentioned above, the AdC's priorities for 2022 include to "Embed competition considerations in current efforts by policymakers, so as to contribute to a resilient and innovative economic recovery: one that is structurally beneficial to consumers and firms"[35].

Question 6

Under the current CA (in force since 8 May 2012) and the current AdC's bylaws, no overruling of any prohibition decision adopted by the AdC under the "extraordinary appeal" to the Minister has yet taken place.

Historically, the Government's possibility to intervene in concentrations has been decreasing over time in the last three decades. This is in line with the evolution towards a stricter competition-based test to assess concentrations and the growing independence of the agencies in charge of enforcing competition rules.

In order to provide the full picture, it is important to underline that the "extraordinary appeal" to the Minister replaced an even more interventionist instrument, which existed until the initial Competition Act was adopted[36] and the AdC was created.

In that period, the Directorate-General for Competition and Prices (Ministry in charge of Economy) was in charge of merger control proceedings and of submitting

[35] Available at: https://www.concorrencia.pt/sites/default/files/Priorities%202022_0.pdf
[36] Law 18/2003, of 11 June.

the competition assessment of concentrations to the Minister[37]. The Portuguese competition rules at that time were enshrined in Decree-Law n.º 371/93, of 29 October[38]. The latter provided for a substantive test based on the "creation or reinforcement of a dominant position in the national territory or in a substantial part of it which are susceptible of impeding, distorting or restricting competition", as the trigger to prohibit concentrations. Nonetheless, if (i) the economic balance test [equivalent to the one currently in Article 101(3) TFEU] was positive or (ii) the projected concentration reinforced significantly the international competitiveness of the participating undertakings, the concentration could be authorized[39].

If the Minister considered that the concentration was susceptible of affecting competition in a negative manner, then he/she could request an opinion from the Competition Council (the other agency in charge of competition enforcement) before adopting a final decision[40].

However, in 2003, with the adoption of the 2003 CA and the creation of the AdC, that new independent agency became the sole entity competent for merger control proceedings. The dominance test remained in the 2003 CA and the consideration for the industrial policy within the competition assessment evolved towards the "contribution of the concentration for the international competitiveness of the Portuguese economy"[41]. Nevertheless, the AdC's 2003 bylaws still provided for the possibility of the Minister in charge of economy to "overrule" a prohibition decision by AdC and authorize the projected concentration "when the benefits resulting from the concentration to the promotion of fundamental interests of the national economy supersede the disadvantages for competition arising from its implementation"[42].

Historically, there is one case registered in this respect. On 7 April 2006, the AdC prohibited a concentration consisting of the acquisition of joint control of the Portuguese highways' operator Auto-Estradas do Atlântico by its competitors Brisa and Auto-Estradas do Oeste[43]. The AdC concluded that the concentration was susceptible of creating or reinforcing a dominant position which might

[37] Article 12[indent l)] of Law n.º 18/2003, of 11 June (2003 Competition Act).

[38] Decree-Law 371/93, of 29 October established the legal framework for the defense and promotion of competition and provided for the competencies of the agencies in charge of enforcing such aims.

[39] Article 10(2) of Decree-Law n.º 371/93 mentioned above in 38.

[40] In case the final decision consisted of a prohibition of the concentration or a non-opposition with conditions and obligations, the same was jointly adopted with the Minister in charge of the sector of activity in question, as provided in article 34(2) of Decree-Law n.º 371/1993, of 29 October. Such decision could be appealed to the Supreme Administrative Court.

[41] Article 12 of Law n.º 18/2003, of 11 June.

[42] Under article 34(1) of Decree-Law n.º 10/2003, of 18 January which approved the bylaws of the PCA.

[43] Case 22/2005 Brisa/AEO/AEA.

result in significant impediments to effective competition in two markets for the exploitation of motorways.

But the parties filed and extraordinary appeal to the Minister of Economy, which was upheld[44]. The Minister authorized the concentration, although imposing "complementary measures". The justification for the authorization was that the concentration "corresponds to fundamental interests of the national economy, not only due to the development of the sector in question, which is a national strategic sector, but also due to the upscaling of the undertakings involved, which will allow them an increased innovation capacity and increased international competitiveness, with inherent benefits to the national economy".

Finally, it should also be pointed out that most recent measures made that "extraordinary appeal" even more extraordinary. In 2012, amongst the structural measures adopted by the Portuguese Government to increase competition in the context of the implementation of the Economic and Financial Assistance Programme to Portugal was the revision of the CA and the AdC's bylaws (in 2014). One of the aims pursued consisted in reinforcing their alignment with EU law and EU merger control proceedings. In this way, the "extraordinary appeal" to the Minister was amended so as to become even more exceptional and arguably raise the standard for the Government to intervene in prohibited concentrations. Until the present day, no more "extraordinary appeal" has been made.

Question 7

a)

In the most recent years, the AdC has shown increased attention towards this sector of activity. For example, in 2019, the AdC submitted to public consultation a draft Issues Paper on Digital Ecosystems, Big Data, and Algorithms and subsequently adopted the final version[45]. Already in 2020, the AdC set up a "digital task force" with the aim of "detecting and investigating such behaviours, as well as to monitor digital competition policy initiatives". And on its Priorities of Competition Policy for 2022, the AdC states that, given the "increased digitization of various traditional sectors", there is a risk of abusive or collusive behaviour in the digital environment.

[44] Information available at https://web3.cmvm.pt/english/sdi/emitentes/docs/FR9670.pdf.

[45] Available at https://www.concorrencia.pt/en/articles/call-information-digital-ecosystems-big-data-and-algorithms

According to the AdC's public information[46], following a complaint and subsequent analysis of the concerned markets and questioning of its main economic agents, on 17 May 2022, the AdC decided to open administrative proceedings against Google for abuse of dominance. The proceedings are not public.

In the context of that investigation, "the AdC has collected indicia of self-preferencing behaviours by Google at various stages of the digital advertising value chain". The AdC considered that there were "indicia that Google has used information not accessible by competitors on online advertisement auctions in order to change the outcome of those auctions in Google's favour and has possibly limited the development of competing auction technologies, among other competition restricting behaviours in the context of negotiations with publishers".

On 27 July 2022, the Commission informed the AdC that, "in view of the scope and impact of the matter in question, it intended to extend the scope of its own investigation on Google to also include the practices and markets under investigation by AdC". Consequently, the AdC was relieved of that investigation[47] and closed it on 6 September 2022. The same is thus conducted by the Commission. Interestingly, the AdC made clear to the Commission importance of investigating the Portuguese markets "in view of the serious concerns identified in its investigation" and "has also made available to the Commission all the information collected during its investigation", notably "the information given by the Portuguese market stakeholders".

Already in a speech of 5 May 2022[48], a member of the Board of the AdC explained that in the context of the investigation it was found that "the agreement meant that each competitor refrained from targeting specific customers of rival companies, thus restricting competition both in the national telecom markets in which they are active and the national market for paid search advertising, by reducing the number, variety and quality of ads viewed by users of Google search. Therefore, it reduced the quality of this service as well". Although by then no final decision had yet been taken, that case was said to illustrate "the significance of search advertising for businesses today as a vital instrument for competition and differentiation, since it targets consumers when they are more willing to buy and perhaps change provider (the so-called performance phase)".

[46] Available at: https://www.concorrencia.pt/en/articles/portuguese-competition-authoritys-google-investigation-moves-european-commission

[47] Council Regulation n.º 1/2003.

[48] During the International Competition Network Annual Conference – at the Breakout session on "Theories of harm in digital markets" in Berlin. Available at https://www.concorrencia.pt/sites/default/files/MJM%20Theories%20of%20harm%20in%20digital%20markets%20ICN%20Berlin%20May%202022.pdf

b)

Given the above answer, it is likely that the outcome of current cases against the large US digital platforms will be well received by the AdC.

c)

The abovementioned speech of 5 May 2022[49] provides some insight on the way the AdC understands the Digital Markets Act (DMA). As referred to an AdC's member of the Board, in 2021, the AdC was directly involved in the negotiations of that legislation during the Portuguese Presidency of the Council.

The AdC is expected to see the DMA as "an ex-ante complementary tool to the case-by-case antitrust enforcement work of competition agencies in the future. Therefore, it will not replace competition enforcement in digital, which will continue, and perhaps may even intensify, given the acceleration of the digital transition and the burst in e-commerce. The interplay between the DMA, which will be enforced by the Commission, and competition rules, which will continue to be enforced by national agencies, will require an even closer cooperation between these institutions, to avoid, for example, conflicting decisions or remedies imposed on gatekeepers. Therefore, the DMA includes provisions whose purpose is to coordinate DMA proceedings with antitrust proceedings and on exchanging information between enforcers within the framework of the European Competition Network (ECN)".

d)

Both extremes, either the risk of inconsistencies or over-enforcement, can be avoided if there is a good cooperation between national enforcement agencies and the Commission. The ECN appears indeed to be the ideal tool for such cooperation[50].

Question 8

State aid is acknowledged to be able to distort competition in the internal market. The EU has had an approach towards this type of aid that is more demanding than that adopted in other regions of the globe. The growing protectionism in other areas of the globe and especially the scale of direct foreign investment in the EU during the last decade have brought much criticism on the uneven level playing field of EU companies when compared to companies from third countries.

[49] See above footnote 48.

[50] In 2021 the national competition authorities of the European Union at the ECN Directors General's meeting of 22 June 2021 endorsed a Joint paper on "How national competition agencies can strengthen the DMA".

As such, the recent industrial policy of the EU is to be implemented through a complex toolbox. That comprises notably the EU Regulation on the screening of foreign direct investment[51] and the soon to be adopted EU Regulation on foreign subsidies distorting the internal market[52].

In parallel, the approach towards State aid is evolving and we assist at a reflection on the challenges arising from exceptional circumstances such as the 2020 COVID 19 pandemics and economic crisis and this year's war in Ukraine.

Nevertheless, a "strong industrial player" should be able to grow in a competitive environment without prejudice to developing its activity on the basis of its merits.

In Portugal, the role of the AdC in respect of State aid is rather limited. Pursuant to Article 65(2) of the CA, the AdC may examine any aid or aid project and formulate to the Government or any other public entity the recommendations it deems necessary to eliminate the negative effects on competition. However, aid schemes are not required to be notified to the AdC for previous approval. The role of AdC is therefore only of issuing recommendations. Public authorities decide on the public policy objectives of eventual aid schemes.

The crisis triggered by the COVID-19 pandemic forced governments and public authorities to reassess many premises and review long-term practices. One example of such challenges was the swiftly adoption by the Commission of a Temporary Framework for assessing collaboration agreements in response to situations of urgency stemming from the COVID-19 outbreak, in parallel with the national competition authorities' willingness to act in the same line[53].

On 19 March 2020, the Commission adopted the State Aid Temporary Framework, which was amended six times. Its aim was "to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak". In parallel, the remaining State aid legal framework, such as the one on rescue and restructuring aid, continued to be applicable by the Commission.

Even though there is an increasing awareness of the impact of State aid that has been authorized, it is still premature to draw lessons on the Commission's practice during

[51] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[52] On 30 June 2022, the interinstitutional negotiations of the legislative proposal have led to a provisional agreement between the European Parliament and of the Council.

[53] Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

such exceptional times. Moreover, before a full economic recovery post-COVID 19, the EU economy is also being highly impacted by the ongoing war in Ukraine.

In times of uncertainty and rapid evolution of sectors which impact the whole economy, such as the digital one, the assessment of whether "the long-term viability" of a strategic European industry sector is to be considered as relevant factor in future State aid decisions may bring increased legal uncertainty as such. This is without prejudice to the fact that the main sustainable development goals may prove to be useful to reduce the degree of uncertainty concerning the future.

During the COVID-19 pandemic, in Portugal, the political debate turned around the question whether the main national air carrier, TAP, should be regarded as a "strategic national company" that would justify to be rescued.

Question 9

Portuguese courts do not make an intensive use of the remedies and tools available: for example, in the first 20 years following the accession of Portugal to the EU, only 60 preliminary requests pursuant to Article 267 TFEU wee formulated to the Court of Justice. Likewise, the Portuguese courts have not made themselves available of the possibility to ask the Commission for information on questions concerning the application of State aid rules.

Geopolitical instruments, trade defence instruments, and competition policy

Question 10

There is no publicly available information on any investigation where existing trade instruments affected the AdC's competition law analysis.

TRADE

FDI control

Question 11

a)

In Portugal, Decree-Law 138/2014, of 15 September establishes a regime for the safeguarding of strategic assets essential to guaranteeing public security.

That decree-law grants the Council of Ministers, on the basis of a proposal by the member of the Government responsible for the sector in which the strategic asset

in question is integrated, in exceptional circumstances and through a reasoned decision, the power to oppose the conclusion of legal transactions that result, directly or indirectly, in the acquisition of control, directly or indirectly, over infrastructures or strategic assets by natural or legal persons from third countries to the European Union (EU) and the European Economic Area (EEA).

Any possible opposition decision is subject to judicial control by the administrative courts, which control is effective, insofar as the provision in that decree-law of objective and transparent decision criteria allows the competent courts to review, taking into account in particular the reasoning of the decision, compliance with the provisions of the law.

b)

The FDI Screening Regulation is directly applied in Portugal. However, the national regime is far less intrusive. There is currently no publicly available information on any scrutiny of third party direct investments falling within the scope of the national decree law.

c)

Third country investors (natural or legal persons from third countries to the EU or EE) and only in respect of investments, which are structural and long-lasting, thus constituting concentrations from a competition law viewpoint.

d)

Energy, communications and transports.

e)

The member of the Government responsible for the sector may, by means of a reasoned decision, initiate a procedure for evaluating the operations that result, directly or indirectly, in the acquisition of control, direct or indirect, of infrastructure or strategic assets, within 30 days after the conclusion of the legal transactions relating to such operations or after the date from which such transactions become generally known.

The investors must send the information and documents related to the operation to the Government member responsible for the area, after which the Council of Ministers, on the basis of a proposal from that Government member, has a period of 60 days to exercise its power of opposition.

In this way, the public interest of national defence and security and the security and continuity at all times of essential services are safeguarded, without the opposition

regime representing State interference in the management and exploitation of the assets in question.

The concepts of de facto or de jure control adopted are those defined by national law and European Union law on competition matters, as well as by the case law of the CJEU.

f)

No. Merger control and FDI control are completely separate mechanisms, applied by different entities.

g)

No national rules in this respect have been adopted so far.

h)

Any eventual opposition decision by the government is subject to judicial review by the administrative courts.

i)

Not in Portugal. No amendment of the 2014 regime so far[54].

Trade defence and public procurement – foreign subsidies

Question 12

There has been no public debate so far in this respect.

[54] In its First Annual Report on the screening of foreign direct investments into the Union delivered on November 2021, the Commission mentioned that Portugal was one of two Member States "having initiated a consultative or legislative process expected to result in the amendments to an existing one". Moreover, in the Staff Working Document on the same Report it was expressly mentioned that there were efforts "ongoing to update the existing screening legislation". Amongst them were included the following ones:

The establishment in 2020 of an inter-ministerial Working Group at technical level; The discussion of a set of possible changes to the existing law – acknowledgment of "initial agreement on adjustments proposed, including on: the alignment of deadlines between national and EU mechanisms, the establishment of the contact point and the introduction of the possibility of imposing mitigation measures

It was further referred that "A number of important issues remain to be decided. It is therefore not yet possible to conclude the review and begin the legislative process".

Notwithstanding, in page 9 of the Commission's Second Annual Report on the screening of foreign direct investments into the Union, dated 1 September 2022, Portugal is solely included in the list of Member States with "National FDI screening mechanism in place" and not on the one mentioned above. Moreover, in page 35 of the Commission's Staff Working Document on the same Report, it is stated that "Portugal currently has no ongoing initiatives that may result in amendments to its existing screening mechanism".

Question 13

Transposing the existing competition, public procurement and trade defence frameworks to the assessment of foreign subsidies runs the risk of raising similar concerns to the ones highlighted above in respect of the introduction of "sustainability" elements in competition analysis.

Indeed, screening foreign investments requires a case-by-case analysis. In the context of that analysis, there are public policy choices to be made, as well as relevant considerations of international policy to be taken into account. Public authorities, composed by political elected representatives, are best placed to make those choices.

In the context of competition assessments, verification of the respect of public procurement rules or the implementation of existing trade defence instruments, the final decisions should be adopted on the basis of a sound economic analysis and a strict respect of the legislative framework. This is the best way to ensure that such decisions will be able to meet the scrutiny of courts, both at EU level as well as at international level.

Mandatory due diligence and regulating supply chains

Question 14

In Portugal, the criminal regime for corruption in international trade and in the private sector was established by Law no. 20/2008 of 21 April, as amended.

The law applies to foreign officials, officials of international organizations, holders of foreign political office, workers in the private sector and entities of the private sector.

The law is applicable, in cases of active corruption with prejudice to international trade, to acts committed by Portuguese nationals or by foreigners who can be found in Portuguese territory, regardless of where the practice of these facts has taken place.

Regarding crimes of active or passive corruption in the private sector, the law is applicable, also irrespective of the place where the facts were committed, when the agent is a national official or holder of a national political office or, if it is a Portuguese national, an official of an international organization.

The Portuguese Securities Code ("Código dos Valores Mobiliários")[55] contains the most relevant provisions regarding the duty of care/due diligence obligations that

[55] Decree-Law n.º 486/99, of 13 November, as amended.

apply to listed companies. For example, Article 26(I)(1) of the Securities Code concerns the "Involvement Policy". It provides that:

"Institutional investors who invest, directly or through a financial intermediary that provides portfolio management services in shares traded on the regulated market, and financial intermediaries that provide portfolio management services, to the extent that they invest in shares traded on the regulated market on behalf of investors, shall prepare and disclose to the public a policy of shareholder involvement in their investment strategy, describing how:

a) to monitor the subsidiaries with regard to relevant issues, including strategy, financial and non-financial performance, risk, capital structure, social and environmental impact and corporate governance"

See also Law No. 99-A/2021, of 31 December.

The following legal instruments are also relevant:

- Decree-Law No. 89/2017, of 28 July (as amended), which transposes Directive 2014/95/EU of the European Parliament and of the Council, of 22 October 2014, into Portuguese law, amending Directive 2013/34 /EU, with regard to the disclosure of non-financial information and information on diversity by certain large companies and groups.
- Law nº 50/2020, of 7 August, which transposes into the Portuguese legal system Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, concerning the rights of shareholders of companies listed on the regarding their long-term involvement.
- The General Regime for Collective Investment Undertakings, Law no. 16/2015, of 24 February, as amended.

There are also other instruments that impose a duty of care to companies, in the context of climate law: Law no. 98/2021 of December 31. For example, Article 38(1) provides that "companies shall consider climate change in their respective corporate governance and incorporate, in their decision-making processes, an analysis of climate risk"; and moreover (2) "the duties of care, loyalty and of reporting the management and presenting accounts, in charge of the managers or administrators and the holders of governing bodies with supervisory functions, shall include prudent consideration and transparent information sharing about the risk that the climate change poses to the business model, capital structure and assets of companies".

Finally, (3) "Companies shall assess, in relation to each annual financial year, the economic, environmental and social dimensions and exposure to climate change

of the carbon impact of their activity and operation, integrating this assessment in the respective management reports, and may define a budget of carbon, establishing a total maximum limit for greenhouse gas emissions that consider the targets set out in this law. 4 — Companies and entities in the State business sector shall include, within the scope of informational obligations, namely those provided for in the Securities Code, a chapter that reports the climatic risks faced by those companies, following the recommendations and good practices of disclosing the climate information".

There are also provisions regarding the exposure to climate issues and the review of corporate governance rules: Article 78 (1) of the Securities Code states that "the regulatory and supervisory entities shall identify, within one year after the publication of this law, the legislative and regulatory changes necessary for companies to integrate into corporate governance the exposure to climate scenarios and the potential financial impacts resulting therefrom…".

a)

Listed companies are concerned by the above-mentioned laws.

b)

Listed companies should comply with the obligations provided for in the Securities Code as well as in specific legislation (please see above).

c)

d)

The obligations contained in the Securities Code apply to listed companies. However, the criminal regime for corruption in international trade and in the private sector established by Law no. 20/2008, of 21 April (as amended) can have extra-territorial effects, given that it applies in cases of active corruption with prejudice to international trade, to acts committed by Portuguese nationals or by foreigners who can be found in Portuguese territory, regardless of where the practice of these facts has taken place.

f)

Liability for offenses provided for in the Securities Code are punishable by the Securities Commission. Natural and legal persons, irrespective of the regularity of their constitution, can be made liable. Holders of governing bodies, their representatives and workers can be made liable. The liability of legal persons and similar entities does not exclude the individual liability of the respective agents.

Auditors can also be responsible for damages caused to issuers or third parties due to a deficiency in the report or opinion prepared by the auditor.

Question 15

The Portuguese government is currently considering the revision of the Commercial Companies Code as well as the adoption of further legislation.

The purpose is to ensure greater involvement of shareholders in corporate governance. Asset managers should also further inform the institutional investors regarding their approach to asset management and social, environmental and governance matters.