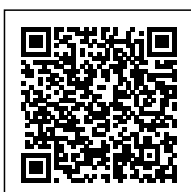


ADVANTAGES OF COMPETITION LAW COMPLIANCE - ABBC

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As the year of 2016 is coming to an end, there is an interesting melting pot of draft legal frameworks and circumstances in Portugal that call for renewed focus on the advantages of competition law compliance.

The more relevant ingredients are: the much discussed and soon to be approved amendment to the Code of Public Contracts, with the influence of the pro-competition approach; the implementation of the Directive on Antitrust Damages Actions, aimed at removing obstacles to compensation for all victims of infringements of EU and national antitrust law; the Portuguese Competition Authority's (PCA) effort to be in line with the increasing international trend of active advocacy of competition by public enforcers; and the designation of a new President to the PCA's Board.

By 18 April 2016, Portugal had to conclude the transposition of the Public Procurement Directives, while the much-discussed amendments to the Portuguese Code of Public Contracts are expected to be approved very soon. Of particular relevance from a competition law perspective are notably: the new rules for increased transparency and efficiency; the notion of tenders that appear abnormally low; the impact of the new division of tenders into lots; and the establishment of thresholds. Moreover, the increasing cooperation of the competent entities with the Portuguese Competition Authority (PCA) for the purposes of advocating compliance with those rules, as well as the latter's aim to combat bid-rigging, mean increased attention to the intertwining of the referred two fields of law is advised.

Equally relevant is the imminent implementation of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States of the European Union. This is due by 27 December 2016.

The classic approach on the scope of the private enforcement of competition rules – notably by considering that it only results from follow-on actions (based on infringement decisions by public enforcers) and that the stand-alone judicial actions are a mirage – is gradually changing. Moreover, it is interesting that this type of action has already been dealt with, not only in civil courts, but also in tax and administrative courts and also in labour courts.

This year the Centre for Research in European, Economic, Financial and Tax Law (Law Faculty of the Lisbon University) made available online a database of Portuguese case law with an array of cases (mostly) on public and private enforcement. Meanwhile, an e-book with a critical analysis of those cases is expected to be published in 2017. These developments may contribute to greater awareness of the enforcement of competition law in general, as well as raising awareness of the existence of a user-friendly tool (to be strengthened with the new legislation) for victims of competition law infringements when considering whether to obtain redress.

In line with the increasing international trend of public enforcers to promote active advocacy, the PCA has recently published guidance on the rules applicable to *associations of undertakings*. Regard must be had to the fact that, for competition law purposes, this definition may include such different entities as liberal professions' associations and even trade unions, together with the classical associations of undertakings representing their respective sector of activity.

For example, recently the Spanish Competition Authority (*Comisión Nacional de los Mercados y la Competencia*) imposed fines on the Madrid and the Alcalá de Henares Bar associations for the imposition of minimum prices to their associates. In Portugal, the PCA closed the infringement proceedings of the Ethics Code of the Psychologists' Association, which concerned the existence of competition restrictions to the economic activity in question and to the freedom of choice by patients/clients. The Association submitted remedies which were considered satisfactory by the PCA.

Equally relevant may be the imminent designation by the government of the new president to the board of the PCA. Notwithstanding the fact that the current two board members are, or have already achieved, half of their term in office, it cannot be excluded that there may be a shift in the PCA's policy.

Lastly, one should not undermine the relevance of recent legislative developments, as well as guidance and decisional practice by public enforcers at the administrative stage of competition law proceedings in the European Union, as well as the European Court of Justice's jurisprudence. In this context, topics such as big data and competition in the context of concentrations, lawfulness of loyalty rebates by incumbent operators and forms of prohibition of online sales are relevant for the competition assessment that it is advantageous for undertakings to develop in this changing environment.

Margarida Rosado da Fonseca is of counsel at ABBC. She can be contacted at m.fonseca@abbc.pt