IN-DEPTH

# Intellectual Property And Antitrust

## PORTUGAL

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# Intellectual Property and Antitrust

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In-Depth: Intellectual Property and Antitrust (formerly The Intellectual Property and Antitrust Review) is an annual concrete and practical overview of global developments on the relationship between antitrust and intellectual property. It provides an update on recent developments, as well as a survey of the overall existing lay of the land regarding the relationship between the two bodies of law in each of the key jurisdictions covered.

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# Portugal

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Summary

## Introduction

In Portugal, the main legal framework regulating competition law matters is the Portuguese Competition Act (the Competition Act), which was last revised in 2012 and further amended in 2022 by Law No. 17/2022.[1] The main legal instrument regulating intellectual property (IP)[2] is the Industrial Property Code (IPC), which was last revised in January 2021.[3]

The relevant European Union (EU) regulations, including EU Regulations No. 2022/720 (the Vertical Block Exemption Regulation (VBER)),[4] No. 2023/1066 (the R&D agreements),[5] No. 2023/1067 (the specialisation agreements)[6] and No. 316/2014 (the Technology Transfer Block Exemption (TTBER)),[7] are directly applicable in Portugal. Additionally, the Portuguese Competition Authority (AdC) and national courts may also rely on approaches included in the European Commission (EC) guidelines, as well as in the case law and decision practice at the EU level.

There are no specific Portuguese statutes, regulations or guidelines directly regulating the interaction between IP and antitrust issues. However, there are inevitable points of intersection between these areas of law, and IP may fall under the general competition law prohibitions.

Under the Portuguese legislation, the conduct of holders of intellectual property rights (IPRs) is not exempt from the competition law rules. Therefore, the AdC is competent when, within the context of IPRs, an undertaking infringes the prohibition of bilateral or unilateral restrictive practices, respectively set forth in Articles 9 and 11 of the Competition Act, which mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The AdC is also competent to assess merger transactions involving IPRs that meet the relevant notification thresholds. In this type of transaction, the existence of exclusive rights is one of the main aspects to be considered by this authority.

As such, the Portuguese rules on anticompetitive agreements and concerted practices (Article 9), on abuse of dominant position (Article 11) and on merger control (Article 36 et seq.) are all relevant and potentially applicable to conduct involving IPRs. In this context, the AdCand the Portuguese Competition, Regulation and Supervision Court (the Competition Court) have jurisdiction only when the facts at stake fulfil the elements provided for in Articles 9, 11 and 12 of the Competition Act or in the EU corresponding norms – Articles 101 and 102 of the TFEU. These entities are not competent to apply the rules contained in the Industrial Property Code.

## Year in review

Over recent years, the main legal developments affecting the relationship between IP and antitrust laws have mostly occurred at the European level, within the IT and pharmaceutical sectors, with the latest developments occurring within the e-commerce sector. In Portugal, the main competition cases involving IPRs are merger cases (mentioned below) and, to a more limited extent, restrictive practice investigations, typically in the pharmaceutical sector.

Although there have not been any recent high-profle cases dealing with the interplay of competition law and IPRs in Portugal, in line with the tendency of the EU countries to pay increased attention to cases involving digital markets, we can expect future enforcement cases including IPRs in this sector.

In this sense, in 2023, the AdC reiterated that a vigorous action on its part in the digital environment is essential to protect the competitive dynamics of the market.[8] More recently, on 19 December 2023, the AdC defined its competition policy priorities, which include, amongst other things, (1) following developments concerning digital transition, increasing international cooperation on the latest legislative and regulatory measures implemented in this field; and (2) focusing on innovative and advanced forensic IT tools, as they play an essential role in the investigation of anticompetitive practices. In addition, the AdC acknowledges the development of artificial intelligence in recent years and confirms it has been assessing the impact of this new digital environment on the economy and, particularly, on competition policy.[9]

This increasing attention to innovation reveals a clear intention of opening the path for evolution regarding the AdC's approach to the substantive assessment of competition issues involving IPRs.

## Licensing and antitrust

### Anticompetitive restraints

As mentioned above, Portuguese law, both in the area of IPRs and antitrust, is largely based on European law. Within this context, under Portuguese law, anticompetitive restraints related to licensing agreements may fall under either the prohibition of agreements and concerted practices (Article 9), or the prohibition of abuse of dominant position (Article 11).

Article 9 prohibits anticompetitive restraints in agreements between undertakings, including licensing agreements, unless they are justified under Article 10 of the Competition Act,[10] which corresponds to Article 101(3) of the TFEU. Consequently, competing companies under a licensing agreement shall not, directly or indirectly, determine as their object or effect, among other things, to restrict the parties' ability to determine its prices,[11] to restrict the licensee's ability to carry out R&D[12] or to allocate markets or customers.[13]

In addition, Article 11 of the Competition Act prohibits abuse of dominant position. Under this provision, several types of behaviours may be deemed unacceptable within the context of licensing agreements. Among others, two types of practices are expressly prohibited by Article 11(2):

1. the application of 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' (Article 11(2)(c)), including the granting of licences under discriminatory conditions, as referred in the MEO/GDA case;[14] and
2. to refuse 'access for another undertaking to a network or other essential facilities that it controls when appropriate payment for such is available' (Article 11(2)(e)), as

further explained below, such prohibition covers the refusal of access or licensing of IPRs.

In Portugal, anticompetitive restraints in breach of Articles 9 and 11 are sanctioned with fines up to a maximum of 10 per cent of the offending undertaking's worldwide turnover in the year preceding the decision.[15] The Competition Act also provides for ancillary penalties, such as the prohibition up to two years on the right to take part in public tenders, as well as the publication of the infringement decision in the Portuguese Official Gazette and in national, regional or local newspapers.[16]

## Refusals to license

The refusal to license may be considered an abuse of dominant position under Article 11 of the Competition Act. As in the EU, in Portugal the essential facilities doctrine sets out the obligation to ensure that competitors have access to essential infrastructure controlled by a dominant undertaking.

Unlike the TFEU, Article 11(2)(e) specifically prohibits a dominant undertaking from refusing 'access for another undertaking to a network or other essential facilities that it controls when appropriate payment for such is available', whenever this other undertaking cannot, as a consequence, compete with the dominant undertaking, unless it can demonstrate that this access cannot reasonably be provided.

The prohibition contained in Article 11(2)(e) covers the refusal of access or licensing of IPRs, which may constitute an offence within the essential facilities doctrine. Under this framework, two types of practices may lead to abusive behaviour of a dominant undertaking: the refusal to license itself and the refusal to license under abusive conditions.

A refusal to license will be considered abusive if the information or product at stake is an essential resource for the exercise of a certain activity and the refusal, not objectively justified, is likely to exclude all effective competition within the relevant market or to limit it, or both, or to prevent the development of a new product.[17]

As for the refusal to license under abusive conditions, this provision essentially covers situations of unfair or discriminatory conditions applied to the licensing of IPRs and may fall under Article 11(2)(c) or Article 11(2)(e) of the Competition Act, as described above. Such abuse may be constituted by attempts to license an IPR at higher prices or to engage in price discrimination.

## Unfair and discriminatory licensing

Unfair and discriminatory licensing practices as an abusive behaviour from a licensor in a dominant position and owner of IPR undertaking may fall under Article 11 of the Competition Act, as well as under Article 102 of the TFEU.

Abusive discriminatory licensing may be found where a licensor in a dominant position applies different conditions and prices to licensees placed in similar situations.

A very relevant case regarding discriminatory licensing of copyright was decided in 2018 by the Competition Court, which followed the ECJ preliminary ruling decision, in the MEO/GDA case.[18]

The case began in 2014, when MEO, one of the major Portuguese telecoms companies and the provider of paid television signal transmission service and television content, submitted a claim to the AdC. MEO claimed that GDA, the Portuguese Cooperative for the Management of the Rights of Performing Artists, which centralises the licensing rights of performing artists in Portugal, had abused its dominant position by applying dissimilar conditions to MEO, in comparison to its direct competitor in the market for paid TV platforms NOS; that is, by charging MEO higher amounts of royalty that had arisen from the use of IPRs, which was in breach of Article 11(2)(c) of the Competition Act and Article 102(2)(c).-[19]

In March 2016, the AdC concluded that GDA's behaviour did not distort competition, namely because the difference in tariffs did not place MEO at a competitive disadvantage, in particular because the fees represented a relatively low percentage of the total costs borne by MEO.[20] Subsequently, MEO claimed that the AdCs had misinterpreted Article 102(2)(c) of the TFEU and had filed an appeal to the Portuguese Competition Court, which led the Competition Court, for the first time since its creation in 2013, to request a preliminary ruling from the ECJ on the concept of competitive disadvantage.

In this context, in April 2018, the ECJ stated that discrimination by an undertaking is abusive only when it creates a distortion of competition between trading partners that are competitors. To this end, the mere occurrence of an immediate disadvantage that affects those companies to which higher prices have been applied does not mean that competition is distorted, but that all relevant circumstances must be analysed, including the relevance of the amounts at stake in MEO overall cost structure.[21]

Based on the ECJ interpretation, the Portuguese Competition Court decided in June 2018 that given the relative weight of the IPRs' licensing prices offered by GDA, such differentiation was unsusceptible to affecting MEO's effective competitive position on the pay-TV platforms market. According to the Competition Court's decision, between 1 January 2010 and 31 December 2013, the amounts paid annually to GDA by MEO in the context of the wholesale services represented between 0.71 per cent and 2.34 per cent of the costs incurred by MEO for the provision of the retail access service to the pay-TV signal, and between 0.03 per cent and 0.08 per cent of the revenues earned by MEO in the scope of the provision of this retail service.[22]

In addition, the market share of MEO in the retail service of access to the pay-TV signal market increased during the period under analysis, from around 25 per cent to more than 40 per cent, while the respective market share of the NOS Group decreased in the same period from more than 60 per cent to less than 45 per cent.[23] The AdC had also relied on this data in the case's original decision.[24]

The interpretation provided by the ECJ and the Competition Court's decision seems to have opened the door for dominant undertakings that may justify differentiated pricing policies, considering that customers – for whom the provided products or services provided represent a less significant portion of their total costs – are able to assume higher fees, without this constituting a competitive disadvantage.

## Patent pooling

Patent pooling agreements – as licensing agreements that provide a platform for the parties notably to fix prices, partition the market or reduce innovation – may fall under Article 9 of the Competition Act and Article 101(1) of the TFEU. In any case, according to the TTBER guidelines, 'patent pools can also play a beneficial role in the implementation of pro-competitive standards'; that is, patent pools can have anti- or pro-competitive effects. Although the EC guidelines are not binding, it is likely that the AdC and other national enforcers take into account the EC approach, as there is no specific provision under Portuguese law. According to this practice, these recommendations are likely to be followed by the AdC and to serve as guidance in patent pooling cases that may arise at a national level.

## Software licensing

Portuguese competition law does not provide specific provisions regarding antitrust issues arising from software licensing. However, based on the above, as a licensing agreement, it must comply with general competition rules and may be analysed under the general prohibitions of anticompetitive restraints.

In 2015, in the National Association of Pharmacies (ANF) case, the AdC addressed a case related, even if incidentally, to the conditions of access to data obtained through a software licensed within the ANF Group, allowing an exclusive right of access to pharma data gathered by each pharmacy.

ANF, the largest association of pharmacies operating in Portugal, and three other undertakings of the same group,[25] had allegedly abused their dominant position through margin squeezing in the market of commercial data of pharmacies, and in the markets of pharma market studies based on this data.[26] In short, ANF made the access to pharmacy data to IMS Health, Lda difficult. IMS Health, Lda provides market studies in the health sector, and is an undertaking competing with HMR (a company created within the ANF Group to operate in the market for the production and sale of market research based on commercial pharmacy data). The AdC considered that the ANF Group's practice was abusive and had led to upstream and downstream markets' foreclosure, and an overall fine of €10.3 million was imposed. The Competition Court upheld the AdC's decision while reducing the amount of the fine to €6.89 million because of the nature and size of the affected market.[27] ANF appealed this decision and in June 2017, the fine was reduced a second time by the Lisbon Court of Appeal, on the grounds that the requirements to establish Farminveste's parental liability were not met, thus revoking the fine of €6.08 million specifically imposed on Farminveste.[28]

The Portuguese Court of Audits outlined the fundamental role played by competition within software licensing proceedings through public tenders.[29] In 2018, the Court denied a direct adjustment required by the Portuguese Tax and Customs Authority concerning the acquisition of software licences, through a public tender, on the grounds that the tender procedure launched by the Tax Authority for the acquisition of these software licences infringed the principle of competition. The Court raised this issue mainly on the grounds of a substantial difference between the financial terms of the Tax Authority and the licensor's contract and the corresponding terms of the software licensing and related services framework agreement.

In this context, the court considered that the offer for the tender was formulated by the Tax Authority in a way that allegedly excluded competitors, favouring Oracle, in breach of the general public procurement principles (i.e., competition, equal treatment and non-discrimination).[30] Additionally, the court mentioned that it was likely to lead to market foreclosure because it restricted the access to the tender to a limited number of pre-qualified companies.

Although the Court of Audits is not competent to apply the Competition Act, it denied the authorisation of authorising an expenditure related to software licensing, owing to the restriction of competition induced by the respective procurement procedure. To this end, the Court of Audits has also ordered that its decision be brought to the attention of the Competition Authority.

## Trademark licensing

Similar to the other types of IPR licensing, trademark licensing is not explicitly provided under the Portuguese Competition rules, and this relationship is mainly governed by the EU rules.

As for the general rules on trademarks, the Industrial Property Code contains specific limitations on IPRs, derived from competition rules, such as the concept of exhaustion of trademarks. According to Article 253 of the Industrial Property Code, the owner of a trademark cannot prevent its use for products sold within the EU with that same trademark, provided the owner previously authorised it.

Franchise agreements normally include a combination of different vertical restraints, in particular selective distribution, non-compete obligation and territorial exclusivity.

In principle, anticompetitive restraints, such as non-compete obligation, territorial restrictions and price-fixing, are banned by Article 9 of the Competition Act. However, the VBER is directly applicable and these restrictions provided in a franchise agreement are not covered by Article 9 when the franchisor has a market share of less than 30 per cent.

In any case, hardcore restrictions that may eliminate intra-brand competition, such as price maintenance, restriction of cross-supplies between distributors and exclusivity, are not allowed and cannot benefit from the Block Exemption.

In 2014, the AdC had identified a set of competition concerns allegedly related to franchise agreements of the Portuguese supermarket chain Dia Portugal Supermercados.[31] The AdC found that information asymmetries may have induced the franchisees to understand recommended and maximum prices as fixed prices. Consequently, the absence of price competition between them was likely to: (1) prevent more efficient retailers from entering the market; (2) prevent reaching a sufficient size through the practice of lower prices; and (3) facilitate the adoption of collusive behaviour. The AdC closed the case following the commitments by the franchisor not to bind the franchisees to implement recommended or maximum prices.

The non-compete obligation in respect of goods or services purchased from the franchisee is not prohibited by Article 9 of the Competition Act, when such obligation is necessary to maintain the common identity and reputation of the franchised network, provided it does not exceed the duration and scope of the franchise agreement itself.

In this context, the Portuguese Supreme Court has already declared null and void a non-compete clause on the grounds that the clause did not underlie a transfer of know-how that justified this protection.[32]

In another case, the Supreme Court concluded that the non-compete clause was void as it prohibited post-term competition beyond the territorial limits indispensable to the protection of the franchisor's IPRs. As such, it ordered a reduction in the scope of the clause.[33]

## Standard-essential patents

In Portugal, no specific consideration has been given in statutes, regulation or case law to the antitrust implications of the adoption of proprietary technologies in industry standards.

In this context, the AdC and the Competition Court will most likely follow the EU approach to standard-essential patents (SEPs) and rely on the EC and ECJ decisions, in particular, on the decision in the Huawei v. ZTE case; notably on the question of the circumstances and limits under which the assertion of SEPs constitutes an abuse of a market dominant position under Article 102 of the TFEU.[34]

## Intellectual property and mergers

### Transfer of IP rights constituting a merger

Under Portuguese competition law, the transfer of IPRs may constitute a merger provided that it leads to a lasting 'change of control in the whole or parts of one or more undertakings' and that they constitute an activity resulting in a presence in a market to which a turnover arises. The Competition Act provides that such change of control may arise from the 'acquisition of ownership rights, or rights to use the whole or a part of the assets of an undertaking'.[35]

Therefore, an acquisition of IPRs may constitute a merger where they are related to specific assets that constitute a business generating market turnover. In most cases, the relevant transaction will be an asset deal that includes IPRs, meaning that concentration will be constituted by the acquisition of the assets.

The AdC already considered that a notified transaction did not constitute a concentration because the assets were composed by a set of equipment and contracts that were not capable, on their own, of developing an activity through which turnover can be achieved.[36]

The acquisition of IPRs in the pharmaceutical sector is the most frequent in Portugal. In this field, over the past few years, the AdC analysed relevant cases, such as:

1. the acquisition of sole control over the assets necessary for the production and marketing of the orphan medicine Cystagon in every country, excluding the United States, Australia and Japan.[37] The acquired assets were necessary for the production and marketing of the Cystagon orphan drug. The transaction included IPRs such as: (1) trademarks; (2) relevant marketing authorisations and business

files related to customers and suppliers; and (3) the rights and know-how necessary for the manufacture of Cystagon. In this case, the AdC authorised the operation and considered that it did not present any anticompetitive concerns based on three main grounds: (1) the operation consisted in the mere vertical integration of the Cystagon assets with its current exclusive distributor, Orphan Europe (having no impact on the structure of the offer of this medicine in Portugal); (2) Cystagon was no longer protected by patent rights, which could prevent similar products from entering the Portuguese market; and (3) there was one medicine that could represent a potential competitor to Cystagon in Portugal: Procysbi. Despite not being marketed in Portugal, Procysbi had held a marketing authorisation at the European level since 2013, and could potentially enter the Portuguese market;

2. the acquisition of Astellas Pharma's dermatological business by LEO Pharma. The target assets included trademarks, domain names, patents, marketing authorisations, cosmetic quality records, safety data, technology and marketing know-how and rights resulting from manufacturing contracts, supply, distribution contracts, in-licensing and out-licensing contracts. Each one of these assets was related to four prescription medicines (Protopic, Pimafucort, Locoid and Zineryt) and a cosmetic product (Locobase Repair);[38]
3. the transfer of IP rights constituting a merger in other sectors, for instance in the Hartmann/Lindor assets merger.[39] The target business comprised a set of assets, including all government licences and approvals that are exclusively owned or used by the Lindor Business, as well as all listed IPRs and trademarks, clientele associated with the trademarks and acquired IPRs; and
4. the acquisition by Trinseo of some of Synthomer's assets composed mostly of IPRs and related rights.[40] Following the conditional approval of Omnova's takeover by the EC on 15 January 2020, Synthomer plc had to sell its vinyl pyridine latex (VP latex) operations to Trinseo SA.[41] This operation was subject to approval from several national competition authorities, including the AdC. The transaction consisted of the acquisition of sole control over a number of assets including technology, know-how, intellectual property assets and trademark registrations, customer lists and related contracts as well as all business records concerning the Pyratex VP Latex business.

Furthermore, under the Competition Act, a clearance decision also covers restrictions directly necessary to the implementation of the merger. This includes restrictions resulting from, for example, licensing agreements that allow transitory access to certain brands, copyright and patents.[42] To this end, such agreements, when necessary for the preservation of the value of the transferred business, fall outside the scope of Article 9 of the Competition Act. However, where the AdC considers these restrictions to be competitively problematic, they are excluded from the scope of the clearance decision. In such cases, the AdC may subsequently investigate the respective agreements under the rules on restrictive practices.

## Remedies involving divestitures of intellectual property

The concept of remedies is enshrined in Article 51 of the Competition Act. To this end, the AdC issued guidelines on the adoption of remedies in merger transactions, in which it expressly recognises the possibility of presenting remedies in the form of divestment of IPRs assets; granting of access to patents, know-how or other IPRs; trademarks cession; and granting of access to technology covered by IPRs. However, the AdC specified that the divestiture of a business is preferred to the licensing of IPRs, considering that such a remedy requires a continuing relationship with the parties that may lead the licensor to influence the competitive behaviour of the licensee.[43]

In past decisions, the AdC accepted remedies involving IPRs, mostly concerning trademarks. For example, in the case of SC Johnson & Son/Sara Lee Insecticides and Repellents Business, the AdC only authorised the transaction through the divestment of all tangible and intangible assets, including IPRs over the DUM DUM brand, associated with the development, marketing and sale of Crawling Insect Killer, Flying Insect Killer and anti-moth products in Portugal.[44]

In addition, in the case Sumolis/Compal, the AdC cleared the transaction provided that the notifying party would divest the brand Sucol in Portugal and Spain, as well as the technical formulations in the composition of drinks used in Sucol, Sumol Néctar, Sumol Néclight and Sumol 100% Sumo. Additionally, Sumolis had to suspend the marketing, in Portugal, of the brands Sumol Néctar, Sumol Néclight and Sumol 100% Sumo for three years.[45]

## Other abuses

IP dispute-settlement agreements may be found anticompetitive under Article 9 of the Competition Act. The AdC has already clarified that agreements between companies to settle a patent litigation are, like any other agreement between undertakings, subject to the scrutiny of the competition rules. This means that although companies have the right to settle their patent disputes, they must do so while respecting the competition rules. In other words, the fact that these agreements are based on a patent dispute and consequent arbitration decision does not exempt them from complying with the competition rules.[46] Furthermore, agreements made between undertakings that aim to prevent the access of substitutes to the market, such as pay-for-delay, are also prohibited.

In 2014, in the AstraZeneca case, the AdC assessed for the first time a potential pay-for-delay infringement.[47] At issue was an agreement that was concluded between Teva and its subsidiary Ratiopharm with the company AstraZeneca, through which Teva and Ratiopharm agreed to withdraw the product Rosuvastatin Ratiopharm, distributed by Ratiopharm, from the Portuguese market. In Portugal, AstraZeneca commercialises the medicines Crestor and Visacor, which are composed of the active substance Rosuvastatin. The medicine Crestor was protected by a patent until 2012 and by a supplementary protection certificate until 2017 (valid at that time). However, Rosuvastatin Ratiopharm, a competing product that was distributed by Ratiopharm, entered the market without any verification of the IPRs at stake. In this context, AstraZeneca filed a patent infringement proceeding, and the parties settled the conflict through an agreement that covered the withdrawal from the Portuguese market of the product Rosuvastatin Ratiopharm.

The AdC assessed the scope of this agreement and found that the sole objective sought by the parties was to settle the dispute. In particular, no compensation of any kind had been received by any company of the Teva group for the withdrawal of the medicine from the market.

Furthermore, the Industrial Property Code prohibits unfair competition practices, which are defined, under Article 311, as any act contrary to the rules and honest practices of any type of activity conducted by any entity with the intention to cause damage to any competitor and to obtain an illegitimate gain. Under certain circumstances, unfair competition practices may fall under Articles 9, 11 or 12 of the Competition Act or Articles 101 and 102 of the TFEU. In these cases, the AdC is competent to investigate and sanction such behaviour on the grounds of any violation of prohibition of anticompetitive restraints. Otherwise, in the event of acts of unfair competition involving IPRs, or patent infringement or conflicts, because these come under the Intellectual Property Court's jurisdiction, the AdC and the Competition Court have no jurisdiction.

## Special considerations

**[48]**

In addition to the above-mentioned, there was a substantial change in the Portuguese legislation pertaining to the patent litigation system in the pharmaceutical sector. In Portugal, patents are governed by the Industrial Property Code, and the Court of Intellectual Property has jurisdiction over cases concerning industrial property in all forms, including patent litigation. In January 2019, the law that establishes a specific legal system for the settlement of disputes arising from IPRs related to medicinal products and generic medicines was modified. Since then, the specificity of the pharmaceutical patent enforcement system was maintained but the nature of the arbitration changed and became voluntary. Therefore, any interested party who intends to pursue one of these IPR claims must do so before the Intellectual Property Court or, in the case of agreement between the parties, submit the dispute to voluntary arbitration.

## Outlook and conclusions

Portuguese law does not provide specific provisions regarding the relationship between IP law and antitrust, and relies on general competition prohibitions to assess the validity of IPR-related practices. The regulation of interplay between both areas is largely similar in substance to the applicable EU rules. Because the main legal developments affecting IP and antitrust laws have occurred at the European level, many issues are yet to be addressed by the AdC and the national Competition Court.

However, the AdC's decisions demonstrate a certain concern towards mitigating the eventual anticompetitive effect of IPRs, which allows for some expected developments at national level in this area. In any case, it is likely that the AdC and national courts will closely follow the EC and ECJ approach.

In addition, the recent focus on innovation and digital issues is paving the way for a new approach to IPRs within the context of digital markets (but not only), or even the potential widening of an intellectual property approach to realities not originally covered by IPRs, such as access to big data.

This approach is leading to more sophisticated substantive assessments in merger control proceedings, namely more importance is being given to merger's impacts in terms of reducing choice and harming innovation. Thus, we can expect further developments in the near future and undertakings must remain vigilant for new rules and, especially, new enforcement approaches.

## Endnotes

1 Law No. 19/2012 of 8 May 2012, as amended by Law No. 17/2022, of 17 August 2022. ^ Back to section

2 For the purpose of this chapter, and in accordance with the Portuguese legal framework, the area of intellectual property law and rights covers industrial property law, copyright and related rights. ^ Back to section

3 Decree-Law No. 110/2018 of 10 December 2018. ^ Back to section

4 Commission Regulation No. 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, pp. 4–13. ^ Back to section

5 Commission Regulation No. 2023/1066 of 1 June 2023 on the application of TFEU Article 101(3) to certain categories of research and development agreements, OJ L 143, 2.6.2023, pp. 9–19. ^ Back to section

6 Commission Regulation No. 2023/1067 of 1 June 2023 on the application of TFEU Article 101(3) to certain categories of specialisation agreements, OJ L 143, 2.6.2023, pp. 20–26. ^ Back to section

7 Commission Regulation No. 316/2014 of 21 March 2014 on the application of TFEU Article 101(3) to categories of technology transfer agreements, OJ L 93, 28.3.2014, pp. 17–23. ^ Back to section

8 AdC's competition policy priorities for 2023. Available at https://www.concorrencia.pt/sites/default/files/Competition%20Policy%20Priorities%20for%202023.pdf. ^ Back to section

9 AdC's competition policy priorities for 2024. Available at https://www.concorrencia.pt/sites/default/files/documentos/documentacao-organizacao-adc/Competition%20pc
^ Back to section

10 Article 10(1) of the Competition Act considers that agreements (and concerted practice or decisions) between competitors may be justified when they 'contribute to improving production or distribution of goods or services or to promoting technical or economic progress if cumulatively they: a) allow the users of these goods or services an equitable part of the resulting benefit; b) do not impose on the undertakings concerned any restrictions which are not indispensable to the attainment of these objectives; c) do not afford such undertakings the possibility of eliminating competition from a substantial part of the market for the goods or services at issue'. ^ Back to section

11 Article 9(1)(a), Competition Act. ^ Back to section

12 Article 9(1)(b), Competition Act. ^ Back to section

13 Article 9(1)(c), Competition Act. ^ Back to section

14 See Section III.iii. ^ Back to section

15 Article 69, Competition Act. ^ Back to section

16 Article 71, Competition Act. ^ Back to section

17 See Gonçalo Anastácio, Lei da Concorrência – Comentário Conimbricense (in English: Competition Act – Coimbra Commentary), 2nd Edition, Almedina, p. 253. ^ Back to section

18 Competition Court, 9 June 2018, case No. 77/16.7YUSTR. ^ Back to section

19 See Tânia Luísa Faria, Gestão Coletiva de Direitos de Autor e Direito da Concorrência: O Ótimo é Inimigo do Bom ou Vice-Versa – Reflexões a Propósito do Caso CISAC, in Revista do Instituto do Direito Brasileiro, No. 11. (in English: Collective Management of Copyright and Competition Law: The Optimum is the Enemy of the Good or Vice Versa – Thoughts on the CISAC Case, in Journal of the Brazilian Law Institute). ^ Back to section

20 AdC, 3 March 2016, PRC-2015/07. ^ Back to section

21 European Court of Justice (ECJ), 19 April 2018, C-525/16, MEO v. Autoridade da Concorrência, Paragraph 34. ^ Back to section

22 AdC, 3 March 2016, PRC-2015/07, Paragraph 67(ii); and Competition Court, 9 June 2018, case No. 77/16.7YUSTR, Paragraph 26(x). ^ Back to section

23 Competition Court, 9 June 2018, case No. 77/16.7YUSTR, Paragraphs 26(y). ^ Back to section

24 AdC, 3 March 2016, PRC-2015/07, Paragraphs 67–68. ^ Back to section

25 Farminveste SGPS, Farminveste – Investimentos, Participações e Gestão, SA and HMR – Health Market Research, Lda. ^ Back to section

26 AdC, 22 December 2015, case No. PRC/2009/13 – Associação Nacional das Farmácias. ^ Back to section

27 Competition Court, 20 October 2016, case No. 36/16.QYUSTR – Associação Nacional das Farmácias. ^ Back to section

28 Lisbon Court of Appeal, 14 June 2017, case No. 36/16.QYUSTR.L1 – Associação Nacional das Farmácias. ^ Back to section

29 Court of Audits, case No. 3086/2017, Decision No. 1/2018 of 9 January 2018 and Appeal Decision No. 8/2018 of 2 May 2018. ^ Back to section

30 Article 1-A, Decree-Law 18/2008 of 29 January (the Code of Public Contracts). ^ Back to section

31 AdC, 9 June 2016, PRC-2014/03. ^ Back to section

32 Supreme Court of Justice, 5 October 2013, case No. 191/10.2TVLSB.L1.S1. ^ Back to section

33 Supreme Court of Justice, 5 February 2013, case No. 3371/08.7TVLSB.L1.S1. ^ Back to section

34 ECJ, 16 July 2015, C-170/13, Huawei Technologies v. ZTE. ^ Back to section

35 Article 36(3)(b), Competition Act. ^ Back to section

36 AdC, 30 May 2006, Case Ccent. 16/2006 – Modelo Continente/Macmoda/Tribo. ^ Back to section

37 AdC, 27 February 2018, Case Ccent. 8/2018 – Recordati / Ativos Cystagon. ^ Back to section

38 AdC, 10 March 2016, Case Ccent. 6/2016 – LEO Pharma/Negócio de Dermatologia da Astellas Pharma. ^ Back to section

39 AdC, 20 April 2017, Case Ccent. 11/2017 – Grupo Hartmann/Negócio Lindor. ^ Back to section

40 AdC, 21 April 2020, Case Ccent. 11/2020 – Trinseo/Ativos VP Latex Synthomer. ^ Back to section

41 EC, 15 January 2020, Case M.9502 – Synthomer/Omnova Solutions. ^ Back to section

42 Article 41(5), Competition Act. ^ Back to section

**43** AdC guidelines on the adoption of remedies in merger transactions, Paragraph 77. Available at https://www.concorrencia.pt/sites/default/files/Comunicado201109_DOC_2-Linhas_de_Orientacao.pdf.
^ Back to section

**44** AdC, 21 December 2012, Case Ccent. 25/2010 – SC Johnson & Son/Negócio de Insecticidas e Repelentes Sara Lee. ^ Back to section

**45** AdC, 14 August 2008, Sumolis/Compal. ^ Back to section

**46** AdC, 29 March 2016, PRC-2014/04 – AstraZeneca, Teva and Ratiopharm. ^ Back to section

**47** ibid. ^ Back to section

**48** Law No. 62/2011 of 12 December 2011. ^ Back to section

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