

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

### Autoridade da Concorrência, Portugal

The following template is submitted by **Autoridade da Concorrência, Portugal** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### I. Introduction

The Autoridade da Concorrência (AdC) is an independent authority whose mission is to ensure the enforcement and promotion of competition in Portugal in the private, public, cooperative and social sectors, in accordance with the principles of market economy and free competition, bearing in mind the efficient operation of the markets, the optimal allocation of resources and the interest of consumers.

More information about the AdC can be found on the AdC website: [www.concorrencia.pt](http://www.concorrencia.pt).

The legal framework for the protection of competition in Portugal is provided under Law No 19/2012 of 8 May, the [Portuguese Competition Act \(LdC\)](#). The AdC is also responsible for enforcing provisions of EU competition law, notably Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), if the anticompetitive practices are likely to affect trade between the EU Member States. The rules in the LdC and the TFEU are very similar.

For the purposes of this Template, the AdC adopts the definitions in section A of the Annex to the ICN CAP.

#### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

##### b) Non-Discrimination

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

The investigation and enforcement policies and Procedural Rules of the Portuguese competition law afford Persons of another jurisdiction treatment no less favourable than Persons of the Portuguese jurisdiction in like circumstances.

The [Constitution of the Portuguese Republic](#) (CRP) establishes the principle of equal treatment.<sup>1</sup> Against this background, the AdC has no legal grounds for discrimination, and does not discriminate based on nationality, residence or origin of a Person.

Portugal is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

### c) Transparency and Predictability

- i. *Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. *Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. *Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. *Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. *Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

All laws in Portugal are published and publicly available in a public register ([www.dre.pt](http://www.dre.pt)).

Procedural Rules applicable to Investigations and Enforcement Proceedings are set mainly in the [LdC](#) and, additionally, (i) for cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices, in the [Misdemeanour Act](#) and the [Criminal Procedure Code](#) and (ii) for merger control proceedings, in the [Administrative Procedure Code](#).

Under the [Statutes of the AdC](#), the AdC has to make available in its website *inter alia* (i) [legislation relating to the AdC activity](#), which includes the Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction, (ii) [guidance and recommendations](#) clarifying or explaining its Investigations and Enforcement Proceedings, (iii) the AdC's annual [competition policy priorities](#) and (iv) the AdC's [Annual Report](#), which provides an overview of the AdC's activity and main cases.<sup>2</sup>

The AdC also publishes in its website the final decisions concerning its Investigations and Enforcement Proceedings, including with respect to [cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices](#) as well as [merger control](#).

In addition, the AdC also makes available in its website links to notices, leaflets and [press releases](#), with the aim of explaining the AdC powers as well as its Investigations and Enforcement Proceedings.

<sup>1</sup> See Article 13 of the CRP.

<sup>2</sup> See Article 46(1) of the Statutes of the AdC.

#### **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

i. The AdC informs any Person that is the subject of an Investigation concerning cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices as soon as practical and legally permissible of that Investigation, according to the status and specific needs of the Investigation. This information includes the legal basis for the Investigation and the conduct under Investigation.

If the AdC intends to carry out inspections, it will usually inform the Person subject of an Investigation only at the beginning of the inspection in order to protect the Investigation. Otherwise, the Person that is the subject of an Investigation will be informed after the formal opening of the Investigation, usually in connection with a request for information or when the AdC has opened the Investigation following a complaint and asks the Person subject of the Investigation to provide its views regarding the subject matter of the complaint. Furthermore, before a fining decision the AdC will inform the Person that is the subject of the Investigation of the accusation (Statement of Objections, SO).

As a rule, in merger control proceedings a merger cannot be implemented before the AdC's approval, which means that usually the investigative process starts with the notification by the merging parties. However, the case team is available for contact with the parties from the beginning. The latter may also contact the AdC before notification and in such case the AdC may already flag the main competition concerns.<sup>3</sup>

ii. The Person subject of an Investigation concerning cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices has the right to make its views to the AdC in reply to the SO and it may also request an oral hearing for this purpose.<sup>4</sup> In addition, the AdC may at any time provide the Person subject of an Investigation with the opportunity to comment on any relevant document, including for example complaints or other third-party documents.<sup>5</sup>

---

<sup>3</sup> See [Guidelines](#) regarding pre-notification contacts in merger control proceedings, paragraph 33.

<sup>4</sup> See Article 25(1) and (2) of the LdC.

<sup>5</sup> See [Guidelines](#) regarding the Investigation and Enforcement Proceedings, paragraph 66. These Guidelines concern cartels and other anticompetitive agreements, unilateral conduct and monopolistic practices.

In merger control proceedings, the notifying party has the opportunity to engage with the AdC in pre-notification contacts allowing for a meaningful and timely engagement on significant and relevant factual, legal, economic and procedural issues,<sup>6</sup> including regarding the duty to notify transactions and the notification thresholds (some of the merger control thresholds are based on market shares).

iii. When issuing requests for information in Investigations and Enforcement Proceedings, the AdC must indicate *inter alia* the legal basis and the objective of the request.<sup>7</sup> The standard deadline for replying in Investigations and Enforcement Proceedings regarding cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices is 10 working days.<sup>8</sup> The deadline may be extended upon request from the Person subject of the request for information.<sup>9</sup> In merger control proceedings, the deadline for replying to the request for information must be “reasonable” and it is usually also 10 working days.<sup>10</sup>

#### **e) Timing of Investigations and Enforcement Proceedings**

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

The AdC strives to conclude its Investigations and Enforcement Proceedings within a reasonable time period.

The LdC requires that, when possible, the AdC should carry out its Investigations of cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices within 18 months after initiating the Investigation.<sup>11</sup> Furthermore, when possible, the ensuing Enforcement Proceedings should be over 12 months after the notification of the Statement of Objections to the Person subject of the Proceedings.<sup>12</sup> If it is not possible to conclude the Investigation or the Enforcement Proceedings within these deadlines, the AdC informs the Person subject of the Investigation or Enforcement Proceedings, indicating the foreseeable period required to conclude the Investigation or Enforcement Proceedings.<sup>13</sup>

The AdC also needs to take into account the relevant limitation periods. The LdC provides a five-year limitation period concerning Competition Law infringements, except for infringements of procedural nature, for which the duration is three years.<sup>14</sup> The limitation period starts with the termination of the infringement. The period is interrupted by the notification by the AdC to any of the Persons subject of an Investigation of any act which

---

<sup>6</sup> See Article 37(5) of the LdC and the Guidelines regarding pre-notification contacts in merger control proceedings mentioned above.

<sup>7</sup> See Articles 15(1) and 43(2) of the LdC.

<sup>8</sup> See Article 15(2) of the LdC.

<sup>9</sup> See Article 14(3) of the LdC.

<sup>10</sup> See Article 49(3) of the LdC.

<sup>11</sup> See Article 24(1) of the LdC.

<sup>12</sup> See Article 29(1) of the LdC.

<sup>13</sup> See Articles 24(2) and 29(2) of the LdC.

<sup>14</sup> See Article 74(1) of the LdC.

may affect the Person.<sup>15</sup> The period is suspended during appeals or, upon the AdC's decision, while a decision regarding the same subject matter is pending in another EU Member State.<sup>16</sup> The suspension may not last longer than three years<sup>17</sup> and prosecution is time-barred at the latest after seven and half years (five years for procedural infringements), in addition to the period of suspension. Thus, there is an absolute limitation period of ten and half years (eight years for procedural infringements).

With respect to merger control proceedings, there are strict time limits. The AdC has 30 working days (so-called first phase) after the merger notification is declared complete in order to decide whether to approve the merger or initiate an in-depth investigation.<sup>18</sup> After initiating an in-depth investigation (so-called second phase), the AdC has to take a decision within a total of 90 working days (as of the date in which the merger notification was declared complete).<sup>19</sup> This period may be extended for 20 working days at the request of the notifying party or with its agreement.<sup>20</sup> If the notifying party submits commitments (whether before or after the initiation of an in-depth investigation), the merger review period is suspended for up to 20 working days.<sup>21</sup> The review period is suspended (i) if the AdC requests information from the notifying party and until a complete reply is received by the AdC,<sup>22</sup> (ii) when a hearing is held prior to the decisions at the end of the first and second phases,<sup>23</sup> and (iii) during consultation with sector regulators whose opinion is binding.<sup>24</sup>

#### **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

i. The LdC, which is publicly available, provides the legal framework regarding the identification and treatment of confidential information.

---

<sup>15</sup> See Article 74(3) of the LdC.

<sup>16</sup> See Article 74(4)(a) and (5) of the LdC.

<sup>17</sup> See Article 74(7) of the LdC.

<sup>18</sup> See Article 49(1) of the LdC.

<sup>19</sup> See Article 52(1) of the LdC.

<sup>20</sup> See Article 52(3) of the LdC.

<sup>21</sup> See Article 51(2) of the LdC.

<sup>22</sup> See Article 49(3) and (4) of the LdC.

<sup>23</sup> See Article 54(4) of the LdC.

<sup>24</sup> See Article 55(2) of the LdC.

ii. Confidential information obtained or used by the AdC during Investigations and Enforcement Proceedings is treated in accordance with the law. Members of the Board, directors and officials are bound by an obligation of confidentiality<sup>25</sup> and subject to liability.<sup>26</sup>

iii. As a rule, the AdC Investigations and Enforcement Proceedings are public. Any Person subject to an Investigation or Enforcement Proceeding, or any third party showing a legitimate interest, may have access to the non-confidential version of the case file.<sup>27</sup>

As an exception, in Investigations regarding cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices, until the notification of the SO, access to the case file may be denied when the case is subject to secrecy of proceedings.<sup>28</sup> The AdC may subject a case to secrecy of proceedings when it considers that (i) the investigation would be harmed if the nature of the proceedings were public or (ii) such measure is justified in connection with the rights of the Person subject to the Investigation or Enforcement Proceedings.<sup>29</sup>

Once the SO is notified to the Person subject to the Enforcement Proceedings, the Person will have immediate access to the confidential version of the case file. This includes all the case file irrespective of whether the documents are used as evidence or not. In particular, following the notification of the SO, the AdC will grant immediate access to the confidential version of the case file to the Persons' external legal counsel or economic advisor for the purpose of preparing the defence. In such a case, legal counsel and economic advisors must ensure confidentiality.<sup>30</sup>

The [Guidelines](#) regarding the Investigation and Enforcement Proceedings (which concern cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices) include a section on the treatment of confidential information.<sup>31</sup>

## **g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

The Statutes of the AdC foresee a number of rules designed for identifying, preventing and handling conflicts of interest, ensuring that decision makers and other AdC officials are objective, impartial and not conflicted in respect of any personal or financial interests. Decisions of the AdC are jointly taken by the members of its Board.

<sup>25</sup> See Article 43 of the Statutes of the AdC.

<sup>26</sup> See Article 44 of the Statutes of the AdC.

<sup>27</sup> See Articles 33(1) and (3) and 48 of the LdC.

<sup>28</sup> See Article 33(2) of the LdC.

<sup>29</sup> See Article 32(2) and (3) of the LdC.

<sup>30</sup> See Article 33(4) of the LdC.

<sup>31</sup> See Section VI.2.

Board members, directors and other AdC officials may not have a contractual relationship with, nor any shares in, any undertaking or association of undertakings, with the exception of instances in which they are clients of such undertakings or associations of undertakings.<sup>32</sup> This prohibition also applies to Board members and directors in the two-year period after leaving office, with respect to those undertakings or association of undertakings which have been involved in proceedings or subject to acts or decisions of the AdC while the Board members and directors were in office.<sup>33</sup>

Board members are also not allowed to have (i) any other professional occupation except for non-remunerated positions in research and academia or (ii) a contractual relationship with any other entity which may conflict with their duties and powers.<sup>34</sup>

These rules are complemented by additional procedures established in the AdC [Code of Conduct](#) and [Plan for Prevention of Corruption Risks and Related Infringements](#), including for example a gift and rewards policy as well as the obligation for any AdC official, upon joining the AdC, to sign a declaration reporting the absence of conflict of interests and committing to report immediately any such conflicts should they appear afterwards. Officials not reporting conflicts of interest are subject to disciplinary and criminal proceedings, when applicable.

#### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

i. The AdC provides a Person subject to an Enforcement Proceeding concerning cartels and other anticompetitive agreements, unilateral conduct or monopolistic practices with an SO that includes a description of the alleged violations against them, as well as the facts, evidence and relevant legal and economic reasoning relied upon by the AdC.<sup>35</sup>

ii. Once the SO is notified to the Person subject to the Enforcement Proceedings concerning cartels and other anticompetitive agreements, unilateral conduct or monopolistic

<sup>32</sup> See Articles 17(1)(b) and (c) and 30(6) of the Statutes of the AdC.

<sup>33</sup> See Articles 17(2) and 30(11) of the Statutes of the AdC.

<sup>34</sup> See Article 17(1)(a) and (d) of the Statutes of the AdC.

<sup>35</sup> See Article 24(3)(a) of the LdC.

practices, the Person will have immediate access to the confidential version of the case file. This includes all the case file irrespective of whether the documents are used as evidence or not. In particular, following the notification of the SO, the AdC will grant immediate access to the confidential version of the case file to the Persons' external legal counsel or economic advisor for the purpose of preparing the defence. In such case, legal counsel and economic advisors must ensure confidentiality.<sup>36</sup>

iii. Persons who receive an SO are given 20 days to present their defence in writing.<sup>37</sup> They also have the right to an oral hearing.<sup>38</sup>

In merger proceedings, if the AdC considers prohibiting a merger, it will prepare a draft decision and, in respect of the latter, provide the notifying party and interested parties with timely access to the file and the opportunity to submit comments within a hearing procedure taking place prior to the final decision.<sup>39</sup>

#### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

i. Under Portuguese law, Persons can appoint a qualified legal counsel of its choosing.<sup>40</sup> The AdC will grant requests submitted for this purpose.

ii. The AdC grants Persons the opportunity to present views regarding substantive and procedural issues via counsel.

iii. Legal professional privilege (LPP) is protected under Portuguese law. LPP covers lawful communication between Persons and not only external but also in-house counsel. In particular, communication between Persons and counsel relating to the solicitation or rendering of legal advice is protected by LPP and it may not be seized by the AdC, unless the communication relates to a crime for which counsel is under investigation.<sup>41</sup> The

<sup>36</sup> See Article 33(4) of the LdC.

<sup>37</sup> See Article 25(1) of the LdC.

<sup>38</sup> See Article 25(2) of the LdC.

<sup>39</sup> See Article 54 of the LdC.

<sup>40</sup> See Article 20(2) of the CRP.

<sup>41</sup> See Article 180(2) of the Criminal Procedure Code and Article 76(1) and (4) of the [Statutes of the Portuguese Bar Association](#).

Guidelines regarding the Investigation and Enforcement Proceedings include a section on the treatment of information covered by legal professional privilege.<sup>42</sup>

## **j) Decisions in Writing**

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

i. The AdC issues in writing all its final decisions in which it finds a violation of applicable Competition Laws, or in which it imposes a prohibition, remedy or sanction under such laws. These final decisions set out the findings of fact and conclusions of law on which they are based, and describe any remedies or sanctions.<sup>43</sup> Furthermore, subject to confidentiality rules and applicable legal exceptions, the AdC has to make its final decisions concerning Investigations and Enforcement Proceedings publicly available in the AdC website.<sup>44</sup>

ii. All commitments that the AdC accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, the AdC is legally bound to make public any commitments it accepts, describing the basis for the competition concerns.<sup>45</sup>

## **k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

Under Portuguese law, any decision of the AdC imposing a prohibition, remedy or sanction for violation of applicable Competition Laws may be appealed to the Tribunal da

<sup>42</sup> See Section VI.3.

<sup>43</sup> See Article 58(1) of the Misdemeanour Act and Article 153(1) of the Administrative Procedure Code.

<sup>44</sup> See Article 90(1) of the LdC.

<sup>45</sup> See Articles 23(5) and 90(1) of the LdC.

Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court).<sup>46</sup>  
The same applies to the AdC's interlocutory decisions and interim measures.<sup>47</sup>

The court has powers to carry out a full judicial review, receive documents submitted by the parties and hear experts or other witnesses, including representatives from the AdC. The court may also reduce or increase the fine.<sup>48</sup>

---

<sup>46</sup> See Articles 87(1) and 92(1) of the LdC.

<sup>47</sup> See Articles 85(1) and 86 of the LdC.

<sup>48</sup> See Article 88(1) of the LdC.