

LEGAL ALERT

DEFENCE OF COMPETITION IN THE DIGITAL SECTOR

The Portuguese Competition Authority (PCA) – having already assumed digital as one of its [priorities for 2023](#) – has recently published a [policy brief](#) on “**Defence of Competition in the Digital Sector in Portugal**”, where it focuses its analysis on four major topics, identified below. By way of background, the PCA also notes that it has created a task force for the digital sector that has been analyzing several complaints and exposures, as well as developing unofficial investigations.

I. **Barriers to entry and expansion in the digital sector in Portugal**

The PCA understands that the **characteristics of digital markets** – such as the existence of economies of scale and/or scope, network effects, switching costs, access to data, and vertical integration – may pose **barriers to entry and expansion for** undertakings in these markets. The PCA also considers that there is a **trend towards high concentration in digital markets**, which may be conducive to the creation of conditions that allow existing players to adopt **strategies to exclude competitors**.

This issue is particularly sensitive for companies with a dominant market position, since it may be framed as an infringement of competition rules. The PCA highlights, in this regard, the administrative offence proceeding it has opened against Google regarding self-preferencing practices at various levels of the value chain associated with the sale of online advertising space, which investigation is currently being conducted by the European Commission.

II. Vertical Restraints in the Digital Sector

The growth of **online commerce** models (including marketplaces) is seen by the PCA as a possible driver of the use of **vertical agreements between suppliers and retailers** in the digital environment leading to possible restrictions on this matter.

Vertical restrictions – which, according to the PCA, may concern the characteristics of the companies, the type of product sold, the geographic scope, and the conditions under which transactions will take place – must be **properly weighed** by companies operating in the digital sector so as **not to infringe competition rules**.

In this sense, the PCA has also been developing sectorial analyses with the aim of better understanding these relationships in the scope of e-commerce and ascertaining the existence of possible efficiency gains and respective compensation for anticompetitive effects.

III. Algorithms and Competition

The PCA has been trying to deepen its knowledge on the **prevalence and evolution of pricing algorithms** by preparing sector inquiries (namely in the online retail sector of electronic goods and household appliances) aimed at anticipating possible risks to the conditions of competition in digital markets.

The PCA also understands that the **use of algorithms may result in efficiencies and reinforce price comparison by consumers**. However, there are competition risks associated with monitoring algorithms in the sense that they may be instrumental in price coordination agreements and commercial strategies between companies (particularly in the implementation of price fixing and alignment strategies between competitors), also allowing for a faster detection of possible deviations.

From another perspective, **ranking, search and recommendation algorithms** are considered by the PCA as mechanisms that, despite allowing a more personalized offer to each user, may raise **competition concerns, given the influence they have on the consumer's final**

decision (e.g., if they are used in competitor exclusion strategies or coordination strategies in the market).

As for the **online advertising** industry, the PCA identifies the risk that certain price auctions and their underlying algorithms may be biased to favor certain participants in that auction.

IV. Strengthening enforcement through digital tools

Finally, the PCA emphasizes the possibility of using **investigative tools in the digital environment** to increase the effectiveness in the analysis of evidence of possible anti-competitive practices, noting that it has already collected information through web scraping.

These monitoring tools have **already been used to support and reinforce a decision to open an investigation**, as well as a request for a **search warrant, examination, collection, and seizure**, in the context of a case involving alleged retail price maintenance, in a digital environment, by a supplier of products in the pharmaceutical/health sector.

The [European law and competition team of Morais Leitão](#) closely follows the activities of the PCA in order to keep its clients informed and to provide advice on various matters.

[Dzhamil Oda \[+ info\]](#)

[Gonçalo Rosas \[+ info\]](#)

[Inês Ferrari Careto \[+ info\]](#)

[David Noel Brito \[+ info\]](#)

This publication is purely informational and is not meant to be a source of legal advice, nor does it contain a comprehensive review of all aspects of the law and practice referred to. The information contained herein refers to the date of first publication, readers being warned to take legal advice before applying it to specific issues or transactions. The contents of this publication may not be copied, disclosed or distributed in whole or in part without prior consent. For more information please contact us at com.pr@mlgts.pt.