Anticompetitive Contractual Clauses: the Blueotter and EGEO Case – PRC/2019/3

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On June 30th, 2021, the Portuguese Competition Authority (hereinafter, "PCA") adopted a condemnatory decision addressed to the companies Blueotter (and its members Circular, Citri, Proresi) and EGEO (and its members EGEO SGPS and EGEO TA), as well as six directors of those companies, for breach of Article 9, no. 1 of Law No. 19/2012 on restrictive competition agreements.

Between 2017 and 2019, the Blueotter Group and the EGEO Group, both service providers within the scope of waste management systems in Portugal, established non-competition obligations enshrined in the "Contract for the Provision of Services for the Recovery and Disposal of Waste" (hereinafter, "CPS") and in the Share Purchase and Sale Promissory Agreement (hereinafter, "SPSPA").

In the CPS, the parties agreed to use their best efforts to minimize expressions of interest or presentation of commercial proposals to customers that the counterparty had in its customer portfolio at the date of signature of said contract, in a clause to which the parties called it the "Principle of Mutual Cooperation".

The SPSPA was signed within the scope of the merger control procedure, and it would allow Blueotter to acquire exclusive control over Circular. In this contract, there were clauses that expanded the scope of the "Principle of Mutual Cooperation", prohibiting competition between all the business areas developed by the economic groups involved in the transaction (The "Non-Competition Commitment").

In order to have an agreement that restricts competition, it is necessary to be in the presence of companies that conclude an agreement, regardless of the formality chosen - it is enough that the companies have expressed their common will to behave in the market in a certain way -, and that it has as its object the restriction of competition between

Member States, that is revealing a sufficient degree of severity in relation to the competition or having significative impeding, restrictive or false effects.[1]

The European jurisprudence has come to an understanding that the act of drafting an agreement of non-competition obligation constitutes an acknowledgement by the signatory parties of the existence, between them, of effective or at least potential competition.

In view of the evidence gathered and after having heard the parties, the PCA concluded that the "Non-Competition Obligations" - which include the "Principle of Mutual Cooperation" and the "Non-Competition Commitment" - constituted a horizontal market-sharing agreement with national scope, characterized by a continuous effort by the Blueotter Group and the EGEO Group to eliminate any competitive dynamics between the aforementioned economic groups.

The evidence contained in the case file also allows us to conclude that four directors of EGEO and two directors of Blueotter were directly aware of the "Non-Competition Obligations" and actively participated in the negotiation and/or implementation thereof, not adopting measures to terminate them.

The legal consequence resulted in the nullity of the agreements and the imposition of a fine of a total of 2.9 million euros to the companies and directors involved, plus an accessory sanction of publishing an extract of the final decision taken by the PCA in the II Series of the Diário da República and in a newspaper with national expansion.

Thus, the PCA fulfils the role of guaranteeing the application of the rules for the promotion and defence of competition, respecting the principle of the market economy and free competition in the interests of consumers, putting an obstacle to illegal market sharing agreements in the national territory.

[1] European Court of Justice Cases: LTM process 56/65, Allianz Hungária C-32/11, T-Moblie Netherlands C-8/08.