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LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Contribution from Portugal

3-4 September 2013, Lima, Peru

The attached document from Portugal is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

CONTRIBUTION FROM PORTUGAL

1. The 2012 reform of the Portuguese Competition legal framework

1. In 2012, the Portuguese Competition legal framework was reformed through the approval of the new Competition Act, Law No. 19/2012 of 8th May. The new Competition Act entered into force on the 7th July 2012.

2. The new Competition Act replaces two legal instruments: the previous Competition Act of 2003, Law No. 18/2003, of 11 June 2003, and the previous Leniency regime, Law No. 39/2006, of 22 November 2006.

3. The reform of the Portuguese competition legal framework also included an institutional dimension. A new specialized Court on Competition and Regulation matters was created, the Competition, Regulation and Supervision Court. Moreover, a reform of the Portuguese Competition Authority's by-laws is underway.

4. The reform of the legal framework for competition was initiated by a project presented by the Portuguese Competition Authority (PCA) in 2008. However, the process was bolstered by the Economic Adjustment Programme initiated in 2011. In particular the Memorandum of Understanding signed between Portugal and the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) contains measures addressing the need to reinforce competition enforcement in Portugal, including institutional and legal issues regarding competition enforcement.

5. In view of the measures contained in the MoU, the review process of the Competition ACT was re-launched by the submission by the PCA of a project to the Government in July 2011. The project was submitted to public consultation, which gave the opportunity to various stakeholders to express their views on the project. The Government then presented the law proposal to National Parliament, which finally approved it in March 2012.

6. The new Competition Act aims at introducing more legal certainty regarding procedures, making them more autonomous from the subsidiary law, while striving to achieve further convergence with the European Union competition law and procedures.

7. One of the areas which benefited most from the 2012 reform was the investigation of anticompetitive practices, in particular the legal framework applicable to power to carry out unannounced inspections.

8. In the legislative process, the stock-taking exercise of the 10 years of experience of the PCA and national Courts in applying the 2003 Competition Act was a very important element, in particular to introduce more detailed rules on procedure and to fine-tune a vast array of legal aspects.

9. Another key element in the reform was the goal of achieving further convergence with the European Union law and international best practices, which have led to the introduction of innovative legal solutions within the Portuguese legal order.

2. Reinforced powers of inspection

10. The power to carry out unannounced inspections was already foreseen in the 2003 Portuguese Competition Act, although limited to business premises.

11. The 2012 Portuguese Competition Act foresees the power to carry out inspections in Article 18, establishing formal requirements similar to those applicable under the previous competition act.

12. As before, the PCA must obtain a judicial warrant and may request the cooperation of the police authorities, whenever necessary. In practice, the cooperation of the police is mostly used to ensure entrance at the inspected premises. In order to obtain the warrant, the PCA must submit a well substantiated request to the judicial authorities, which issue the warrant or refuse it within 48 hours.

13. However, the new 2012 Competition Act introduces important clarifications and new rules regarding the scope and procedure to carry out unannounced inspections, namely regarding digital evidence, private and other particular kinds of premises and incidental evidence.

2.1 Digital evidence

14. One of the most significant clarifications introduced by the 2012 Competition Act is related to the search and seizure of digital evidence.

15. The PCA's experience shows that evidence in digital format, such as emails, is crucial for proving antitrust infringements, e.g. contacts between undertakings in cartel cases. Undertakings rely increasingly in digital storage of information and electronic communication means.

16. Due to legal amendments in the penal law subsidiary applicable to competition law procedures, it was unclear under the 2003 Competition Act whether the PCA could search and seize digital evidence. The 2012 Competition Act explicitly states that the PCA may carry out searches, examinations, collection and seizure of accounting data or other documentation, irrespective of the devices where they are stored or saved, in the premises, property and means of transport of the undertakings concerned whenever such actions are deemed necessary for obtaining evidence (Article 18(1)c).

17. Moreover, the scope of the power to seal premises is also clarified in accordance with scope of the dawn raids, explicitly encompassing any device where relevant evidence may be stored or saved, such

as computers and other data storage electronic equipment, during the period and to the extent strictly necessary.

18. Therefore, the Competition Act clearly empowers the PCA to search and seize evidence in electronic format, thus increasing legal certainty in antitrust procedures.

2.2 *private premises*

19. The 2012 Competition Act also broadens the scope of the investigative powers of the PCA allowing dawn raids to private premises, in line with European Union competition law.

20. According to Article 19 of the Competition Act, the PCA may carry dawn raids in the private homes of partners, members of the board of directors, employees or anyone who works with the undertaking or association of undertakings involved in the infringement.

21. However, special rules apply to inspections in private premises, which take into account the interests at stake, namely the protection of privacy. Rules on inspections to private premises are also applicable to places other than homes, such as vehicles.

22. The dawn raid may only be authorized by a judge and be carried out between 7 a.m. and 9 p.m. Furthermore, there are specific formal requirements to be fulfilled regarding the request to obtain the judicial warrant. The PCA's request must mention the seriousness of the infringement under investigation, the relevance of the evidence being sought, the involvement of the undertaking or association of undertakings and the reasonableness of the suspicion that evidence is being kept on the private premises for which a search warrant has been requested.

2.3 *Offices of a lawyer, doctor's surgery or financial institutions*

23. The 2013 Competition Act also includes specific rules concerning dawn-raids carried out in the offices of a lawyer, in a doctor's surgery or in financial institutions. These rules take into consideration the sensitive nature of the inspected sites, in particular regarding professional privilege, privacy and banking secrecy.

24. Similarly to private homes, the warrant authorizing the dawn raid must be issued by a judge, which must also be present in the inspection.

25. Moreover, the local president of the Bar Association or of the Medical Association must previously be informed that a dawn raid will be carried out, so that this person or an official representative can be present.

26. Regarding financial institutions, the 2013 Competition Act establishes that the judge seizes the evidence (Article 20(6)) and specific rules on the examination of documents are foreseen.

2.4 *Incidental evidence*

27. Another important aspect which is clarified under the 2013 Competition Act is the power of the PCA to seize incidental evidence.

28. During a dawn raid, the PCA may find evidence of another antitrust infringement not covered by the judicial warrant. If the PCA could not seize it immediately, the integrity of the evidence could be threatened, which would jeopardize any further investigation.

29. According to Article 20 of the Competition Act, the PCA may seize evidence even in the absence of a judicial warrant whenever there is urgency or danger in delaying such seizure. In these cases, the seizure must be validated by a judicial authority within 72 hours.

30. Therefore, this provision empowers the PCA to act immediately, securing evidence of an antitrust infringement outside a judicial warrant found incidentally.

3. Recent experience

31. Since the entry into force of the new Competition Act, the PCA has carried out two dawn raids, both aiming at collecting evidence of possible anticompetitive agreements.

32. One of the dawn raids targeted banking institutions for suspicions of exchange of sensitive commercial information which may amount to a breach of national and EU competition law. As explained above, judges and public prosecutors participated in the inspections together with PCA officials.

33. The challenges faced during the inspections relate mostly to resources constraints. The inspections targeted a high number of sites, which were inspected simultaneously. This is quite challenging for a small sized competition authority such as the PCA

34. Moreover, during the inspections the PCA used IT forensic tools to search and seize evidence. As many teams are working at the same time, this posed the challenge of training PCA officials and prioritizing the allocation of more sophisticated IT tools to the most relevant targets.

35. The experience thus far shows that the new rules introduced by the 2012 Competition Act, in particular regarding digital evidence, have proven to increase legal certainty on procedural issues and due process in the benefit of both the PCA and undertakings.