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INDEPENDENCE OF COMPETITION AUTHORITIES--FROM DESIGNS TO PRACTICES

Contribution from Portugal

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INDEPENDENCE OF COMPETITION AUTHORITIE--FROM DESIGNS TO PRACTICES

-- Portugal --

1. Design of the Portuguese Competition Authority

1. The Portuguese Competition Authority (“PCA”) was created in 2003 with the aim of replacing two separate bodies previously entrusted with the enforcement of competition law in Portugal: the Directorate-General for Trade and Competition (“Direção-Geral do Comércio e Concorrência”), which had investigative powers, and the Council for Competition (“Conselho da Concorrência”), which had decision-making powers. Both entities were integrated within the Ministry of Economy:

2. The separation of tasks between the Directorate-General for Trade and Competition and the Council for Competition was considered to be a source of confusion and divergence that could undermine the credibility and efficiency of competition policy in Portugal. Moreover, their integration within the Government structure could constitute a threat to their independence.

3. Therefore, an institutional change took place in 2003 with the main objective of establishing an independent authority with the mission of enforcing and promoting competition rules in Portugal¹, able to effectively contribute to ensure compliance with competition rules and to promote a true culture of competition in Portugal.

4. The PCA is the only authority responsible for the enforcement of competition law in Portugal. A single administrative model is therefore in place in Portugal since 2003.

5. The PCA is also a single-purpose authority, as its only task is the enforcement and promotion of competition. It does not have powers to defend consumer’s interests as such or to regulate markets, which are entrusted to different bodies². The PCA acts in all areas of economic activity, including those subject to sector regulation.

6. The PCA was awarded operational, administrative and financial autonomy to perform its sanctioning, supervisory and regulatory powers.

7. In 2014, new Bylaws of the PCA were approved³, following the publication of the Framework-Law for Regulatory Authorities in 2014, one of the key structural reforms of the Economic Adjustment Programme.

8. The Framework Law, which applies to the Portuguese regulatory authorities, including the sector regulators (National Regulatory Authorities – NRAs) and the PCA, is based on the fundamental principles

¹ The PCA was created by the Decree-Law No. 10/2003, of 18 January 2003, which also approved its first Bylaws. In 2003, a new Competition Act (Law No. 18/2003, of 11 June) was also enacted.

² The Directorate-General for Consumers and the several National Regulatory Authorities, respectively.

³ The new Bylaws were approved by Decree-Law No. 125/2014, of 18 August 2014 and entered into force in 1 September 2014.

⁴ Law No. 67/2013, of 28 August.

of institutional design of regulatory authorities: independence, rigour and accountability. It aims in particular at strengthening the role and powers of the NRAs and the PCA and at ensuring their independence and financial, administrative and management autonomy.

9. The new Bylaws of the PCA did not introduce significant changes to the institutional model for the enforcement of competition law in Portugal.

2. The 2014 Bylaws: Independence and accountability

10. The PCA has always been, since its creation, an independent entity, having at its disposal a set of legal tools which allows it to act with a high degree of autonomy.

11. Notwithstanding, the new Bylaws have enhanced some guarantees of independence, in line with the Framework Law for Regulatory Authorities.

12. According to the Framework Law, the PCA and NRAs are organically, functionally and technically independent, have administrative, financial and management autonomy and own their own bodies, services, staff and property. They shall be independent in the exercise of their function and are not subject to government supervision. They are entrusted with regulatory, regulation, monitoring, supervisory and sanctioning powers.

13. Accordingly, the new PCA's Bylaws strengthen its independence and provide for further administrative and financial autonomy.

14. Besides enhancing the guarantees of independence, accountability requirements were also reinforced both in the Framework Law and in the new PCA's Bylaws. The PCA and NRAs are bound to perform their activity according to high standards of quality and economic efficiency and are subject to duties of transparency and report.

2.1 Independence

2.1.1 Nature of the PCA

15. The PCA is an independent administrative entity and has been awarded administrative, financial and management autonomy, as well as organic, functional and technical independence (Article 1 of PCA's Bylaws).

2.1.2 Operational independence

16. The law expressly establishes that the PCA is independent in the performance of its duties, thus having operational autonomy (article 40(1) of the PCA's Bylaws).

17. The previous PCA's Bylaws of 2003 stated that the independence of the PCA in the performance of its duties was "without prejudice to the guidelines on competition policy set out by the Government (...) or to the acts subject to ministerial oversight".

18. This provision, which could be perceived as lessening the PCA's independence, has now been removed from the Bylaws. It is now explicitly stated that the PCA is not subject to governmental supervision and that the Government cannot make recommendations or issue directives to the Board on the priorities to be adopted by the PCA in carrying out its mission (Article 40(1) of the PCA's Bylaws). Therefore, the law now excludes the possibility of external interference with the PCA's activity.

19. Also, another sign of the reinforcement of the PCA's autonomy in the performance of its duties is the introduction, by the 2012 Competition Act (Article 7), of a priority-setting mechanism, which allows for an assessment of the investigations to pursue and a more efficient allocation of resources.

20. Therefore, the PCA is now able, in the exercise of its autonomy whilst based on the criterion of the promotion of public interest, to define priorities for its activity, both in terms of competition policy and in the context of its enforcement activity. Concerning the former aspect, the PCA annually defines its priorities of competition policy for the following year. Those priorities are published on the PCA's website. In relation to the latter point, the introduction of the principle of opportunity allows the PCA to determine the degree of priority to be applied to a matter brought to it.

21. Under the law (Article 41 of the Bylaws), a prohibition decision of the PCA issued within the scope of merger control may be subject to an extraordinary appeal to the member of Government responsible for the economy, which could be interpreted as weakening the PCA's independence. However, this exceptional authorization of a merger, which can be granted by the Council of Ministers following that extraordinary appeal, can only be based on the achievement of fundamental strategic interests of the national economy which specifically outweigh the disadvantages for competition.

22. Therefore, it can be concluded that the PCA and the Council of Ministers carry out different types of assessment, with no mutual interference, as the Government does not interfere with the PCA's assessment under the competition act.

2.1.3 *Management and financial autonomy*

23. As stated in the Framework Law for Regulatory Authorities and in its Bylaws, the PCA is entrusted with management and financial independence, has its own staff, defines its internal organization and manages its budget autonomously.

24. In particular, some decisions concerning staff recruitment and career management, previously dependent on ministerial authorization, are now, according to the law, autonomously taken by the PCA and NRAs.

25. There are, however, some temporary limitations for the PCA in terms of staff recruitment and career management due to the context of economic downturn to which Portugal has been subject. Actually, even if on a provisional basis, the PCA is at the moment subject to rules similar to those applicable to Public Administration in general, namely in the State budget, that impact on its autonomy in the staff recruitment (where Government authorization is needed) and on the management of human resources (promotions and salary increases not being allowed).

2.1.4 *Funding*

26. Having sufficient human and financial resources is critical for the PCA to perform its duties in an efficient manner⁵.

⁵ As "[t]he attribution of sufficient staff and budget to NCAs is a fundamental precondition for each authority to be able to effectively enforce the (...) competition rules" (European Commission – Commission Staff Working Paper "Enhancing competition by the Member States' competition authorities: institutional and procedural issues", Accompanying the document "Communication from the Commission to the European Parliament and the Council "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", p. 7).

27. The financing of the PCA is ensured by transfers from NRAs, as well as by fees charged within the scope of the PCA's specific activity and other types of revenue, such as part of the fines imposed. This is an original solution which has guaranteed funding completely independent from the State budget.

28. Transfers from NRAs are explicitly regulated in the PCA's new Bylaws, with the aim of increasing predictability of financing, and are, by far, the most important source of financing, accounting for around 81% since 2004.

29. The amount of transfers from NRAs is determined by applying a rate on the total amount of own revenues of NRAs. If an annual ministerial order setting out that rate of NRAs' revenues is not adopted, a default rate to be transferred to the PCA is now set in Article 35 of the Bylaws. Thus, contributions may vary between 5.5% and 7.0% of the total amount of own revenues of NRAs, with a default rate of 6.25%, is now foreseen.

2.1.5 Guarantees of independence concerning the Board of Directors

30. With the aim of strengthening the guarantees of independence, some innovations regarding the members of the PCA's Board of Directors were introduced in the 2014 Bylaws.

31. The PCA's Board of Directors is a collegial body comprising a chair and up to three members. It may also have a deputy-chair and an odd number of members must be assured.

32. Already with the 2003 Bylaws, Board Members could only be removed/dismissed under very exceptional circumstances, such as committing a criminal offence (Article 15).

33. With the new Bylaws, Board Members are now appointed for a non-renewable six years term. As regards the appointment procedure, novelties include the intervention of the Portuguese Agency for the Selection and Recruitment of Senior Administration Officers (CRESAP) and a hearing before the Parliament. CRESAP must issue an opinion on the suitability of the members' profile for the duties to be performed, including compliance with the applicable conflict of interest and impediments rules (Article 14). After the hearing of the Board Members before the Parliament, they are finally appointed by the Council of Ministers.

2.2 Accountability

2.2.1 Economic and financial accountability

34. Along with the rules on the PCA's autonomy as regards economic and financial management, rules were created to ensure an adequate degree of accountability on, in line with the principle of transparency set forth in the Framework Law for Regulatory Authorities.

35. In this regard, the PCA's budget, multiyear plan and annual management report and accounts are subject to the approval of the members of Government responsible for finance and the economy. It is worth noting, however, that approval may only be withheld by a decision based on illegality or on damage to the aims of the PCA or to the public interest, and a tacit approval is now possible (Article 40).

2.2.2 Transparency

36. Transparency requirements have also been introduced by the new PCA's Bylaws.

37. PCA's regulations with external binding effect are now required to be submitted to public consultation, involving Government, businesses, other relevant stakeholders, user or consumer associations, as well as the general public (Article 7).

38. Detailed publicity requirements are also contained in the new Bylaws. An extensive list of information to be publicised at the PCA's website has been established which includes legislation governing its activity, regulations, guidelines, recommendations and codes of conduct, the PCA's competition policy priorities, its activity plans, activity reports and multiyear plans, budgets and management reports and accounts, information regarding the PCA's supervision and sanctioning activity, co-operation protocols or agreements and tenders for recruitment of staff (Article 46).

2.2.3 *Scrutiny*

39. The PCA's plan of activities, programming and multiyear plan is annually submitted to the relevant committee of the Parliament (Article 42(1) of the Bylaws).

40. The members of the Board appear, whenever requested, before the relevant committee of the Parliament to provide information or clarification on the PCA's activities or on matters of competition policy (Article 42(3) of the Bylaws).

41. Also, information on the implementation of the PCA's annual and multiyear activity plans and on its budgets and multiyear plans may be requested to the Board by the member of the Government responsible for the economy (Article 42(4) of the Bylaws).

2.2.4 *Incompatibilities and impediments for members of the Board of Directors*

42. The new PCA's Bylaws contain several rules concerning incompatibilities and impediments for the members of the Board aiming at enhancing the transparency of their activity and providing for strengthened guarantees of independence (Article 17).

43. The Board members must perform their duties on the basis of exclusivity. Furthermore, during a period of two years following the end of their term, Board members are not allowed to maintain any contractual link or relationship with companies involved in proceedings having taken place during the duration of their mandate.

3. **Concluding remarks**

44. Since 2003, competition law enforcement is entrusted to the PCA, as the single administrative authority with the mission of promoting and protecting competition.

45. The new PCA's Bylaws of 2014 have not changed the institutional model of competition enforcement in Portugal.

46. The PCA is, from the outset, an independent entity, acting with a high degree of autonomy.

47. Even if no fundamental institutional changes were introduced in the 2014 PCA's Bylaws, some guarantees of independence and autonomy of the management of financial and human resources were enhanced, in accordance with the Framework Law on Regulatory Authorities.

48. According to its current Bylaws, the PCA is an independent administrative entity which is endowed with administrative, financial and management autonomy, as well as with organic, functional and technical independence.

49. There are, however, some challenges remaining, mostly due to the last years' economic context. Those challenges mainly regard limitations on the PCA autonomy to recruit staff and manage its human resources.