RIGHT OF DEFENCE – ARTICLE 3 OF THE ECN+ DIRECTIVE

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Abstract *This text focuses on the right of defence recognized by article 3 of the ECN+ Directive in a comparative perspective between the level of protection granted by the EU Competition Law Proceedings, that provides for the minimum standard to all Member States, with the level of protection granted by the Portuguese Legal System, and see if we reach this minimum standard.*

1. INTRODUCTION

In this text, I am going to talk about the right of defence, which is one of the rights recognized by Article 3 of the Directive aiming at harmonizing the powers of national competition authorities (hereafter "ECN+ Directive")[1].

As stated in recital 14 of the ECN+ Directive, national competition authorities (hereafter "NCAs"), in cases related to Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter "TFUE"), should at least comply with the general principles of Union law and with the Charter of Fundamental Rights of the European Union, according with the case law of the Court of Justice of the European Union (hereafter "CJEU"). This means that we can consider the EU Competition Law Proceedings the minimum standard to all Member States.

1 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

It is important to note that this minimum is not as low as we might think. In a recent text[2], Bernatt, Botta & Svetlicinii made the comparison between the level of protection granted by EU Competition Law Proceedings to the right of defence with the level of protection granted by the legal systems of some of EU countries[3]. They came to the conclusion that the level of protection given by the EU Competition Law Proceedings is stronger.

What I'm going to do is compare the level of protection granted by EU Competition Law Proceedings with the level of protection granted by the Portuguese Legal System, and see if we reach this minimum standard.

2. CONTENT OF THE RIGHT OF DEFENCE

The right of defence was recognized for the first time by the CJUE in *Hoffmann La Roche*. According to the CJUE "*the right of defence is a fundamental principle of Community law which must be complied with (by the European Commission) even if the proceedings in question are administrative proceedings.*"[4]. This right includes several sub-rights, namely the following: (i) the right to be informed – Article 3(2) and (3); (ii) the right to be heard – Article 3(2); (iii) the right to access the file; (iv) the privilege against self-incrimination; (v) and the legal professional privilege. I will analyze each of these sub-rights.

2.1. Right to be informed

Starting with the right to be informed, we find in EU Competition Law Proceedings several manifestations of this right.

The first and most important is the statement of objections, where the Commission sets-out its preliminary position on the alleged infringement of Articles 101 and/or 102 TFEU, after an in-depth investigation[5]. Its purpose is to give the parties concerned the information they need to exercise their defence. In the Portuguese legal system we have the Note of illegality

2 Bernatt, Botta, & Svetlicinni, 2018.

3 The countries were: Bulgaria; Croatia; Czech Republic and Slovakia; Hungary; Poland; and Romania.

4 C-85/76, *Hoffmann-La Roche & Co. AG v. Commission*, ECLI:EU:C:1979:36, p. 9. Such statement is codified today in Recital 37 in the preamble of Reg. 1/2003.

5 See Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002, Article 10 of Commission Regulation (EC) No 773/2004 of 7 April 2004 and European Commission, 2011:3.1.1.

– Competition Act, Articles 24(3), a), and 25(1) – which has the same function as the statement of objections.

Another important manifestation of this right is the *supplementary statement of objections* and the *letter of facts*[6]. The supplementary statement of objections is used in two cases: when the Commission wants to change the facts, due to the production of new evidence; and when the Commission wants to change the legal basis to the disadvantage of the parties concerned. The letter of facts is used when new evidence is produced, but with no implications to the facts stated in the statement of objections. The letter of facts informs the parties of the new evidence. In the Portuguese legal system we also have the "Supplementary" note of illegality, when the Portuguese Competition Authority (hereafter "AdC") wants to change de facts or the legal basis, as well as a notification of new evidence which has the same function as the letter of facts[7].

In addition to these information means, the Commission provides information at different stages of the proceedings – an example of that is when the Commission informs the parties subject to investigations pursuant to formally opening the proceedings[8]. In the Portuguese legal system, we don't have specific legal rules on other information at different stages of the proceedings, but I think that, in general terms, information should be provided at any stage of the proceeding when it is necessary for the exercise of the defence, such as when the AdC applies an interim measure or when it addresses requests for information or documents. In requests for information or documents, the Portuguese Competition Court has already ruled in case nr. 228/18.7YUSTR-A that the AdC has to inform the relevant party of the facts that led to the investigation so that the party can control the necessity of the request. However, this understanding is not yet well established in practice by the AdC.

2.2. Right to be heard

About the right to be heard, in EU Competition Law Proceedings there are two ways to exercise it.

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6 See European Commission, 2011:3.1.7. and also Case 54/69, *SA française des matières colorantes (Francolor) v. Commission*, ECLI:EU:C:1972:75. pp. 16 –17.

7 Portuguese Competition Act, Article 25(5) and (6)).

8 Bernatt, Botta & Svetlicinii, 2018: 7.

One way is the written reply to the Statement of Objections, where the parties concerned can express their point of view, can present documents and may require the production of other means of proof.[9] The time-limit can be set with some flexibility depending on the circumstances of the case. This is very important, because cases are not all the same in terms of complexity and a fixed deadline may not be applicable to all types of cases, thus potentially jeopardizing the effective exercise of the right of defence in cases of greater complexity.

The other mean is the Oral Hearing, to be conducted by a fully-independent Hearing Officer, and where the parties can present their arguments, and natural persons can be heard[10].

In the Portuguese Legal System we also have these two ways to exercise the right to be heard, and the time-limit to present the written reply to the note of illegality can be set with some flexibility depending on the circumstances of the case[11]. The only difference is that in our case oral hearing is not conducted by a Hearing Officer in full independence. This difference is important because powers are all concentrated on the same authority, although it is not a decisive one for any failure during the oral hearing may be subject to review by the court.

2.3. Right to access the file

About the right to access the file, in EU Competition Law Proceedings the rule is the access to the file after the statement of objections is issued[12]. In the Portuguese Legal System the rule is the access both before and after the statement of objections is issued[13].

There are exceptions in the two systems[14], the most important of which, in practice, is related to business secrets. In both systems these secrets are

9 Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002, Article 10 (2) and (3) of Commission Regulation (EC) No 773/2004 of 7 April 2004 and European Commission, 2011:3.1.4.

10 Portuguese Competition Act, Article 25(1).

11 Portuguese Competition Act, Articles 25(2) and 26.

12 Article 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002, Article 15 of Commission Regulation (EC) No 773/2004 of 7 April 2004 and European Commission, 2011: 3.1.2..

13 Portuguese Competition Act, Article 33(1).

14 In the EU Competition Law Proceedings the exceptions are: business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States, like correspondence between the Commission and the competition authorities of the Member States or between the latter – see Article 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002, Article 15 (2) of Com-

protected. This protection may give rise to very serious problems when accessing confidential information is necessary for the exercise of the right of defence. However, both systems have procedures for facilitating the exchange of confidential information between parties to the proceedings. So, in EU Competition Law Proceedings, we have the negotiated disclosure to a restricted circle of persons and the data-room procedure[15]. In Portuguese Legal System, we have access restricted to the lawyer or economic adviser for the exercise of the right of defence; reproduction or use of information for any other purpose is not permitted[16].

I think that Portuguese rules about this reconciliation are not completely clear and raise some problems of interpretation, one of which is whether the legal standard means that documents classified as confidential can only be consulted in a data-room. I think the legal rule on this subject is not very clear, and this is only a possible interpretation. For this reason I think this issue should be more subject to discussion and needs further clarification.

2.4. Privilege against self-incrimination:

About the privilege against self-incrimination, the Portuguese Legal System is equal to the EU Competition Law Proceedings, as it follows the case law of the Court of Justice on this matter. So for us, like in the EU Competition Law Proceedings, the subjective scope of the privilege includes the legal person. Note that some legal systems – such as in Germany and in the United States – do not recognize this right to legal persons, only natural persons. The objective scope only includes "directly" self-incriminatory information. It does not include preexisting documents, even if they are directly self-incriminatory, nor information not directly self-incriminatory[17].

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mission Regulation (EC) No 773/2004 of 7 April 2004 and European Commission, 2011: 3.1.2. and 3.1.3. In the Portuguese Legal System some exceptions are: before the note of illegality when the entire file is classified as confidential to protect investigation and access could undermine the investigation; and after in relation to documents that contain information classified as confidential, such as business secrets (Portuguese Competition Act, Article 33(2), and (4))

15 See European Commission, 2011:3.1.3.

16 See Portuguese Competition Act, Article 33(4).

17 See: C-374/87, *Orkem v. Commission*, ECLI:EU:C:1989:387, pp.34-35; joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to C-252/99 and C-254/99, *Limburgse and others v. Commission*, ECLI:EU:C:2002:582, p. 273; joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C- 219/00, *Aalborg Portland and others v. Commission,* ECLI:EU:C:2004:6, pp. 61-65; joined Cases C-65/02 and C-73/02, *ThyssenKrupp v. Commission*, ECLI:EU:C:2005:454, p. 49; C-301/04, *SGL Carbon and others v. Commission*, ECLI:EU:C:2006:432, pp. 39-49; C-407/04, *Dalmine SpA v. Commission*, ECLI:EU:C:2007:53, p. 34; joined Cases

I think there remain two open questions related to the privilege against self-incrimination.

The first is the objective scope of the privilege in the case of natural persons. In this case there are specific reasons for protecting the right against self-incrimination which do not apply to legal persons, for example related to the dignity of the human person, which may justify a wider objective scope. This point is important to us because in our system natural persons may be subject to sanctions. I think Article 31 of the directive allows for this understanding.

The second is related to pre-existing documents and a theory that exists in United States concerning the act of delivering the document, because as it is a form of communication, it has a meaning and that can lead to the admission of the infringement. There is also an important difference between the pre-existing document and the act of delivering. The former is produced outside the proceeding; this means that is not contaminated with the strategic thinking originated by the proceeding. On the other hand, the act of delivering is produced within the proceeding. I think that is an open question that needs further discussion and clarification.

2.5. Legal professional privilege:

In EU Competition Law Proceedings the objective scope includes: written communications between the lawyer and its client made for the purpose and interest of the exercise of the client's rights of defence. It covers communications both exchanged after the initiation of the administrative proceedings or earlier written communications, which have a relationship to the subject-matter of that same proceeding; preparatory documents, even if they have not been exchanged with a lawyer or have not been created to be transmitted to a lawyer, provided that they have been drawn-up exclusively for the purpose of requesting legal advice from a lawyer in the exercise of the right of defence[18].

C-125/07, C-133/07, C-135/07 and C-137/07, *Erste Group Bank AG and others v. Commission,* ECLI:EU:C:2009:576, p. 271; T-34/93, *Société Générale v. Commission,* ECLI:EU:T:1995:46, pp. 72-75; T-112/98, *Mannesmannröhren-Werke AG v. Commission*, ECLI:EU:T:2001:61, pp. 63-67; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *SGL Carbon and others v. Commission,* ECLI:EU:T:2004:118, pp. 403-407.

18 C-155/79, *AM&S Europe Limited* v. *Commission*, ECLI:EU:C:1982:157; joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, ECLI:EU:T:2007:287, as confirmed by case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, ECLI:EU:C:2010:512, and European Commission, 2011:2.7.

In the Portuguese Legal system – according to a certain interpretation of the law – the scope can be broader, because its legal basis does not derive from the Portuguese Competition Act, but from the Legal Profession Act, which provides for a wider scope. In any case, the Legal professional privilege in the Portuguese Legal system includes, at least, the same communications that are included in EU Competition Law Proceedings.

Concerning the subjective scope, Legal professional privilege under EU Competition Law Proceedings includes only communications emanating from independent lawyers, i.e. lawyers who are not bound by a relationship of employment with the client.

In the Portuguese legal system the law is not clear, but there seems to be some understanding in the sense that the Legal professional privilege includes in-house lawyers. This was the position of the AdC adopted in the guidelines and also by the Commercial Court of Lisbon in case nr. 572/07.9TYLSB. This can raise problems. not related with the right of defence, but with the principle of effectiveness, since a wider protection will reduce the public enforcement exercised by the AdC in the protection of competition.

Finally, in EU Competition Law Proceedings there are clearer proceedings during an inspection, thus preventing the Commission from becoming aware of the content of the documents before a final decision by the CJEU.

In Portuguese legal system, when inspections are not conducted in the lawyer's office, these proceedings are not defined by the law.

3. CONCLUSIONS:

The foregoing analysis leads me to three conclusions:

(i) Firstly, the level of protection granted by the Portuguese legal system is practically equivalent to that granted by EU Competition Law Proceedings. However, there are some aspects that need further consolidation in practice or greater clarification such as: the information given by the AdC in requests for information and documents; the conciliation between the right of defence and business secrets; the privilege against self-incrimination in relation to natural persons and the application of the theory of the act of delivering when it concerns the delivering of pre-existing documents, leading to confession of the facts; the proceedings during an inspection by the AdC related to the legal professional privilege.

(ii) EU Competition Law Proceedings provides for the minimum standard, which means that Member States can go beyond this standard, awarding more protection. However, in certain cases going beyond this minimum may raise problems related to the principle of effectiveness.

(iii) In general terms, we must end the litigation around fundamental rights on matters that are already consolidated and no new arguments or perspectives are presented. However, we should not wish to end the litigation around fundamental rights when new arguments, new perspectives, new rights or new dimensions of protection are presented, as it fosters more perception, more complexity, more deepness and, in the end, more justice.

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