REVIEW OF THE PORTUGUESE COMPETITION ACT – THE SEVEN YEAR ITCH*

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INTRODUCTION

Within the context of the transposition of the Directive (EU) 1/2019, of 14 January 2019, commonly known as the ECN+ Directive, which will imply several amendments to Law 19/2012, of 8 May (the "Portuguese Competition Act"), the Portuguese competition law community, under the impulse of the Portuguese Competition Authority ("PCA"), has been debating the opportunity for further amendments to the Portuguese Competition Act. At this stage, we are not going to discuss the appropriateness of the protagonism of the PCA within this context (even though we generally disagree with its prominent role in the preparation of laws that it will subsequently enforce).

In fact, seven years after the entry into force of the Portuguese Competition Act, stakeholders have had the time to take note of the shortcomings in this legal framework. Furthermore, as sometimes happens in long-term relationships, certain stakeholders seem to be itching for a change, as the Portuguese competition framework appears to be less capable of meeting their needs. On the one hand, enforcers want more ambitious enforcement tools and, on the other hand, undertakings, individuals and their legal representatives are concerned with the increasing restriction of their fundamental rights.

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In our view, the majority of the limitations of the Portuguese Competition Act within the last few years result from an approach to competition law, particularly from the enforcers, as if it were an "orphan" legal framework setting forth exceptional solutions that are divorced from the legal system. In fact, as we will subsequently demonstrate, many of the limitations of the Portuguese Competition Act have a clearer, more balanced, solution in the general rules applicable to several matters.

In this regard, we should bear in mind that competition law is both administrative law and quasi-criminal misdemeanour law (*direito das contraordenações*). Consequently, prior to economic and psychological considerations, the core of any amendment to the Portuguese Competition Act should certainly entail a broad, in-depth dialogue between competition specialists and legal experts working in relation to misdemeanours and more generalist administrative law.

This does not mean that, as legal practitioners, we do not have our own wish list for potential changes to the Portuguese Competition Act. This also does not mean that we shy away from sharing it. This only means that structural changes cannot be motivated by non-structural conditions, as Richard Sherman had concluded by the end of the movie mentioned in the title of this article[1].

These suggestions derive from our experience, using the Portuguese Competition Act on a daily basis in the last few years, and focus only on the practical aspects we consider relevant to discuss within the available timeframe, as this stage, outside the scope of the transposition of the Directive ECN+, and without prejudice to further developments on this matter.

1. MERGER CONTROL

As regards merger control, we have been confronted with practical issues related to the filing and to the formal steps of the proceedings, but we also want to address the current hot topics in terms of merger control, including the need to adapt merger control thresholds to digital markets and the potential inclusion of industrial policy considerations in the assessment of mergers.

1 Reference to the 1955 movie the Seven Year Itch, directed by Billy Wilder.

1.1 Thresholds

According to our experience, in general, the merger control thresholds set forth in the Portuguese Competition Act seem to be adequate for the Portuguese economy.

In our opinion, the market share thresholds, which have been contested on many occasions in the past, have revealed themselves to be a useful tool to monitor developing markets; including markets based on IT, commonly designated as digital markets.

In particular, the market share thresholds could be, in our view, an important alternative to innovative thresholds such as the transaction value threshold recently introduced in Austria and in Germany[2]. The uncertainty issues traditionally attributed to market share thresholds could be less relevant if compared to the very burdensome task of determining the value of the transaction, considering the complexity of M&A instruments, the applicable accountability rules and the possible attempts to manipulate the figures[3].

1.2 Timing of the Filing

The provisions concerning the timing of the filing have raised some issues in insolvency and public tender cases.

As regards insolvency procedures, Article 36(4) of the Portuguese Competition Act only mentions that no concentration exists when the insolvency administrator acquires the management of the insolvent assets. If a third party, approved by the competent court, acquires the insolvent party's assets after the submission of an insolvency and recovery plan, the Portuguese Competition Act provides no guidance. Since such an acquisition would take place after a complex judicial procedure, which cannot be subject to a condition precedent related to merger control requirements, the appropriate moment to submit a filing would, in our view, be after the homologation of the insolvency and recovery plan by the court. In any case, insolvency acquisition cases, which became more frequent after the financial crisis, would benefit from some further clarification and better coordination between judicial cases and administrative proceedings subject to a standstill obligation.

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2 For more developments, please refer to https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/.

3 For a critical appraisal, please refer to https://www.hlregulation.com/2018/05/16/hunting-unicorns-german-and-austrian-competition-authorities-publish-draft-guidance-note-on-transaction-value-thresholds/

In public tender cases, Article 37(2) of the Portuguese Competition Act sets forth that the filing should take place after the definitive award of the contract. This provision raises significant challenges, worthy of further reflection, concerning what can be considered a definitive award, the coordination with exclusive rights and public interest services, the role of competition ex-ante and ex-post and the potentially anticompetitive impact of the merger control framework within this ambit.

1.3 Role of Third Parties

Article 47 of the Portuguese Competition Act, differently to what takes place at the EU level, and also, for instance, in Spain, allows the formal intervention of interested third parties opposing the concentration within Phase I. This is clearly different from the informal submission of comments by third parties, which is always possible and does not grant these entities a procedural role.

This intervention takes place right after the submission of the filing, within the ten business days set forth in the act, introducing, in our view, some level of disruption in the merger control proceedings from the very beginning, even before the PCA has had the opportunity to get acquainted with the filing party's arguments.

Also, interested third parties can delay the issuance of a final decision, for an additional deadline of 20 business days (a month), even in cases where no competition concerns exist, in Phase I, using the right to a prior hearing granted in Article 48(3) of the Portuguese Competition Act.

Consequently, this mechanism should be re-examined, at least in relation to the prerogatives and deadlines applicable within this ambit.

1.4 European / National Champions

Within the last few months, following the prohibition, by the European Commission ("EC"), of the Siemens / Alstrom concentration, France and Germany initiated a discussion on the inclusion of industrial policy within the purposes of competition law. We have had the opportunity to contest this return to the protectionist past, as well as to challenge the potential coordination between the idea of European champions and the advancement of Franco-German national champions[4].

4 Please refer to our article of 15 March 2019, available at https://eco.sapo.pt/opiniao/propostas-de-alteracao-da-politica-controlo-de-concentracoes-da-ue-no-sentido-da-criacao-de-campeoes-europeus-uma-especie-de-deja-vu/

Therefore, in our view, any amendment in this regard should be totally rejected. Furthermore, perhaps it is time to do exactly the opposite, by excluding the "dead letter" of Article 41 of the PCA's By-laws that allows the Minister of the Economy to overcome a prohibition decision by the PCA, by invoking the strategic interests of the Portuguese economy.

2. RESTRICTIVE PRACTICES

As regards restrictive practices, we understand that Articles 9 and 11 of the Portuguese Competition Act, prohibiting, respectively, restrictive agreements and concerted practices, as well as abuses of a dominant position, are consistent with Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), notwithstanding the interpretative and constitutional difficulties that these provisions, formulated as general principles, generate on their own.

We suggest, however, that there should be a definitive harmonisation of the wording of Article 9 of the Portuguese Competition Act with Article 101 of the TFEU as regards the restrictive objective of the conduct. The mistaken translation of "restriction by objective" as "restriction by object" should be finally put to rest.

2.1 Abuse of Economic Dependency

As far as we are aware, Article 12 of the Portuguese Competition Act has been, up until now, "dead letter" and, as a principle, we oppose dead letter provisions. However, legislation on the abuse of economic dependency seems to have been experiencing a "second life" as a tool to prevent abuses in digital markets. It is referred to as being desirable in the Furman Report and a provision of this type was recently incorporated by the Belgian legislator in the Code of Economic Law[5].

5 For further developments, please refer to https://www.lexgo.be/en/papers/distribution-concurrence--consommation/commercial-practices/new-belgian-rules-against-abuse-of-economic-dependence-changes-in-b2b-relationships,127425.html. As regards the Furman Report, which makes recommendations for changes to the UK's competition framework, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, recommendation 5 sets forth that "*To account for future technological change and market dynamics, the digital markets unit should be able to impose measures where a company holds a strategic market status – with enduring market power over a strategic bottleneck market. The 'significant market power' test in telecoms regulation provides a good starting point. Aspects of market power particularly relevant to platforms and their potential to act as a bottleneck should also be considered for incorporation: economic dependence, relative market power and access to markets*".

In any case, taking a lead from the Belgian regime, perhaps it would be advisable to include further elements to determine the existence of a situation of economic dependence and the maximum amount of the fine should, at least, be limited in these cases, in order to state the difference in terms of seriousness of an abuse of economic dependence if compared, for instance, to the maximum 10% fine applicable in case of an abuse of a dominant position[6].

2.2 Antitrust Procedure

We understand that the rules setting forth deadlines for the PCA to conclude an antitrust investigation, prior to, and after, issuing the statement of objections, *i.e.*, Articles 24 and 29 of the Portuguese Competition Act, respectively, and which were probably inspired by the Spanish legal framework, have not represented added value to the PCA's practice.

Differently to what takes place in Spain, these deadlines are not mandatory and there are virtually no limits to the unilateral extensions by the PCA. In some cases the PCA has extended the deadline on three or four occasions, without any other justification than the complexity of the case, prior to the end of the deadline and even after the end of the deadline initially established.

In our view, these provisions would only serve their purpose if they were mandatory or, at least, if the number of extensions were limited.

2.3 Seizing of Documents and Access to File

Interpretative concerns by the PCA have also given rise to several difficulties regarding access to the file by the addressees of statements of objections, considering the confidential nature of a significant part of the PCA's file and the obstinate refusal by the PCA to exclude irrelevant (and confidential) information from its file. In our view, the issue in this case is not so much the law, but the equivocal interpretation of the existing provisions regarding the type of information that can be included in the PCA's file, as well as the parsimony of the enforcers in resorting to the applicable subsidiary legislation under Article 13 of the Portuguese Competition Act.

6 Under the Belgian provision, economic dependence corresponds to "*an undertaking's position of submissiveness towards one or more other undertakings that is characterised by the absence of a reasonable equivalent alternative, available within a reasonable period of time, and under reasonable conditions and costs, allowing this or each of these undertakings to impose obligations or conditions that cannot be obtained under normal market circumstances.*"

Besides the provisions of Articles 20 and 31 of the Portuguese Competition Act, and even though we do not usually support the inclusion in special law of provisions already present in the general, subsidiarily applicable, law, perhaps it could be advantageous to clearly incorporate the idea derived from the joint interpretation of Article 124 and 186 of the Penal Procedure Code. Specifically, that the PCA cannot seize and maintain information in the file which has no connection with the object of the investigation, and that all information that does not comply with this requirement should be immediately excluded from the file and returned to the addressees (in the case of hard copies) or destroyed (in the case of digital files).

3. MISCELLANEOUS

Finally, we consider it necessary to mention more general issues that could also be worth subjecting to public debate.

3.1 Deadlines

On several occasions, we have been faced with the lack of a clear deadline for the PCA to reply to the requests or claims made by undertakings or by individuals, including requests for access to the file and requests to protect the fundamental rights of undertakings and individuals. In practice, according to our experience in merger control and antitrust cases, the replies vary from a couple of weeks to more than a month.

Even though we consider the general deadline resulting from Administrative Procedures Code to be applicable to these cases, it would be useful, in practical terms, to avoid unnecessary limbos – harmful to the parties' rights to a fair and speedy process – to establish a subsidiary deadline for the PCA within this context. This could probably be a maximum of 10 business days, and applicable to all matters that do not have a specific deadline set forth in the Portuguese Competition Act.

Furthermore, as regards appeals deadlines, even though common sense and the Portuguese Constitution determine that the appellant cannot have a deadline to submit an interlocutory appeal that is shorter than the deadline the PCA has to reply to that appeal, Article 85(1) of the Portuguese Competition Act has raised debate on this issue. To our knowledge, in several cases, the interpretation of this Article has determined the submission by the appellants of appeals within 10 days, which manifestly limits these entities' capacity to exert their rights of defence. It is imperative to clarify that the 20

business days' deadline set forth on Article 85(1) of the Portuguese Competition Act is applicable to both parties.

Finally, the 30 business days deadline to appeal a final misdemeanour decision, set forth in Article 87(1), could also be reviewed, considering the complexity of antitrust investigations, and the size of the case files. A two months deadline could be considered.

3.2 Sanctions and Ancillary Sanctions

In terms of sanctions, we understand that, similarly to the debate that took place in Spain and Germany, constitutionality issues arise regarding the general maximum threshold of 10% set forth for a group of heterogeneous actions or omissions, which are very different in terms of seriousness and impact. Consideration should be given in order to guarantee the full compatibility of these provisions with the principles of legality, guilt and harm. Additionally, similarly to what takes place in other misdemeanours, specific ranges should be established within the 10% limit allocated to a certain type of actions, using the impact and seriousness of the infringement as criteria.

Also, the ancillary sanction to prevent the infringing entity from participating in public tenders and other biding processes, set forth in Article 71(1) (b) of the Portuguese Competition Act, is another example of a dead letter provision that should be revised. Furthermore, this sanction would have harmful effects on competition by limiting the number of participants in subsequent tender and bidding processes. Consequently, it should also be reassessed.

3.3 Joint Liability

In our view, the principles of guilt and harm applicable to sanctions under public law create significant limitations on joint liability for misdemeanours or for the payment of the fine that could be imposed. However, public enforcers in the field of competition naturally consider joint liability as a useful tool to ensure the effectiveness of competition provisions.

Take, for instance, Article 73(8) of the Portuguese Competition Act, which sets forth joint liability of the board members of a trade association for the payment of a potential fine arising from an anticompetitive decision of trade association. Even though it is possible to exclude liability by evidencing the opposition to the decision in writing, in practice, this exclusion is very difficult, especially for board members that were only appointed after

the alleged decision. It is also inconsistent with the liability for infringements of a similar nature within the Portuguese legal system.

3.4 Appeals

Articles 84 and the following of the Portuguese Competition Act are among the most pressing issues deriving from the implementation of this legal framework.

As we have extensively put forward, the current regime has to be systematically interpreted, in order to ensure that the addressees of PCA's decision have full access to the courts[7]. However, a change in the wording of these provisions would help to reduce the extensive litigation derived from these shortcomings.

On one hand, appeals from sanctioning decisions should have suspensive effects, since, due to the amount of the fines applicable to undertakings in antitrust infringement proceedings, which can result in sanctions higher than the highest criminal fine applicable in Portugal, the absence of suspensive effects would breach the presumption of innocence. In any case, the advanced payment of the fine while the appeal in pending – except if significant financial difficulties are demonstrated, in which case a deposit would be allowed – raises significant constitutionality issues and is clearly inconsistent with the EU practice and the rules applicable to appeals in other misdemeanour offences which entail, it should be highlighted, lower fines.

On the other hand, appeals from interlocutory decisions should have suspensive effects when mere devolutive effects would render the appeal useless. As stated, it is not necessary for the competition law framework to sets forth specific solutions for all issues, but it should at least, not give rise to uncertainty regarding the application of the general rules on interlocutory appeals as set forth in the Penal Procedure Code. In this case, Article 84 of the Portuguese Competition Act should by reviewed in order to refrain from limiting the application of Articles 407 and 408 of the Penal Procedure Code in relation to antitrust investigations.

7 Faria, Tânia Luísa, *Os efeitos dos recursos judiciais em processo de contraordenações da Autoridade da Concorrência: uma interpretação sistemática*, Revista de Concorrência e Regulação 32, 2017: 146-166.

4. FINAL REMARKS

In view of the above, without prejudice to our initial observations advising caution on this matter, and also subject to further input within the appropriate forums, there is certainly room for improvement in the Portuguese Competition Act.

We have focused on the practical matters deriving from our experience, rather than on proposing a radical change of paradigm in competition law in Portugal or arguing in favour of a hasty change to accommodate the so-called "digital economy" that we are not currently able to fully anticipate, but that we cannot exclude in subsequent debates.

The law cannot, and should not, set forth all the possible hypotheses for its subsequent implementation. In our view, the main aspects to safeguard within this context derive from the applicable constitutional principles, which require the full observation of the rights of defence, access to justice and also of the requirements regarding legality, guilt and harm.

We are not advocating in favour of more rights for the addressees of competition investigations regarding restrictive practices. On the contrary, we are requesting the same rights for entities subject to investigations and sanctions of the same nature.