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AMENDMENT OF THE COMPETITION ACT NOTES ON PAST EXPERIENCE ON THE TIMING, MILESTONES AND SCOPE

*Margarida Rosado da Fonseca**

When preparing the Conference celebrating its 10 years of existence, the Portuguese Association for Competition Lawyers (“CAPDC”) had the aim of choosing the most acute topics focusing on the Portuguese Competition framework and its specificities, without prejudice to the relevance of the EU competition environment. Thus, the amendment of the current Competition Act (“2012 Act”) and the Competition Authority’s (“AdC”) bylaws resulting from the implementation of Directive (EU) 2019/1 (“Directive ECN+”) were a natural choice. Moreover, the Government seems to aim at presenting the proposal of Law with the amendments much before the time-limit for the said implementation and an informal working group has been set to discuss it with the AdC.

But CAPDC’s proactive approach for the discussion of competition rules and enforcement in Portugal¹ advised for anticipating a timely discussion of amendments to the 2012 Act which are “beyond ECN+” (in the sense that they are not directly linked with the same). The 2012 Act was adopted during the Economic and Financial Assistance Programme to Portugal by the European Commission, the European Central Bank and the International Monetary Fund (together “international creditors”), following the request for financial assistance by the Portuguese authorities (XVIII Government and Bank of Portugal) on April 7th, 2011. Such assistance was conditional upon implementation by the latter notably of a set of structural measures contained

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1 “A propósito dos dez anos do Círculo dos Advogados Portugueses de Direito da Concorrência”, Carlos Pinto Correia in *Revista de Concorrência e Regulação*, nr. 38, April/June 2019.

in the economic adjustment programme (“Programme”) agreed in May 2011 and their progress in implementation was monitored through quarterly (and continuous) quantitative performance criteria, structural benchmarks and quarterly programme reviews.

One of the cornerstones of the Programme consisted in strengthening the competitiveness of the economy by “ensuring a level-playing field” while “minimizing rent-seeking”. In this context, the Portuguese authorities committed to revise the 2003 Competition Act (“2003 Act”) in line with the aim of increased convergence with the European Union (EU) competition legal framework. In practice, this revision soon evolved into the adoption of a new Act and providing that it concerned a structural benchmark of the Programme one may guess that there was important interaction with the international creditors (especially with Directorate-General for Competition of the European Commission). Though this may help to contextualize some of the modifications having been introduced, it must be noted that, in the preceding year, the President of the AdC publicly mentioned what would be the “necessary” amendments for strengthening of the competition enforcement². Unsurprisingly, they arguably included the reinforcement of enforcement powers of the AdC beyond what one could expect from Portugal’s obligations as Member State of the European Union and seem to have paved the way to the specific guidelines of the Programme for the amendment of the Act.

The Programme provided for a very ambitious timeframe for the amendment of the 2003 Act, as moreover its adoption was intertwined with structural measures such as the enactment of a Framework Law for the functioning of independent regulatory authorities (and subsequent amendment of the AdC’s bylaws) and the creation of a specialized tribunal for Competition, Regulation and Supervision. Notwithstanding, the XIX Government decided to undertake a public consultation of the draft Act while setting up an *ad hoc* working group comprising different stakeholders who discussed the contributions received and proposed further amendments whenever adequate. Besides contributions received by the Government even before the public consultation (at least the ones from the AdC and from the CAPDC), at least 26 entities presented comments (and in several cases, alternative wordings) during the 30-day public consultation. Besides the CAPDC, amongst them are included law firms, undertakings of various sectors of

2 This information was conveyed to Parliament during its annual hearing on the performance of the AdC.

activity (such as beverages and telecoms ones), several associations of undertakings and confederations, which reflects the relevance of this measure for the stakeholders. Beyond the difference of approach which may be explained by their distinct backgrounds and views of competition law enforcement, it should be noted that there are common features which are worthwhile considering in future amendments of the Competition framework. After the Government presented a proposal of Law to Parliament, the latter institution requested Opinions to the High Council of the Public Prosecution Service, to the Superior Council of the Judiciary and to the Bar Association during the internal legislative procedure. These included comments on the material and procedural features of the investigatory powers of the AdC, which maintain their acuteness in the light of future amendments to the extent there are specificities concerning the quasi penal nature of the procedure and the broadness of the AdC's scope of action.

Regard should be taken to the circumstance that, over the last 47 years, Portuguese competition laws have been adopted on average every decade. More precisely, what may be considered the "first" Competition Act dates from 1972, the "second" one was adopted in 1983 and the "third" one a decade later. It should be highlighted that in 2002 the XIV Government created an *ad hoc* commission of three experts for the preparation of a timetable and proposals concerning the drafting of a new Competition Act and the creation of an independent Competition Authority. Even though the following year the government which took office adopted a somewhat different approach concerning the initial aims of the working group's mandate, it still considered nevertheless several features of its proposals³. The "fourth" Competition Act was adopted in June 2003, shortly after the creation of an independent Competition Authority. As referred above, the current Act dates from 2012. Notwithstanding several of its features continue to be dealt with by the competent courts in appeals which are pending, several lessons can already be drawn from recent jurisprudence of national courts and also from the AdC's decisional practice.

I believe that even before the end of 2019 it is advisable to start a thorough, considered and dispassionate reflection on the timing, milestones and scope of the amendments to the 2012 Competition Act "beyond ECN+".

³ "Introduction to the new Competition legal framework - Difficulties of modernization projects" by José Luís da Cruz Vilaça, in *Competition - Studies*, jointly coordinated by António Goucha Soares and Maria Manuel Leitão Marques, Almedina editions, June 2006, pp. 13 and following.

This is due to all that has been said above, my experience in participating in the 2011 *ad hoc* working group and also considering the ongoing work for implementation of Directive ECN+. On the one hand, it is expected that ECN+'s impact on the current Act and the AdC's bylaws results in significant reinforcement of the latter's (already broad) enforcement powers. Criticism concerning an "unbalanced system" when considering notably the rights of defence of undertakings being investigated and access to file in the context of misdemeanour proceedings, gains new momentum if no measures are adopted to introduce increased duties (including in terms of the duration of the investigations) and accountability (both in the administrative and judicial phases of the proceedings). Thus, ideally the amendments "beyond ECN+" should be adopted simultaneously with the implementation of Directive ECN+. Moreover, the time-limit for the latter implementation is February 4th, 2021 and there are advantages in avoiding successive amendments of the same Act.

On the other hand, when deciding on the scope of the amendments "beyond ECN+", it would be most useful to build on the experience gained from the 2011/2012 procedure envisaging the adoption of the 2012 Act. Most relevant features may be summarized as follows:

- (A) Importance of ensuring a timely participation of stakeholders in the legislative process and due analysis and discussion of their comments by an insightful working group comprising representatives from the judiciary, jurists, the AdC and most involved associations such as the CAPDC;
- (B) Evaluation of maintenance of legal provisions where there was no widespread consensus on its amendment or even elimination, as well as the ones without practical application - For instance, as regards article 12 ("Abuse of economic dependence");
- (C) Assessment of the adequateness of the novelties introduced in the 2012 Act (notably taking into consideration recent jurisprudence) - It is the case, amongst others, of the rule of non-suspensive effect of the judicial appeals [article 84(4) and (5)]; the systematic framework of the legal basis for the exercise of supervisory powers by the AdC (before formally initiating the investigation pursuant to article 17) - commonly based in articles 43 and 61 and following; the imposition of measures deemed "necessary and adequate to restore a situation prior to a concentration [including reversal of the operation or

cessation of control” with no statute of limitations according to article 56 (4)];

- (D) Taking into consideration the developments in the EU and Portuguese competition systems occurred since 2012, such as the enactment of Law Nr. 23/2018 of June 5, which implements the Directive on Antitrust Damages Actions and the advantage in harmonizing the wording with the Act;
- (E) Reinforcement of advocacy of competition beyond the AdC’s action, notably admitting that effective Competition compliance programs by groups of undertakings participating in anticompetitive practices may be an attenuating circumstance when calculating the amount of the fine;
- (F) Envisaged clarification and streamlining of the provisions raising interpretative doubts either because of their wording or because of their necessary joint application with legislation from other fields of Law, such as Public Procurement [an example being article 37(3) on the control of concentrations] or sector-specific legislation (such as the application of article 55 in concentrations in the media sector, given that ERC - *Entidade Reguladora para a Comunicação Social* may have a binding opinion in the merger control proceedings).

Regardless to say that ultimately it is for the legislator to decide from a broader perspective the degree of strengthening of the competition enforcement in the overall context (of sector specific regulation, powers of sectoral regulators, amongst other considerations), within the obligations which Portugal has as Member State of the EU.

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