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of Harmonized Procedural Rules?
The Case of the Portuguese
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I. INTRODUCTION

In 2012 a new Portuguese competition act (Law 19/2012) was enacted and entered into force introducing changes both to the substantive and procedural aspects of the competition regime in Portugal. The reform took into account the knowledge acquired during the nine years of enforcement of the former competition law (Law 18/2003) and the latest developments in European competition law and jurisprudence.

The amendment of the competition act was one of the measures prescribed in the Memorandum of Understanding (“MoU”) between Portugal and the Commission, the European Central Bank, and the International Monetary Fund, envisaging the improvement of the speed and effectiveness of competition rules enforcement. As set out in the MoU, the new competition law should be as autonomous as possible from the Administrative Law and the Penal Procedural Law and more harmonized with the European Union competition legal framework.

The PCA’s powers of investigation were a central point of the reform, particularly the power to conduct inspections in non-business premises and to seize digital evidence and emails, as such powers were limited under the previous law. Article 18 of the Law 19/2012 establishes the “powers of inquire search and seizure” and expressly foresees the power *iter alia* to conduct search in non-business premises as well as to seize digital evidence. The exercise of search powers is subject to a court warrant that delimits the scope of the powers of the PCA during the inspections. As such, the power to conduct searches in general and in non-business premises in particular as well as to seize digital evidence during the searches will very much depend on the interpretation the judiciary will have on the scope of those powers.

This is a particularly sensitive issue because under the former competition act (Law 18/2003) some court warrants did not allow for the search of email boxes and the seizure of emails as the judiciary understood emails to be protected by the guarantees recognized to private correspondence. If this understanding remains under the new competition act, it will be a considerable limitation of the investigative capacity of the PCA as emails are an important communication tool in business context and a probable source of evidence for proving an infringement of competition law.

II. The Use of Cooperation Mechanism to Overcome Limits to the Powers of Investigation of a National Competition Authority

Limitations to the investigative powers of a competition authority set at the national level can be, at least to a certain degree, overcome by the use of cooperation mechanisms established at

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the EU level in the context of the decentralized enforcement of articles 101 and 102 of the Treaty. An active use of such cooperation mechanism may allow the Portuguese Competition Authority to make use of the investigative powers of other national competition authorities and of the EU Commission enlarging its own investigative capacity. How?

At the EU level, EU competition law co-exists with the national competition laws both on substantive and procedural terms. The decentralization of enforcement of European competition law implemented by Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition law laid down in Articles [101] and [102] of the Treaty (Regulation 1/2003) did not imply an harmonization of the procedural norms of the national competition authorities. Therefore, national competition authorities enforce EU competition law according to the procedures and rules established at their national levels subject to the general principles the EU Law, in particular to the principles of effectiveness and equivalence.

The scope of powers of investigation among the members of the European Competition Law can vary depending on the national laws and, as pointed out by the European Competition Network Report “Investigative Powers” published in October 2012, even if the “national legislators have made clear efforts to make their procedures for enforcement of articles 101 and 102 TFEU more convergent, (...) [i]t has however not led to uniformity.”

In such context, a competition authority of a Member State can try to enlarge its investigative capacity by making use of the cooperation mechanisms established by Regulation 1/2003. When enforcing EU competition law, national competition authorities can collect information themselves or they may ask for assistance from other national competition authorities of the Member States and of the Commission. They can also exchange confidential information in the context of an investigation.

According to Article 22 (1) of Regulation 1/2003:

The competition authority of a Member State may in its own territory carry out any inspections or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement to Article [101] or Article [102] of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

Under this possibility the Portuguese Competition Authority can ask for assistance of the competition authority of another Member State (assistant competition authority). Also, even if not directly expressed in the Regulation 1/2003 there is nothing therein that would impede the EU Commission to provide the same type of assistance.

Under article 22 of the Regulation 1/2003, the assistant competition authority will conduct the inspections on behalf and for the account of the PCA but will do it under its national law. Therefore, the scope of investigative powers of the assistant competition authority will be that established by the respective national law and not that of the authority that requested assistance. The investigative powers of the assistant competition authority will not be limited by the scope of the investigative powers of the Portuguese Competition Authority. The assistant competition authority will be able to make use of all its investigative powers in order to gather

information that will then be exchanged with the Portuguese Competition Authority under article 12 of the Regulation 1/2003.

Under article 12 (1) of the Regulation “[f]or the purpose of applying articles [101] and [102] of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.”

The fact that the Portuguese Competition Authority receives evidence that, if it was not for the assistance of the other competition authority it would not have had the powers to gather, does not have an impact on the validity of the evidence. In fact the “question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority” (see paragraph 27 of the Commission Notice on Cooperation within the Network of Competition Authorities).

The Portuguese Competition Authority can also enlarge its investigation capacities in the context of parallel investigations to apply articles 101 and 102 of the Treaty. In the situation where the PCA investigates a case in parallel with other national competition authority it can also receive and use in evidence information gathered by the other competition authorities in the context of their own proceedings. This exchange of information will also take place under article 12 of Regulation 1/2003 and the information can be used both to prove an infringement of EU Competition law and to national competition law.

It is important to reference that some procedural rights and guarantees were established for undertakings or individuals in the context of exchange of evidence between national competition authorities of the Member States and the Commission. For example, under article 12 (2) of the Regulation 1/2003 information exchange can only be used in evidence for the application of articles 101 and 102 of the Treaty and for the subject matter for which it was collected.

Moreover, according to article 73 of Law 19/2012 the Portuguese Competition Authority has the power to impose sanctions on individuals for infringement of competition law. Under article 12 (3) of the Regulation 1/2003, information exchanged under article 12 of the Regulation can only be used in evidence to impose sanctions on natural persons if two conditions are fulfilled: (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of articles 101 and 102 of the Treaty, or, in the absence of thereof, if (ii) the information has been collected in a way which protects the same level of protection of the rights of defiance of natural persons provided for under national rules of the receiving authority.

Some extra guarantees expressed in the Commission Notice on Cooperation within the Network of Competition Authorities regarding the exchange of information voluntarily submitted by a leniency applicant were also agreed by the competition authorities and the Commission. Such information will only be exchanged under article 12 of the Regulation 1/2003 with the consent of the applicant. However, no consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, or where the receiving authority has provided a written commitment that neither the information transmitted will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions.

III. CONCLUSIONS

Regulation 1/2003 establishes cooperation mechanisms that allow national competition authorities to expand their powers of investigation by seeking the assistance of the national competition authorities of other Member States or of the EU Commission.

The fact that some national legal system limits the national competition authority's power of investigation in some way will not bar the competition authorities to ask assistance from other competition authorities. The assistant competition authorities can use their full investigative powers under their national laws to gather information to assist other competition authority which powers of investigation can be more limited.

In the case of the PCA, eventual doubts on its power to search email boxes and to seize emails that may remain under the new competition act will not have an impact on the possibility to receive and use in evidence digital evidence and emails gathered by another national competition authority or by the Commission either in the context of their own investigation or following a cooperation request by the PCA under article 22 of the Regulation 1/2003.

An active use of the cooperation mechanisms by Competition Authorities of the Member States in general, and of the PCA in particular, will allow for the extension of their investigative power overcoming eventual limitations that a national legal system may impose.