Kluwer Competition Law Blog

Review of the Portuguese Competition Act

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On 16 September 2022 came into force the amendments to the Portuguese Competition Act introduced by Law no. 17/2022, of 17 August which also modifies the bylaws of the Competition Authority (PCA). This is the third amendment to the 2012 Competition Act, and the first amendment to the PCA bylaws.

Law no. 17/2022 transposes the so-called ECN+ Directive (Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, which aims 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 takes its name from the "European Competition Network", the cooperation network between national competition authorities in the EU.

The main changes now introduced in the Competition Act, which in some instances go beyond what the Directive required, concern:

- liability of parent companies for antitrust infringements committed by their subsidiaries;
- calculation of the fine based on the worldwide annual turnover of an undertaking and not just based on national turnover;
- joint and several liability of the members of an association of undertakings for the payment of a fine imposed on the association;
- treatment of business secrets in antitrust proceedings;
- priorities of the PCA in the handling of complaints;
- suspensory effect of appeals and lodging of security;
- time limits for appeals and statute of limitation.

The rules concerning the seizure of emails on company premises, while not significantly changed, were also subject to certain developments.

Liability of Parent Companies

In Portugal, competition rules are addressed to the "undertaking", i.e., "*any entity engaged in an economic activity, irrespective of its legal status or means of financing*". The perimeter of this entity is determined by the "economic unity" arising from the relationship of control or interdependence with other entities.

The Competition Act now provides that any entity which is a part of the "economic unit" of the alleged infringer and controls it, may be held liable for an infringement. In other words, a parent company may be held liable. In addition, there is now a presumption that control exists whenever an entity owns at least 90% of the share capital of a company.

For anyone familiar with the dynamics of multinational companies and the inevitable degree of autonomy enjoyed by their national subsidiaries it may come as a shock that a parent company may be held liable for the behaviour of one of its subsidiaries when it had no knowledge (nor perhaps the means to have knowledge) of that behaviour.

This development is likely to cause particular concern to multinationals which have a subsidiary in Portugal. It is worth emphasising that this mechanism raises serious doubts about its compatibility with the constitutional principles of faultt and the non-transferability of individual liability, which will likely give rise to litigation in the national courts.

Worldwide Turnover

The new rules providing for the liability of parent companies are particularly significant when combined with another development concerning the basis for the calculation of the fine.

Following the EU model, Portuguese law already determined the calculation of the fine applicable to competition law infringements based on a percentage of up to 10% of the company's annual turnover. Portuguese law never made explicit which basis – national or worldwide – should be used to calculate the fine. On the one hand, legal standards require the amount of the fine to be related to the "*affected market*": in the case of infringements committed in Portugal, the "*affected market*" is of course the national market and therefore the relevant parameter is the national turnover. On the other hand, the jurisdiction to investigate infringements with a transnational scope (and where therefore the relevant parameter is the worldwide turnover), typically lies with the European Commission and not with the PCA.

This topic is particularly relevant for multinational companies with a presence in Portugal. The new version of the Competition Act results, at first sight, in the possibility of the parent company facing a fine calculated based on its worldwide turnover for an infringement committed in Portugal. For most multinational companies, any percentage applied to their worldwide turnover results in an astronomical figure.

The enforcement of this provision is far from straightforward. According to other Portuguese constitutional and legal principles, the amount of the fine must still bear a connection to the "*affected market*" and thus, as far as infringements committed in Portugal are concerned, to the turnover generated in Portugal.

Joint and Several Liability in Industry Associations

The previous version of the law already provided for the joint and several liability of companies that were members of an association of undertakings if the association was subject to a fine for an antitrust infringement. However, the regime suffered from several loopholes and raised questions

of constitutionality in light of the principle of the non-transferability of individual liability.

The new version of the Competition Act further details the regime, and now provides that where the association may become insolvent as a result of payment of the fine (a likely scenario for many industry associations), all members will be asked to contribute to ensuring such payment. If the contributions are not received in full, the joint and several liability mechanism is triggered concerning the companies whose representatives held management positions in the association at the time of the infringement, and the companies that were active in the market where the infringement took place.

The new regime has not rectified all of the constitutional issues, but at least benefits from an increased clarity.

Confidential Business Information

The treatment of business secrets by the PCA has been subject to heavy criticism over the years and has given rise to recurrent litigation. The new version of the Competition Act contains three new developments in this regard:

- converting what was previously a mere administrative practice into hard law: the submission of the non-confidential version of a document must now be accompanied by a "*concise but complete description of the redacted information*";
- the PCA may now provisionally accept the classification of the information as a business secret until the classification is definitively consolidated in the final decision of the proceeding;
- the law now formally establishes that, whenever the PCA does not agree with the classification of the information as a business secret, the owner of the information has the right to submit observations prior to a final decision by the PCA.

A business secret is still the only possible ground to claim confidentiality. This means that the law remains deaf to the fact that other types of information which do not strictly correspond to the legal concept of "*business secret*" under Portuguese law should qualify as confidential.

On the other hand, experience shows that the obligation to submit what is now called a "*concise but complete description of the redacted information*" implies a massive bureaucratic effort for the company, which is required to individually describe hundreds or thousands of pieces of redacted information due to the amount of evidence collected by the PCA. A more reasonable approach would be to allow the aggregation of homogeneous pieces of information under the same description.

The PCA is now obliged to adopt new guidelines on the protection of confidential information in antitrust proceedings within two years. Bets are on as to how the PCA will evolve in this respect.

Priorities of the PCA

The previous version of the Competition Act already replicated, in a mitigated form, the EU regime under which the European Commission has the power to reject complaints or initiate

investigations based on discretionary priorities. The Competition Act enshrined the priority criterion, although subject to an additional set of legal criteria.

The new version of the law now openly allows the possibility for the PCA to reject the treatment of issues which are not a priority. This approach has the merit of being transparent in that it fully acknowledges the "*principle of opportunity*" as opposed to the "*principle of legality*" which is the guiding principle for other public entities in Portugal (and other legal systems within the same legal family) vested with investigating and sanctioning powers.

It remains to be seen how the principle of opportunity will be articulated with the principles of equality and the pursuit of public interest, in particular as regards to the rejection of complaints.

Suspensory Effect of Appeals and Lodging of Security

The previous version of the law determined, as a rule, that appeals against a decision by the PCA to impose a fine did not suspend the effects of that decision. However, the court could suspend the effects of the decision if the company: (a) demonstrated that the enforcement of the decision would cause "*considerable harm*"; and (b) offered to lodge security. The indeterminate character of the notion of "*considerable harm*" and the discretion as to the court's decision to grant suspensory effect to the appeal has given rise to unclear case law, casting uncertainty on the effectiveness of the appeal mechanism, and inducing legitimate doubts as to the scope of the principle of presumption of innocence. Moreover, this solution was not entirely consistent with the approach adopted at the EU level.

The new version of the law now establishes the suspensory effect of the appeal upon the effective lodging of security corresponding to half of the amount of the fine and dispenses with the need to show "*considerable harm*", reflecting the most recent case law of the national Competition Court. Although this approach contributes toward enhancing the principle of the presumption of innocence, it does not unfortunately eliminate the issues regarding access to justice for entities (e.g., industry associations) without the economic capacity to provide security in the order of millions or tens of millions of euros, as is so often the case with fines applied by the PCA.

Submission of Appeals and Statute of Limitation

The time limit for filing an appeal against a final decision from the PCA has been increased from 30 working days to 60 days (presumably continuous), which represents a small gain in time for appellants. More relevant is the elimination of the "*non-extendable*" rule, opening the possibility that certain cases of particular complexity may benefit from an extension of the time limit for filing an appeal.

This small gain in the protection of appellants is counterbalanced by the provision under which "*the limitation period in an infringement case shall be suspended for as long as the PCA decision is the subject of proceedings pending before the courts, including interlocutory appeal or appeal to the Constitutional Court, without any time limit*."

The absence of any limit on the suspension of the limitation period undermines, in practice, the

very institution of the statute of limitation for competition law infringements. At stake is the principle of legal certainty, which the statute of limitation purports to safeguard.

Seizure of Emails

The preliminary bill intended to transpose the ECN+ Directive proposed by the PCA provided for the possibility of the PCA seizing "*copies in any form of information or data, in any format, physical or digital, namely documents, files, books, records or messages of electronic mail or an instant messaging system, regardless of the device, state or location in which they are stored, namely in a computer system or other system to which legitimate access is allowed from the former, servers, laptops, mobile phones, other mobile devices or other devices*".

The possibility of seizure of emails by the PCA at company premises, and their use as evidence in infringement proceedings, has given rise to fiery litigation and diverging case law in the Portuguese courts. The wording of the preliminary bill aimed to put an end to the controversy but caused harsh reactions from several stakeholders, including the Parliamentary Committee on Constitutional Affairs, Rights, Freedoms and Guarantees. The Committee issued an opinion in which it considered that this power would contravene Article 34(4) of the Constitution, which forbids any interference of public authorities in telecommunications, except in the cases provided for in criminal law. In Portugal, the nature of competition law rules is not criminal law.

The wording that was ultimately adopted by the Parliament in Law no. 17/2022 foresees – in a very mitigated way – the possibility for the PCA to "*inspect the books and other records concerning the undertaking, regardless of the device in which they are stored, having the right to access any information accessible to the inspected entity*" and to "*take or obtain in any form copies of or extracts from the controlled documents*".

The PCA will, in all likelihood, continue its attempts to justify the seizure of emails based on its power of inspecting documents "*regardless of the device in which they are stored*" and obtain copies of documents "*in any form*". This task, however, is now hampered by the refusal of Parliament – for the second time – to adopt the explicit wording initially proposed by the PCA, and by the damaging content of the opinion issued by the Parliamentary Committee of Constitutional Affairs.

It remains to be seen how the courts will deal with this critical issue in the numerous pending cases.

Applicability

Law no. 17/2022 states that the amendments to the Competition Act apply to proceedings triggered after it enters into force. The term "*triggered*" is ambiguous and is not consistent with the legal terminology historically used to determine something as important – especially when sanctions are involved – as the entry into force of a statute. The question of exactly which proceedings the amended provisions apply to is now somewhat open-ended. A question that will unavoidably, albeit unnecessarily, occupy the courts in times to come.

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