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AMENDMENTS TO THE COMPETITION FRAMEWORK DURING TROIKA TIMES IN PORTUGAL: A *SOFT TOOL* FOR ENHANCING ENFORCEMENT A DECADE BEFORE ECN+

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Abstract:

On 21 May 2021, Portugal's XXII Government submitted to Parliament a proposal of a law implementing the ECN+ Directive. Ten years earlier, the Portuguese authorities agreed on an Economic Adjustment Programme for Portugal with international creditors in the context of the formers' request for financial assistance to the country. These creditors included the European Commission, which was entitled to 'continued advice and guidance' on the 'ambitious agenda for structural reforms', including the competition framework.

In 2014, paving the way for what would later be the 2017 proposal of the ECN+ Directive, the Commission qualified Economic Adjustment Programmes as one of the *soft tools* to achieve the aims of strengthening the powers of enforcement of the national competition authorities concerning EU competition rules, as well as increasing their independence and resources.

This paper seeks to systematise the indications of the impact of the Economic Adjustment Programme for Portugal on the anticipation of the reform of the Competition framework in line with the aims and goals of the ECN+ Directive. In my view, the acuteness of this reflection goes beyond the ongoing implementation of the ECN+ Directive; it may also be useful for the future amendment of the Competition Act and the Portuguese Competition Authority's powers beyond the ECN+ Directive.

Keywords:

Troika, PAEF, competition law, ECN+ Directive, European Commission, Portugal, Portuguese Competition, competition enforcement, competition framework, Commission's powers, ECN, Portuguese Competition Authority, European Commission's policy, ECN, soft tools, Economic Adjustment Programmes, Assistance Programmes

INTRODUCTION

On 21 May 2021, Portugal's XXII Government¹ submitted to Parliament a proposal of Law No 99/XIV/2.^a (the Proposal of Law).² This is intended to implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, empowering the competition authorities of the Member States to be more effective enforcers and ensuring the proper functioning of the internal market (the ECN+ Directive).³

Ironically, the government's Proposal of Law came in the same month that, back in 2011, the agreement on the Economic Adjustment Programme (the Programme) was being negotiated between the Portuguese authorities and officials from the European Commission (Commission), the European Central Bank and the International Monetary Fund (together the international creditors, also commonly referred to as the Troika). This negotiation followed Portugal's request for financial assistance in 7 April 2011, made towards the European Union, the eurozone countries and the IMF. The terms and conditions of the financial assistance package were agreed by the Eurogroup and the EU's Council of Economics and Finance Ministers on 17 May 2011.⁴ The financial package covered Portugal's financing needs of up to €78 billion.⁵

1 This government was chosen by the president of the Portuguese Republic, given the results of the legislative elections that took place on 6 October 2019 and its support by the majority in Parliament, composed by the Socialist Party, the Communist Party and Bloco de Esquerda.

2 Proposta de Lei 99/XIV/2 Transpõe a Diretiva (UE) 2019/1, que visa atribuir às autoridades da concorrência dos Estados-Membros competência para aplicarem a lei de forma mais eficaz e garantir o bom funcionamento do mercado interno. Available from: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalleIniciativa.aspx?BID=110842> [Accessed June, 19 2021].

3 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, OJ L 11, 14.01.2019, pp. 3–33.

4 The Minister of State and Finance of the XVIII Government participated in this ECOFIN meeting. EC (2011), *3088th Council meeting Economic and Financial Affairs Brussels, 17 May 2011*. Available from: https://ec.europa.eu/commission/presscorner/detail/en/PRES_11_131 [Accessed June, 19 2021]. For more, see: EC (2011-2021), *Financial assistance to Portugal*. Available from: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-portugal_en [Accessed June, 19 2021] and Banco de Portugal (2014), *The Financial Assistance Programme*. Available from: <https://www.bportugal.pt/en/page/efap-and-post-programme-surveillance> [Accessed June, 19 2021].

5 The EU, through the use of EFSM and EFSF, would provide up to €26 bn each to be disbursed over three years and further support would be made available through the IMF for up to €26 bn.

The Economic Adjustment Programme is provided for in the Letters of Intent of the Portuguese authorities⁶ addressed to the international creditors, and their enclosures comprising the Memorandum of Understanding on Specific Economic Policy Conditionality (Memorandum of Understanding), the Memorandum of Economic and Financial Policies and the Technical Memorandum of Understanding (together the memoranda of understanding).

The Programme notably provides for “deep and frontloaded structural reforms to boost potential growth, create jobs, and improve competitiveness”⁷ and includes a title on the Competition Framework. Under the latter title, the Portuguese authorities expressly commit that

*State involvement in private sector activities will be reduced, and the independence of sectoral regulators reinforced. We will eliminate “golden shares” and all other special rights established by law or in the statutes of publicly quoted companies that give special rights to the state [...] We will take bold steps to address excessive profits and reduce the scope for rent-seeking behavior. We will (i) submit to Parliament a law revising the Competition Law, clearly separating rules on competition enforcement procedures and penal procedures, and (ii) establish a new Court on Competition Matters and introduce greater specialization of judicial functions*⁸.

In 2014, the Commission concluded its analysis of the first decade of Council Regulation 1/2003 (Regulation 1/2003)⁹ being in force. The analysis was from the perspective of the National Competition Authorities, given that the regulation decentralises the

6 The Letters of Intent were signed by the Minister of State and Finance, Fernando Teixeira dos Santos, and by the Governor of the Bank of Portugal, Carlos Costa. On 5 May 2011, the Council of Ministers of the XVIII Government – supported in Parliament by the Socialist Party – approved a resolution according to which:

(1) *having concluded the negotiations with the three international creditors about the financial assistance to Portugal, considers that the conditions are met so as to a) approve the adjustment programme contained in the Memorandum of Understanding on Specific Economic Policy Conditionality (Memorando de Entendimento and Memorando de Políticas Económicas e Financeiras) and b) approve the draft instruments that formalise the financial assistance to Portugal, and*

(2) *delegate to the Minister of State and Finance the authority, on behalf of the Government and in representation of the Portuguese Republic, to agree on the adjustment programme and the financing contracts, as well as any other instruments necessary to implement the financial assistance to which the Resolution refers to, pursuant to its approval by the Council of the European Union (ECOFIN) on 17 May 2011. Resolution No 8/2011 was published in the DR, II Series, No 95, 17.05.2011, p. 21164.*

7 See for all, the Council’s Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal (Council Decision), OJ L 159, 17.06.2011, p. 88. See Recital 3.

8 Under the title “Competition Framework”, see paragraphs 40 and 41 of the MEFP (in its original version).

9 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, pp. 1–25.

application of EU competition law by empowering NCAs to apply it alongside the Commission. In this line, the Commission highlights that,

*the NCAs have to ensure procedural fairness in accordance with national law and practices, including fundamental rights standards laid down in their national law, while respecting the requirements flowing from EU law, including the Charter on Fundamental Rights, as well as the ECHR. All this may have an impact on the institutional structures and the decision-making processes of NCAs which are not harmonised by EU law.*¹⁰

Thus the main aim of the ECN+ Directive is to ensure that all NCAs will have enforcement powers that mirror those held by the Commission under Regulation 1/2003, and thus create a level playing field in terms of the enforcement of EU competition rules. It also strengthens the ECN, created by the Commission in 2004 when Regulation 1/2003 entered into force, and constituting a forum for discussion and cooperation gathering of the Commission and the NCAs.¹¹ This means that the implementation of the ECN+ Directive may entail very significant changes in several Member States, depending on the existing frameworks at a national level.

Going back to 2011, it is particularly relevant to acknowledge that the implementation of Portugal's economic adjustment programme was paramount to the smoothness of the disbursements for the requested financial assistance. More precisely, after the initial disbursements in the first weeks after it was agreed, the following weeks were subject to Portugal's "requirements and to quarterly reviews by the Commission in cooperation with the IMF and in liaison with the European Central Bank".¹² To this should be added the 2012 ruling of the Portuguese Constitutional Court (the Constitutional Court), which expressly confirmed the binding nature of the memoranda of understanding sent

¹⁰ EC (2014) Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final.

Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues accompanying the document communication from the Commission to the European Parliament and the Council. Ten years of antitrust enforcement under regulation 1/2003: Achievements and future perspectives {COM(2014) 453 final} {SWD(2014) 230 final}. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0231&from=EN> [Accessed September, 12 2020]. Footnote 317 in the excerpt transcribed above states as follows: "See the jurisprudence regarding Article 51(1) of the Charter of Fundamental Rights of the European Union according to which the Member States are required to comply with the provisions of the Charter "when they are implementing Union law". See in particular the judgment of 26 February 2013 in Case C-617/10 *Åklageren v Hans Åkerberg Fransson*, paragraphs 16-29 and the judgment of 6 March 2014 in Case C-206/13 *Siragusa v Regione Sicilia-Soprintendenza Beni Culturali e Ambientali di Palermo*".

¹¹ The basic foundations of the functioning of the ECN are laid out in the Commission Notice on cooperation within the Network of Competition Authorities and in the Joint Statement of the Council (of the European Union) and the Commission on the Functioning of the Network of Competition Authorities. More information: EC, European Competition Network. Overview > More details. Available from: https://ec.europa.eu/competition/ecn/more_details.html [Accessed June, 19 2021].

¹² See the Council's Implementing Decision 2011/344/EU.

by the Portuguese authorities to the Troika, to the extent they are based on legal instruments that are “the founding Treaties of the international institutions participating in the same [memoranda of understanding], and to which Portugal is an integrant part – of International Law and European Union Law, as recognised first and foremost by Article 8(2) of the Portuguese Constitution”. The Constitutional Court thus concluded that “the implementation by the Portuguese authorities of the measures contained in the memoranda of understanding is the condition for the staged execution of the financing agreements entered into with the same entities”.¹³

Among the Commission’s roles was the aim to:

“provide continued advice and guidance on [...] structural reforms”, “in order to ensure the smooth implementation of the Programme’s conditionality, and to help to correct imbalances in a sustainable way”. “Within the framework of the assistance to be provided to Portugal, together with the IMF and in liaison with the ECB, it [the Commission] shall periodically review the effectiveness and economic and social impact of the agreed measures, and shall recommend necessary corrections with a view to enhancing growth and job creation, securing the necessary fiscal consolidation and minimising harmful social impacts, particularly regarding the most vulnerable members of Portuguese society.”¹⁴

It should be noted that, irrespective of the merits of the Portuguese Competition Authority concerning the authorship for earlier calls for action,¹⁵ it seems undisputed that competition culture in Portugal until 2011 was not such as to show receptiveness to the PCA’s call for substantially increased investigatory powers and further alignment with EU rules. This paper addresses in particular the extent to which the 2011/2014 Economic Adjustment Programme to Portugal and the structural reforms agreed with the Troika are precursors to the ECN+’s ultimate purpose and goals. In fact, in 2014 the impact of

13 Non-official translation of the Constitutional Court’s plenary judgment in case 353/2012, DR Série I, No 140, 20.07.2012. A group of members of the Parliament had lodged an action for the declaration *erga omnes* of the unconstitutionality of given reductions of remunerations provided in the 2012 Budget Law in the context of the implementation of the Economic Adjustment Programme. The same action was partially upheld.

14 See Article 3(9) of the Council’s Implementing Decision 2011/344/EU.

15 See M. Moura e Silva’s paper seeking “to demonstrate that although Law No 19/2012 was to be portrayed as fulfilling a commitment to the Troika, it emerged from an initiative of the Portuguese Competition Authority, long before the economic adjustment programme addressed changes in the national competition law and enforcement”. See MOURA E SILVA, M. (2014) As Práticas Restritivas Da Concorrência Na Lei N.º 19/2012: Novos Desenvolvimentos (Restrictive Practices Under the Portuguese Competition Law No. 19/2012: New Developments) (20 March 2014). *Revista do Ministério Público*, 35(137), p. 9. Available from: <https://ssrn.com/abstract=2468752> [Accessed June, 19 2021]. We also very briefly addressed this background in ROSADO DA FONSECA, M (2020) As diligências de busca e apreensão em processos sancionatórios: contextualização da sua evolução a partir da Lei da Concorrência. In: de Sousa Mendes, P., Neves da Costa, J., Geraldo, T. (eds.) *Novos Estudos sobre Law Enforcement, Compliance e Direito Penal*. Coimbra: Almedina, pp. 443-470.

the same Programme was positively mentioned by the Commission when comparing the evolution that occurred in the Member States under assistance (programme countries) with the remaining Member States, in the context of its justification for an approach beyond the use of “soft tools”, later presented as proposal for the ECN+ Directive.¹⁶

It should be noted that the Economic Adjustment Programme did not formally interfere with the rights and obligations of Portugal as a Member State of the EU under the Treaties.¹⁷ In addition, there is no public information about any interruption or suspension of any previous interaction between the EU institutions and the national authorities, such as the one taking place within the ECN between the Commission and the PCA.

In this paper, we briefly mention the four axes comprising the structural reform on the Competition framework in Portugal, and in particular the amendment of the competition law, while referring further to the extensive doctrine on the topic.¹⁸

16 Par. 33 {COM(2014) 453 final} {SWD(2014) 230 final} “In the absence of any explicit requirements concerning NCAs in Regulation 1/2003 or, in the case of an integrated authority, any extended application of sector specific requirements, there are no EU law provisions that explicitly oblige Member States to ensure the independence of the NCAs and to require the grant of sufficient resources. Nonetheless, the competition enforcement regimes in several Member States have been strengthened in the framework of the Memorandum of Understanding of Specific Economic Policy Conditionality with the Member States benefiting from a financial-assistance programme (known as ‘Programme countries’)”.

17 It is relevant to wonder whether in May 2011, the Portuguese Government’s commitment to “eliminate ‘golden shares’ and all other special rights established by law or in the statutes of publicly quoted companies that give special rights to the state” (structural benchmark, end July 2011) was not beyond what would be required from a Member State under the EU Treaties and the European courts’ jurisprudence as regards this topic. Back in June 2009, the Commission had brought an action under Art. 226 on the TFEU for failure to fulfil obligations against Portugal before the CJEU. The same action sought the declaration from the CJEU that, by maintaining special rights for the Portuguese State and for other public entities or public sector bodies in GALP Energia SGPS SA, allocated in connection with privileged (‘golden’) shares held by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Art. 43 and 56 TFEU. Judgment of the CJEU (First Chamber) [2011] *European Commission v Portuguese Republic*, C-212/09, ECLI:EU:C:2011:717. It was rendered only on 10 November.

18 See for all, MOURA E SILVA, M. (2018) *Direito da Concorrência*, Lisboa: Associação Académica da Faculdade de Direito de Lisboa; BOTELHO MONIZ, C. (2016), *Lei da Concorrência anotada - Lei Nº 19/2012, de 8 de Maio*. Coimbra: Almedina; LOPES PORTO, M., DA CRUZ VILAÇA, J.L., CUNHA, C., GORJÃO-HENRIQUES, M., ANASTÁCIO, G. (eds.) (2017) *Lei da Concorrência – Comentário Conimbricense*. Coimbra: Almedina; MOURA E SILVA, M. (2013) *Direito sancionatório das autoridades de Regulação, Supervisão e defesa da Concorrência: A caminho de um Direito Comum?*. Available from: https://institutoeuropeu.eu/images/stories/Apresentao_Prof._Doutor_Miguel_Moura_e_Silva.pdf [Accessed June, 19 2021]; SOUSA MENDES DE, P. (2018) Poderes de busca e inspeção: O caso especial dos dawn raids. In: Amado Gomes, C., Neves, A.F., *Estudos sobre a atividade inspetiva*. Lisboa: AAFDL Editora, p. 149 ff.; COSTEIRA, M.J. (2018) Direito da Concorrência: O controlo jurisdicional das decisões proferidas em processos sancionatórios. *Revista de Concorrência e Regulação* 36, pp. 19-38.

GENERAL AND COMPETITION LAW BACKGROUNDS

The Portuguese Republic is a “democratic state based on the rule of law [...] with a view to achieving economic, social [...] democracy”.¹⁹ The fundamental tasks of the state include “to guarantee the fundamental rights and freedoms and respect for the principles of a democratic state based on the rule of law”.²⁰ Among the fundamental principles set out in the organisation of society and the economy are, “The subordination of economic power to democratic political power” and the “Freedom of entrepreneurial initiative and organisation, within the overall framework of a mixed economy”.²¹ In the economic and social field, the Portuguese State is under a priority duty, notably, “to ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest”.²²

Without prejudice to the relevance of the analysis of the early times of competition law in Portugal, we focus hereunder on the reform of the competition framework concomitant with the preparatory works and the enactment of Regulation 1/2003. In brief, building on the work undertaken by an *ad hoc* commission that took into consideration the preparatory works of Regulation 1/2003, the XV Government²³ in 2003:

- created a Competition Authority (PCA)²⁴ seen as “the first step in the necessary reform of the competition legal framework in Portugal, which is indispensable to the modernisation and competitiveness of our economic life”;²⁵ and
- submitted to Parliament the Proposal of Law, which was approved as Law 18/2003 on 11 June (2003 Competition Act).²⁶

19 Art. 2 of the Constitution of the Portuguese Republic (CRP). Translation available at <https://dre.pt/constitution-of-the-portuguese-republic> [Accessed June, 19 2020].

20 Art. 9(b) of CRP.

21 Art. 80 (a) and (c) of CRP.

22 Art. 81(f) of CRP.

23 The XV Government was chosen by the president of the Portuguese Republic, given the results of the legislative elections that took place on 17 April 2002 and its support by the majority in Parliament constituted by the coalition between the Social Democratic Party and the Christian Democratic Party. For more details on the work of the same *ad hoc* Commission, see DA CRUZ VILAÇA, J.L. (2006) *Introdução à nova legislação da Concorrência: Vicissitudes dos Projetos de Modernização*. In: Goucha Soares, A., Leitão Marques, M.M., *Concorrência – Estudos*. Coimbra: Editions Almedina S.A., p. 13 ff. J.L. da Cruz Vilaça presided to the same *ad hoc* Commission, created by the former government. See p. 44 on the influence of the preparatory works of Regulation 1/2003.

24 Through the enactment of Decree-Law 10/2003, of 18 January, which approved the PCA’s bylaws published in DR Series I-A, No 15, 18.01.2003.

25 Recital 2 of Decree-Law 10/2003.

26 Law 18/2003, of 11 June (2003 Competition Act), DR, Series I-A, No 134, 11.06.2003 and subsequently amended four times. Law No 39/2006, of 25 August, provided for the leniency regime in the Portuguese legal framework and complemented Law No 18/2003. As regards doctrine on the 2003 Competition Act, see for all, MENDES PEREIRA, M. (2009) *Lei da Concorrência – Anotada*. Coimbra: Coimbra Editora; BOTELHO MONIZ, C., ROSADO DA FONSECA, M., GOUVEIA

The acuteness of the creation of the PCA was further highlighted in the context of the evolution under way at EU level, and was thus considered necessary “to have a competition authority effectively capable of promoting the enforcement of the European competition rules and its inclusion” in the ECN.

In short, the significant changes included the PCA’s enforcement powers covering all sectors of activity, the combined powers of investigation and sanctioning in a single entity and its independence towards the government. More precisely, the PCA is a public entity of institutional nature, with own bodies, services, staff and patrimony and financial and administrative autonomy. In addition, the PCA is a single purpose entity entrusted to “enforce competition rules within the scope of the aims and competences attributed to it” and sectoral regulators “cooperate in the application of competition rules” with it.²⁷ In 2004, the Government allocated to the PCA a part of the sectoral regulators’ revenues stemming from the fees paid by their regulated entities,²⁸ in addition to the PCA’s own financial revenues. Until 2011, this allocation has encountered several hurdles, as publicly reported by the PCA on various occasions.

Besides an overall inspiration on the current Articles 101 and 102 of TFEU, the influence of secondary EU law provisions is reflected notably in the economic justification of restrictions to competition.²⁹ It should also be noted that Art. 60 of the 2003 Competition Act sets out that the legal framework contained in, as well as in the Decree-Law approving the PCA’s bylaws “will be adapted so as to include the developments occurred in the European legal framework applicable to undertakings under” the current Articles 101 and 102 TFEU and the regulations concerning merger control and “the Government is bound to undertake such amendments after consulting the PCA”.

As regards the investigation and sanctioning of anticompetitive practices, the PCA’s decisions cover misdemeanours.³⁰ The 2003 Competition Act provides that:

E MELO, P. (2004) The 2003 Competition Law Reform in Portugal. *European Public Law* 10(1), pp.19–32.

27 Art. 14 and 15 of the 2003 Competition Act. The drafting of these Articles, together with the drafting of some sectoral legislation, gave rise to debate on the boundaries of the PCA’s authority in relation to the authority of the sectoral regulators, and the drafting concerning this topic evolved positively in Law No 19/2012, of 8 May which repealed the former Competition Act and is currently in force (2012 Competition Act).

28 Decree-Law 30/2004 of 6 February published in DR, Series I-A, No 31, 6.02.2004.

29 Pursuant to Art. 5(3) of the 2003 Competition Act, they may be considered justified when, “despite not affecting inter-state trade, they fulfil the remaining conditions provided for in a regulation adopted in the context of Article 81(3) of the Treaty establishing the European Community” [Art. 101(3) TFEU]. Nonetheless, the PCA may withdraw the same benefit in given circumstances.

30 MOURA E SILVA, M. (2018) considers that infringements to Competition rules have an “uncertain location between administrative sanctioning law and criminal and criminal procedural law”, which can be explained in part by the proximity in terms of dates between the approval of the administrative offences’ regime in 1979 (and its subsequent amendment) and the approval of the regime sanctioning the anticompetitive practices (in 1983) (our translation). The “subsequent amendment” mentioned by the author concerns Decree-Law No 433/82 of 27 October 1982, DR, Série I, No 249, 27.10.1982.

- Infringement procedures concerning restrictive practices and abuses of dominance are regulated by the same law and on an ancillary basis by the administrative offences regime, and this is “equally applicable with due adaptations to infringement proceedings concerning Articles 81 and 82 of the Treaty establishing the European Community [Articles 101 and 102 TFEU] initiated by the PCA or when the same is called upon to intervene”.³¹ This is without prejudice to the 2003 Competition Act also providing in a somewhat ambiguous manner that, as regards “sanctioning proceedings”, it respects the principles of hearing interested parties, due process and other general principles applicable to the procedures and administrative action contained in the Code of Administrative Proceedings, “as well, as, if applicable, in the administrative offences regime”;³²
- The PCA’s decisions in the context of merger control proceedings have an administrative nature and are regulated by the Code of Administrative Proceedings.³³

The experience from the first years when the 2003 Competition Act was in force “showed difficulties in its application, mainly due to the insufficient embodiment of the procedural rules”.³⁴ It should be added that, in an annual hearing in Parliament on 14 July 2010, the president of the PCA stated that “several circumstances suggest that possibly the time has come for an amendment to the Competition Act”. It was disclosed that, “internally, the PCA is undertaking a reflection on possible new amendments on the basis of the following ‘concerns’:

- i) Increased predictability and legal certainty with a view to diminish litigation, mainly the one related to difficulties in the interpretation of legal provisions;
- ii) Increased harmonisation with the EU Competition legal framework; and
- iii) Increased autonomy concerning the ancillary application through the adapted reproduction of the same legal provisions”.³⁵

As detailed hereunder, the similarity of this envisaged evolution with the one provided in the wording of the Memorandum of Understanding of May 2011 indicates that the same was proposed the Government (and arguably upon prior proposal by the PCA).³⁶

31 Art. 22 of the 2003 Competition Act.

32 Art. 19 of the 2003 Competition Act.

33 See Art. 20 of the 2003 Competition Act, which starts with the disclaimer “Save as stated otherwise in the present law”.

34 See MOURA E SILVA, M.(2018) p. 123. This author gives the example of the seizure of emails, mainly after the entry into force of the amendments introduced in 2007 to the Portuguese Criminal Procedure Code.

35 The annual hearing of the president of the PCA took place in the Commission for Economic Matters, Innovation and Energy. The presentation: SEBASTIÃO M. (2010) *Audição Parlamentar Comissão de Assuntos Económicos, Inovação e Energia*. Available from: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheAudicao.aspx?BID=88874> [Accessed June, 19 2021].

36 MOURA E SILVA, M. (2014) highlights the importance of the PCA’s contribution to the evolution reflected in the current Competition Act and also to the Government’s receptiveness shown in the beginning of 2011 when presenting to Parliament a set of measures aimed at reforming the 2003 Competition Act.

It is fair to say that, in 2010, both the legal community and the community in general shared a growing perception of the need for improvements to the 2003 Competition Act, though not necessarily in the same way as that of the PCA in its call to strengthen its investigative and sanctioning powers.

SOME NOTES ON THE 2011/2014 PROGRAMME

As referred to above, the negotiation of the Economic Adjustment Programme in May 2011 was preceded by a request from the Portuguese authorities of financial assistance dated 7 April 2011, from the EU, eurozone countries and the IMF.³⁷

On 30 May 2011, the Council Implementing Decision on granting Union financial assistance to Portugal³⁸ established that its authorities, “in line with specifications in the Memorandum of Understanding”,

- “shall adopt the following measures before the end of 2011: [...] take urgently action to foster competition and the economy’s adjustment capacity. This includes the abolition of special rights of the State in companies, a revision of competition law to make it more effective”
- “shall adopt the following measures during 2012: [...] (m) The functioning of the judicial system shall be improved by implementing the measures proposed under the Judicial Reform Map [...]; (n) The competition framework shall be improved by reinforcing the independence and resources of the national regulatory authorities”.

In May 2014, Portugal exited its three-year economic adjustment programme³⁹ which “included the implementation of an ambitious reform agenda and contributed to regaining economic growth and restoring investor confidence”.⁴⁰ Since then, Portugal

³⁷ See for all the Commission’s press release: EC (2011) *EU and EFSF funding plans to provide financial assistance for Portugal and Ireland*. Available from: https://ec.europa.eu/commission/presscorner/detail/en/memo_11_313 [Accessed June, 19 2021].

³⁸ See Council’s Implementing Decision 2011/344/EU.

³⁹ See Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 2014 European Semester: Country-specific recommendations Building Growth, COM(2014) 400 final, Brussels, 2.06.2014. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0400&from=EN> [Accessed June, 19 2021].

⁴⁰ Portugal’s Programme assessment is summarized by the Commission here: EC, DG ECFIN (2014) *Portugal Programme Assessment*. Available from: https://ec.europa.eu/info/sites/default/files/ppt_for_technical_briefing_15052014_en1.pdf [Accessed June, 19 2021]. The XIX Government decided to end the programme without disbursing the full amount of the assistance (in the end €24.3 billion of €26 billion was requested). This decision was publicly announced by the government on 12 June 2014 and the concluding EFSM disbursement took place on 12 November 2014. The XIX Government was chosen by the President of the Portuguese Republic considering the results of the legislative elections that took place on 5 June 2011. The Government was supported in Parliament by a coalition between the Social Democratic Party and the Christian Democrat Party and took office on 21 June 2011.

has been under post-programme surveillance (PPS), until at least 75% of the financial assistance received has been repaid.⁴¹

COMPETITION MEASURES IN THE 2011/2014 PROGRAMME

For the purposes of this paper, we have focused on the Memorandum of Understanding, without prejudice to the equivalent relevance of the MEFP's contents and conditionality.

In the original version of the MoUs, under the Title "Competition, public procurement and business environment", among the Objectives set out are the following: "Ensure a level playing field and minimise rent-seeking behaviour by strengthening competition and sectoral regulators; eliminate special rights of the state in private companies (golden shares); reduce administrative burdens on companies; ensure fair public procurement processes". It should be noted that the amendment of the Competition law framework constitutes a "Structural benchmark" in the MEFP, with the inherent consequences in terms of disbursements and the conditionality of the programme.⁴² The text of the specific MoUs measures read as follows:

Competition and sectoral regulators

7.20. *Take measures to improve the speed and effectiveness of competition rules' enforcement. In particular:*

- i. Establish a specialised court in the context of the reforms of the judicial system [Q1-2012].*
- ii. Propose a revision of the competition law, making it as autonomous as possible from the Administrative Law and the Penal Procedural Law and more harmonized with the European Union competition legal framework, in particular: [Q4-2011]*
 - simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensure effective enforcement of competition law;*

⁴¹ The objective of PPS is to measure Portugal's capacity to repay its outstanding loans to the EFSM and EFSF. Under PPS, the Commission and the ECB launch regular review missions to Portugal to analyse economic, fiscal and financial developments, and report semi-annual assessments that may recommend further measures when necessary.

⁴² See Portugal (2011) Letter of Intent, Memorandum of Economic and Financial Policies (Portuguese version), and Technical Memorandum of Understanding, May 17, 2011, p. 10, table 2: Portugal. Structural Conditionality, point B: Enhance competitiveness. Available from: <https://www.imf.org/external/np/loi/2011/prt/051711.pdf> [Accessed June, 19 2021]. See also fn. 26 of Measure 7.20. in the MoU[s], above in the transcribed text. Concerning the commitments on Competition as assumed by the Portuguese authorities, see paragraph 27 of the MEFP in its original version and the paragraph's recitals.

- *rationalize the conditions that determine the opening of investigations, allowing the competition authority to make an assessment of the relevance of the claims;*
- *establish the necessary procedures for a greater alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the ex ante notification of a concentration operation;*
- *ensure more clarity and legal certainty in the application of Procedural Administrative law in merger control.*
- *evaluate the appeal process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.*

iii. Ensure that the Portuguese Competition Authority has sufficient and stable financial means to guarantee its effective and sustained operation. [Q4- 2011]

7.21. *Ensure that the national regulator authorities (NRA) have the necessary independence and resources to exercise their responsibilities. [Q1-2012]*

In order to achieve this:

- i. provide an independent report (by internationally recognised specialists) on the responsibilities, resources and characteristics determining the level of independence of the main NRAs. The report will benchmark nomination practices, responsibilities, independence and resources of each NRA with respect to best international practice. It will also cover scope of operation of sectoral regulators, their powers of intervention, as well as the mechanisms of coordination with the Competition Authority. [Q4-2011]*
- ii. based on the report, present a proposal to implement the best international practices identified to reinforce the independence of regulators where necessary, and in full compliance with EU law. [Q4-2011]*

In brief, the two measures transcribed above contain four complementary axes for pursuing the aim of strengthening competition enforcement of EU competition rules in Portugal, as follows:

- i) the creation of a court with specific competence for competition cases, until then of the competence of the Lisbon's commercial court;
- ii) the amendment or enactment of a streamlined Competition law more aligned with the EU rules;
- iii) adequate measures to ensure stability and suitability concerning the PCA's financial means (a condition for the due exercise of its powers of enforcement of EU rules);

iv) legal assurance that not only the PCA but also the main sectoral regulators⁴³ hold “the necessary independence and resources” to exercise their responsibilities.

Without prejudice to focusing specifically on the Competition framework in this context, one should not underestimate the importance of the intertwining nature of the broader commitments assumed by the Portuguese authorities with the aim of substantially increasing competitiveness, as the Troika arguably seems to acknowledge during its ongoing evaluation. It may explain (at least partially) the evolving nature of the wording of the versions of the memoranda of understanding until the conclusion of the Economic Adjustment Programme.

After the First Review mission in August 2011, the Troika’s assessment of the actions to implement the above measures was undertaken globally and in a positive tone. More precisely, the Commission’s staff report states that

*the first actions to improve the speed and effectiveness of enforcing competition rules have been taken with the creation of a specialised court for Competition, Regulation and Supervision. [...] An independent report on the governance and resources of the NRAs is due by Q1-2012, to be followed by proposals in the following quarter, which will be implemented by Q3 and Q4-2012. A new measure sets October 2011 for the launch of the tender.*⁴⁴

⁴³ Even though measure 7.21. of the MoUs (original version) does not identify the main sectoral regulators it concerns, when considering the overall goals of the Economic Adjustment Programme it is safe to assume that first and foremost the measure is addressed to the sectors where there was already increased harmonisation, and where EU rules provided for the existence of independent sectoral regulators, such as energy, telecoms and transports. This may be explained not only by the interplay between sectoral regulators and the PCA within the scope of their respective competencies, but also by the related structural reforms that were in the memoranda of understanding as regards the implementation of EU legislation on those sectors of activity. See for instance, measure 5.2. of the MoUs: Transpose the Third EU Energy Package by the end of June 2011. This will ensure the National Regulator Authority’s independence and all powers foreseen in the package; measure 5.16 of the MoUs: Ensure more effective competition in the sector by implementing the new Directive on EU electronic communications regulatory framework (“Better Regulation Directive”), which will (among other things) enhance independence of the National Regulator Authority. [Q2-2011]; measure 5.20 of the MoUs: Further liberalise the postal sector by transposing the Third Postal Directive ensuring that powers and independence of the National Regulator Authority are appropriate in view of its increased role in monitoring prices and costs [Q3-2011]; and measure 5.23 of the MoUs: Transpose the EU Railway Packages and in particular: [Q3-2011] i. Strengthen the rail regulator independence and competences including by strengthening its administrative capacity in terms of decision and execution powers and staffing.

⁴⁴ See page 5 of the report available at: EC (2011) *The Economic Adjustment Programme for Portugal. First review - Summer 2011*. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op83_en.htm [Accessed June, 19 2021]. After the joint EC/ECB/IMF mission met with the Portuguese authorities in Lisbon from 1 to 12 August 2011 to assess compliance with the terms and conditions of the First Review under the Economic Adjustment Programme, the Commission’s services produced the referred report which includes their joint conclusions.

More precisely, the Competition, Supervision and Regulatory Court was created by Law No 46/2011, of 24 June⁴⁵ (and later installed by Decree No 84/2012, of 29 March).⁴⁶ During the same Review, the “full commitment of the newly elected Government to the programme agreed in May” was duly noted by the Troika.⁴⁷

On 4 November 2011, the Government launched a public consultation on a draft proposal of the Competition Act that, in our view, somewhat attenuated the initial revamping impetus set out in the original version of the memoranda of understanding. Public consultation lasted for a month and the observations presented by many stakeholders still criticised the unbalance between the substantial reinforcement of the PCA’s powers and the constitutional and legal safeguards inherent to misdemeanours, notably as regards the rights of defence and due process.⁴⁸ The Ministry of the Economy was particularly involved in the implementation of this measure and created an informal working group that included the PCA and representatives of very relevant stakeholders with different backgrounds, with the view of covering as a broader range of insights as possible, in addition to the public consultation.⁴⁹ The same working group analysed the observations received and provided its input to the Government’s internal conclusion of the draft proposal of law.

Given the Commission’s role to “provide continued advice and guidance [...] [on] structural reforms”⁵⁰ as referred above, it is possible to guess the intensity of the interaction there may have been between the Portuguese authorities and at least the Competition Directorate-General on the contents and wording of the draft proposal of law. It should be noted that the Commission, in the context of its participation in the

45 Lei n.º 46/2011 Assembleia da República, DR, Series I, No 120, 24.06.2011.

46 Portaria n.º 84/2012 Ato da Série I Ministério da Justiça Declara instalados o 1.º Juízo do Tribunal da Propriedade Intelectual e o 1.º Juízo do Tribunal da Concorrência, Regulação e Supervisão, DR, Series I, No 64, 29.03.2012.

47 See par. 67 of the report mentioned above in fn. 44. Reference to the XIX Government is made above in fn. 40. As regards the binding nature of the memoranda of understanding for the Portuguese State, see above fn. 13.

48 According to information publicly available, there were at least 27 contributions to the public consultation, which included notably undertakings, associations and law firms and many of them continue to be publicly available.

49 Besides the president and his team from the PCA, the working group included a member of the Minister’s Cabinet, a member of ESAME (from the Cabinet of the Deputy Secretary of State to the Prime Minister) and the presidents of the Portuguese Competition Lawyers Association (CAPDC) and the Portuguese delegation of the International Chamber of Commerce. ESAME was the Government’s technical unit monitoring the implementation of the Economic Adjustment Programme, liaising (together with the Ministry of Finance) between the Government and the Troika as regards the technical implementation. ESAME was created by Resolution of the Council of Ministers No 28/2011 of 11 July, later repealed by Decree-Law No 177/2012, of 3 August, which integrated the technical unit in the Cabinet of the Deputy Secretary of State to the Prime Minister. Annex 1. “provision of data” to the MoU[s] had commitments for ESAME on the reporting of data to the Troika. ESAME was disbanded with the successful conclusion of the Economic Adjustment Programme in 2014.

50 See Article 3(9) of the Council’s Implementing Decision 2011/344/EU.

ECN and ongoing assessment of the effectiveness of enforcement of EU competition rules by NCAs and the means to improve it, would be particularly attentive to the implementation of this measure.

After the Second Review mission in mid-November 2011, the Commission's staff report⁵¹ states that

*The success of the Programme depends crucially on the implementation of a wide range of structural reforms that will remove the rigidities and bottlenecks behind the economy's decade-long stagnation. [...] As for tackling entrenched practices distorting competition, a strengthening of the competition framework is underway.*⁵²

The timeline for the enactment of the competition law was extended to January 2012.⁵³

After the Third Review mission of mid-February 2012, the Commission's staff report⁵⁴ stated that "Noticeable progress has been made in the area of structural reforms. The far-reaching and ambitious reform agenda is on track in the areas of [...] regulatory framework including competition". In the meantime, the Government submitted the Proposal of Law for the new Competition Act to Parliament.⁵⁵ After a thorough legislative procedure, which included opinions delivered by several entities, such as the Superior Council of Judiciary and the Public Attorney's office, as well as the Bar Association,⁵⁶ Parliament approved the new Competition Act, Law 19/2012 and it was published on 8 May 2012 (2012 Competition Act).⁵⁷

51 European Economy (2011) *The Economic Adjustment Programme for Portugal Second review - Autumn 2011*. Brussels: EC Directorate-General for Economic and Financial Affairs. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp89_en.pdf [Accessed June, 19 2021].

52 Council recommendation of 10 July 2012 on the National Reform Programme 2012 of Portugal and delivering a Council opinion on the Stability Programme of Portugal, 2012-16 (2012/C 219/20), OJ C 219, 24.07.2012, p. 69.

53 As provided in the third version of the MoUs and likewise on the updated Table 2. Portugal. Structural Conditionality, Point B: Enhance competitiveness enclosed to the updated MEFP.

54 A joint EC/ECB/IMF mission met with the Portuguese authorities in Lisbon from 15 to 27 February to assess compliance with the terms and conditions of EC, *The Economic Adjustment Programme for Portugal Third Review - Winter 2011/2012*. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp95_en.pdf [Accessed June, 19 2021].

55 Proposta de Lei 45/XII/1 Aprova o Novo Regime Jurídico da Concorrência, revogando a Lei n.º 18/2003, de 11 de junho, e a Lei n.º 39/2006, de 25 de Agosto. Available from: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalleIniciativa.aspx?BID=36753> [Accessed June, 19 2021]. The initial text of the Proposal of Law was submitted on 6 February 2012, but there were technical problems and it was subsequently replaced.

56 See above in the link mentioned in fn. 54 the different phases of the legislative procedure and the opinions delivered by the participating entities.

57 Lei n.º 19/2012 Aprova o novo regime jurídico da concorrência, DR, Series I, No 89, 8.05.2012. Already amended by Law 23/2018, of 5 June, which implements Directive No 2014/104/EU of the

Deadlines were addressed during this same Review mission and the Troika acknowledged that

A number of deadline postponements in the current review are not necessarily a sign of non-compliance by the Portuguese authorities. When negotiating the original MoU[s] in May of last year, a relatively large cluster of deadlines were set to be fulfilled by the end of the year. Most were met by Portuguese authorities, but a number of deadlines turned out to be over-optimistic for one or several reasons, be this (i) an underestimation of the challenges to be tackled, (ii) capacity constraints as overlapping demands have been addressed to the same services; or (iii) the need to deal with unforeseen events.⁵⁸

After the Fourth Review mission of late May-early June 2012, the Commission's staff report⁵⁹ stated that "In the area of structural reform, a number of dossiers have been closed, but a lot remains to be done to complete the agenda. [...] Regulatory reform is making headway in various areas, including the general competition framework, and the judicial reform is advancing on schedule"⁶⁰. Nonetheless, "The monitoring of the implementation of structural reforms will continue to be a major task over coming staff missions"⁶¹.

The wording of measures 7.20 and 7.21 (original version), aimed at implementing the four axes mentioned above, reflect different "margins of manoeuvre" of the Portuguese authorities when implementing them. The final wording of the 2012 Competition Act, which concerned several of the features to which the Portuguese authorities committed under the above measures, notably as regards merger control, is fully deserving of a detailed analysis. However, for the purposes of this paper, and considering the primary aim of Directive ECN+, we merely highlight the commitment to "simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensuring the effective enforcement of competition law".

European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1-19.

58 Proposta de Lei 45/XII/1.

59 A joint EC/EBC/IMF mission met with the Portuguese authorities in Lisbon between 22 May and 4 June to assess compliance with the terms and conditions of the Fourth Review of the Portuguese Economic Adjustment Programme. See paragraph 5 of the Report: European Economy (2012) *The Economic Adjustment Programme for Portugal Fourth review – Spring 2012*. Available from: https://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp111_en.pdf [Accessed June, 19 2021]. On page 7 of the document, it is reminded that 7. *Revisions to the Memorandum of Understanding reflect mainly advances in reform implementation. In most cases, adjustments are the result of the evolution of specific reform measures, either because the measure has been completed and therefore dropped from the MoUs or because the measure has advanced to another stage and conditions had to be modified accordingly. Occasionally also deadlines were adjusted, given changed circumstances.*

60 Ibid, p. 6.

61 Ibid.

This touches upon the complex interplay between the historic nature of a misdemeanour of competition infringements and the need to further consolidate a set of autonomous rules in the context of the competition legal framework. Though the wording of the 2012 Competition Act provides for further consolidation of the procedural rules, there are, nonetheless, subtle indications of the efforts to choose between the EU sanctioning legal framework and the ancillary application of the national misdemeanour regime (importing concepts from criminal and procedural penal law).⁶² It should be noted that the Portuguese legal framework provides for the right of individuals to request leniency, their liability for infringements of competition and the sanctions applied to them.

To this should be added that the discussion on the applicable procedural rules concerning the infringement procedure continues to be very acute in the context of the ongoing implementation of the ECN+ Directive. Upon the Government commissioning the PCA to prepare a draft of the Proposal of Law to implement the directive in early 2019 and the setting up of an *ad hoc* working group with some relevant stakeholders,⁶³ this topic was debated heavily, including during the subsequent interaction with stakeholders and the public consultation on the updated draft which followed. The PCA's final draft was sent to the Government⁶⁴ and served as the basis for the latter's proposal of law currently being debated in Parliament.

The last two axes of the amendment of the Competition framework provided in the Economic Adjustment Programme, as mentioned above, were addressed in a convergent manner between 2012 and 2014. More precisely, the financing of the PCA was temporarily ensured by decree, and subsequently included in the bylaws of the PCA⁶⁵ amended in line with the new Framework Law of Independent Administrative Entities (Framework Law).⁶⁶ This regulated the creation and functioning of the main NRAs. The bylaws of several sectoral regulators were subsequently amended or enacted in light

62 See, for instance, MOURA E SILVA, M. (2014), when analysing the amendments introduced by the 2012 Competition Act in the sanctioning procedure (title 3).

63 More information: AdC (2020) *The AdC has submitted to the Government the proposal of draft legislation for the transposition of the ECN+ Directive*. Available from: http://www.concorrenca.pt/vEN/News_Events/Noticias/Pages/The-AdC-has-submitted-to-the-Government-the-proposal-of-draft-legislation-for-the-transposition-of-the-ECN--Directive.aspx?lst=1&Cat=2020 [Accessed June, 19 2021].

64 See, for instance, the opinions received by the PCA and made available at: AdC (2019) *Consulta pública sobre proposta de anteprojeto de diploma de transposição da Diretiva "ECN+"*. Available from: http://www.concorrenca.pt/vPT/Noticias_Eventos/ConsultasPublicas/Paginas/Consulta-p%C3%BAblica-sobre-proposta-de-anteprojeto-de-transposi%C3%A7%C3%A3o-da-Diretiva-%E2%80%9CECN-%E2%80%9D.aspx?lst=1&Cat=2019 [Accessed June, 19 2021] and the contributions published after the PCA updated the draft Proposal of Law subsequently to the analysis of the opinions received during the consultation procedure, available in *Revista C&R* (Competition and Regulation Review) 42-43 from September 2020, http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Revista_CR/Paginas/RevistaCR42.aspx?lst=1.

65 Decree-Law No 125/2014 of 18 August, DR, Series I-A, No 157, 18.08.2014.

66 Law No 67/2013, of 28 August, DR, Series I-A, No 165, 28.08.2013. This law has already been amended three times.

of the Framework Law and the sectoral legislation enacted in the context of the overall commitments of the Portuguese authorities.

Further insight into the Commission's assessment of the Portuguese legislator's choices made during the Economic Adjustment Programme was made public in 2014, as detailed below.

REFERENCE TO PORTUGAL'S 2011 REFORM IN THE ROOTS OF THE ECN+ DIRECTIVE

.....

In the present context, we are focusing on the contents of the Commission's 2014 Communication on the Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (Communication) and the two Staff Working Documents that accompanied it.⁶⁷ This is due to the fact that they paved the way for the preparatory work of Directive ECN+⁶⁸ and contain several insightful references to the amendments introduced by Member States under financial assistance (designated by the Commission as "Assistance countries") to their respective competition frameworks, in the context of structural reforms agreed with the international creditors.

When introducing the goal of enhancing competition enforcement by the NCAs, regarding institutional and procedural issues, the Commission⁶⁹ points out the landmark change that Regulation 1/2003 brought about in the way in which EU competition law was enforced beforehand. It also presents figures confirming that, at least in terms of quantity, NCAs have become a key pillar of the application of EU competition rules,⁷⁰ even though, according to the Commission in 2014, a "substantial level of convergence in the application of the rules has been achieved, but divergences subsist".

67 COM(2014) 453 final} {SWD(2014) 230 final} and the two Staff Working Documents are mentioned above in fn. 10 and 16. Available at https://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf. This is without prejudice to the relevance of the previous assessments and notably the 2009 Report on Regulation 1/2003 and the follow-up, in the context of which the ECN made a detailed inventory of the investigation and decision-making procedures for competition enforcement which existed in the Member States. The two ECN Reports on Investigative and Decision-Making Powers were published in November 2012 and provided an overview of the status quo in the ECN for the first time. EC, *Competition Policy*. Available from: <http://ec.europa.eu/competition/ecn/documents.html> [Accessed June, 19 2021].

68 See the Commission's press release of 22 March 2017: EC (2017) *Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth*, Brussels, 22 March 2017. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_685 [Accessed June, 19 2021] with a link to the proposal. After the publication of the 2014 documents by the Commission, it carried out a public consultation between November 2015 and February 2016 and sounded out options for specific action with both the national competition authorities and the Member State ministries. On 19 April 2016, the Committee on Economic and Monetary Affairs of the European Parliament and the Commission's Competition Directorate General co-organised a Public Hearing on how to empower national competition authorities to be more effective enforcers.

69 Par. 7 of COM(2014) 453 final} {SWD(2014) 230 final}.

70 Par. 26 of COM(2014) 453 final} {SWD(2014) 230 final}.

In addition, the Commission considers that the divergences “are largely due to differences in the institutional position of NCAs and in national procedures and sanctions”.⁷¹

More precisely, they concern the:

- institutional position of NCAs – the Commission recognises that EU law leaves Member States a large degree of flexibility for their design⁷² and attributes to the circumstance that this was largely left open by Regulation 1/2003, subject to the EU law principles of effectiveness and equivalence.⁷³

More precisely, in 2014 the Commission stated that, although

*EU law leaves Member States a large degree of flexibility for the design of their competition regimes [...] Many national laws contain specific safeguards to ensure the independence and impartiality of NCAs. For instance, recent reforms in Cyprus, Ireland, Greece and Portugal have strengthened the position of the NCAs.*⁷⁴

In particular, as regards the institutional design of the PCA, it should be noted that during the autumn of 2011, doubts were raised by some about whether the PCA should continue as a single purpose entity or should become a conglomerate (comprising competition and economic regulatory competences, for instance).⁷⁵

Moreover, as regards axes (iii) and (iv) of the reform of the Competition framework during the Economic Adjustment Programme referred to above, the Commission highlighted that the “MoU[s] with Portugal provided that sufficient and stable resources

71 Par. 24 of COM(2014) 453 final} {SWD(2014) 230 final}.

72 Par. 26 of COM(2014) 453 final} {SWD(2014) 230 final}.

73 Par. 24 of COM(2014) 453 final} {SWD(2014) 230 final}.

74 Par. COM(2014) 453 final} {SWD(2014) 230 final}. Footnote 6 of the transcribed excerpt reads: “Such changes were underpinned by the Economic Adjustment Programmes”. It should be noted that the Commission expresses its concerns on the trend of NCAs having “additional competences in various areas including, inter alia, consumer protection, public procurement and the supervision of liberalised sectors such as energy, post, telecommunications and railways” (paragraph 25 of the Communication). Indeed, it goes further by stating that, “Such merging of authorities is part of a Member State’s discretion and is often motivated by a search for synergies and efficiency gains. The Commission has closely followed instances where NCAs were merged with other regulators. Such amalgamation of competences should not lead to a weakening of competition enforcement or of the additional competences granted to the NCAs, or to a reduction in the means assigned to competition supervision”. Par. 26 of COM(2014) 453 final} {SWD(2014) 230 final}.

75 Given the influence that recent 2011 amendments to the Spanish competition framework could have on the Portuguese one that same year, it is most relevant to note the Commission’s statement according to which, “The establishment of the new CNMC in Spain, merging the Spanish NCA with six sectoral regulators, has also been subject to close monitoring in the context of the European Semester, inter alia regarding its independence, financial and human resources and the division of functions between the regulator and the competent ministries. In relying on the EU legal framework for sectoral supervisory authorities, Spain was called upon to ensure the effectiveness, autonomy and independence of the newly created authority” - see par. 37 of {COM(2014) 453 final} {SWD(2014) 230 final}. The CNMC was created by Law No 3/2013 of 4 June 2013.

should be allocated to the NCA.³¹⁷⁶ and that the “MoU[s] with Portugal also led to the adoption of a framework law on national regulatory authorities which provides for general principles on the structure, functioning and financing of administrative authorities in Portugal, including the NCA.³²⁷⁷

- the procedures and sanctions for the application of the EU competition rules in the Member States – again the Commission reminds that

they are only subject to general principles of EU law, in particular, the principles of effectiveness and equivalence, as well as the observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable. This means that the procedures and sanctions used by the NCAs to apply Articles 101 and 102 TFEU are largely governed by national law.⁷⁸

In this context, the Commission acknowledges that “Procedural convergence has been enhanced in the context of agreements on financial support from the EU with the Programme Countries”.⁷⁹ Furthermore, “In Portugal, a new competition law was adopted which provides for major improvements, including the introduction of priority setting and more effective investigatory powers for the NCA”.⁸⁰ According to the Commission, the setting of priorities by NCAs is one of the “key components of the toolbox” that NCAs should have at their disposal, as recognised by the ECN.⁸¹

The above considerations were put forward by the Commission in 2014 when assessing “Convergence by ‘soft tools’ – achievements and limitations” in the absence of harmonisation by legislation of the Member States’ laws with the system set out for the Commission in Regulation 1/2003.⁸² It is most interesting that the Commission considers that “there are limits to what can be achieved by voluntary convergence and ‘soft tools’ developed in the ECN, as well as the means to foster convergence in the context of cross-cutting EU programmes”.⁸³ More precisely, the Commission highlights the difficulty in achieving “convergence with a common standard through the use of ‘soft tools’, including in the context of economic adjustment programmes”, to the extent “procedural differences are rooted in national legal traditions, national fundamental right standards or other general principles”.⁸⁴ It is outside the scope of this contribution to comment on this comparison and the qualification of what the Economic Adjustment Programmes entailed, without prejudice to its utmost importance to understand the

76 Par. 34 of {COM(2014) 453 final} {SWD(2014) 230 final}.

77 Ibid.

78 Par. 42 of {COM(2014) 453 final} {SWD(2014) 230 final}.

79 Par. 49 of {COM(2014) 453 final} {SWD(2014) 230 final}.

80 Par. 49 of {COM(2014) 453 final} {SWD(2014) 230 final}.

81 Par. 59 of {COM(2014) 453 final} {SWD(2014) 230 final}.

82 Title 3.2. of {COM(2014) 453 final} {SWD(2014) 230 final}.

83 Par. 53 of {COM(2014) 453 final} {SWD(2014) 230 final}.

84 Ibid.

Commission's mindset when developing its role of "advice and guidance" concerning structural reforms in the same context.

It is in view of all the above that, in 2014, the Commission concluded that, in order to "enhance EU competition enforcement for the future, the institutional position of NCAs needed to be reinforced, while at the same time ensuring the further convergence of national procedures and sanctions applying to infringements of EU antitrust rules". And these two aspects are "key to achieving a truly common competition enforcement area in the EU".⁸⁵ In this way, the Commission paves the way for the justification of higher convergence through the enactment of the ECN+ Directive.

CONCLUSIONS

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The interplay between the enhancement of the powers of the NCAs to enforce EU competition rules with the aim of creating a level playing field and the asymmetries explained by national law specificities continues to be an acute topic in the realm of the implementation of the ECN+ Directive in Member States. It also calls for a thorough analysis and an in-depth reflection that is not possible within the context of this contribution.

As regards specifically the Portuguese reality, it is most interesting to ascertain the impact of the Economic Adjustment Programme (2011/2014) on the anticipation of several of the lines of the reform of the Competition framework as set out in the ECN+ Directive.

Irrespective of any merits of the Portuguese Competition Authority concerning the authorship of earlier calls for action, there seems little doubt that competition culture in Portugal until 2011 did not show readiness to support the PCA's call for substantially increased investigatory powers and further alignment with EU rules. The circumstances under which the Portuguese authorities undertook to revamp the overall Competition framework in the context of the "ambitious reform agenda" in May 2011, and subsequently undertook the actions to comply with the overall targets, are well known.

Moreover, correlated topics with the amendment of the competition law such as (i) the PCA's stability concerning its financing and the resources to pursue its mission, (ii) the clarification of the interaction between the PCA and sectoral regulators, (iii) the assurance of their overall independence and financial resources with the consequent impact on the enforcement of competition, and (iv) the judicial scrutiny of the PCA's decisions, also constitute structural reforms considered the backbone of the "Competition framework" in Portugal. The same seem to have been considered as such when the Troika undertook the positive assessment of the changes introduced in 2011/2014.

It should be remembered that, besides continuing to develop efforts in the context of ECN, pushing the enhanced convergence of national competition frameworks towards greater alignment with EU rules, the Commission's role in the context of the 2011/2014 Economic Adjustment Programme for Portugal included to "provide continued advice

⁸⁵ Par. 25 of {COM(2014) 453 final} {SWD(2014) 230 final}.

and guidance on [...] structural reforms”. Can we assume that the subtle evolution of the wording of the commitments set out in the relevant measures allows for the interpretation that, in particular, the Commission acknowledged the complexity of some of the ambitious goals, including due to the diverse nature of stakeholders’ contributions, and considered the boundaries of their feasibility in light of the specific nature of national law and the factual framework?

In any event, while it welcoming the evolution that occurred in the same time period, compared to Member States that did not receive financial assistance, the Commission concludes that the use of such “soft tool” has limitations for enhancing convergence of the enforcement of EU rules by NCAs. More precisely, procedural differences “rooted in national legal traditions, national fundamental right standards or other general principles”. Thus, the Commission considers that, similarly to what happens with other “soft tools” having the same aim, it is not adequate for obtaining the envisaged level playing field and thus the enactment of legislation by the EU is justified.

Adopting a forward-looking perspective, we wonder how to reconcile the differences mentioned above (several of which continue to be current as regards the Portuguese framework) with the ongoing implementation of the ECN+ Directive.

We thus hope that the systematization of the most recent historical background proves to be useful when discussing the need and adequacy of the evolution envisaged by some of the provisions set out in the Proposal of Law presented by the XXII Government to the Parliament on 21 May. When anticipating an impending amendment of the Competition Act that goes beyond the implementation of the ECN+ Directive, lessons from the outcome of the amendment of the Competition framework a decade ago may also prove useful. More precisely, going beyond what the directive provides may increase litigation and legal uncertainty beyond what may already be anticipated concerning some of the directive’s innovations in light of the Portuguese constitutional principles and the constitutional rights.