

THE NEW PORTUGUESE COMPETITION LAW – WHAT WILL CHANGE?

BACKGROUND

Today the new competition legal regime was published in the Official Journal (“*Diário da República*”) – hereinafter “new competition law” or “NCL”¹. It is one of the reforms agreed to within the *Troika Memorandum of Understanding* (entered into in 2011 between Portugal, the European Commission, the ECB and the IMF), with the purpose of aligning our competition legal regime with that of the European Union and taking into account both the Portuguese case-law and the Portuguese Competition Authority’s decisional practice (‘PCA’). This law is of great importance to companies in so far as it creates the conditions for a stronger enforcement of competition law. The PCA is provided with a complete set of tools, at the same level as that of the most advanced authorities in the world. Regrettably however, the same cannot be said in relation to the control and transparency mechanisms.

RESTRICTIVE PRACTICES

Home searches

The possibility to conduct home searches in competition law investigations is a very controversial issue, as it may be challenged on the basis of constitutional grounds. Bearing in mind that a competition law infringement is qualified as a misdemeanour, it is difficult to understand that the PCA may carry out home searches, in breach of the right to privacy. In fact, according to the Portuguese Constitution, public authorities are prohibited from interfering with correspondence, telecommunications

and other types of communication, with the exception of those cases stipulated by law in matters relating to criminal procedure (Article 32 §4 of the Portuguese Constitution).

Dismissal of case through commitments

During the proceedings, the PCA may accept commitments susceptible of eliminating anticompetitive effects resulting from such practices. Although there is no formal admission of fault by the accused, the PCA may dismiss the proceedings through the imposition of commitments. This new procedure allows for a faster closure of the proceedings, avoiding complex litigation, as well as the imposition of fines and appeals and protects the undertaking’s reputation.

Settlement procedure

The accused may submit a settlement proposal to the PCA, acknowledging both its participation in the illicit act and its liability. Three essential consequences result from this: *i)* reduction of the fine, *ii)* facts cannot be re-assessed in another proceeding, and *iii)* confessed facts may not be contested in Court.

Structural measures

Other than the imposition of fines, decisions may also include the imposition of behavioural or structural measures that are considered indispensable for the termination of the restrictive practices or its effects. However, structural measures, such as the selling of assets, may only be imposed when there are no equally effective behavioural measures.

¹ The NCL revokes Law n.º 18/2003, 11 June and Law n.º 39/2006, 25 August.

Studies, inspections and audits

A new legal provision intends to put an end to the long-standing dispute as to whether information and documents collected during non-infringement supervisory proceedings, such as sector inquiries, may be used in the infringement proceedings. At stake is the breach of the fundamental constitutional right against self-incrimination, due to the fact that it is possible for the PCA to include documents from supervisory proceedings which do not adequately protect the rights of the accused, such as the right to silence.

Publication of decisions

Following upon the Commission's best practices in relation to the publication of its decisions, the PCA is now due to publish on its website the decisions on restrictive practices, whilst protecting trade secrets and other confidential information.

Guidelines for setting fines

The PCA must publish guidelines including the methodology for the setting of fines, as is the case with the European Commission, thereby giving greater legal certainty to companies.

Suspension of the Statutory Limitation Period

The law establishes the suspension of the statutory limitation period while an appeal against the PCA's decision is still pending.

Leniency

The leniency legal regime is now directly included in the NCL and is now more aligned with European Commission's regime, as it applies only in cartel cases and to a larger number of undertakings that may benefit from this legal regime, in terms of immunity or reduction of fines.

The appeal does not suspend the fine

The appeal does not suspend the effects of the condemnatory decision and the undertakings must immediately pay the fine. Though this is the European rule, the Portuguese rate of decisions upheld by the courts is extremely different. Moreover, the provision

also raises constitutional issues regarding the presumption of innocence (*in dubio pro reu* principle).

Upon the filing of the appeal, it is possible for the accused to provide a guarantee instead of paying the fine, when the compliance of the decision would cause him considerable damage. In times of austerity this provision will seriously affect many undertakings, given the current very difficult access to bank guarantees.

Deadline to appeal

When comparing the term for filling an appeal of decisions of two months as attributed in the European competition law to the deadline of 30 working days in the NCL, the latter deadline is not sufficient, given that it is a response to typically extensive decisions, involving a complex juridical and economical analysis spanning several months in preparation, involving fines that may go above and beyond dozens (or even hundreds) of millions of euros.

Courts may increase fines

Contrary to Portuguese legal tradition, the NCL eliminates the prohibition of *reformatio in pejus*, meaning that the court may increase the fine imposed by the PCA.

PCA's freedom of action

The PCA has been given significant freedom of action in relation to:

- a) Assigning different degrees of prioritization in the handling of complaints;
- b) The granting of only 10 working days for the undertaking to respond to requests for information;
- c) The possibility of performing seizures that have not been previously authorised by a judicial authority (it now only needs to be validated, *a posteriori*, by the prosecutor); and the
- d) Possibility of excluding access by the undertakings concerned to the file, until such time as there is the notification of the statement of objections.

MERGER CONTROL

New notification thresholds

The thresholds determining the obligation to notify have been increased. Thus, mergers are subject to previous notification when one of the following conditions has been fulfilled:

- a) Market share equal to or above 50%;
- b) Market share equal to or above 30% and under 50%, provided that the individual turnover in Portugal, by at least two of the undertakings concerned, was over 5 million euros; or
- c) The group of undertakings involved in the merger attained a turnover superior to 100 million euros in Portugal, as long as the turnover that was individually attained in Portugal, by at least two of the undertakings concerned, was over 5 million euros.

Term for filling the notification

The previous deadline of seven working days to notify a merger to PCA, following the conclusion of a binding agreement, has been removed, as a result of which the current European solution has been adopted. Furthermore, undertakings may submit, in advance and voluntarily, a notification to the PCA even before the conclusion of the agreement.

Substantive test

Pursuant to EU law, the current substantive test for market dominance was replaced by the concept of "*significant impediment to effective competition*", which is a more demanding criterion that allows for, *inter alia*, the prohibition of mergers that create non-coordinated effects in oligopolistic markets.

Competition Court

Although this is not a matter to be regulated directly by the NCL, a new court with jurisdiction on matters of competition, regulation and supervision was recently created, which will be located in Santarém, 84 km North of Lisbon. These decisions may be appealed to the Appeals Court of Évora, located 134 km East of Lisbon.

Entry into Force

There is a *vacatio legis* period of 60 days, as a result of which the new law will come into force on 7 July.

CONTACTS

www.srslegal.pt

_LISBON

R. Dom Francisco Manuel de Melo n°21, 1070-085

T +351 21 313 2000

F +351 21 313 2001

_FUNCHAL

Av. Zarco n°2, 2º,

9000-069 Funchal

T +351 29 120 2260

F +351 29 120 2261

_OPORTO (*)

R. Tenente Valadim n°215,
4100-479

T +351 22 543 2610

F +351 22 543 2611



_1



_2



_3



_4



_5



_6



_7

1_ GONÇALO ANASTÁCIO
goncalo.anastacio@srslegal.pt

2_ ANA RITA ANDRADE
ana.andrade@srslegal.pt

3_ DUARTE PIRRA XAREPE
duarte.pirra@srslegal.pt

4_ ALBERTO SAAVEDRA
alberto.saavedra@srslegal.pt

5_ DIANA ALFAFAR
diana.alfafar@srslegal.pt

6_ LESLIE CARVALHO
leslie.carvalho@srslegal.pt

7_ MANUEL LOPES PORTO
Of Counsel

Sociedade
Rebello de Sousa
& Advogados
Associados, RL

The present statement is general and does not constitute legal advice in relation to any specific issue.

All curricula may be consulted at www.srslegal.pt