

INFORMATIVE NOTE

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May 2011

EU AND COMPETITION LAW

THE “TROIKA” AND COMPETITION LAW

The Memorandum of Understanding entered into between the Portuguese State and the International Monetary Fund, the European Central Bank and the European Commission (“the Troika”) sets forth a range of goals and measures that shall be implemented by the Portuguese State in order to promote competition in the markets as a means to improve economic growth.

The Memorandum includes a section on competition, public procurement and business environment, in which the need to ensure a level playing field and to minimise rent-seeking behaviour in the Portuguese markets by strengthening competition as well as sectorial regulation is highlighted.

In light of such purpose, the Portuguese State is henceforth under the obligation of reviewing several competition rules related in particular with procedural issues that may affect the enforcement of competition law:

Competition Rules – enforcement and procedure

■ The Portuguese State shall undertake a revision of competition law, making it as autonomous as possible from both the Administrative and the Criminal Procedural Law and more harmonised with the European Competition law framework.

Restrictive Practices

■ With regard to the control of practices that restrict competition (eg. cartels, abuses of a dominant position, resale price maintenance), the Competition Authority shall be given a greater discretion in its decisions to open investigations so as to focus on the more relevant infringements. The “Troika” seems to seek a concentration of means on the investigation of cases that might harm markets and consumers more significantly, giving the Competition Authority the possibility of setting enforcement priorities. The legal framework proposed by the “Troika” may be read as an upshot of the viewpoint that the Competition Authority should be more active in its ex post control of restrictive

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Awards 2006 & *Who’s Who* legal Awards
2006, 2008, 2009

“Corporate Law Firm of the Year -
Southern Europe”
ACQ Finance Magazine, 2009

“Best Portuguese Law Firm for Client
Service”
*Clients Choice Award - International Law
Office*, 2008, 2010

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practices, the memorandum drawing attention to the need to ensure that the Competition Authority is provided with sufficient financial means to carry out its enforcement activity.

Merger Control

■ Regarding merger control, the Memorandum points towards a simpler procedure with the view of removing unnecessary administrative obstacles to business. The main goal is to move the Portuguese legal framework closer to that of EU law, namely with regard to the criteria to make compulsory the ex ante notification of a concentration operation. Currently Portuguese law sets out two alternative criteria establishing the jurisdiction of the Competition Authority: (i) the existence of a combined market share of 30% of the Portuguese market after the merger; (ii), the achievement of a combined turnover of € 150 million in Portugal, provided that the turnover individually achieved by at least two of the parties to the concentration exceeds € 2 million.

■ In this regard the Portuguese legislator may take two alternative courses of action in order to undertake the required changes in the legislation. It may simply decide to remove the market share criterion, which does not exist in EU law. Conversely, it may adopt a solution combining a market share criterion with a turnover criterion.

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This latter option was recently made in Spain, allowing a reduction of the number of notifications, while keeping a safeguard considering the risks of monopolisation in small-sized markets in terms of value.

■ The “Troika” also aims some level of clarification regarding the application of procedural administrative law in merger control. Currently, the procedural administrative law is the main legal framework applicable to merger procedures *ex vi* the Competition Act. The goal underpinning this obligation is to adjust the procedural rules in force to the needs of the merger control procedure, particularly with regard to the pace of the procedure, in order to make it timelier to the benefit of business.

Courts and System of appeals:

■ The Memorandum imposes the establishment of a specialised competition court, a measure that was already under preparation by the caretaker government. Other EU countries such as the United Kingdom or Poland have specialised competition courts. The new court will decide on first instance on matters related to the enforcement of competition law, namely in appeals against merger control and restrictive practices decisions taken by the Competition Authority. Currently jurisdiction to hear appeals against decisions of the Competition Authority lies with the Lisbon Commercial Court.

■ The Portuguese State is also under the obligation of evaluating the appeal procedure and making the necessary changes in order to ensure a due and timely process. On this matter, changes to the law might come as a consequence of a more general reform of the judicial system

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and procedure. In this regard it is noteworthy that, on the section of the Memorandum where reference is made to the judicial system, the need to improve the functioning of the judicial system through ensuring, *inter alia*, “effective and timely enforcement of competition rules” is highlighted.

Final Remarks:

The emphasis given in the Memorandum of Understanding to the need to promote competition does not come as a surprise since the economic paradigm across the EU lies on the existence of open market economies with free competition.

The notion that the Portuguese economy is still attached to old corporatist habits might have underpinned this vigorous statement by the “Troika” as to the need to improve the enforcement of competition law. There is no reference in the Memorandum to the Portuguese substantive competition law, which mirrors to a great extent the EU law. The attention of the “Troika” was drawn to the institutional and procedural dimensions of Portuguese Law. These are the fields where changes are demanded to ensure a more effective application of the law.

Since the implementation of the Memorandum of Understanding will be thoroughly scrutinised by the entities that signed the agreement with the Portuguese State, one will

probably see important progress in the enforcement of competition law in the near future.

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