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SUMMARY OF KEY ASPECTS OF THE NEW COMPETITION LAW

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CRITICAL ANALYSIS OF THE NEW COMPETITION LAW

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1. SUMMARY

After approval by the Portuguese Parliament on 22 March 2012, Law no. 19/2012 - the new Law to protect and promote competition in Portugal which repeals Law 18/2003 of 11 June – has now been enacted by publication in the Official Gazette.

The main changes now being made to the current rules can be summarised as follows:

1. The investigative powers of the Competition Authority (the "**PCA**") specifically include the ability to search and seize premises, vehicles or other property belonging to partners/ shareholders, members of the board of directors, employees or others working with or on behalf of the companies/associations.

2. As part of its supervisory powers, the PCA can conduct on-site inspections and audits of companies. This power can be exercised by obtaining a warrant from the public prosecutor or judge and by complying with the requirement to give 10 days' notice to the company. The evidence collected can be used in other cases, including proceedings to determine sanctions against the company in question.

3. When performing its duties, the PCA is now formally guided by a principle of opportunity and, on the basis of this principle, it may assign different degrees of priority when dealing with the matters it is called upon to analyse.

4. The notification thresholds for concentrations have been altered significantly and the following concentrations/mergers must now be reported:

a. the creation of or increase in a market share to a level equal to or exceeding 50% (the previous threshold was «more than 30%»), or

b. the creation of or increase in a market share to a level exceeding 30% but less than 50%, where the turnover in Portugal over the last year of at least two participating companies has been more than EUR 5 million; or when

c. the turnover of (i) all participating companies in Portugal over the last year has been more than EUR 100 million (previously EUR 150 million) and (ii) the turnover of at least two of the participating companies has been more than EUR 5 million (previously EUR 2 million).

5. As was the already the case, the members of the companies' management bodies may be held personally liable for payment of fines. However, those responsible for the management or supervision of areas of activity which result in an infringement (e.g. commercial, finance and legal directors) are now also potentially liable whenever they are aware or should be aware of the commission of an infringement and do not adopt appropriate measures to put an immediate end to it;

6. Fines applicable to individuals should not exceed 10% of gross annual salary including all benefits, regardless of their nature, earned as a result of working for the infringing company over the last full year in which the prohibited activity occurred;

7. Appeals from decisions of the PCA will be heard by the new specialised competition, regulation and supervision court (referred to here by its Portuguese initials "**TCRS**"), which has already been set up in the city of Santarem;

8. Appeals against judgments of the PCA will, as a rule, not stay enforcement of the judgment. However, the parties affected by the judgment may apply in their appeal for final decisions ordering payment of fines or other sanctions to be stayed. For this purpose, the application must (i) demonstrate that the implementation of these decisions will cause considerable harm, and (ii) offer to provide an alternative form of security (without a predefined amount) within the period set by the TCRS;

9. The TCRS judge has full jurisdiction to hear appeals against decisions made by the PCA that apply fines (and/or penalties), and it can reduce or increase fines (and/or periodic penalty payments) ordered by the PCA;

10. The statute of limitations will increase from 8 years to 10.5 years;

11. The limitation period will be suspended during an appeal against a judgment by the PCA or during any EU procedure conducted by other national competition authorities (although the suspension cannot exceed a maximum period of 3 years);

2. TRANSITIONAL ARRANGEMENTS - ENTRY INTO FORCE

The new Law comes into force on 9 July 2012 and, after that date, it will apply to:

a) New infringement proceedings;
b) Mergers that are notified to the PCA;
c) Studies, inspections and audits which fall under the jurisdiction of the PCA; and
d) Applications submitted to the PCA.

3.CRITICAL ANALYSIS

The approval of the new Competition Law (the "**Law**"), almost a decade after the publication of Law 18/2003, is part of an extraordinary moment in the life of the country. Indeed, the need to review the competition Law framework in Portugal, which had long been discussed by the country's legal community, was a result of the Memorandum of Understanding signed between the Portuguese government and the Troika composed of the International Monetary Fund, the European Central Bank and the European Union.[1]

In line with the agreed structural reform process, the new Law will make a set of relevant changes to the existing legislative framework and, right away, bring it closer to the current European competition framework. At the same time, it will greatly strengthen the investigative and sanctioning powers of the PCA. It is, however, a legislative change that has not been free from criticism and a number of questions have been raised that will only be answered by the future decision-making practices of the PCA and the respective interpretation by the courts.

In this Newsletter we will seek to address the main changes under this new Law and also draw attention to some of the controversial aspects that will certainly come up before the national courts.

3.1 *Substantive rules on anti-competitive practices*

As to the substantive rules, the triple prohibition in Law 18/2003, that is, the prohibition on: (i) agreements, concerted practices and decisions by associations of an anti-competitive nature, (ii) abuse of a dominant position; and (iii) abuse of economic dependence, remains in place.

It should be noted, however, that the definition of a dominant position that was included in the rules has been eliminated. This is perhaps a result of the fact that the economic concept of 'dominant position' is widely-known and settled.[2] As to the content of the prohibition on abuse of a dominant position, the elimination of the reference to the situation that the object or effect of the abuse may be a restriction on competition is still relevant. This elimination shows a clear intent not only to align Portuguese Law with the corresponding provisions of the Treaty on the Functioning of the European Union, but also to give priority to the analysis of the conduct of dominant undertakings on the basis of the effects of that conduct. This is also in line with the decision-making practice of the European Commission on this matter.

3.2 The process for imposing sanctions for anti-competitive practices

If, for the most part, the substantive rules on restrictive practices do not make more than mere adjustments to the text of the legislation in force, the new Law does make an important change to the structure of the previous legislative framework regarding the proceedings and powers of the PCA. Two changes deserve particular attention: the greater discretion of the PCA in selecting competition policy priorities and management processes, and a substantial strengthening of its powers to investigate and impose sanctions in its fight against anti-competitive practices.

[1] In order to improve the speed and effectiveness of the application of competition rules, the Memorandum of Understanding set out the following fundamental goals: 1) to establish a specialised court in the context of judicial reform, 2) to propose a review of current competition Law, making it as independent as possible from administrative Law and the criminal procedure code and more in line with EU competition rules, and 3) to ensure that the PCA has sufficient funding and stability to guarantee that it is efficient and sustainable.

[2] If we recall the text of Law 18/2003, a company was regarded as being in a dominant position under Article 6 (2)(a) if it was «a company acting in a market which is not subject to significant competition or which takes precedence over its competitors.» Also, according to paragraph b) of the same Article, two or more companies acting in concert in a market where competition does not suffer significantly or where they take precedence over third parties could also be deemed in a dominant position.

Unequivocally demonstrating the wide margin of discretion given to the PCA in selecting its priorities, Article 7(1) states that «in carrying out its statutory duties, the PCA is guided by the criterion of the promotion of the public interest and defence of competition and may, based on this criterion, assign different priorities to address the issues which it is called upon to consider"[3]. The intention is to allow more efficient management of available resources, while it gives the PCA increased responsibility in going after and punishing the conduct that it investigates.

However, the replacement of a principle of legality of action by a principle of opportunity cannot take place without difficulties. The management and selection of a competition policy that rejects a significant number of complaints may leave retailers and consumers without any effective course of action against competition Law infringements that affect them. Knowing the constraints and weaknesses of taking action by means of classic civil proceedings, the PCA surely cannot fail to act when a serious infringement of the substantive provisions of the new Law appears to have taken place.

3.2.1. The procedure for breach of competition rules

a) Investigation phase

Proceedings for a breach of competition rules may typically be started by the PCA, following a complaint from an injured party or a request for immunity from a company or individual involved in the infringement being denounced.

As a result of enshrining the principle of opportunity in the legislation, the decision of the PCA as to whether to initiate an investigation or not will depend on it assessment of the following points: (i) the PCA's own competition policy priorities, (ii) the elements of fact and Law presented, (iii) the gravity of the infringement, (iv) the likelihood of being able to prove the existence of an infringement, and (v) the extent of the investigative measures required.

The Law seeks to protect the interests of complainants to a certain extent in that the PCA's decisions to reject complaints or to close a file following investigation are subject to appeal to the TCRS under Articles 8.4 and 24.5. However, the compatibility of these provisions with Article 84.2 of the new Law will certainly raise some concerns to the extent that the latter provision states that «it is not possible to appeal against a decision to close a case, whether or not conditions are imposed»

As a result of contributions during the public consultation phase, the new Law establishes time limits for the duration of each procedural stage: 18 months for investigation and 12 months for the adversarial phase. If the PCA cannot comply with these time limits, the PCA's council must inform those subject to the procedure and state the period required for completion of the investigation. The deadlines established under the new legislation are, therefore, an incentive for the PCA to act and investigate in a timely manner, contributing to a greater control over duration of the procedure and providing greater predictability to the parties involved.

The investigation phase may be concluded by the PCA in one of four ways: (1) by beginning the adversarial process, after reaching a conclusion on the basis of its investigations that there is a reasonable possibility that a decision finding an infringement will be made, (2) by closing the case when, unlike (i) above, the investigation does not lead to the conclusion that there is a reasonable possibility of such decision being made, (3) by ending the case with a settlement procedure that results in a decision ordering sanctions, and (4) by closing the case on the basis of the imposition of conditions.

[3] In contrast, Article 24 of Law 18/2003 states that «*whenever the PCA becomes aware, by any means, of any practice prohibited by Articles 4, 6, and 7, it shall open an inquiry and start an investigation to identify those practices and the respective perpetrators*».

The last two methods for concluding the investigation phase – decision by settlement and imposition of conditions - show a relevant and innovative (at least in respect of express legislative provisions) degree of flexibility when it comes to completion of the investigation. It is, therefore, clear recognition that pro-competitive activity can sometimes be more easily achieved by the PCA through cooperation with the parties involved than by way of an adversarial process.

However, some difficulties do arise with regard to the solution of ending the process with a decision finding an infringement in a settlement procedure insofar as this implies recognition by the subject of the investigation of its liability in the commission of the infringement. As the infringement of competition rules also implies civil liability on the part of the infringing party towards the injured parties, to be recognised in the context of potential successive or parallel compensation proceedings, the settlement agreement with recognition of guilt should be looked upon with particular care by the economic agents who opt for this solution. Therefore, it is important for the PCA to publicise the advantages of using this mechanism to reduce the applicable fine, failing which it will be ineffective.

In contrast, the approach of closing the case by imposing conditions is typically used to address less serious conduct or conduct which is ambiguous in terms of its restricting competition. As such, the Law makes it clear – in a solution that also arose from the contributions made during the public consultation process – that the respective final decision does not imply imputation or assumption of liability by the company being targeted, in other words, it "*did not conclude the existence of an infringement of this Law, but makes it mandatory for the parties against whom the decision is made to meet the commitments they have made*." The aim of this is to encourage the use of this tool, with the inherent administrative savings. Without such a safeguard, targeted companies would be discouraged from using the process because of a legitimate fear of repercussions in terms of civil liability.

Finally, it is important to note that, besides broad powers of investigation, search and seizure, the Law also makes provision, for the first time in the country, for the PCA to be able to carry out home searches. This is a broad concept that covers not only the homes of shareholders, members of the management bodies and employees and staff of the companies, but also vehicles and other locations, when there is reasonable suspicion that relevant evidence may be found there.[4] The PCA must obtain a warrant from the court before any such search.

Although the objective of the rule described is understandable, we must raise the question of whether the solution chosen is truly consistent with the merely administrative nature of cases relating to competition Law infringements. The extensive nature of the investigative powers should usually be proportional to the gravity and ethical resonance of the unlawful act.

b) The adversarial phase

If the PCA concludes, on the basis of the investigations carried out, that there is a reasonable possibility of obtaining a decision finding an infringement, it will begin the adversarial phase by sending a Statement of Objections to the subject of the investigation. The latter will have a period of not less than 20 business days to make a written submission on: 1) the issues that may be of interest in reaching a decision in the case; 2) the evidence produced; and 3) to request any complementary steps as regards evidence that it sees fit.

In its reply to the Statement of Objections, the subject of the investigation may ask for the Statement to be complemented by an oral hearing.[5] Any such hearings, at which the PCA may ask questions, will be recorded and copies of the recordings will be made available to the various subjects of the investigation (if there are co-defendants).

[4] The possibility of home searches is not, however, new to Portugal - It is also present in Article 21 of EC Regulation No. 1/2003 which deals with the investigative powers of the European Commission.

[5] In contrast, under Law 18/2003, the oral hearing may be substituted or complemented by a written hearing if the companies or associations of companies against which the proceedings are brought apply to the PCA for this within five days of receiving the notification.

It should also be pointed out that the Statement of Objections does not bring the PCA's investigation activity to a standstill and the PCA may still carry on taking complementary steps to gather evidence under Article 25 (4) of the Law. However, if the new evidence results in a substantial change to the facts initially put forward or to their classification, the PCA must issue a new Statement of Objections. This will give rise to a new reply from the subject of the investigation to honour its right to defend itself and to a prior hearing.

3.3 Control of merger operations

The Law also features innovation in respect of merger control. Indeed, the evolution of European regulations demands corresponding changes to Portuguese legislation on this point.

3.3.1 Operations subject to control

Accordingly, changes have been made to the definition of the thresholds for notification of operations to the PCA. Notice must be given whenever operations result in: 1) the creation of or increase in a market share to a level greater than 50%; 2) the creation of or increase in a market share to a level greater than 30% and lower than 50%, as long as the turnover achieved individually in Portugal by at least 2 of the participating companies is greater than 5 million euros; or when 3) the turnover in Portugal of all the companies participating in the operation is greater than 100 million euros, as long as at least 2 of the companies individually achieve a turnover of 5 million euros.[6]
As a consequence, unlike the case under the EU rules, the legislator did not opt for a single criterion for company turnover. The thresholds established are understandable in light of the small sPCAle of many markets in Portugal. A significant part of the country's economy would run the risk of being outside the control of the PCA if notification thresholds based solely on turnover had been enacted.

It should also be noted that express provision is made for an obligation to report bundles of operations. Accordingly, when two or more merger operations take place within a period of 2 years between the same subjects that reach the turnover thresholds referred to above, they must be notified even if, considered individually, they would not be subject to that obligation.[7]

3.3.2 Procedure for merger control

The start of the merger control procedure occurs, as mentioned above, as a result of notification by one of the participating companies. The notification obligation for merger operations falls: 1) jointly on the parties when the issue is a merger, the creation of a common company or the acquisition of joint control over the whole or part or one or more companies; or 2) on the party that acquires control of one or more companies in the remaining situations.

One of the new features of this Law lies in the absence of a time limit to give notice of merger operations. Notice of these operations may be given at any time after the underlying agreements are executed. However, they may not be implemented before they have been subject to a non-opposition decision or to the PCA considering that the operation is not covered by the procedure for prior merger control.[8] The notification may also be presented on a voluntary basis in the phase preceding the conclusion of the agreement underlying the operation when the companies demonstrate a serious intention to conclude it. This Law, therefore, offers greater flexibility to companies to bring their internal timing into line with the deadlines for notifying the PCA.

After notification, provision is made for a period of 30 business days at the end of which, under Article 50 of the new Law, the PCA must decide: 1) that the operation is not covered by the procedure for merger control; 2) not to oppose the merger of companies; or 3) to start the in-depth investigation.

[6] See Article 37 (1) of the new Law. In contrast, wider notification obligations were provided for under Law 18/2003, in which the duty to notify arose when: 1) as a consequence of PCArrying out an operation, a share greater than 30% in the domestic markets was created or increased; or 2) when the group of participating companies in the merger operation has acieved a turnover greater than 150 million euros in Portugal in the last financial year, as long as the turnover achieved individually in Portugal by at least two of these companies has been greater than two million euros.

[7] See Article 38 of the new Law.

[8] This is established in Article 40 of the new Law. In accordance with Article 7 of Regulation (EC) 139/2004, the same solution is envisaged for operations of an EU dimension.

If the PCA decides to start the in-depth investigation, this must be concluded within 90 business days of the notification. Under Article 53, the final decision of the PCA may be: 1) not to oppose the merger as notified or following changes made by the notifying company; or 2) to prohibit the merger operation of the companies in question.

3.3.3 Substantive analysis of the merger operation

The criteria that underlie the substantive analysis of mergers have also been reviewed by the new Law. Mergers that may create "*significant impediments to effective competition*" may now be prohibited, unlike the earlier criterion contained in Law 18/2003, which required the prohibition decision to be grounded on "*creation or reinforcement of a dominant position*". Also on this point, the approximation of the text of the legislation to the EU rules is clear. This is legislation that is far from being merely cosmetic in character. It allows control over merger operations which, even though they do not appear capable of strengthening an individual dominant position, if they go ahead, may have negative consequences for the competition process by virtue of the fact that they increase phenomena of coordination in markets that tend towards oligopolies.

As to the criteria for evaluation of the merger, one should note the disappearance of the legislative text referring to the contribution of mergers to the international competitiveness of the domestic economy, as this was a consideration of industrial policy that was out of line with the objectives of the competition rules that the PCA is committed to pursuing.

3.4 *Sanctions*

The regulations on sanctions to be applied by the PCA have seen some adjustments in the new Law. The result is that: 1) the practice of anti-competitive agreements, abuse of a dominant position and abuse of economic dependence; 2) failure to comply with conditions imposed following the closure of an infringement PCAse or failure to respect measures of a structural nature imposed following the decision to convict; and 3) failure to respect a decision ordering protective measures, may be punished with a fine up to 10% of the turnover for the "financial year prior to the decision".

It is also important to remember that express provision is made for the possibility of imposing structural measures as a consequence of the infringement of competition Law when such measures are essential in order to stop the practice or its effects. However, the application of structural measures is subject to a strict test of proportionality and they may only be imposed when there is no other measure that is equally effective or, if there is, is more onerous for the company in question.

As to infringements relating to the procedure for merger control, provision is also made for: 1) merger operations to be carried out before they have been subject to a non-opposition decision; and 2) the failure to respect conditions, obligations or measures imposed on companies by the PCA in this respect also lead to the imposition of a fine up to 10% of annual turnover.[9]

One of the most relevant new features in this area relates to the liability of individuals for infringements of competition Law: the range of people who may be held liable is broadened. In addition to the members of the management bodies of legal entities or equivalent entities, those responsible for the management or supervision of the areas of activity in which an infringement is committed may also now be subject to sanctions in the form of payment of fines when they are aware or ought to be aware of the commission of the infringement and do not take appropriate steps to put an immediate end to it.

[9] Provision is also made for fines of up to 1% of turnover for cases of: 1) failure to provide information or provision of false, inaccurate or incomplete information; 2) failure to cooperate with the PCA or obstruction of its powers; and 3) unjustified failure to appear by the complainant, witness or expert in the proceedings for which they have received proper notice.

The fines applicable to individuals must not exceed 10% of the respective annual gross remuneration earned from the infringing company in the last full year of the prohibited practice. For this purpose, the concept of remuneration is very broad in character including as it does wages, salaries, payments, gratuities, percentages, commissions, shareholdings, subsidies or bonuses, attendance fees, and accessory emoluments and remuneration.

3.5 *The programme for non-imposition and reduction of fines*

Some relevant adjustments have also been made in respect of the possibility of non-imposition or reduction of the fine for an infringing company following the filing of a leniency application with the PCA. The Law makes it clear that the sole objective of this instrument is to detect horizontal anti-competitive practices, that is, between competitors.

With a view to changing the status quo that is conducive to the continuation of conduct that tends towards the creation of cartels, the new legislation makes it possible for both legal entities and individuals to benefit from full exemption. For this purpose the individual or entity seeking immunity must be the first to contribute with information and evidence relevant to demonstrating the infringement.[10] Anyone who, although they are not the first to present the complaint, supplies information or evidence to the PCA that has significant added value for the investigation, may also benefit from successive reductions in fines.

3.6 Appeals to the courts from decisions of the PCA

Finally, reference should be made to the sweeping changes that the new legislation makes in the field of appeals to the courts against decisions of the PCA in infringement proceedings, some of which are far from being consensual.

In the first place, appeals from decisions of the PCA come under the jurisdiction of the new TCRS (specialised competition, regulation and supervision court).

Secondly, as a rule, such appeals do not stay enforcement of the proceedings[11]. However, in the case of final decisions that apply a fine or other sanctions, an application may be made as part of the respective appeal for the appeal to suspend enforcement. In this case, the applicant must: 1) demonstrate that the enforcement of such decision would cause them considerable harm; and 2) offer to provide a financial guarantee in place of the enforcement, within the period fixed by the Court.

Thirdly, the Court decides appeals from infringement proceedings with unlimited jurisdiction. It may reduce or increase any fine or compulsory financial penalty applied by the PCA and this means the prohibition on *reformatio in pejus* (an increase in the penalty in an appeal brought by the party subject to the penalty) - which applied under the previous rules and which is the general rule in the Portuguese criminal and administrative offence systems - no longer applies. It is, therefore, to be expected that the first decisions of the recently established TCRS will have to find an answer for the better understanding of these new provisions and respective compatibility in criminal and crime-related matters, including in respect of the principle of presumption of innocence, the accusatory structure of the process and of the defendant's right to be heard and to a defence.

[10] The granting of immunity depends on the cumulative fulfillment, under Article 77 of the new Law, of the following conditions: 1) full and continued co-operation with the PCA; 2) the leniency applicant has stopped its participation in the infringement; and 3) the leniency applicant has not coerced the other undertakings to participate in the infringement.

[11] The new Law only maintains the rule of the suspending effect of the appeal for decisions that apply measures that are structural in character, determined as a consequence of the infringement.

4. CONCLUSION

The various changes to the current legal framework give the PCA wide powers to define when and how to act. To a great extent, the PCA will have extensive discretion in deciding what actions to take and it is to be expected that it will seek to select priorities that will lead to more decisive action in the sectors defined. In fact, this strengthening of the powers of the PCA, which the PCA itself had requested, means that it will have increased responsibility as an engine for the development of the competitive process in Portugal.

Naturally, the question arises as to whether the objective of increasing the PCA's powers to impose sanctions and to investigate has not perhaps been achieved at the expense of an excessive compression of the rights of companies and citizens. The PCA's first responsibility will be to answer this question by demonstrating, by means of the transparent application of the legislation, in accordance with best administrative practices, that these fears are unfounded. It will ultimately fall to the courts, when necessary, to correct the direction of the PCA's decision-making practices. It will, therefore, be essential to follow the evolution of the PCA's actions and wait for the first decisions of the courts to interpret the new rules. These will, no doubt, be key moments in the development of the Law and culture of competition in Portugal.