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THE NEW COMPETITION LAW IN PORTUGAL

The new Portuguese Competition Act ('*Regime Jurídico da Concorrência*') approved by Law No. 19/2012 of May 8 (henceforth, 'RJC' or 'Law No. 19/2012') entered into force on July 7, repealing Law No. 18/2003, of June 11 (the current Competition Act).

Background

MoU. The *Memorandum of Understanding on Specific Economic Policy Conditionality* made between Portugal, the EU Council (Ecofin and Euro group formations), the European Commission and the IMF (with the participation of the ECB) on May 17, 2011 provided for, as a condition to grant the loan, the approval of new competition rules. According to the MoU the new Act ought to 'improve the speed and effectiveness of competition rules' enforcement', notably through the creation of a

specialised court[1] and the revision of the current Competition Act, with the major purpose of 'making it as autonomous as possible from the Administrative Law and Penal Procedural Law and more harmonized with the European Union competition legal framework'.

Public Consultation. The submission by the Portuguese Government to the Parliament of its proposal for a new Competition Act was preceded, in an unparalleled move, by a public consultation that took place between November 4 and December 5, 2011. The original draft underwent significant modifications as a result of the various comments submitted by stakeholders (including *Sérvulo & Associados*), as well as of the public debate that the public consultation triggered, and of the work undertaken by the working group that was set up by the Ministry for Economy and Employment – which included *Sérvulo & Associados* partner Miguel Gorjão-Henriques.

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[1] The Competition, Regulation and Supervision Court (CRSC) was established on March 30, 2012 (Order n. 84/2012, of March 29). The CRSC was created by Law-Decree n. 67/2012, of the March 20, and its official seat is in Santarém. The CRSC will work with two sections and two judges. For the time being, only the first section is active, dealing with cases filed after the creation of the Court.

The new legal framework for competition

The following changes are of particular relevance:

I. Greater number of specific rules of procedure. Although the procedural rules pertaining to general administrative and criminal offences remain applicable on a subsidiary basis, the RJC introduces a substantial amount of specific procedural rules which will apply to infringement procedures for anti-competitive practices (*e.g.* cartels, abuse of dominance or abuse of economic dependence), and also in the context of merger control where breaches of the law may lead to sanctions. In order to promote transparency and legal certainty, the Competition Authority must adopt guidelines on best practices during competition infringement proceedings.[2]

II. Procedural autonomy. As provided for in the MoU, the RJC allows the Competition Authority to set its own priorities. This rule must be read in line with the principles of legality and public interest

[2] In 2010 the Competition Authority had already submitted a draft to public consultation.

(that stand at the heart of the administrative action under the rule of law). Notwithstanding, when imposing sanctions for anticompetitive practices, the Competition Authority will no longer be bound by a strict understanding of the principle of legality. This goes along a reinforcement of its democratic supervision by the Parliament and RJC imposes the definition and publication of its competition policy priorities for the coming year.

III. Intensification of the coercive means at the disposal of the Competition Authority. Under the RJC, the Competition Authority is entitled to undertake searches on private premises, including the houses of partners, administrators, and employees of a company, and also in vehicles (or other sites) owned by these persons, if there is reasonable suspicion that evidence of serious violation of the competition rules may be obtained. It is not entirely clear whether this possibility is compatible with the Portuguese Constitution, which foresees that such power may only be granted in relation to specific forms of criminal behavior. To grant similar powers in the context of the investigation of administrative offences, like competition rules, seems disproportionate. The search must be authorized by a judge and can only be conducted between 7 AM and 9 PM if the house or its

rooms are inhabited. It is noteworthy that it will be possible to seize 'documents, irrespective of their nature or the devices where they are stored or saved' in addition to the already-existing possibility of seizing copies or extracts of documentation. The new rule seems to envisage the seizure of electronic documents, including e-mails, thus raising questions of compatibility with the fundamental rights of privacy and inviolability of correspondence.

IV. The RJC provides for new means of dispute resolution prior to the adoption of a final decision at the end of the infringement procedure thereby granting to the Competition Authority competences similar to those the European Commission already enjoys at EU level. To boost procedural efficiency and reduce the number of cases brought to court, a procedure of dispute settlement may thus be initiated during the phase of inquiry. In the context of this procedure the party concerned admits the infraction and the Competition Authority rewards its cooperation through a reduction in its fine. The practice of the European Commission shows that this procedure is particularly suited to deal with secret agreements between competitors (cartels).

V. The RJC further prescribes that the Competition Authority will be able to close infringement procedures for anticompetitive practices by imposing commitments upon the companies. The RJC thereby brings the practice of the Competition Authority with the law, since under Law No. 18/2003 cases were often closed in this way, even if lacking a legal basis. The conditions imposed need, at least formally, to be proposed by the party concerned. As the Competition Authority does not, in this case, apply fines nor declare the existence of an infraction, this procedure has no implications in terms of recidivism. Since it implies the imposition of conditions that must be observed in the future, this procedure is logically not adequate for past anticompetitive practices.

VI. Similarly to the power the European Commission enjoys since May 2004, the Portuguese Competition Authority will also be able to impose structural remedies (such as divestment solutions) in its infringement decisions, when such remedy is necessary to bring the infraction effectively to an end and the imposition of alternative behavioral remedies would not be equally effective or would be more onerous to the party concerned.

VII. It is also noteworthy that the Competition Authority is bound to adopt Guidelines on the method of setting fines and on the new extended time periods of the statute of limitation.

VIII. A very significant change introduced by the RJC is that the effects of infringement decisions applying pecuniary penalties will not be suspended in case of appeal. Hence, in the cases opened after July 7, 2012, companies have to pay the fine even if they bring an appeal against the decision, unless (i) they request the suspension of the decision by means of interim measures, if they meet the necessary conditions and offer to pay a guarantee; or (ii) in what concerns structural remedies imposed by the Competition Authority. Bearing in mind that the Competition Authority may apply fines of up to 10% of a company's turnover (to be read not as the turnover of the single legal entity, but as the turnover of the corporate group to which that entity belongs), given the current economic situation in Portugal, this normative solution is of utmost importance and severity.

IX. The RJC reduces the scope of application of the leniency program (immunity or reduction of the fine applied to a party involved in a cartel about which it reports to the Competition Authority) as its

wording covers only agreements or concerted practices between competitors, thus accommodating the unduly restrictive and unconstitutional way the Competition Authority has been reading Law No. 18/2003 in this regard. Under the new leniency framework, the first lenient company (meeting all the applicable legal requirements) may benefit from total immunity and the subsequent lenient companies may benefit from a reduction to the fine of, respectively, 50%, 30% and 20%. Under Law No. 18/2003, only the second company could benefit from a reduction in the fine. In addition, pursuant to Law No. 39/2006, also repealed, leniency may only apply if the Competition Authority has not yet opened an inquiry (art. 4, 1). The RJC stipulates that in this situation the reduction thresholds will be halved and it emphasizes the value of the information conveyed (i) to undertake searches and to seize evidence, or (ii) to prove the infringement.

X. Attention should further be drawn to the strengthening of the Competition Authority's supervisory powers, in particular with regards to inspections and audits, which turn the Competition Authority into a horizontal regulator with powers close to those sector regulators have in relation to the entities whose activities they regulate. The interplay between these reinforced supervisory powers, the power to impose

sanctions and the rights of defense is an issue of extreme legal complexity which poses a number of challenges with regards to constitutional principles.

XI. Finally, concerning merger control, the following changes are of note: (i) express stipulation that the mere acquisition of market share may trigger the obligation to notify the transaction for clearance; (ii) increase - from 30% to 50% - of the market share threshold above which the transaction needs to be notified for clearance; (iii) stipulation that prior notification is required in case of market shares of 30% only where at least two of the companies involved registered a turnover of 5 million Euros in Portugal in the last year (*de minimis* clause); (iv) reduction of the turnover thresholds - from 150 to 100 million Euros - and an increase of the *de minimis* clause - from 2 to 5 million Euros; (v) elimination of the obligation to notify the transaction within 7 working days from the triggering event.

XII. In what regards the award of public contracts, prior notification must occur after the definitive tender selection and before the public contract is signed off. The entity awarding the contract must ensure

that the public procurement rules comply with the regime governing control of concentrations.

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