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Update

European and Competition Law

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This is not a drill: The Portuguese transposition of the ECN+ Directive

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[Law nr 17/2022, of August 17](#), which transposes the ECN+ Directive ([Directive \(EU\) 2019/1, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market](#)), was recently published after a complex legislative process. [SÉRVULO had the opportunity to make comments on the draft proposal](#) presented by the Portuguese Competition Authority (“PCA”). As a preliminary note, we would like to point out the elimination of several proposed alterations we considered controversial because they were outside the scope of the Directive and could infringe the Portuguese Constitution.

The relevancy of this diploma in the daily life of companies cannot be understated. Compliance with Competition Law is a growing concern on corporate structures. This Summer alone we saw several PCA’s decisions across multiple economic sectors, such as sport, private security, and food retail, on a weekly basis. The transposition of the Directive is not even necessary to demonstrate the effectiveness of the PCA. However, Law n.º 17/2022, makes drastic changes across the Portuguese Competition Law (“PCL”). In this update we will cover some of the main changes made by Law nr. 17/2022, although several other structural modifications were madeⁱ.

Investigative powers

The new legislation reformulated articles 18 and 19 of the PCL, regarding powers to search, examine, collect, and apprehend and the regime for domiciliary searches. It also adds a new article, article 17-A, to regulate the PCA’s **powers of inquiry**. This new article establishes the essential requisites for summons for such inquiries.

In what concerns powers to **search, examine, seize, and apprehend**, the general powers remain mostly similar. It is important to note, however, that the PCA and the Portuguese Government pushed for a norm that would expressly permit the apprehension of electronic correspondence. That norm did not pass in Parliament, which clearly implies that the apprehension of electronic correspondence is not admissible in infringement proceedings under Portuguese Competition Law. Aside from several negative opinionsⁱⁱ, on the final legislative procedure the Note of Admissibility and the Technical Note prepared by the parliamentary services state that the questions of constitutionality are solved, **considering that the final diploma does not mention the possibility of apprehending and using as proof correspondence and e-mails, respecting article 34(4) of the Portuguese Constitution.**

With regards to **house searches**, they were already permitted for situations where there are suspicions of infringements to the prohibition of restrictive practices (article 9) and abuses of dominant position (article 11). Additionally, Law nr. 17/2022 allows searches based on suspicions of an abuse of economic dependence (article 12). Moreover, searches on the offices of a certified public accountant are now treated as searches on the offices of a lawyer or a doctor.

Limitation periods

The norms on limitation periods were also reviewed on the transposition proceedings. We would highlight the introduction of article 74(9) of the PCL, according to which the **limitation period for infringement proceedings is suspended** for as long as the PCA's decision is appealed (including appeals of interlocutory decisions and appeals to the Constitutional Court) **without any temporal limitation**. The solution is excessive and clearly disproportionate, infringing the principles of legal safety and certainty. If the norm passes a constitutionality ruling, which is doubtful, it will mean that, during the pendency of any action before a court related to an infringement proceeding, the limitation period would not be counted. We point out that the Portuguese Supreme Administrative Court, in the [Observations](#) submitted on the public consultation of the PCA's draft proposal of law to transpose the ECN+ Directive, already considered that the norm would be infringing the Constitution.

Appeals

Law nr. 17/2022 regulates the time period for **appeals of interlocutory decisions**: 20 business days (article 85(1) of the PCL). Decisions on these appeals will be made without a hearing, unless the Court considers that there is a need for one.

The time period for **appeals of final decisions** is also changed from 30 business days to 60 days.

However, the new legislation maintains, as a general rule, that the appeal does not suspend the effects of the PCA's decision, including in interlocutory appeals. **In order for the effects of a PCA's decision that imposes fines to be suspended, the undertaking must provide a deposit of 50% of the fine imposed.** It does no longer need to demonstrate a considerable harm if the fine was imposed.

We would also highlight the introduction of article 86-A, regarding reactions to decisions during search and seizure procedures, according to which all questions, of validity and execution of the procedure, should be addressed to the judicial authority who authorized the referred procedures.

Fines

Lastly, the norms that regulate the maximum amount of fines have also been reviewed. The fines that the PCA imposes now have a limit of 10% of the annual turnover rate, at a global level, of all the legal persons who compose the infringing undertaking, in the year prior to the PCA's final decision (article 69(4) of the PCL). However, as an "escape valve", article 69(7) of the PCL, establishes that the maximum amount of the fine is limited to the same value on the year before the infraction.

This solution is heavily penalizing on groups of undertakings who operate globally, when compared to those that mainly act in Portugal, which may infringe the principle of equal treatment. The rule that the maximum amount of fine would be 10% of the turnover rate of the undertaking (which typically would be the turnover rate in the Portuguese territory) is no longer in force.

Conclusion

Law nr. 17/2022 **will enter into force on September 17.**

The changes operated on the PCL are encompassing and of enormous importance to companies. Globally, the PCA's powers are increased while the rights and guarantees of companies are severely reduced. Considering that companies are also confronted with tougher sanctions, it is important to develop compliance programmes that aim to prevent, detect, and cease possible competition law infringements.

ⁱ Law n.º 17/2022 modifies norms on information requests, inquiries (including during searches, regarding facts or documents pertaining to the alleged infraction); legal secrecy and publication of decisions; leniency and settlement proceedings or decisions imposing commitments; drafting of non-confidential versions; access to proceedings; means of evidence; interim measures; criteria for the setting of fines; periodic penalty payments; compulsory sanctions; responsibility, etc.. The PCA's by-laws are also altered to confer greater independence to the PCA (for example, through changing the PCA's funding rules).

ⁱⁱ We highlight the opinions given by the Commission for Economy, Innovation, Public Works and Housing and by the Commission on Constitutional Affairs, Rights, Freedoms and Guarantees, in the context of the legislative proceedings, both agreeing that the initial formulation presented by the Government infringed the Constitution as regards the apprehension of e-mails as a means of evidence to be used in competition law investigations.