



To appeal or not under new Portuguese Competition Law

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Background

The New Portuguese Competition regime, Law 19/2012 (hereinafter ‘NCL’)¹ is one of the reforms agreed upon under the Troika *Memorandum of Understanding for Financial Assistance* (‘MoU’) signed between Portugal, the European Commission, the European Central Bank and the International Monetary Fund.²

The underlying purpose of the NCL is to align Portuguese competition law with the rules of the European Union and to take both Portuguese case-law and the Portuguese Competition Authority’s (‘PCA’) decisional practice into account. Law 19/2012 is of utmost importance to companies, as it creates conditions for a stronger enforcement of competition law. The PCA now has more tools to investigate restrictive practices, meeting the most advanced standards of the world’s authorities.

One of the key features found within the MoU is the need to “*evaluate the appeal process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.*” Bearing this objective in mind, this text briefly explains the main changes brought about by the NCL in terms of the judicial review of antitrust proceedings, in order to anticipate the consequences the enactment of the cartel enforcement may have.

Courts May Increase Fines

The Court now has full jurisdiction to decide appeals regarding infringement proceedings, and the legislator has distanced itself from the Portuguese tradition of the *reformatio in pejus* prohibition.³ As a result, once either the PCA’s or the Court’s condemnatory decision has been appealed, the Court may uphold or amend the fine and any other financial sanction, enabling it to reduce the fine as well as to increase its amount. The abolition of the principle, enabling the increase in the level of fines, is likely to discourage both litigation and delays in antitrust proceedings.

¹ Law No. 19/2012, 8 May, which revokes the previous competition act, Law No. 18/2003 and the leniency regime, Law No. 39/2006. An English non-binding translation is available at: http://www.concorrenca.pt/vEN/News_Events/Noticias/Documents/Lei19_2012_En.pdf.

² “Portugal: Memorandum of Understanding on Specific Economic Policy Conditionality” , 17 May 2011, available at: http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

³ See Article 409 of the Code for Criminal Procedure (Decree-Law No. 78/87 of 17 February, as amended) and Article 72-A of the General Regime for Misdemeanours, approved by Decree-Law No. 433/82 of 27 October (as amended).

Appeal does not Suspend the Payment of Fines

The judicial appeal of a condemnatory decision ceases to have a suspensive effect, a rule which exists under national criminal law and is applicable to most misdemeanours. Hence, the condemnatory decision will be put into action (in particular, the payment of the fine), regardless of its judicial review.

Although the appeal from the European Commission's condemnatory decisions does not have suspensive effects either, its track record is altogether very different from that of the PCA (particularly in regards to the most relevant cases). In fact, the "*Community Courts have reviewed a great number of fines imposed by the Commission and have largely endorsed the Commission's approach.*"⁴

The principle of non-suspension comprises both an exception and a limitation. As regards the exception, an appeal suspends the effects of a decision that imposes structural measures (*e.g.*, sale of a company's assets). Alternatively to the prior payment of the fine, the target company may include within its appeal a request for suspensive effect whenever the enforcement of the decision causes considerable damage; it also offers an alternative form of guarantee. Subsequently, and only if a guarantee has been effectively provided, the Court may order the suspension of the effects.

In the current times of austerity in Portugal this provision may affect the sustainability of the companies faced with credit difficulties, lack of liquidity and difficulties in accessing bank guarantees.

Term for Appeal

The NCL sets a deadline of 30 working days to appeal, which is a small, though insufficient, improvement in relation to the previous situation (formerly a period of only 20 days).⁵ Notwithstanding, it would be important to align our NCL with EU law and to further extend the term for appeal to two months, due to the legal and economic complexity of antitrust cases.

Decisions closing proceedings and rejecting complaints

In such cases where the PCA decides to close the antitrust proceedings, neither the

⁴ See § 17 of the Commission's Communication to the European Parliament and the Council - Report on the implementation of Regulation No. 1/2003, 29.04.2009, COM (2009) 206 final.

⁵ See Article 59 (3) of the General Regime for Misdemeanours, *ex vi* Article 49 of Law No. 18/2003 of 11 June.

defendant⁶ nor the complainant is given the opportunity to appeal. However, in contrast to this situation, the PCA's decisions rejecting complaints without further investigation may be appealed: "*the Competition Authority shall declare expressly in writing that it deems the complaint to be unfounded or not worth priority treatment, and an appeal may be lodged at the Competition, Regulation and Supervision Court.*"⁷

Filing of the Appeal

The NCL maintains the previous awkward regime under which judicial appeal is first submitted to the PCA, which will also include its own response to it and any other documents or information that it deems relevant to the decision in question. Subsequently, the PCA then sends the complete file to the Court.

Suspension of the Statute of Limitations

The most serious anti-competitive behaviours have a maximum limitation period of seven and a half years. It should be noted however that this period may be further extended by an additional three years, provided that the statute of limitations in relation to the challenged decision has been suspended. This occurs, for instance, for the period during which the PCA's decision is the subject of judicial review. In the previous regime, these limitation periods were suspended for as long as a judicial review was pending, with a limit of only six months. Ultimately, the end result is that the statute of limitations has increased from eight years to ten-and-a-half years.

Court of Competition, Regulation and Supervision

In regards to the development of a competition culture in Portugal, it is relevant to highlight the creation of the Court of Competition, Regulation and Supervision.⁸ First and foremost, there are not enough competition law appeals that would justify, *per se*, a specialized Court solely for competition. In this context, we are of

⁶ A defendant may be interested in appealing if, for instance, the PCA imposes commitments attached to the decision terminating proceedings and these are not the result of conditions offered by the defendant. Conversely, even settlement decisions may be appealed, as long as the facts to which the party concerned in the case has confessed are not challenged.

⁷ See Article 8 (4) of the NCL.

⁸ See Order No. 84/2012 of 29 March 2012 setting up the Court for Competition, Regulation and Supervision. Note also that the Decree-Law No. 67/2012 which created the Court determined its entry into force on the date it was physically established, locating its composition and headquarters in Santarém. To date, and before the creation of this new Court, issues regarding competition law were handled by the Courts of commerce (formerly by the Commercial Court of Lisbon).

the opinion that it is right to aggregate the areas of "Competition, Regulation and Supervision," despite the fact that they are obviously very different from each other.⁹ There is, however, evidence of the vast influence of both European Law and Economics in all three of these areas. Furthermore, there are a number of legal issues common to the various regulators, as well as a regular relationship that sector regulators must maintain with the PCA in areas such as energy, telecommunications and transport. Finally, the rules on misdemeanours apply subsidiarily to the infringement proceedings in these areas (both antitrust and regulatory proceedings).

Appeal Procedure

The decision of the Court of Competition, Regulation and Supervision is subject to one further appeal to the Appellate Court ("*Tribunal da Relação*") that will rule as the last instance on the case, though solely in relation to points of law. As such, the NCL maintains an uneven balance between the antitrust and the administrative appeals.¹⁰ Whereas the former proceedings only benefit from two stages of judicial scrutiny, cases subject to the latter proceedings maintain three degrees of jurisdiction and a further appeal may be filed with the Supreme Court ("*Supremo Tribunal de Justiça*") limited to matters of law.

Conclusion

The NCL brought many changes that will cause a dramatic difference in antitrust enforcement. There is an expectation that these new rules will provide a clearer framework in terms of judicial review, thereby attaining the MoU's goal of increasing the *efficiency in terms of due process and timeliness of proceedings* without jeopardizing its *fairness*.

⁹ On the aggregation of the various topics by the Court for Competition, Regulation and Supervision, see Gonçalo Anastácio, "Aspectos normativos decisivos para a modernização do direito da concorrência em Portugal", in *Revista de Concorrência e Regulação*, year II, 5, January-March, 2011, pp. 50 et seq..

¹⁰ For example, merger control proceedings are subject to administrative appeals.