

PORTUGAL

Amendments to UNCTAD's Model Law on Competition (2007)

The legal framework for competition in Portugal was fully reformed in 2003. Two legal instruments supported the reform: Decree-Law 10/2003, of January 18, and Law 18/2003, of June 11¹.

a) The Competition Authority - Decree-Law 10/2003

One of the main purposes of the review of the competition legal framework in Portugal was to reform the institutional structure for enforcement of competition rules.

To this extent Decree-Law 10/2003 replaced the two former entities entrusted with competition enforcement - the "Competition Council" and the "General Directorate for Commerce and Competition" - by a new single entity: the "Competition Authority" (*Autoridade da Concorrência*), to which was assigned the mission of "...assuring the enforcement of competition rules in Portugal, on the basis of respect for the principle of the market economy and that of free competition, taking into consideration the efficient functioning of the markets, the effective allocation of resources and the interests of the consumer...".

Created as a public corporation, the Competition Authority has been granted statutory independence for the performance of its tasks vis-à-vis the Government. The autonomy granted to manage its finances and assets, and the requirements in relation to the members of its Board with regard to their nomination, the duration of their mandate and the rules on incompatibility and impediment strengthen the independent nature of this new agency.

Nevertheless, the acts of the Competition Authority with financial impact, such as the activities plan and budget and the annual report on its activities and accounts were subject to administrative supervision of the minister responsible for economic affairs. However, the statute of independence of the Competition Authority is not substantially

¹ References to the Portuguese legal framework in UNCTAD's Model Law 2007, in particular, paragraphs 54, 173, 176 and 191, pages 88 and 89 and endnotes 178 and 186, should be amended according to the new legislation in force in Portugal.

affected thereof, since the funding of its budget is to be ensured by revenues from earmarked funds, user fees and fines, with a marginal recourse to general revenue.

The Competition Authority is composed of two bodies: the Board (Conselho) and the Single Auditor (Fiscal Único).

The Board is the Authority's highest body, being responsible for the enforcement of competition rules and for the management of the Authority's staff. It is composed of one chairperson and two or four other members (two at the present state) appointed by resolution of the Council of Ministers. Such members must be persons of recognized competence, with experience in the fields relevant to the fulfillment of the Authority's duties.

The members of the Board are nominated for a mandate of five years, renewable for five more years. On the first nomination or after the dissolution of the Board, some of its members are nominated for a period of three years and the remaining ones for a period of five years.

The Single Auditor, a chartered accountant or a firm of chartered accountants, is responsible for the control of the financial aspects of the Authority's activities. The Single Auditor is appointed by a joint order of the ministers responsible for finance and economic affairs for a period of three years, renewable for an equal period of three years.

In order to perform its mission, the Competition Authority is entrusted with supervisory and regulatory powers along with powers to impose penalties.

Within the exercise of *supervisory powers*, the Competition Authority investigates and decides, *inter alia*, on proceedings concerning mergers. Within the scope of *regulatory powers* it may issue general recommendations and guidelines or may approve or propose the adoption of regulations. Finally, the Competition Authority is granted powers to investigate practices likely to infringe competition law and to decide on the correspondent proceedings by imposing the appropriate penalties.

As far as merger control and proceedings on anticompetitive practices in regulated sectors are concerned, the powers granted to the Competition Authority are to be carried out in cooperation with the respective regulatory agencies.

The Competition Authority's decisions may only be challenged before the courts. However, merger prohibition decisions may be appealed to the minister responsible for

economic affairs, who may approve the prohibited merger whenever the resulting benefits to fundamental national economic interests exceed the inherent disadvantages for competition.

b) Competition Act – Law 18/2003

In June 2003, a new Competition Act came into force – Law 18/2003, of 11 June, which has undertaken the review of the substantive and procedural rules of Portuguese competition law.

- Anticompetitive practices

Law 18/2003 introduced some significant changes to the legal framework of anticompetitive behavior.

As to prohibition of *collusive practices*, Law 18/2003 requires now that collusive practices have an appreciable impact on competition, which allows the so-called “cases of minor importance” to be disregarded. Furthermore, Law 18/2003 provides now automatic justification for agreements that, though not affecting trade between Member States, fulfill the remaining application requirements of any Community block exemption regulation.

On the issue of *abuse of a dominant position*, Law 18/2003 eliminated the market share based presumption of dominant position contained in the earlier legislation. On the other hand, the abusive nature of a non justified refusal to provide access to an essential facility was emphasized in this new Act by adding this type of conduct to the shortlist of abuses of dominant position already provided for in the previous law.

In what refers to the *abuse of economy dependency* - the other form of abuse of economic power provided for in Portuguese competition legislation - Law 18/2003 requires now that it has an effect on the functioning of the market or on the structure of competition to qualify as a restrictive practice.

Significant changes were also introduced to the *regime of penalties* for anticompetitive practices. Fines are now set in relation to the total turnover of the undertakings

concerned and the application of periodic penalty payments is also admissible under Law 18/2003.

Finally, *limitation periods* have been extended to five years vis-à-vis the three years provide for under the ancient regime.

- Mergers

Merger control was also reviewed under Law 18/2003.

All sectors of activity, including banking and insurance, are now submitted to merger control under the new Competition Act. As a matter of fact, until the coming into force of Law 18/2003 mergers in the banking and insurance sectors fell out the scope of competition law, concentrations in these markets being only scrutinized by the correspondent regulatory agencies.

As to requirements for prior notification, thresholds based either on the market share (over 30%) or on the aggregate turnover (€150 million) of the undertakings concerned in Portugal remain the basic criteria for notification. However, as far as the turnover thresholds are concerned, Law 18/2003 requires now, in addition, that at least two of the undertakings taking part in the merger have a turnover that exceeds 2 million euros.

The rule on merger appraisal has also changed under the new Competition Act. Indeed, under the previous legislation a merger which adversely affected competition within the national market could be cleared, should the undertakings succeed to make the argument on the contribute of the envisaged merger to their competitiveness at an international level. According to Law 18/2003, mergers that create or strengthen a dominant position which may result in significant barriers to effective competition in the national market shall be prohibited, enhancement of international competitiveness being just one of the criteria to take into consideration when evaluating the impact of a merger on competition.

Finally, several procedural issues were revisited under the reform undertaken by Law 18/2003.

Merger proceedings are now divided into two phases: the first phase with duration of 30 working days and a second phase, with duration of 90 working days, which is only to be opened if the merger is likely to produce anticompetitive effects. Since most cases are decided in the first phase, this has allowed a significant shorting of the time limits for

deciding on mergers when compared with which were set out before the coming into force of Law 18/2003.

Furthermore, third parties are now fully allowed to participate in merger proceedings on their own initiative, the publication of the essential elements of the merger, within 5 working days after its notification, becoming mandatory with Law 18/2003.

Penalties for infringements of merger control rules have been also revised, in line with the reform of sanctions applying to anticompetitive behavior mentioned above. Thus, fines are now set in relation to the total turnover of the undertakings concerned and the application of periodic penalty payments has also become admissible.

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