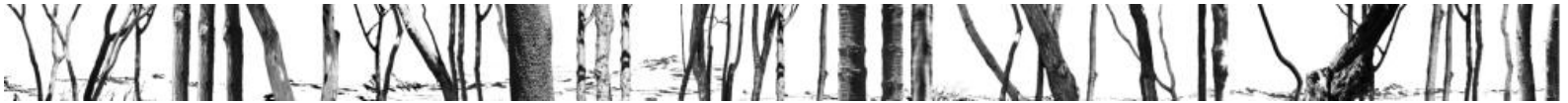




 **VIEIRA DE ALMEIDA**
& Associados Sociedade de Advogados, R.L.

The New Portuguese Competition Law

**Main features of
Law 19/2012 of 8 May**



1. Main goals of the New Competition Law

Law No 19/2012 (“New Competition Law”), published in the Official Gazette of 8 May, approves the new legal framework for competition, repealing Law No. 18/2003 of 11 June. The new law increases the competition policy’s transparency and significantly enhances the Competition Authority’s capacity for action, strengthening its powers of inspection, sanction and supervision. Henceforth, the Competition Authority is free to define its own policies and to set its own intervention priorities.

2. Entry into force

The New Competition Law enters into force 60 days as of its publication, i.e., on 7 July 2012. Following its entry into force, the New Competition Law will be applicable to all subsequent investigation, merger filing, request and complaint.

3. Competition policy’s transparency and scrutiny

As long as a legitimate interest is demonstrated, any person will be allowed access to infringement proceedings in order to inspect its contents and to request copies, extracts or certificates from documents contain therein, albeit excluding any confidential information regarding business secrets.

In the last quarter of each year, the Competition Authority shall publish its policy priorities for the upcoming year at its website. The Competition Authority is obliged to provide all clarifications

requested by the competent Parliamentary Committee.

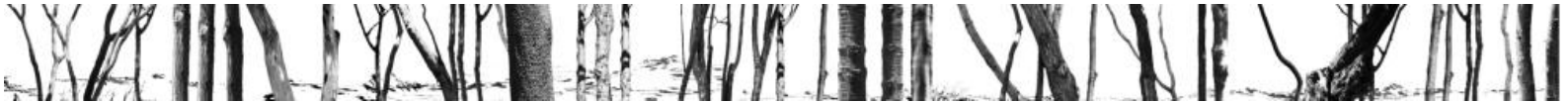
The Competition Authority shall also publish at its website the final decisions adopted in the scope of infringement proceedings, with reference to any pending appeals, as well as the courts’ judgments resulting from appeals, excluding any confidential information regarding business secrets.

4. Competition policy and sanction proceedings’ priorities

In performing its duties, the Competition Authority is guided by the public interest in the promotion and defense of competition and may therefore establish different priorities regarding the matters that it is called upon to investigate.

The Competition Authority will apply its sanctioning powers whenever deemed necessary for the defense of public interest related with competition rules and regulations. In so doing, the Competition Authority shall take into account the competition policy’s priorities, the matters of fact and law which have been submitted to it, the seriousness of the potential infringement, the likelihood of proving the existence of such infringement and the extent of the necessary investigation measures.

The Competition Authority may act on its own initiative or upon complaint. However, it only has the duty to open infringement proceedings whenever the public interest is at stake.



5. Prohibition of anti-competitive practices

Similarly to what happened under the previous Law, according to the New Competition Law agreements and concerted practices between undertakings, as well as decisions of associations of undertakings are forbidden whenever they restrict or distort competition considerably in the national market, or whenever they are capable of producing such result, regardless of the intent or of the actual production of such effect. Abuses of dominant position and abuses of economic dependence are also prohibited. The terms and conditions applicable to these prohibitions are identical to the ones provided for in articles 101 and 102 of the Treaty on the Functioning of the European Union.

6. Investigation deadlines

Complaints shall be presented according to a specific form approved by the Competition Authority. If the Competition Authority deems that a complaint is either groundless or does not fall within its competition policy priorities, it must so inform the complainant. The same applies whenever, once an investigation has been initiated, the Competition Authority concludes that there is no reasonable likelihood that an infringement decision will be adopted. In both cases, the complainant may present its comments and appeal against the Competition Authority's decision to drop the case. As a rule, inquiries should be concluded within 18 months and, in the event of a statement of objections, the final decision should be adopted within the 12 following months.

7. Burden of proof and admissible evidence

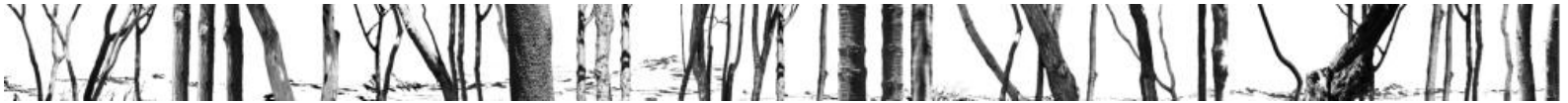
In infringement proceedings the burden of proof of exemption or of objective justification lies with the undertakings or associations of undertakings accused of breach of competition law. The Competition Authority is entitled to use as evidence any documents considered confidential for containing business secrets. Access to such documents is restricted to the lawyer or to the external economic advisor exclusively for the purposes of defence or for filing any judicial appeal against a decision of the Competition Authority imposing sanctions.

8. Reinforcement of the Competition Authority's powers

The Competition Authority is entitled:

- To conduct searches in the premises of undertakings or associations of undertakings. The searches may include the examination, collection and seizure of record extracts and any other documents.
- To seal any business premises or computers or other electronic data storage devices, to the extent considered necessary for the investigation.
- To carry out searches in the domiciles of partners, members of the governing bodies, workers, or employees of the undertakings or associations of undertakings concerned.

The Competition Authority may use as evidence confidential information containing business secrets, as well as information and documents obtained in the



exercise of its supervisory powers or in other infringement proceedings.

According to the New Competition Law, searches can be conducted in law firms provided a judge is present and the Bar Association is informed in order to have a representative present.

Seizure of documents under legal professional secrecy is not allowed, unless they are, in themselves, the object or element of the infringement.

9. Closing of the investigation by way of negotiation and settlement

The New Competition Law allows the defendant to negotiate with the Competition Authority with a view to defining the conditions necessary to closing the investigation and obtain a fine reduction, upon condition of acknowledging liability for the infringement. The New Competition Law also allows the defendant to start negotiations with a view to closing the investigation without acknowledging liability, upon commitment to cease the practices which were object of complaint.

10. New behavioural and structural sanctions and extension of the leniency regime

Besides admonition and the imposition of fines of up to 10% of an undertaking's turnover, the New Competition Law empowers the Competition Authority to impose the behavioral or structural remedies deemed essential to put an end to the infringement or to its effects.

The Competition Authority can prevent a company or association of companies from

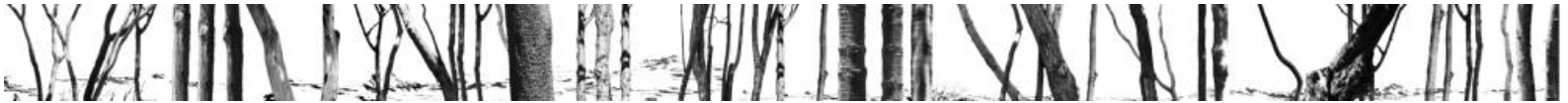
participating in proceedings concerning the award of public works, concession of public works, concession of public services, leasing or acquisition of movable property, purchase of services, or in proceedings for the attribution of licenses or permits, for a maximum period of two years.

In case of cartel proceedings (agreements between competitors) the Competition Authority can reduce the fine applicable to the first undertaking (30% to 50%), to the second undertaking (20% to 30%) and to the remaining undertakings (up to 20%) whenever the same provide the Competition Authority with substantial additional information or significant value added proof.

11. Board members and directors liability

Fines may be applied to the members of the governing bodies, as well as to any director or person responsible for monitoring any area of activity in which an infringement has been committed. This may occur whenever, having acknowledged or having the responsibility of acknowledging the anti-competitive infringement, they fail to adopt adequate measures to immediately cease the infringement. In such cases, fines can reach up to 10% of the annual income of the individual paid by the breaching company.

Undertakings whose representatives were members of the governing bodies of an association of undertakings at the time of the infringement are jointly and severally liable for the payment of the fine applied to the association of undertakings, calculated according to the annual turnover of all of its members, exception made to the cases where they opposed the



decision giving rise to the infringement by way of a written statement.

12. New statute of limitations

In infringement proceedings the Law provides for a statute of limitations of five years starting from the date the offense occurred. The limitation is interrupted whenever the defendant is formally charged or whenever a notification is formally received by the defendant. The infringement proceedings must be concluded within seven and a half years, excluding a maximum three years suspension for reasons such as the appeal formed against the decision of the Competition Authority.

13. New rules on merger control

Concentrations continue to be subject to prior notification and to the Competition Authority's non-opposition decision. A notification should be filed before the Competition Authority when one of the following conditions is fulfilled:

- Acquisition, creation or reinforcement of a market share of at least 50% in the relevant national market;
- Acquisition, creation or reinforcement of a market share of at least 30% but less than 50%, in the relevant national market, provided that the individual turnover of at least two participating undertakings, registered in Portugal, in the preceding financial year, exceeds 5 million Euros;
- The aggregate turnover of the participating undertakings in Portugal, in the preceding financial year, is over 100 million Euros, provided that the individual turnover in Portugal of at

least two of the undertakings, exceeds 5 million Euros.

In line with the European Union law on merger control, should be prohibited, not only concentrations that create or reinforce a dominant position, but also concentrations that may constitute a significant impediment of effective competition in the national market or in a substantial part of it.


The notification can be presented after the conclusion of an agreement, or after the publication of the preliminary announcement of a take-over bid or of the exchange offer or bid to acquire a controlling stake in a holding company whose shares are accepted to trade in the regulated market. In case of a merger resulting from a public tender procedure, the notification can take place after the final award.

The New Competition Law allows for a voluntary notification to be presented before the conclusion of any agreement, provided that the undertakings demonstrate a serious intention to effectively carry out the transaction.

Once the notification is filed and all necessary information is provided, the Competition Authority has 30 working days to adopt a non-opposition decision or to initiate an in-depth investigation. The in-depth investigation should be concluded within 90 working days as of the day of the notification; this deadline may be extended for a period of 20 days upon request of the notifying party.

The notifying party may, at all times, undertake commitments with a view to guaranteeing effective competition. The Competition Authority may reject such commitments whenever it deems they are insufficient or inadequate.

The appraisal of the concentration by the Competition Authority may be delayed



during the time necessary to hear third interest parties, to the delivery of a binding opinion by any sector-specific regulator, to the assessment of the commitments presented by the notifying party and, in general, whenever the Competition Authority requests the notifying party additional information necessary for the assessment of the merger.

The New Competition Law foresees that the Competition Authority shall approve a simplified notification form for mergers which, further to a preliminary assessment, prove not to entail significant obstructions to competition.

14. Competition Authority's new supervisory powers

Whenever indicators of competition distortion or restriction are detected the Competition Authority should search for its causes. For that purpose, it may conduct inspections and audits with the consent and cooperation of the entities concerned. Upon conclusion of the inspections and audits, the Competition Authority may recommend the adoption of the behavioral or structural measures it deems adequate to restore effective competition. Refusal to cooperate, when required, namely refusal to provide information and the submission of false, inaccurate or incomplete information is punishable with a fine of up to 1% of the total turnover of the company.

*Should you require any further clarification please contact: **Nuno Ruiz** (nr@vda.pt), **Miguel Mendes Pereira** (mig@vda.pt), or **Ricardo Junqueiro** (rjb@vda.pt).*

Lisbon, 15 May 2012
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