

2012-07-09

THE PORTUGUESE PARLIAMENT

Law No 19/2012

of 8 May

Hereby approves the new competition act, repealing Laws No 18/2003 of 11 June and No 39/2006 of 25 August, and makes the second amendment to Law No 2/99 of 13 January¹

Under the provisions of paragraph *c*) of article 161 of the Constitution, the Portuguese Parliament decrees as follows:

CHAPTER 1

Competition enforcement and advocacy

Article 1

Object

This law sets out the competition act.

Article 2

Scope

1 – This law is applicable to all economic activities, whether permanent or occasional, in the private, public and cooperative sectors.

2 – Without prejudice to the international obligations of the Portuguese State, this law is applicable to competition enforcement and advocacy, specifically in terms of prohibited practices and concentrations of undertakings on Portuguese territory or whenever these practices have or may have an effect there.

Article 3

Notion of undertaking

1 – The term undertaking, for the purposes of this law, shall be deemed to be any entity that has an economic activity comprising the supply of goods or services in a specific market, irrespective of its legal status or means of financing.

2 – A group of undertakings is deemed to be a single undertaking, even if the undertakings themselves are legally separate entities, where such undertakings make up an economic unit or maintain interdependence ties deriving specifically from the following:

¹ This translation is a non-binding text. It is provided by the Portuguese Competition Authority for information purposes only. While every effort has been made to ensure its accuracy, the only legally binding text is the original Portuguese document, Law No 19/2012, of 8 May, as approved by the Portuguese Parliament. The Portuguese Competition Authority reserves the right to revise any part of this translation as it deems appropriate in the light of comments and suggestions that are made.

- a) The undertaking so defined has a majority of the share capital;
- b) It has more than half of the voting rights conferred by the share capital;
- c) It has the power to appoint more than half of the members of the board of directors or the supervisory board;
- d) It has the necessary powers to manage the businesses of the group and of each of its undertakings.

Article 4

Services of general economic interest

1 – State owned undertakings, State owned business undertakings and undertakings to which the State has granted special or exclusive rights are covered by this law, notwithstanding the provisions of the following paragraph.

2 – Those undertakings that have been legally entrusted with the management of services of general economic interest, or are by their nature legal monopolies, are subject to the provisions of this law, to the extent that enforcement of these provisions does not create an obstacle to the fulfillment of their specific mission, either in law or in fact.

Article 5

The Competition Authority

1 – The Competition Authority is responsible for ensuring compliance with the rules that govern competition enforcement and advocacy, and, to this end, it has the sanctioning, supervisory and regulatory powers set down in this law and in its own statutes.

2 – The statutes of the Competition Authority are as approved by decree law.

3 – Financing of the activities of the Competition Authority is ensured by transfers from the budget of sectoral regulatory authorities and by any fees collected under terms to be defined in its statutes.

4 – The sectoral regulatory authorities and the Competition Authority shall cooperate in the enforcement of competition law, under the terms of the law, and can enter into bilateral or multilateral protocols for such a purpose.

5 – Each year, the Competition Authority shall publish a report of its activities and the exercise of its sanctioning, supervisory and regulatory powers, including the balance sheet and statement of income relating to the previous calendar year.

6 – The report and other documents specified in the previous paragraph, following approval by the board of the Competition Authority, shall be submitted to the Government, together with the opinion of the external auditor, before 30 April in each year, and it is the responsibility of the Government to send all the documentation to the Portuguese Parliament.

7 – Should members of the Government responsible for the economy and the treasury fail to make a decision on the report, balance sheet and statement of income, the same shall be deemed to be approved following 90 days from the date the documentation was received.

8 – The report, balance sheet and statement of income shall be published in the Official Journal of the Portuguese Republic² and on the Internet site of the Competition Authority within 30 days of approval, whether this is express or tacit.

Article 6

Parliamentary scrutiny

1 – A plenary debate on competition policy shall be held in Parliament at least once in each legislative session.

² *Diário da República* in Portuguese.

2 – Without prejudice to the responsibility of the Government in terms of competition policy, the members of the board of the Competition Authority shall appear before the relevant parliamentary committee for:

- a) Testifying in a hearing on the report of the activities of the Competition Authority, as set out in article 5 of this law, to be held up to 30 days from receiving the report;
- b) Reporting on their activities or any issues relating to competition policy, whenever required to do so.

Article 7

Priorities in the pursuit of its mission

1 – In carrying out its responsibilities, the Competition Authority shall be guided by the criterion of public interest in competition enforcement and advocacy, and to this end it may define priorities in the handling of issues that it is called on to analyse.

2 – The Competition Authority shall exercise its sanctioning powers on a case-by-case basis, whenever the public interest of pursuing and punishing infringements of competition rules determines the initiation of administrative offence³ proceedings, taking into account in particular the priorities in competition policy and the elements of fact and of law brought by the parties to the file, as well as the seriousness of the alleged infringement, the likelihood of being able to prove its existence and the extent of investigation required to fulfil as well as possible its mission to ensure compliance with articles 9, 11 and 12 of this law and articles 101 and 102 of the Treaty on the Functioning of the European Union.

3 – During the last quarter of each year, the Competition Authority shall publish on its Internet site the competition policy priorities for the following year, though making no sectoral reference where its sanctioning powers are concerned.

Article 8

Handling of complaints

1 – The Competition Authority shall make a record of each and every complaint that is submitted to it, and initiate administrative offence or supervisory proceedings if the information adduced in the complaint so warrants, under the provisions of the previous article.

2 – Where the Competition Authority considers on the basis of the information in its possession that there are insufficient grounds for acting on a complaint pursuant to the previous article, it shall inform the complainant and set a time limit of no less than 10 working days for the complainant to make his views known in writing.

3 – The Competition Authority is not obliged to take into consideration any other written views that it may receive after the time limit mentioned in the previous paragraph.

4 – If the complainant makes his views known within the time limit set by the Competition Authority, and the written submissions made by the complainant do not lead to a different assessment of the complaint, 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.

5 – If the complainant fails to make known its views within the time limit set by the Competition Authority, the complaint shall be closed.

6 – The Competition Authority shall close complaints that do not lead to the initiation of proceedings.

³ *Contraordenação* in Portuguese.

CHAPTER II

Prohibited practices

SECTION I

Types of prohibited practices

Article 9

Agreements, concerted practices and decisions by associations of undertakings

1 – Agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part, and to a considerable extent, are prohibited, in particular those which:

- a)* Directly or indirectly fix purchase or selling prices or any other trading conditions;
- b)* Limit or control production, markets, technological development or investment;
- c)* Share markets or sources of supply;
- d)* Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e)* Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2 – Any agreement between undertakings and decisions by association of undertakings prohibited under the provisions of the previous paragraph shall be null and void, except where they are deemed to be justified under the provisions of the following article.

Article 10

Justification for agreements, concerted practices and decisions by associations of undertakings

1 – Agreements, concerted practices or decisions by associations of undertakings as referred to in the previous article may be considered justified, should they thereby contribute to improving production or distribution of goods or services or to promoting technical or economic progress if cumulatively they:

- a)* Allow the users of these goods or services an equitable part of the resulting benefit;
- b)* Do not impose on the undertakings concerned any restrictions which are not indispensable to the attainment of these objectives;
- c)* Do not afford such undertakings the possibility of eliminating competition from a substantial part of the market for the goods or services at issue.

2 – It is the responsibility of the undertaking or association of undertakings which invoke this justification to provide evidence that the conditions stipulated in the previous paragraph are fulfilled.

3 – Agreements, concerted practices or decisions by associations of undertakings prohibited under the provisions of the previous article may be considered justified where, although they do not affect trade between Member States, they do fulfill all the other requirements for application of a regulation adopted in accordance with the provisions of article 101(3) of the Treaty on the Functioning of the European Union.

4 – The Competition Authority has the right to withdraw the benefit referred to in the previous paragraph should there be, in any specific case, a practice involved that produces effects incompatible with the provisions of paragraph 1 above.

Article 11

Abuse of a dominant position

1 – Any abuse by one or more undertakings of a dominant position in the domestic market or in a substantial part of it is prohibited.

2 – Such abuse may, in particular, consist in:

a) Imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

b) Limiting production, markets or technical development to the detriment of consumers;

c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

e) Refusing access for another undertaking to a network or other essential facilities that it controls, when appropriate payment for such is available, in a situation where the other undertaking cannot therefore, in fact or in law, act as a competitor of the undertaking in a dominant position in the market, upstream or downstream, unless the dominant undertaking can demonstrate that, for operational or other reasons, such access cannot reasonably be provided.

Article 12

Abuse of economic dependence

1 – It is prohibited for one undertaking or more undertakings to abuse the economic dependence under which any of its supplier or customer may find itself as a result of the fact that any equivalent alternative is not available, to the extent that such a practice affects the way the market or competition operate.

2 – The following cases, among others, may be considered abusive:

a) The adoption of any behaviour such as described in subparagraphs *a)* to *d)* in paragraph 2 of the previous article;

b) Any unjustified break, total or partial, in established commercial relations, bearing in mind previous commercial relations, recognised practices in that particular economic activity and the contractual conditions that have been set down.

3 – For the purposes of paragraph 1, an undertaking is deemed not to have an equivalent alternative when:

a) The supply of the goods or service at issue, specifically at the point of distribution, is controlled by a restricted number of undertakings; and

b) The undertaking cannot find identical conditions from other commercial partners within a reasonable time scale.

SECTION II

Administrative offence proceedings regarding prohibited practices

Article 13

Applicable norms

1 – Procedures for infringement of the provisions of articles 9, 11 and 12 are governed by this law and by subsidiary provisions in accordance with the General Regime of Administrative Offences, approved in Decree Law No 433/82 of 27 October.

2 – The provisions of the previous paragraph are also applicable, with the necessary adaptations, to cases initiated by the Competition Authority for infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union or where the Competition Authority has to intervene, within the scope of its responsibilities under article 6, paragraph 1, subparagraph g) of its statutes, approved in Decree Law No 10/2003 of 18 January.

Article 14

General provisions on time limits

1 – Should there be no special provision set for any action or diligence claiming that the case is null and void, or making any claim regarding due process or other procedural powers, the time limit shall be 10 working days.

2 – When the setting of time limits is the responsibility of the Competition Authority, the criteria shall be based on reasonably required time for drawing up observations or making statements, and the urgency of the action to be carried out.

3 – The time limits stipulated in law or by decision of the Competition Authority can be extended, for the same period, if there is a request, duly substantiated, handed in within the initial time period.

4 – The Competition Authority may refuse the extension of the time limit whenever it has a substantiated reason to believe that the request is merely a delaying tactic.

5 – The decision referred to in the previous paragraph is not subject to appeal.

Article 15

Request for information

1 – Where the Competition Authority requests, in writing, documents and other information from undertakings or other natural or legal persons, the request shall perforce be made up of the following elements:

a) The legal basis for the person receiving the request to be required to provide information, his legal status in the context of such a request, and the purpose of the request;

b) The time limit for providing this documentation or supplying the information requested;

c) A reference to the fact that the undertakings should duly identify the information that is deemed to be confidential, because it contains business secrets, providing in this case a copy of the documents with the confidential information expunged;

d) A warning that failure to comply with the request is an administrative offence, pursuant to article 68, paragraph 1, subparagraph *h*).

2 – The information and documentation requested by the Competition Authority should be provided within a time limit not less than 10 working days, unless a different time limit is expressly stated in a well-substantiated decision.

3 – The provisions of paragraph 1, subparagraph *c*), are applicable to documentation provided voluntarily by the parties concerned in the case, by the complainant or by any third party.

Article 16

Notifications

1 – Notifications shall be made by registered letter, sent to the registered head office or residence of the person being notified or personally, if necessary, by the police.

2 – Should the person being notified not have a head office or a residence in Portugal, the notification shall be made at the branch, agency or representative office in Portugal or, if there be none such, at the registered head office or residence in the foreign country.

3 – Notification shall always be addressed to the party concerned in the case, whether the matter relates to an interim measure, a statement of objections, a decision to close the case, with or without

conditions, a settlement decision, an admonition decision or a decision imposing a fine or other sanctions, or any communication relating to a personal act.

4 – Whenever the party concerned in the case cannot be found or refuses to receive the notification mentioned in the previous paragraph, that party is deemed to have been notified on publication of an announcement in one of the daily papers with a large nationwide circulation, containing a summary of what is being imputed to that person.

5 – Notifications are also made to the lawyer or person acting for the defence, when so appointed, notwithstanding the duty to notify the party concerned, as stipulated in paragraph 3 above.

6 – Notification by post is presumed to have been made on the third working day after date of register in the case specified in paragraph 1 above, and on the seventh working day after date of register in the case specified in the second part of paragraph 2 above.

7 – In the situation set out in paragraph 5 above, the time limit for proceedings after notification is counted from the next working day of the last of these notifications that were issued.

8 – Should the party concerned in the case fail to appear at the proceedings for which it was notified in accordance with this article, such a fact shall not stop the administrative offence proceedings from being pursued.

Article 17

Initiation of investigation

1 – The Competition Authority shall initiate investigation into practices prohibited under articles 9, 11 and 12 of this law or under articles 101 or 102 of the Treaty on the Functioning of the European Union, *ex officio* or following a complaint, in accordance with the provisions in article 7 of this law.

2 – Within the scope of the investigation, the Competition Authority shall apply the investigative procedures necessary to determine the existence of a prohibited practice and the identity of those involved and it shall also collect evidence to this end.

3 – All public entities, specifically those which are part of any direct, indirect or autonomous General Government structure, as well as independent administrative authorities, have the duty to inform the Competition Authority of facts they become aware of that might be construed as prohibited competition practices.

4 – Any natural or legal person becoming aware of a prohibited practice may denounce it to the Competition Authority by filling in the form approved by the Competition Authority and available on its Internet site.

5 – The sovereign bodies and their representatives have the duty to inform the Competition Authority of breaches in competition law, within the terms of their mission to defend the legal and constitutional order.

Article 18

Powers of inquiry, search and seizure

1 – In the exercise of its sanctioning powers, the Competition Authority, through its statutory bodies or employees, can, among other things:

a) Question persons at the undertaking and other persons involved in the case, either personally or through their legal representatives, as well as request documents and other items of information that it considers useful or necessary for determining the facts;

b) Interview any other persons, either personally or through their legal representatives, whenever it considers that these persons' statements may be pertinent, as well as request documents and other items of information;

c) Carry out searches, examinations, collection and seizure of accounting data or other documentation, irrespective of the devices where they are stored or saved, in the premises, property

and means of transport of the undertakings concerned whenever such actions are deemed necessary for obtaining evidence;

d) Seal off the premises of undertakings or associations of undertakings where there is, or may be, accounting data or other documentation, including the devices where they are stored or saved, such as computers and other data storage electronic equipment, during the period and to the extent that is strictly necessary for carrying out the actions detailed in the previous subparagraph;

e) Request assistance from any service that is part of the Public Administration, including the police, as necessary for the fulfillment of its functions.

2 – The actions set out in subparagraphs *c)* and *d)* of the previous paragraph depend on a warrant from the competent judicial authorities.

3 – The warrant referred to in the previous paragraph shall be well substantiated, and requested in advance by the Competition Authority, and the decision on the warrant shall be taken within 48 hours.

4 – Outside the premises of the Competition Authority, the employees who carry out the actions set down in subparagraphs *a)* to *c)* of paragraph 1 above shall have with them:

a) In the case of subparagraphs *a)* and *b)*, a credential issued by the Competition Authority detailing the purpose of the action;

b) In the case of subparagraph *c)*, the credential referred to in the previous subparagraph and the warrant set down in paragraph 3, which shall be notified to the person or persons subject to the investigation at the outset of the action.

5 – The notification referred in subparagraph *b)* of the previous paragraph shall be made to the legal representative, or in his absence, to anyone who works with the undertaking or association of undertakings that is present.

6 – When carrying out the actions set out in subparagraphs *c)* and *d)* of paragraph 1, the Competition Authority can be accompanied by the police.

7 – If the legal representative, employees or anyone who works with the undertaking concerned are not on the premises or if there is refusal to be notified, notification shall be effected by affixing a duplicate of the notice in a visible place on the premises.

8 – The actions set out in subparagraphs *a)* to *d)* of paragraph 1 above shall be written down in a notice and the party concerned in the case shall be duly notified.

9 – Should anyone requested to make a statement to the Competition Authority not make an appearance so to do, the case shall be pursued nonetheless.

Article 19

Search of private premises

1 – Where there is a well-substantiated indication that evidence of a serious infringement of articles 9 or 11 of this law or articles 101 or 102 of the Treaty on the Functioning of the European Union may be found at the private premises of partners, members of the board of directors, employees or anyone who works with the undertaking or association of undertakings, a search of private premises can be made, duly authorized by the judge responsible for procedural safeguards⁴ in response to a request of the Competition Authority.

2 – The Competition Authority request must mention the seriousness of the infringement under investigation, the relevance of the evidence being sought, the involvement of the undertaking or association of undertakings and the reasonableness of the suspicion that evidence is being kept on the private premises for which a search warrant has been requested.

3 – The judge responsible for procedural safeguards can order the Competition Authority to provide information on the elements necessary to control the proportionality of the action requested.

⁴ *Juiz de instrução* in Portuguese.

4 – The warrant should be issued within 48 hours, providing due identification of the object and purpose of the action, with the date when the action starts and an indication that it can be subject to judicial review.

5 – The provisions of paragraph 4, subparagraph *b)*, and of paragraphs 5 to 8 of article 18, with all necessary adaptations, apply to search and seizure in private premises.

6 – A search in a house where people live or in dependent premises which are closed can only be authorized by the judge responsible for procedural safeguards and carried out between 7 a.m. and 9 p.m., since it may otherwise be rendered null and void.

7 – Where the search is carried out in the offices of a lawyer or in a doctor's surgery, the judge responsible for procedural safeguards must be present, or otherwise it would be null and void, and must previously inform the local president of the Bar Association or of the Medical Association, respectively, so that this person or an official representative can be present.

8 – The provisions stipulated in this article apply, with the necessary adaptations, to searches made in other places, including vehicles of partners, members of the board of directors and employees or those who work with the undertaking or association of undertakings.

Article 20

Seizure

1 – The seizure of documents, irrespective of their nature or the devices where they are stored or saved, shall be authorized, ordered or validated by a judicial authority.

2 – The Competition Authority can make a seizure during the search or whenever there is urgency or danger in delaying.

3 – Any seizure made by the Competition Authority that has no prior order or authorization must be validated by a judicial authority within 72 hours of the occurrence.

4 – Where the seizure is made in a lawyer's office or a doctor's surgery, the provisions of paragraphs 7 and 8 of the previous article shall apply.

5 – In the cases referred to in the previous paragraph, it is prohibited to seize documents covered by legal or medical privilege, since the seizure would then be null and void, unless the documents are the object of or element in the infringement.

6 – Any seizure in banks or other credit institutions covered by banking secrecy shall be carried out by the judge responsible for procedural safeguards, whenever there are well-substantiated reasons for believing that they are related to an infringement and are of major importance for finding out the truth or in terms of evidence, even if they do not belong to the party concerned in the case.

7 – The judge responsible for procedural safeguards can examine any documentation from the bank in order to verify whether the objects to be seized are of importance under the provisions of the previous subparagraph.

8 – The examination pursuant to paragraph 7 shall be made personally by the judge responsible for procedural safeguards, assisted where necessary by the police or by qualified staff of the Competition Authority, and are all bound by the duty of confidentiality relating to everything they have found out and is not of interest as evidence.

Article 21

Territorial competence

The public prosecutor or, when expressly stipulated, the judge responsible for procedural safeguards, both within the area of the head office of the Competition Authority, have the power to authorize the actions set out in article 18, paragraph 1, subparagraphs *c)* and *d)*, and in articles 19 and 20.

Article 22

Settlement proceedings in the investigative phase

1 – During the course of the investigation, the Competition Authority can set a time limit, of not less than 10 working days, for the party concerned in the case to make known in writing their willingness to enter into a discussion with a view to the possibility of proposing a settlement.

2 – During the course of the investigation, the party concerned in the case can make known in writing to the Competition Authority their willingness to enter into a discussion with a view to the possibility of proposing a settlement.

3 – The party concerned in the case participating in a settlement discussion shall be provided with information by the Competition Authority 10 days before the initiation of such a discussion, pertaining to the facts that are imputed to him, the evidence underpinning the imputation of a sanction and the range of the amount of the fine set by law for the offence in question.

4 – The information referred to in the previous paragraph is confidential, as is any other that is provided by the Competition Authority during the discussion, notwithstanding the fact that the Competition Authority can expressly authorize disclosure to the party concerned in the case.

5 – The Competition Authority can, at any time, decide to terminate the discussion with one or more parties concerned in the case if it considers that there is no progress in the proceedings, and no appeal can be made against this decision.

6 – Once the discussion has been concluded, the Competition Authority shall set a time limit, of not less than 10 working days, for the party concerned in the case to submit a settlement submission in writing.

7 – The settlement submission submitted by the party concerned in the case must take into account the result of the discussion and accept responsibility for the infringement at issue and this submission cannot subsequently be unilaterally revoked by that person.

8 – Once the settlement submission has been received, the Competition Authority shall evaluate it, assessing its conformity with the provisions of the previous paragraph, and can refuse it if the Competition Authority considers the submission unsubstantiated, without leave to appeal, or can accept it and, in such a case, the Competition Authority shall draw up a settlement notice, including the identification of the party concerned in the case, a summary of the facts that have been imputed, the legal stipulations that have been violated and an indication of the terms of the settlement, including the sanctions imposed and the percentage reduction of the fine.

9 – The party concerned in the case shall, in writing and within the time limit set by the Competition Authority, of not less than 10 working days following the notification, state that the settlement notice reflects the substance of the submission that has been submitted.

10 – Should the party concerned in the case not agree, pursuant to the previous paragraph, then the administrative offence proceedings shall continue, and the settlement notice referred to in paragraph 8 shall be deemed to be devoid of purpose.

11 – The settlement submission referred to in paragraph 7 shall be deemed to be revoked once the time limit stipulated in paragraph 9 has elapsed, with the party concerned in the case not showing agreement with the proceeding, and it cannot be used as evidence against any party under investigation in the settlement proceedings.

12 – The settlement notice can be converted into a definitive decision imposing a sanction if the party concerned in the case so agrees, pursuant to paragraph 9, and makes the payment of the fine, and the facts cannot be assessed again as an administrative offence for the purposes of this law.

13 – The facts to which the party concerned in the case has confessed through the decision referred to in the previous paragraph cannot be subject to judicial review for the purposes of any appeal made under the provisions of article 84.

14 – The reduction of the fine under the provisions of article 78 following the submission of a request by the party concerned in the case made for this purpose shall be added to the reduction of the fine referred to in this article.

15 – For the purposes of the provisions of article 25, paragraph 1, the Competition Authority can allow access to the settlement submissions made under the provisions of this article, but no copy of these can be made without due authorization by the author of the proposal.

16 – No access to the settlement submissions referred to in the provisions of this article is allowed except if authorized by the author of the proposal.

Article 23

Closing of investigation with conditions

1 – The Competition Authority can accept commitments submitted by the party concerned in the case as long as they are likely to eliminate the effects on competition stemming from the practices at issue and can close the case following the imposition of conditions guaranteeing that the proposed commitments shall be kept.

2 – The Competition Authority, whenever it considers such action suitable, can notify the party concerned in the case that an initial appreciation of the facts is being undertaken, providing the opportunity thus for the submission of commitments that are likely to eliminate the effects on competition stemming from the practices at issue.

3 – The Competition Authority or the party concerned in the case can at any moment discontinue the discussion and the administrative offence proceedings shall continue.

4 – Before approving a decision to close the case with conditions, the Competition Authority shall publish on its Internet site and in two newspapers with large nationwide coverage, at the expense of the party concerned in the case, a summary of the case, the identification of the party concerned in the case, and the essential elements of the commitments proposal, with a time limit of not less than 20 working days for any interested third party to make any observations.

5 – The decision shall identify the party concerned in the case, the facts imputed to this person, the object of the investigation, the objections expressed, the conditions set out by the Competition Authority, the obligations of the party concerned in the case as to the commitments, and the way that compliance with the commitments shall be monitored.

6 – The decision to close the case with conditions, with the acceptance of commitments and imposition of conditions as per this article, does not conclude that an infringement to this law has occurred, but makes it mandatory for the party concerned in the case to comply with the commitments.

7 – Notwithstanding the sanctions that are applied, the Competition Authority can within two years reopen any case that has been closed with conditions, whenever:

- a) There has been a substantial change in the facts on which the decision was based;
- b) The conditions are not being complied with;
- c) The decision to close the case is deemed to have been based on false, inaccurate or incomplete information.

8 – It is the duty of the Competition Authority to monitor if the conditions have been complied with.

9 – As long as there has been compliance with the conditions, the case cannot be reopened, as set out in paragraph 7 above.

Article 24

Conclusion of investigation proceedings

1 – The investigation should be concluded whenever possible within a period of 18 months after the decision to initiate the case.

2 – Whenever it is not possible to comply with the time limit referred to in the previous paragraph, the board of the Competition Authority shall inform the party concerned in the case of this fact and set the time necessary to complete the investigation.

3 – When the investigation is concluded, the Competition Authority shall decide whether:

a) to initiate prosecution proceedings, with notification to the party concerned in the case of the statement of objections, whenever it concludes on the basis of the investigation undertaken, that there exists a reasonable likelihood of a decision imposing a sanction;

b) to close the case, when the investigations undertaken do not support the conclusion that there exists a reasonable likelihood of a decision imposing a sanction;

c) to settle the case following a decision imposing a sanction, made as part of a settlement procedure;

d) to close the case following a decision imposing conditions, as set down in the previous article.

4 – If the investigation was initiated following a complaint, the Competition Authority, when it concludes on the basis of the available information, that there does not exist a reasonable likelihood of a decision imposing a sanction shall inform the complainant of the decision, and the reasons, and shall set a time limit, of not less than 10 working days, for the latter to submit any observations in writing.

5 – If the complainant should make these observations within the time limit set and the Competition Authority considers that these observations do not amount, directly or indirectly, to a reasonable likelihood of a decision imposing a sanction, the case shall be closed, though an appeal can be made to the Competition, Regulation and Supervision Court against the decision to close the case.

6 – The decision to close the case shall be notified to the party concerned in the case and to the complainant, if there is one.

Article 25

Prosecution proceedings

1 – In the notification of the statement of objections, referred to in the previous article, paragraph 3, subparagraph *a)*, the Competition Authority shall set a reasonable time limit of not less than 20 working days for the party concerned in the case, to respond in writing with regard to the issues that may be of interest for the decision on the case, as well as with regard to the evidence submitted and to request actions to be taken with regard to complementary evidence considered to be of use.

2 – In the written reply referred to in the previous paragraph, the party concerned in the case can request an oral hearing to complement the written reply.

3 – The Competition Authority can refuse, provided its decision is well substantiated, to undertake additional actions with regard to complementary evidence when it is in all likelihood irrelevant or merely a delaying tactic.

4 – The Competition Authority can undertake additional actions with regard to complementary evidence, specifically of the type referred to in article 18, paragraph 1, even after the written reply by the party concerned in the case, as mentioned in paragraph 1 of this article, and after the oral hearing.

5 – The Competition Authority shall notify the party concerned in the case that more evidence has been attached to the case file as per the previous paragraph and can set a reasonable time limit, of not less than 10 working days, to make a statement.

6 – Whenever the evidence collected as a result of additional actions to obtain complementary evidence make for a substantial difference to the facts initially imputed to the party concerned in the case or his legal status, the Competition Authority shall issue another statement of objections, as per the provisions of paragraphs 1 and 2 above.

7 – Pursuant to its regulatory powers, the Competition Authority shall adopt guidelines on the conduct of the investigation and procedural requirements.

Article 26

Oral hearing

1 – The oral hearing referred to in paragraph 2 of the previous article shall be held by the Competition Authority in the presence of the applicant, and other natural or legal persons are allowed to participate, in accordance with the applicant's understanding that they can clarify specific aspects of his written statement.

2 – Where there is more than one applicant, the oral hearings shall be held separately.

3 – In his written reply, the applicant shall clearly state what issues are to be clarified in the oral hearing.

4 – In the oral hearing, the applicant, either directly or through the people referred to in paragraph 1, shall make all due clarification, and can add documentation to the case file.

5 – The Competition Authority can raise questions to the participating parties.

6 – The oral hearing is recorded and the transcription is attached to the case file with a notice.

7 – A notice on the fact that the oral hearing took place and on the documents attached is written and signed by all the parties present.

8 – Copies shall be made of the notice referred to in the previous paragraph, the documents and the transcription of the oral hearing to be sent to the applicant and to be notified to any other parties concerned in the case.

Article 27

Settlement proceedings in the prosecution phase

1 – In the statement referred to in article 25, paragraph 1, the party concerned in the case can put forward a settlement submission, confessing to the facts and accepting responsibility in the infringement at issue, and he cannot unilaterally revoke the settlement submission.

2 – Putting forward the settlement submission pursuant to the previous paragraph leads to suspension of the time limit set down in article 25, paragraph 1, for the period set by the Competition Authority, of not more than 30 working days.

3 – Once the settlement submission has been received, the Competition Authority shall evaluate it, and can refuse it if the Competition Authority considers the submission unsubstantiated, without leave to appeal, or can accept it and, in such a case, the Competition Authority issues the notification of the settlement notice containing the terms of the settlement, including the sanctions imposed and the percentage reduction of the fine.

4 – The Competition Authority shall give the party concerned in the case a time limit, of not less than 10 working days, to confirm that the settlement notice issued in accordance with the terms of the previous paragraph reflects the substance of the settlement submission.

5 – Should the party concerned in the case not agree, pursuant to the previous paragraph, then the administrative offence proceedings shall continue, and the decision referred to in paragraph 3 above shall be deemed to be devoid of purpose.

6 – The settlement submission submitted pursuant to paragraph 1 above shall be deemed to be revoked once the time limit referred to in paragraph 4 has elapsed, with the party concerned in the case not showing agreement with the proceeding, and it cannot be used as evidence against any party under investigation in the settlement proceedings.

7 – The settlement notice can be converted into a definitive decision imposing a sanction if the party concerned in the case so agrees, pursuant to paragraph 4, and makes the payment of the fine, and the facts cannot be assessed again as an administrative offence for the purposes of this law.

8 – The facts to which the party concerned in the case has confessed through the decision referred to in the previous paragraph cannot be subject to judicial review for the purposes of any appeal.

9 – The reduction of the fine under the provisions of article 78 following the submission of a request by the party concerned in the case made for this purpose shall be added to the reduction in the fine referred to in this article.

10 – For the purposes of the provisions of article 25, paragraph 1, the Competition Authority allows access to the settlement submissions made under the provisions of this article, but no reproduction can be made without due authorization by the author of the proposal.

11 – No access to the settlement submissions put forward under the provisions of this article is allowed, except if authorised by the author of the proposal.

Article 28

Closing of prosecution with conditions

During prosecution proceedings, the Competition Authority can close the case with conditions and the provisions of article 23 shall apply.

Article 29

Conclusion of prosecution proceedings

1 – Prosecution proceedings shall be concluded whenever possible within a 12-month period from the notification of the statement of objections.

2 – Whenever it is not possible to comply with the time limit referred to in the previous paragraph, the board of the Competition Authority shall inform the party concerned and set the time necessary to conclude the prosecution proceedings.

3 – When the prosecution proceedings are concluded, the Competition Authority shall adopt a final decision based on the prosecution report, for which the following possibilities exist:

a) To declare that there has been a prohibited practice but in so doing consider such a practice justified pursuant to article 10;

b) To impose a sanction in the context of a settlement decision pursuant to article 27;

c) To order the case to be closed with the imposition of conditions under the provisions of the previous article;

d) To order the case to be closed without the imposition of any conditions.

4 – The decisions referred to in the first part of subparagraph *a)* of paragraph 3 can be accompanied by an admonition or the imposition of fines and other sanctions set down in articles 68, 71 and 72 and, if this be the case, the imposition of behavioural measures or of structural measures necessary for halting the prohibited practices or their effects.

5 – The structural measures referred to in the previous paragraph can only be imposed when there is no behavioural measure that would be equally effective or, should it exist, it would be more onerous for the party concerned in the case than the structural measures themselves.

Article 30

Business secrets

1 – During prosecution proceedings, the Competition Authority shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets, notwithstanding the provisions of paragraph 3 of the following article.

2 – Following the actions undertaken as per article 18, paragraph 1, subparagraphs *c)* and *d)*, the Competition Authority shall give to the party concerned in the case a time limit of not less than 10 working days to select from the information that has been collected what is deemed to be confidential in terms of business secrecy, in a substantiated way, providing in this case a copy of the documents with the confidential information expunged.

3 – Whenever the Competition Authority wants to attach documents to the case file that may contain information that may be confidential, it shall give the undertaking or association of

undertakings or other entity duly identified the opportunity to express their opinion, under the provisions of the previous paragraph.

4 – If the undertaking or association of undertakings or other entity duly identified, having been given the opportunity to respond, in accordance with paragraphs 2 and 3 above or article 15, should fail to identify any information that it considers to be confidential, or fail to provide the grounds for such an identification, or not provide a copy of the documents with the confidential information expunged, then the information is deemed to be non-confidential.

5 – If the Competition Authority does not agree with the classification of the information as a business secret, it shall inform the undertaking or association of undertakings or other entity that it does not agree, either as a whole or in part, with the request for confidentiality.

Article 31

Evidence

1 – Evidence is deemed to be all the facts legally relevant for demonstrating the existence or non-existence of an infringement, identifying whether the actions of the party concerned in the case are punishable or non-punishable, determining the sanction that can be applied and setting the amount of the fine that can be imposed.

2 – Any evidence not prohibited by law is admissible.

3 – Notwithstanding the guarantee of the rights of defence of the party concerned in the case, the Competition Authority can demonstrate that there has been an infringement of the competition provisions set out in this law or of European Union law, using as evidence information classified as confidential, for reasons of business secrecy, under the provisions of article 15, paragraph 1, subparagraph *c*), and paragraph 3, as well as paragraphs 2 and 3 of the previous article.

4 – Except where the law provides otherwise, the evidence is analysed in accordance with the rules of experience and freely arrived at conviction of the Competition Authority.

5 – The information and documentation obtained by the Competition Authority in its supervisory role and as part of administrative offence proceedings can be used as evidence in administrative offence proceedings in progress or to be initiated, provided the undertakings are duly informed that such information may be used for that purpose in the requests for information directed to them and in the actions undertaken by the Competition Authority.

Article 32

Publicity of the case and secrecy of proceedings

1 – The case shall be public, barring exceptions stipulated in law.

2 – The Competition Authority can specify that the case is subject to secrecy of proceedings⁵ until the final decision, should it consider that publicity does harm the investigation.

3 – The Competition Authority can, either *ex officio* or in response to a request from the party concerned in the case, specify that the case is subject to secrecy of proceedings until the final decision, whenever it considers that the rights of the party concerned in the case so determine.

4 – Should the case be subject to secrecy of proceedings, the Competition Authority can, either *ex officio* or through a request from the party concerned in the case, lift the ban at any point of the proceedings, taking into consideration the interests referred to in the previous paragraphs.

5 – Notwithstanding any request from the judicial authorities, the Competition Authority can inform third parties of the contents of any act or document covered by secrecy of proceedings, if by doing so the investigation is not compromised and if it is believed to be relevant to finding the truth.

6 – The Competition Authority shall publish on its Internet site the final decisions adopted in prohibited practices proceedings, without prejudice to the safeguard of business secrets and other items of information considered confidential.

⁵ *Segredo de justiça* in Portuguese.

7 – The court rulings regarding appeals against the Competition Authority shall also be published by the Competition Authority on its Internet site.

Article 33

Access to file

1 – The party concerned in the case can put in a request to consult the case file and obtain, at his own expense, any extracts, copies or certificates, except as detailed in the following paragraph.

2 – The Competition Authority can refuse access to file to the party concerned in the case until the notification of the statement of objections in cases where the proceedings are subject to secrecy of proceedings under the provisions of paragraph 2 of the previous article and whenever it considers that such access may harm the investigation.

3 – Any natural or legal person showing legitimate interest in the case can request access to the file and request copies, extracts or documents from the file, at their own expense, except as set down in the previous article.

4 – Access to the documents referred to in article 31, paragraph 3, is only available to the lawyer or economic advisor and is strictly for the purposes of defence for the party concerned in the case, pursuant to article 25, paragraph 1, and for the judicial review of a Competition Authority decision where the information mentioned has been used as evidence, and no authorization shall be given for reproduction, in full or partially and by any means, nor its use for any other purpose.

Article 34

Interim measures

1 – Whenever investigations indicate that the practice subject to proceedings is on the point of doing serious and irreparable harm to competition, or damage making competition difficult to reinstate, the Competition Authority can, at any point in the proceedings, issue an interim measure to immediately suspend the practice in question or any other temporary measure needed for restoring competition, or required for the final decision on the case to be effective.

2 – The measures set out in this article may be adopted by the Competition Authority on its own initiative or at the request of any interested party and remain in force until they are revoked, for a period no longer than 90 days, except if extension for the same periods is granted, duly substantiated, and the decision on the investigative phase shall be made within a maximum of 180 days.

3 – The adoption of measures such as those described in paragraph 1 shall be preceded by a hearing of the parties concerned, except in the case where this could seriously jeopardise the aim or the effectiveness of the measures, in which case the parties are heard after the measures have been put in place.

4 – Whenever a market subject to sectoral regulation is involved, the Competition Authority shall request the opinion of the sectoral regulatory authority, who has five working days to issue an opinion if it so wishes.

5 – In cases of urgency, the Competition Authority can decide on its own initiative what interim measures are necessary for a return to or maintenance of effective competition, and the parties concerned shall be heard after the decision.

6 – In the case set out in the previous paragraph, whenever a market subject to sectoral regulation is at issue, the Competition Authority shall request the opinion of the sectoral regulatory authority before the decision on interim measures is taken.

Article 35

Coordination with sectoral regulatory authorities on prohibited practices

1 – Whenever the Competition Authority becomes aware, pursuant to article 17, of facts occurring within the scope of sectoral regulation and likely to be classified as prohibited practices, it shall

inform the sectoral regulatory authority of the issue immediately, so as to allow this authority to issue an opinion, within a time limit stipulated by the Competition Authority.

2 – Whenever the issue concerns prohibited practices with an effect on a market subject to sectoral regulation, a decision by the Competition Authority, under the provisions of article 29, paragraph 3, shall be preceded by an opinion from the sectoral regulatory authority concerned, within a time limit stipulated by the Competition Authority, except in situations where the case has been closed without conditions.

3 – Whenever a sectoral regulatory authority, within the scope of its responsibilities and without prejudice to article 17, paragraph 3, on its own initiative or at the request of an entity within its jurisdiction, makes an assessment of issues concerning a possible breach of the provisions of this law, it shall forthwith inform the Competition Authority, attaching information on its essential items.

4 – Before taking a final decision, the sectoral regulatory authority shall inform the Competition Authority of the draft decision, so that the Competition Authority issues its opinion, within the time limit that is set.

5 – In those cases set out in the previous paragraphs, the Competition Authority can, on a well-substantiated decision, suspend the decision to initiate prosecution proceedings or it can pursue the matter, within a time limit that it considers adequate.

CHAPTER III

Concentrations between undertakings

SECTION I

Concentrations subject to control

Article 36

Concentration between undertakings

1 – A concentration between undertakings is understood to exist, for the purposes of this law, when a change of control in the whole or parts of one or more undertakings occurs on a lasting basis, as a result of:

- a) The merger of two or more previously independent undertakings or parts of undertakings;
- b) The acquisition, directly or indirectly, of control of the whole or parts of the share capital or parts of the assets of one or various other undertakings, by one or more persons or by one or more undertakings already controlling at least one undertaking.

2 – The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration between undertakings for the purposes of subparagraph *b)* of the previous paragraph.

3 – For the purposes of the provisions of previous paragraphs, control results from any act, irrespective of the form it takes, implying the possibility of exercising a decisive influence over the activity of an undertaking on a lasting basis, whether solely or jointly, and taking into account the elements of fact and of law, specifically:

- a) The acquisition of the whole or a part of the share capital;
- b) The acquisition of ownership rights, or rights to use the whole or a part of the assets of an undertaking;
- c) The acquisition of rights or the signing of contracts which confer a decisive influence on the composition, voting or decisions of the undertaking's corporate bodies.

4 – A concentration of undertakings shall not be deemed to arise as a result of:

- a) The acquisition of shareholdings or assets in receivership by the insolvency administrator;

- b)* The acquisition of shareholdings merely to serve as collateral;
- c)* The acquisition by credit institutions, financial institutions or insurance companies of shareholdings in undertakings with different purposes from that of these three types of undertakings is acceptable, held on a temporary basis and acquired with a view to reselling the shareholdings, provided they are not to be held on a lasting basis and provided the institutions do not exercise voting rights in respect of such shareholdings with a view to determining the competitive behaviour of those undertakings or provided they exercise such voting rights only with a view to preparing the disposal of the whole or part of that undertaking or of its assets or the disposal of such shareholdings and that any such disposal takes place within one year of the date of acquisition, and that period may be extended by the Competition Authority if such institutions can show that disposal was not reasonably possible within the time limit set.

Article 37

Prior notification

1 – Concentrations between undertakings are subject to prior notification when they fulfil one of the following conditions:

- a)* As a consequence of the concentration, a market share equal to or greater than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced;
- b)* As a consequence of the concentration, a market share equal to or greater than 30% but smaller than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced in the case where the individual turnover in Portugal in the previous financial year, by at least two of the undertakings involved in the concentration are greater than five million euros, net of taxes directly related to such a turnover;
- c)* The undertakings that are involved in the concentration have reached an aggregate turnover in the previous financial year greater than 100 million euros, net of taxes directly related to such a turnover, as long as the turnover in Portugal of at least two of these undertakings is above five million euros.

2 – The concentrations covered by this law shall be notified to the Competition Authority after the parties have concluded an agreement and prior to its implementation, if this is to be the case, following the date of the preliminary announcement of a public offer of acquisition or exchange, or of the announcement of the acquisition of a controlling shareholding in an undertaking with shares listed on a regulated stock market or, in the case of a concentration resulting from a public procurement procedure, after the definitive tender selection and before the public contract is signed off.

3 – In those cases referred to in the final part of the previous paragraph, the entity awarding the contract shall ensure that the public procurement rules shall comply with the regime governing control of concentrations as set down in this law.

4 – When the undertakings taking part in a concentration reveal to the Competition Authority that there is a serious intention to conclude an agreement, or, in the case of a public offer of acquisition or exchange, where they have publicly announced the intention to make such an offer, and if this agreement or the public offer at issue results in a concentration, the operation can be notified voluntarily to the Competition Authority, prior to the obligation set down in paragraph 2 of this article.

5 – The proposed concentrations can be the subject of a prior appraisal by the Competition Authority, according to procedures set down by this Authority.

Article 38

Concentrations between undertakings considered as a single concentration

1 – Two or more concentrations between the same natural or legal persons within a period of two years, even when individually considered as not being subject to prior notification, are considered a single concentration subject to prior notification when the concentrations together reach the turnover set down in paragraph 1 of the previous article.

2 – The concentration referred to in the previous paragraph shall be notified to the Competition Authority after conclusion of the agreement on the last of the operations and before its implementation.

3 – The concentrations referred to in paragraph 1, which are not subject to prior notification when considered individually, and which have been implemented, are not subject to the provisions of article 40, paragraph 4, and article 68, paragraph 1, subparagraph *f*).

Article 39

Market share and turnover

1 – In order to calculate the market share and the turnover for each undertaking concerned in the concentration, set down in article 37, paragraph 1, the turnover to be taken into account, cumulatively, is as follows:

- a*) Turnover of the undertaking concerned in the concentration, pursuant to article 36;
- b*) Turnover of the undertaking in which it has, directly or indirectly:
 - i*) A majority shareholding;
 - ii*) More than half of the voting rights;
 - iii*) The possibility of appointing more than half of the members of the board of directors or the supervisory board;
 - iv*) The power to manage its businesses;
- c*) Turnover of the undertakings that have, in the undertaking concerned, in isolation or as a whole, the rights or powers detailed in the previous subparagraph;
- d*) Turnover of the undertakings in which any of the undertakings referred to in the previous subparagraph may have the rights or powers detailed in subparagraph *b*);
- e*) Turnover of the undertakings where various undertakings referred to in subparagraphs *a*) to *d*) hold together, between themselves or with third party undertakings, the rights and powers detailed in subparagraph *b*).

2 – Where one or various undertakings involved in the concentration hold together, between themselves or with third parties, the rights and powers detailed in subparagraph *b*) of the previous paragraph, in the calculation of the turnover of each undertaking concerned in the concentration:

- a*) No account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected to any of them pursuant to subparagraphs *b*) to *e*) of the previous paragraph;
- b*) Account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and any other third undertaking, which shall be apportioned equally amongst all the undertakings concerned that control the joint undertaking.

3 – The turnover referred to in the previous paragraphs includes the value of the products sold and the service rendered to undertakings and consumers in Portugal, net of the taxes directly related to such a turnover, but not including transactions carried out between the undertakings referred to in paragraph 1.

4 – By way of derogation from paragraph 1, if the concentration consists in the acquisition of parts of the assets of one or more undertakings, only the turnover relating to the parts which are the object of the transaction shall be taken into account with regard to the seller.

5 – Turnover shall be replaced:

a) In the case of credit institutions and financial institutions, by the sum of the following income items, as defined in applicable legislation:

i) Interest income and similar income;

ii) Income from securities:

Income from shares and other variable rate securities;

Income from shareholdings;

Income from shareholdings in affiliated undertakings;

iii) Commissions receivable;

iv) Net profit from financial operations;

v) Other operating income;

b) In the case of insurance companies, by the value of gross premiums written by residents in Portugal, which shall comprise all amounts received and receivable from insurance contracts issued by or on behalf of the insurance undertaking, including outgoing reinsurance premiums, with the exception of taxes or fees collected on the basis of the amounts in premiums or their total volume.

Article 40

Suspension of a concentration

1 – A concentration subject to prior notification shall not be implemented prior to being notified, or if this is done, prior to a non-opposition decision by the Competition Authority, express or tacit.

2 – The provisions of the previous paragraph shall not prevent implementation of a public offer of acquisition or exchange that has been notified to the Competition Authority pursuant to article 37, provided the acquiring party does not exercise the voting rights inherent in the shareholding at issue or exercises them merely with a view to protecting the full value of its investment on the basis of a derogation granted under the provisions of the following paragraph.

3 – Should there be a reasoned request from the undertakings concerned, submitted before or after the notification, the Competition Authority may grant a derogation from the obligations set down in the previous paragraphs, having pondered the consequences of suspending the operation or of suspending the exercise of voting rights by the undertakings concerned and the negative effects of the derogation on competition, and may, if necessary, add to the derogation conditions or obligations destined to ensure effective competition.

4 – Without prejudice to the sanction set out in article 68, paragraph 1, subparagraph *f*), following notification of a concentration implemented in infringement of paragraph 1 and before the Competition Authority has taken a decision:

a) The natural or legal persons who acquire control shall immediately suspend their voting rights, and the board of directors is obliged not to practice any act which is not under the remit of current affairs management of the undertaking and is prohibited from disposing of shareholdings or parts of the assets of the undertaking that has been acquired;

b) Should there be a reasoned request from the natural or legal persons who have acquired control, the Competition Authority may grant a derogation from the obligations set down in the previous subparagraph, having pondered the consequences of such a measure on competition, and may, if necessary, add to the derogation conditions or obligations destined to ensure effective competition;

c) The Competition Authority may adopt the measures referred to in article 56, paragraph 4.

5 – A complaint can be lodged against the decision to accept or reject the request for a derogation referred to in paragraph 3 above and paragraph 4, subparagraph *b*), but no appeal is admissible.

6 – All legal transactions that violate the provisions of paragraph 1 are hereby ineffective.

Article 41

Appraisal of concentrations

1 – Concentrations notified in accordance with the provisions of article 37 are appraised in order to determine their effects on the structure of competition, taking into consideration the need to preserve and foster, in the interests of intermediate and final consumers, effective competition in the domestic market or in a substantial part of it, without prejudice to the provisions of paragraph 5.

2 – In the appraisal referred to in the previous paragraph, the following factors shall be taken into consideration, specifically:

- a*) The structure of the relevant markets and the existence or absence of competition from undertakings in these markets or in separate markets;
- b*) The position of the undertakings concerned in the relevant markets and their economic and financial power, compared with those of their main competitors;
- c*) The purchaser's market power and its ability to prevent the reinforcement of situations of economic dependence *vis-à-vis* the undertaking that results from the concentration, pursuant to article 12 of this law;
- d*) Potential competition and the existence, in fact or in law, of barriers to entry into the market;
- e*) The possibility of choice for suppliers, clients and users;
- f*) The access of various undertakings to sources of supply and markets for their goods;
- g*) The structure of existing distribution networks;
- h*) Developments in the supply and demand of the products and services at issue;
- i*) The existence of special or exclusive rights conferred by law or stemming from the nature of the products being traded or the services supplied;
- j*) The control of essential facilities by the undertakings concerned and the possibility of access to these facilities provided for competing undertakings;
- k*) Any technical and economic progress that does not constitute an impediment to competition, provided there are efficiency gains that benefit consumers, stemming directly from the concentration.

3 – Concentrations which are not likely to create significant impediments to effective competition in the domestic market or a substantial part of it shall be authorised.

4 – Concentrations which are likely to create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant position shall not be authorized.

5 – A decision authorizing a concentration of undertakings shall be deemed to cover the restrictions directly related with the implementation of the concentration and necessary for it.

6 – In the cases set out in article 36, paragraph 2, if the creation of the joint undertaking has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, over and beyond the aim of the joint undertaking, such coordination shall be appraised pursuant to articles 9 and 10.

SECTION II

Procedures regarding control of concentrations

Article 42

Applicable norms

Procedures regarding control of concentrations between undertakings are governed by the provisions of this section and by subsidiary provisions in accordance with the Code of Administrative Procedure.

Article 43

Power to take statements and request information

1 – In the exercise of its supervisory powers, the Competition Authority can take statements, directly or through legal representatives, from any natural or legal person, whenever it deems relevant.

2 – The Competition Authority can request documentation and other information from undertakings and any other natural or legal persons, and the request shall be submitted with the following elements:

- a)* The legal basis for and the purpose of the request;
- b)* The time limit for providing documents or the information requested;
- c)* Reference to the fact that the undertakings or any other natural or legal person must identify, duly substantiated, and in the light of applicable procedures, any information that they consider confidential in terms of access to administrative documents as legally stipulated, attaching, in such a case, a copy of the documents with the confidential information expunged;
- d)* An indication that non-compliance with the request is an administrative offence, punishable pursuant to article 68, paragraph 1, subparagraph *i*).

3 – The provisions in subparagraph *c)* of the previous paragraph are applicable to all documents submitted voluntarily by undertakings or any other natural or legal person.

4 – The information regarding the internal affairs of the undertakings concerned can be considered by the Competition Authority as confidential in terms of access to administrative information whenever the undertaking shows that knowledge of this information by interested parties or by third parties could cause serious damage.

5 – The Competition Authority can also consider confidential any information relating to the internal affairs of undertakings which is not relevant to the conclusion of the proceedings or where the need for confidentiality, well-substantiated, is deemed to be in the public interest.

Article 44

Notification of a concentration

1 – Prior notification of a concentration between undertakings shall be made to the Competition Authority:

- a)* Together by all the parties involved in the merger, in the creation of a joint venture or in the acquisition of joint control over the whole or part of one or more undertakings;
- b)* Individually by the party that is acquiring exclusive control of the whole or part of one or more undertakings.

2 – The joint notifications shall be made by a common representative, with the power to send and receive documents on behalf of all the notifying parties.

3 – The notification shall be submitted according to a form approved in a Competition Authority regulation and shall contain all the information and documents requested therein.

4 – In the case of concentrations which, in a preliminary assessment, do not pose significant impediments to competition, in accordance with criteria to be laid down by the Competition Authority, the notification shall be submitted on a simplified form approved in a Competition Authority regulation.

Article 45

Effective date of notification

1 – Without prejudice to the provisions in the following paragraphs, the notification shall become effective on the date it has been submitted to the Competition Authority in accordance with the terms of the regulation referred to in the previous article, along with the proof of payment of the fee set down in article 94.

2 – Whenever information or documentation in the notification are incorrect or inaccurate, taking into consideration the elements required, in accordance with paragraphs 3 and 4 of the previous article, the Competition Authority shall, in writing and within a time limit of seven working days, invite the undertaking to complete or correct the notification within the time limit stipulated, and the notification will then take effect from the date of reception of the information or documentation requested by the Competition Authority.

3 – The Competition Authority can, on receiving a well-substantiated request from the notifying undertaking, waive the submission of specific information or documents that are not considered essential at that time for initiating proceedings.

4 – The waiver referred to in the previous paragraph shall not preclude the request for the information or documentation to be produced before a decision is taken.

Article 46

Withdrawing from the procedure and renouncing rights

The notifying party can at any time withdraw from the procedure or withdraw some of the requests that have been submitted, and also renounce its rights or legally protected interests, except in those cases stipulated in law.

Article 47

Participation in the proceedings

1 – Holders of subjective rights or legally protected interests who may be affected by the concentration and who submit observations to the Competition Authority wherein they state their express and substantiated opinion on the implementation of the concentration shall be entitled to intervene in the proceedings.

2 – For the purposes of the provisions set out in the previous paragraph, the Competition Authority shall, within a time limit of five working days, counting from the day when the notification becomes effective, provide for the publication of the key elements of the concentration in two of the daily papers with a large nationwide circulation, at the expense of the notifying party, setting a time limit of not less than 10 working days for submitting observations.

3 – Failure to submit observations within the time limit stipulated extinguishes the right to intervene in the hearing as set out in article 54, paragraph 1, unless the Competition Authority considers that such participation is relevant for the proceedings and does not preclude the adoption of an express decision within the time limit that is legally set.

Article 48

Access to information

1 – Access to information may be granted under the provisions set down in the Code of Administrative Procedure and in the following paragraph to any natural and legal persons who show a direct interest in the administrative proceedings for control of the concentration or who show legitimate interest in such information.

2 – Between the expiration of the time limit for submission of observations referred to in the previous article and the beginning of the hearing as set out in article 54, the natural or legal persons referred to in the previous paragraph, with the exception of the notifying party, are only entitled to be informed of how the proceedings are unfolding.

3 – As set out in the previous paragraph, the prior hearing shall last for a minimum of 20 days unless the Competition Authority pursuant to paragraph 1 has granted to the opposing parties full access to the file, excluding business secrets.

4 – In the case of concentrations between undertakings with shares quoted on a regulated market under the provisions of the Securities Code, the Competition Authority may set a shorter time limit than the minimum set down in the previous paragraph.

Article 49

Proceedings

1 – The Competition Authority shall conclude proceedings within 30 working days from the date that the notification becomes effective.

2 – The Competition Authority may authorize the introduction of substantial changes to the notification that has been submitted, following a well-substantiated request from the notifying party, in which case the time limit set out in the previous paragraph for conclusion of proceedings shall be adjusted so as to count anew from the date when the changes were received.

3 – Where at any time during the proceedings more information or documentation is required, or what has been provided has to be rectified, the Competition Authority shall inform the notifying party, setting a reasonable time limit for providing the elements at issue or for making the necessary rectifications.

4 – The communication set out in the previous paragraph shall suspend the time limit referred to in paragraph 1, with effect from the first working day following dispatch, and expiring on the day the Competition Authority receives the elements requested, along with a copy with the confidential information expunged, as referred to in article 43, paragraph 2, subparagraph *c*).

5 – Throughout the proceedings, the Competition Authority may request from any other entities, public or private, any information that it deems relevant for conclusion of the proceedings, which shall be provided within the time limits set by the Competition Authority.

6 – Without prejudice to the provisions of article 68, paragraph 1, subparagraph *i*), the information obtained subsequent to the expiry of the time limit set in the previous paragraph may still be considered by the Competition Authority on the condition that it does not compromise the adoption of a decision within the time limit legally set for the conclusion of proceedings.

Article 50

Decision

1 – Before the time limit referred to in paragraph 1 of the previous article expires, the Competition Authority shall decide:

a) That the concentration at issue does not fall within the scope of the procedure regarding control of concentrations between undertakings;

b) That it does not oppose the concentration between undertakings when it considers that the concentration, as notified or as modified by the notifying party, is not likely to create significant impediments to effective competition in the domestic market, or a substantial part of it;

c) To initiate an in-depth investigation when, in the light of the elements gathered and taking into consideration the criteria defined in article 41, it considers that the concentration at issue raises serious doubts as to its compatibility with the criterion set out in paragraph 3 of article 41.

2 – The decisions taken by the Competition Authority pursuant to subparagraph *b)* of the previous paragraph may be accompanied by the imposition of conditions or obligations intended to guarantee compliance with the commitments entered into by the notifying party with a view to ensuring the maintenance of effective competition.

3 – The legal transactions concluded in breach of the conditions set down in the previous paragraph are null and void, without prejudice to the provisions of article 57, paragraph 1, subparagraph *a)*, and of article 68, paragraph 1, subparagraph *g)*.

4 – Where a decision has not been taken within the time limit as stipulated in paragraph 1 of the previous article, a non-opposition decision is deemed to have been adopted concerning the proposed concentration between undertakings.

Article 51

Commitments

1 – The notifying party may at any time submit commitments with a view to ensuring that effective competition is maintained.

2 – The submission of commitments referred to in the previous paragraph shall suspend the time limit provided for the adoption of a decision for a period of 20 working days counting from the first working day following the submission of commitments and expiring on the day that the notifying party is informed of the decision to accept or refuse such commitments.

3 – The Competition Authority may, during the period of suspension of the time limit stipulated in the previous paragraph, request, pursuant to paragraphs 3 to 6 of article 49, the information that it considers necessary to assess whether the commitments offered are sufficient and adequate to ensure that effective competition is maintained or any other that may be necessary to the proceedings.

4 – The Competition Authority shall refuse the commitments whenever it considers that the submission is simply a delaying tactic or that the conditions or obligations offered are insufficient or inadequate to prevent impediments to competition that might result from the concentration between undertakings or that the feasibility of such commitments is uncertain.

5 – A complaint may be lodged against the refusal referred to in the previous paragraph, but no appeal is allowed.

Article 52

In-depth investigation

1 – Within a maximum time limit of 90 days from the date when the notification referred to in article 45 becomes effective, the Competition Authority shall undertake the complementary actions deemed necessary for the investigation.

2 – The provisions of paragraphs 2 to 6 of article 49 are applicable to the investigation referred to in the previous paragraph.

3 – The time limit referred to in paragraph 1 can be extended by the Competition Authority, upon request from the notifying party or with its agreement, up to a maximum of 20 working days.

Article 53

Decision after in-depth investigation

1 – Before the time limit set in paragraph 1 of the previous article expires, the Competition Authority shall decide:

a) Not to oppose the concentration between undertakings when it considers that the concentration, as notified or as modified by the notifying party, is not likely to create significant impediments to effective competition in the domestic market or in a substantial part of it;

b) Prohibit the concentration between undertakings when it considers that the concentration, as notified or as modified by the notifying party, is likely to create significant impediments to effective competition in the domestic market or in a substantial part of it.

2 – Where the concentration has already been implemented, the Competition Authority, within the scope of the opposition decision that is referred to in subparagraph *b)* of the previous paragraph, shall order measures that are appropriate to restore effective competition, specifically the separation of the undertakings or of any aggregated assets, including reversal of the operation or the cessation of control.

3 – The provisions of paragraphs 2 and 3 of article 50 and article 51 apply, *mutatis mutandis*, to the decision referred to in subparagraph *a)* of paragraph 1 above.

4 – The legal transactions concluded in breach of subparagraph *b)* of paragraph 1 or of paragraph 2 are null and void, without prejudice to the provisions of article 68, paragraph 1, subparagraph *f)*.

5 – Where a decision has not been taken within the time limit as stipulated in paragraph 1 of the previous article, a non-opposition decision is deemed to have been adopted concerning the proposed concentration between undertakings.

Article 54

Prior hearing

1 – Prior to taking any decisions referred to in articles 50 and 53, the notifying party and interested parties specified in paragraph 1 of article 47 shall be heard.

2 – Decisions in accordance with article 53 shall be preceded by a prior hearing to be held within a maximum time limit of 75 working days counting from the date that the notification referred to in article 45 becomes effective.

3 – In the absence of interested parties that have opposed the concentration, the Competition Authority can waive the prior hearing whenever it intends to take a non-opposition decision without imposing any conditions.

4 – Should a prior hearing be held, such a situation shall suspend the time limits referred to in paragraph 1 of article 49 and paragraph 1 of article 52.

Article 55

Coordination with sectoral regulatory authorities on control of concentrations

1 – Whenever there is a concentration in a market that is subject to sectoral regulation, the Competition Authority, prior to taking a final decision, shall request the opinion of the sectoral regulatory authority, setting a reasonable time limit for such a purpose.

2 – The time limit for adopting a final decision is suspended when the opinion to be issued is binding.

3 – The suspension set down in the previous paragraph begins on the first working day after the request for an opinion has been sent and expires on the day that the Competition Authority receives the request or at the expiration of the time limit set by the Competition Authority under the terms of paragraph 1.

4 – If a binding opinion has not been issued within the period set down in paragraph 1 of this article, the Competition Authority shall not be inhibited from taking a final decision.

5 – The provisions of paragraph 1 above shall not hinder the sectoral regulatory authorities from exercising their powers relating to the concentration at issue, as legally conferred within their specific remit.

Article 56

***Ex officio* proceedings**

1 – Without prejudice to the provisions of article 68, paragraph 1, subparagraph *f*) and article 72, subparagraph *b*), *ex officio* proceedings relating to concentrations shall be initiated whenever the Competition Authority becomes aware of a concentration having been implemented in the preceding five years, without prior notification having been made to the Competition Authority in breach of the provisions of the law.

2 – *Ex officio* proceedings are initiated by a communication from the Competition Authority to the natural or legal persons who are at fault, so that they can submit a notification of the concentration within a reasonable time limit in accordance with the provisions of this law.

3 – *Ex officio* proceedings must be concluded within the time limits set down in article 49 and 52, counting from the date when the notification becomes effective.

4 – The Competition Authority can at any time take all the measures that it deems necessary and appropriate to restore the situation prior to the concentration, as much as possible, specifically the separation of the undertakings or of any aggregated assets, including reversal of the operation or cessation of control.

Article 57

Decisions revoked

1 – Without prejudice to the application of the corresponding sanctions and the invalidities as set down in the law, Competition Authority decisions may be revoked when the concentration:

a) Has been implemented in disrespect of a decision of non-opposition imposing conditions or obligations;

b) Has been authorized on the basis of false or inaccurate information concerning essential circumstances for the decision provided by the undertakings concerned by the concentration.

2 – The decisions set out in the previous paragraph shall be revoked by the Competition Authority through *ex-officio* administrative proceedings, pursuant to the same formalities stipulated for the adoption of the revoked decision.

3 – Without prejudice to the revocation of the decision, the Competition Authority may adopt at any time the measures set out in paragraph 4 of the previous article.

SECTION III

Administrative offence proceedings regarding control of concentrations

Article 58

Initiation of investigation

Within the scope of control of concentrations between undertakings, the Competition Authority shall initiate investigations, in accordance with the provisions of article 7:

a) If the concentration has been implemented before a non-opposition decision has been taken, infringing articles 37 and 38, article 40, paragraph 1, and paragraph 4, subparagraph *a)*, or after having been prohibited pursuant to article 53, paragraph 1, subparagraph *b)*;

b) If there has been no compliance with the conditions, obligations or measures imposed on the undertakings by the Competition Authority pursuant to article 40, paragraph 3 and paragraph 4, subparagraphs *b)* and *c)*, article 50, paragraph 2, article 53, paragraphs 2 and 3, article 56, paragraph 4, and article 57, paragraph 3;

c) If information has not been provided or if the information provided is false, inaccurate or incomplete in response to the request of the Competition Authority in the use of its supervisory powers;

d) If there has been no cooperation with the Competition Authority or obstruction in the exercise of its powers as set down in article 43.

Article 59

Applicable regime

1 – The proceedings referred to in the previous article are governed by the provisions of this section and articles 15, 16, 18 to 28, and 30 to 35 and, with due adaptations in article 17, paragraphs 2, 3 and 4, and article 29 of this law.

2 – The proceedings of this section are governed by subsidiary provisions in accordance with the General Regime of Administrative Offences, approved in Decree-Law No 433/82 of 27 October.

CHAPTER IV

Market studies, examinations and audits

Article 60

Applicable norms

Proceedings covering market studies, examinations and audits are governed by subsidiary provisions in accordance with the Code of Administrative Procedure.

Article 61

Market studies and sectoral inquiries

1 – The Competition Authority can carry out market studies and inquiries focusing on economic sectors or types of agreement, which may be deemed necessary for:

a) Supervising and monitoring the markets;

b) Verifying any circumstances that may indicate distortion or restriction of competition.

2 – The conclusions reached in the market studies shall be published on the Competition Authority Internet site, and this can be preceded by a public consultation to be organised by the Competition Authority.

3 – In those cases where the market studies and inquiries referred to in paragraph 1 relate to economic sectors regulated by a sectoral regulatory authority, the conclusions should be preceded by a request for a non-binding opinion from the relevant regulator, with the Competition Authority setting a reasonable time limit for this purpose.

4 – Should a non-binding opinion not be issued within the time limit set down in the previous paragraph, this does not prevent the Competition Authority from concluding the market study and inquiry relating to the above mentioned request for an opinion.

5 – The Competition Authority can make a request to undertakings or associations of undertakings or any other parties or bodies for all the information that it considers relevant from the legal competition standpoint, applying the provisions of article 43 with the necessary adaptations.

Article 62

Recommendations

1 – Whenever the Competition Authority concludes that there are circumstances or behaviour that affect competition in the markets or economic sectors analysed, the conclusions of the market study, of the sectoral inquiry or of the inquiry on a type of agreement, or the report on examinations and audits should:

- a)* Identify the circumstances in the market or the behaviour of undertakings or associations of undertakings that affect competition, and to what extent;
- b)* Indicate those behavioural or structural measures it considers appropriate to prevent, remove or offset the effects.

2 – Whenever the market study and its report focuses on a market subject to sectoral regulation, the Competition Authority should inform the sectoral regulatory authority of the circumstances or behaviour that affect competition and possible measures to correct the situation.

3 – The Competition Authority can recommend the adoption of behavioural or structural measures considered appropriate to restore or ensure competition in the market, under the following terms:

- a)* When the issue involves markets that are subject to sectoral regulation and the circumstances described in subparagraph *a)* of paragraph 1 stem from the same, the Competition Authority may submit to the Government and the sectoral regulatory authority the recommendations that it considers appropriate;
- b)* In the remaining cases, the Competition Authority may recommend the adoption of appropriate behavioural or structural measures to the Government and other entities.

4 – The Competition Authority shall monitor compliance with the recommendations that it has made pursuant to the previous paragraph, and can request from the bodies receiving the recommendations all that information that it believes to be pertinent to implementing them.

Article 63

Examinations and audits

1 – Whenever there are circumstances that point towards distortions or restrictions on competition, the Competition Authority shall make all the examinations and audits necessary to identify the causes.

2 – When carrying out examinations and audits, the Competition Authority shall act in accordance with the powers set down in the following article, following consent from the entity concerned, exercising its duty of co-operation.

3 – The Competition Authority shall carry out examinations and audits on a case-by-case basis, or as part of an approved programme of examinations.

4 – If, as a result of examinations or audits, the Competition Authority should detect situations that affect competition in the markets at issue, the provisions of the previous article shall apply.

Article 64

Powers of examination and auditing

1 – The Competition Authority can carry out examinations and audits in any undertaking or association of undertaking.

2 – The examinations and audits carried out by the Competition Authority are notified to the undertakings or associations of undertakings at a minimum of 10 working days before they are carried out.

3 – The employees of and other persons mandated by the Competition Authority to carry out an examination and audit can:

a) Enter all premises, properties and means of transport of undertakings or associations of undertakings;

b) Inspect the books and other ledgers relating to the undertakings or associations of undertakings, irrespective of the device on which they are stored or saved;

c) Obtain, in any way, copies or extracts of the documents to be controlled;

d) Request from any legal representative, employee or other person working for the undertaking or association of undertakings to provide clarification on facts or documents related to the subject and purpose of the examination and audit and draw up a record of their responses.

4 – The legal representatives, employees or other persons working for the undertakings or association of undertakings are obliged to provide all the assistance necessary for the employees of the Competition Authority and others so mandated to exercise the powers specified in the previous paragraph.

5 – The employees of the Competition Authority and others so mandated to carry out an examination and an audit shall carry with them a credential where the purpose of the action is made explicit.

CHAPTER V

State aid

Article 65

State aid

1 – Aid for undertakings granted by the State or any other public body should not restrict, distort or affect competition in the domestic market, as a whole or in a substantial part of it, and to a significant extent.

2 – The Competition Authority can analyse any aid or projected aid and, as it sees fit, formulate for the Government or any other public body its recommendations for eliminating any negative impact on competition.

3 – The Competition Authority shall monitor the execution of its recommendations, and can request from any entities information relating to the implementation of such measures.

4 – The Competition Authority shall make public its recommendations on its Internet site.

CHAPTER VI

Regulations

ARTICLE 66

Regulation procedures

1 – Prior to publishing any regulation with effect on its proceedings or decisions, the Competition Authority shall submit the proposed regulation for public consultation on its Internet site for a time limit of not less than 30 working days.

2 – In the preamble to the regulations as set down in the previous paragraph, the Competition Authority shall substantiate its options, specifically with reference to the opinions expressed during the public consultation.

3 – The regulations of the Competition Authority with effect on its proceedings or decisions shall be published in the Official Journal of the Portuguese Republic, 2nd series.

CHAPTER VII

Infringements and sanctions

Article 67

Legal status

Without prejudice to criminal responsibility and any administrative measures that may be taken, infringements to the provisions set out in this law and in European Union law where the enforcement of compliance with such provisions is the responsibility of the Competition Authority shall be deemed an administrative offence, punishable pursuant to the provisions of this chapter.

Article 68

Administrative offences

1 – The following are deemed to be administrative offences punishable with a fine:

- a)* Infringement of the provisions of articles 9, 11 and 12;
- b)* Infringements of the provisions of articles 101 and 102 of the Treaty on the Functioning of the European Union;
- c)* Non-compliance with the conditions referred to in article 29, paragraph 3, subparagraph *c)*;
- d)* Non-compliance with the measures imposed pursuant to article 29, paragraph 4;
- e)* Non-compliance with the decision imposing interim measures, pursuant to article 34;
- f)* Implementation of a concentration between undertakings before there has been a decision of non-opposition in breach of articles 37 and 38, of article 40, paragraph 1 and paragraph 4, subparagraph *a)*, or where there has been a prohibition decision pursuant to article 53, paragraph 1, subparagraph *b)*;
- g)* Non-compliance with the conditions, obligations or measures imposed on the undertakings by the Competition Authority pursuant to article 40, paragraph 3 and paragraph 4, subparagraphs *b)* and *c)*, article 50, paragraph 2, article 53, paragraphs 2 and 3, article 56, paragraph 4, and article 57, paragraph 3;
- h)* Not providing information or providing false, inaccurate or incomplete information in response to a request of the Competition Authority, under its sanctioning powers;
- i)* Not providing information or providing false, inaccurate or incomplete information in response to a request of the Competition Authority, under its supervisory powers and during studies, examinations and audits;
- j)* Not assisting the Competition Authority or obstructing it in the exercise of its powers as set out in articles 18 to 20, 43, 61 and 64;
- k)* Unjustified failure to appear as a complainant, witness or expert, during a case where notification has been duly served.

2 – If the administrative offence consists in non-compliance with a legal duty or an order issued by the Competition Authority, the application of a fine does not free the party concerned from compliance, provided this is still possible.

3 – Negligence is punishable.

Article 69

Setting the amount of the fine

1 – When setting the amount of the fine referred to in the previous article, the Competition Authority can consider, among other things, the following criteria:

- a) The seriousness of the infringement in terms of its effect on competition in the domestic market;
- b) The nature and size of the market affected;
- c) The duration of the infringement;
- d) The degree of involvement in the infringement by the party concerned in the case;
- e) The advantages gained by the party concerned in the case in the prohibited practices stemming from the infringement, when such advantages can be identified;
- f) The behaviour of the party concerned in the case in the process of eliminating the prohibited practices and repairing the damage caused to competition;
- g) The economic situation of the party concerned in the case;
- h) Previous administrative offences by the party concerned in the case involving an infringement of competition rules;
- i) The assistance given to the Competition Authority throughout the proceedings.

2 – In the case of the administrative offences referred to in subparagraphs *a) to g)* in paragraph 1 of the previous article, the fine set pursuant to paragraph 1 above cannot exceed 10% of the turnover of the year immediately preceding the final decision issued by the Competition Authority for each of the undertakings concerned or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings.

3 – In the case of the administrative offences referred to in subparagraphs *h) to j)* in paragraph 1 of the previous article, the fine that is set pursuant to paragraph 1 cannot exceed 1% of the turnover of the year immediately preceding the final decision issued by the Competition Authority for each of the undertakings concerned or in the case of associations of undertakings the aggregate turnover of the associated undertakings.

4 – In the case of the administrative offences referred to in subparagraphs *a) to g)* of paragraph 1 of the previous article, the fine set for natural persons cannot exceed 10% of their annual income deriving from the exercise of their functions in the undertaking concerned, in the last full year when the prohibited practice occurred.

5 – In the figure for income referred to in the previous paragraph, this shall include salaries, earnings, gratifications, percentages, commissions, holdings, subsidies or bonuses, attendance vouchers, emoluments and additional payments, even if periodical, fixed or variable, as part of a contract or not, and any other payments as defined for income tax assessment, earned as a result of work or connected with this work and constituting an economic advantage for the beneficiary.

6 – In the case of the administrative offences referred to in subparagraphs *h) to j)* of paragraph 1 of the previous article, the Competition Authority can impose a fine of between 10 and 50 units of account.⁶

7 – In the case of the administrative offences referred to in subparagraph *k)* of paragraph 1 of the previous article, the Competition Authority can apply a fine of between 2 and 10 units of account.

8 – The Competition Authority, under its regulatory powers, shall provide guidelines containing the methodology for setting the amount of the fines, in accordance with the criteria defined in this law.

⁶ A unit of account (*unidade de conta processual* in Portuguese) corresponds to an amount in euros, subject to yearly update, currently set at 102 euros, which is used by the courts or by administrative authorities for setting the amount of the fine or the fee to be charged for judicial proceedings, this amount being expressed as a certain number of units of account.

Article 70

Immunity from fines or reduction of fines in cartel cases

The Competition Authority can grant immunity from a fine or reduction of a fine, as would be set pursuant to the previous article, under the terms of this law.

Article 71

Accessory sanctions

1 – When the seriousness of the infringement and the fault of the party concerned so justifies, the Competition Authority can apply the following accessory sanctions, in tandem with the fine:

a) Publication in the Official Journal of the Portuguese Republic and in a national, regional or local newspaper with a large circulation, according to the relevant geographical market, at the expense of the party concerned, with this publication containing an extract of the decision imposing a sanction or, at the least, that part of the decision relating specifically to the sanction handed down in a case initiated under the provisions of this law, such publication to be after the final court ruling, which is not subject to any appeal.

b) A ban on the right to take part in the procedures for contracts where the purpose is to offer services typical of public works contracts, public service concessions, leasing or acquisition of movable assets or the acquisition of services or procedures involving the award of licences or authorisations, in those cases where the practice that has led to an administrative offence punishable with a fine has occurred during or because of such procedures.

2 – The sanction set out in subparagraph *b)* of the previous paragraph may be in force for a maximum of two years counting from the final ruling upholding the decision imposing the sanction, which is not subject to any appeal.

Article 72

Periodic penalty payment

Without prejudice to the provisions of articles 69 and 70, the Competition Authority can decide, when it is justifiable, to impose a periodic penalty payment, to a maximum of 5% of the average daily turnover in the year immediately before the decision, per day of late payment, counting from the notification date, in the following cases:

a) Non-compliance with a Competition Authority decision that has imposed a sanction or the adoption of specific measures;

b) Non-notification of a merger operation subject to prior notification pursuant to articles 37 and 38.

Article 73

Liability

1 – Liability for administrative offences as stipulated in this law covers natural persons and legal persons, regardless of how they are constituted, as well as undertakings and associations with no legal status.

2 – Legal persons and equivalent entities, as referred to in the previous paragraph, are responsible for the administrative offences set down in this law, when committed:

a) In their name and in their collective interests by persons who occupy leading positions; or

b) By anyone acting under the authority of the persons referred to in the previous subparagraph, stemming from a breach of the duty of oversight or control that is incumbent upon them.

3 – It is understood that those who occupy a leading position are the corporate bodies and representatives of the legal person and those that hold the power to exercise control over its activity.

4 – Mergers, demergers and transformations do not extinguish the responsibility of the legal person or equivalent entity, and liability for the administrative offence devolves as follows:

a) In the case of a merger, onto the legal person or equivalent entity which has taken over other undertakings or is formed as a result of the operation;

b) In the case of a demerger, onto the legal persons or equivalent entities resulting from the operation or who benefit from incorporation of the assets of the undertaking that has been demerged;

c) In the case of a transformation, onto the legal persons or equivalent entities which are formed as a result of the operation.

5 – In the case where the legal person or equivalent entity is wound up, the assets which have been set aside for distribution shall be pledged to the amount of the fine which was levied.

6 – The members of the board of directors of the legal person or equivalent entity, as well as those responsible for the management or supervision of the areas of activity where there has been an administrative offence, are liable to a sanction pursuant to paragraph 4 of article 69 when they have acted in the terms described in subparagraph *a)* of paragraph 2, or when, knowing or having the duty to know of an infringement committed, they have not adopted appropriate measures to terminate it forthwith, unless they are liable to a more serious sanction through another legal provision.

7 – The responsibility of legal persons or equivalent entities does not preclude individual responsibility for any natural person, nor does it depend on the responsibility of this person, in the case where there has been a breach of the duty to cooperate.

8 – Those undertakings whose representatives, at the time of the infringement, were members of corporate bodies of an association of undertakings which has been the object of a fine or a pecuniary penalty payment, pursuant to article 68, paragraph 1, subparagraphs *a)* to *g)*, article 69, paragraph 2, and the previous article, are jointly responsible for the payment of the fine, unless they have made a written comment declaring their opposition to the decision which constitutes the infringement or led to it.

Article 74

Statute of limitations

1 – The administrative offence proceedings reach the statute of limitations, this point in time being counted pursuant to article 119 of the Penal Code, in:

a) Three years, in the cases set out in article 68, paragraph 1, subparagraphs *h)* to *k)*;

b) Five years, for all other cases.

2 – The statute of limitation for sanctions is five years from the day in which the decision to apply it has become definitive or has reached the stage where there are no more appeals, except as defined pursuant to article 69, paragraphs 3, 6 and 7, where the time limit is three years.

3 – The time limit for proceedings involving administrative offences is interrupted by the notification to the party concerned in the case or by the notification to this person of any act by the Competition Authority which affects him personally, and the interruption takes effect from the moment that notification of the act has been made to any of those concerned in the case.

4 – The statute of limitations in an administrative offence is suspended:

a) For the period when a Competition Authority decision is the subject of judicial review;

b) From the date that the case is sent to Office of the Public Prosecutor until its return to the Competition Authority, pursuant to article 40 of the General Regime of Administrative Offences.

5 – In those cases where the Competition Authority has initiated administrative offence proceedings for infringement of articles 101 and 102 of the TFEU, the statute of limitations is suspended when the Competition Authority learns that a Competition Authority in another member state has initiated proceedings concerning the same facts pursuant to the same articles of the Treaty,

and notifies the party concerned in the case of the decision to suspend the case pursuant to article 13, paragraph 1 of Council Regulation (EC) No 1/2003 of 16 December 2002.

6 – In the case referred to in the previous paragraph, suspension terminates on the date that the Competition Authority is informed of the decision handed down in the other case.

7 – The suspension of the statute of limitations shall not exceed three years.

8 – The statute of limitations shall always occur when five or seven and a half years have elapsed for, respectively, the cases in subparagraphs *a)* or *b)* of paragraph 1 above, except for the period of suspension.

CHAPTER VIII

Immunity from fines or reduction of fines in cartel cases

SECTION I

General provisions

Article 75

Objective scope

Immunity from fines or a reduction of fines shall be granted in administrative offence proceedings concerning agreements or concerted practices between two or more undertakings, prohibited pursuant to article 9 of the present law and, if applicable, pursuant to article 101 of the Treaty on the Functioning of the European Union, where such agreements or practices are aimed at coordinating their competitive behaviour on the market or influencing relevant parameters of competition, specifically through the fixing of purchase or selling price or other trading conditions, the allocation of production or sales quotas, the sharing of markets, including collusion in auctions and bid-rigging in public procurement, restrictions on imports or exports or anti-competitive actions against other competitors.

Article 76

Subjective scope

The following can benefit from immunity from a fine or reduction of a fine:

- a)* Undertakings, as defined in article 3, paragraph 1;
- b)* Members of the board of directors or the supervisory board of legal persons and equivalent entities, as well as those responsible for the executive management or supervision of areas of activity where an administrative offence has occurred, such persons being held responsible as stipulated in article 73, paragraph 6.

SECTION II

Requirements

Article 77

Immunity from the fine

1 – The Competition Authority shall grant immunity from the fine, pursuant to article 70, to the undertaking that discloses its participation in an alleged agreement or concerted practice, provided this undertaking is the first to supply information and evidence which, in the view of the Competition Authority, allow it to:

a) Provide a substantive reason for a request to carry out search and seizure pursuant to article 18, paragraph 1, subparagraph *c)*, and articles 19 and 20, at a time when the Competition Authority does not have enough information to warrant the request; or

b) Detect an infringement as set out in article 75, provided that, at this point in time, the Competition Authority does not have enough evidence about the infringement.

2 – The Competition Authority shall grant immunity from the fine, under the terms of the previous paragraph, if the undertaking complies cumulatively with the following conditions:

a) It cooperates fully and continuously with the Competition Authority from the time where it submits the application for immunity or a reduction of the fine, the undertaking then being obliged, among other things, to:

i) Provide all the information and evidence that it has or may come to have in its possession or under its control;

ii) Promptly reply to any request for information that may contribute to determining the facts;

iii) Refrain from any acts that may hinder the progress of the investigation, such as the destruction, falsification or concealment of information or evidence related to the infringement;

iv) Refrain from disclosing the existence or the content of its application or the intention to submit such an application, except with written authorization from the Competition Authority;

b) Terminate its participation in the infringement, from the point where it has provided the Competition Authority with the information and evidence as referred to in subparagraph *a)*, except to the extent that is reasonably necessary, in the view of the Competition Authority, to maintain the effectiveness of the investigation;

c) Has not coerced any of the other undertakings to participate in the infringement.

3 – The information and evidence referred to in the previous paragraphs shall contain full and accurate information on the agreement or concerted practice and the undertakings involved, including its aims, activities and functioning, the product or service concerned, the geographical scope, the duration, and specific information on dates, locations, content of and participants in contacts made, and all relevant explanations presented in support of the application.

Article 78

Reduction of the fine

1 – The Competition Authority shall grant a reduction of the fine which would be applied pursuant to article 70 for undertakings not complying with the conditions set down in paragraph 1 of the previous article but nonetheless fulfilling the following conditions cumulatively:

a) They provide information and evidence on an infringement as referred to in article 75, if this represents significant added value with respect to the information already in possession of the Competition Authority.

b) The conditions set down in subparagraphs *a)* and *b)* of paragraph 2 and in paragraph 3 of the previous article have been verified.

2 – The Competition Authority shall determine the reduction of the fine in the following way:

a) The first undertaking providing information and evidence that is of significant added value: a reduction of 30–50%;

b) The second undertaking providing information and evidence that is of significant added value: a reduction of 20–30%;

c) Subsequent undertakings that provide significant added value: a reduction of up to 20%.

3 – In order to determine the reduction of the fine, the Competition Authority shall take into consideration the order in which the information and evidence was submitted, as set down in

subparagraph *a*) of paragraph 1, and the extent to which it represents added value for the investigation and conclusive evidence in establishing that there was an infringement.

4 – If the application from any of the parties concerned was received after the notification referred to in article 24, paragraph 3, subparagraph *a*), the percentages mentioned in paragraph 2 above will be reduced by half.

Article 79

Representatives

1 – Should there be full and continuous co-operation with the Competition Authority, pursuant to article 77, paragraph 2, subparagraph *a*), from members of the board of directors or the supervisory board, and those responsible for the executive management and supervision of the business areas where there has been an infringement as set down in article 75, these persons will benefit, pursuant to paragraph 6 of article 73, from immunity or a reduction of the fine which would have been applied, even if they did not request such benefits personally.

2 – The persons referred to in the previous paragraph who have submitted a personal application shall benefit, with all due adaptations, from the provisions of articles 77 and 78.

SECTION III

Proceedings and decision

Article 80

Proceedings

The administrative proceedings for granting immunity from the fine or reduction of the fine are set out in a regulation to be approved by the Competition Authority pursuant to article 66.

Article 81

Confidential information

1 – The Competition Authority considers that the application for immunity from the fine or reduction of the fine is confidential, along with all the documents and information submitted for the purpose of immunity or reduction.

2 – Pursuant to the provisions of article 25 paragraph 1, the Competition Authority allows access to the party concerned in the case to the application for immunity from the fine or reduction of the fine, and to the documents and information referred to in the previous paragraph, though no copy can be made unless authorized by the applicant.

3 – Access by third parties to requests, documentation and information submitted when applying for immunity from the fine or reduction of the fine shall require authorization by the applicant.

4 – No authorization for access to copies of the relevant oral statements shall be granted to the party concerned in the case, nor shall authorization for access to such oral statements be granted to third parties.

Article 82

Decision on the application for immunity from the fine or reduction of the fine

1 – The application for immunity from the fine or reduction of the fine is evaluated by the Competition Authority in the decision referred to in article 29, paragraph 3, subparagraph *a*).

2 – Immunity from the fine or reduction of the fine shall be based on the amount that would be applicable pursuant to article 69.

3 – In determining the fine that is levied, the criterion set down in article 69, paragraph 1, subparagraph *i*) shall not be taken into consideration.

CHAPTER IX

Judicial review

SECTION I

Cases involving administrative offences

Article 83

Procedural regime

The following articles and subsidiary provisions in accordance with the General Regime of Administrative Offences shall apply, except where there is a different provision in the present law, to the lodging, processing and court hearings of appeals set down in this section.

Article 84

Appeals, the competent court and the effects of appeals

1 – The decisions handed down by the Competition Authority are subject to appeal, except where they are expressly not appealable under the provisions of the present law.

2 – No appeal is admissible against decisions that relate merely to bureaucratic procedures or decisions to close a case, with or without imposing conditions.

3 – The Competition, Regulation and Supervision Court shall hear all appeals against the decisions by the Competition Authority.

4 – The appeal shall not suspend the effects of the decision, except for decisions that impose structural measures, as set down in article 29, paragraph 4, which have suspensive effect.

5 – In the case of decisions imposing fines or other sanctions as set down in the law, the party concerned may request in an appeal that the decision has suspensive effect when implementing the decision may cause him considerable harm, and the party offers to pay a guarantee in lieu, in which case the suspensive effect depends on the guarantee actually being paid within the time limit set by the court.

Article 85

Appeal against interlocutory rulings

1 – Should an appeal be lodged against an interlocutory decision by the Competition Authority, the request is submitted to the Office of the Public Prosecutor within 20 working days, with an indication of the number of the case in the administrative stage of the case file.

2 – The request shall be accompanied by any elements or information that the Competition Authority considers relevant for a ruling on the appeal, and claims can be affixed to the case file.

3 – The appeals against interlocutory decisions by the Competition Authority handed down in the same case during the administrative stage of the case file shall be considered a single case in law.

Article 86

Appeal against interim measures

The provisions of the previous articles shall be applied to the appeals lodged against decisions by the Competition Authority imposing interim measures, pursuant to article 34, when they are part of the same case in the administrative stage of the case file.

Article 87

Appeal against final decision

1 – The party concerned in the case, having been notified of a final sanctioning decision handed down by the Competition Authority, can lodge an appeal within 30 working days, this time limit not being extendable.

2 – When an appeal has been lodged against a decision imposing a sanction handed down by the Competition Authority, the Competition Authority shall submit all due documentation to the Office of the Public Prosecutor within 30 working days, not extendable, and can affix claims and other information deemed to be relevant for the case in hand, and can provide evidence, without prejudice to the provisions of article 70 of the General Regime of Administrative Offences.

3 – Should there be appeals against decisions by the Competition Authority, pursuant to articles 85 and 86, the appeal against the final decision is processed with the case file of the first or the only appeal that was lodged.

4 – Should there be appeals against decisions by the Competition Authority handed down on the same case following the final decision on the case, the provisions of article 85, paragraph 3, are applicable.

5 – The Competition Authority, the Office of the Public Prosecutor or the party concerned in the case may oppose a decision by the court to rule by dispatch on the case without recourse to a court hearing.

6 – The decision by the Office of the Public Prosecutor to withdraw the charge shall depend on the agreement of the Competition Authority.

7 – The court shall notify the Competition Authority of the ruling, along with all its dispatches except those that are merely bureaucratic.

8 – Should there be a court hearing, the court should rule on the basis of evidence presented in the hearing as well as the evidence submitted during the administrative stage of the case file.

9 – The Competition Authority can legitimately appeal on its own initiative against rulings that are not merely bureaucratic.

Article 88

Control by the competent court

1 – The Competition, Regulation and Supervision Court shall have full jurisdiction in cases of appeals lodged against decisions by the Competition Authority imposing a fine or a periodic penalty payment, and can reduce or increase the amount of the fine or of the periodic penalty payment.

2 – The decisions by the Competition Authority imposing sanctions shall mention the provisions of the last part of the previous paragraph.

Article 89

Appeal against court ruling

1 – The competent appellate court⁷ shall hear the appeals lodged against the rulings and dispatches of the Competition, Regulation and Supervision Court, and shall be the court of last instance.

2 – The following are legitimately entitled to appeal:

a) The Office of the Public Prosecutor and, in its own right, the Competition Authority, against any rulings or dispatches that are not merely bureaucratic, including those that relate to issues that are null and void and to other prior or incidental issues or to the application of interim measures;

b) The party concerned in the case.

⁷ *Tribunal da Relação* in Portuguese.

3 – The provisions of article 85, paragraph 3, article 86, and article 87, paragraphs 3 and 4, are applicable to the appeals set down in this article, with the necessary adaptations.

Article 90

Publication of decisions

1 – The Competition Authority has the duty to publish on its Internet site the non-confidential version of its decisions, taken pursuant to article 24, paragraph 3, subparagraphs *c*) and *d*), article 29, paragraph 3, article 50, paragraph 1, and article 53, paragraph 1, indicating also whether these decisions are pending an appeal.

2 – The Competition Authority can publish on its Internet site the non-confidential version of its decisions pursuant to article 68, paragraph 1, subparagraphs *h*) to *k*), indicating also whether these decisions are pending an appeal.

3 – The Competition Authority must also publish on its Internet site any rulings on appeals lodged pursuant to article 84, paragraph 1, and article 89, paragraph 1.

4 – The Competition Authority may also publish on its Internet site any rulings on appeals lodged pursuant to article 92, paragraph 1, and article 93, paragraphs 1 to 3.

SECTION II

Administrative proceedings

Article 91

Procedural regime

The provisions of the following articles and subsidiary provisions in accordance with the Code of Administrative Courts Procedure shall be applicable to the lodging, processing and court hearings referred to in this section.

Article 92

Competent court and effects of the appeal

1 – Any appeal against the decisions by the Competition Authority in cases of administrative proceedings as referred to in the present law, as well as any ministerial ruling as set out in article 34 of the Competition Authority statutes, approved in Decree-Law N0 10/2003 of 18 January, shall be lodged at the Competition, Regulation and Supervision Court and shall be processed as a special administrative judicial case.

2 – The appeal as set down in the previous paragraph shall have no suspensive effect, unless it is provided for, solely or cumulatively with other interim measures, explicit in the interim measures duly handed down.

Article 93

Appeal against court rulings

1 – The competent appellate court shall hear appeals lodged against rulings handed down by the Competition, Regulation and Supervision Court in administrative cases as referred to in this section.

2 – Should the appeal referred to in the previous paragraph focus on an issue of law, the appeal shall be lodged directly at the Supreme Court.

3 – Should appeals against rulings by the competent appellate court be lodged at the Supreme Court, the appeals shall be limited to issues of law.

4 – The appeals as set down in this article shall have no suspensive effect.

CHAPTER X

Fees

Article 94

Fees

1 – Fees shall be levied on the following:

- a) The appraisal of concentration between undertakings subject to the duty of prior notification, pursuant to article 37;
- b) The appraisal of concentration between undertakings as referred to in article 37, paragraph 4;
- c) The issue of copies and certificates;
- d) Any other act that is seen as the Competition Authority rendering a service to private entities.

2 – Fees shall be set, settled and collected under the terms defined in a Competition Authority regulation.

CHAPTER XI

Final and transitional provisions

Article 95

Amendment to Law No 2/99, of 13 January

Article 4 of Law No 2/99 of 13 January is amended as follows:

“Article 4
[...]

- 1 –
- 2 –
- 3 –

4 – The decisions by the Competition Authority on concentrations between undertakings where the participating entities referred to in the previous paragraph are subject to a prior opinion from the media regulatory authority, and this should be negative when freedom of speech and the expression of differing opinions are proven to be at stake, and in this case, it shall be binding on the Competition Authority.”

Article 96

Future amendments

1 – The new competition act, approved in the present law, shall be revised in accordance with amendments to the European Union competition regime.

2 – The Competition Authority shall be heard prior to the adoption of legislative measures that change the provisions of the new competition act, as approved in the present law, or of the remit and competencies that have been conferred on it in competition enforcement and advocacy.

Article 97

Legal references

The references to Law No 18/2003 of 11 June and Law No 39/2006 of 25 August shall be considered as being references to the present law.

Article 98

Transitional provisions

1 – Until the Competition, Regulation and Supervision Court is operational, the rules governing competencies set down in Law No 18/2003 of 11 June are applicable to appeals against decisions handed down by the Competition Authority as referred to in articles 84, 85, 86 and 92 of the present law, as well as the ministerial ruling referred to in article 92 of the same law.

2 – Until the Competition, Regulation and Supervision Court is operational, the rules governing competencies set down in Law No 18/2003 of 11 June are applicable to appeals against rulings as referred to in articles 89 and 93 of the present law.

Article 99

Repeal provision

1 – Without prejudice to the previous article, Law No 18/2003 is hereby repealed, including the amendments introduced in Decree-Law No 219/2006 of 2 November, Decree-Law No 18/2008 of 29 January, and Laws No 52/2008 of 28 August and No 46/2011 of 24 June, which sets out the competition regime.

2 – Law No 39/2006 of 25 August, setting out the rules for immunity from fines and reduction of fines in administrative offence proceedings concerning infringement of the Portuguese competition provisions, is hereby repealed.

Article 100

Application of the law after its entry into force

1 – The new competition act, approved by this law, shall apply to:

- a)* Administrative offence proceedings initiated after the present law has entered into force;
- b)* Concentrations between undertakings that have been notified to the Competition Authority after the present law has entered into force;
- c)* Market studies, examinations and audits undertaken by decision of the Competition Authority after the present law has entered into force;
- d)* Requests submitted to the Competition Authority after the present law has entered into force.

2 – Competition Authority regulation No 214/2006, published in the Official Journal of the Portuguese Republic, 2nd series, No 225 of 25 November 2006 stays in force, with the necessary adaptations, until a new regulation on the issue is published, pursuant to article 66 of the present law.

Article 101

Entry into force

The present law enters into force 60 days after its publication.

Approved on 22 March 2012.