Unclassified **DAF/COMP/LACF(2013)27**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **26-Aug-2013**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/LACF(2013)27
Unclassified

LATIN AMERICAN COMPETITION FORUM

Session I: Criteria for Setting Fines for Competition Law Infringements

Contribution from Portugal

3-4 September 2013, Lima, Peru

The attached document from Portugal is circulated to the Latin American Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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JT03343707

English - Or. English

LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session I: Criteria for Setting Fines for Competition Law Infringements

CONTRIBUTION FROM PORTUGAL

1. The 2012 Portuguese Competition Act

1. In 2012, a new Portuguese Competition Act, Law No. 19/2012 of 8th May, was approved, which entered into force on 7 July 2012.

2. The new Competition Act reviews and gathers in one single legal instrument the Competition Act and the Leniency regime, replacing Law No. 18/2003, of 11 June 2003, and Law No. 39/2006, of 22 November 2006, respectively.

3. The new Competition Act aims at introducing more legal certainty, in particular regarding procedures, building on the ten years' experience of enforcement of the previous competition act by the Portuguese Competition Authority (PCA) and national Courts, while striving to achieve further convergence with the European Union competition law.

2. Scope of the sanctioning powers of the PCA

4. The PCA has the power to impose sanctions for breaches of national and European Union competition law. When a competition law infringement is found, the PCA may impose fines, as well as other accessory sanctions.

5. The competition law infringements foreseen in national law are *(i)* prohibited agreements between undertakings, concerted practices and decisions by associations of undertakings (Article 9 of the Competition Act), *(ii)* abuse of dominant position (Article 11 of the Competition Act), and *(iii)* abuse of economic dependence (Article 12 of the Competition Act[1]).

[1] According to Article 12(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.

6. Liability for administrative offences covers undertakings and associations, as well as individuals. Individuals include not only members of the board of directors but also persons responsible for the management or supervision of the areas of activity where there has been a prohibited behaviour.

7. In the case of individuals, they are liable either because they committed the infringement in name of the undertaking and in their collective interests while occupying a leading position, or because they knew or had the duty to know of an infringement and did not take appropriate measures to terminate it forthwith (Article 73(6) of the Competition Act).

8. The PCA may impose fines up to 10% of the turnover of the year immediately preceding the final decision issued by the PCA for each of the undertakings concerned or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings (Article 69(2)).

9. In the case of individuals, the fine may not 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.

10. The PCA sets fines at a sufficiently deterrent level, in order to sanction the undertaking or individual that breached competition law and also to deter other players from anticompetitive behaviour.

11. The 2012 Competition Act contains a non-exhaustive list of criteria to be taken into account when determining the concrete level of the fine, which include: 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 stemming from the infringement, when such advantages can be identified; f. The behaviour of the party concerned in eliminating the prohibited practices and repairing the damage caused to competition; g. The economic situation of the party concerned; h. Previous administrative offences by the party concerned involving an infringement of competition rules; i. The assistance given to the Competition Authority throughout the proceedings.

12. Together with a fine, the PCA may impose two types of accessory sanctions: (i) publication of an excerpt of the PCA's sanctioning decision in the Official Journal and in a newspaper, and (ii) ban of the right to participate in public tenders up to two years in cases where the anticompetitive practice is related to public procurement procedures. Regarding the imposition of these accessory sanctions, the PCA must assess the seriousness of the infringement and the fault of the party concerned.

3. The PCA's Notice on the methodology for setting the amount of the fines in antitrust cases

13. In line with the objective of increasing legal certainty and transparency of the PCA's decision-making process, the 2012 Competition Act foresees that the PCA shall publish guidelines containing the methodology for setting the amount of the fines, in accordance with the criteria defined in the law.

14. Pursuing that legal obligation, the PCA published in 2012 its first Guidelines on the methodology for setting the amount of the fines in all antitrust cases, following a public consultation[2].

15. In drafting the Guidelines, the PCA took into account its own experience in enforcing the 2003 Competition Act and relevant Court rulings, as well as the European Commission's Guidelines on the

2 The Guidelines are available on the PCA's website: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201218.aspx?lst=1&Cat=2012

method of setting fines. Aiming to strengthen convergence within the European Union and create a level playing field for undertakings, the PCA has introduced a novel methodology for setting fines, which departs in some aspects from its previous decisional practice.

16. When setting the concrete amount of the fine, the PCA follows a three step approach. Firstly, a basic amount of the fine is set. Subsequently, the basic amount of the fine is adjusted according to mitigating or aggravating circumstances. Finally, the amount of the fine may be increased or reduced taking into account all the facts of the case, namely the benefits obtained by the infringer and deterrent effect of the fine.

17. The basic amount of the fine is set according to the gravity and duration of the infringement. An additional amount of fine is applied in the most serious infringements, namely cartels and abuses of a dominant position by way of exclusionary conduct or creation of barriers to entry in the market.

18. Regarding aggravating circumstances, the PCA will take into consideration, among others, recidivism, refusal to cooperate with or obstruction to the investigation, role of instigator of the infringement or ring leader, retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement and concealment of the infringement.

19. Mitigating circumstances include the intervention of public authorities or legislation authorizing or encouraging the anticompetitive behaviour, cooperation with the investigation beyond legal duties, behaviour of the undertaking eliminating the prohibited practices and repairing damage caused to competition, and evidence of a substantially limited participation in the infringement and that the undertaking actually avoided applying the prohibited behaviour by adopting competitive conduct in the market.

20. When determining the concrete level of the fine, the PCA will also take into account the inability to pay the fine under the relevant economic and social context.

4. The PCA's Leniency program

21. The PCA has a leniency program since 2006, introduced by Law No. 39/2006, of 22 November 2006. In 2012, the leniency regime was reviewed and is now part of the 2012 Competition Act.

22. Following the approval of the new Competition Act, the PCA has published a new Regulation on procedure and an information notice, whose drafts were submitted to public consultation[3].

23. Building on the PCA's experience in applying the 2006 Leniency Act, the new legal framework aims at ensuring that the Portuguese leniency program is both predictable and attractive to applicants. The revision of the leniency program was also strongly influenced by the objective of further convergence with the European Competition Network (ECN) Model Leniency Program[4].

24. The leniency program is only applicable to cartel cases and is available to undertakings and individuals, as both may be liable for fines, as described above. Duties of cooperation are foreseen for all leniency applicants.

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3 The Regulation and Information Notice are available on the PCA's website: www.concorrencia.pt.

4 The ECN Model Leniency Program, which was also reviewed in 2012, is available on http://ec.europa.eu/competition/ecn/documents.html.

25. Immunity from fines may be granted to the first applicant to supply information and evidence of a cartel that allows the PCA to (i) substantiate a request for a judicial warrant to carry out inspections or (ii) detect an infringement on which the Competition Authority does not have enough evidence.

26. Reduction of fines is granted to all other undertakings or individuals that provide information and evidence on an infringement with significant added value with respect to the information already in possession of the PCA. The reductions are of 30–50% for the first undertaking providing such information, of 20–30% to the second applicant and up to 20% to subsequent applicants.

27. The 2012 leniency program also provides rules on written or oral submissions of applications, taking into account access to file issues. Moreover, clearer rules on the marker system for leniency applications are foreseen, as well as on the submission of summary applications within the ECN, which may now be presented in Portuguese or in English.

5. Judicial review of decisions imposing fines: recent amendments

28. In the context of the PCA's fining policy, it is also worth mentioning the amendments introduced in the Competition Act with the objective of reducing litigation as a mere delaying tactic to comply with sanctioning decisions.

29. According to the new legal provisions, the judicial appeal does not suspend the effects of the decision, except for decisions that impose structural measures. The party may only avoid prompt payment of the fine following a request to the Court for the suspension of the decision on the grounds that the implementation of the decision could cause considerable harm. In this case, the party has to offer to pay a guarantee in lieu.

30. Moreover, when deciding on an appeal, the review Court may not only confirm or lower the level of the fine, but also increase its amount. Unlike under the 2003 Competition Act, the Court is no longer bound by the prohibition of *"reformatio in pejus"*, having full jurisdiction regarding fines.

6. Final remarks

31. The 2012 review of the Portuguese Competition Act, together with the publication of the Guidelines on the methodology for setting the amount of the fines and the reform of the leniency program, have reinforced the effectiveness of the sanctioning powers of the PCA and contributed to reduce incentives to excessive litigation.

32. The increased transparency and predictability regarding PCA's procedures and decision-making process achieved will surely also contribute for further attracting cooperation with the PCA's investigations in the context of leniency applications.