

Competition - Portugal

New Competition Act deals hard blow to rights of undertakings

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

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The new Competition Act, approved by Law 19/2012, came into force on July 8 2012. It represents a comprehensive reworking of the rules of the Competition Act 2003. Some of the changes seek to give the statute greater autonomy in relation to other branches of law, such as administrative law and the law on misdemeanours. In other areas the reform aims to align Portugal's competition system with the EU regime in both substantive and procedural matters.

A common thread seems to run through the most notable innovations in the new act. The Competition Authority's investigatory and fact-finding powers have been significantly increased, whereas the rights and prerogatives of undertakings and individuals have been strictly curtailed. The new legislative regime does not always succeed in striking a reasonable balance between its stated aim of more efficient competition enforcement and the constitutional and legal guarantees that protect the rights of defence of those involved in infringement procedures. This overall trend is illustrated by three aspects of the new law:

- In amending the authority's powers to gather evidence of possible anti-competitive conduct, the act has introduced the right to search the homes and vehicles of company shareholders, directors and employees, provided that the search has judicial authorisation. In addition - and despite some ambiguity over the exact scope of the relevant provisions - the act allows the authority to search the offices of lawyers and doctors and, with certain limitations, to seize documents.
- The new act has radically altered the rules on judicial appeals against the authority's decisions. An appeal against a fine no longer suspends execution of an infringement decision. Limited exceptions apply - for example, decisions that impose structural measures are still automatically suspended in the event of an appeal. However, in most cases defendants must comply with a contested decision - and must pay any fine imposed - before it has been considered and confirmed by a court. Although defendants may ask the court to suspend the authority's decision, they must show that immediate implementation of the decision would cause considerable damage; even if the court agrees to suspend the decision, the defendant must pay a deposit. In practice, even if the court grants a suspension, defendants may be required to advance considerable sums, depending on the amount of the fine. Such deposits will not be recoverable until a final judgment has been issued, which may take several years. Moreover, the recovery of undue payments from the state is typically a complicated and lengthy process.
- The appellate court now has unlimited jurisdiction to resolve disputes; in particular, it may confirm, reduce or increase any fine imposed by the authority. Combined with the change to the suspensory effect of appeal, this extension of the court's jurisdiction will inevitably have the effect of further discouraging companies from appealing decisions and fines.

These and other provisions of the new act have tipped the scales strongly in favour of the authority and have bolstered its powers and prerogatives; they represent a significant limitation on the rights of undertakings involved in public enforcement procedures. Given their scope and impact, there are serious doubts as to whether the new rules are appropriate and proportionate, and they are likely to be challenged in future cases on various constitutional grounds.

*For further information on this topic please contact **Gonçalo Machado Borges** at **Morais Leitão Galvão Teles Soares da Silva & Associados** by telephone (+351 21 381 7400), fax (+351 21 381 7411) or email (gmb@mlgts.pt).*

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Author

Gonçalo Machado Borges

