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INTERNATIONAL FINANCIAL LAW REVIEW

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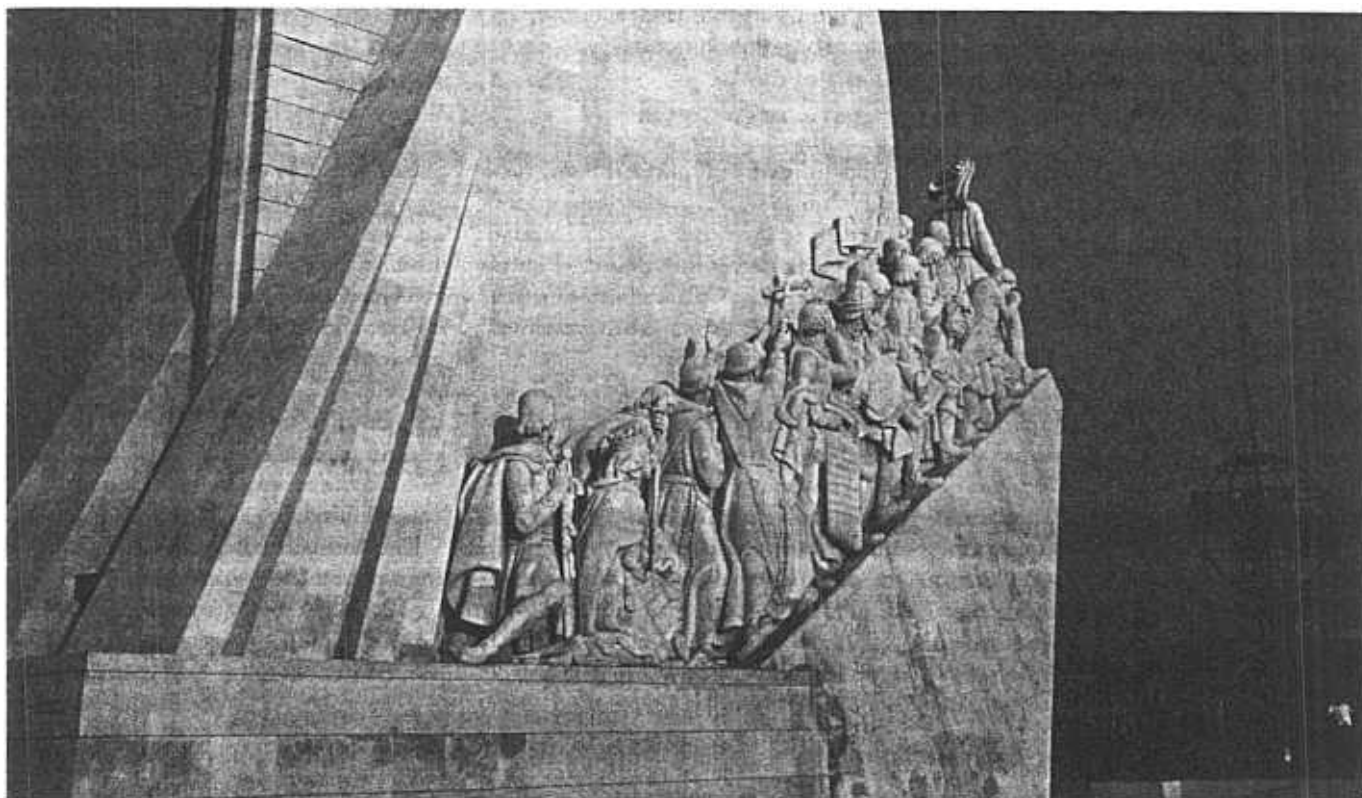
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# Client guide to Portugal



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# Why the market is favouring arbitration

The cost and delays involved in litigating in the state courts are leading many in the Portuguese market to consider arbitration instead. By Pedro Metello de Nápoles and Inês Gomes da Cruz of PLMJ

Arbitration in Portugal is not a new field of law: the Arbitration Act dates from 1986 – although it has had some amendments – and arbitration proceedings were possible before then.

Despite being around for at least 20 years, the practice of arbitration has been limited for a number of reasons, such as a general suspicion about arbitration, the costs involved, and the fact that the Arbitration Act contained some provisions that could be used by a party less interested in starting litigation to freeze proceedings for years.

As to the general suspicion – although it is becoming less relevant, at least when compared with other criticisms that can be made of the state court system – it has several different causes.

In the Portuguese system there is not a tradition of conciliation. Almost all disputes go into litigation and settlements only are negotiated close to the stage of trial. No punitive damages are foreseen in the law and the defeated party will only bear a limited part of the legal costs of the counterparty, so litigation – considering the slow pace of Portuguese courts – frequently appears as an advantage.

This obstacle will always exist – at least until the law strongly penalizes the party that does not fulfil – but there is a growing conviction that disputes and litigation are disruptive and should be avoided or, when unavoidable, solved as swiftly as possible.

Arbitration, by nature and because of the proximity between the parties and the tribunal, tends to provide many more opportunities for informal conciliation. However, the pursuit of unanimous decisions by tribunals can provoke more balanced decisions, therefore harming the parties aiming for full conviction or acquittal.

Similarly, there is a belief (which still has several followers) that the parties' appointed arbitrators should be an extension of the parties' lawyers, which

necessarily undermines their position before the president of the tribunal (who will, ultimately, render the decision). But parties (and their counsel) are becoming more convinced of the advantages of having a fully independent arbitral panel as the sole means of ensuring the effectiveness of arbitration.

Traditionally, there was also a high level of respect for the state courts, which has been progressively diminishing because of the slowness of the proceedings (a case might easily take five years to be decided) and the state courts' inability to deal with the demands of some types of modern litigation.

For example, in theory a judge may appoint an expert to assist in their decision. But the provisions of the law concerning the payment of such experts are so strict and limited that it is almost impossible to appoint top experts. Likewise, the law does not allow the possibility of having a team of experts and always looks at the expert as a single person.

A similar problem occurs with the non-specialization of the courts. The courts (at least in the big cities) specialize in broad areas of the law (such as family, crime, civil, labour, tax, and commerce), but no court is prepared to address, for example, a dispute concerning project finance or a dispute on the perfect fulfilment of a contract involving the procurement of a large industrial facility.

So, despite the reservations the market might still have concerning arbitration, it is slowly establishing itself as the main alternative dispute resolution method.

As to costs, state courts used to be substantially less costly than arbitration. However, the law on costs was changed

recently and state court fees were increased, leading to a situation in which – especially in large disputes – the costs of arbitration could be similar to the fees charged by a state court.

Lastly, in the original version of the Portuguese Arbitration Act, the arbitral proceedings could only begin when the parties had agreed on the object of the dispute. This led to having parties systematically challenging the object of the dispute or simply stating that it was not acceptable. In those cases the object of the dispute would have to be established by a state court. Non-cooperative parties could, by forcing the recourse to courts, freeze arbitration for years.

This strange system was changed in 2003 and now, like in other systems, agreement is no longer necessary. Although the practitioners were developing remedies, this change clearly constitutes a step towards making arbitration a more secure alternative dispute resolution system.

The Portuguese Arbitration Act is far from perfect and could benefit from some changes. But it is a valid tool and provides almost complete freedom to arbitrators in defining the applicable rules

and/or allows the application of international regulations. This means that, despite some local eccentricities, the Portuguese Law regulates and accepts arbitration in similar terms to what happens with other modern laws.

Regarding commercial disputes –

excluding conflicts regarding consumer protection and similar small disputes – from a moment it was considered as an option for wealthy parties and multinational companies, arbitration has become an increasingly popular method of solving conflicts. And the inefficiency of the Portuguese court system is not the only reason for this increased popularity: arbitration clauses are often included in contracts involving foreign parties (due to the foreign party's lack of trust of the counterparty's jurisdiction) and in national contracts where it is expected that, due to the complexity of future disputes or the values involved, the matter would be better decided if analysed by a specialist panel.

**Respect for the state courts has been progressively diminishing because of the slowness of the proceedings and the state courts' inability to deal with the demands of some types of modern litigation**



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The government has made a big step towards the acceptance of arbitration as an effective dispute resolution method – a number of major contracts it entered into in recent years included arbitration clauses.

As to advantages, it is generally accepted that arbitration is faster and more efficient. Secrecy of the proceedings is also an advantage, together with the possibility of choosing the arbitrators and the possibility of adapting the procedural rules to the particulars of the case.

This does not mean that in judicial courts parties are condemned to have bad decisions: however, court judges often have to analyse hundreds (and in some cases thousands) of cases running simultaneously, without easy access to technology, expert support and, sometimes, even court rooms for trials.

### The Portuguese Arbitration Act – present status

Despite the presence of national arbitration centres and the acceptance of rules of international centres (such as ICC, LCIA, and Uncitral), most arbitration proceedings in Portugal are *ad hoc* proceedings conducted according to the Portuguese Arbitration Act: Law 31/86 of August 29, with the modifications introduced through Decree-Law 38/2003 of March 8.

This Act only provides general guidelines and, concerning procedural rules, leaves almost absolute freedom to the Tribunal (and the parties) to define the applicable rules. A number of general principles have to be respected, most of

them common to the New York Convention of 1958.

The party that wishes to submit the dispute to the Arbitral Tribunal must notify the other party by mail, referring to the arbitration agreement and stating the nature of the dispute, if this has not already been established in the agreement. If the parties wish to appoint one or more arbitrators, this notification must contain their identification, as well as an invitation for the other party to appoint the arbitrators it chooses. No pleadings should be prepared at this stage.

The arbitral tribunal may be composed of one or more arbitrators, in accordance with the agreement, but there must always be an odd number. The same principles of judges' exemption and incapacities apply to arbitrators. If the parties cannot agree on the appointment of the arbitrators, the appointment will be requested to the appeal court at the seat of the arbitration. The most common procedure, and one that generally gives the best results, is that each party appoints an arbitrator and the two arbitrators thus appointed agree on a third member to preside the arbitral tribunal.

Once arbitration has commenced, with the written notification, the proceedings must be conducted according to a few fundamental principles, which if breached can set the grounds for the nullity of the arbitral award: (i) the defendant will be summoned to present their defence; (ii) the adversarial principle will be observed at all stages of the pro-

ceeding; (iii) both parties will be heard, orally or in writing, before the final arbitral award is issued.

Notwithstanding the legal framework, there is a tendency to follow the civil procedural law applicable in national courts, which sometimes brings some stiffness to the proceedings. Despite that, arbitration still constitutes an effective dispute resolution method, with a wide range of advantages over national courts.

The parties are free to grant the tribunal the power to decide *ex aequo et bono* or to establish that the award will be rendered according to the strict applicable law. Regardless of that choice, it is not uncommon to see an arbitration panel acting as amicable compositeur, which again appears as an advantage to national courts, where normally conciliation is no more than a mere formality.

If nothing is agreed by the parties, the law establishes that the award will have to be rendered six months after the constitution of the Tribunal. This time limit can only be extended by mutual agreement of the parties, which can be a problem, as experience shows that fast-track arbitrations are difficult to deal with. Therefore it is advisable that the parties, when drafting the arbitral clause, foresee remedies to situations such as these.

As to the effects of the decisions rendered, the law states that domestic arbitration awards have the same value as national court decisions and awards rendered abroad will be accepted in terms close to the ones applicable to judgments given by foreign courts. Portugal is a signatory state of the New York Convention of 1958 regarding the recognition and enforcement of arbitral awards.

The parties are free to waive the right to appeal, which does not prevent them from challenging the award. However, and as in most European legal systems, the grounds for a request to set aside an award are limited and filing such a request will not suspend the enforcement of the award.

Portuguese law makes a distinction between domestic and international arbitration, although in practical terms the consequences of the distinction are few. Article 32 of the Arbitration Act defines international arbitration as an arbitration in which international trade interests are at stake. This definition is less than satisfactory because it is not always clear what these interests are. In a more pragmatic and necessarily simplistic manner, international arbitration is that which has an



international element, usually parties with different nationalities.

In the scope of international arbitration, the differences between court proceedings and arbitral ones, which are generally related to formalities, become even more evident than in domestic arbitration. The prevailing influences of international arbitration are the ideas of flexibility and the purpose of the proceedings.

Mainly due to the greater flexibility, arbitrators play a more active role both in directing the dispute and in its outcome, which has contributed to the rise of this form of justice as an independent means of international dispute resolution. Additionally, the fact that international arbitration is not as fettered by the legal concepts of a given country or legal system as is state justice makes it an ideal instrument to settle disputes that have an international slant.

International sets of rules (such as the ones from ICC) are well accepted in Portugal, and Portuguese practitioners are familiar with awards rendered abroad, and with the doctrine produced in the past decades. Consequently, the local

approach to international arbitration tends to be similar to most of the legal systems in Europe.

In international arbitration seated in Portugal, the set of principles mentioned above have also to be fully complied with. Consequently it is of the utmost importance that the parties be represented by lawyers who are familiar with this type of proceeding and the rules applicable, not only during or immediately before the dispute, but also in negotiating and drafting the arbitration clause.

### Arbitration is the future

Portuguese judicial courts have been facing exceptional delays in the past 10 years, mainly due to the exponential increase in the number of claims filed. Many changes in the procedural law have been introduced recently but their practical effects are yet to be seen. Although the civil procedure has been greatly improved, the shortage of immediate results has contributed to the growth of the arbitration and mediation fields.

No dispute resolution method is perfect and there will always be criticisms about arbitration. However, and after

considering the situation of national courts and the tight legal framework that applies to the development of proceedings in such courts, there can be no hesitation in recommending arbitration as an alternative dispute resolution method.

This acceptance of arbitration is further confirmed in day-to-day practice, where more and more new contracts include, *ab initio*, arbitration clauses. In the future, and at least when the matters under dispute are complex, arbitration will stand side by side with national courts as the favoured dispute resolution method.

Arbitration should be strongly considered whenever is possible to anticipate that a future dispute will arise and will assume a complex nature. Ironically, a judge, despite having all the support of the legal machine, will normally decide alone; an arbitrator, without any structure to rely on, will be free to make use of many more resources.

Taking into account the sophistication of some modern disputes, arbitration is – at least for now – the best answer the legal system can provide.

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The foundation of the firm dates from the late 1960's and the internationalisation and specialisation policies pursued by the firm since its inception led to the continued growth of PLMJ over the following years and to its current position in the Portuguese legal market, being today the largest firm in Portugal.

Structured and equipped to meet the growing challenges of modern times, PLMJ is internally organised in departments specially geared to the different fields of law. Whenever the nature or the volume of the work so requires task forces composed of lawyers from various departments are set up.

#### Litigation and Arbitration Departments

The firm has 30 attorneys working in this area of practice, of which 6 senior partners and 5 junior partners, so litigation and arbitration consumes one fifth of PLMJ most valuable resources – its lawyers.

Given the increasing complexity of litigations, the lack of means of the Courts to decide conscientiously, and the consequently slower pace of justice, the recourse to arbitration appears more and more as a solution to be pondered by the parties to a contract.

Arbitration is daily growing as a field of practice, specially involving large business deals and our firm handles an ever-increasing number of both domestic and international arbitrations.

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# Change brings credibility for competition authority

The Portuguese Competition Law creates a new and improved Competition Authority, which is cracking down on anti-competitive practices and concentrations. By José Luís da Cruz Vilaça and Dorothee Choussy Serzedelo of PLMJ

**T**he past two years have brought changes in the content and enforcement of Portuguese competition law.

A new independent Competition Authority, which took over the powers formerly entrusted to the Directorate-General for Trade and Competition (Direcção-Geral do Comércio e da Concorrência) and the Competition Council (Conselho da Concorrência), was created by Decree-Law 10/2003 of January 18 and a new Competition Act was adopted (Law 18/2003 of June 11).

The new Competition Authority is an independent and financially autonomous entity. Contrary to the previous situation, in which the enforcement powers of the competition agencies were limited in certain sectors (for example, banking and insurance were not subject to merger control), the new Competition Authority has the power to apply any competition rules, in all economic sectors, within the limits of the Constitution, the law, and the competition policy principles approved by the government.

It may act upon its own motion or upon complaint by any interested party. If the case under appraisal relates to a sector subject to specific regulation, the Competition Authority will liaise with the relevant regulatory authorities (for example, the Bank of Portugal or the Securities Market Commission).

## Anti-competitive practices

Since its inception, the Competition Authority has been active against anti-competitive practices. Portuguese competition law makes it clear that the term *prohibited practices* only refers to agreements and practices that appreciably restrict competition. Such prohibited practices classically comprise direct or indirect fixation of prices or of other transaction conditions; limitation or control of production, distribution, technical

development or investments; sharing of markets or sources of supply; discriminatory prices or other conditions to equivalent transactions.

Decree-Law 370/93, on individual practices restricting trade, prohibits certain practices that are considered to prevent fair competition between companies, even though they do not affect competition on the market. These practices are: application of discriminatory prices or conditions of sale; sale below cost; refusal to sell goods or services; and abusive business practices.

The new Act also expressly determines that EC block exemptions may be applied to agreements and practices falling outside the scope of EC law (that is, not affecting trade between member states).

## Prior notification

Companies suspecting that some of their agreements, decisions or concerted practices might be anti-competitive are able, under Portuguese law – contrary to the system under EC Regulation 1/2003 that does not allow

prior notification – to notify such agreements, decisions or practices to the Competition Authority to obtain certainty as to their legality. A new Regulation on prior notification of prohibited practices (Regulation 9/2005) that revokes Ministerial

Decree 1097/93 was published on February 3 2005. It allows undertakings or associations of undertakings to obtain confirmation that: (i) the practice falls outside the scope of the prohibition or that; (ii) although falling within its scope

it is exempted as justified by certain efficiencies. The Competition Authority's assessment is strictly limited to agreements of national/domestic effect (that is, those not covered by Article 81 of the EC Treaty). Few prior notifications of agreements have been filed with the Competition Authority in the past two years. Prior notification by Banco Comercial Português, of an agreement for the management of financial assets with Eureko BV and F&C Group (Holdings) Limited, was filed under the previous Ministerial Decree 1097/93. So far, no prior notification has been made on the basis of the new Regulation. The expensive filing fees for assessment (between €7,500 and €25,000), the workload implied by the details requested in the filing forms, and the fact that the Competition Authority is not bound to issue a decision within a set timetable, might have a deterrent effect on companies wishing to obtain certainty as to the legality of their agreements in Portugal.

## The fight against cartels

The Competition Authority has received, in the first year of its activities, around 100 complaints about potential anti-competitive practices. Forty-three proceedings were instructed in the past two years.

The fight against cartels has been considered a priority by the Portuguese Competition Authority, which is said to be dealing with 40 potential cartels. The cement and concrete market, the construction market and the market for public works are under particular scrutiny.

The next step to be taken in the fight against cartels will be the adoption of a statute on leniency for companies who report cartels to which they have been part. At the time of writing, a draft statute is about to be put forward to the government.

In January 2005, the Competition Authority imposed heavy fines (€644,000 each, with a total amount of €3.22 million) to five pharmaceutical companies allegedly involved in a cartel within the context of a public bid for the

**The new Competition Authority has the power to apply any competition rules, in all economic sectors, within the limits of the Constitution, the law, and the competition policy principles approved by the government**



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José Luís da Cruz Vilaça is head of the EU and competition department.

He is a graduate of the University of Coimbra Law School (1966) and was admitted to the Portuguese Bar Association in 1969. He also holds a postgraduate degree in political-economic sciences (1968) and a doctorate in international economics from the University of Paris I (1978).

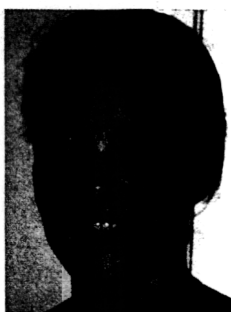
Among his many academic posts, José Luís da Cruz Vilaça was head professor at University of Coimbra Law School (political economics and financial economics) from 1972 to 1985 and was a professor at the Centre for European Studies at the Law School (external economic relations of the EEC) from 1983 to 1985. He was also professor of international economics and international economic organizations and director of the Institute of Economic Studies at the Lusíada University Lisbon Law School from 1988 to 2000.

José Luís da Cruz Vilaça was a member of parliament from 1980 to 1986, in which time he acted as Secretary of State of Internal Affairs (1980); Secretary of State of the Prime Minister's Office (1981); and Secretary of State for European Integration (1981 to 1982).

He was advocate general at the Court of Justice of the European Communities (1986 to 1988); president of the Court of First Instance of the European Communities (1989 to 1995); general secretary of the Portuguese Association of European Law (APDE) (1998); is chairman of the Disciplinary Board of the European Commission; and was resident of the Commission for the Revision of Legislation on Competition.

He is a member of the Academy of European Law – European University Institute of Florence (advisory board); Europäische Rechtsakademie, University of Trier (advisory board); European Air Law Association (directive committee); Foundation for European Studies, Maastricht (guidance committee); Academic Committee of the Máster en Estudios de la Unión Europea – University of Corunha; Portuguese Association of European Law (secretary general, since 1998); and the Permanent Delegation of the CCBE (Council of the Bars and Law Societies of the European Union) to the Court of Justice and the Court of First Instance of the EC and the EFTA.

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She speaks Portuguese, French, and English.

supply of products for diagnosis and control of diabetes. An appeal has been lodged against that decision before the Lisbon Commercial Court.

The recent decision of the Competition Authority fining the Ordem dos Médicos Veterinários (the association regulating the veterinary profession in Portugal) is the first time since EC Regulation 1/2003 entered into force that the Competition Authority has applied Article 81(1) of the EC Treaty. In that decision, the Authority considered that, because both national and foreign veterinarians were under the obligation to follow

the prices indicated by the association, trade between member states was affected and competition restricted. It fined the Association €75,935 for fixing minimum prices for veterinary services.

The Competition Authority considers the question of investigating restrictive practices crucial. It has been much discussed in particular further to the dawn raid organized at Portugal Telecom in 2004 (the company filed an appeal against the Competition Authority's action and obtained the Authority's condemnation to return some of the apprehended documents). The

Consultative Committee of the Procuradoria-Geral da República (Public Attorney's Office) recently issued an opinion concluding that the apprehension, examination and copy by the Competition Authority's agents of e-mails already opened and archived did not constitute a violation of Article 194 (2) of the Penal Code (violation of correspondence or telecommunications).

## Abuse of dominance

Regarding abuse of dominance, the presumptions of dominance based on market share have been abandoned. According to the new statute, a dominant undertaking is one that does not face significant competition or enjoys supremacy *vis-à-vis* competitors on a particular market or a substantial part of it.

The new statute provides examples of practices that may constitute an abuse of dominant position that are not expressly referred to in Article 82 of the EC Treaty. Any behaviour that would be unlawful under the provisions relating to anti-competitive agreements would be considered abusive if adopted by a dominant undertaking. The Act expressly includes the denial of access to essential facilities.

The rules on abuse of economic dependence have been modified to cover only cases where such abuses have an impact on the structure of competition.

The new law provides examples of abuses of this kind: again, any behaviour that would be unlawful under the provisions relating to anti-competitive agreements will be considered abusive. Furthermore, the Act expressly prohibits the unjustified total or partial termination of an established commercial relationship.

The new Competition Act subjects public undertakings, undertakings enjoying exclusive or special rights and undertakings entrusted with the provision of services of general economic interest to a regime similar to that of Article 86 of the EC Treaty. As under EC law, application of national competition rules to such undertakings will only be possible if it does not constitute an obstacle to the fulfilment, in law or in fact, of the specific mission with which they have been entrusted.

## Concentrations

The regime of control of concentrations has been amended. First, it now applies to the banking and insurance sectors. The rules on calculation of turnover of under-

takings operating in these sectors follow closely the ones in the EC Merger Regulation.

Second, a turnover threshold for the target of €2 million in Portugal has been created so that transactions with little or no impact on the structure of the market cease to be caught by the merger control provisions.

Third, undertakings now enjoy one week after execution to notify the deal, but cannot, unless duly authorized, close the transaction before clearance is given. A waiver of the standstill obligation may be granted where the negative consequences of the suspension of the operation or of the exercise of the voting rights exceed the negative effects of the waiver to competition.

The creation or reinforcement of a dominant position restricting competition remains the substantive test for

determination of the compatibility of a given concentration with competition. In making its assessment, the Competition

Authority will consider a series of factors, in particular the structure of the relevant market, the position of the participating undertakings in the market, potential competition and barriers to entry, distribution networks and access to essential facilities.

So far, the Competition Authority has analysed 83 concentrations. In 2004 it reviewed 46: 39 of these were approved without conditions and 7 were not opposed after specific measures had been implemented. The Competition Authority analyses around five concentrations each month.

Two concentrations are worth mentioning due to the fact that in both cases a second phase or in-depth investigation has been ordered: (i) within the market of the daily written press (generalist and

sports), the acquisition of Lusomundo (part of the Portugal Telecom Group) by Controlinveste through the purchase of all the shares previously owned by PT Multimédia – Serviços de Telecomunicações e Multimédia SGPS SA; and (ii) the acquisition by GALP of some of Esso Portuguesa's petrol stations.

Fines are now determined, as under EC law, with reference to the turnover of the infringing undertaking. This should have a greater deterrent effect than the penalties provided by the previous regime. In the case of the most serious breaches, fines imposed may amount to 10% of the global group turnover.

### The Authority's recommendations

The Competition Authority has also conducted various studies (relating to the energy, telecommunications, distribution and media sectors) and issued recommendations to the government, some of which have been turned into legislation. For example, further to a recommendation from the Authority of November 2004 that said the prohibition of petrol stations next to hypermarkets and supermarkets was a restriction on competition, the

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Portuguese government amended the regulation relating to the construction and operation of petrol stations to allow them to be installed in such places.

In July 2005, the Competition Authority issued, on the basis of the Report by the European Commission named "European Electronic Communications Regulation and Market 2004," a recommendation on the "form and place of indication of prices for the terrestrial mobile service" that proposed measures to facilitate the choice of the best tariff for mobile telecommunications. In practice, such measures would permit the consumer, through simulators on the sites of each operator, to calculate their monthly expenses, to

compare the tariffs between different operators and/or other advantageous or penalizing conditions. In Portugal, contrary to most EU member states, the price of mobile communications increased between 2003 and 2004.

#### Raising awareness

Lastly, the Competition Authority has attempted to raise the public's awareness as to the benefits of free and fair competition and its efforts in developing contacts with professional bodies should be praised.

A conference for magistrates of the Public Ministry co-organized with the Procuradoria-Geral da

República (Public Attorney's Office) held at the beginning of June 2005 and the

First Forum of Competition Lawyers to be held on 19 September 2005 are worth mentioning. On 3 and 4 November, the Competition Authority will also host the Lisbon Conference on Competition Law and Economics, which well-known competition professionals will attend (Neelie Kroes will give the opening address to the Conference).

The Portuguese Competition Authority, which has recently been awarded three stars by the specialist international publication *Global Competition Review* in the worldwide ranking of competition law regulators, has increased its efficiency in the enforcement of competition law, thereby gaining credibility (although controversial) in the public opinion and among competition law practitioners.

**Fines are now determined, as under EC law, with reference to the turnover of the infringing undertaking. This should have a greater deterrent effect than the penalties provided by the previous regime**

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# The pros and cons of the Prospectus Directive

Jorge de Brito Pereira and Sónia Teixeira da Mota of PLMJ assess the impact of the EU Prospectus Directive on Portugal's capital markets

**T**he implementation of Directive 2003/71/CE of the European Parliament and of the Council, on the prospectus to be published when securities are offered to the public or admitted to trading (the Prospectus Directive) has spurred developments in Portugal.

This Directive should have been implemented in all EU Member States no later than July 1 2005. Although this obligation granted enough time for each member state to transpose the Directive, it has not yet been implemented into Portuguese legislation, due to recent government changes.

To avoid confusion caused by the delay of the implementation in Portugal, a part of the Directive must be regarded as being already in force in Portugal, as stated by the Portuguese Securities Market Commission (CMVM) in a General Opinion issued on June 17.

The Prospectus Directive will impact not only European companies but also companies registered outside the EU. Under the terms of the Directive, foreign equity issuers will be subject to the regime of the first EU member state in which they make a public offering or an admission to trading of securities (at the choice of the issuer). And foreign non-equity issuers of securities with a denomination per unit of at least €1000 can choose between the regime of the first EU member state in which they make a public offering or admission to trading of securities or the framework of the member state where they already have securities admitted to trading in a regulated market.

The Prospectus Directive belongs to the *maximum harmonization directives*, also called *detailed directives* (*directives détaillées*), which leave member states a limited selection of means to achieve the imposed solution dictated by the directives' content. If a member state fails to transpose such a directive, it will be subject to the Level 4 enforcement

procedures implemented by the Commission and can be judicially compelled to comply.

To complete the Prospectus Directive application, the Commission Regulation EC/809/2004 of July 19 has been approved. This Regulation came into force on July 1 2005 and is directly applicable in the local legislation of all the EU member states. This Regulation defines the information to be provided in the prospectus and covers its format, the information incorporated by reference, the publication of prospectuses and the dissemination of advertisements, establishing also a standard format for all prospectuses, irrespective of their use. The Regulation was largely based on technical advice given by the Committee of European Securities Regulators (CESR) to the Commission.

The aims of the Directive and its implementing measures are: investor protection, market transparency and efficiency, and the creation of a single European market for securities and financial services where wholesale and retail cross-border offers are facilitated by a passport regime, following in the footsteps of the Commission's communications "Risk capital action plan" and "Implementing the framework for financial market: Action Plan".

The Prospectus Directive's purpose is to harmonize requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a member state.

Pursuing this objective, the Prospectus Directive involves a two-tier regime. The

first regime relates to issues that are admitted to an EU regulated market, after the approval of a prospectus by the home competent authority. The second regime, which relates to unlisted securities, requires that, where securities are offered to the public in any member state, a prospectus must be produced and published unless: (i) the offer is addressed only to qualified investors; (ii) the offer of securities has a denomination above €50,000 euros; (iii) investors will have to subscribe at least €50 000; and (iv) the offer is to fewer than 100 persons per member state.

One of the measures the EC predicts will attain its goals is the implementation of a single authorization system (a single passport for issuers). Once approved by the competent authority in one EU member state, a prospectus will be accepted in another EU member state - provided the competent authority of that member state is notified - without further local examinations of its content or the imposition of additional conditions by the host-state competent authority.

Another intended driver of integration foreseen in the Directive is the possibility of the prospectus being produced in only one language in the case of multi-jurisdiction offers, either the language accepted by the competent authorities of

the member states where the securities will be admitted to trade or offered or in a language customary in the sphere of international finance. This prospectus will enclose a summary, which might be subject to a translation requirement by

the host-state authority, designed to accomplish the investor protection purposes of the Directive.

The implementation of the Prospectus Directive in Portugal will require the introduction of several amendments to the Portuguese Securities Code (Código de Valores Mobiliários or CVM) and a draft implementation Decree-Law was disclosed for public consultation on the last quarter of 2004. However, the enactment of the Directive's transposition Decree-Law is dependent on the

**The implementation of the Prospectus Directive in Portugal will require the introduction of several amendments to the Portuguese Securities Code**



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government's empowerment by the parliament for its approval.

To reduce the confusion caused by the delay of the enactment of the Directive's transposition Decree-Law, CMVM has made public that, pursuant to the European Court of Justice's doctrine as to Directives' direct effect, the following provisions of the Prospectus Directive became enforceable in Portugal on July 1 2005:

- sub-paragraphs m) and n) of Article 2(1), which lay down the definitions of home member state and host member state;
- Article 3(2) on the non-application of the obligation to publish a prospectus in certain types of securities offers;
- Article 4, which sets out certain exemptions from the obligation to publish a prospectus;
- Article 5(3) and (4) and Article 12(3)

and (4), on the drawing up of a prospectus comprised by one or more then one separate documents and of base prospectus;

- Article 9, on the validity of prospectus, base prospectus and registration documents;
- Article 11, which addresses the incorporation into the prospectus of references to previously or simultaneously published and approved documents;
- Article 13(2) to (4), which rules the delays for approval of prospectus by the competent authorities; and
- Articles 17 and 18, which implement the prospectus European passport mechanism.

As stated by the CMVM, the Portuguese Law is already in line with some provisions of the Prospectus Directive, such as: (i) the mandatory

prior approval and publication of a prospectus in public offers of securities; and (ii) the option given to offerors to draft their prospectus in Portuguese or any foreign language of common use in the international financial markets.

As said, the CMVM proposed, on the last quarter of 2004, a draft Decree-Law to implement the Directive in question, having launched a public consultation process on this matter. Any Decree-law implementing the Prospectus Directive must introduce several amendments to the Portuguese Securities Code. The main amendments foreseen in the draft Decree-Law are related to the public offering of securities and to the rules on admission to trading on regulated markets.

If this draft Decree-Law is approved, it will imply the modification of over 50 articles of the CVM (and the addition of nine more), mainly its Title III. Such modification will include the following:

- the creation of a European passport of prospectuses;
- the definition of the national competent authority to approve the prospectus;
- the possibility to choose the format of the prospectus: single or tripartite (including the registration document, the securities note and the summary note);
- the new scheme of incorporation of information by reference;
- the adoption of a *base prospectus* for offering programmes;
- the obligation to provide annual information, that is, to report on information filed in other non-EU states pursuant to stock exchange requirements or securities laws;
- the requirement to deliver a summary; and
- the possibility of drafting the prospectus in a language customary in the sphere of international finance.

As far as public offerings are concerned, and given the differences between the new European regime for prospectuses and the Portuguese Law, the draft Decree-Law clarifies that the registration of a public offer implies the approval of a prospectus. This approval becomes the cornerstone of a public offering's administrative control. Nonetheless, the existence of an offering registration is maintained in view of lawfulness control because such control exceeds the scope of the information rendered in the

prospectus. When a prospectus is not required for public offerings (for example, certain offerings to employees), the offering is exempted from the assistance of a financial intermediary and a simplified registration procedure is created.

To adopt the Prospectus Directive and the requirement to launch a public offer announcement (under the Portuguese Securities Code), the public offer announcement in public offers for distribution will need to be abolished, except for takeover bids (OPAs), as in this case the publication of the prospectus summary is not mandatory; and the announcement regarding the availability of the prospectus only when the offeror exclusively opts for the disclosure by means of electronic format must be retained.

Furthermore, some modifications will be introduced in the legal regimes of cash bonds, mortgage bonds and of collective investment undertakings and real estate funds, because the Directive also applies to the prospectus of public offers and admissions to trading of non-equity securities.

As a consequence of the implementation of the Prospectus Directive, two

concepts will be redrafted: *institutional investors* and *public offers*.

The concept of qualified investors will replace the concept of institutional investors, as its scope will need to be extended to include:

- financial institutions of states that are not members states of the EU;
- entities trading in commodities and in derivatives on commodities;
- national and regional governments, central banks and public entities that manage the public debt;
- international and supranational institutions, such as the European Central Bank, the European Investment Bank, the International Monetary Fund and the World Bank;
- other legal entities whose corporate purpose is to invest in securities;
- companies that according to their last annual or consolidated accounts meet

two of the following criteria: (i) an average number of employees of 250; (ii) a total balance sheet of €43 million; or (iii) an annual net turnover of €50 million.

Moreover, the Portuguese Securities Market Commission will be empowered to extend this qualification, through specific regulation, to other entities with sophisticated competence and expertise in the securities field, that is, issuers.

Regarding the term *public offers*, its scope now includes those offers addressed at, at least, 100 natural or legal

persons other than qualified investors residing or established in Portugal, whereas in the current legal framework the reference number is 200 persons.

The main features of the new public offer regime intended to promote financial services integration are: (i) *maximum harmonization*; (ii) the *full home country*;

**Given the differences between the new European regime for prospectuses and the Portuguese Law, the draft Decree-Law clarifies that the registration of a public offer implies the approval of a prospectus**

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and (iii) the mutual recognition and passport regime. Despite improvements in terms of transaction costs and comparability of information, the Directive raises several issues that have been highlighted by market participants.

The maximum harmonization characteristic makes the Directive arguably an excessive measure that will erase the benefits of regulatory competition. Although justified by the aim of fully implementing the passport regime and avoiding the transaction cost created by regulatory discrepancies, those objectives could be achieved by prohibiting host-state authorities imposing additional requirements upon a passport approved by the competent authority.

Moreover, the new regime could be criticized on the grounds of erasing the possibility of choice of the competent authority by the issuers. In particular, EU equity issuers will always be subject to the authority of the place of its registered and non-EU issuers and non-equity debt issuers have a limited choice. In spite of allowing full home country control, this policy option eliminates regulatory competition and its success is fully dependent on supervisory convergence between 25 member states with discrepant institu-

tional structures and different levels of financial market development.

There are also high compliance costs of the disclosure requirements imposed by the Directive, in particular in relation to foreign issuers, which will be subject to the initial disclosure requirements foreseen in the Directive combined with the ongoing requirements established in the so-called Transparency Directive. This costs of this new disclosure regime are due, in particular, to the following: firstly, foreign issuers are faced with the risk of having to change their accounting requirements to comply with International Accounting Standards; secondly, the exemption regime to private placements still contributes only to the developments of the wholesale market and creates a complex regime to certain markets such as the debt market, whose exemption regime is subject to a denomination criteria.

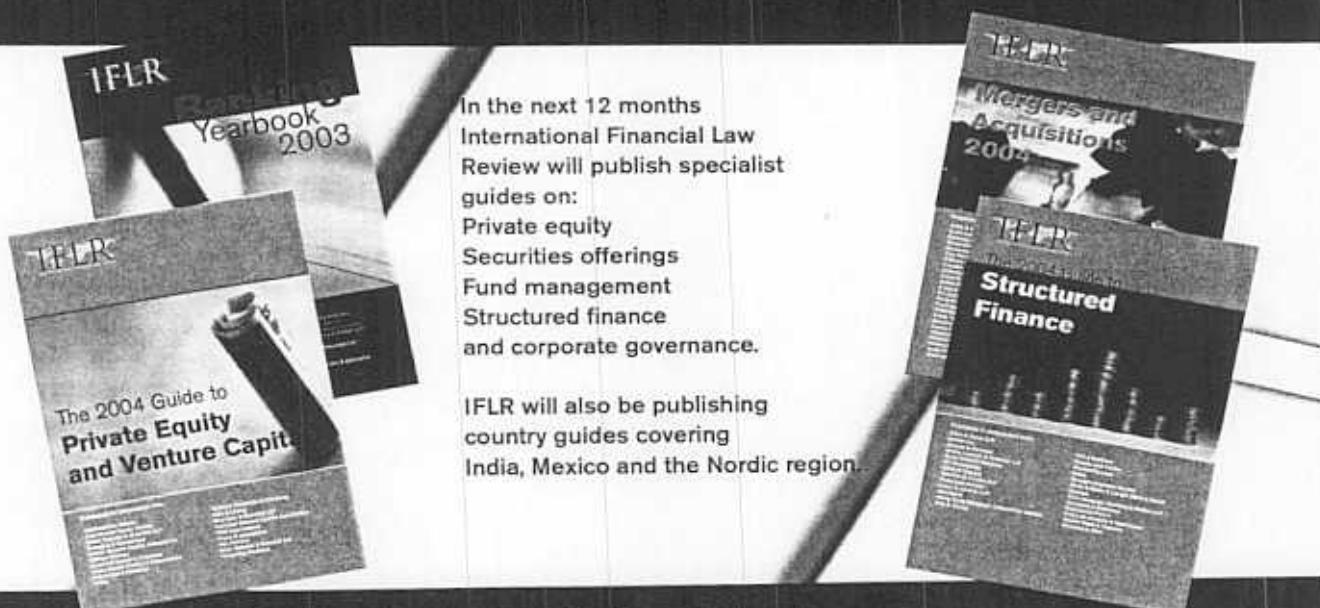
The Prospectus Directive will involve the following main changes: (i) the amendment of definitions of *institutional investors* and *public offer*, with impact upon the scope of exempted offers; (ii) the new structure of the prospectus, in particular allowing for the shelf registration mechanism of frequent issuers and

for a summary containing special warning to retail investors; (iii) the redefinition of the national competent authority to approve the prospectus with full control upon the relevant issuers; and (iv) the obligation to provide ongoing information.

Although these changes will not mean a complete revision in the Portuguese framework, they will have a two-fold impact. The revised disclosure regime will impose an additional disclosure burden on Portuguese, EU and foreign issuers offering or admitting securities subject to the Portuguese authority's competence, and impose additional supervisory costs on CMVM, which might have a broader competence and is subject to cooperation and supervisory convergence obligations. However, it will provide an environment for private placements under a unified regime with the remaining EU member states, and ideal conditions for cross-border retail public offers facilitated by the integrated regulations.

Taking all this into consideration, the Portuguese securities market expects that the implementation of the Prospectus Directive will permit a more friendly environment for public offerings and admissions in Portugal. ■

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