



EU AND COMPETITION LAW

The New Portuguese Competition Act

On 16 September 2022, Law 17/2022 came into effect, thereby transposing the ECN+ Directive into Portuguese law (the “**Revised Competition Act**”).

The Revised Competition Act **increases the Portuguese Competition Authority’s enforcement toolkit** by adopting the following key measures:

1. Scope of 10% turnover cap on fines clarified

The law now explicitly states that the 10% cap on fines is applicable to companies’ **worldwide turnover**.

- This is a significant development given the **very significant increase in fines** imposed by the PCA in the recent past.

Fines of
€1.4 billion
have been issued
by the current
PCA executive

In the **first half of 2022**
alone, infringement decisions
fining companies nearly
€500 million
were adopted

Total fines for the PCA’s
overarching hub and spoke
investigation into the food retail
distribution sector currently stand
at **€681 million**

Accordingly, we **may see even greater fines in the coming years**, particularly given that the PCA will almost certainly revise its fining guidelines to reflect this clarification.

2. Statute of limitations suspended during appeals of PCA decisions.

Under the Revised Competition Act, the statute of limitations **is suspended for the entire period the infringement decision is under appeal before the courts**.

- This is a significant development because in past and current cases the limitation period can only be suspended for up to 3 years (with the maximum statute of limitations ranging from 8 to 10.5 years). Given the **backlog of cases in the courts**, PCA decisions faced a **real risk of exceeding the statute of limitations and becoming unenforceable** – this risk has now been reduced significantly (if not eliminated entirely) for future PCA decisions.

Other relevant points to note

1. Potential tension between investigatory powers and powers to review emails.

In a prior version of the Revised Act, **explicit reference was made to a PCA power to seize and search electronic correspondence**. This provision was removed from the final version of the law as there are arguments such a power **is contrary to a constitutional right to privacy**.

- The PCA currently seizes electronic correspondence **via the general power to inspect relevant “materials” and “documents”**. The extent to which this practice is lawful will become clear in the coming years via the various judicial appeals to PCA decisions.

2. Deadline to appeal a PCA decision extended.

The deadline to appeal a PCA decision has been extended to 60 days.

3. Parental liability.

EU **jurisprudence regarding parental liability** for infringements is codified by the Revised Competition Act. In addition, a legal presumption (which is rebuttable) is created according to which an entity with a 90%+ shareholding in the company found to have been involved in an infringement is jointly liable for the infringement and payment of any fine.

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4. Trade association members liability.

The Revised Competition Act includes several provisions that clarify the situations where trade association members **may be held jointly liable for the payment of a fine resulting from an infringement by a trade association**.

5. 50% bank guarantee to suspend immediate payment of full fine.

The Revised Competition Act codifies current practice according to which a bank guarantee of 50% of any fine due for an infringement must be presented upon appeal to avoid full payment of the fine immediately (i.e., when the PCA infringement decision is adopted). ■

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