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Fining methodologies for competition law infringements****- Contribution from Portugal -****24-25 September 2019, San Pedro Sula, Honduras**

The attached document from Portugal is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 24-25 September 2019 in Honduras.

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Session I: Fining Methodologies for Competition Law Infringements

– Contribution from Portugal –

1. Legal Framework

1. The Portuguese Competition Authority (Autoridade da Concorrência, hereinafter AdC) may impose fines on companies and individuals when they infringe the Portuguese Competition Act¹.
2. The fines imposed by the AdC have an administrative nature and aim to punish the offenders and deter them from future violations, as well as to deter the wider community from breaching the competition rules.
3. According to the Portuguese Competition Act, the AdC may impose a fine up to 10% of the company's total turnover in the business year preceding the AdC's decision². The AdC may also impose fines on administrators and directors of the companies involved up to 10% of their remuneration. These individuals are liable where they are, or should have been, aware of the infringement and fail to take appropriate measures to terminate it³.
4. The Portuguese Competition Act also lists the main criteria for determining the fine's amount. Within the limits set by the Portuguese Competition Act, the AdC enjoys a considerable margin of discretion when imposing a fine. Notwithstanding, the offenders can appeal to the courts against the AdC's decision to impose a fine.
5. In order to ensure the transparency, impartiality and legal certainty of its decisions, as well as the deterrence effect of its fines, the AdC adopted guidelines on the method for setting fines in December 2012 (hereinafter Guidelines), following the entry into force of the 2012 Competition Act. These Guidelines follow closely the practice of the European Commission.

2. Determination of the fine

6. The Portuguese Competition Act establishes the maximum level of the fines and foresees the main factors to take into account when determining the fine's amount. These factors are: (i) seriousness and (ii) duration of the infringement; (iii) the nature and size of the affected market; (iv) the level of the company's involvement in the infringement; (v) the gains taken from the infringement; (vi) whether the company has terminated the infringement and has repaired damages; (vii) the financial and economic situation of the company; (viii) whether the company is a repeated offender; (ix) the level of cooperation

¹ Law 19/2012 of 8 May. Article 68 of the Portuguese Competition Act.

² Article 69 (2) and (4) of the Portuguese Competition Act.

³ Articles 69 (4) and 73(6) of the Portuguese Competition Act.

with the AdC throughout the investigation⁴. This list is not exhaustive and the AdC may take into account other factors to determine the amount of fines.

7. According to the AdC's 2012 Guidelines, the AdC follows a three step methodology to set the fines. First, it establishes the basic amount of the fine of each company involved. Secondly, it adjusts that basic amount taking the specific aggravating or mitigating circumstances into account. Thirdly, it may revise the adjusted basic amount upwards or downwards for specific deterrence and proportionality reasons.

8. The basic amount is determined by reference to the value of sales of goods (or services) to which the infringement relates. The value of sales is determined before VAT and other taxes directly related to the sales. Where the figures available are not reliable or where the sales related to the infringement are disproportional to its economic impact, the AdC may take the total turnover as a reference (bearing in mind the legal limit of the fine).

9. Depending on the gravity of the infringement, the AdC establishes a percentage (up to 30%) of the value of sales to take into consideration. This proportion of the sales value is then multiplied by the number of years the company has participated in the infringement, in order to set the basic amount.

10. The basic amount will be adjusted upwards or downwards depending on the aggravating or mitigating circumstances.

11. Among aggravating circumstances, the AdC usually takes into account: (i) recidivism, (ii) leader or instigator role, including any steps taken to coerce other companies to participate in the infringement, or retaliatory measures to enforce the anti-restrictive practice; or (iii) refusal to cooperate with, or obstruction of, the AdC's investigation.

12. As mitigating circumstances, the AdC takes into account: (i) the fact that the conduct was authorised or encouraged by a public authority or legislation; (ii) evidence that the company's involvement was substantially limited and, while being part of the offending agreement, the company avoided its implementation by adopting a competitive conduct; (iii) any steps taken by the company to terminate the infringement and to repair respective damages; or (iv) cooperation with the AdC during its investigation (outside the Leniency Programme).

13. As a third step, this adjusted amount may be revised upwards in order to ensure deterrence, where the company has significant market power and financial resources, or where it is necessary to exceed the gains improperly made as a result of the infringement, or/and the affected market is of particular economic relevance.

14. Conversely, the AdC may revise the basic adjusted amount downwards to ensure proportionality where the company's core business takes place on the affected market.

15. In exceptional circumstances, the AdC may also take into account the company's inability to pay the fine. In this case, a reduction may be granted solely on the basis of evidence that the imposition of a fine (determined according to the Guidelines) would irreversibly jeopardise the economic viability of the company and cause its assets to lose their value.

⁴ Article 69 (1) of the Portuguese Competition Act.

16. When submitting their inability to pay claim, companies are requested to show financial evidence of their profitability, liquidity and solvency, as well as to demonstrate a direct link between the imposition of a fine and the devaluation of their assets. The AdC may also consider redundancies or restructuring programs which were not already scheduled and would result from the imposition of the fine (before a reduction)⁵.

3. Interplay between fines, leniency and settlement procedures

17. In cartel cases, it is also necessary to take into account the AdC's leniency program when determining the fine. The first company that comes forward and complies with the program requirements can receive full immunity from fines. The second and third companies that come forward with valuable evidence and comply with the program requirements may have a fine reduction of 30% to 50% and 20% to 30%, respectively. Other companies, which are still able to bring evidence with added value and fulfil the requirements may have a fine reduction up to 20%.

18. The amount of fines may also be reduced through a settlement procedure. The Portuguese Competition Act does not set a limit for the reduction. In the last years, the AdC has followed the European Commission's approach and did not offer a reduction, on this ground, higher than 10%.

4. Practical issues in determining the amount of fines

19. In practice, when the AdC determines the amount of a fine, it is bound by other rules, such as the parent company liability rule, and also makes use of other instruments, such as the leniency program and the settlement procedure.

20. In order to ensure an appropriate level of deterrence, the AdC recent decision making practice is endeavoring to impute liability to parent companies, by resorting to the notion of undertaking as a single economic unit, which is enshrined in the law, and the established case law of the European Court of Justice on parental liability, whenever there is evidence that a parent company exercises decisive influence over a subsidiary's activity. However, some practical issues still remain unsettled, e.g. the type of evidence required to show effective exercise of control, legal basis for joint and several liability of the parent, etc.

21. As explained above, the AdC may accumulate the leniency reduction with a settlement reduction. This happened, for example, in cartel cases concerning bid rigging in public tenders for the supply of prefabricated modules for schools, and price fixing and market sharing in the sector of office supplies.

22. In the bid rigging case in the construction sector, the first company received full immunity under the leniency program and the remaining three companies received a reduction of 40%, 30% and 20% of the respective fines, depending on the value of the

⁵ Differently, after setting the fine and notifying the company thereof, the AdC may accept a company's request to pay the fine by instalments. Instalment plans cannot exceed a period of two years from the moment the decision becomes final. The AdC has accepted instalment payments in a bid rigging case concerning public tenders for pre-fabricated modules for schools.

evidence brought by each one. All of them later entered into a settlement agreement and received an additional reduction of 10% of fines each⁶.

23. In the cartel case regarding the sector of office supplies, the second company that came forward with evidence received a reduction of 50% of the fine under the leniency programme, and later it entered into a settlement agreement and received an additional reduction of 10% of the fine⁷.

24. Ultimately, the amount of fines determined by the AdC can be reviewed by the courts on appeal.

25. Under Article 88 of the Portuguese Competition Act, the Competition, Regulation and Supervision Court has powers of full jurisdiction and can reduce or increase the amount of the fine or of the periodic penalty payment.

26. The review Court has reduced the amount of fines imposed by the AdC on various grounds⁸. For example, it concluded that direct intent was not established or it valued differently mitigating circumstances, such as the absence of prior convictions, termination of the infringement before, or as soon as, the AdC intervened, or cooperation with the AdC.

27. The appeal against a fining decision by the AdC does not suspend the duty to pay the fine. Companies must apply for suspension if they want the fine to be stayed during the appeal. In that case, companies must show that paying the fine causes them considerable harm and are required to pay a deposit.

28. So far, the AdC has not encountered a situation where a company refused to pay a fine when the decision became final. The only instances where the AdC failed to retrieve fines were related to companies undergoing insolvency and liquidation processes.

29. In any event, the AdC can impose periodic penalty payments for each day of delay in complying with a AdC decision imposing a sanction or ordering the adoption of certain measures. These periodic penalty payments may not exceed 5% of the average company's daily turnover in Portugal in the financial year preceding the AdC's decision⁹.

5. Final remarks

30. The current Portuguese Competition Act, together with the Guidelines on the methodology for setting the amount of the fines, have ensured the effectiveness of the sanctioning powers of the AdC and contributed to reduce incentives to excessive litigation.

⁶ See press release: http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201518.aspx?lst=1&Cat=2015.

⁷ See press release: http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201612.aspx?lst=1&Cat=2016.

⁸ Under Article 88 of the Portuguese Competition Act the Courts may also revise the fine upwards, which was not possible under the previous competition act. So far, the Courts have not used this prerogative.

⁹ Article 72 of the Portuguese Competition Act.

31. The increased transparency and predictability regarding the AdC's procedures and decision-making process also contribute for further attracting cooperation with the AdC's investigations in the context of the settlement procedure and leniency applications.