# 2022 PORTUGUESE COMPETITION GUIDE

MACEDO VITORINO

# ABOUT US

MACEDO VITORINO WAS ESTABLISHED IN 1996, FOCUSING ITS ACTIVITY ON ADVISING DOMESTIC AND FOREIGN CLIENTS IN SPECIFIC ACTIVITY SECTORS, INCLUDING BANKING, TELECOMMUNICATIONS, ENERGY AND REAL ESTATE AND INFRASTRUCTURE.

Since the incorporation of the firm, we have been involved in several high-profile transactions in all of the firm's fields of practice, including banking and finance, capital markets, real estate, M&A, complex disputes and corporate restructurings.

We have strong relationships with many of the leading international firms in Europe, the United States and Asia, which enable us to effectively handle any cross border legal matters.

We are mentioned by The European Legal 500 in most of its practice areas, including Banking and Finance, Capital Markets, Project Finance, Corporate and M&A, Tax, Telecoms and Litigation. Our firm is also mentioned by IFLR 1000 in Project Finance, Corporate Finance and Mergers and Acquisitions and by Chambers and Partners in Banking and Finance, Corporate and M&A, TMT, Dispute Resolution and Restructuring and Insolvency.

The multidisciplinary and integrated character of our corporate and commercial group allows us to efficiently solve the legal issues of our clients, in particular:

- Commercial contracts, distribution agreements and franchising
- Competition and European law
- Copyright, intellectual property, IT, patents, and trademarks
- Corporate and acquisition finance
- Dispute resolution, litigation, mediation, and arbitration
- Employment
- Foreign investment, mergers & acquisitions, and privatisations
- Real estate acquisition and disposal
- Tax

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# INTRODUCTION

Competition is not only necessary to achieve economic efficiency, but it is one of the essential conditions of a market economy as well. Companies committed to the preservation of fair competition should develop and foster a competitive culture and help its directors and employees ensure the company complies with competition laws.

The purpose of a competition guide is to explain the basic provisions of European and national competition laws to make companies (executive bodies and employees) aware of the basic competition rules and how these rules may affect their business.

A competition guide does not cover all circumstances/ issues companies can run into, but it provides enough information regarding competition law, which helps companies recognizing patterns and specific situations and require legal advice if needed.

Competition guides make it easier for companies (especially the ones operating in several different countries) to develop a consistent approach wherever the company is operating so that its employees may apply business practices in line with the company's global standards.

A training program is required to implement a competition guide, which is essential to keep companies regularly aware of competition issues. This would include training sessions, information on antitrust developments, updates of the competition guide, etc.

Companies should encourage their employees and business partners to feel personally responsible for the strict application of competition rules set out in competition guides. Otherwise, the development of a competitive culture may be at risk.

# 1. OVERVIEW

The main provisions on anti-competition practices of the European Union Competition Law are outlined in Articles 101 and 102 of the Treaty on the Functioning of the EU ("TFEU").

EU Competition Law applies to all companies doing business within the Member States or which can affect trade between the Member States of the European Economic Area ("EEA") regardless of whether these companies are established in one of those countries or not.

On the other hand, the Portuguese Competition Law, which was approved by Law 19/2012, of 8 May 2012 (the "Competition Law"), applies to restrictions of competition in Portugal.

The rules on anti-competitive practices laid down in Articles 9 to 11 of the Competition Law are similar to those of Articles 101 and 102 of TFEU as developed by the European case law. Between TFEU and the Competition Law, there could be differences resulting from:

- Adaptation to Portuguese legal concepts;
- Particular features of the Portuguese markets;
- Portuguese culture and experience; and
- Interpretation by the Portuguese lawmakers and the Competition Authority of European case law.

There are, however, practices forbidden by both:

- Cartels. All agreements intended to prevent, restrict, or distort competition are prohibited. Does not matter the form of agreement. There are two types of agreements: horizontal agreements (the ones between companies acting on the same marketing stage, e.g. agreements with competitors) and vertical agreements (the ones between companies acting on different marketing stages, e.g. agreements with suppliers and customers; and

- Abuse of dominant position. Competition law forbids undertakings from abusing their dominant position to prevent, distort, or restrict competition in the market or a substantial part of it.

# 1. HORIZONTAL AND VERTICAL AGREEMENTS

## 1.1. AGREEMENTS BETWEEN COMPETITORS (HORIZONTAL AGREEMENTS)

Under Competition Law, the term "agreement" has a very broad meaning and includes all kinds of agreements between two or more competitors, i.e., two or more companies operating at the same level(s) in the market, like levels of production or distribution.

But not all agreements with competitors are illegal. Agreements with competitors that do not restrict competition are legal but sometimes must be notified to the relevant competition authorities.

In what concerns dealings with competitors, there are some general principles to be considered:

- *Prices and conditions of supply*. To agree or co-operate in any way with competitors to fix prices is prohibited. Competitors cannot, specifically: (i) jointly determine selling or purchase prices, price increases, and specific minimum or maximum prices or price ranges, and (ii) jointly agree to rebates, discounts, and other supply conditions.
- *Market sharing*. It is forbidden to share or allocate markets in any form. More specifically, competitors cannot, specifically: (i) share or allocate markets regarding specific territories, products, customers, or sources of supply, and (ii) fix production, buying, and selling quotas between competitors;
- *Boycotts*. It is forbidden to refuse to deal with one or more customers or suppliers to hinder such customers or suppliers to do business in a market. It is however possible to have a competitor as a supplier or customer at an arm's length basis, as long as all other antitrust rules are observed; and
- *Joint ventures*. Joint venture agreements between competitors can be beneficial, e.g., by facilitating technological advances (efficiencies), but can also affect or restrain competition. Because of that, these agreements should not be closed without legal advice.

## 1.2. AGREEMENTS WITH SUPPLIERS AND CUSTOMERS (VERTICAL AGREEMENTS)

Unlike agreements between competitors, many agreements with suppliers and customers are necessary for companies to develop their business activity and entirely appropriate.

When it comes to vertical agreements, companies should respect the following principles:

- *Resale prices*. The producer must not set the resale prices charged by the distributor. It is not allowed to, specifically: (i) fix or set resale prices to distributors or dealers for any product, (ii) require the distributor to stick to the recommended resale prices, (iii) terminate the agreement with a distributor due to their refusal to stick to the recommended resale prices, (iv) coordinate the price policy with the distributor according to the market situation, (v) forbid the distributor from granting any discounts, etc.;
- *Exclusivity*. While closing exclusive distribution, purchase, franchise, or license agreements, companies must comply with certain rules. For instance, it is forbidden to (i) prevent from making passive sales to customers outside its exclusive customer group or territory prescribe not to passively supply customers from outside the territory, (ii) forbid a distributor from accepting a customer's inquiry from outside the territory, (iii) forbid a distributor from supplying products to other distribution channels upon corresponding orders, (iv) refuse orders from distributors exporting products due to territory restrictions;
- *Parallel trade*. Parallel trade is a consequence of free trade within a market. It is not allowed to: (i) impose export bans, (ii) prevent from exporting to customers from outside the territory, (iii) refuse orders from partners exporting products due to territory restrictions;
- *Tying*. Tying clauses that make a product supply subject to the acceptance of supplementary obligations to buy other goods and/or services which, either by their nature or according to commercial usage, have no connection with the contract subject, generally should not be used, especially when companies have a significant market share in the first product;
- *Competition clause*. Under certain circumstances, it is possible to forbid a distributor or licensee to sell or manufacture competing products. It is allowed to do so to extend the prohibition beyond the duration of the agreement;
- *Patent, trademark, copyright*. When licensing patents, copyrights, know-how, or trademarks, it is not allowed to (i) forbid the partner from contesting the secrecy of the licensed know-how or the licensed trademarks and patents, (ii) forbid the partner from contesting the validity of the licensed patent, (iii) fix the price that the licensee charges for its product, (iv) reach agreements with other patent owners regarding royalties to be charged for competing patents; and
- *Improvements and new applications*. In patent licensing and know-how licensing agreements, either party should generally be free to compete with its developed products, improvements, or new applications of the technology in so far as these are severable from the licensee's initial know-how. However, it is not allowed to restrict either party from competing with the other

party when it comes to research and development, manufacture, use, or sale of any own developed product, improvement, and a new application of the technology.

# 2. ABUSE OF DOMINANT POSITION

An undertaking has a dominant position when it has a position of economic strength (and market power) that enables it to prevent effective competition and to behave independently from its competitors, customers, and consumers to an appreciable extent.

Although several factors should be considered in the assessment of a company's position, the market share of the product is the main factor. Market shares are calculated based on geographical and product markets.

Dominant companies have a special responsibility to behave fairly having to comply with special rules to protect competitors, customers, and market structure from abusive behaviour. Many of the commercial policies and tools that are legal for a non-dominant company may be abusive if carried out by a dominant company. As a result, companies in a dominant position (unilateral or collective) should act carefully so to avoid any abuse of such a dominant position.

The following are examples of abuse:

- *Discrimination/Different terms of sale*. A company with a dominant position must not discriminate in its terms of sale when dealing with similar customers under comparable circumstances. It is however possible to (i) grant different terms of sale (rebates) to distributors providing special services that are not met by other distributors, (ii) grant different terms of sale to distributors of another stage in the distribution channel (wholesalers/retailers) since such distributors are providing different services;
- *Hindrance of competitors*. Market-dominant companies are not allowed to substantially restrict the access of competitors to customers or dealers by imposing (i) exclusive purchase commitments on customers, (ii) fidelity rebates, (iii) rebates with similar effects, and (iv) unfair or predatory price (method in which a seller sets a price so low that other suppliers cannot compete and are forced to exit the market); and
- *Refusal to supply*. A refusal to sell to distributors or customers might constitute an abuse of a dominant position. It is not allowed, specifically, to (i) refuse to sell to a customer which meets the same requirements as other customers which are supplied, and (ii) reduce supplies to comparable customers in different ways without an unbiased justification.

# 3. CONSEQUENCES OF BREACHING COMPETITION RULES

Not complying with competition laws can seriously negatively impact companies. These are the main risks companies might face are:

- *Fines*. Companies that breach antitrust rules might be subject to significant fines and compulsory penalties. The European Commission and national competition authorities, including the Portuguese one, can impose fines of up to 10% of the consolidated total turnover of companies. Competition Authorities might take into account the company size, the seriousness of the illegal business practices at stake, the duration of the illegal practices, and the existence of repeat offenses to increase the discouraging effect of fines;
- *Civil liability*. A company can be sued for damages by those who can demonstrate that they have sustained losses caused by anti-competitive practices carried on by that company. Although actions for damages resulting from breach of competition rules are not a common solution in Portugal, a set of measures has been implemented recently, so it is expected that damages actions will be used more frequently by injured parties soon;
- *Contractual risk*. Any contractual provision infringing antitrust laws is generally void, which means it cannot be enforced before local courts. The entire contract could also be void in certain circumstances.
- *Reputation risk*. Violation of antitrust laws is more and more perceived by the stakeholders as unethical behaviour that can seriously impact the image and reputation of a company and make it look like it does not observe/regard the highest corporate governance standards. Share price can also be significantly affected. Recent studies tend to show a correlation between cartel investigations and a decrease in the share price.

A competition guide is of the utmost importance for companies' executive bodies, employees, and business partners to understand fully that any breach of applicable competition laws might seriously damage a company's business activity.

# 4. RECOMMENDATIONS

## 4.1. PRACTICAL RECOMMENDATIONS

Undertakings usually are part of professional associations. These professional associations may be subject to monitoring by the Competition Authority, as professional associations might lead to collusion between competitors.

Because of what was said above, undertakings' employees should comply with specific rules when dealing with these professional associations, particularly regarding membership, meetings, and information exchange.

In most cases, it is not possible to notify the Competition Authority to get a clearance on specific matters. An individual assessment could be more easily made based on a set of rules on competition and, of course, companies can always require external legal opinion in sensitive cases.

Companies can follow some guidelines when dealing with professional associations:

- Do not exchange nor accept receiving sensitive information;
- Declare that the company does not want to receive any sensitive information, and protest in writing in case it happens;
- Do not attend professional associations meetings without written minutes attesting to the agenda and those resolutions are taken under the law;
- Make sure informal conversations before, during or after such meetings are not about anticompetitive subjects and be properly aware of what could be the content of those discussions;
- Require professional associations to have a confidential collection system, the so-called "black box system"; and
- In case the professional association your company is part of does not have a competition guide, suggest/ recommend it adopts one.

## 4.2. HOW TO COMMUNICATE WITH CLIENTS AND COMPETITORS

Communications between companies, their clients, and their competitors are fundamental for the development of their business activities. Companies should use care in their written and oral communications.

The use of inappropriate words in internal or external communications could be misinterpreted as indicative of anticompetitive behaviour. Companies should be conscious that any documents, as a rule, may be subject to seizure by the competition authorities.

To prevent these situations, undertakings should define a set of rules on how to communicate with their clients and competitors. For instance:

- Do not use expressions that have ambiguous or controversial meaning, especially when it relates to their competitors or competitive behaviour;
- Do not suggest that their marketing or pricing decisions (based on the company strategy, such as market status, competitor behaviour, customer threats, etc.) should be founded on grounds other than those;
- Indicate the source of any sensitive information, such as market shares, prices, production capacities; and
- Write carefully and clearly in memoranda, letters and emails and keep in mind that everything written may be disclosed publicly in an adversarial proceeding.

## 4.3. HOW TO HANDLE DOCUMENTATION

Competition Law requires undertakings to cooperate with the Competition Authority, which implies that they should disclose all information/documentation relating to an investigation procedure in course.

Regardless of specific rules on keeping documentation (for instance, accounting and tax documentation), companies should be aware that some documents could be relevant in an investigation procedure since they could have an important role as evidence or negotiating tool in the scope of settlements or leniency/reduction of fines program.

Once an investigation/litigation is initiated, documents of any kind which directly or indirectly related to the subject of the proceedings must be immediately retained and never destroyed or concealed. Destruction of sensitive documents (even as part of a general retention/destruction policy) or the appearance of a cover-up in the context of an investigation procedure or lawsuit could result in very high fines.

## 4.4. HOW TO REACT TO COMPETITION AUTHORITIES' DAWN-RAIDS

Competition authorities have wide investigative powers, which include the power to make inquiries, do searches in companies' premises, examine, copy, and seize documents as well as seal the premises if necessary.

To react against the so-called "dawn-raids" of competition authorities, companies should define a set of guidelines.

For example, in what concerns the access to documents in the possession of attorneys, the Portuguese Competition Authority, in line with European case law, understands that the client/attorney secrecy privilege only applies to outside counsel and not to in-house lawyers. However, the Lisbon Commerce Court has ruled, in a recent decision, which may be followed by other Portuguese courts, that communications with in-house lawyers should be deemed privileged.

Employees should be aware of the investigative powers of these authorities and know the measures that they can adopt in these circumstances.

All employees, who are likely to be confronted with dawn-raids, for instance, receptionists, managers, lawyers, should be well trained to adopt the right behaviour, as a good relationship with the competition authorities is in the best interest of companies. Refusal to cooperate could create an incorrect impression, as if the company had something to hide.

Undertakings and/or their employees can be fined by competition authorities.

## 4.5. FINAL REMARKS

To avoid risks, companies should be aware of the risks that their employees' daily informal behaviours can lead to anti-competitive practices and seriously harm the company business even when such conduct was not intended by the company's management.

The best approach is to:

- Ensure cooperation with the authorities;
- Grant access to information that is duly requested by the authorities;
- Keep documentation;
- Get legal advice on what is allowed and what is not; and
- Develop internal proceedings that promote a competition compliance culture.

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