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Assembly of the Republic

Law No. 18/2003

of 11 June

APPROVING THE LEGAL FRAMEWORK FOR COMPETITION

Pursuant to Article 161 c) of the Constitution, the Assembly of the Republic makes the following decree, which shall stand as a general law of the Republic:

CHAPTER I

The rules of competition

SECTION I

General provisions

Article 1

Scope

1 – This act is applicable to all economic activities carried out on a permanent or occasional basis in the private, public or co-operative sectors.

2 – With the exception of the international obligations of the Portuguese state, this act is applicable to restrictive competition practices and concentrations between undertakings which take place or have or may have effects in the territory of Portugal.

Article 2

Concept of an undertaking

1 – For the purposes of this Act, an undertaking is considered to be any entity exercising an economic activity that consists of the supply of goods and services in a particular market, irrespective of its legal status or the way in which it functions.

2 – A group of undertakings is considered as a single undertaking if, though legally distinct, they make up an economic unit or maintain ties of interdependence or subordination among themselves arising from the rights or powers set out in Article 10 (1).

Article 3

Services of general economic interest

1 – Public undertakings and those to which the state has granted special or exclusive rights are covered by the provisions of this Act, without prejudice to the provisions of the following paragraph.

2 – Undertakings legally charged with the management of services of general economic interest or which have the nature of legal monopolies are subject to the provisions of this Act, insofar as the application of these rules does not constitute an impediment in law or in fact to fulfilment of the particular mission entrusted to them.

SECTION II

Prohibited practices

Article 4

Prohibited practices

1 – Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, are prohibited, in particular those which:

- a) Directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them artificially either to rise or fall;
- b) Directly or indirectly fix other transaction conditions effected at the same stage or different stages of the economic process;
- c) Limit or control production, distribution, technical development or investments;
- d) Share out markets or sources of supply;
- e) Systematically or occasionally apply discriminatory pricing or other conditions to equivalent transactions;
- f) Directly or indirectly refuse to purchase or sell goods or services;
- g) Subject the signing of contracts to the acceptance of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2 – Except in such cases as are considered justified, under the terms of Article 5, practices prohibited under paragraph 1 are null and void.

Article 5

Justification of prohibited practices

1 – Practices referred to in Article 4 may be considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, they:

- a) Offer the users of such goods or services a fair part of the benefit arising therefrom;
- b) Do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives;
- c) Do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market in question.

2 – The practices provided for in Article 4 may be the subject of prior assessment by the Competition Authority, hereinafter referred to as the Authority, according to the procedure to be established by the regulations to be approved by the Authority in accordance with its Statutes.

3 – Practices prohibited by Article 4 are considered justified when, though not affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 81 (3) of the Treaty establishing the European Community.

4 – The Authority may withdraw the benefit referred to in paragraph 3 if, in a particular case, it ascertains that a practice covered by it has effects incompatible with the provisions of paragraph 1.

Article 6

Abuse of a dominant position

1 – One or more undertakings shall not engage in the abusive exploitation of a dominant position in the national market or a substantial part of it, with the object or effect of preventing, distorting or restricting competition.

2 – The following are to be understood as having a dominant position in the market for a particular good or service:

- a) An undertaking that is active in a market in which it faces no significant competition or in which it predominates over its competitors;
- b) Two or more undertakings that act in concert in a market in which they face no significant competition or in which they predominate over third parties.

3 – The following in particular may be considered abusive:

- a) Any of the forms of behaviour referred to in Article 4 (1);
- b) The refusal, upon appropriate payment, to provide any other undertaking with access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, always excepting that the dominant undertaking demonstrates that, for operational or other reasons, such access is not reasonably possible.

Article 7

Abuse of economic dependence

1 – Insofar as it may affect the functioning of the market or the structure of the competition, one or more undertakings shall not engage in the abusive exploitation of the economic dependence on it or them of any supplier or client on account of the absence of an equivalent alternative.

2 – The following in particular may be considered abusive:

- a) Any of the forms of behaviour laid out in Article 4 (1)
- b) The unjustified cessation, total or partial, of an established commercial relationship, with due consideration being given to prior commercial relations, the recognised usage in that area of economic activity and the contractual conditions established.

3 – For the purposes of paragraph 1, an undertaking is understood as having no equivalent alternative when:

- a) The supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings; and
- b) The undertaking cannot obtain identical conditions from other commercial partners in a reasonable space of time.

SECTION III

Concentrations between undertakings

Article 8

Concentrations between undertakings

1 – For the purposes of this Act, a concentration between undertakings shall be understood to exist:

- a) In the case of a merger between two or more hitherto independent undertakings;
- b) In the case that one or more individuals who already have control of at least one undertaking or of one or more undertakings acquire control, directly or indirectly, of the whole or parts of one or several other undertakings.

2 – The establishment or acquisition of a joint undertaking shall constitute a concentration between undertakings, within the meaning of subparagraph b) of the paragraph above, inasmuch as the joint undertaking fulfils the functions of an independent economic entity on a lasting basis.

3 – For the purposes of the paragraphs above, control shall be constituted by any act, irrespective of the form which it takes, which, separately or jointly and having regard to the circumstances of fact or law involved, implies the ability to exercise a determining influence on an undertaking's activity, in particular:

- a) Acquisition of all or part of the share capital;
- b) Acquisition of rights of ownership, use or enjoyment of all or part of an undertaking's assets;
- c) Acquisition of rights or the signing of contracts which grant a decisive influence over the composition or decision-making of an undertaking's corporate bodies.

4 – The following are not held to constitute a concentration between undertakings:

- a) The acquisition of shareholdings or assets under the terms of a special process of corporate rescue or bankruptcy;
- b) The acquisition of a shareholding merely as a guarantee;
- c) The acquisition by credit institutions of shareholdings in non-financial undertakings, when such acquisition is not covered by the prohibition in Article 101 of the General Regulations for Credit Institutions and Financial Institutions approved by Decree-Law No. 298/92 of 31 December.

Article 9

Prior Notification

1 – Concentrations between undertakings are subject to prior notification when one of the following conditions is fulfilled:

- a) Their implementation creates or reinforces a share exceeding 30% of the national market for a particular good or service or for a substantial part of it.
- b) In the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding EUR 150 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds two million euros.

2 – The concentrations covered by this Act shall be notified to the Authority within seven working days of conclusion of the agreement or, where relevant, by the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest.

Article 10

Market share and turnover

1 – Calculation of the market share and turnover provided for in Article 9 shall take into account, accumulatively, the turnover of:

- a) Undertakings taking part in the concentration;
- b) Undertakings in which such undertakings dispose, directly or indirectly, of:
A majority holding in the share capital;
More than half the votes;
The ability to nominate more than half the members of the management or supervisory bodies;
The power to manage the undertaking's business;
- c) Undertakings which, in the participating undertakings, separately or jointly, have the rights or powers specified in subparagraph b);
- d) Undertakings in which an undertaking referred to in subparagraph c) has the rights or powers specified in subparagraph b);
- e) Undertakings in which various undertakings referred to in subparagraphs a) to d) jointly dispose, among themselves or with third-party undertakings, of the rights or powers specified in subparagraph b).

2 – If one or more undertakings involved in the concentration jointly dispose of the rights or powers specified in paragraph 1 b), the calculation of the turnover for the undertakings taking part in the concentration:

- a) Shall not take account of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings taking part in the concentration or any other undertaking connected to them within the meaning of paragraph 1 b) to e);
- b) Shall take account of the turnover from the sale of products or provision of services between the joint undertaking and any other third-party undertaking and such turnover shall be attributed to each of the undertakings participating in the concentration in the part corresponding to its division into equal parts for all the undertakings controlling the joint undertaking.

3 – The turnover referred to in the preceding paragraph includes the value of products sold and services provided to undertakings and consumers within the territory of Portugal, net of taxes directly related to the turnover, but does not include transactions carried out between the undertakings referred to in the same paragraph.

4 – By way of derogation from the provisions of paragraph 1, if the concentration consists of the acquisition of parts, with or without their own legal personality, of one or more undertakings, the turnover to be taken into account with regard to the transferor or transferors shall solely be that relating to the parts involved in the transaction.

5 – The turnover shall be substituted:

- a) In the case of credit and other financial institutions, by the sum of the following items of income, as they are defined by the applicable legislation:
 - i) Interest and equivalent income;
 - ii) Income from securities:
Income from shares and other variable-yield securities;

- Income from equity investment;
 - Income from parts of the capital in associated undertakings;
 - iii) Commission received;
 - iv) Net profit from financial operations;
 - v) Other operating income.
- b) In the case of insurance undertakings, by the value of gross premiums written, paid by residents of Portugal, which shall include all amounts received or receivable in respect of insurance contracts issued by or on behalf of such undertakings, including premiums paid to re-insurers, except for the taxes or levies charged on the basis of the amount of the premiums or their total volume.

Article 11

Suspension of concentrations

1 – A concentration subject to prior notification shall not be put into effect before it has been notified and has been the object of an explicit or tacit decision of non-opposition.

2 – The validity of any legal transaction carried out in contravention of the provisions of this section depends on the explicit or tacit authorisation of the concentration.

3 – The provisions of the preceding paragraphs do not impede the implementation of a public bid to purchase or an exchange offer that has been notified to the Authority in accordance with Article 9, provided that the acquirer does not exercise the voting rights attached to the securities in question or exercises them solely to protect the full value of its investments on the basis of a derogation granted under the terms of the following paragraph.

4 – At the request, duly substantiated, of the participating undertaking or undertakings, presented prior to or subsequently to the notification, the Authority may grant a derogation from the obligations provided for in paragraphs 1 or 3, after considering the consequences for the participating undertakings of suspending the concentration or the exercise of voting rights and the negative effects of the derogation for the competition. The derogation may, if necessary, be accompanied by conditions and obligations intended to guarantee effective competition.

Article 12

Appraisal of concentrations

1 - Without prejudice to the provisions of paragraph 5 of this article, concentrations notified in accordance with Article 9 shall be appraised in order to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market, in the interests of the intermediate and final consumer.

2 – The appraisal referred to in paragraph 1 shall take into account the following factors in particular:

- a) The structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets;
- b) The position of undertakings participating in the relevant market or markets and their economic and financial power, in comparison with their main competitors;
- c) The potential competition and the existence, in law or in fact, of entry barriers to the market;
- d) The opportunities for choosing suppliers and users;
- e) The access of the different undertakings to supplies and markets;
- f) The structure of existing distribution networks;
- g) Supply and demand trends for the products and services in question;
- h) Special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
- i) The control of essential infrastructure by the undertakings in question and the access opportunities to such infrastructure offered to competing undertakings;
- j) Technical and economic progress provided that it is to the consumer's advantage and does not create an obstacle to competition;
- l) The contribution that the concentration makes to the international competitiveness of the Portuguese economy.

3 – Authorisation shall be granted to concentrations that neither create nor strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it.

4 – A prohibition shall be imposed on concentrations that create or strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it.

5 – A decision which authorises a concentration also covers the restrictions directly related to the implementation of the concentration and necessary therefor.

6 – In the cases provided for in Article 8 (2), if the object or effect of creating the joint undertaking is to co-ordinate the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under the provisions of Articles 4 and 5 of this Act.

SECTION IV

State Aid

Article 13

State Aid

1 – The aid granted to undertakings by a state or any other public body must not significantly restrict or affect competition in the whole or in part of the market.

2 – At the request of any interested party, the Authority may scrutinize any aid or aid project and formulate such recommendations for the Government as it deems necessary to eliminate the negative effects on competition of such aid.

3 – For the purposes of this article, compensatory payments made by the state in return for the provision of a public service, whatever the form of such payments, shall not be considered aid.

CHAPTER II

Competition Authority

Article 14

Competition Authority

The Competition Authority shall ensure compliance with competition rules, within the limits of the attributions and competences that are assigned to it by law.

Article 15

Sectoral regulatory authorities

The Competition Authority and the sectoral regulatory authorities shall work together to apply the competition legislation, in accordance with Chapter III of this Act.

Article 16

Report

On an annual basis, the Competition Authority shall draw up a report on its activities and the exercise of its powers and competences, in particular in relation to its powers to sanction, supervise and regulate. It shall send this report to the Government, which shall forward it at that moment to the Assembly of the Republic, in readiness for publication.

CHAPTER III

Procedure

SECTION I

General Provisions

Article 17

Powers of investigation and inspection

1 – In exercising its powers to sanction and supervise, the Authority, represented by its institutional bodies and employees, enjoys the same rights and powers and is subject to the same duties as criminal police institutions and is able, in particular:

- a) To question the legal representatives of the undertakings or associations of undertakings involved and to ask them for documents and other elements of information that the Authority deems useful or necessary for clarification of the facts;
- b) To question the legal representatives of other undertakings or associations of undertakings and any other persons whose declarations it deems relevant and to request them to supply documents and other information;
- c) To search for, examine, gather, copy or take extracts from written or other documentation, at the premises of the undertakings or associations of undertakings involved, whether or not such documentation is in a place that is reserved or not freely accessible to the public, whenever such inquiries prove necessary for the obtaining of evidence;
- d) To seal the premises of the undertakings in which elements of written or other documentation are to be found or are liable to be found, for the period and to the extent strictly necessary for the inquiries referred to in the preceding paragraph;
- e) To require any other public administration services, including criminal police bodies, through the proper ministerial channels, to provide the co-operation necessary for the full discharge of their duties.

2 – The investigations provided for in paragraph 1 c) require a warrant from the legal authorities, requested beforehand by the Authority in an application that is duly substantiated. The decision shall be handed down within 48 hours.

3 – The Authority's employees who, externally, perform the investigations provided for in paragraph 1 a) to c) shall carry with them:

- a) With respect to subparagraphs a) and b), credentials issued by Authority stating the purpose of the investigation;
- b) With respect to subparagraph c), the credentials referred to in the preceding subparagraph and the warrant provided for in paragraph 2.

4 – Whenever necessary, the persons alluded to in the preceding paragraph may request the action of the police authorities.

5 – When persons summoned to make declarations to the Authority fail to attend, such failure shall not prevent the case from proceeding.

Article 18

Request for information

1 – Whenever, in exercising the powers to sanction and supervise afforded by the law, the Authority requests undertakings or associations of undertakings or any other persons or bodies to provide necessary documents or other information, this request shall include the following information:

- a) The legal basis and the purpose of the request;
- b) The period within which the information should be communicated or the documents provided;
- c) The penalties applicable in the case of non-compliance with the request;
- d) The instructions that undertakings should identify information which they consider confidential, with due justification. In this case, they should enclose a non-confidential copy of the documents containing such information.

2 – Information and documents requested by the Authority in pursuance of this Act should be provided within 30 days, unless, with a properly substantiated decision, the Authority lays down a different period.

Article 19

Penalty procedures

Without prejudice to the provisions of this Act, the penalty procedures respect the principle that parties involved are given a hearing, the principle of the adversarial system and other general principles applicable to the procedure and administrative action contained in the Administrative Procedure Code, approved by Decree-Law No. 442/91 of 15 November, in the wording of Decree-Law No. 6/96 of 31 January and contained, if applicable, in the general regime for administrative offences, approved by Decree-Law No. 433/82 of 27 October, in the wording of Law No. 109/2001 of 24 December.

Article 20

Supervisory procedures

Unless provided for otherwise by this Act, the decisions adopted by the Authority under the supervisory powers conferred on it by the law follow the common administrative procedure laid down in the Administrative Procedure Code.

Article 21

Regulatory procedures

1 – Before issuing any externally effective regulation, adopted under the regulatory powers provided for in Article 7 (4) of its statutes, the Authority shall publicize the proposal of the regulation on the Internet for public discussion purposes, for a period of not less than 30 days.

2 – In the preamble to the regulations provided for in the paragraph above, the Authority shall justify its options, particularly with reference to the opinions expressed during the public discussion period.

3 – The provisions of the paragraphs above shall not be applicable in urgent cases, for which the Authority may decide to shorten the period allowed or dispense with it, on grounds which it shall cite.

4 – Authority regulations containing externally effective rules are published in the 2nd Series of the official gazette, the *Diário da República*.

SECTION II

Proceedings relating to prohibited practices

Article 22

Applicable law

1 – Proceedings for infringement of the provisions of Articles 4, 6 and 7 are governed by the provisions of this section and Section 1 of this Chapter and, subsidiarily, by the general regime for administrative offences.

2 – The provisions of the preceding paragraph are also applicable, with the necessary adaptations, to the proceedings for infringement of Articles 81 and 82 of the Treaty establishing the European Community which are initiated by the Authority or in which the Authority is called to intervene, under the powers conferred on it by Article 6 (1) g) of Decree-Law No. 10/2003 of 18 January.

Article 23

Notifications

1 – Notifications are carried out personally, if necessary with the assistance of the police authorities, or by registered letter with recorded delivery, sent to the head office, principal establishment or address in Portugal of the undertaking or its legal representative or to the place of business of its legal agent, nominated for the purpose.

2 – When the undertaking has no main office or establishment in Portugal, the notification is carried out by registered letter with recorded delivery to the company headquarters or principal establishment.

3 – When it is not possible to carry out the notification, in accordance with the provisions of the paragraphs above, the notification is considered to have been carried out on the 3rd and 7th working day after despatch, respectively, with the sanction applicable being stated in the act of notification.

Article 24

Opening of the inquiry

1 – Whenever the Authority becomes aware, from whatever source, of possible practices prohibited by Articles 4, 6 and 7, it shall initiate an investigation, within the scope of which it shall carry out the inquiries necessary to identify such practices and their agents.

2 – All direct, indirect or independent administrative services of the state, as well as independent administrative authorities, have the duty to inform the Authority if they become aware of facts which may be described as restrictive competitive practices.

Article 25

Inquiry decision

1 – When the inquiry is complete, the Authority shall decide:

- a) To take no further action, should it deem that there is not sufficient evidence of infringement;
- b) To initiate proceedings by notifying the accused undertakings or associations of undertakings, should it conclude from the investigations carried out that there is sufficient evidence of infringement of the competition rules.

2 – If the investigation has been instituted on the grounds of an accusation by any interested party, the Authority may not annul the proceedings without previously informing the accusing party of its intentions, granting it a reasonable period to make its position known.

Article 26

Taking evidence for the case

1 – In the notification referred to in Article 25 (1) b), the Authority shall set a reasonable period for the accused to make its position known in writing with respect to the accusations and other questions that may concern the decision for the case and with respect to the proof produced, as well as a reasonable period for the accused to request the further inquiries for evidence that they consider proper.

2 – At the request of the accused undertakings or associations of undertakings, presented to the Authority within 5 days of notification, the hearing in written form to which the preceding paragraph refers may be completed or replaced by an oral hearing. This hearing shall take place on the date set by the Authority for the purpose, though in no circumstances before expiry of the period initially set for the hearing in written form.

3 – The Authority may refuse to carry out further inquiries for evidence whenever the evidence requested is clearly irrelevant or the purpose purely dilatory.

4 – The Authority may officially order further inquiries to gather evidence, even subsequently to the hearing referred to in paragraphs 1 and 2, provided that it guarantees the accused compliance with the principle of the adversarial system.

5 – In gathering evidence, the Authority shall safeguard the legitimate interests of undertakings by not revealing their business secrets.

Article 27

Interim measures

1 – Whenever the investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third-party interests, the Authority may, at any moment in the investigation or evidence-taking, preventively order the immediate suspension of the practice or take any other provisional measures that are

necessary to immediately re-establish the competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings.

2 – The measures provided for in this article may be adopted officially by the Authority or at the request of any party concerned and shall remain in force until revoked by the Authority and, in all cases, for a period not exceeding 90 days, unless, for sound reasons, an extension is granted.

3 – Without prejudice to the provisions of paragraph 5, before the measures referred to in the preceding paragraphs are adopted, the parties concerned shall be heard, unless such action shall put the objective or effectiveness of the preventive order at serious risk.

4 – Whenever a market which is subject to sectoral regulation is in question, the Authority shall request the respective regulatory authority's prior opinion, which shall be delivered within a maximum of five working days.

5 – The provisions of paragraph 4 shall not prevent the Authority, in urgent cases, provisionally determining the measures that are essential to re-establish or maintain effective competition.

Article 28

Completion of the evidence-taking

1 – When the evidence-taking is complete, on the basis of the report by the department gathering the evidence, the Authority shall make a final decision in which it may, depending on the case:

- a) Order that no further action on the case be taken;
- b) Declare that a practice restricting competition exists and, in this case, order the offender to adopt the preventive measures necessary for this practice or its effects to cease, within the period laid down;
- c) Apply the fines and other penalties provided for in Articles 43, 45 and 46;
- d) Authorise an agreement, under the terms and conditions of Article 5.

2 – Whenever practices affecting a market which is subject to sectoral regulation are in question, before a decision is made pursuant to paragraph 1 b) to d), the respective sectoral regulatory authority shall provide a prior opinion, which shall be delivered within a reasonable period of time prescribed by the Authority.

Article 29

Co-ordination with sectoral regulatory authorities

1 – Whenever, in accordance with Article 24 of this Act, the Authority is aware of facts occurring in an area subject to sectoral regulation which may be described as practices restricting competition, it shall immediately report such facts to the competent sectoral regulatory authority for the subject matter, for the latter authority to state its opinion within a reasonable period of time, to be set by the Authority.

2 – Whenever, within the scope of its attributions and without prejudice to the provisions of Article 24 (2), a sectoral regulatory authority officially or at the request of regulated bodies appraises issues that may constitute an infringement of this Act, it shall immediately inform the Authority of the case and supply the essential facts.

3 – In the cases referred to in the preceding paragraphs the Authority may, with a duly substantiated decision, defer its decision to open or proceed with an inquiry or proceedings for the period that it considers appropriate.

4 – Before reaching its final decision, the sectoral regulatory authority shall inform the Authority of its draft proposals, in order that the Authority may state its opinion within a reasonable period of time prescribed by the sectoral authority.

SECTION III

Control procedure for concentrations between undertakings

Article 30

Applicable law

The control procedure for concentrations between undertakings is governed by the provisions of this section, Section 1 of this Chapter and, subsidiarily, the Administrative Procedure Code.

Article 31

Presentation of a notification

1 – Prior notification of concentrations between undertakings shall be presented to the Authority by the persons or undertakings referred to in Article 8 (1) a) and b).

2 – Joint notifications shall be presented by a common representative with powers to send and receive documents on behalf of all the notifying parties.

3 – The notification shall be presented in accordance with the form approved by the Authority and shall contain the information and documents which it demands.

Article 32

Effective date of notification

1 – Without prejudice to the following paragraph, the notification shall be effective on the date of payment of the fee due under the terms of Article 57.

2 – Whenever the notification documents or information are incomplete or inaccurate, having regard for the information that should be supplied under Article 31 (3), the Authority shall invite the authors of the notification, in writing and within seven working days, to complete or rectify the notification within the period it stipulates. In this case the notification shall be effective on the date on which the Authority receives the information or documents.

3 – The Authority may forgo presentation of certain information and documents if they are not considered necessary for appraisal of the concentration.

Article 33

Publication

Within five days of the date on which it is effective, the Authority shall publish the essential elements of the notification in two national newspapers, at the expense of the authors of the notification, so that any interested third parties may present their observations within the prescribed time, which may not be less than 10 days.

Article 34

Evidence-taking

1 – Within 30 days of the date on which the notification is effective, the Authority shall complete the evidence-taking for the respective proceeding.

2 – If in the course of the evidence-taking it becomes necessary for additional information or documents to be supplied or for those that have been supplied to be corrected, the Authority shall communicate this fact to the authors of the notification, setting a reasonable time limit for them to supply the information in question or to carry out the essential corrections.

3 – The communication provided for in paragraph 2 suspends the period referred to in paragraph 1, with effect from the first working day immediately after that on which it is sent. The suspension shall terminate on the day immediately after receipt by the Authority of the information requested.

4 – In the course of the evidence-taking, the Authority shall request any other public or private bodies to provide any information that it considers appropriate for the decision on the case. This information shall be delivered within the time limits the Authority prescribes.

Article 35

Decision

1 – Within the time limit referred to in Article 34 (1), the Authority shall decide:

a) The concentration is not covered by the obligation of prior notification referred to in Article 9; or

b) Not to oppose the concentration; or

c) To initiate an in-depth investigation, when it considers that the concentration in question, in the light of the evidence gathered, may create or strengthen a dominant position which may result in significant barriers to effective competition in the Portuguese market or in a substantial part of it, in the light of the criteria defined in Article 12.

2 – The decision referred to in paragraph 1 b) shall be taken whenever the Authority concludes that, as it was notified or following the authors of the notifications' amendments, the concentration is not liable to create or strengthen a dominant position which may result in significant barriers to effective competition in the Portuguese market or in a substantial part of it.

3 – The decisions taken by the Authority pursuant to paragraph 1 b) may contain conditions and obligations intended to guarantee compliance with the commitments accepted by the authors of the notification with a view to ensuring that effective competition is maintained.

4 – The lack of a decision within the period referred to in paragraph 1 shall be interpreted as a decision of non-opposition to the concentration.

Article 36

In-depth investigation

1 – Within a maximum of 90 days of the decision date referred to in Article 35 (1) c), the Authority shall carry out the additional inquiries that it considers necessary.

2 – The provisions of Article 34 (2) to (4) shall, in particular, be applicable to the inquiries referred to in the preceding paragraph.

Article 37

Decision after the in-depth investigation

1 – Until the end of the period prescribed in Article 36 (1), the Authority may decide:

a) Not to oppose the concentration;

b) To prohibit the concentration, prescribing appropriate measures, should the concentration have already gone ahead, to re-establish effective competition, particularly the de-merging of the undertakings or the assets grouped together or the cessation of control.

2 - The provisions of Article 35 (2) and (3) shall be applicable, with due adaptations, to the decision referred to in paragraph 1 a).

3 - The lack of a decision within the period referred to in paragraph 1 shall stand as a decision of non-opposition to the concentration.

Article 38

The right of the parties to be heard

1 – Before the decisions referred to in Articles 35 and 37 are taken, the authors of the notification and the opposing parties shall be heard.

2 – In the decisions of non-opposition referred to in Article 35 (1) b) and Article 37 (1) a), when not accompanied by conditions and obligations, the Authority may, in the absence of opposing parties, forgo the opportunity to hear the notification authors.

3 – For the purposes of this article, opposing parties shall be considered those who, within the proceeding, have shown themselves to be against the concentration in question.

4 – While the parties are being heard, the calculation of the time limits referred to in Articles 34 (1) and 36 (1) shall be suspended.

Article 39

Co-ordination with the sectoral regulatory authorities

1 – Whenever a concentration of undertakings affects a market that is subject to sectoral regulation, before reaching a decision pursuant to Article 35 (1) or Article 37 (1), depending on the cases, the Competition Authority shall ask the respective regulatory authority to state its opinion, within a reasonable period prescribed by the Authority.

2 – The provisions of the preceding paragraph shall not affect the exercise by the sectoral regulatory authorities of the powers that, within the scope of their specific duties, are legally conferred on them in relation to the concentration in question.

Article 40

Official proceedings

1 – Without prejudice to the application of the relevant penalties, the following are subject to official proceedings:

- a) Concentrations of which the Authority becomes aware and which, in not complying with the provisions of this Act, have not been subject to previous notification;
- b) Concentrations for which the explicit or tacit decision of non-opposition was grounded on information, provided by the participants in the concentration, which was false or inaccurate with regard to essential circumstances for the decision;
- c) Concentrations in which there has been total or partial disregard for the obligations or conditions imposed at the time of the decision of non-opposition.

2 – In the case of subparagraph a) of the preceding paragraph, the Authority shall notify the undertakings of the position of non-compliance so that they may notify the concentration under the terms of this Act, within a reasonable period prescribed by the Authority, which may also decide on the fine to be applied under Article 46 b).

3 – In the cases of 1 a) and 1 b), the Authority is not subject to the periods prescribed in Articles 32 and 37 of this Act.

4 – In the cases falling under 1 c), the Authority's decision to initiate official proceedings is effective from the date of its communication to any of the undertakings or persons participating in the concentration.

Article 41

Nullity

Legal acts relating to a concentration are null and void insofar as they contravene the Authority's decisions which have:

- a) Prohibited the concentration;
- b) Imposed conditions on its implementation; or
- c) Ordered appropriate measures to re-establish effective competition.

CHAPTER IV

Infringement and penalties

Article 42

Qualification

Without prejudice to the criminal responsibility and administrative measures which exist, infringements of the regulations laid down in this Act and of the Community law regulations which the Authority has the responsibility of enforcing are administrative offences punishable under the provisions of this Chapter.

Article 43

Fines

1 – The following constitute an administrative offence with a fine that may not exceed 10% of the previous year's turnover for each of the undertakings participating in the infringement:

- a) Infringement of Articles 4, 6 and 7;
- b) The execution of concentrations of undertakings which have been suspended under the terms of Article 11 (1) or that have been prohibited by a decision adopted pursuant to Article 37 (1) b);
- c) Disregard of a decision ordering preventive measures, pursuant to Article 27;
- d) Disregard of the conditions or obligations imposed on undertakings by the Authority in pursuance of Article 11 (4), Article 35 (3) and Article 37 (2).

2 – In the case of associations of undertakings the fine provided for in paragraph 1 shall not exceed 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour.

3 – The following constitute an administrative offence with a fine that may not exceed 1% of the previous year's turnover for each of the undertakings:

- a) Failure to notify a concentration subject to prior notification according to Article 9;
- b) Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by the Authority in the exercise of its powers of sanction or supervision;
- c) Failure to co-operate with the Authority or obstruction of its exercise of the powers provided for in Article 17.

4 – If witnesses, specialists or representatives of the complainant or non-compliant undertakings fail to attend, without justification, in proceedings for which they have been properly notified, the Authority may apply a fine not exceeding 10 units of account.

5 – In the cases provided for in the preceding paragraphs, if the administrative offence is the omission to comply with a legal duty or an order issued by the Authority, the application of the fine does not discharge the offender from compliance with the duty, if compliance is still possible.

6 – Negligence is punishable.

Article 44

Criteria for determining the fine

The fines referred to in Article 43 are set in relation to the following circumstances, amongst others:

- a) The gravity of the infringement for the maintenance of effective competition in the Portuguese market;
- b) The advantages that the offending undertakings have enjoyed as a result of the infringement;
- c) The repeated or occasional nature of the infringement;
- d) The extent of participation in the infringement;
- e) Co-operation with the Authority, until the close of the administrative proceedings;
- f) The offender's behaviour in eliminating the prohibited practices and repairing the damage caused to the competition.

Article 45

Additional penalties

Should the gravity of the infringement so justify, the Authority shall, at the offender's expense, publish the decision taken in proceedings initiated in pursuance of this Act, in the official gazette, the *Diário da República*, or in a Portuguese newspaper with national, regional or local circulation, depending on the relevant geographical market in which the prohibited practice had its effects.

Article 46

Periodic penalty payments

Without prejudice to Article 43, in the following cases the Authority may decide, when justifiable, to apply a periodic penalty payment of up to 5% of the average daily turnover in the last year, for each day of delay, calculated from the date prescribed in the decision:

- a) non-compliance with a decision of the Authority imposing a penalty or ordering the application of certain measures;

- b) Failure to notify a concentration subject to prior notification according to Article 9;
- c) Failure to supply information or the supply of misleading information in the prior notification of a concentration of undertakings.

Article 47

Responsibility

1 – For the offences provided for in this Act the following may be held responsible: individuals, legal persons, regardless of the regularity of their constitution, companies and associations without legal personality.

2 – Legal persons and their equivalents, in the terms of paragraph 1, shall be responsible for the offences provided for in this Act when the facts have been carried out on their behalf or on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees,.

3 – The directors of legal persons and equivalent bodies shall be subject to the penalty prescribed for the author, especially attenuated, when they know or should know of the infringement yet fail to take the appropriate measures to terminate it immediately, unless a more serious penalty is applicable in pursuance of another legal provision.

4 – Undertakings which are part of an association of undertakings that is subject to a fine or a periodic penalty payment according to Articles 43 and 46 are jointly and severally responsible for payment of the fine.

Article 48

Periods of Limitation

1 – Proceedings for an administrative offence are subject to a period of limitation of:

- a) Three years in the cases provided for in Article 43 (3) and (4);
- b) Five years in other cases.

2 – The period of limitation for penalties is five years from the date on which the decision determining its application becomes final or res judicata, except in the case provided for in Article 43 (4), for which it is three years.

3 – The period of limitation is suspended or interrupted in the cases provided for in Articles 27-A and 28 of Decree-Law No. 433/82 of 27 October, in the wording of Decree-Law No. 109/2001 of 24 December.

CHAPTER V

Appeals

SECTION I

Administrative offence proceedings

Article 49

Legal regime

Unless otherwise provided for by this Act, the following articles and, subsidiarily, the general regime for administrative offences are applicable to the lodging, processing and judgement of the appeals provided for in this section.

Article 50

Jurisdiction and effects

1 – The Tribunal de Comércio de Lisboa (Lisbon Commercial Court) shall hear appeals against the Authority's decisions to apply fines or other penalties provided for by the law, with suspensive effect.

2 – The same court shall hear appeals against the other decisions, orders and measures taken by the Authority, solely with devolutive effect, according to the terms and limits prescribed in Article 55 (2) of Decree-Law No. 433/82 of 27 October.

Article 51

Procedural regime

1 – When an appeal has been lodged against one of its decisions, the Authority shall forward the records to the Public Prosecution Service within 20 working days. It may also enclose further statements.

2 – Without prejudice to Article 70 of Decree-Law No. 433/82 of 27 October, in the wording of Decree-Law No. 244/95 of 14 September, the Authority may also enclose other particulars or information which it considers relevant to the decision in question and may offer proof.

3 – The Authority, the Public Prosecution Service or the accused may object to the court's decision being made by order, without a court hearing.

4 – Withdrawal of the accusation by the Public Prosecution Service requires the Authority's agreement.

5 – If there is a court hearing, the court shall make its decision on the basis of the evidence presented in the hearing as well as on the proof produced in the administrative phase of the offence proceedings.

6 – The Authority has the right to appeal, independently, against appealable decisions arising from an objection.

Article 52

Appeal against the decisions of the Lisbon Commercial Court

1 – Appealable decisions of the Lisbon Commercial Court, in accordance with the general regime for administrative offences, may be challenged in the Lisbon Court of Appeal, of which the decision shall be final.

2 – There is no ordinary appeal against the judgement of the Lisbon Appeal Court.

SECTION II

Administrative procedures

Article 53

Procedural regime

The provisions of the following articles and, subsidiarily, the Administrative Court Procedural Code regulations on objections to administrative acts, are applicable to the lodging, processing and judgement of the appeals referred to in this section.

Article 54

Jurisdiction and effects of the appeal

1 – The Lisbon Commercial Court shall hear appeals against the Authority's decisions in the administrative proceedings to which this Act refers and against the ministerial decision provided for in Article 34 of Decree-Law No. 10/2003 of 18 January, with such appeals being treated as special administrative action.

2 – The appeals provided for in paragraph 1 have a purely devolutive effect, unless they are granted, exclusively or accumulatively with other provisional measures, suspensive effect by way of the order covering the provisional measures.

Article 55

Appeal against Lisbon Commercial Court decisions

1 – Judicial appeals against Lisbon Commercial Court’s decisions in the administrative actions to which this section refers shall be lodged with the Lisbon Appeals Court and, those against the latter court’s decision, though limited to matters of law, with the Supreme Court of Justice.

2 – If the judicial appeal solely concerns matters of law, the appeal shall be lodged directly with the Supreme Court of Justice.

3 – The appeals provided for in this article have a devolutive effect.

CHAPTER VI

Fees

Article 56

Fees

1 – The following are subject to a fee:

- a) Appraisal of concentrations between undertakings which are subject to compulsory prior notification according to Article 9;
- b) Appraisal of agreements between undertakings under the prior assessment procedure provided for in Article 5 (2);
- c) The issue of certificates;
- d) The issue of opinions;
- e) Any other acts that constitute a service provided by the Authority to private bodies.

2 – Fees are set, settled and charged under the terms defined in the Authority’s regulations.

3 – Enforced payment of debts arising from the failure to pay fees shall be carried out by means of a tax foreclosure action, with the certificate issued by the Authority for this purpose serving as a writ of execution.

CHAPTER VII

Final and transitional provisions

Article 57

Amendment to Law No. 2/99 of 13 January

Article 4 (4) of Law No. 2/99 of 13 January shall now be worded as follows:

«Article 4
(...)»

- 1 - (...)
- 2 - (...)
- 3 - (...)

4 – The Competition Authority’s decisions on concentrations between undertakings in which bodies referred to in the preceding paragraph have a holding are subject to a binding prior opinion of the Alta Autoridade para a Comunicação Social (Media Authority), which shall be negative when the free expression and confrontation of the different opinion trends are demonstrably in question.»

Article 58

Transitional regulation

Until entry into force of the Administrative Court Procedural Code, approved by Law No. 15/2002 of 22 February, the regulations on objections to administrative acts presently in force are subsidiarily applicable to the lodging, processing and judgment of the appeals referred to in Section II of Chapter V.

Article 59

Legislation repealed

1 – Decree-Law No. 371/93 of 29 October is repealed.

2 – Legislation granting competition protection responsibilities to bodies other than those provided for in Community law and the present Act are repealed.

3 – Until publication of the Authority's regulations to which Article 5 (2) of this Act refers Ministerial Order No. 1097/93 of 29 October shall remain in force.

Article 60

Review

1 – The legal framework for competition established in this Act and in the law establishing the Authority shall be adapted to take account of the development of the Community regime applicable to undertakings, according to Articles 81 and 82 of the Treaty which established the European Community and the regulations on the control of concentrations between undertakings.

2 – The Government shall make the necessary legislative amendments after hearing the Competition Authority.

Approved on 10 April 2003.

The President of the Assembly of the Republic, *João Bosco Mota Amaral*.

Promulgated on 26 May 2003

Let it be published.

The President of the Republic, JORGE SAMPAIO

Countersigned on 28 May 2003

The Prime Minister, *José Manuel Durão Barroso*
