

## 1. A Brief Study of Competition Law

### 1.1 Companies and Competition

Effective competition in the supply of goods and provision of services reduces prices, improves quality and allows greater choice for consumers.

A balanced competitive market assumes, therefore, economic agents subject to competitive pressure from each other, behaving autonomously, through lawful means, based on the merits of the goods or services concerned and / or marketing strategy.

When economic agents, through the respective conducts seek to distort or falsify the functioning of markets, may be concerned competence restrictive practices.

### 1.2 Competition restrictive practices

The competition restrictive practices are, fundamentally, three: 1) agreements and concerted practices and decisions of companies' association; 2) abuse of a dominant position; 3) abuse of an economic dependence.

1) The **agreements and concerted practices and decisions of companies' association** which have as their object preventing, distorting or restricting substantially the competition in all or part of the market, are prohibited (and null) namely when they aim to fix, directly or indirectly, purchase or sales prices or any other transaction conditions; limit or control production, markets, technical development or investment; fragment the markets or sources of supply; apply in relation to business partners, unequal conditions to equivalent services, thus placing them on that basis, at a competitive disadvantage; do depend agreements celebration of the acceptance by the other parties, of supplementary obligations which, by their nature or according to commercial practice, have no connection with the object of such contracts.

It includes a set of behaviors carried out by separate companies, who coordinate their actions in the market, eliminating the risk and uncertainty inherent to the autonomous conduct of each one, replacing them with an understanding of wills and/or procedures.

On the competitive environment companies are obliged to autonomously determine their behavior in the market. When this does not happen, indicating, in contrast, the existence of

coordination between them, we may be facing the existence of competition restrictive practices whenever the companies involved give up from its behavior autonomy in the market, to reduce or eliminate the risks of competition.

These practices, in particular, are forbidden by the Portuguese Competition Law (article 9 of Law n° 19/2012 of 8 May) and article 101° of the Treaty on the Functioning of the EU, punishable whenever they have the purpose or effect of preventing, falsifying or restricting competition.

2) The **abuse of a dominant position** is a competition restrictive practice arising from the using by a company (or a group of companies) of its power in some market.

The abuse of a dominant position is the improper use by a company of its market power, resulting in the exploitation of other economic agents or in the exclusion of competitors from the market.

The determination of the existence of a dominant position of a company in a market, involves understanding the market share of the company, and the market shares of other companies in the market. It considers that a company has a dominant position in a market when it has a power that allows it to behave independently of its competitors, its suppliers and its clients. This is when the company occupies a relevant position that, when it takes decisions in terms of trade policy, doesn't need to worry about the reaction of other economic agents.

It is understood that the company abuses of its dominant position when adopts behaviors inclined to influence the structure of a market with the purpose of avoiding the preservation of the level of competition on the market or the growth of that competition, where, precisely as a result of its presence, the competition is already weakened

A company abuses of its dominant position if, for example, refuses to supply goods and services to certain companies or practices selling prices of products below cost.

The abuse of a dominant position is forbidden by the Portuguese Competition Law (article 11° of Law n° 19/2012 of 8 May) and article 102° of the Treaty on the Functioning of the EU.

3) The **abuse of an economic dependence** is a practice that occurs from the illicit use by a company of its power in a relation with another one, which is in a state of dependence, due to lack of equivalent alternative for the provision of goods or services.

The abuse of an economic dependence is a competence restrictive practice, and forbidden in the Portuguese Competition Law (article 12 of Law No. 19/2012 of 8 May) but not provided in European Law.

Refers to situations where it is exploited abusively the dominance of one company over another, in the field of bilateral relations between the two whenever this behavior is likely to affect the functioning of the market or the competition.

As essential notes of this practice we can point out that:

1) the abuse of dependence is only observable in a vertical relationship between two companies;

2) the company "victim" now has to be in a state of economic dependence of the "dominant" company, because of the lack of equivalent alternatives. It is considered that the company "victim" has no equivalent alternative when the supply of the good or service in question are covered by a limited number of companies and the company "victim" cannot get identical conditions by other trading partners within a reasonable period of time;

3) the dominant company must have adopted behaviors, regarding the company "victim", in the context of that relationship of dependency, considered abusive. The law exemplifies some of these possible abusive behavior: refusal to supply, abrupt cutting of trade relations, among others; and finally, as mentioned above,

4) abuse of economic dependence must likely to affect the functioning of the market or the structure of competition.

With regard to the consequences for companies for adopting restrictive practices it can lead to the imposition of a fine by the Competition Authority determinate by pondering the gravity of the practice, its duration, the offender's behavior and its impact on competition.

The Competition Authority can still apply, during the sanctioning procedure, a protective measure (eg. the practice suspension) when investigations suggest a practice is about to cause serious and irreparable damage or difficult to repair for competition.

The legal consequence for the managers or the directors of the companies involved in those practices is the application of a fine not exceeding 10% of the respective annual compensation earned by the performance of their duties in the offending company, the last full year in which there has been a prohibited practice.

### **5.3 Benefits of the complainants to the Competition Authority for breaches of Competition Law committed by themselves**

The benefits of the complainants to the Competition Authority for violations of Competition Law committed by themselves are eventually the exemption or the reducing of the fines amount, since the company reveals its participation in an alleged agreement or concerted practice, and is this company the first to provide information and evidence and cooperates with the Competition Authority during the sanctioning procedure.

The exemption or fine reduction only applies to agreements and concerted practices and decisions of companies' association which have as their object preventing, distorting or restricting substantially their competition in all or part of the market.

#### **5.4 Competition Authority powers**

The Competition Authority mission is to assure and apply the rules of promotion and defense of competition in the private, public, cooperative and social sectors, ensuring the respect for the principle of the market economy and free competition, in view of the efficient functioning of markets, optimal allocation of resources and the interests of consumers. To this end, it has sanctioning, supervision and regulation powers.

In the exercise of its sanctioning powers, it is for the Competition Authority:

- 1) To identify and investigate the behavior liable to infringe the national and European Union Competition Law, particularly with regard to restrictive practices, proceeding to the examining and decision on the respective processes applying to where appropriate, sanctions;
- 2) To charge fines;
- 3) To adopt protective measures;

In the exercise of its supervision powers, it is for the Competition Authority:

- 1) To instruct and decide administrative procedures relating to concentrations between companies in order to determine their effect on the structure of competition, considering the need to preserve and develop, in the interest of consumers, the effective competition on the market;
- 2) To carry out studies, inspections and audits, in competition matters.

In the exercise of its regulatory powers, it is for the Competition Authority:

- 1) To prepare and approve regulations;
- 2) To make recommendations and general directives;
- 3) To comment legislative initiatives or other relating to the promotion and protection of competition, upon request of the Parliament or the Government;
- 4) To make suggestions or proposals for the creation or revision of the legislation.

## **2. INDUSTRIAL LAW**

### **2.1 Concept and object of Industrial Law**

The Industrial Law is a Commercial Law sub-branch whose purpose is the protection of the economic statement of the company and fair competition through two mechanisms:

- Assignment of private rights protected by exclusivity (patents, trademarks, etc.) and
- Prohibition of unfair competition.

### **2.2 Patents**

The object of the patent is the protection of a new invention, implying inventive activity and susceptibility of industrial application. Through the patent is granted on its holder the exclusive right to exploit the invention, the right to prevent third parties without his consent, to manufacture, deliver, store, trade or use the invention.

The requirements for patentability are novelty, inventive activity and susceptible of industrial application of the invention.

First, an invention is considered new when it is not in the state of the art. The state of the art consists, on the one hand, all that was made available to the public before the date of the patent request in the INPI (National Institute of Industrial Property), by description, use or any other means and, on the other hand, the content of patent and utility model requests not yet published.

Second, it is considered that an invention involves an inventive activity if, an expert in the area does not reach easily to the same invention.

Finally, an invention is susceptible of industrial application if its object can be manufactured or used in any kind of industry or in agriculture.

The Portuguese Industrial Property Code establishes some situations that legitimize a third party to exploit a patented invention, for example:

- Through the patent owner's consent can a third party who has obtained such consent exploit the patented invention.
- The exploitation can be performed by those who have obtained a contractual license from the patent owner.

Regarding the patent attribution process it consists, fundamentally, in the evaluation by the INPI (National Institute of Industrial Property) of the compliance with the requirements of patentability of the invention. A patent lasts for 20 years and is not renewed.

### **2.3 Utility Models**

The object of the patent and utility model is exactly the same: protection of an invention as the technical knowledge with practical application that is new, that involves an inventive activity and is susceptible of industrial application.

The administrative procedure for the granting of the utility model is quicker and more simplified and less expensive than the patent. However, the duration of the utility model shall be six years and may be renewed twice for further periods of two years (term less than the patent: 20 years accordingly).

On the other hand, cannot be a utility model, but only a patent, the inventions relating to biological matter or that relate to chemical or pharmaceutical substances or processes.

### **2.4 Trademarks**

A trademark serves to mark or distinguish goods and services of a company relative to the other or others. In addition to the distinctive function a trademark takes the indirect guarantee function of the quality of products or services, reporting them to a non-misleading origin. Assume also an advertising function, contributing itself to the promotion of products and services which marks.

A trademark can be any word, sign, symbol or graphic. The trademark serves as a badge of origin for business and its brands (the name that a business chooses for one of their products), and can consist of words, logos, images, slogans, shapes and colors, or a combination of all of these.

The exclusive use of the trademark is granted by its registration in the INPI and the registration duration is 10 years from its concession and can be renewed indefinitely for equal periods.

The trademark registration confers to its holder the exclusive use and therefore the right to prevent third parties without the owner's consent, use, in the exercise of economic activities,

any signal equal or similar in identical goods or services or related those for which the mark is registered, and that as a result of the similarity between the signs and the similarity of the products or services could cause a risk of confusion or association in the minds of consumers.

The trademark will be regarded as misleading if it consists of signs that are likely to mislead the public into error, in particular the nature, qualities, usefulness or geographical origin of the goods or services to which the mark is intended. If the mark is misleading its registration will not be accepted.

On the other hand it is considered a trademark imitation if cumulatively:

- The registered trademark has priority;
- Both identify identical or similar goods or services;
- Have such graphic, figurative, audio similitude or other that easily induce the consumer to error or confusion, or which carry a risk of association with a previously registered trademark, so that the consumer cannot distinguish but after close examination or comparison.

## **2.5 Logos**

The trademark has the function to mark or distinguish the goods and services of one company relative to other, and may consists of a sign or set of susceptible signs of being represented graphically, by words, including personal names, designs, letters, numbers, sounds the shape of the product or its packaging.

The logo is intended to mark or distinguish the entity that sells products or provides services and can be used in establishments, ads, print or mail. The logo may consist of a sign or set of signs capable of being represented graphically, particularly by word elements, figurative or a combination of both. The logo is assigned upon registration that lasts 10 years and can be renewed.

For example the owner of “Good Food” restaurant decided to create “Good Wine” trademark to mark the wine he produces. “Good Food” is the restaurant logo and “Good Wine” a trademark.



Do not confuse the logo with the firm. The logo marks and distinguishes the entity that sells products or provides services and can usually be designated as the name of the establishment. The firm is the trade name of the trader that by which it is known in the trade.

## **6.6 Transmission, Licensing and Merchandising**

The rights derived from patents, utility models, trademarks and logos may be transmitted or object of an exploration license.

The license agreement should adopt the written form.

Unless expressly stipulated otherwise in the agreement, the licensee has, for all legal purposes, the powers of the licensor.

The license is presumed to be non-exclusive.

Exclusive license is the one in which the right holder is prevented from granting other, while the first remains in force.

The exclusive license does not exclude the owner from also directly exploiting the licensed right, unless otherwise is stipulated in the agreement.

Unless otherwise agreed, the right obtained through the exploitation license cannot be alienated without the written consent of the right holder.

## **Merchandising**

It is a license subspecies by which the trademark owner authorizes a person to use it as a sign for different goods or services from the original ones with a promotional purpose. Normally the merchandising respects to the trademarks who have acquired a particular publicity value.

For example movie merchandising includes toys based on buildings or vehicles in the movies, action figures based on movie characters, prints of the movie poster and T-shirts with catchphrases and images from the movie.

## **6.7 Unfair Competition**

Unfair competition is the competition act contrary to honest acts, norms and practices of any branch of economic activity, namely:

1- Acts likely to cause confusion with the company, the establishment, the goods or services of competitors, whatever the means employed;

2- False statements made in the exercise of an economic activity, in order to discredit competitors;

3- Statements or references unauthorized made in order to benefit from the credit or reputation of a name, establishment or extraneous trademarks;

4- False indications of credit or own reputation, relating to capital or financial situation of the company or establishment, the nature or scope of its activities and business and the quality or quantity of its clientele;

5- False descriptions or indications of the nature, quality or utility of the products or services as well as the false indications of origin, locality, region or territory, of factory, property or establishment;

6- The elimination, occultation or alteration, by the seller or any intermediary, of the geographical origin of products or the registered trademark of the producer or manufacturer in products he intends to sale.

Constitutes an unlawful act, namely, disclosure, acquisition or use of trade secrets of a competitor without his consent, provided that such information:

- Is secret in the sense of not being generally known or readily accessible;
- Have commercial value because they are secret;
- Have been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

It will be punished with a fine of 3.000 euros to 30.000 euros, in the case of legal persons, and 750 euros to 7.500 euros, in the case of an individual who commit any of the acts of unfair competition being the entity responsible for the instruction of administrative offense processes and the application of fines the ASAE

It may also be mentioned measures and procedures aimed to protect industrial property rights. Thus, whenever there is violation or founded fear that another person cause serious damage and difficult to repair of the industrial property right, the court may, enact appropriate action to:

- Inhibit any imminent infringement; or
  
- Prohibit the continued violation.

Who, intentionally or recklessly, unlawfully violates the industrial property rights of other, is obliged to compensate the injured party for damages.

In addition to compensation for damages, the court may determine measures relating to the destination of the goods in which there has been infringement of industrial property rights including the destruction or removal, from the market, without any compensation to the offender.

It can still be imposed by the court inhibitory measures such as:

- A temporary ban of certain activities or professions;
- The deprivation of the right to participate in fairs or markets;
- The temporary or permanent closure of the establishment.