# THE LAW OF COMPETITION - A CRIME OR A MERE MISDEMEANOR?

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***Abstract***

*Competition is a public good that supports the proper functioning of the market economy and democracy itself. Competition is the priority public good in a market economy since only through it can the goal of efficiency of affectation and well-being be achieved. It is necessary to assess, in terms of their impact on the wellbeing of citizens in general, those that are consumers, as well as the impact of competition on preservation and self-preservation of companies. The behavior of economic agents, which we will mainly address as violators of competition law, has a large impact on the private sphere of citizens and other companies. From immemorial times, this reality has been, at least, intuitive and its function attributed to the Law. Unlawful competition may, from a legal point of view, invest distinct types, as becomes evident from a geographical and temporal comparison. In our study we address the evolution of the Competition law in Portugal throughout he years, and its implications. We conclude that the non-criminalization of acts that violate the provisions of Competition Law promotes a repetition, as reiterated behavior, since these are highly profitable actions, even in the case of very high pecuniary sanctions.*

***Keywords:*** *competition law; Portugal; economy; crime; misdemeanor.*

***JEL Classification:*** K22

## 1. Introduction

Because we understand market economy as the most efficient economic system available, and since competition is the mechanism that regulates and operates our economic system, turning it into a public good, we argue that the State has the duty to ensure compliance. Competition is, therefore, a public good that supports the proper functioning of the market economy and democracy itself. Obviously, it must be considered an integral part of public law. It is necessary to assess, in terms of their impact on the wellbeing of citizens in general, those that are consumers, as well as the impact of competition on preservation and self-preservation of companies. The behavior of economic agents, which we will mainly address as violators of competition law, has a large impact on the private sphere of citizens and other companies.

We understand, from the above, that competition should be the object, as it indeed is, of private litigation.

The regulation of the economic system, as well as the politic, lacks guarantees. It is well known that monopolies diminish social wellbeing and that the existence of a single company providing a service, instead of several companies, limits and restricts consumer wellbeing. In this sense, competition law aims to increase and disseminate social wellbeing, rather than giving power to large companies. There are, however, limitations to the role of competition Law. These shortcomings, or limitations, as we addressed them initially, translate into asymmetry between companies, products and workers, and make markets undergo moments of great uncertainty.

Because of the exposed, the resolution of market problems is not clear through the current competition law or through the sanctions applied by this normative to the transgressors. It is, therefore, necessary to find solutions that reach beyond the existing ones and that allow for an effective market regulation.

The goal of this work is, therefore, to search for a solution that, from our perspective, contributes to an effective and definitive solution to the problem.

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## 2. Competition as a public good

Competition is a public good, and society cannot expect the victims of anticompetitive conduct to protect themselves."[3] Competition is a constitutional asset[4].

Regulation and competition protection aims to promote consumer wellbeing by correcting market failures, resulting from cartels and other restrictive agreements between companies, as well as to face the abuses of dominant position and economic dependence.

However, these benefits are frequently so disseminated that there is not enough incentive for the victims to react to these offenses. The protection of competition, as a public good, entails the creation and safeguarding, first and foremost, of conditions which allow the competitive functioning of markets, to the benefit of consumers as well as companies[5]. We understand, therefore, that the legal right protected by the rules of Competition Law is essentially the free market operation.

In the present socioeconomic context, the concept of perfect competition[6] does not exist.

In this context, the State assumes the role of society's representative, insofar as it considers itself responsible for restoring the violated legal order[7]. Such intervention aims, above all, to promote free competition, repressing any and all market distortions caused by the adoption of harmful practices and behaviors by companies.

In a doctrinal way[8], we understand that State intervention on the economy must always be rooted on avoiding practices or behaviors economically considered as abusive, with effective market repercussions, and obviously with regards to the affectation of free trade and free competition. It is also an expression of free initiative, which together with human labor is the ratio of a Democratic State of Law, aiming above all to ensure a dignified living for all citizens and to put in effect the more social aspect of Justice.

## 3. The emergence and development of Competition Law in Portugal

Some doctrine on Competition Law already exists in Portugal. Interest on this topic first arose in 1973, when Teixeira MARTINS[9] included this term, "Competition", in the title of his work on consumer protection law. It was followed by Simões PATRÍCIO[10] in 1982, CARDOSO MOTA in 1984[11], JALLES in 1985[12]. In 1989, the first lessons on Competition Law appeared by the hand of CASEIRO ALVES[13].

Some contributions to the history of Competition Law in Portugal are deserving of highlight: the report presented by Nuno RUÍZ to the FIDE Congress and published by the Bulletin of Documentation and Comparative Law[14]; the communication of Counselor Anselmo RODRIGUES,

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[3] Jonathan B. Baker, "The Case for Antitrust Enforcement", Journal of Economic Perspectives, vol. 17, no. 4, 2003, p. 27.

[4] We will refer to this constitutional consecration on the next chapter.

[5] Michael Porter on this matter: "*few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry. Rivalry at home is not only uniquely important to fostering innovation, but benefits the national industry and cluster in many other ways (…) In fact, creating a dominant domestic competitor rarely results in international competitive advantage*. *Firms that do not have to compete at home rarely succeed abroad. Economies of scale are best gained through selling globally, not through dominating the home market*".

[6] In which a number of small producers meet market demands with similar goods and products, at identical pricing, without any collusive practice between them

[7] When there are situations of abusive practices by the economic power

[8] Vide Moura E Silva, Miguel, "*Direito da Concorrência. Uma Introdução jurisprudencial*", Coimbra, Almedina, 2008, p. 15.

[9] Martins, J.T. , Capitalismo e Concorrência: Sobre a Lei de Defesa do Consumidor. Coimbra: Centelha, 1973.

[10] Patrício, J.S., Direito da Concorrência: Aspectos Gerais. Lisboa: Gradiva, 1982.

[11] Cardoso Mota, A.J., O Know-How e o Direito Comunitário da Concorrência. Lisboa: Centro de Estudos Fiscais da Direcção Geral das Contribuições e Impostos, 1984.

[12] Jalles, I., Os Contratos de Licença de Patentes Face ao Direito Comunitário da Concorrência: Apreciação de Algumas Cláusulas-Tipo. Coimbra: Gráfica de Coimbra, 1985.

[13] Alves, J.M.C., Lições de Direito Comunitário da Concorrência. Coimbra: Coimbra Editora, 1989.

[14] Ruiz, N., *A aplicação do Direito Comunitário da Concorrência em Portugal*. Boletim de Documentação e Direito Comparado. (1999), vol. 77-78.

president of the Competition Council, to the Economic and Social Council in 2001[15]; the review presented by SANTOS *et al.* on the Economic Law manual[16]; and the introduction to the new competition law that José Luís CRUZ VILAÇA wrote for the Competition studies by Goucha Soares and Maria Manuel Leitão Marques[17]. According to SANTOS[18], the first attempt at competition defense legislation in Portugal dates back to 1936, when Law No. 1936 of March 18 on the control of economic coalitions was approved, without having great practical consequences. The same authors also mention three projects that have aspects of competition defense: Decree-Law No. 44016 of November 8, 1961; a Law proposal to the National Assembly (508/XIII); and the Law 1/72 of March 24. Decree-Law 44016 proposed to "*create a free trade area in the national space, in accordance with the principle of article XXIV of GATT*", in order to allow Portugal's accession to GATT without applying the principle of most-favored-nation clause. It included a set of provisions conducive to that goal; between rules on free movement of goods, elimination of customs duties and quantitative restrictions, and a transport policy, emerged Articles 36 and 37 that established a system for competition defense that included the criminalization (to be carried out later) of company behaviors that divided the national market amongst themselves, or that practiced discriminatory pricing[19], thus negatively viewing anti-competitive behavior[20].

With regards to Law No. 1/72 of March 24, using the words of Counselor Anselmo RODRIGUES, it proclaimed having *"... in view the economic and social development of the country», «taking into consideration market structure…" (...)*. It provided for *the punishment of concerted agreements, decisions or practices, as well as other competition restrictive practices, and instituted an administrative body responsible for its supervision (...), the High Council of Economy"* [21]. This law was never more than a dead letter, as it was never regulated as established[22], probably a consequence of the regime's hesitations between the corporate and the market solutions, as correctly pointed out by CRUZ VILAÇA[23]. CRUZ VILAÇA, however, mentions the existence of "*modernity*" notes in the instrument, namely in what concerns the enumeration of conducts that could be considered anti-competitive practices (clearly influenced by European Law), or the idea that some of these practices might be justified on grounds of the public interest – progress or better production conditions. The corporate influence was, however, manifest. CRUZ VILAÇA also indicates a latent confusion between the interests of competition and the interests of competitors, as well as between anti-competitive practices and practices of unfair competition. The need for competition laws arose, in the modern terms, in the late 19th century in Austria and spread throughout Europe; it probably reached Portugal between the end of the 19th and the beginning of the 20th century.

The political instability that Portugal went through during this period, more than possible ideological objections, prevented this from happening. After missing the first wave, Portugal could have taken advantage of the second continental wind of the Competition Law in the late 1940s, 1950s and even 1960s, which also did not happen as we have seen previously. At this stage, we consider the

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[15] Rodrigues, A., Instituições de Defesa da Concorrência em Portugal e a sua Actuação. In SOCIAL, C.E.E. *A Concorrência e os Consumidores.* Estoril: Conselho Económico e Social, 2001.*Cit.*

[16] Santos, A., Gonçalves, E. & Marques, M.M., Direito Económico. 5 ª edição. Coimbra: Almedina, 2006. ISBN 9789724023298.*Cit.*

[17] Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. and Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.

[18] Santos, A., Gonçalves, E. & Marques, M.M., Direito Económico. 5 ª edição. Coimbra: Almedina, 2006. ISBN 9789724023298.*Cit* p. 326, note 19.

[19] Cruz, M.J.O., Planeamento Económico em Portugal 1953-1974. Um Acervo Histórico. editado por PLANEAMENTO, D.D.P.E. Lisboa: Ministério do Ambiente, do Ordenamento do Território e do Desenvolvimento Regional, 2006. p. 210

[20] Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. and Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.

[21] Rodrigues, A., Instituições de Defesa da Concorrência em Portugal e a sua Actuação. In SOCIAL, C.E.E. *A Concorrência e os Consumidores.* Estoril: Conselho Económico e Social, 2001. p. 45.

[22] Santos, A., Gonçalves, E. & Marques, M.M., Direito Económico. 5 ª edição. Coimbra: Almedina, 2006. ISBN 9789724023298. In the same direction, Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização in Soares, A.G. & Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.

[23] Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. & Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.

biggest obstacles were ideological[24]. Although it does not fit within the scope of this study, it seems opportune to make some considerations about Portuguese corporatism in the 20th century, insofar as its influence may have determined a Portuguese way of thinking the economy that could have repercussions to this day.

Of Italian inspiration, Portuguese corporatism in the 20th century[25] was based essentially on the idea – opposite to the liberal and neoliberal concept of individual rationalism – that the individual's motivations are determined by instincts of cooperation and association. Thus, corporations appeared that, under state supervision, would coordinate individual actions[26]. Martins AFONSO[27], quoting Oliveira Salazar's speech of July 30, 1930, summarized the fundamental principles of the political revolution that would be the basis of the Constitution of the Portuguese Republic of 1933, the National Labor Statute of 1933, and Law No. 2086 of August 22, 1956, that instituted corporations [28]: every individual and collective interests were subordinated to the national goals, a strong social and corporate State limited by traditional Christian morality and Law, a stable, strong, and independent executive power that was in close correspondence with families, parishes, municipalities and corporations, as well as the State's guidance of the economy.

Martins AFONSO[29] elaborates a doctrinal work on Portuguese corporatism, tracing its history in Portuguese territory[30]. The official doctrine, therein described, highlighted the existence of corporations participating in the government of the city of Lisbon since the reign of D. Dinis, referring the participation of *"doos homees bons de cada mester"* and using toponymic examples to illustrate the importance of corporations. The official doctrine had the notion that Portuguese medieval corporations had a municipal basis and aimed, above the interests of their associates, at the defense of the local economy. To this end, each corporation had a private regulation and own authorities, under the direction of municipal authorities. AFONSO considers the regiment of 1489, relating to *"borzeguyeiros, çapateiros e todolos outros ofiçios do oficio do Spirital de san Vicente"*[31], to be the first recorded Regiment of "*office*" although such regiments were already an ancestral practice. AFONSO gave an overview of corporations and confraternities in Portugal from the first dynasty, and refers that the title of *procurator* was introduced by Master of Aviz to designate the representatives of Lisbon crafts on the House of the Twenty Four, which was the remote origin of the Corporate Chamber. According to AFONSO, Portuguese corporative organization was based on *economic groups of apprentices, officers and teachers from the same profession*, organized around a *Professional Chamber*, named *House of the Twenty Four*, which represented corporations at the county level and thus participated on Municipality administration. The advantages offered to corporations consisted in the dignification of work and the profession, the good product quality and work perfection, and the mutual assistance between associates. Based on this register, AFONSO violently criticized liberalism for its opposition to the corporative system that resulted in the extinction of the corporative institution[32] and proclaimed the return of this institution by the Estado Novo, in doctrinal association with the encyclical *Rerum Novarum* of Pope Leo XIII in 1891 and the encyclical *Quadragesimo Anno* of Pope Pius XI in 1931.

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[24] Rodrigues, A., Instituições de Defesa da Concorrência em Portugal e a sua Actuação. In SOCIAL, C.E.E. *A Concorrência e os Consumidores.* Estoril: Conselho Económico e Social, 2001.

[25] Bastien, C. E Cardoso, J.L., *From homo economicus to homo corporativus: A neglected critique of neoclassical economics*. The Journal of Socio-Economics. (2007), vol. 36, p. 118.

[26] Ibid.

[27] Afonso, A.M., Princípios Fundamentais de Organização Política e Administrativa da Nação. 15 ª edição. Lisboa: Papelaria Fernandes, s/d. p.34.

[28] Approved by Decree-Law No. 23 048 of September 23, 1933.

[29] The work in reference was the manual adopted for the class of Political and Administrative Organization of the Nation, part of the 6th grade of Lyceum

[30] *Op. Cit. pp. 78 and following.* It is a fascinating text on the origin of corporations in Portugal, which mentions a little-known work by Marcello Caetano, *A antiga organização dos mesteres da cidade de Lisboa*, communication presented to the colloquium on Corporate and Labor Law and published by the National Press in 1943 and 1946.

[31] Afonso, A.M. — Princípios Fundamentais de Organização Política e Administrativa da Nação. 15 ª edição. Lisboa: Papelaria Fernandes, s/d. p. 79. This regiment is also pointed out by SÁ, A. - Sinais da Guimarães Urbana em 1498. Braga: Universidade do Minho, Instituto de Ciências Sociais. 2001.

[32] SÁ, A. - Sinais da Guimarães Urbana em 1498. Braga: Universidade do Minho, Instituto de Ciências Sociais. 2001.

Law 2086 of August 22, 1956 organized the national economy into eight corporations that were subsequently created between 1957 and 1959: Farming, Industry, Commerce, Transportation and Tourism, Credit and Insurance, Fishing and Canned fish products, Press and Graphical arts, and Entertainment. These corporations had a number of functions, including coordination of Federations or Unions, at an intermediate level, and of National Unions, Guilds, Houses of the People and of Fishermen, at a basic level. The dissemination and strengthening of the corporative spirit was the object of a "Social and Corporative Formation Plan", approved by Law No. 2085 of August 17, 1956[33],which was the first manifestation of Estado Novo's evident concern to educate the population for corporatism. The work of AFONSO is a magnificent example of this. With the 1974 revolution, the corporative period of the Portuguese Republic formally ended, with the beginning of a phase of some hesitation between the model of market economy and the model of planned economy[34]. This hesitation was even reflected in constitutional terms[35]. It was only after overcoming this identity crisis, with the somewhat clear option of European integration, that it was possible to consider the need for a competition policy. This came to pass for the first time, at the constitutional level, with the 1982 revision by the addition of Article 81 (f): Priority State Tasks, included in Title – I, General Principles of Part II – Economic Organization.

Under the abovementioned provision and with regards to economic organization, the State's functions were to "*ensure balanced competition between companies*", and it would be imperative to interpret them under Article 85 (1), which provides that the State "*protects economically viable small and medium-sized companies*". It was, therefore, a somewhat incipient proclamation that, nevertheless, proved to be an evolution on the previous state of affairs in which nothing was said about competition. In any event, this statement was consistent with the lack of definition of the type of economic organization to be followed: still in Article 81, in the 1982 redaction that kept the original wording, point *(l)* stated that it would be incumbent upon the State to create the necessary legal and technical structures for the establishment of a democratic planning system for the economy. "*Otherwise*", nothing in the Constitution of the Portuguese Republic mentioned the market.

The Portuguese Constitution has currently some, even if slight, concern with competition even in relation to the market: Article 81 *(f)* on its current wording establishes that it is incumbent on the State: *"to ensure the efficient functioning of markets in order to guarantee a balanced competition between companies, to counteract monopolistic forms of organization, and to suppress abuses deriving from a dominant position and other practices that are detrimental to the general interest".* Contrary to MATEUS[36], we think that only with a lot of goodwill can one consider the defense of competition as a priority, on this constitutional norm. The basic idea is that the efficient functioning of the market serves to ensure a balanced competition, which completely reverses the logic of market economy or even of social market economy; moreover, when Article 99 (1) of CRP shows competitive concerns, it does so in terms of healthy competition between market agents, pointing to unfair competition and not to the search for efficiency – primarily it defends the interest of competitors and not the general interest: **competition is the guarantor of market efficiency which in turns is the guarantor of the economy's efficiency.**

Two reasons may exist for this norm's redaction: the first one is poor wording, perhaps caused by a poor understanding of the market and competition in the management of the economy; alternatively, it deals with a concept of competition that is different from what economic theory considers indispensable under market economies. We find it difficult to form an opinion on which of the two situations occurs: if the reference to the *balanced competition between companies* seems to point towards a neocorporative view of competition as a fair market behavior, the concern with monopolies and *practices detrimental to the general interest* seem to indicate a genuine concern with

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[33] Id. Ibid.

[34] Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. & Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.

[35] Rodrigues, A., Instituições de Defesa da Concorrência em Portugal e a sua Actuação. In SOCIAL, C.E.E. *A Concorrência e os Consumidores.* Estoril: Conselho Económico e Social, 2001.*Cit.* pp. 83-84.

[36] Mateus, A., *Economia e Direito da Concorrência e Regulação*. Sub-Judice, ISSN 08722137. (2007), vol. 40 no. September, 2007, p. 11.

competition as a mechanism to promote market efficiency that regulates the economy. It should be noted, however, that even today the constitutional legislation does not provide an obvious indication of what the Competition Law "*ratio legis"* should be: whether a regulation for the protection of small and medium-sized companies against unfair competition, or for guaranteeing economic efficiency through the promotion of business efficiency. Perhaps here resides the explanation for the traditional problems of the national economy and one of the major difficulties to overcome by those who must supervise and sanction anti-competitive behaviors. If we were forced to choose which of these two interpretations would prevail as the intention of the constituent legislator, we would say the Constitution, as a whole and through its evolution, appears to include this normative as a transition from a greater concern with the loyalty between companies, which would be dominant in the past, and an embryonic attention to anti-competitive practices. How much *should be* we have no doubt about the error that works in the normative under scrutiny[37].

During the 1980's and before the constitutional revision, the Decree-Law 293/82 of July 27 was approved, creating the Directorate-General for Competition and Pricing[38], integrated on the Ministry of Agriculture, Commerce and Fishing, with *"attributions of study, design and administrative execution of competition and pricing policies, as well as analysis of the distribution circuits"* in accordance with Article 1 (1) point *f)* of the diploma. This body was an administrative entity dependant on the governmental hierarchy and, consequently, of non-existent independence and dubious autonomy[39].

After the constitutional revision of 1982, appeared Decree-Law No. 422/83 of December 3 and Decree-Law No. 428/88 of November 19 – the former concerning agreements between companies, abuses of dominant position and certain practices restrictive of competition and the latter controlling mergers. In 1993, both diplomas where substituted by Decree-Law No. 371/93 of October 29; however, the established system remained for the most part unchanged[40]. This Decree-Law remained in force until Law No. 18/2003 of June 11[41].

Decree-Law 422/83 of December 3 introduced the novelty of the Competition Council which was to decide on processes of restrictive practices that would be instructed by the Directorate-General for Competition and Pricing. The creation of this Council was a step in the right direction, as it increased the independence, from the public powers, of the competent authority to decide on proceedings concerning restrictive practices. However, its composition and appointment were not designed to guarantee its independence and autonomy: only the President, necessarily a magistrate on duty, had a pre-defined term of three years without any indication of replacement. The salary of the Council members was cumulative with any other remuneration and no incompatibilities with the exercise of their function were present in the law.

This diploma also created the Advisory Commission on Competition which was attended by an industry representative, nominated by the Confederation of Portuguese Industry; a representative of agriculture, nominated by the Confederation of Portuguese Farmers; a trade representative, nominated by the Confederation of Portuguese Trade; a representative of the production cooperative sector; a representative of the Consumer Defense Institute; and a representative of the consumer cooperative sector, in accordance with Administrative Rule 459/84 of July 14. This Commission was required to give an advisory opinion on competition law as well as on any other matters relating to restrictive practices, submitted to it by the Ministry of Commerce and Tourism or by the Competition Council.

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[37] For a view, in spite of everything, less critical in this regard, see Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. And Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.

[38] Santos, A., Gonçalves, E. & Marques, M.M., Direito Económico. 5 ª edição. Coimbra: Almedina, 2006. ISBN 9789724023298.

[39] On Governmental transparency; Vilela, N., Gomes, J., Morais, P.. Government Transparency: Reality or Mirage?. Lex localis - Journal of Local Self-Government, 2017

[40] Ruiz, N. — *A aplicação do Direito Comunitário da Concorrência em Portugal*. Boletim de Documentação e Direito Comparado. (1999), vol. 77-78

[41] Marques, M.M.L., Almeida, J.P.S.D. & Forte, A.M. — Concorrência e Regulação. editado por CEDIPRE. Coimbra: Coimbra Editora, 2005. ISBN 9723213575.

The creation of this Advisory Committee is revealing of the Portuguese way of thinking about competition: it presents a greater representation of what would be considered *"industry"* but that we prefer to qualify, in market logic, as supply: of the seven members, four were indicated by the supply side and three by the demand side. In addition, there seems to be an intention to create a coordination platform between producers and consumers, in a participative logic on the normative process that, once again, reminds us of a corporative register even in the number of members.

In substantive terms, Decree-Law 422/83 proclaimed as its objective the drafting of a competition law in European terms[42]. The defense of competition defined by the normative[43] seems to give competition an instrumental nature, integrating the established regime in a category generally known as medium competition system[44]. In any case, some fundamental sectors of the economy were, from the onset, outside the scope of its application[45]: central, local and regional administration, production, transportation and distribution of electricity, postal services, and telecommunications. Unlawful competition was classified in two categories: individual behaviors and collective behaviors; the former were more or less clearly aimed at vertical restraints, such as the imposition of minimum prices, discriminatory prices and conditions of sale, and refusal of sales or services. In what concerns collective practices, the regime followed fairly close what was established in the then Article 85 of EC Treaty, at least in what regarded the type of behavior: agreements between companies, association of companies and concerted practices, and also the concept of dominant position. Collective behaviors were covered by the prohibition, the fixing or the direct or indirect recommendation of prices or other transaction conditions, limitation or control of production, distribution, technical development and investment, distribution of markets and supply sources, discriminatory prices and conditions, refusal of sales or services, and subordinated sales. The abuse of a dominant position was assessed in a non-exhaustive way by the adoption by a company, which fulfills the legal definition of dominant position, of any collective behaviors classified as anti competition. The regime directly established exceptions to the application of prohibitions with regards to publications and the possibility of the interested parties requesting the exception of the prohibition, or through Ministerial Order. This capacity was regulated by Administrative Rule No. 585/84 of August 9, which established the rules for exemption requests and was used in Administrative Rule No. 838/84 of October 30, regarding agriculture, forestry, livestock and fisheries, implementing Article 36 (3).

The legal regime of competition was supplemented in 1988 with the approval of Decree-Law 428/88 of November 19, 1988, establishing the rules on company mergers which included, among other options, the exclusion of the financial sector from the scope of its application. Taking both diplomas together, the only sectors subtracted from Competition Law in Portugal were the financial sector, banking and insurances, the central, regional and local public administrations, publishing activities, electricity, postal services, telecommunications, and the sectors targeted for public pricing. The competence to authorize mergers was attributed to the Ministry of Commerce and Tourism, and the Competition Council could be called upon to emit a non-binding opinion.

In 1993, Decree-Law 370 and Decree-Law 371/93, both of October 29[46] were approved. The former included rules on anti-competitive behaviors and public aid; the latter established a regime of misdemeanors for the violation of some prohibitions on this matter. With regards to its application scope, the regime of 1993 reduced existing exclusions. It maintained, however, the exclusion of the banking, insurance and financial sectors, with regards to mergers, as well as the exclusion of public service concessionaires and editorial activity. In substantive terms, no relevant changes occurred. The legislative framework for the defense of Competition also includes Law 18/2003 of June 11, the so-

[42] Actually, this objective was not achieved. On this topic see Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. And Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.
[43] Article 1.
[44] Santos, A., Gonçalves, E. e Marques, M.M., Direito Económico. 5 ª edição. Coimbra: Almedina, 2006. ISBN 9789724023298. Also Porto, M.C.L., Os Novos Desafios e Exigências do Direito da Concorrência. In: Estudo em Homenagem ao Doutor António Castanheira Neves. Coimbra, 2009.
[45] Too many, in our opinion. In the same direction, Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. and Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004.
[46] These diplomas suffered from an excessively bureaucratic view of Competition Law, as mentioned by Cruz Vilaça.

called Competition Law and Decree-Law 10/2003 of January 18 that created the Competition Authority[47].

The creation of the Competition Authority was an important step on the right direction, taken because of the need to provide the country with an independent entity capable of ensuring the respect for the competition rules by the economic operators, and to create a competition culture in Portugal. This need arose from the preamble of Decree-Law 10/2003 and, in our opinion, constitutes a confession of the State's incapacity to make economic operators respect the competitive market. In fact, the same preamble also states that "*there is a **particularly great** necessity to create a prestigious and independent authority which contributes, primarily, to ensure that competition rules are respected by economic operators and other entities in order to create a true competition culture in Portugal*." [48]

The only possible interpretation for the expression, *particularly great,* cannot be different from the governmental admission of the incapacity of the then existing structure to ensure the respect for competition rules[49]. Moreover, paragraph 1 of the preamble refers the need for an efficient application of a quality competition law, which leads us to conclude that even the Government questioned the quality of the supervision and application of the existing Competition Law. In addition to this extremely important aspect, another fact emerges. As mentioned by SANTOS *et al.*[50], the competition regime contained in Law 18/2003, approved in July of the same year, essentially reproduces the same principles included in the regime of Decree-Law 370/93 of October 29. Since there are not substantive differences between both regimes, largely inspired by the EU regime as it is unanimously recognized, the problem identified by the Government could never be on the legislation itself but on its supervision and application. The creation of an independent Authority was, therefore, required to replace the Directorate-General for Competition under the Ministry of Economy and the Competition Council on the functions performed since 1983.

There are other factors that, in our view, contributed to the transformation that has taken place, including the entry into force of Council Regulation 1/2003 of December 16, 2002[51] and the imminent emergence of the European Competition Network, as well as the OECD insistence on the matter, on successive "*Country surveys*", and the necessity to implement an effective competition defense system in Portugal.

In 2012, a new law came into force, Law 19/2012, after approval by the Assembly of the Republic, which revoked Law No. 18/2003. Even though it imported several amendments to competition law, no changes were made to the articles pertaining to unlawful competition. The amended sanctions remained of a purely pecuniary nature. The Competition Authority had now new powers: investigative powers would specifically include the possibility for searches and apprehensions of homes, vehicles or other sites belonging to member, administrative bodies, workers or any other company/association collaborators; supervision powers were also extended, enabling inspections and audits of company premises, even without a Public Prosecutor's Office or a judge's order, subject to a 10-days notice, and the collected evidence could be used in other cases, including sanctioning procedures against the company in question. This field of action would be formally guided by a principle of opportunity, which could assign different priorities in the treatment of the issues that were called for analysis.

The merger notification had its thresholds significantly altered, and mergers should be notified that implied: (a) creation or strengthening of a market share of 50% or more (the previous threshold

[47] On the legislative process that lead to the adoption of this legislation, see Cruz Vilaça, Ibid. who chaired the Revision Committee in charge of the preparatory work and the presentation of a legislative proposal.

[48] Paragraph 1 of the preamble, Decree-Law 10/2003 of January 18. Bold from the Author.

[49] On the incapacity of the previous system, see Cruz Vilaça, J.L., Introdução à nova legislação da Concorrência: Vicissitudes dos projectos de modernização In Soares, A.G. and Marques, M.M.: Concorrência - Estudos. Coimbra: Almedina, 2004. For changes on the UK system, Wall, R., Vilela, N. Deal or no deal: English Devolution, a top-down approach. Lex localis - Journal of Local Self-Government, North America, 2016.

[50] Santos, A., Gonçalves, E. E Marques, M.M., Direito Económico. 5 ª edição. Coimbra: Almedina, 2006. ISBN 9789724023298.

[51] Council Regulation 1/2003 of December 16, relative to the execution of the competition rules established by articles 81 and 82 of the Treaty.

was "in excess of 30%"); or (b) the creation or reinforcement of a market share of more than 30% and less than 50%, provided that the turnover in Portugal, over the previous financial year, of at least 2 participating companies exceeded €5M; or when (c) the turnover in Portugal of all participating companies, over the previous financial year, exceeded €100M (previously €150M), and at least 2 participating companies exceeded €5M (previously €2M).

With regards to personal accountability, not only members of the administrative board could be personally held accountable by the payment of fines, but also those responsible for directing or supervising the areas of economic activity where the infraction occurred, whenever, knowingly or being responsible for knowing the infraction, they did not adopt the appropriate measures to immediate terminate it.

Regarding the fines applicable to companies, regrettable from our point of view, despite being aware of the high cost they might represent, they should not exceed 10% of the total annual gross earnings of the infringing company, including every earning, irrespective of its nature, during the last full year of the prohibited practice.

Within the scope of appeals against Competition Authority decisions, these would be judged by the new specialized Competition, Regulation and Supervision Court. This court would have full jurisdiction over the appeals against Competition Authority decisions that applied a fine (and/or a compulsory pecuniary penalty), having the power to reduce or increase fines (and/or compulsory pecuniary penalties) determined by the Competition Authority and this appeal would lose, as a rule, a suspensive effect. By means of a solicitation, the suspensive effect of final judgments that imposed fines or other sanctions remained possible. To this end, the party had to demonstrate that the execution of such decisions caused them considerable damage; and offered to provide a replacement bond[52], within the period determined by the court.

The prescription also had its deadline altered, increasing the maximum period of prescription from 8 years to 10 years and 6 months.

### 4. The criminalization of Competition Law

A genuine infringement of competition always tends to generate a monopolistic profit, which means that in any economically justified, reasonably priced reference frame, there will always be an abuse.

The payment of 10%, in relation to the last financial years is, in our opinion, manifestly inappropriate. The full awareness of the hypothetical values in terms of pecuniary sanctions does not, however, seem to us a clear deterrent or sufficiently punitive of the infraction, since the high amount to be paid is always related to the billed amount. Mathematically, we can easily realize that 10% of 10€ is 1€ and 10% of 1,000,000,000€ is 100,000,000€, leaving the company with a total of 900,000,000€ after paying the fine. It would be necessary to assess the amount actually obtained through the violation of this normative and, at the very least, and only taking into account pecuniary sanctions, "deliver" the full amount to the State. Taking this issue a little further, through the principle of equitable justice, part of the paid value should be distributed between the companies that, because of the violation of the sanctioned company, had their net income reduced, allowing them to subsist in a fair and economically stable way, and thus avoiding or largely reducing bankruptcies, insolvencies and company difficulties.

The criminalization of anti-competition practice, in particular the so-called *hardcore cartels*, is a current, although not recent, trend of competition laws[53]. In fact, the criminalization of the competition infraction in the United States was enshrined in the *Sherman Act*[54] which is now

[52] With no predetermined amount.

[53] Harding, C., *Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy*. European Journal of Crime, Criminal Law and Criminal Justice. (2004), vol. 12 no. 4, p. 275-300.

[54] The *Sherman Act*, appeared in 1890, and was the first legislative recognition of Competition Law. For an adequate understanding of the goals and interests it protects, it is necessary to investigate the determining factors that led to the promulgation of this law, starting with the analysis of the socioeconomic context of American society at the time. There are several determinant factors of the *Sherman Act*. Concerns about consumer protection against abuses by large concentrations is raised as one of these determinants,

considered particularly useful in two main areas: as a deterrent to the behavior and as an incentive to the status of clemency[55]. Even though the criminal liability of certain practices can be somewhat difficult, primarily because of the apparent lack of an EU competent authority for this purpose[56], the legal good that is offended by unfair competition completely justifies, in our opinion, the criminal accountability of the individuals involved. This understanding is, moreover, borne by the experience revealed in comparative law[57].

The effectiveness of Competition Law also is dependent on the possibility of consumers harmed by anti-competition behaviors being compensated for the losses they suffered[58]. We even think that this is the *ultima ratio* in which *antitrust* efficiency must necessarily be manifested and the one that will, in the end, restore justice in the market. The action on compensation by anti-competition practices is, therefore, an essential instrument for the protection of competition, as was stated by the Court of Justice in 2001, on the "*Courage*"[59] case: "*2. The full effectiveness of Article 85 of the Treaty (now Article 81 EC) and, in particular, the effectiveness of the prohibition set out in paragraph 1 would be called into question if it were not possible for anyone to claim compensation for the harm caused to them by a contract or a conduct liable of restricting or distorting competition. Such a right strengthens the operational character of EU competition rules and discourages agreements or practices, often disguised, capable of restricting or distorting competition.*

## 5. Conclusions

The decision to adopt anti-competition behaviors does not depend on the company. If, on the one hand the company is penalized in a pecuniary way, the individual responsible for the commission of the wrongdoing must also be punished, in our point of view, and the penalty for this violation of competition law should be a criminal sanction and not only pecuniary.

The justification for a prison sentence to the individual who actively violates the provisions of Competition Law refers to the fact, mentioned initially, that we consider this is the only deterrent to the offence of a primordial public good, the Market Economy.

Other countries exist where this practice, already criminalized for many years, has proven highly effective, e.g. United States and United Kingdom.

In order to achieve this, one must:

- Make managers and administrators criminally accountable, with prison sentences, since the fine penalty is innocuous for people with economic capacity;

- Impose dissuasive fines on companies. These fines should remove the full amount of illicit profit derived from the anti-competition practice. The assumption that a company only benefited 10% of the profit from the last financial year seems to us inadequate, both because it only accounts for a financial year and also because it is estimated that companies would profit approximately 30% from violations of competition law. A company that has a margin of 40% and only pays a 10% fine will still have a huge profit margin;

- Massive action to the benefit of consumers must be taken and they should be able to jointly move a class action against companies engaged in unlawful acts.

These actions would, for obvious reasons, have prescription deadlines different from those currently in existence.

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however, part of the American doctrine questions the consumer wellbeing argument, pointing to the growing reduction in prices on the main markets, with high concentration rates on the period that precedes the law (61% reduction in the price of refined oil, 18% in the price of sugar), as well as the approval by Congress, on the same legislative term, of Mckinley Tariff, one of the most damaging taxes to consumers in American history.

[55] Ibid.

[56] Whelan, P.M., *Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law*. King's Law Journal. (2008), vol. 19 no. 2.

[57] Albert, S.M., Becket, United Kingdom: Overview. In: The European Antitrust Review 2009. Global Competition Review, 2009.

[58] Cruz Vilaça, J.L., Política de Concorrência: o caminho da modernização In Faculdade de Direito da Universidade Nova de Lisboa: 50 anos Tratado de Roma. Lisboa: Ancora, 2007. See also: Cruz Vilaça, J.L., *O ordenamento comunitário da concorrência e o novo papel do juíz numa união alargada*. Revista do CEJ, Coimbra: Almedina. (2004), no. 1.

[59] TJCE: *Courage and Crehan*. Processo nº C-453/99. Acórdão de 20 de Setembro de 2001. *Col. Jur.*: 2001.

Finally we consider that the increasingly relevant question of the need for a more geographically comprehensive Competition Law, under the aegis of an international organization in the image and likeness of the World Trade Organization[60], should not be overlooked. In fact, the size and globalization of business operations requires an urgent analysis of their global behaviors rather that at the local or regional levels.

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[60] Or even developed within the framework of this organization. It should be noted, however, that the embryo for this world competition organization is reflected in the International Competition Network (ICN). See, in this regard: Damro, C., *Transatlantic Competition Policy: Domestic and International Sources of EU--US Cooperation*. European Journal of International Relations. 06 (2006), vol. 12 no. 2, p. 171-196. and in particular Damro, C., *The new trade politics and EU competition policy: shopping for convergence and co-operation*. Journal of European Public Policy, Routledge. 09 (2006), vol. 13 no. 6, p. 867-886.