

## 12th EU-China Competition Week

### Commitments and Suspension of Investigations

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*Fair Play. With competition  
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# Portuguese Legal Framework on Commitments

- Law 19/2012, of 8 May (Portuguese Competition Law - “PCL”)
- Guidelines on Prosecution Proceedings 2013 - Chapter II (Section 4)
- The Portuguese Competition Authority (PCA) **can accept** commitments
- **Submitted by the party** concerned in the case
- As long as they are **likely to eliminate the effects on competition** stemming from the practices
- The PCA can **close the case** following the **imposition of conditions** guaranteeing that the proposed commitments shall be kept [art. 24/3/d) and 29/3/c) PLC] – i.e. commitments offered are conveyed in the PCA decision as conditions
- **Both in the investigation phase** (art. 23 PLC) and **prosecution phase** (art. 28 PLC)

# Main Steps

- PCA **reaches a preliminary view of the main issues** raised by a case
- PCA **informs** the parties concerned
- Parties concerned **may offer commitments**
- **Interactions** to assure all competition concerns are addressed by the commitments offered
- The PCA or the Party concerned **can at any moment discontinue** the discussion and the administrative offence proceedings continues
- Complainant consultation + market test (publication in PCA website and 2 national newspapers)
- Possible modification of commitments
- If the prohibited practices have potential effect on a market subject to sectoral regulation the **PCA consults the sectoral regulator** (art. 35/2 PCL)

- Commitments implemented within 2 years (time the PCA's has to reopen the case) [art. 23/7/b)]
- Structural vs behavioural
- Implementation costs and effectiveness (reports, trustees)
- If commitments implicate third parties agreement proof of this agreements has to be presented to the PCA

# Elements Taken into Account by the Competition Authority

- **Principles**

- Deterrence effects:
  - Specific concerning the parties
  - General
- Efficiency and time effectiveness

- **PCA does not accept commitments (Guidelines):**

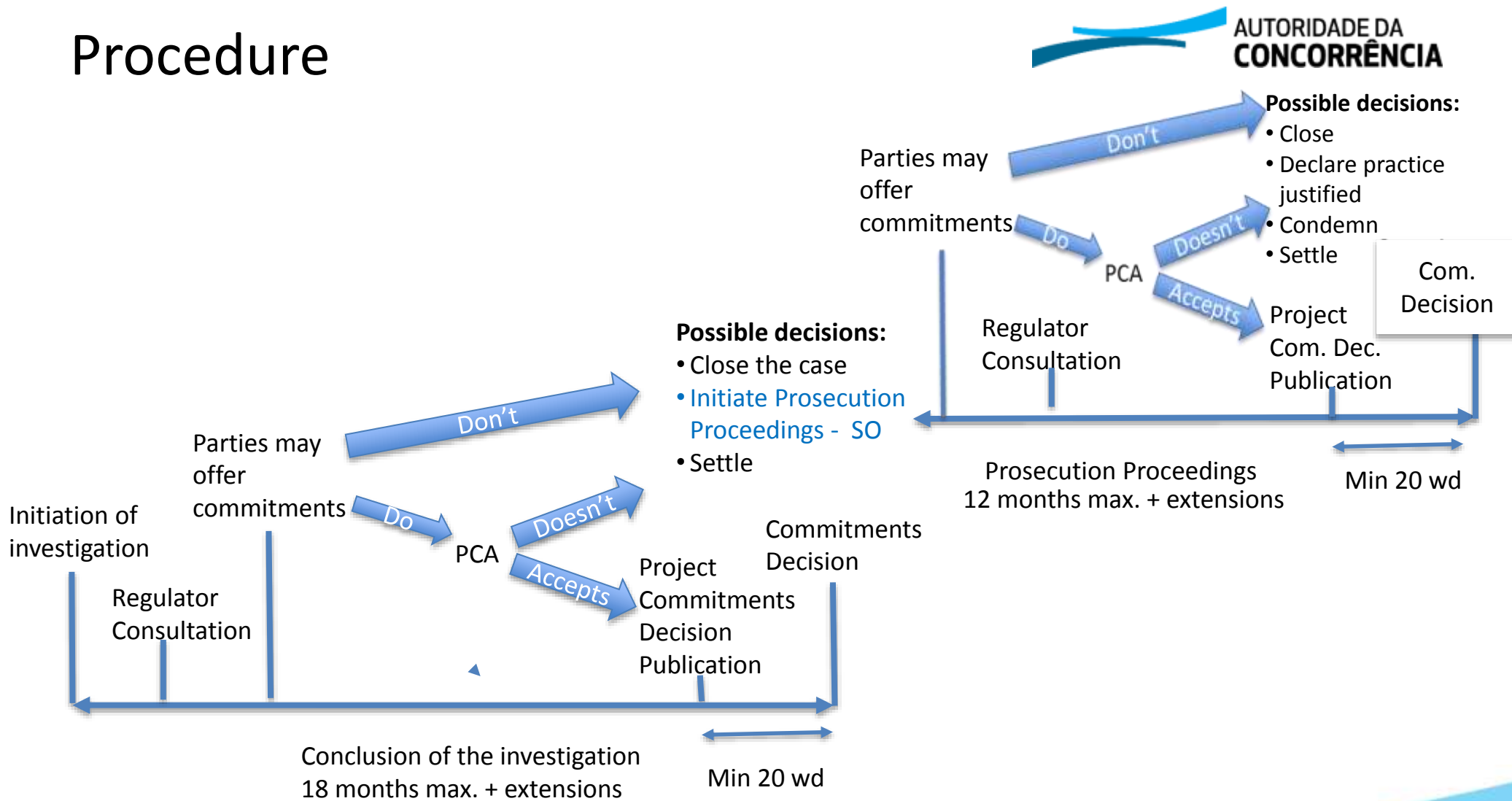
- When the only possible commitments correspond to the elimination of the anticompetitive behavior
- In cartels cases

# Parties' Cost/Benefits Analysis

- Direct and opportunity costs
- Cost of the implementation of the commitments vs the avoidance of a fine
- Time horizon of the consequences, statute limitations
- **Some specific advantages:** the decision to close the case with conditions **does not conclude that an infringement to Competition Law** has occurred – that is relevant, for instance, because:
  - (i) previous administrative offences by the party concerned in the case involving an infringement of competition rules are one of the elements taken into account in the **setting the amount of the fine** (in future infringements)
  - (ii) A condemnation may involve **accessory sanctions** - such as a **ban on the right to take part in the procedures for contracts** where the purpose is to offer services typical of public works contracts, public service concessions, leasing or acquisition of movable assets or the acquisition of services or procedures involving the award of licences or authorisations, in those cases where the practice that has led to an administrative offence punishable with a fine has occurred during or because of such procedures (maximum of 2 years after the final decision/ruling)

- The **decision shall identify** (art. 23/5 PCL):
  - The party concerned in the case
  - The facts imputed to this person
  - The object of the investigation
  - The objections expressed
  - The conditions set out by the Competition Authority
  - The obligations of the party concerned in the case as to the commitments
  - The way that compliance with the commitments shall be monitored
- **The decision** (art. 23/6 PCL):
  - Does **not conclude that an infringement** to Competition Law has occurred
  - Makes it mandatory for the party concerned in the case to comply with the commitments

# Procedure





# Reopening of the Case

- The PCA can within two years reopen any case that has been closed with conditions, whenever (art. 23/7 PCL):
  - a)* There has been a substantial change in the facts on which the decision was based;
  - b)* The conditions are not being complied with;
  - c)* The decision to close the case is deemed to have been based on false, inaccurate or incomplete information.
- As long as there has been compliance with the conditions, the case cannot be reopened (art. 23/9 PCL)

- Administrative offences punishable with a **fine up to 10% turnover** of the year immediately preceding the PCA decision (art. 68/1/c) and 69/2 PCL)
- Parties still have the obligation to comply with the commitments (art. 68/2 PCL)
- Reopening of the case

# Motor vehicles cases 2015

- Cases: PRC/2015/05 SIVA (Audi, VW and Škoda); PRC/2015/01 Ford Lusitana; PRC/2013/05 Peugeot Portugal
- **Anticompetitive behaviour** – extension clauses in warranties contracts imposed by motor vehicles distributors limited buyers from repairing and maintaining their vehicles outside the authorised repairers (i.e., in independent repairers) establishing as consequence the loss of the warranty
- **Commitments (2015/5):**
  - Eliminate the clauses and send proof of the communications to the PCA in 15 wd
  - Abstain from introducing similar clauses in future contracts
  - Communicate the change in 30 wd within the whole distributor's network and all the clients
  - Insert a declaration in the website (text specified in the decision) stating the non-discrimination between the brands and independent retailers concerning all warranty extensions
  - Monitoring – annual report informing the PCA of all changes in warranty contracts

# Sports Channel Case 2013

PRC/2013/02 - Controlinveste Media /PPTV /Olivedesportos / Sportinveste /Sport TV

- CIM is the sole acquirer of football TV rights and stadium publicity to clubs in Portugal
- It then sells the rights to both PPTV and Olivedesportos (its subsidiaries), that resell them to TV operators (sports channels producers for pay-TV and free-to-air TV stations)
- The PCA considered the exclusivity, long duration, suspension mechanism (in case the team is relegated from the Premier League) and purchase option had a negative impact in competition
- CIM offered to limit the exclusivity for a period of 3 years maximum, the maximum that would be applicable event in case of suspension
- It also offered to eliminate the purchase option

- **Correct identification of the anticompetitive behaviour** and its potential effects
- **Inform the parties shortly** so that commitments interactions may begin as early in the process as possible
- Careful identification of **third parties** that can contribute to market test and whose agreement is necessary
- **Effective consultation:**
  - Give the correct insight of the case and substantial information on commitments
  - Expedite and rigorous treatment of confidential information from the beginning of the procedure
  - Market testing techniques
- **The devil is in the detail:**
  - Remedies when set in main objectives may seem adequate, but still a long way before reaching a final document (the importance of templates)
  - Have the case team ready to check if detail ensure the correct implementation of the remedies
  - Monitoring is as important as negotiating remedies (case team)

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