Dominance

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little

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GETTING THE DEAL THROUGH

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Contributing editors

Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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Dominance 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

Portugal

Mário Marques Mendes and Pedro Vilarinho Pires

Gómez-Acebo & Pombo

General questions

1 Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The Portuguese Constitution (article 81) lists the following among the general principles of economic organisation and as primary duties of the state:

- ensuring the efficient functioning of the market to guarantee balanced competition between undertakings;
- opposing monopolistic forms of organisation;
- pursuing abuses of dominant position and other practices that may harm the general interest; and
- guaranteeing the protection of the interests and rights of the consumer.

The Constitution has evolved from the original 1976 version to reflect the various (indeed, somewhat conflicting) political, social and economic concerns of the legislature. That said, the principles referred to above, along with the recognition of private property, private enterprise and consumer protection, show that competition is seen as an essential element of the Portuguese economic system.

The Portuguese competition regime went through a significant reform in 2012 with the adoption of a new Competition Act, Law No. 19/2012 of 8 May (the Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (the former Competition Act).

The Act largely follows the rules established at EU level, and addresses agreements between undertakings, decisions of associations of undertakings and undertakings' concerted practices, as well as the abuse of a dominant position, the abuse of economic dependence, concentrations and state aid. The Act also includes the leniency regime for immunity or reduction of fines imposed for breach of competition rules, which was formerly set forth in a separate statute (Law No. 39/2006 of 25 August 2003).

Decree-Law No. 125/2014 of 18 August 2014 adopted and approved the new statutes of the Competition Authority (the Authority), superseding Decree Law No. 10/2003 of 18 January 2003, which created the Authority (which replaced the Directorate General for Trade and Competition and the Competition Council, the administrative entities formerly entrusted with the enforcement of competition law) and approved its former statutes.

As regards appeals, Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court), which was established in the town of Santarém, effective from 30 March 2012. The Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Competition Authority.

Also relevant are:

- the general regime on quasi-criminal minor offences (enacted by Decree-Law No. 433/82 of 27 October 1982), which applies, on a subsidiary basis, to the administrative procedure on anticompetitive agreements, decisions and practices, and to the judicial review of sanctioning decisions;
- the Penal Code and the Code of Criminal Procedure, both applying on a subsidiary basis to quasi-criminal minor offences, by virtue of the general regime on quasi-criminal minor offences; and
- the Civil Code and the Code of Civil Procedure, regarding civil liability for anticompetitive infringements.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 11 of the Act, contrary to article 6 of the former Competition Act, does not include a definition of dominance. In establishing dominance, the Authority follows EU case law as well as its past practice under the former competition regimes.

The Authority, in its last decision regarding an abuse of dominant position – *Associacao Nacional de Farmacias (ANF)* (December 2015) – invoking *United Brands* (case 27/76, 1978) and *Hoffmann-La Roche* (case 85/76, 1979), states that 'holding a dominant position corresponds to detaining substantial market power' which occurs when a company 'is able to raise prices up to a supracompetitive level, in a lasting and profitable way, without the fear of losing clients. That only happens when it is not subject to effective competitive pressure'. And the Authority, in line with its past understanding and practice, restated in the same decision the full convergence between national and EU competition law as regards the concept of dominant position.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the legislation and the underlying dominance standard seems to be economic insofar as the Act does not mention any specific interests to be protected by the prevention and prosecution of abuses of a dominant position.

Nevertheless, article 81(f) of the Constitution (see question 1) specifically mentions 'the general interest' as a value to be protected against abuses of a dominant position.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Act's provisions, including those on dominance, apply to all economic activities taking place in the Portuguese market or having effects therein, be they permanent or occasional, in the private, public and cooperative sectors, as per article 2 of the Act.

Sector regulators are entrusted with the generic power to ensure effective competition in the corresponding regulated markets. For instance, in the specific case of telecoms, according to Law No. 5/2004 of 10 February 2004, as amended, the sector regulator, the National Communications Authority, may declare which companies, if any, have significant market power, and impose duties on them, such as transparency, non-discrimination in access to interconnection, accounting separation, and price control and cost accounting (article 66). It should, nevertheless, be noted that the above powers do not include those of establishing or pursuing abuses of a dominant position under article 11 of the Act.

Dominance issues related to merger control may also be subject to specific rules in what concerns the intervention of sector regulators, for example, in the insurance, banking and media sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The notion of an 'undertaking' adopted in the Act is very broad, in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it operates in the private, public and cooperative sectors.

Under the Act, as in the former Competition Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The Act only provides for the behaviour of firms that are already dominant. The Act does not take issue with an undertaking becoming dominant or attempting to become dominant.

The acquisition or reinforcement of a dominant position, as a result of a concentration may, however, be scrutinised under the rules in the Act regarding merger control (articles 36 to 59 of the Act).

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes. Both article 102 of the TFEU and article 11 (1) of the Act provide for the prohibition of abuses committed by one or more companies. As noted above (see question 2), the Act does not include a definition of dominance but the Authority follows EU case law and the Commission's approach, also in what refers to the findings of collective dominance. See DG Competition discussion paper on the application of article 82 of the Treaty to exclusionary abuses (December 2005), points 43 to 50.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes. The Act applies to dominant purchasers. Although none of the decisions on abuse of dominant position so far adopted by the Authority concern dominant purchasers, there should be no differences in the application of the law to dominant suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

According the Authority's decision practice, the Authority follows in its methodology of definition of the relevant markets the 'Commission Notice on the definition of relevant market for the purposes of Community competition law' (Official Journal C372, 9 December 1997). The relevant product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned supply their products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas (see the *Sport TV Portugal* decision referred to in question 29).

The Act does not rely on market-share thresholds to establish dominance.

While very high market shares may constitute an indication of a dominant position notably when competitors hold much smaller market shares (see, eg, *Hoffmann-La Roche*, case 85/76, 1979; *AKZO*, C-62/86, 1991), such conclusion does not follow necessarily, a number of other factors having to be taken into account in the corresponding assessment. In Portugal, the Authority also seems not to grant a decisive importance to the size of the market share in determining the existence of dominance or lack thereof.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 11(1) of the Act does not give an express legal definition of abuse. It states that 'the abusive exploitation, by one or more undertakings, of a dominant position in the national market or a substantial part of it is prohibited'. It is, therefore, an open clause, with a potentially broad scope of application.

Nonetheless, article 11(2) of the Act gives examples of abusive practices, as follows:

- directly or indirectly fixing purchase or sale prices or other unfair trading conditions (article 11(2)(a));
- limiting production, distribution or technical development to the prejudice of consumers (article 11(2)(b));
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (article 11(2)(c));
- making the signing of contracts conditional on the acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts (article 11(2)(d)); and
- refusing to provide, upon appropriate remuneration, access to an essential network or other essential infrastructures controlled by the dominant undertaking to any other undertaking, when without such access this latter undertaking cannot, for factual or legal reasons, compete with the dominant undertaking in the upstream or downstream markets, unless the dominant undertaking demonstrates that, for operational or other reasons, the access is reasonably impossible (article 11(2)(e)).

At the EU level, despite the criticism that used to be made that both the Commission and the EU Courts had a very formalistic approach to article 102, it is undeniable that the Commission has for some time expressly adopted an effects-based approach (see Guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009)), as to which the Commission stated its 'determination to prioritise those cases where the exclusionary conduct of a dominant undertaking is liable to have harmful effects on consumers' (Commission Press Release IP/08/1877, 3 December 2008). The EU Courts have also increasingly adopted an effects-based approach (see, eg, decisions in cases *Deutsche Telekom* (C-280/08) and *Telia Sonera* (C-52/09), in which the European Court of Justice (ECJ) considered that potential competitive effects must be found for a margin squeeze to be punished). The recent ECJ judgement in case *Intel* (C-413/14P) seems to be in line with previous case-law regarding pricing strategies such as margin squeeze. The Authority, which follows as a rule, at least in theory, the positions of the Commission and the case law of the EU Courts, is in line with the evolution detected. For example, in its last decision on abuse of dominance, the Authority tried to detect effects on the market concerned in order to declare unlawful an alleged margin squeeze by the ANF Group on the market for studies based on pharmacies' data (see question 18).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The examples mentioned in article 11(2) of the Act include examples of both exploitative and exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Under the competition regime in place prior to the former Competition Act, there was considerable debate on whether a causal link had to be established between the dominant position and the abuse. In a 1996 statement, the Competition Council (one of the former competition authorities) seemed to consider that such a test had to be met, although more recent decisions showed some dissension within the Council on that subject.

In the 1995 *Multifrota* case, the Competition Council decided that a company that was dominant in the tachograph equipment market was abusively taking advantage of that position in order to get better results in the market for tachograph paper, a market where it was not dominant. This type of approach has been followed by the Authority in subsequent cases.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In principle, defences based on objective justifications (such as objective necessity or meeting competition) or efficiencies may be discussed under the Act, which, as stated, closely follows article 102 of the TFEU. If exclusionary intent is shown it shall be more problematic to raise defences particularly because the burden of proof for such an objective justification or efficiency defence remains with the dominant company.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may be caught under the open clause of article 11(1) of the Act. In addition, article 11(2)(c) of the Act prohibits the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Although retroactive rebates are more likely to have foreclosure effects, any rebate scheme, particularly its economic effect, must be assessed on a case-by-case basis. It cannot be excluded that an incremental rebate scheme may be considered anticompetitive having taken into account its specific circumstances. The decision of the former Competition Council in *Martini* (1987) sanctioned the application of a discriminatory rebate scheme to certain classes of customers.

15 Tying and bundling

Article 11(2)(d) of the Act prohibits making the signing of contracts conditional on the acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In *Via Verde* (2002), the former Competition Council decided that the service under discussion – the issuing of receipts to users – and the identification and prosecution of infringers on the automatic toll payment of the Lisbon bridges involved tying; the provider of the service of automatic toll payment was subsequently fined for abuse of a dominant position.

16 Exclusive dealing

Exclusive dealing issues may be caught by the general prohibition of abusive exploitation of a dominant position in the national market established in article 11(1) of the Act. Former Competition Council decisions concerning these issues include:

- *Moraes & Wasteels* (1987) on the exclusive purchase obligation and purchase-price fixing regarding certain train tickets for groups of students or emigrant workers supplied by Wasteels Expresso to national travel agencies;
- *Luso* (1987) regarding market partitioning between distributors of the same brand which results from the existence of price lists and freight bonuses that rendered the purchase prices equal, coupled with recommended retail prices followed in practice by all the distributors, thereby eliminating any motivation for the search of alternative sources of supply, even for passive sales, by potential buyers; and
- *Tabaqueira I* (1988) concerning the imposition of an exclusive purchase obligation on tobacco wholesalers, which resulted, it was found, from an abuse of the negotiating strength that Tabaqueira's market power granted to it, closing the market to actual or potential competitors.

17 Predatory pricing

Article 11(2)(a) of the Act applies to predatory pricing. The decision of the former Competition Council in *RAR* (1988), concerning a sugar refiner and packager, punished predatory pricing in the packed sugar market. RAR was punished for abusing its dominant position in the market of white sugar in bulk by using it and putting into practice a price reduction in the white sugar in sachets market, having as a consequence affecting the economic balance of its competitors' packaging companies.

18 Price or margin squeezes

Article 11(2)(a) and (c) of the Act should apply to price or margin squeezes. In the decision adopted in *Portugal Telecom* (PT the then telecoms incumbent) Group/ZON Group (2009), the Authority punished the PT Group and the ZON Group for margin squeeze. In addition, in the decision in *National Association of Pharmacies (ANF)* (2015) the Authority also fined the ANF and its affiliated companies for alleged margin squeeze. In this latter case, for example, the Authority found an abuse of dominant position through a margin squeeze by the ANF Group to the extent the price imposed by the latter regarding pharmacies' data upstream when compared with the prices imposed by the Group in the downstream market for the studies based on pharmacies' data did not permit an equally efficient competitor to obtain a margin sufficient to cover the remaining production costs.

19 Refusals to deal and denied access to essential facilities

Article 11(2)(e) of the Act expressly outlaws the refusal to facilitate access to a network or to essential facilities. The decision of the former Competition Council in *Auto-Sueco* (1995) stated that the dominant importer of heavy lorries abusively tried to prevent an operator in a downstream market (urban waste disposal vehicles) from entering the market by refusing to deal with it.

Further, one of the decisions so far adopted by the Authority regarding the abuse of a dominant position concerns the refusal, by PT Comunicações (PTC), a Portugal Telecom subsidiary, to grant access to its underground conduits network, which is considered an essential facility by PTC's competitors TvTel and Cabovisão. Nonetheless, the Lisbon Court of Commerce annulled this condemning decision, based on the Authority's failure to provide sufficient proof that there had been an unjustified or discriminatory refusal of access to an essential facility. The annulment was subsequently confirmed by the Appellate Court of Lisbon.

20 Predatory product design or a failure to disclose new technology

Theoretically and depending on the facts at issue it is conceivable that the open clause of article 11(1) of the Act may apply to predatory product design or a failure to disclose new technology.

21 Price discrimination

Article 11(2)(c) of the Act refers to the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The Authority's decisions in *PT Comunicações* (2008) and in *PT Group/ZON Group* (2009) punished, respectively, PT Comunicações and PT Group and ZON Group for discriminatory conditions regarding equivalent services. Likewise, in the *Sport TV* decision (2013) the practice in question was the consistent application of discriminatory conditions to equivalent transactions (the system of remuneration in agreements for distribution of the Sport TV Portugal channels).

Outside the context of the Act, special legislation governing unilateral commercial practices (Decree-Law No. 166/2013 of 27 December 2013), prohibits, among other practices, discriminatory prices or other sales conditions between undertakings, with respect to equivalent transactions, when such discrimination does not have a cost justification or

does not result from 'practices in conformity with Competition Law'. In this respect, it should be noted that the authority in charge of the enforcement of this statute is the Food and Economic Safety Authority, which, lacking the required expertise, oddly enough, may be called to apply competition rules and principles.

22 Exploitative prices or terms of supply

The open clause of article 11(1) of the Act excludes any forms of exploitation, including exploitive prices or terms of supply. The decision of the former Competition Council in *Tabaqueira II* (1997) punished discriminatory minimum purchase obligations under the competition regime in force before the former Competition Act. In this decision the former Competition Council concluded that for entities with a dominant position in the market the imposition of minimum acquisition quantities that progressively leads to the reinforcement of the quantities at issue and the removal of the players in that or other markets amounts to an abusive behaviour.

23 Abuse of administrative or government process

Although there is no known case in Portugal of an investigation of abuse by misuse of administrative or government process, it cannot be excluded that article 11(1) of the Act may apply to such cases.

In terms of judicial procedure, specific provisions apply in the case of bad faith litigation, which comprises the abuse of judicial procedure, where fines are applied by the court and damages awarded when proved by the other party.

24 Mergers and acquisitions as exclusionary practices

Mergers may be scrutinised by the Authority under the merger control provisions of the Act, and a merger shall be prohibited if it creates significant impediments to effective competition in the Portuguese market or in a substantial part of it, in particular if such impediments result from the creation or strengthening of a dominant position.

There is no known case in Portugal in which mergers or acquisitions have been investigated as abuses.

25 Other abuses

As stated above, article 11(1) of the Act constitutes an open clause with a potentially broad scope of application. Accordingly, types of abuse not covered by the previous questions may theoretically be sanctioned under the Act.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The responsibility for enforcing the competition regime rests with the Competition Authority.

The Authority is a public entity endowed with administrative and financial autonomy, which has been granted statutory independence to perform its activities, without prejudice to the competence of the government as regards competition policy.

The Authority has extensive powers of investigation and inspection. Among other powers, it can, notably:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examinations, collection and seizure of extracts from accounting records or other documentation at the premises, lands or transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, a judge or the public attorney, issued upon an Authority's substantiated application);
- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, a judge or the public attorney issued upon an Authority's substantiated application); and
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the Authority's functions.

If there are reasonable suspicions that in the domicile of shareholders, members of the board of directors or employees of undertakings or associations of undertakings there is evidence of serious infringements to the provisions of the Act on restrictive practices or abuses of dominant position, or to articles 101 or 102 of the TFEU, domicile searches may be carried out by the Authority if previously authorised by a judge upon request from the Authority. If the search is carried out in an attorney-at-law's office or in a doctor's office it must be made, otherwise being null, in the presence of a judge who previously informs the president of the local section of the Bar Association or of the Doctors' Association, as applicable, so that this latter may be present or indicate a representative to be present.

The proceedings carried out by the Authority after it has opened an inquiry must ensure that the parties involved are given a hearing and comply with the other principles of the adversarial system.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Abuse of dominance is considered a quasi-criminal minor offence. The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, etc) as there are no criminal sanctions for competition law offences.

In relation to sanctions for quasi-criminal minor offences, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 11 of the Act or article 102 of the TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase;
- for the non-compliance with behavioural or structural remedies imposed by the Authority; or
- for non-compliance with a decision ordering interim measures.

The Authority published Guidelines on the methodology to use in the application of fines, dated 7 August 2012, according to which the Authority takes into account the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates (similarly to the European Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02)), or the total turnover when the calculation of the turnover related to the infringement is impossible to determine.

In the case of any of these infringements being carried out by individuals held responsible under the Act the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, the refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the Authority are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority, for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In the case of any of these infringements being carried out by individuals held responsible under the Act the applicable fine ranges from 10 to 50 units of account (each unit of account at present amounting to €102).

Further, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from 2 to 10 units of account.

Additionally, should the infringement be considered sufficiently serious, the Authority can impose, as ancillary sanctions, the publication, at the offender's expense, of an extract of the sanctioning decision

in the Official Gazette and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market, or, in the case of competition law infringements carried out during, or because of, public procurement proceedings, the prohibition for a maximum of two years from participating in proceedings for entering into public works contracts for concessions of public works or public services for the lease or acquisition of goods or services by the state or for the granting of public licences or authorisations.

The Authority may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in the year immediately preceding that of the final decision, per day of delay, counted from the date established in the notification, where the undertakings do not comply with an Authority decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity), or by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out are also liable when holding leading positions they act on behalf or on the account of the legal entity, or knowing or having the obligation to know the infringement they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings whose representatives were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment are jointly and severally responsible for paying the fine, unless they have expressed in writing their opposition to the infringement.

Further, the Authority's decisions declaring the existence of a restrictive practice may include the admonition or the application of other fines and other sanctions set forth in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy that is equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

In addition, the Authority may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause serious damage, irreparable or difficult to repair damage. The interim measures may be adopted by the Authority ex officio or upon request by any interested party and shall be effective until they are revoked and for a period of up to 90 days, extendable for equal periods within the time limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such a hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested.

As noted above, the Authority has published Guidelines on the methodology to use in the application of fines. In drafting these guidelines the Authority has taken into account the European Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003, also referred to above. While the Authority's guidelines largely reflect those adopted by the European Commission in respect of the method for the setting of fines, they include, nevertheless, specific provisions resulting from the application of the general regime on quasi-criminal minor offences, which applies, on a subsidiary basis, to the administrative procedure on anticompetitive agreements, decisions and practices (see question 1). For instance, where the economic benefit obtained from the infringement may be established and exceeds the maximum limit of the applicable fine the Authority may impose a fine up to such benefit as long as the applicable fine does not exceed the said maximum limit by more than a third; in the case of several infringements, the applicable fine cannot exceed the double of the higher limit applicable to the infringements at issue; in the case of negligence, the amount of the applicable fine is reduced by half.

The highest fine ever imposed was the one levied on the PT Group and the ZON Group, in which the Authority fined the said groups an aggregate amount of €53.062 million (€45.016 million on the PT Group and €8.046 million on the ZON Group), for abuse of a dominant position between 22 May 2002 and 30 June 2003 in the wholesale and retail broadband access markets. The sanctioned abusive practices included retail margin squeeze, discriminatory conditions regarding equivalent services and limiting production, distribution, technical development and investment in respect of the services concerned. This decision was revoked by the Lisbon Court of Commerce on 4 October 2011, which, on the grounds of the applicable statute of limitations acquitted the defendants.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Competition enforcers impose sanctions directly (see questions 26 and 27).

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Under both the former Competition Act and the Act, and although several investigations into reported abuses of dominance have been carried out or are at present under way, only seven condemning decisions have so far been adopted by the Authority.

The first three cases involved the Portugal Telecom (PT) Group, the then telecoms incumbent in Portugal: in the first case in 2007, the Authority fined PT Comunicações, a subsidiary of Portugal Telecom, €38 million for refusal of access to its underground conduits network to competitors Tvtel and Cabovisão, a decision that was annulled by the Lisbon Court of Commerce on 2 March 2010, this annulment having been confirmed by the Appellate Court of Lisbon. The second decision fined PT Comunicações €2.1 million in 2008 for abuse of a dominant position in the wholesale markets for the lease of communication circuits, a decision that was revoked by the Lisbon Court of Commerce on 29 February 2012, which acquitted PT. The Authority appealed this latter decision to the Appellate Court of Lisbon, but in any case the statute of limitations has meanwhile expired. The third decision fined the PT Group and the ZON Group an aggregate amount of €53.062 million (with a €45.016 million fine on the PT Group and a €8.046 million fine on the ZON Group) for abuse of a dominant position between 22 May 2002 and 30 June 2003 in the wholesale and retail broadband access markets, a decision that was revoked by the Lisbon Court of Commerce on 4 October 2011, which acquitted the defendants.

In addition, on 12 April 2012, the Authority imposed on Roche Farmacêutica, a local subsidiary of Roche, a fine of €900,000 for abuse of a dominant position related to a discount system applied by Roche to public hospitals within public tenders' proceedings in 2006.

Further, in a decision announced on 18 May 2010, the Authority fined the Portuguese Association of Chartered Accountants (OTOC) €229,300 for adopting anticompetitive practices in the market of mandatory training for chartered accountants, a decision that was partially confirmed by the Lisbon Court of Commerce, which lowered the fine to €90,000. A subsequent appeal has been lodged by the OTOC with the Appellate Court of Lisbon, which confirmed the Lisbon Court of Commerce's decision.

Subsequently, on 20 June 2013, the Authority imposed on Sport TV Portugal a fine of €3.73 million for abuse of a dominant position in the national market for television channels of conditioned access with premium sport content, a fine that the Competition, Regulation and Supervision Court (the Specialised Court) decreased to €2.7 million. This latter decision has been confirmed by the Appellate Court of Lisbon.

Finally, in a decision of 22 December 2015, the Authority imposed on the National Association of Pharmacies (ANF) and on three companies of the same group (Farminveste SGPS, Farminveste – Investimentos, Participações, Gestão, SA and HMR – Health Market Research, Lda) a

Update and trends

The Competition Authority has not adopted any abuse of dominance decision in 2017. There is nevertheless an interesting pending case that had some developments in late 2017. The case started in February 2015 when the Competition Authority has initiated proceedings against CTT, the Portuguese postal services incumbent, which led to the adoption of a Statement of Objections in which the Authority identified competition concerns related to the access by competitors to the CTT's traditional mail distribution network.

The Authority has considered that in order to provide traditional mail services to their corporate customers, postal services competitors need to have access to the CTT's distribution network and that, on a preliminary assessment, the CTT' s behaviour could potentiate a restrictive effect in competition by creating obstacles to an effective competition in such a traditional mail services market.

In order to overcome the competition concerns raised by the Authority, in December 2017 CTT submitted a set of commitments that provide for an amendment to the CTT Postal Network Access Offer. Such commitments basically consist of:

- enhanced services covered by the Access Offer, notably the National Editorial Service (related to the mailing of editorial products comprehending non advertisement books, newspapers and periodic and non-periodic publications of up to 2kg), Priority Service (faster delivery of mail of up to 2kg) and National Registration Service (faster delivery of mail of up to 2kg with a higher degree of security and individual control through the Track & Trace system);
- new points to access the CTT's postal network, downstream in the postal distribution network;
- a faster delivery deadline for deliveries through Destination Shops with respect to the National Base Service with more than 50g and the National Editorial Service;
- possibility for the competitor operator to perform additional mail processing tasks such as separation of mail by distribution areas in the Postal Distribution Centre; and
- network access fees lower than those offered to end users and fees fixed taking into account the access point, the mail service and the processing tasks performed by competitor operator.

The above commitments have been subject to public consultation during which any interested party could submit observations. If the above commitments are accepted by the Authority, this latter may close the case subject to conditions imposed on CTT.

fine in the aggregate amount of €10.34 million for abuse of dominant position (margin squeeze) on the market for studies based on pharmacies' data. Following an appeal lodged by ANF the Specialised Court lowered the fine to circa €7 million, a decision that ANF appealed to the Appellate Court of Lisbon, which lowered further the fine to €815 thousand.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Contractual clauses that substantiate or have as an effect practices prohibited by the Act are null and void as a result of their being contrary to the law, according to article 280(1) of the Civil Code. In principle, this merely involves the nullity of the specific clause in the contract and not of the whole contract, unless, as per article 292 of the Civil Code, it is proved that the parties would not have entered into the contract without the invalid clause.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

As a preliminary remark, it should be pointed out that the answer to this question as well the answers to questions 32 and 33 hereunder are based on the current Portuguese rules set out in the Portuguese Civil Code and in the Civil Procedure Code. Legislation enacting Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Antitrust Damages Directive) is yet to be enacted (a draft legislation having been subject to public discussion in 2016), although the deadline to implement such Directive has already expired on 27 December 2016.

Third-party claims for damages are currently dealt with under the general principles and provisions applicable to civil liability as provided for in the Civil Code. Standard liability requirements are the existence of unlawful conduct (the abusive behaviour), injury to the claimant and a causal link between the two. The purpose of this liability is merely to repair damage, and, therefore, there is no award of punitive damages.

Any injured party has individual standing. Class actions, whereby individual litigants or associations may, under certain conditions, sue in representation of injured parties, are provided for in Law No. 83/95 of 31 August 1995, and article 31 of the Code of Civil Procedure, and may, in principle, be applicable to competition law injuries.

As for the possibility of a dominant firm being ordered to grant access, supply goods or services or conclude a contract, as stated in question 27, the Authority's decisions declaring the existence of a restrictive practice may include the admonition or the application of other fines and other sanctions set forth in the Act and, if required, the imposition of behavioural or structural remedies to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy that is equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy. As regards courts, although they may adopt decisions whereby a party is ordered to refrain from practices prohibited by law, such as an abuse, we are of the opinion that, under the Portuguese legal system, within the framework of the Act they cannot impose obligations on a specific contract.

As stated above (see question 30), contractual clauses that substantiate or have as an effect practices prohibited by the Act are null and void as a result of their being contrary to the law, according to article 280(1) of the Civil Code. This nullity may be declared ex officio by the court.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Claims are adjudicated by the courts. The award of damages aims at restoring the situation that would have existed if the event that determines the need for the reparation had not occurred. The amount of compensation shall be measured by the difference between the actual patrimonial situation of the damaged party and the patrimonial situation of such party that would exist if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct, but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action. Predictable future damage shall be taken into account for this purpose. Undeterminable future damage, on the contrary, shall be the object of a subsequent procedure and decision.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Law No. 46/2011 of 24 June determined the creation of the Specialised Court to handle competition, regulation and supervision matters, as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Authority.

Under the current regime, the Authority's sanctioning decisions (typically involving anticompetitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the

effects of the Authority's decision, except for decisions that impose structural remedies as established in the Act. Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis of the allegation that the enforcement of the decision may cause it considerable harm and if such party offers a guarantee, and provided such guarantee is submitted within the time limit set by the court. The Specialised Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment, and can reduce or increase the corresponding amounts.

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Unilateral anticompetitive behaviour by both dominant and non-dominant undertakings is taken into account in cases of an 'abuse of economic dependence'. Article 12 of the Act prohibits the abusive exploitation by one or more undertakings of the economic dependence on them by any suppliers or clients owing to the absence of an equivalent alternative, insofar as it affects the market functioning or the structure of the competition.

An equivalent alternative is considered not to exist when:

- the supply of the goods or services in question, notably the distribution service, can only be provided by a restricted number of undertakings; or
- an undertaking cannot obtain identical conditions from other trading parties within a reasonable time frame.

The following may be considered abusive:

- carrying out any of the practices mentioned in article 11(2)(a),(b),(c) and (d) of the Act (corresponding to behaviour that may amount to abusive practices, see question 15); and
- partial or total termination of an established commercial relationship without justification, taking into account past commercial relationships, the accepted trade usages in the concerned sector of economic activity and the applicable contract terms.

In addition, as stated above (see question 21) there is special legislation governing unilateral commercial practices (Decree-Law No. 166/2013 of 27 December 2013), dealing with unfair competition practices such as price and non-price discrimination, sale below cost and refusal to sell.

G A _ P

Gómez-Acebo & Pombo

Mário Marques Mendes **marquesmendes@ga-p.com**
Pedro Vilarinho Pires **pvpires@ga-p.com**

Avenida Duque de Ávila, No. 46, 6th floor
1050-083 Lisbon
Portugal

Tel: +351 21 340 86 00
Fax: +351 21 340 86 08
www.ga-p.com

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