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The International Comparative Legal Guide to: Cartels & Leniency 2012

A practical cross-border insight into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for cartel prohibition is the Portuguese Competition Act (Law n.º 18/2003, 11 June, hereinafter “the Act”), which prohibits and sanctions anti-competitive agreements, concerted practices and decisions by associations of undertakings (in terms similar to Article 101 (1) of the Treaty on the Functioning of the European Union, hereinafter “TFEU”).

Similarly to all other infringements of competition law, cartels are considered misdemeanours and not criminal offences. As a result thereof, they are sanctioned with fines and other ancillary sanctions (see section 3 below).

1.2 What are the specific substantive provisions for the cartel prohibition?

The relevant substantive provision is Article 4 (“Prohibited Practices”) of the Act, which prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have the object or effect to appreciably prevent, distort or restrict competition in the whole or in part of the national market, regardless of the form they take. The above shall include in particular agreements, concerted practices or decisions by an association of undertakings, which:

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

This list is non-exhaustive and, therefore, other conduct that has the object or effect of restricting competition to an appreciable extent may be caught by the above-referenced prohibition.

1.3 Who enforces the cartel prohibition?

The enforcement of competition law in Portugal is entrusted to the Portuguese Competition Authority (*Autoridade da Concorrência*), which was created in 2003 by Decree-Law n.º 10/2003, 18 January. The Authority is a public entity with statutory independence for the performance of its activities and enjoys administrative and financial autonomy. The Authority has sanctioning, supervisory and regulatory powers which are established in Decree-Law n.º 10/2003 and further developed in the Act.

The Authority is, furthermore, responsible for enforcing competition law in any sector of the economy.

For activities subject to sector-specific regulation, however, the Act establishes (Articles 15, 27 (4) and 29) a general principle of cooperation between the Authority and sector-specific regulators in the application of competition legislation, which translates into the following rules:

- Whenever the Authority initiates an investigation into matters subject to sector-specific regulation, the relevant facts shall be immediately communicated to the sector regulator, which shall present his opinion within a reasonable time-limit.
- Whenever a sector-specific regulator deals, in the scope of his own powers, with issues that may constitute an infringement of the Act, he shall immediately inform the Authority of the procedure and of the essential facts.
- In any of the above situations, the Authority may decide not to initiate an investigation or to stay an ongoing investigation for as long as necessary.
- Whenever the Authority intends to apply interim measures within the course of an investigation in a market subject to sector-specific regulation, it shall, as a rule, request a prior opinion from the sector regulator, to be given within five working days.
- Before adopting a final decision, the Authority shall, where regulated markets are involved, consult the sector-specific regulator.

Cooperation with sector-specific regulators is, thus, based on consultation mechanisms according to which the Authority, in the course of the investigations it conducts, obtains an opinion from other regulators.

In order to facilitate cooperation and assure coherence in the decision-making process, a cooperation protocol was established between the Authority and the telecommunications regulator. There is not, up to the present date, public information on any other protocols having been signed with other sector-specific regulators. In its annual activities’ reports, the Authority gives out general information on ongoing cooperation with sector-specific regulators.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The Authority is legally bound to initiate an investigation once it becomes aware, in any manner, of eventual anticompetitive practices.

An investigation is divided into two stages: during the first stage (“*inquérito*”) the Authority undertakes all necessary inquiries within the scope of its investigative powers to identify the relevant anti-competitive conduct and its agents. There are no timescales for the conclusion of this first stage of investigation; rather, it will end once the Authority is able to reach a decision to either:

- (i) close the investigation, if there is not sufficient evidence that an infringement has occurred; or
- (ii) continue with the proceedings by notifying the accused companies in writing of the “statement of objections” stating the facts, their legal assessment and applicable sanctions – i.e. enter a second phase (“*instrução*”).

Whenever an investigation is initiated pursuant to a complaint by an interested third party, it may not be closed as referred to in (i) without the complainant being given a reasonable delay to state his views regarding the Authority’s proposal to reject the complaint.

During the second phase of an investigation, the defendant is able to exercise his right to a defence. The defendant is given a “reasonable period” to reply to the statement of objections (the practice of the Authority so far has been to grant a 30-working day period) and it may request that the Authority undertakes additional evidentiary measures (e.g., witness depositions) and also that their written submission be complemented or replaced by an oral hearing. The Authority can refuse additional evidentiary measures if it believes them to be irrelevant to the case or to have primarily a delaying purpose, but it may also promote additional measures to gather evidence on its own initiative, even after a reply has been submitted, and provided that the rights of defence are observed at every stage.

Conclusion of this second-phase, which is not limited by any specific procedural time-frame, shall occur when the Authority adopts a final decision to either:

- (i) order the closing of the investigation; or
- (ii) declare that anti-competitive conduct has occurred, establish the relevant sanctions (fines etc. – see section 3) and, if necessary, order the infringing undertaking to adopt any measures required to put an end to the anti-competitive conduct or its effects, within a stipulated period.

The only timeframe which constrains investigative procedures is that resulting from the limitation periods (see question 3.4 below).

Whenever the market in question is subject to sector-specific regulation, there are specificities concerning the procedure and the intervention of the sector-specific regulator (see question 1.4).

1.5 Are there any sector-specific offences or exemptions?

The Act applies equally across all sectors of the economy and to all economic activities in the private, public or cooperative sectors.

Companies that are legally charged with the management of services of general economic interest or which have the nature of legal monopolies shall, however, be subject to the provisions of the Act only to the extent that those provisions do not constitute an impediment in law or in fact to the fulfilment of the mission they have been entrusted with.

An exemption from the general rule of prohibition of anti-competitive agreements laid down in Article 4 is foreseen for those agreements, practices or decisions by associations of undertakings that can be considered as justified, because they contribute to improving the

production or distribution of goods and services or promoting technical or economic development, and, cumulatively thereto, they:

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

Practices prohibited by Article 4 are also considered as justified when, though not affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 101 (3) of the TFEU. The Authority may nonetheless withdraw this benefit if, in a particular case, it ascertains that a practice covered by such a Community regulation has effects incompatible with the requirements for justification laid down above.

The Act expressly refers to the possibility of a prior assessment, by the Authority, of agreements, practices or decisions covered by the prohibition of Article 4 pursuant to an express request by the parties and according to a procedure laid down in Regulation No 9/2005 of the Authority. This possibility is, however, limited to cases to which only the Act (not Article 101 of the TFEU) applies.

1.6 Is cartel conduct outside Portugal covered by the prohibition?

Cartel conduct outside Portugal will, in principle, be covered by the prohibition to the extent that the practice has or is liable to have effects in the Portuguese territory. This follows from the general rule laid down in Article 1 (2) of the Act, according to which, subject to the exception of the international obligations of the Portuguese state, the Act is applicable to restrictive competition practices and concentrations between undertakings which take place or have or may have effects in the territory of Portugal.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

| Investigatory power | Civil / administrative | Criminal |
|--|------------------------|----------|
| Order the production of specific documents or information | Yes | N/A |
| Carry out compulsory interviews with individuals | Yes | N/A |
| Carry out an unannounced search of business premises | Yes* | N/A |
| Carry out an unannounced search of residential premises | No | N/A |
| ■ Right to ‘image’ computer hard drives using forensic IT tools | Yes* | N/A |
| ■ Right to retain original documents | Yes* | N/A |
| ■ Right to require an explanation of documents or information supplied | Yes | N/A |
| ■ Right to secure premises overnight (e.g. by seal) | Yes | N/A |

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

In accordance with Article 42 of the general regime on misdemeanours (as approved by Decree-Law 433/82, 27 October, and subsequently amended), correspondence and telecommunications are explicitly protected and, therefore, may not be used as evidence in competition infringement procedures. The existing case-law under the Act has so far distinguished between opened and unopened correspondence, considering the former as normal documentation (which the Authority can use as evidence) and only unopened correspondence will benefit from protection. E-mails are treated as telecommunications while they travel between the sender and the recipient's computers and, once lodged in the recipient's mailbox, they are treated as correspondence.

2.3 Are there general surveillance powers (e.g. bugging)?

There are no general surveillance powers foreseen for conduct that merely infringes competition rules.

2.4 Are there any other significant powers of investigation?

Pursuant to Article 17(1) e) of the Act, the Authority has the right to require any other public administration services, including criminal police bodies, through the proper ministerial channels, to provide the co-operation necessary for the full discharge of the Authority's duties.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business premises are carried out by the Authority's duly appointed employees who shall, for that purpose, bear the credentials issued by the Authority stating the purpose of the investigation and the warrant from the public attorney. Whenever necessary, the Authority may request the action of the police authorities. In practice, the Authority is usually accompanied by police authorities.

The law does not impose any obligation on the Authority's investigators to wait for legal advisors to arrive, but companies under inspection have the right to have their legal advisors present at the diligence.

2.6 Is in-house legal advice protected by the rules of privilege?

Under Portuguese Law, the protection given by the rules on legal professional privilege (which is protected by the Constitution, the Penal Code and the Lawyers Act) covers both independent lawyers and in-house lawyers who are members of the Portuguese Bar since they are subject to the same professional and ethical duties.

In a legal opinion issued in 2007, the General Council of the Portuguese Bar expressly acknowledged that in-house lawyers (that are Portuguese Bar members) benefit from the rules on legal privilege in the context of enquiries by the Authority.

This view was confirmed by the judiciary in 2008, when the Lisbon Commerce Court decided on an appeal brought against a decision

of the Authority that refused the restitution of documents (i) seized from the office of the company's in-house counsel (which was also his professional domicile), and/or (ii) prepared by the in-house counsel but seized elsewhere in the company's premises, during a surprise inspection conducted by the Authority. The Court began by acknowledging that in investigations carried out by the Authority (even if a potential breach of provisions of the TFEU is at stake) national procedural rules shall apply. Those rules do not differentiate between in-house and external lawyers: an in-house lawyer who has been employed to exercise his activity as a lawyer and is registered in the Portuguese Bar shall be subject to the same duties and rules – and therefore shall benefit from the same guarantees and privileges – as external lawyers, in particular in regards to legal professional privilege. The Commerce Court ordered the restitution of the documentation seized as a consequence.

The protection given by national rules of legal professional privilege is therefore broader than the one resulting from the application of the case-law of the EU courts and, as a result, the regime applicable to in-house legal advice may differ depending on whether Portuguese national rules or EU rules apply.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The rights of companies/individuals being investigated comprise essentially of the following: the right to access the file; the right to a defence according to the adversarial principle; the right to a hearing; and the right to appeal against interlocutory and final decisions adopted by the Authority.

Most of the Authority's decisions condemning companies for anticompetitive practices have been appealed in court and it is interesting to note that several of them have been quashed for violation of the rights of defence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Failure to co-operate with the Authority or obstruction of the exercise of the Authority's investigatory powers (either by willful misconduct or negligence) is sanctioned with a fine, which amount may not exceed 1% of the previous year's turnover for each of the undertakings.

Failure to supply, or the supply of false, inaccurate or incomplete, information in response to a request by the Authority in the exercise of its powers of sanction or supervision (either by willful misconduct or negligence) shall be subject to a similar sanction.

According to public information, the Authority has adopted some of these "non-compliance" decisions in respect to information requests. For example, in 2005, the Authority imposed a fine of €1,000.00 on a Professional Association for supplying incomplete information during an infringement procedure, which was confirmed by the court on appeal (Proc. n.º 769/05.6TYLSB). In that same year, the Authority imposed fines ranging from €79,939.39 - €94,850.11 on three companies for refusing to provide information to the Authority in the exercise of its powers of supervisions. The fines were annulled by the court on appeal (Proc. n.º 205/06.0TYLSB) due to irregularities in the requests for information.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Besides ordering that the infringement be brought to an end, the Authority may impose fines where it concludes that there has been a competition law breach. The maximum fine in a cartel case is up to 10% of the turnover of each participating undertaking.

In addition to the above, if the seriousness of the infringement and the liability of the offender so justify, the Authority may impose ancillary sanctions of two kinds:

- (i) publication in the official gazette or in a national newspaper, at the offender's expense, of the relevant parts of a decision finding an infringement; and
- (ii) deprivation of the right to participate in procurement proceedings if the infringement found has occurred during, or as a consequence of, such proceedings. This sanction may only last for a maximum period of two years.

Moreover, and whenever deemed necessary, the Authority may impose a periodic penalty payment in cases of non-compliance with a decision of the Authority imposing a penalty or ordering the application of certain measures. This may result in a periodic payment of up to 5% of the average daily turnover of the infringing undertaking for each day of delay.

Members of an association that is subject to a fine or a periodic penalty payment are jointly and severally responsible for payment of such sanctions.

Finally, civil-law sanctions may arise, notably, all prohibited agreements and concerted practices are null and void; also, parties that have suffered losses as a result of the cartel infringement may seek compensation in court (see section 8).

3.2 What are the sanctions for individuals?

Individuals (which shall include only members of the board of directors and of equivalent statutory bodies) may be subject to the penalty prescribed for the respective company (see the response to question 3.1), although with a special reduction, if they knew or should have known of the infringement but failed to take the appropriate measures to bring it to an end. However, if a more serious penalty is applicable pursuant to other legal provisions, the latter will apply.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Act does not have specific provisions dealing with potential fine reductions for these reasons. In determining the fines, the Authority shall take into account (amongst other non-specific criteria): seriousness and duration of the infringement; the advantages enjoyed by the offenders as a result of their behaviour; the level of cooperation with the Authority; and the offender's conduct in eliminating the violation and repairing the damages.

Nevertheless, the general regime of misdemeanours, which is subsidiarily applicable to the proceedings relating to cartels, determines that one of the factors to take into account when establishing a fine is the economic situation of the offender. Thus, although this provision does not establish any quantitative guidance as to how the economic situation should be factored in the amount of the fine, it provides the Authority with the legal grounds to do so within the general principle of proportionality and subject to

judicial review (see section 7). It is also likely that the Authority would follow the Commission's view on the 'inability to pay' claims, as provided in the 2006 Fines Guidelines.

In a decision of 2011 regarding an alleged price fixing between driving schools established in Madeira Island, the Authority imposed a total fine of €9,865.40 on seven undertakings (the individual fines ranging from a minimum of €684.07 to a maximum of €2,731.36). In setting the amount of the fine, the Authority not only took into consideration the criteria foreseen in the Act (see above) but also the small economic scale of the companies concerned (in terms of turnover and number of workers) as well as of the fact they operate in a market characterised by insularity.

3.4 What are the applicable limitation periods?

Sanctioning proceedings for cartel offences (similarly to other prohibited practices) are subject to a 5-year limitation period. The issue of when this limitation period starts to run will ultimately depend on the type of infringement at stake, for example, in the case of continuing infringements, the 5-year period starts to run from the date on which the infringement ceases.

Five years (counting from the date when the decision has become non-appealable) is also the time limit for the enforcement of the sanctions imposed.

These limitation periods are suspended for as long as a judicial review is pending, with a limit of 6 months. The period is interrupted whenever the Authority takes any action for the purpose of the investigation. Each interruption shall start the time running afresh.

Expiry of the limitation periods referred to above will occur on the day on which a period equal to 1.5 times the respective limitation period, plus the eventual suspensions, has elapsed.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

As referred to above (question 3.2) only directors or other members of statutory bodies (but not employees) can be personally liable and subject to penalties for competition law violations.

Regarding those individuals, there is no specific provision preventing a company from paying the penalties and/or legal costs imposed on them by the Authority.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Act refers that legal persons shall be responsible for infringements arising from the actions carried out on their behalf, on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees. Hence, even though employees are not individually liable for competition infringements, their actions – when taken on behalf or on account of the company or in the exercise of their duty – will bind the company and result in liability for competition infringements. From a competition law perspective no action may be brought against the employees, but under the general principles of labour and civil law, an employer may claim damages (including legal costs and financial penalties) from an employee if the latter acted wilfully or negligently and his action caused the employer's engagement and punishment in the cartel.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Portugal enacted its leniency programme in 2006, through Law No 39/2006, 25 August. This Act was subsequently complemented by Regulation No 214/2006, 22 November, which sets out the correspondent administrative procedure. There is also a specific form to apply for leniency, which is enclosed in Regulation No 214/2006.

From an objective viewpoint, the leniency regime applies to all agreements and concerted practices punishable under national or EU provisions (respectively, Article 4 of the Competition Act and Article 101 TFEU) and not only to cartels (as occurs under the EU leniency programme).

From a subjective viewpoint, leniency may be granted either to companies or to members of a company's board of directors or equivalent bodies. The latter may apply for leniency on behalf of the company or individually (in the last case, immunity or special reduction will only benefit the applicant).

There are four types of lenient categories: full immunity; special reduction of a fine above 50%; special reduction of a fine up to 50%; and additional reduction of a fine (or 'leniency plus') – we will deal with the last category in question 4.6 below.

Common requirements to the four categories

To benefit from any of the four categories of leniency mentioned above, companies have to comply with three conditions:

- (i) cooperate fully and continuously with the Authority from the moment an application is filed. This requires providing all evidence available at the moment or in the future, responding to any information requests, abstaining from jeopardising the course of the investigation and refraining from informing the other participants in the agreement or concerted practice about the leniency application;
- (ii) put an end to its participation in the infringement; and
- (iii) not have exercised any coercion on the other companies to engage in the infringement.

Specific requirements for full immunity

Full immunity from fines is reserved to 'first in' situations, i.e., companies or individuals which have presented the Authority with information and evidence of an agreement or concerted practice before the Authority has initiated an investigation relating thereto.

Specific requirements for special reduction of a fine above 50%

Reductions of fines above 50% are also granted in 'first in' situations. However, in this case, the company or individual bringing forward the elements on the infringement does it at a time when the Authority has already initiated an investigation but has not yet issued a statement of objections.

To obtain leniency under this procedure it is also necessary that the information made available by the applicant has contributed decisively to the investigation and substantiation of the infringement.

Specific requirements for special reduction of a fine up to 50%

A reduction of fines of up to 50% is possible if a natural or legal person 'comes in second' to an ongoing investigation in which the Authority has not yet issued a statement of objections. The same requirement applies on the importance of the information provided for the investigation.

Specific requirements for additional reduction of a fine ('leniency plus')

There is also a possibility for an additional reduction in the fine, known as 'leniency plus'. This may apply to companies or

individuals that have applied for leniency in respect of a given agreement or concerted practice and provide the Authority with information and evidence on another agreement or concerted practice in relation to which they will also apply for leniency.

The law does not provide for a specified amount of reduction in these cases and the benefit will only apply if the elements are offered prior to the Authority issuing a statement of objections in the second investigation.

In accordance with the publicly available information, up until now the Authority has only issued one decision based in the leniency programme. This occurred in the 2009 *catering cartel*, which was triggered by the leniency application of a former director of one of the cartelists, who disclosed the infringement to the Authority and benefited from full immunity. His former employer and the directors of the other companies in the cartel were all fined.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is no formal 'marker' system in place, in the sense that a leniency applicant will not receive a notification stating its rank in the proceedings. However, both before and after the application is filed, it is possible to contact the Authority informally and ask for an indication on the subject. The decision to grant or refuse immunity or a reduction in the fines is taken by the Authority at the end of the proceedings.

The leniency application is deemed to be filed (for ranking purposes) on the date and time of reception at the Authority's premises, postal address or email address (see question 4.3 below).

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

A leniency application must be made in accordance with the form approved by Regulation No 214/2006 and contain all information required therein. The application is filed in writing via physical delivery at the Authority's premises, registered postal address or certified e-mail.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The applicable legal rule (for criminal investigations in general as well for misdemeanours and cartels in particular) is that investigations are not covered by secrecy, even prior to the issue of the statement of objections. However, the law entitles the Authority to determine that investigation secrecy should apply at the inquiry stage, under some conditions and in exceptional circumstances related to the protection of the investigation or of the rights of the parties involved. The Authority often resorts to this possibility. If a case is covered by investigation secrecy, the parties concerned in the investigation and third parties with a legitimate interest will not be granted access to the file prior to the statement of objections. Conversely, if the case is not protected, parties may have access to the file at this stage. Business secrets and other confidential information will in any case be protected and only access to the non-confidential version of the file is granted.

Although there is no established case law on the subject, the Authority might consider that in order to protect an ongoing investigation as well as the overall effectiveness of the leniency regime, information and documents other than the identity of the leniency applicant should be treated as confidential at any stage.

It is worth mentioning that, when the Authority decides not to grant

immunity or reduction of fines under the leniency programme, the documents delivered to it by the applicant will not be returned and may be used by the Authority to substantiate the infringement concerned. This is without prejudice to the special regime on the exchange of information between European competition authorities obtained through leniency programmes, as provided in Article 11 of Regulation No 1/2003 and in paragraphs §§ 37 *et seq.* of the Commission's notice on cooperation within the Network of Competition Authorities.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

As referred in our response to question 4.2, the decision to grant or refuse lenient treatment is made by the Authority only at the end of the proceedings. Since one of the requirements to benefit from leniency is to cooperate fully and continuously with the Authority from the moment the application is filed (see question 4.1), this means the 'continuous cooperation' should last until the final decision on the proceedings is adopted. If, during the course of the investigation, the Authority considers that the applicant is no longer cooperating, it shall immediately inform the applicant that it will not benefit from immunity or a fine reduction under the leniency programme.

However, the cooperation initially given may still be relevant for other purposes, in particular, considering that the level of cooperation with the Authority during an investigation is one of the criterion used to establish the amount of a fine under the Act (see question 3.3).

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Please refer to question 4.1.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Companies' directors may apply for leniency individually, in which case the leniency will only benefit the applicant, not the company.

Outside the scope of the leniency programme, any individual (either a director, an employee or any third party) may submit a complaint to the Authority implicating other individuals or companies in a suspected cartel. The Authority has a complaint form available on its website which, although not mandatory, may serve as a guideline for the type of information the Authority expects to receive. The practice of the Authority has also been to accept anonymous complaints.

Once the Authority receives a complaint it shall start an investigation and may not dismiss it without previously granting the complainant the opportunity to submit observations on the proposed decision.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Apart from the leniency programme, there are no other national legal provisions empowering the Authority to enter into settlement

arrangements in respect to cartels. Nevertheless, the Authority has already introduced these procedures in its decision-making practice.

The public records show that the Authority has adopted several decisions with binding commitments. Some examples are: (i) the *Bayer / Sapec* case, concerning a non-compete clause included in a contract between the two companies for the distribution of various agro-chemical products. The proceedings were terminated in 2007 with a decision incorporating binding commitments on Bayer to suppress the said clause in its relationship with the distributors; (ii) the *Nestlé / Delta / Nutricafés / Segafredo* case, also involving a non-compete clause included in a vertical agreement for the supply of coffee to the HORECA channel. The Authority dropped the administrative proceedings in 2008, subject to several commitments undertaken by the companies involving modifications to the respective supply agreements; and (iii) the *Sugalidal* case, which involved a suspected abuse of a dominant position by Sugalidal by means of a tying arrangement included in its contracts with industrial tomato producers. The case was closed in 2009 through a commitments decision imposing on Sugalidal the obligation to eliminate such arrangements.

The main effect of commitments decisions is to terminate the investigation and render the undertakings concerned free from liabilities and penalties. The companies will be bound by the commitments imposed and the Authority will be bound by its decision unless significant modifications occur in the facts and/or assumptions concurring to its adoption. Because, unlike Regulation 1/2003, there is no provision in the Competition Act empowering the Authority to terminate an antitrust investigation resorting to commitments, failure by a company to comply with commitments made binding by an Authority decision does not constitute an infringement *per se*. In these cases, however, the Authority may reopen the proceedings to assess the conducts occurred and ultimately sanction them.

One of the aspects that is being considered in the context of the revision of the Competition Act is the inclusion of a provision on binding commitments in antitrust cases.

7 Appeal Process

7.1 What is the appeal process?

Appeals in sanctioning proceedings are ruled by specific provisions of the Act and, subsidiarily thereto, by the provisions of the general regime on misdemeanours. The decisions of the Authority are subject to a judicial appeal, to be filed (together with the allegations and conclusions) within 20 working days from the moment the company becomes aware of the decision. The Authority will then have 20 working days to forward the records to the public prosecution service and may include its own allegations in the records forwarded.

The Authority may also enclose other particulars or information which it considers relevant to the decision in question and may offer proof.

The public prosecutor can only withdraw the accusation if the Authority gives its consent.

The court may reach a final decision with or without a previous court hearing, in the latter case only if the Authority, the public prosecutor or the defendant do not object thereto.

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

A principle of prohibition of *reformatio in pejus* shall apply, pursuant to the general rules on misdemeanours and, therefore, the amount of the fine cannot be increased by the court on appeal nor can an ancillary sanction not foreseen in the decision be imposed by the court.

The court decision is subject to one further appeal and the Appellate Court will finally rule on the case.

The Authority has an autonomous right to appeal.

The rules on the competent court to hear appeals of the Authority's decisions went through significant modification in 2008 and, more recently, in June 2011, although the practical effect of such modification has so far been limited. The Act initially attributed to the Lisbon Commerce Court the exclusive jurisdiction to hear appeals of decision of the Authority. The decisions of the Lisbon Commerce Court were then subject to appeal to the Appellate Court of Lisbon, which (in sanctioning proceeding cases) finally decides the case without further possibility for appeal. In 2008, a new legal structure of court organisation and functioning was approved by Law n.º 52/2008, 28 August, which modified the rules of the competent appeal court by decentralising appeals from the Lisbon Commerce Court to specialised commercial sections of the territorial competent courts. This system was initially subject to a trial phase in only three pilot areas and, at present, to a staggered implementation throughout the territory, to be completed only by September 2014.

More recently, Law n.º 46/2011, 24 June, introduced (again) changes in the existing laws on court organisation and functioning and in the Act, determining the creation of a specialised court for competition, regulation and supervision, which shall have, *inter alia*, jurisdiction in matters relating to the appeal, the review/revisions and the enforcement of all of the Authority's decisions (along with more limited jurisdiction over appeals of decisions of other sector-specific regulators, which shall be limited to sanctioning procedures). The intention of the Government – judging from the public announcements that preceded the approval of this law – was to create one single specialised court with jurisdiction over the entire national territory.

The final wording of Law n.º 46/2011, however, leaves some room for uncertainty as to the legislator's precise intent because references to a unique specialised court for competition, regulation and supervisions (in the Act), on the one hand, and references to specialised lower court sections for competition, regulation and supervision (in the revised Law n.º 52/2008), on the other hand, remain in force. The amendments introduced by this new law will only enter into force with the setting-up of the new court, for which no precise date is indicated.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes. The appeal of an Authority's decision imposing a fine or any other sanction shall have a suspensive effect, pursuant to the law (whereas appeals of other types of decisions do not have a suspensive effect).

7.3 Does the appeal process allow for the cross-examination of witnesses?

Testimonial evidence is permitted and the witnesses can be subject to cross-examination by the counterparty.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow-on' actions as opposed to 'stand alone' actions?

Damages actions for loss suffered as a result of any breach of the Act (including, therefore, for cartel conduct) follow general civil law and civil law procedures. Hence, private antitrust liability depends on the fulfilment of the five cumulative requirements established in the Portuguese Civil Code for tort liability, which are: (1) a conduct (act or omission) controllable by human resolution; (2) the conduct's unlawfulness; (3) the imputation of the conduct to a wrongdoer; (4) the existence of damages; and (5) a causal link between the conduct and the damages.

There is no material difference in terms of substantive and procedural law between follow-on and stand-alone actions. In the former, however, the Authority's final decision can serve as *prima facie* evidence that an infringement of competition law (requirements 1 to 3 above) has occurred and, therefore, the position of the claimants is likely to be stronger from the outset (even though, pursuant to the applicable procedural rules, the Authority's decision shall be freely evaluated by the judge).

Finally, one should not exclude the possibility of a damages claim being brought under contractual liability in cases where a contract exists between the wrongdoer and the entity suffering the damage and there is a breach of a contractual obligation or of any ancillary duty.

8.2 Do your procedural rules allow for class-action or representative claims?

Law No. 83/95, 31 August, establishes the legal framework applicable to the representative action ('*acção popular*'), which can be used in the context of a private antitrust class action. To our knowledge, however, the Portuguese representative action has never been triggered on the grounds of a competition law breach. The aim of these actions is to defend collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Under this framework, any natural person, association or foundation (the latter two in cases which are directly connected with their scope) should be capable of bringing a private antitrust class action before a Portuguese court based on the breach of competition law rules. Companies, on the contrary, may not use the representative action procedure.

Our national procedure can be qualified as an opt-out system, as the claimant automatically represents by default all the holders of similar rights or interests at stake who did not opt out, following, *inter alia*, the public notice regarding the submission of the representative action before the court.

The liable party must compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the conduct in question.

In the representative action the court is not bound by the evidence gathered or requested by the parties and, as a general rule, has the power to collect the evidence that it deems appropriate and necessary.

The claimant may seek redress for damages suffered; the law determines that the compensation of rights' holders who cannot be individually identified shall be determined globally. The right to compensation shall be time-barred within 3 years from the delivery of the court decision that has acknowledged the existence of such right.

8.3 What are the applicable limitation periods?

The right to compensation under the tort liability regime is subject to a time-limitation of 3 years from the moment when the injured party becomes aware of his right to make a claim for damages.

If contractual liability were at stake, the time-limitation would be 20 years.

8.4 Does the law recognise a “passing on” defence in civil damages claims?

The Portuguese Civil Code determines that the injured party has the right to claim for loss suffered and lost profits resulting from the illegal conduct. Reparation of damages shall only take the form of pecuniary compensation either if natural reconstitution is impossible or does not fully repair the damage suffered or is excessively costly for the debtor.

The indemnity shall be the difference between the pecuniary situation of the claimant on the most recent date that can be taken into account by the court and the pecuniary situation in which the claimant would be in the absence of those damages. Thus, the measure of loss which shall be compensated in an antitrust damage case will be the difference between the claimant’s actual position and the situation the claimant would have been were it not for the illegal conduct.

In light of the above, the defendant may use a pass-on defence to sustain that the claimant did not suffer all or part of the damages claimed because of overcharges passed on to its customers.

Such a defence, although permissible, may entail non-negligible difficulties in practice as the defendant may find it difficult to prove that the passing-on has actually occurred.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The general provisions of the Regulations of procedural fees apply. Procedural fees include (broadly) court fees (“*taxa de justiça*”) and court expenses. Court fees are due and charged for the procedural initiative of the party and depend on the amount of the claim or claims at stake in the proceedings as well as on the complexity of the case. Court expenses relate to the costs of certain procedural acts or services.

In light of the particulars of a given case (in particular, the amount of the claims at stake), it is possible to estimate approximately the procedural fees to be charged in the proceedings.

Procedural fees and expenses are charged in different moments throughout the procedure to both parties.

The final court decision (or a decision that finally decides any procedural incidents or appeals) will rule on the liability for costs, the general rule being that the losing party will be liable for payment of the procedural costs in the proportion of its loss.

If the court decision convicts the defendants to the fulfilment of a joint and several obligation, the liability as to procedural fees shall also be joint and several.

Plaintiffs in representative actions will benefit from an exemption of court fees in accordance with Article 4(1b) of the recently revised Portuguese Court Fees Act.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To the best of our knowledge, there have been no successful private antitrust damages actions so far for cartel conduct. We are also not aware of any out of court settlements.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

A revision of the Act (dated 2003) has been expected for some time taking into account several references thereto in public interventions by both the current as well as the former President of the Authority.

The Memorandum of Understanding signed on 03.05.2011 by the Portuguese Government, the European Commission, the European Central Bank and the International Monetary Fund in the context of the financial assistance package granted to Portugal, specifically addresses competition issues and refers (*inter alia*) to the need for a revision of competition law, to be initiated by the 4th quarter of 2011.

The indications given in the Memorandum as to the purpose of the revision of the Act focus on the need to make competition law as autonomous as possible from the Administrative Law and the penal procedural law and more harmonised with the European Union competition legal framework, to be achieved in particular by:

- simplifying the law, separating clearly the rules on competition enforcement procedures from the rules on criminal procedures with a view to ensure an effective enforcement of competition law;
- rationalising the conditions that determine the opening of investigations, allowing the Authority to make an assessment of the relevance of the claims;
- establishing the necessary procedures for a better alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria for the compulsory *ex-ante* notification of concentrations; ensuring more clarity and legal certainty in the application of Procedural Administrative law in merger control; and/or
- evaluating the appeal process and adjusting it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.

The Government has, in the meanwhile, undertaken to present to the Parliament, by December 2011, a bill to amend the Competition Act. For the time being, no details on the particulars of the proposal for amendment have been made public.

Alongside the revision of the Act, other measures identified in the Memorandum for the improvement of competition law enforcement include the establishment of a specialised court in the context of the reforms of the judicial system (to be achieved by the 1st quarter of 2012) and measures to ensure that the Authority has sufficient and stable financial means to guarantee its effective and sustained operation.

9.2 Please mention any other issues of particular interest in Portugal not covered by the above.

Please see question 9.1 above.

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