

Immunity, Sanctions & Settlements

Portugal

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GCR | Know-how

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Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

The first company successfully lodging the immunity application before the Portuguese Competition Authority (Authority) is not subject to fines. *Ope legis*, such application by the company also covers potential fines applicable to company's representatives, directors and employees involved in the antitrust conducts led to the knowledge of the Authority.

2 Do the protections extend to current and former officers, directors and employees?

Yes. The company's immunity application submitted before the Authority, *ope legis* jointly covers and is applicable to the company's officers, directors and employees involved in the wrongful conduct reported by the company.

3 Is immunity available after an investigation begins?

De jure and formally immunity (a zero fine) is only available applicable when an investigation is not yet pending before the Authority. If the investigation is already pending before the Authority the company may obtain, conditions met, a non-negligible reduction in the fine under an application for a fine reduction.

4 What are the eligibility requirements before an investigation begins?

Eligibility conditions for immunity (a zero amount fine) require that the company is the first to offer information and evidence which, in the Authority's view:

- allows it to provide a substantive reason for a judicial request to carry out search and seizure orders at a time when the Authority does not have enough information to warrant such judicial request; or
- to detect an infringement, provided that, at such point in time, the Authority does not have enough evidence about the infringement.

Further, the Authority grants immunity from the fine, under the terms provided above, if additionally the company cumulatively complies with the following conditions:

- cooperates fully and continuously with the Authority from the time when it submits the application for immunity;
- provides all the information and evidence that it has or may come to have in its possession or under its control;
- promptly replies to any request for information that may contribute to determining the relevant facts;
- refrains from any acts that may hinder the progress of the investigation, such as the destruction, falsification or concealment of information or evidence related to the infringement;

- refrains from disclosing the existence or the content of its application or the intention to submit such an application, except with written authorisation from the Authority;
- terminates its participation in the infringement, from the point where it has provided the Authority with the relevant available information and evidence, except to the extent that is reasonably necessary, in the view of the Authority, to maintain the effectiveness of the investigation; and
- did not coerce any of the other companies to participate in the reported infringement.

The information and evidence referred to supra shall contain full and accurate information on the agreement or concerted practice and the companies involved, including its aims, activities and functioning, the product or service concerned, the geographical scope, the duration, and specific information on dates, locations, content of and participants in contacts made, and all relevant explanations presented in support of the immunity application.

5 What are the eligibility requirements after an investigation begins?

If the conditions for immunity are not met, the company may benefit, during the investigation phase, from a reduction of the applicable fine, if it provides information and evidence on the infringement, as long as such elements represent significant added value with respect to the information already in possession of the Authority.

In addition, and similar to the immunity application setting, the above referred information and evidence shall contain full and accurate information on the agreement or concerted practice and the companies involved, including its aims, activities and functioning, the product or service concerned, the geographical scope, the duration, and specific information on dates, locations, content of and participants in contacts made, and all relevant explanations presented in support of the fine reduction application.

Moreover, in the reduction of fine legal framework, the Authority determines the reduction of the fine under the following rules:

- first company providing information and evidence that is of significant added value for the Authority: fine reduction between 30 per cent and 50 per cent;
- second company providing information and evidence that is of significant added value for the Authority: a fine reduction between 20 per cent and 30 per cent; and
- additional companies providing significant added value: a fine reduction of up to 20 per cent.

6 Will the applicant have to admit to a violation of law?

No. The applicant in an immunity or fine reduction application setting does not have to formally recognise directly and expressly the breach of the relevant provisions.

7 Are ringleaders or initiators of the conduct eligible?

Yes, as long as the ringleader or initiator did not coerce any of the other companies to participate in the reported antitrust infringement.

8 When must the applicant terminate its involvement in the conduct?

As a rule the applicant must terminate the involvement in the wrongful conduct prior to the submission of the immunity and/or reduction application before the Authority. In exceptional circumstances, the Authority may request the applicant to continue to participate in conduct to the extent that is reasonably necessary, in the view of the Authority, to maintain the effectiveness of the investigation – in any event this exception is triggered ex officio by the Authority and not by the applicant.

9 What constitutes termination of the conduct?

One can consider that termination of the conduct encompasses the extinction of any direct or indirect actions or omissions that fulfil the legal requirements of the breached Competition Act provision. *Exempli gratia*, non-participation in meetings with competitors aimed at fixing the price of competing products or services in the relevant market.

10 Will the applicant be required to make restitution to victims?

Restitution is dependent on the specificities of each case and is not tackled by the Authority's public enforcement. In any event, the economic damage caused to victims can be pondered by the Authority as one of the requirements, as an aggravating circumstance, to determine the amount of the applicable fine. Under Portuguese civil code rules restitution must be claimed under contractual and/or tort liability rules by the affected natural or legal person harmed by the wrongdoing before judicial courts or through alternative dispute resolution mechanisms.

11 Can more than one applicant qualify for immunity?

Yes. There can be several applications for immunity. In any event, the Authority only grants immunity to one company, mostly the one that fulfils the applicable requirements, as detailed in question 4.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

If an employee reports the conduct to the Authority acting solo as mere former or current employee of a company, not representing the company, and respective application is deemed complete by the Authority, the company may not afterwards benefit from immunity. Still, the company may benefit from a reduction of fine, if the conditions detailed above in reply to question 5 are met.

13 Does the afforded protection extend to any non-antitrust infringements?

No. The Authority's protection is exclusively related to the fines that could be applied by the Authority, in the absence of the immunity application. Private antitrust enforcement is not barred based on such application before the Authority.

14 What confidentiality assurances are given to the first applicant to report?

In accordance with the applicable provisions, the application for immunity of fines or reduction of fines is confidential, along with all the documents and information submitted by the applicant for the purpose of immunity or reduction of fine.

15 Does the authority publish guidance regarding the application of the programme?

Yes. The Authority published comprehensive detailed guidance on the Programme's rules through the Information Notice "Immunity from a fine or reduction in a fine in administrative procedures to establish infringement of competition rules" – http://concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/DR_NOTA%20INFORMATIVA_CLEMENCIA_PosPublReguDR_03_01-2013.pdf

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

Portuguese jurisdiction rules follow closely DG COMP's provisions as governed in the applicable EU regulations and guidelines and also in the ECN Model Leniency Programme. As a rule one can consider that Portuguese jurisdiction rules do not conflict with other EU member state rules.

Immunity application and marker process**17 What is the initial process for making an application?**

A submission before the Authority of a written application that can alternatively be replaced by oral statements made during a meeting with the unit handling antitrust proceedings, at the premises of the Authority.

18 What information is required to secure a marker?

To secure a marker the applicant must submit the following elements in writing or orally (in this latter case subject to a document produced by the Authority and signed by the applicant's representative):

- Information about the applicant: company (name, address) (if the application is submitted on behalf of different legal entities of the same group of companies, all companies should be listed) and company's representative;
- Information about the alleged infringement: (i) participants; (ii) affected product(s) and/or service(s); (iii) affected territories; (iv) location of the evidence; (v) brief description of the alleged infringement; (vi) period of the alleged infringement; and vii other information deemed relevant or useful;
- If applicable, information about the submission of a leniency application before the European Commission, including application submission date (if not yet submitted, date foreseen by the applicant) and name of the contact at DG COMP;
- If applicable, reasoning why the applicant considers that DG COMP is particularly well placed to deal with the alleged practices;
- If applicable, information on the existence of other leniency applications: (i) name of the competition authorities to which an application was submitted and contact; (ii) name of the competition authorities to which an application is going to be submitted;
- Additional information, if any.

19 How much time will an applicant have to perfect its marker?

As a rule, the applicant has a minimum period of 15 days to perfect its marker.

20 Can the deadline for perfecting the marker be extended?

There is no legal prohibition banning the Authority to extend the time period for perfecting the marker, however detailed and substantiated circumstances should reason such time extension request, for instance necessity to gather all the documentation on the reported conduct. In any event, if the application is not completed within the Authority's provided deadline, the application is rejected and the submitted documents returned to the applicant.

21 What is required to perfect the marker?

All the information and elements detailed and identified above in the answer to question 4 (on immunity) and question 5 (on reduction of fines).

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?

As a rule, yes. Albeit, if such additional information is in the meantime reported by another applicant to the Authority, such expansion of the marker may be deemed untimely by the Authority without producing the requested effects.

23 Can an applicant lose its marker if a second applicant comes forward with better information?

Yes. Such situation as de facto occurred in accordance with the decisional acquis of the Authority, whereby a third non-immunity applicant gained second non-immunity applicant status based on the quality and quantity of evidence adduced before the Authority.

24 What if the applicant's investigation reveals that no violation exists?

The case is closed by the Authority. From a legal standpoint, such scenario may occur (i) immediately after submission of the application, prior to the opening of an inquiry; (ii) following the opening of the inquiry; or (iii) after the adoption of a statement of objections, deriving, inter alia, from legal and/or factual elements submitted by other defendants before the Authority.

25 What if the authority decides not to investigate?

In accordance with the applicable rules, such decision can be subject to review by the applicant before the Portuguese Competition Court, reasoned on the lack of merits of the adopted decision and/or on procedural grounds.

Immunity cooperation obligations**26 What is the applicant required to produce?**

The applicant in the judicial file should provide sound factual and legal reasoning on the merits of the application regarding the wrongful conduct.

27 Will the applicant be required to make a written confession?

The applicant, under the applicable rules, is not required to make a written confession before the Authority. From a legal standpoint the applicant is exclusively required to provide all elements and information in its possession on the antitrust conduct without being required to confess the wrongdoing.

28 Can third parties obtain access to the materials provided by the applicant?

As a rule, materials provided by the applicant cannot be accessed by third parties, but co-defendants may access such materials, although they cannot copy the applicants' materials provided to the Authority. Information containing business secrets is not subject to access by co-defendants.

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

Such assessment is dependent on the specificities of each case and on the relevance of the employee at stake in the alleged wrongful conduct. If the employee was a key figure in the antitrust conduct, such refusal to cooperate may potentially lead the company to lose its immunity status before the Authority.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

If an employee engages in obstructive conduct prior or after submission of the application, including destruction of evidence, one cannot dismiss the possibility of the Authority dismissing the immunity application.

31 Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?

No. Under Portuguese Bar Association rules all attorney-client communications and documents, including memoranda, emails, legal opinions, et al are protected by legal professional privilege and are not subject to disclosure to the Authority. Under the Portuguese jurisdiction rules, such legal privilege protection is afforded indistinctively, with no exceptions, to in-house lawyers and external lawyers.

Granting immunity**32 How does the authority announce its promise not to charge or sanction?**

After assessment of the immunity application the Authority confirms in writing if the applicable criteria for fine immunity are met and, if these are fulfilled, conditionally confirms the non-application of a fine.

33 Does the authority put its commitment in writing?

Yes. After assessment of the immunity application the Authority confirms in writing if the applicable criteria for fine immunity are met.

34 Who is given access to the document?

The Authority's document conditionally granting immunity from the applicable fine is notified to the applicant.

35 Does the authority publish a model letter for conferring immunity?

No, the Authority does not have a model letter for conferring immunity.

Individual immunity or leniency**36 Is there an individual immunity programme?**

Yes. Former or current company's employees, directors or respective representatives can individually submit an immunity application before the Authority.

37 What is the process for applying?

Eligibility conditions for immunity (a zero amount fine) require that the individual applicant is the first to supply information and evidence that, in the view of the Authority:

- allows it to provide a substantive reason for a judicial request to carry out search and seizure orders at a time when the Authority does not have enough information to warrant the request; or
- to detect an infringement, provided that, at such point in time, the Authority does not have enough evidence about the infringement.

Further, the Authority grants immunity from the fine, under the terms provided above, if additionally the individual cumulatively complies with the following conditions:

- cooperates fully and continuously with the Authority from the time when it submits the application for immunity;
- provides all the information and evidence that it has or may come to have in its possession or under its control;
- promptly replies to any request for information that may contribute to determining the relevant facts;
- refrains from any acts that may hinder the progress of the investigation, such as the destruction, falsification or concealment of information or evidence related to the infringement;
- refrains from disclosing the existence or the content of its application or the intention to submit such an application, except with written authorisation from the Authority;
- terminates its participation in the infringement, from the point where it has provided the Authority with the relevant available information and evidence, except to the extent that is reasonably necessary, in the view of the Authority, to maintain the effectiveness of the investigation; and
- did not coerce others to participate in the reported infringement.

The information and evidence referred to supra, provided by the individual applicant, must contain full and accurate information on the agreement or concerted practice and the companies involved, including its aims, activities and functioning, the product or service concerned, the geographical scope, the duration, and specific information on dates, locations, content of and participants in contacts made, and all relevant explanations presented in support of the immunity application.

38 What are the criteria for qualifying?

The relevant eligibility criteria is provided and detailed in reply to question 37, supra.

Revocation of immunity

39 On what basis can corporate immunity be revoked?

Grounds for revocation of corporate immunity by the Authority can derive from the following actions or omission by the applicant:

- absence of full and continuous cooperation with the Authority from the time when it submits the application for immunity;
- non-disclosure to the Authority of all the information and evidence that it has or may come to have in its possession or under its control;
- lack of prompt replies to any request for information that may contribute to determining the relevant facts;
- execution of acts that hinder the progress of the investigation, such as the destruction, falsification or concealment of information or evidence related to the infringement;
- disclosing the existence or the content of its application or the intention to submit such an application, without written authorisation from the Authority; or
- continues to participate in the infringement, from the point where it has provided the Authority with the relevant available information and evidence, and the Authority did not authorise the continuation of such conduct.

40 When can it be revoked?

The decision conditionally granting full immunity can be revoked ex officio when the Authority deems that from a factual and legal standpoint the respective cumulative requirements are no longer met by the applicant.

41 What notice is required to revoke?

The Authority's act that revokes the conditionally granted immunity is subject to communication to the applicant.

42 Can the applicant file a judicial challenge to a decision to revoke?

Yes. Applicable procedural rules allow the applicant to challenge referred decision before the Portuguese Competition Court, the latter decision also subject to appeal before the Lisbon Appeal Court.

Reduction in sanctions

43 Does the leniency programme allow for reductions in sanctions?

Yes. If the applicant is not the first to submit the application on the alleged infringement it can still access a reduction from the applicable sanction.

44 What is the process for seeking a reduction in sanctions?

If the conditions for immunity are not met, the company may benefit from a reduction of the applicable fine, if the subsequent requirements are cumulatively fulfilled:

In addition, and similar to the immunity application legal framework, the above referred information and evidence shall contain full and accurate information on the agreement or concerted practice and the companies involved, including its aims, activities and functioning, the product or service concerned, the geographical scope, the duration, and specific information on dates, locations, content of and participants in contacts made, and all relevant explanations presented in support of the fine reduction application.

Moreover, in the reduction of fine legal framework, the Authority determines the reduction of the fine under the following rules:

- first company providing information and evidence that is of significant added value for the Authority: fine reduction between 30 per cent and 50 per cent;
- second company providing information and evidence that is of significant added value for the Authority: a fine reduction between 20 per cent and 30 per cent; and
- additional companies providing significant added value: a fine reduction of up to 20 per cent.

45 Is there a marker process similar to immunity applications?

Yes. If the Authority concludes in limine that the elements submitted under the terms of an application for a reduction of a fine have significant added value, it informs the applicant of its intention to grant a reduction of the fine, with an indication of the level specified as follows:

- first company providing information and evidence that is of significant added value: a reduction of 30 per cent up to 50 per cent on the applicable fine;
- second company providing information and evidence that is of significant added value: a reduction of 20 per cent up to 30 per cent on the applicable fine; and
- Subsequent undertakings that provide significant added value: a reduction of up to 20 per cent on the applicable fine.

If the application is submitted after the adoption of the statement of objections by the Authority, the aforesaid fine reductions percentages are reduced by half.

46 Are the reductions in sanctions fixed or discretionary?

The reduction in the applicable sanctions is predetermined in the relevant legal provisions, as detailed in the reply to question 45. In any event the Authority has some discretionary power when determining the de facto applicable reduction under the *supra* mentioned ranges, as well as when defining the base fine to which the reduction is applicable.

47 How are the reductions in sanctions calculated?

In order to determine the reduction of the fine, the Authority takes into consideration the order in which the information and evidence was submitted by the applicants, and the extent to which it represents added value for the investigation and conclusive evidence in establishing that there was an infringement.

48 Are there sentencing guidelines?

Yes. The Authority has adopted sentencing guidelines, as reflected in the Guiding Principles “Methodology Applied in the Application of Fines in the setting of article 69(8) of Law No. 19/2012, 8 May” – http://concorrenca.pt/vPT/Praticas_Proibidas/Praticas_Restritivas_da_Concorrenca/Documents/Linhas_de_Orienta%C3%A7%C3%A3o_Coimas_DEZ2012.pdf.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

Yes. Such additional evidence shall act as a mitigating circumstance of the wrongdoing with potential positive non-negligible effects in the determination of the de facto applicable reduced fine.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

The Authority is in terms of reduction of fines for a non-immunity applicant is bounded by the ranges provided in the applicable legal provisions. The level specified in the governing rules are the following:

- first company providing information and evidence that is of significant added value: a reduction of 30 per cent up to 50 per cent on the applicable fine;
- second company providing information and evidence that is of significant added value: a reduction of 20 per cent up to 30 per cent on the applicable fine; and
- subsequent undertakings that provide significant added value: a reduction of up to 20 per cent on the applicable fine.

If the application is submitted after the adoption of the statement of objections by the Authority, the aforesaid fine reduction percentages are reduced by half.

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

In addition to fine reduction, there are no additional incentives offered by the Authority to an applicant that is the first non-immunity applicant. Still, in addition to the application for a fine reduction the applicant can also trigger before the Authority the settlement procedure aimed at an additional fine reduction.

52 Does the competition authority publish guidance regarding sentencing reductions?

Yes. The sentencing guidelines applicable in the Portuguese jurisdiction result from two documents adopted by the Authority:

- the Guiding Principles on the Methodology Applied in the Application of Fines in the setting of article 69(8) of Law No. 19/2012, 8 May http://concorrenca.pt/vPT/Praticas_Proibidas/Praticas_Restritivas_da_Concorrenca/Documents/Linhas_de_Orienta%C3%A7%C3%A3o_Coimas_DEZ2012.pdf; and
- the Information Notice Immunity from a fine or reduction in a fine in administrative procedures to establish infringement of competition rules – http://concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Documents/DR_NOTA%20INFORMATIVA_CLEMENCIA_PosPublReg-uDR_03_01-2013.pdf

53 Does the authority provide for “Amnesty Plus” benefits?

No. If a company is under investigation by the Authority for one antitrust infringement but is too late to obtain leniency (immunity or fine reduction) for that infringement, formally it cannot receive any benefits in such investigation by reporting its involvement in a separate and autonomous antitrust infringement.

54 How is the Amnesty Plus discount calculated?

The Amnesty Plus Programme is not available in the Portuguese jurisdiction.

Cooperation obligations for sentencing reductions**55 Are the cooperation obligations similar to those for immunity applicants?**

In a reduction from fine application, the cooperation obligations that the applicant must comply with are similar to those applied in the framework of a leniency application. Hence the company must comply with the following duties:

- cooperate fully and continuously with the Authority from the time when it submits the application for immunity;
- provide all the information and evidence that it has or may come to have in its possession or under its control;
- prompt reply to any request for information that may contribute to determining the relevant facts;
- refrain from any acts that may hinder the progress of the investigation, such as the destruction, falsification or concealment of information or evidence related to the infringement;
- refrain from disclosing the existence or the content of its application or the intention to submit such an application, except with written authorisation from the Authority;
- terminate its participation in the infringement, from the point where it has provided the Authority with the relevant available information and evidence, except to the extent that is reasonably necessary, in the view of the Authority, to maintain the effectiveness of the investigation; and
- refrain from coercing others to participate in the reported infringement.

56 Will the applicant be required to make a written confession?

No. The applicant, under the applicable rules, is not required to make a written confession before the Authority. From a legal standpoint the applicant is exclusively required to provide all elements and information in its possession on the antitrust conduct without being required to confess the wrongdoing.

57 Can third parties obtain access to the materials provided by the applicant?

As a rule, materials provided by the applicant cannot be accessed by third parties, but co-defendants may access such materials, although they cannot copy the applicants' materials disclosed to the Authority. Information containing business secrets is not subject to access by co-defendants.

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

Such assessment is dependent on the de facto specificities of each case, including the relevance of the employee at stake in the alleged wrongful conduct. If the employee was a key figure in the antitrust conduct, such refusal to cooperate may potentially lead the company to have a weaker standing when applying for a fine reduction.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

If an employee engages in obstructive conduct prior or after submission of the reduction from application, including destruction of evidence, one cannot dismiss the possibility of the Authority dismissing the application or revoking the conditionally approved application, if already granted.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

No. Under Portuguese Bar Association rules all attorney-client communications and documents, including memorandum, emails, legal opinions, et al are protected by legal professional privilege and are not subject to disclosure to the Authority. Under the Portuguese jurisdiction rules, such legal privilege protection is afforded indistinctively, with no exceptions, to in-house lawyers and external lawyers.

61 Can an applicant challenge the amount of the reduction of sanctions?

Yes. Under the applicable rules the applicant can judicially challenge before the Portuguese Competition Court on procedural grounds and/or on the merits the decision of the Authority that determines the amount of the applicable reduced fine.

Settlements

62 How is the settlement process initiated?

During the course of the investigation, the Authority can set a time limit, of not less than 10 working days, for the defendant in the case to make known in writing its willingness to enter into a discussion with a view to the possibility of proposing a settlement.

Equally, during the course of the investigation, the defendant can make known in writing to the Authority its willingness to enter into a discussion with a view to the possibility of proposing a settlement.

If the settlement procedure is triggered, the Authority within 10 days prior to the initiation of the settlement discussion with the defendant, provides to the defendant information on the facts that are imputed to him, the evidence reasoning the imputation of a sanction and the range of the amount of the fine for the offence in question. Aforesaid information, per applicable rules, is deemed confidential.

Further, the Authority can, at any time, decide to terminate the discussion with one or more defendants if it considers that there is no progress in the proceedings.

Once the discussion has been concluded, the Authority shall set a time limit, of not less than 10 working days, for the defendant to submit a settlement submission in writing.

The settlement submission presented by the defendant must take into account the result of the discussion and accept responsibility for the infringement at issue and this submission cannot subsequently be unilaterally revoked by the defendant.

Once the settlement submission is received, the Authority assesses the motion and may refuse it, if considers the submission unsubstantiated, or accept it and, in this latter case it drafts a settlement notice, that includes the identification of the defendant, a summary of the facts that have been imputed, the breached legal provision(s) and an indication of the terms of the settlement, including the sanctions imposed and the applicable fine reduction percentage.

If the defendant does not agree with the content of the draft settlement notice adopted by the Authority, or it does not reply to the Authority within the provided deadline, then the proceedings shall continue, and the settlement notice deemed to be devoid of purpose.

Alternatively, if the defendant agrees with the draft settlement notice it must inform the Authority, within the provided deadline, that the settlement notice reflects the substance of the written motion previously submitted before the Authority.

Afterwards the settlement notice is converted into a definitive decision imposing the applicable sanction, subject to payment of the applied fine by the defendant.

63 Is the amount of the sanction always fixed in the settlement agreement?

Yes. The amount of the sanction to be paid by the defendant is determined in the settlement decision adopted by the Authority that reflects the agreement previously reached in the settlement notice with the defendant. The settlement reduction in the applicable fine, conditions met, can be cumulated with the reduction resulting from a non-immunity application.

64 What role, if any, do the courts play in the settlement process?

In accordance with the applicable provisions, the facts that the defendant accepted, as provided in the settlement decision adopted by the Authority, cannot be subject to judicial review.

Still, the defendant can, inter alia, grounded on procedural issues and also on the merits, challenge the decision before the Competition Court.

65 Are the settlement documents, including any factual admissions, made public?

All the documents and information regarding the settlement discussion, as detailed supra in reply to question 62 are confidential, including the communication whereby the defendant confirms that it agrees with the draft settlement notice adopted by the Authority. The final decision adopted by the Authority in the file, which is public, discontinues the sensitive confidential information related to the reached settlement.

66 Is an admission of wrongdoing required?

Yes. For the defendant to agree with the draft settlement notice produced by the Authority and to settle the case it must recognise the wrongdoing and the legal qualification applied to the facts.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?

The companies that reach a settlement agreement with the Authority benefit from a reduction on the applicable fine, whose percentage is subject to joint assessment by the defendant with the Authority during the settlement negotiation phase.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

No. The settlement procedure to be initiated is not subject to agreement by all defendants in the investigation and can be triggered and successfully concluded with a single defendant.

69 Will the authority settle with subjects who refuse to cooperate?

The Authority has significant discretionary powers in the employment of the settlement framework and may consider, subject to a case by case analysis, that the procedural requirement to reach a settlement are not met when the defendant refuses to cooperate and, as such, discontinue or not initiate individual discussions with one or more defendants aimed at reaching a settlement.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

In accordance with the applicable rules, the content of settlement negotiations, including exchanged information and statements are deemed, as a rule, confidential and cannot be used by the Authority against the defendant that adduce such elements.

71 May a party to the settlement agreement void the agreement after it is entered?

Yes, albeit grave circumstances must be met or procedural rights breached by the Authority for a defendant to have judicial standing to judicially request that the settlement agreement is deemed void.

72 Does the competition authority publish guidance regarding settlements?

Yes. The Authority's guidance on settlement procedures is enshrined in the following two documents:

- In section V of the Guiding Principles on the Instruction of procedures regarding the application of articles 9, 11 and 12 of Law No. 19/2012, of May 8 and of articles 101 and 102 TFEU – http://concorrencia.pt/vPT/Praticas_Proibidas/Praticas_Restritivas_da_Concorrencia/Documents/LO_Instrucao_Processos_2013.pdf); and
- Guidelines on the methodology to be used in Fines application, under article 69, paragraph 8 of Law No. 19/2012 – http://concorrencia.pt/vPT/Praticas_Proibidas/Praticas_Restritivas_da_Concorrencia/Documents/Linhas_de_Orienta%C3%A7%C3%A3o_Coimas_DEZ2012.pdf).

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Eduardo Maia Cadete is a partner in the Antitrust and Competition practice of Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL. He has more than 15 years of cartel, merger control, state aid, internal antitrust audits and litigation experience in both the private and public sectors. He has represented clients in some of the largest, most complex, cartel, merger matters and private enforcement proceedings in Portugal. In 2016 he was described by Chambers as "... advising and representing national and international clients before the European Commission and the NCA". His litigation experience also includes representing clients before European Courts and the European Court of Human Rights.

Mr Maia Cadete is a frequent author and speaker on antitrust issues. He has co-authored the handbook on the Portuguese Competition Act (2016) and is the author of EU and competition law articles in several publications, including International European Law Tax Review, International Law Office, Portuguese Bar Association and Portuguese Bank Association quarterly magazines and The Private Competition Enforcement Review.

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