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The International Comparative Legal Guide to:

Enforcement of Competition Law 2009

A practical insight to cross-border enforcement regulation

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1 National Competition Bodies

1.1 Which authorities are charged with enforcing competition laws in Portugal? If more than one, please describe the division of responsibilities between the different authorities.

The enforcement of competition laws in Portugal is entrusted to the Portuguese Competition Authority (*Autoridade da Concorrência*). The Authority was created in 2003 by Decree-Law Nr. 10/2003, of January 18 (which also sets forward its Bylaws) and its powers were further detailed in the Competition Act (Law Nr. 18/2003, of 11 June). The Authority is a public entity with statutory independence for the performance of its attributions and enjoys administrative and financial autonomy. This independence is without prejudice to the guidelines on competition policy as defined by the Government, in line with the constitutional and legal framework, and of given acts being subject to review by the relevant ministry in accordance with the law.

The Authority has two bodies, the Council and the single auditor ("*fiscal único*"). The first is the decisional body entrusted with the enforcement of competition laws and with the management of the Authority's services. The services are composed of jurists, economists and other officials and currently include the merger control department, the restrictive practices department, the legal and litigation department, the economic studies cabinet, the international relations department and the financial and administrative department. The Council is composed of a chairman and two or four other members, appointed by the Council of Ministers upon proposal of the minister in charge of economic affairs and subsequently to the hearing of the ministers responsible for finance and justice affairs. The law provides that the members of the Council are persons of recognised competence and having experience in areas relevant for the pursuance of the competences that have been attributed to the Authority. Their nominations are for a period of five years and may be renewed once. Particularly relevant is the rule of impossibility for dismissal of the members of the board before the end of their mandate. Exceptions concern the dissolution of the Council by resolution of the Council of Ministers on the grounds of serious collective misconduct or as a result of extinction of the Authority and individual dismissal may occur in exceptional circumstances provided for in the Bylaws.

The second body is the single auditor who is responsible for the legal and economic control of the Authority's assets and financial management and also carries out an advisory role to the Council.

The Authority has sanctioning, supervisory and regulatory powers.

Please see hereunder in **question 1.2** for the relations between the competition authority and sector regulators.

1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Competition Act applies to all sectors of activity and together with Decree-Law Nr. 10/2003 entrusts the Authority with the enforcement of competition laws in all those sectors. In this context, the Government has enacted Decree-Law Nr. 30/2004, of 6 February that establishes that the Authority receives a part of the fees charged by the sector regulators to the undertakings belonging to the sectors they oversee when rendering services to them. As explained above in **question 1.1**, the new competition regime establishes that the Authority has its own financial resources and is independent from the Government and given that the Authority is entrusted with the enforcement of competition law in all sectors of activity, it is justified that a part of the referred fees is awarded to it.

Notwithstanding, it is arguable whether the articulation of competences between the Authority and sector regulators is clearcut. More precisely, Article 15 (1) of the Competition Act provides that the Authority and the sector regulatory authorities shall work together to apply the competition legislation. As concerns restrictive practices and even though the Authority is competent to instruct and decide the case, the competent sector regulator shall be immediately informed of the same case and given a reasonable time-limit to present its Opinion. Should the latter become aware of a restrictive practice, it must immediately inform the Authority of the case and supply the essential facts. As for merger control, whenever a concentration of undertakings affects a market that is subject to sector regulation, before reaching a final decision the Authority shall ask the respective regulatory authority to state its opinion, within a reasonable period prescribed by the Authority. However, Article 39 provides that the referred articulation of competences shall not affect the exercise by the sector regulatory authorities of the powers that, within the scope of their specific duties, are legally conferred on them in relation to the concentration in question. This wording has already given rise to different interpretations particularly in important merger control cases.

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 regulators. In its annual reports of activities, the Authority gives out general information on ongoing cooperation with sector regulators.

1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Portugal?

There is no binding document on the Authority's priorities as

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concerns its investigations. Notwithstanding, the Authority's annual plans of activity provide a useful hindsight of its envisaged priorities for the coming year as concerns the type of infringements that will be the focus of investigations as well as the sectors of activity which may be under surveillance. Moreover and similarly to what is the common practice at Community level, the Authority has taken the opportunity to reiterate the seriousness of given infringements of competition (more precisely, cartels) and the importance awarded to the investigations for its identification and condemnation in the context of publication of press releases concerning the outcome of given investigations. In addition to this, the Authority has developed monitoring of given sectors of activity which are considered of special importance, such as fuels, electricity and pharmaceuticals. In doing this, the Authority explained that this monitoring is due to the circumstance that they are either regulated or have a high degree of concentration in the market.

2 Substantive Competition Law Provisions

2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Portuguese Competition Act does not provide for any criminal sanctions, all competition infringements constituting misdemeanours. Substantive competition law provisions include the following:

- **Article 4 (1)** is equivalent to article 81 (1) of the EC Treaty and prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market. The examples provided for are equivalent to the ones provided in article 81 (1) EC. Moreover, according to Article 4 (2), unlawful practices are null and void, similarly to Article 81(2) EC.
- **Article 5** is equivalent to article 81 (3) of the EC Treaty. Practices referred to in Article 4 may be considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, they:
  a) offer the users of such goods or services a fair share of the benefit arising therefrom;
  b) do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives; and
  c) do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market in question.

  The practices provided for in Article 4 may be the subject to prior assessment by the Competition Authority (for more details, please see **question 3.1** hereunder). It is worthwhile referring that practices prohibited by Article 4 are considered justified when, though not affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 81 (3) of the EC Treaty. Accordingly, the Authority may withdraw the benefit referred to above if, in a particular case, it ascertains that a practice covered by it has effects incompatible with the cumulative conditions referred to above.
- **Article 6** provides for the prohibition of abusive exploitation of a dominant position in the national market or a substantial part of it, with the object or effect of preventing, distorting or restricting competition and applies to single and collective abuses of dominance. This provision considers notably the following:
  a) any of the forms of behaviour referred to in Article 4 (1); and
  b) the refusal, upon appropriate payment, to provide any other undertaking with access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, always excepting that the dominant undertaking demonstrates that, for operational or other reasons, such access is not reasonably possible.
- **Article 7** provides for the prohibition of abusive exploitation of economic dependence of any supplier or client on account of the absence of an equivalent alternative. An undertaking is understood as having no equivalent alternative when:
  a) the supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings; and
  b) the undertaking cannot obtain identical conditions from other commercial partners in a reasonable space of time.

  Furthermore, the following in particular may be considered abusive:
  a) Any of the forms of behaviour laid out in Article 4 (1).
  b) The unjustified cessation, total or partial, of an established commercial relationship, with due consideration being given to prior commercial relations, the recognised usage in that area of economic activity and the contractual conditions established.

The Authority's competences to enforce articles 81 and 82 EC when trade between member states is affected are expressly provided both in the Competition Act and in its Bylaws.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

One of the several innovations of the Competition Act consists in not distinguishing its applicability to any sectors of activity. Notwithstanding and as concerns specifically merger control provisions, the Television Act provides for the competence of the sector regulator to provide a binding Opinion on the concentration which, if negative, will impede the Authority to clear the concentration. The sector regulator may however only issue a negative opinion if the free expression and confrontation of opinions are in question.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

The Portuguese Competition Act expressly provides for a system of prior notification of agreements/practices equivalent to the one that existed at EU level until Regulation 1/2003 entered into force. Notwithstanding and with a view to harmonising the Portuguese competition regime with the EU one, the Council of the Competition Authority enacted Regulation 9/2005 which reduced substantially the scope of application of this system. More precisely, the Regulation provides that the Authority is competent to assess agreements/practices to which only Portuguese competition law is applicable. Furthermore, the regulation provides for high filing fees for the prior assessment of agreements/practices by the Authority (€7,500 to €25,000), the same for filings of

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concentration, which may further refrain undertakings from seeking prior approval. In practice, since 2005 there are only records of very few agreements being notified and the Authority considered itself incompetent to assess them.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

The Authority provides for a complaint form in its website. Even though it is not mandatory, the Authority considers that this document should serve as guideline for the information to be provided by the complainant. The confidentiality of the information contained in the form is ensured by the Authority.

Together with the complaint form, the Authority published a short note on the applicable EU and national legal framework in order to clarify the Authority's powers and help complainants to characterise the alleged infringement of competition rules. Alternatively to the presentation of a formal document with the complaint, the Authority provides for an electronic complaint form on its website, which allows for anonymous complaints. The Authority initiates an investigation ("*inquérito*") when it acknowledges suspicions of unlawful practices either *ex officio* or subsequently to a complaint. In the latter case, the Authority should not dismiss the case before informing the complainant and establishing a reasonable timeframe for the latter to present comments on the proposed decision.

Please note that all the State's services as well as independent administrative authorities have the duty to report to the Authority any facts susceptible of constituting infringements of competition. It is not excluded that these same entities may acknowledge the alleged infringements as a result of complaints.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There is no public information on the overall activity of the Authority as concerns investigations, even though the annual reports of activities refer to the most important cases (the most recent one refers to 2007). In accordance with the very scarce available information, no decisions have been adopted so far by the Authority under the leniency policy. In certain cases the Authority publishes a press release when adopting a decision of condemnation of alleged infringements of competition and refers whether the investigations started with a complaint or an *ex officio* investigation and also whether there was particular cooperation with the Authority which may have resulted in a reduction of fine. It would be a very positive step towards greater transparency and legal certainty if the Authority would disclose non-confidential versions of decisions in this field.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process, that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The law provides that whenever the Authority becomes aware, from whatever source, of possible practices prohibited by Articles 4, 6 and 7, it shall initiate an investigation, within the scope of which it shall carry out the inquiries necessary to identify such practices and their agents. Once the inquiry is complete, the Authority shall decide either to take no further action, should it deem that there is not sufficient evidence of infringement (for the situations where the inquiry has been initiated by a complaint, please see above **section 3**); *or*, to continue with the proceedings by notifying the accused undertakings or associations of undertakings, should it conclude from the investigations carried out that there is sufficient evidence of infringement of the competition rules. In the latter case - which corresponds to the second phase of the proceedings ("*instrução*") - the notification by the Authority shall set a reasonable period for the accused to make its position known in writing with respect to the accusations and other questions that may concern the decision for the case and with respect to the evidence produced, as well as a reasonable period for the accused to request the further inquiries for evidence that they consider proper. In this context, at the request of the accused undertaking(s) or association(s) of undertakings, presented to the Authority within five days of notification, the hearing in written form may be completed or replaced by an oral hearing (this hearing shall take place on the date set by the Authority for the purpose, though in no circumstances before expiry of the period initially set for the hearing in written form).

When the evidence-taking is complete, on the basis of the report by the department gathering the evidence, the Authority shall make a final decision in which it may, depending on the case:

a) order that no further action on the case be taken;

b) declare that a practice restricting competition exists and, in this case, order the offender to adopt the preventive measures necessary for this practice or its effects to cease, within the period laid down;

c) apply the fines and other penalties; and

d) authorise an agreement, under the terms and conditions provided in the law.

It is thus not possible to provide an indicative time-line as moreover there is scarce public information on the Authority's practice on these decisions.

Please note that if the market(s) in question are subject to sector regulation, there are specificities concerning the procedure and the intervention of the sector regulator (please refer to **question 1.2** above).

As concerns interim measures, please refer to **question 5.1** below

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

In exercising its powers to sanction and supervise, the Authority, represented by its institutional bodies and employees, enjoys the same rights and powers and is subject to the same duties as criminal police institutions (Article 17 of the Competition Act). This enables the Authority notably to question the legal representatives of the undertakings or associations of undertakings involved and to ask them for documents and other elements of information that the Authority deems useful or necessary for clarification of the facts. Similarly, the Authority may question the legal representatives of other undertakings or associations of undertakings and any other persons whose declarations it deems relevant and to request them to supply documents and other information.

Article 18 of the Competition Act expressly provides for the cumulative conditions that a request for information must comply with. Moreover, the provision of the information and/or documents requested by the Authority in pursuance of this Act should be made within 30 days, unless, with a properly substantiated decision, the Authority lays down a different period. The time period only includes working days.

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4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

As referred above, the Authority enjoys the same rights and powers and is subject to the same duties as criminal police institutions, as established by Article 17 of the Competition Act. Therefore, the Authority is able notably to search for, examine, gather, copy or take extracts from written or other documentation, at the premises of the undertakings or associations of undertakings involved, whether or not such documentation is in a restrictive area, whenever such inquiries prove necessary for the obtaining of evidence. These investigations require a warrant from the competent judiciary authorities, requested beforehand by the Authority in an application that is duly substantiated. The decision shall be handed down within 48 hours. Moreover the Competition Act requires that the Authority's employees who, externally, perform the investigations shall carry with them credentials issued by Authority stating the purpose of the investigation and the above-referred warrant. Whenever necessary, the Authority may request the action of the police authorities.

The Competition Act does not provide for the power of the Authority to enter any premises other than the ones referred above (such as the domiciles of managers) and this is explained by the fact that infringement of competition rules is not a criminal offence but a misdemeanour.

In the same way, the Authority is able to seal the premises of the undertakings in which elements of written or other documentation are to be found or are liable to be found, for the proceedings and to the extent strictly necessary for the inquiries referred to in the first paragraph to be completed.

The Authority may also 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 their duties.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Authority is competent to conduct the inquiries referred in **question 4.2** above in the course of searches.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

As referred to above in **question 4.3**, the competition authority is entitled to gather, copy or take extracts from written or other documentation during a search to the premises of an undertaking being investigated. Notwithstanding, it is the Authority's duty to identify all the documentation in question and provide a copy of that same list to the representatives of the undertaking in question. The exception to the Authority's referred power concerns documents within the scope of legal professional privilege (see below **question 14.2**).

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

The Competition Act does not provide specifically for this possibility but the expression "written or other documentation" which may be copied or taken extracts from has been considered in practice as including electronic data. Notwithstanding, it is controversial whether the search warrant concerning correspondence (emails included) may be issued by the public prosecutor and also whether the Authority is entitled to gather/copy correspondence given the constitutional principle of protection of correspondence. So far, the case law of national courts has allowed the authority to conduct searches on the basis of an authorisation granted by the public prosecutor. National case law has also drawn a distinction between open and non-open correspondence, the latter being allegedly the only one covered by the constitutional protection of correspondence. Open correspondence (regardless of its format) is in this context considered normal documentation for the purposes of apprehension by the Authority.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

No. Infringements of competition rules constitute misdemeanours and not crimes, therefore, no surveillance powers are provided for.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

Once the inquiry is complete, should the Authority conclude from the investigations carried out that there is sufficient evidence of infringement of the competition rules and decides to initiate proceedings, the defendants are notified of that decision (statement of objections - "*nota de ilicitude*"). In the notification, the Authority shall set a reasonable period for the defendant to make its position known in writing with respect to the accusations and other questions that may concern the decision for the case and with respect to the evidence produced, as well as a reasonable period for the defendant to request the further inquiries for evidence that it considers proper. The referred hearing in writing may be completed or replaced by an oral hearing at the request of the defendant. This hearing shall take place on the date set by the Authority for the purpose, though in no circumstances before expiry of the period initially set for the hearing in written form. The Authority may officially order further inquiries to gather evidence, even subsequently to the above mentioned hearing(s), provided that it guarantees compliance with the principle of the adversarial system to the defendant.

4.9 How are the rights of the defence respected throughout the investigation?

The rights of the defendant during an investigation comprise essentially the following: right to access the file, right to exercise the defence according to the adversarial principle and right to appeal against interlocutory and final decisions adopted by the Authority.

Most of the Authority's decisions condemning undertakings for alleged anticompetitive practices have been appealed to court and several of them have been quashed for violation of the rights of defence. Therefore, it is difficult to draw clear-cut conclusions on this field.

4.10 What rights do complainants have during an investigation?

If the investigation (inquiry phase) has been instituted on the grounds of a complaint, the Authority may not terminate the proceedings without previously informing the complainant of its intentions, granting it a reasonable period to make its position known.

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4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Third parties may participate in the proceedings on their own initiative, even though in a limited manner. The general rule in regard to the investigation of anti-competitive infringements in Portugal is that cases are not covered by investigation secrecy prior to the issue of the statement of objections. However the law entitles the Authority to determine the application of investigation secrecy to the phase of inquiry, under some conditions and in exceptional circumstances related to the course of the investigation or to the rights of the parties involved. If a case is protected by investigation secrecy, third parties will probably not be granted access to the file prior to the statement of objections. Differently, if the case is not protected by secrecy, third parties may have access to the public version of the file at the Authority's premises, provided that they demonstrate a legitimate interest to do so.

Even though not formally constituting a right, third parties (such as competitors, suppliers, customers, consumers and even public bodies) may also intervene in the procedure in reply to the Authority's requests for information and documents during the course of an investigation. If they fail to cooperate with the Authority, severe penalties may be imposed on them.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition Authority is entitled to grant interim measures. Article 27 of the Competition Act, which provides for the circumstances when such type of measures may be granted, is strongly inspired by Article 8 of Regulation (EC) 1/2003 but refers not only to damages to competition but also to third parties.

Whenever the investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third party interests, the Authority may, at any moment in the investigation or evidence-taking, preventively order the immediate suspension of the practice or take any other provisional measures that are necessary to immediately re-establish the competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings (Article 27). These measures may be adopted officially by the Authority or at the request of any party concerned and normally shall remain in force until revoked by the Authority and for a period not exceeding 90 days, unless, for sound reasons, an extension is granted. The decision granting interim measures may be appealed to the competent commercial court but the order is not suspended in the event of an appeal.

In practice, the Competition Authority has only granted interim measures for the first time in January 2009. The case concerned a promotional campaign enabling the subscribers of a pay-television service operator to enjoy free tickets to films in cinemas managed by the same operator. Before issuing the decision that suspended the referred campaign, the Authority notified the undertaking to exercise its right to be heard, which the latter did and subsequently filed an appeal.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The Authority is not bound by any specific time limits in investigating alleged infringements (see response to **question 4.1** above).

The only restriction that the Authority has to take into account during its investigation has to do with the periods of limitation. The Authority's powers in proceedings concerning anti-competitive conducts are subject to a limitation period of five years. Five years is also the time limit for the enforcement of penalties.

The time limits mentioned above shall be suspended, e.g., for so long as a judicial review is pending. The time limit shall also be interrupted, *inter alia*, by a decision imposing a fine or any action by the Authority aiming at enforcing the payment of such fine. Each interruption shall start the time limit running afresh. However, the proceeding will expire if from the date of the infringement, and barring eventual suspensions, a period equal to 1.5 times the limitation period has elapsed.

7 Co-operation

7.1 Does the competition authority in Portugal belong to a supra-national competition network? If so, please provide details

The Authority is a member of at least three supra-national competition networks:

(i) the European Competition Network (ECN);

(ii) the Association of European Competition Authorities (ECA); and

(iii) the International Competition Network (ICN).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN is the forum where consultations and exchanges of information between European competition authorities relating to enforcement of EC law take place. The conditions under which such exchanges may occur are provided for in Article 12 of Regulation 1/2003.

According to this provision, the European Commission and national competition authorities (*vis-à-vis* the former and amongst each other) may provide one another and use in evidence any matter of fact or of law, including confidential information.

Information so exchanged can only be used on two conditions:

(i) in evidence for the application of Articles 81 and 82 EC and for the subject matter for which it was collected by the transmitting authority; or

(ii) for the purpose of applying national competition law in parallel to Community competition law in the same case, provided that as regards the finding of an infringement the application of national law does not lead to an outcome different from that under Community law.

There is an extra safeguard relating to sanctions on individuals on the basis of information exchanged pursuant to Article 12. In these cases, information may only be used for either administrative or

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criminal purposes where the laws of the transmitting authority and those of the receiving one provide for sanctions of a similar kind in relation to natural persons. If this condition is not met, information may only be used if the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the national rules of the receiving entity. However, in this last case, the information conveyed cannot be used by the receiving authority to impose custodial sanctions.

Outside the scope foreseen in Article 12 of Regulation 1/2003, Article 28 of the same regulation states that the European Commission and the competition authorities of the Member States, as well as their officials, servants and other persons working under their supervision, shall not disclose information acquired or exchanged by them in the light of the said regulation and of the kind covered by the obligation of professional secrecy. The term 'professional secrecy' is a Community law concept that includes in particular business secrets and other confidential information (see, e.g., case 53/85, AKZO *Chemie v. Commission*, Rec. 1986, p. 1965, paragraphs 26 *et seq.*).

Last, it should be mentioned that there is a special regime for the exchange of information obtained through leniency programmes. Indeed, Article 11 of Regulation 1/2003 provides that the European Commission and the national competition authorities must keep each other informed of all Article 81 and 82 EC cases they are dealing with. To protect the efficiency of leniency programmes, information voluntarily submitted by an applicant will only be transmitted to another member of the ECN in the following conditions:

(i) if the applicant has consented to the transmission to the authority in question;

(ii) if the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority; or

(iii) if the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain as a result of the information transmitted will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions *(a)* on the leniency applicant, *(b)* on any other legal or natural person covered by the leniency programme of the transmitting authority and *(c)* on any current or former employee of any of the persons covered by *(a)* or *(b)*.

Information submitted under a leniency programme and transmitted to the ECN in terms referred to above may not be used by the European Commission or any other national competition authority other than the receiving one(s) to start an investigation on its behalf.

8 Leniency

8.1 Does the competition authority in Portugal operate a leniency programme? If so, please provide 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 214/2006.

From an objective viewpoint, the leniency regime applies to agreements and concerted practices punishable under national or Community provisions (respectively, Article 4 of Law No 18/2003, 11 June, and Article 81 EC). From a subjective point of view leniency may be granted either to companies or to members of a company's board of directors or equivalent bodies, as the Competition Act also provides for the responsibility of natural persons in specific circumstances. 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 fine above 50%; special reduction of fine up to 50%; and additional reduction of fine.

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 the 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 presenting the Authority with information and evidence on an agreement or concerted practice before the Authority has initiated an investigation relating thereto.

Specific requirements for special reduction of 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 must do so 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 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 fine

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.

Practical aspects of the leniency programme

A leniency application must be made in accordance with the form approved by Regulation 214/2006 and contain all information required therein. The application may be filed via physical delivery at the Authority's services, registered mail or certified e-mail.

The decision to grant or refuse immunity or reduction in the fines is made by the Authority's final decision in the proceedings. However, if during the course of the investigation the Authority considers that the applicant is no longer in condition to benefit from

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lenient treatment (*e.g.*, because it ceased to cooperate with the Authority), it shall notify the applicant of such fact.

If the Authority does not grant immunity or reduction of fines, 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 however without prejudice to the special regime for the exchange of information between European competition authorities obtained through leniency programmes, as mentioned in the response to **question 7.2**.

In accordance with the very scarce available information, no decisions have been adopted so far by the Authority under the leniency policy, although there have been some decisions in which companies cooperated with the Authority during the respective administrative proceedings and were thus granted a reduction in their fines under the general rules of the Competition Act (e.g., some companies in case 04/05 - *Abbott / Bayer / Menarini / Roche / Johnson & Johnson*).

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

If the Authority finds that there has been an anti-competitive conduct it shall issue a decision:

(i) authorising an agreement or concerted practice if they satisfy the conditions laid down in Article 5 of the Competition Act;

(ii) imposing a sanction (see response to **question 9.2**); and

(iii) ordering the offender(s) to adopt the measures necessary for the infringement or its effects to cease within a prescribed period.

Whenever behaviours affecting a market which is subject to sector regulation are in question, the Authority shall consult the respective regulatory body and ask for its opinion prior to adopting a decision pursuant to (ii) or (iii) above.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Besides ordering that the infringement be brought to an end, the Competition Act provides mainly for the power of the Authority to impose fines where the same concludes that there has been a competition law breach. The maximum fine is 10% of the turnover of each of the participating undertakings and it applies, *inter alia*, in respect of prohibited agreements or concerted practices and abuses of dominant position. Fines are set on the basis of several circumstances, such as the seriousness and duration of the infringement, the advantages enjoyed as a result of such infringement, the level of cooperation with the Authority and the offender's conduct in eliminating the breach and repairing the damages.

If the seriousness of the infringement and the liability of the offender so justify, the Authority may, in addition to and simultaneously with the fine, impose ancillary penalties. These are 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.

All legal persons shall be responsible for the offences provided for in the Competition Act when the infringement has been 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.

The members of the board of directors and equivalent bodies of companies held responsible under the Competition Act shall be subject to the penalty prescribed, especially attenuated, for the respective company when they knew or should have known of the infringement yet failed to take the appropriate measures to bring it to an end, unless a more serious penalty is applicable in pursuance of another legal provision.

Companies forming part of an association that is subject to a fine or a periodic penalty payment are jointly and severally responsible for payment of such sanction.

Finally, competition law breaches in Portugal are not regarded as criminal offences *per se* but civil sanctions may arise. Notably, all prohibited agreements and concerted practices are null and void and interested parties may claim for damages if that is the case (see response to **section 13**).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

There is a penalty of up to 1% of the turnover of each undertaking failing to supply or supplying false, inaccurate or incomplete information to the Authority in the context of sanctioning or supervisory procedures. The same sanction applies to undertakings failing to cooperate with the Authority or obstructing the exercise of its powers of investigation and inspection.

According to public information, the Authority has adopted several of these 'non-compliance' decisions. In 2006, the Authority ordered three companies to pay fines ranging from €2,500 - €5,000 for failing to supply information in response to requests by the Authority in the context of investigations of infringements. According to the information available, none of the companies appealed the respective decision.

In 2005, the Authority imposed a fine of €1,000 on a professional bar association for supplying incomplete information during an infringement procedure. The Lisbon Commerce Court, which was then the competent court to hear appeals against the Authority's decisions (see response to **section 11**), confirmed the 'non-compliance' condemnation. Also in 2005, the Authority imposed on three companies fines ranging from €79,939.39 - €94,850.11 for refusing to provide information to the Authority in the exercise of its powers of supervision. This decision was quashed by the Lisbon Commerce Court.

10 Commitments

10.1 Is the competition authority in Portugal empowered to accept commitments from the parties in the event of a suspected competition law infringement?

Except where the leniency programme is concerned (see response to **section 8**), there is no legal provision in Portugal empowering the Authority to enter into settlement arrangements in respect of a suspected competition law infringement. Nevertheless, the Authority has introduced these procedures in its decision-making practice.

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The public records show that the Authority has by now adopted at least four decisions with binding commitments, although information is only available on two of them: (i) *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) *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.

It is worth mentioning that in 2008 the former president of the Authority presented to the Portuguese Parliament a proposal of amendment concerning several procedural aspects of the Competition Act, including the introduction of a provision on binding commitments.

10.2 In what circumstances can such commitments be accepted by the competition authority?

Given that there is currently no express legal basis on the matter we may assume that the Authority has total discretion to select the cases in which to accept commitments as well as the conditions to do so, within the limits of its competences and in pursuance of the aims provided for in the Competition Act.

10.3 What impact do such commitments have on the investigation?

In principle the main effect of such commitments 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.

The Competition Act does not contain a provision similar to Article 23(2) c) of Regulation 1/2003, stating that the mere breach of such commitments may lead to a fine, without the Commission having to prove any (other) anti-competitive behaviour. This means that the failure 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.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

During the course of an infringement investigation it is possible to file a judicial appeal against non-final decisions, orders and measures taken by the Authority, provided that these do not refer to preparatory measures for the final decision or for the imposition of a sanction. Any natural or legal person affected by the decision, order or measure concerned has *locus standi*. The appeal shall be lodged within 20 working days from the date the appellant becomes aware of such act or omission and shall have non-staying effect in the administrative proceeding.

The competent court to handle these appeals was until recently the Lisbon Commerce Court. After 2 January 2009 these pleadings are entrusted to the commerce section of the competent county court or, if the latter does not exist, the commerce section of the competent district court or, if this does not exist either, the Lisbon Commerce Court.

When an appeal has been filed against one of its decisions, orders or measures, the Authority shall forward the records to the Public Prosecution Office within 20 working days. It may also enclose further statements. Withdrawal of the accusation by the Public Prosecutors is dependent upon the Authority's agreement. If there is a court hearing, the court shall base its decision on the evidence presented in the hearing and in that gathered during the administrative proceedings.

Appealable judgments from first instance shall be challenged in the competent Court of Appeal, whose ruling shall be final. The Authority may appeal alone against first instance judgments.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

It is possible to file a judicial appeal against an Authority's final decision applying a fine or other penalty. The appeal shall follow the rules described in the response to **question 11.1**, except for the effect on the administrative proceedings. Appeals from final decisions shall suspend the enforcement of such decisions.

Courts may not place the appellant in a worse position than before it brought its challenge (the *reformatio in pejus* principle). However, in 2008 the former president of the Authority presented the Parliament with a proposal to amend this restriction, thereby suggesting that courts would be allowed to increase - and add interest to - the fines and sanctions imposed by the Authority.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

The role of judicial bodies in competition law matters is essentially restricted to the review procedure explained in the response to **section 11**.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

Concerning the Authority's powers to intervene in court actions, one has to distinguish between judicial proceedings arising from an appeal against an act or omission by the Authority and those relating to other matters of law if a competition issue may arise. The former follows the procedure detailed in the response to **section 11**. In respect to the latter, there are no specific national provisions on the subject, so the question is essentially governed by Article 15 of Regulation 1/2003 and the Commission's 2004 Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC.

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As such, the Authority will probably act as an *amicus curiae*, a third party intervenient that may assist the court in matters of fact or law. This assistance will normally be provided under the form of information, opinions or observations. Typically, the assistance provided by the Authority is dependent on the initiative of the court. However, in cases involving the application of Articles 81 and 82 EC, Article 15(3) of Regulation 1/2003 makes a distinction between written observations, which the Authority may submit on its own initiative, and oral observations, which can only be submitted with the permission of the national court. In any case, the assistance provided by the Authority is not binding on the court and should be subject to adversary rule.

A similar procedural role is played by the European Commission in competition actions before Portuguese courts. In this case though, the Commission will only submit (written) observations on its own motion if the coherent application of Articles 81 and 82 EC so requires (the definition of the precise scope of this requirement is under assessment for the first time by the European Court of Justice in case C-429/07, X BV, the judgment of which is currently pending).

For the sole purpose of the preparation of their observations, the Authority and the Commission may request the relevant court to transmit or ensure the transmission to them of any information necessary for the assessment of the case.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

There are no specific provisions as to private competition enforcement. The subject-matter is governed in substance and in procedure by the general rules on tort provided for in the Portuguese's Civil Code and Code of Civil Procedure.

In this case, the plaintiff will have to claim and substantiate the existence of an unlawful behaviour in the light of national or Community antitrust provisions, the defendant's fault (even if only in the form of negligence), the damages suffered and the causal link between the damages and the unlawful conduct. The competent court to deal with the claim will be determined in accordance with the provisions on territorial jurisdiction.

Any injured person, either a company or an individual, has standing. Class actions are also possible under the general regime of Law No 83/95, 31 August.

The purpose of Portuguese tort law is to compensate the claimant for the actual harmful consequences of a violation. It is not intended to punish the responsible and therefore claims for the award of exemplary damages will not be accepted. The principle with regard to pecuniary compensation is to place the plaintiff, as far as possible, in the position in which he or she would have been should the violation had not taken place (the *restitutio in integrum* principle). This entails compensating emerging damages and/or loss profits.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To the best of our knowledge, there have been no successful claims until now.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Portugal covered by the national competition rules?

The Competition Act applies to all practices and concentrations which have or may have effects in the Portuguese territory, whether in part or the whole of it.

Therefore, anti-competitive conduct carried outside Portugal may nevertheless be caught by the Competition Act provided that those conducts have, or are liable to have, an impact in the national territory.

The scope of territorial jurisdiction in the case of foreign conduct has been mainly tested by the Authority in the context of mergers (the so-called 'foreign to foreign' transactions; see case 07/2004 - *Otto Sauer Achsenfabrik / Deutsche Beteiligungs*). The Authority has in that context adopted a broad interpretation of the legal provisions on the matter, considering that the legislature created a wide notion of spatial connexion with the national territory. It may be assumed that this interpretation is also valid in respect of restrictive practices.

14.2 Please set out the approach adopted by the national competition authority and national courts in Portugal in relation to legal professional privilege.

Legal professional privilege in Portugal is protected by the Constitution, the Penal Code and the Lawyers Act. This protection covers all facts, information and communications relating to the provision of legal services by a lawyer. As a rule, legally privileged documents may not be apprehended by the Competition Authority during a search and the Authority is not entitled to ask for their disclosure.

Unlike European Law (see e.g. cases 155/79, *AM&S v. Commission, and T-125, 253/03, Akzo*), Portuguese law does not distinguish between independent lawyers and in-house lawyers. Legal professional privilege applies to both categories, since they are subject to the same professional and ethical duties.

This has been confirmed by a 2008 judgment, offered by the Lisbon Commerce Court in an appeal against a surprise inspection conducted by the Competition Authority in 2007, during which it collected a number of documents from the office of the company's in-house counsel. The Commerce Court stated that the Authority's action was in breach of legal privilege, which concerns independent and in-house lawyers equally.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Portugal in relation to matters not covered by the above questions.

There are some indications that the Authority is in the process of preparing a proposal to amend the Competition Act, which will subsequently be presented to the Government and/or the Parliament. Some of the changes planned may impact on procedural aspects of restrictive practices and agreements, especially in what concerns harmonisation with Regulation (EC) 1/2003 and judicial review.

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