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The International Comparative Legal Guide to:

Dominance 2009

A practical insight to cross-border dominance regulation

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1 Legislation

1.1 Please set out the basic elements of the offence(s) under your relevant laws?

Article 6 of Law 18/2003, of 11 June 2003, which approved the Portuguese Competition Act ("the Act") expressly prohibits the *abusive exploitation, by one or more undertakings, of a dominant position in the national market or in a substantial part thereof, having as object or effect the prevention, distortion or restriction of competition*.

This provision further establishes a non-exhaustive list of abusive practices, which includes:

- any of the practices mentioned in Article 4 (1) of the Act as examples of anti-competitive agreement, concerted practices or decisions by associations of undertakings, through direct referral to that provision (see question 3.1 for examples); and
- 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.

1.2 What is the underlying purpose of the competition legislation that applies to the conduct of dominant undertakings?

The purpose of the competition legislation on abuse of dominance is to ensure that the competitive process is not distorted or eliminated by the unilateral action of dominant companies. Although exclusionary abuses are covered by the Act, the aim of Article 6 is not to protect competitors but, rather, to ensure consumer welfare, both by prohibiting directly exploitative practices and by ensuring that conduct by undertakings with significant market power does not result in a distorted (unduly concentrated) market structure, with the ensuing restriction of consumer choice.

1.3 Does the legislation also apply to public bodies?

Yes. Article 6 applies to dominant "undertakings" and, for the purposes of the Act, an undertaking is defined as any entity that carries out an economic activity consisting of the offer of goods and services in a certain market, regardless of its legal status and manner of operation (Article 2). This broad concept follows closely the definition construed by the case-law of the European Court of Justice ("ECJ"). Article 3 further specifies that public undertakings are covered by the provisions of the Act and an exception is made only for those undertakings in charge of services of general economic interest or which operate a legal monopoly. Similarly to Article 86 (2) of the EC Treaty, those undertakings are subject to the Act only to the extent that its provisions do not hinder the accomplishment, in legal or factual terms, of the mission which they were assigned.

1.4 Does the legislation apply to: (i) unilateral conduct of a non-dominant firm whereby such a firm seeks to acquire a position of dominance; (ii) collectively dominant undertakings; and (iii) dominant buyers as well as suppliers?

Article 6 of the Act applies as follows:

- It does not apply to conduct by non-dominant firms, even if such conduct is directed at achieving dominance. The creation of a dominant position may only be caught by the merger control provisions of the Act, to the extent it involves a transaction qualifying as a concentration.
- In accordance with Article 6 (2) (b), this provision explicitly applies to situations of collective dominance: "*Two or more [dominant] undertakings that act in concert in a market*". To date, the Portuguese Competition Authority ("the Authority") has issued no decisions based on a finding of collective dominance.
- Article 6 also applies to dominant buyers. Article 6 (3) (a) refers to the practices listed in Article 4 (1) (a) which concerns the direct or indirect fixing of purchase prices (see question 3.1).

1.5 Are there sector-specific regulations which apply to unilateral conduct and how do these relate to the general prohibition of abuse of dominance?

There are sector-specific regulations that apply to unilateral conduct, mainly in those sectors of the economy that have been subject to privatisation and liberalisation from the mid-90's onwards - telecommunications and energy (gas and electricity), rail and air transport, among others - under the impulse of EU-level initiatives. Detailed rules applying to these specific sectors are contained both in legislation and in administrative acts or regulations and are frequently concerned with ensuring access to networks by competitors on transparent and adequate terms.

Examples include:

- **Electronic communications**, governed essentially by Law n.º 5/2004, of 10 February, which transposed the Directives composing the 2002 EC regulatory framework as well as Commission Directive n.º 2002/77/EC, on competition in the markets for electronic communications services.
- **Electricity and gas**, covered by Decree-Law n.º 29/2006 and Decree-Law n.º 30/2006, both of 15 February, which transposed Directive n.º 2003/54/EC and Directive n.º 2003/55/EC, respectively.

These sector-specific regulations are enforced by regulatory authorities and apply concurrently with Article 6, i.e. the fact that a dominant undertaking is subject to *ex ante* regulatory obligations does not preclude application of the competition rules on abuse of dominance.

2 Dominance

2.1 How is dominance, or your equivalent concept, defined under national law?

Article 6 (2) of the Act contains the statutory definition of dominance. The following are to be understood as having a dominant position in the market for a particular product or service:

"*a)* *An undertaking that is active in a market in which it faces no significant competition or in which it predominates over its competitors;*

b) *Two or more undertakings that act in concert in a market in which they face no significant competition or in which they predominate over third parties.*"

In the two infringement decisions adopted under Article 6 since the Act has been in force, the Authority has confirmed that its understanding of dominance mirrors the equivalent concept developed by the case law of the Community courts. As such, it has emphasised the ability of the dominant undertaking to act independently from its competitors, clients and consumers as a key element on which a finding of dominance will rest.

In its 2007 Annual Report, the Authority stated that "*...a dominant position refers to a situation in which an undertaking enjoys a significant degree of market power which enables it, for instance, to set higher prices, sell lower quality products or reduce the rhythm of innovation in relation to what it would do in a competitive market. A dominant position may, thus, be viewed as the power an undertaking has to behave independently from its competitors, suppliers, clients and end consumers*".

2.2 How is dominance established / proven and what type of evidence is used?

The Act abolished the previously existing rebuttable presumptions of dominance beyond certain market share thresholds (see question 2.4), in the acknowledgment that market shares, although a useful indicator of dominance, should be analysed jointly with other relevant aspects.

Admittedly it was left to the Authority to define the relevant criteria for the assessment of dominance in the course of its decisional practice with the support of the case-law of the European Courts.

The two infringements sanctioned so far under the 2003 Act (both pending appeal) involved the Portuguese telecommunications incumbent. Although they involved different markets within the wider communications sector, in both cases the defendant was the sole existing supplier or enjoyed very high market shares (e.g.: ≥75% or ≥85%).

In its 2007 decision concerning a refusal of access to an essential facility - a network of underground ducts - the Authority considered that "*The mere control of an essential infrastructure such as the duct network wherein the fixed telephone network is installed, regarding which there is no alternative of nationwide scope, confers a dominant position*" on the defendant in the market for access to that infrastructure (PRC-02/03 - *underground ducts* case, paragraph 343). Still, the Authority took into account other circumstances that complemented and corroborated the finding of dominance, in particular: the existence of network effects and/or economies of scale and scope in the relevant markets, as well as certain structural characteristics of the undertaking (vertical integration, activity in all relevant markets, the fact that it was a listed company, its funding capacity, amongst others). Similarly, in its 2008 *leased lines* decision, the Authority did not base its finding of dominance strictly on the market shares of the investigated company (which were close to 100%) but also on other aspects indicating a lack of effective competition in the relevant markets such as the high market concentration, the presence of barriers to entry (sunk costs, difficulty in duplicating some of the relevant infra-structures, economies of scale and scope in the expansion of the networks), the vertical integration of the investigated company (present in both wholesale and retail markets for leased lines) the evolution of the market leader's profitability. The Authority also considered the absence of potential competition and the absence of countervailing buying power as relevant to the finding of dominance in the relevant markets.

2.3 How is the relevant market established to assess market power?

In identifying market boundaries, the Authority has generally adhered to the Commission Notice on market definition (Commission Notice on Definition of Relevant Market for the Purposes of Community Competition Law, OJ [1997] 372/5), looking essentially at demand-side substitutability to determine both the product and geographic dimensions of the relevant market(s), but also considering supply-side substitutability and whether entry by potential competitors is feasible.

The Authority has also made reference, in abuse of dominance and merger cases, to the market definitions followed by national regulatory authorities for the purposes of market analysis in the context of *ex ante* regulation in specific sectors.

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

There are no safe harbours for low market shares or presumptions of dominance for high marker shares. Under the previous competition act (Decree-Law 371/93, of 29 October), rebuttable presumptions of dominance existed, in the case of individual dominance for a market share ≥30% of the national market of a given product or service and, in the case of collective dominance for a joint market share ≥50% of the national market of a given product or service (if collective dominance by 3 or less undertakings) or for a joint market share ≥65% of the national market of a given product or service (if collective dominance by 5 or less undertakings). These presumptions were abolished with the approval of the Act.

The decisional practice issued under the Act suggests that, even when confronted with very high market shares the Authority will be willing to consider additional aspects in order to test and corroborate a finding of dominance (see question 2.2).

2.5 How is dominance assessed in relation to after-markets?

Judging from the publicly available data on the decisional practice of the Authority, the issue of dominance in after-markets has thus far not been addressed.

3 Abuse

3.1 How is abuse defined? Is there a general standard? Is there a closed list of abuses?

There is no definition of abuse in the Act or a closed list of abuses. Article 6 (1) contains an open clause on abuse and Article 6 (3) sets out a non-exhaustive list of examples of conduct that can be abusive.

Unlike Article 82 of the EC Treaty, the list of examples was not (but for the specific case of refusal to grant access to an essential infra-structure) specifically designed to illustrate situations of unilateral abusive conducts. Instead, the law makes a direct reference, in Article 6 (3) (a), to the examples of anti-competitive conduct related to agreements, concerted practices or decisions by associations of undertakings (listed in Article 4 (1)).

Examples of abusive conduct thus include:

- directly or indirectly fixing purchase or selling prices or interfering with their establishment by free market forces, causing them artificially to rise or fall (Article 4 (1) (a));
- directly or indirectly fixing other trading conditions at similar or different stages of the economic process (Article 4 (1) (b));
- limiting or controlling production, distribution, technical development or investments (Article 4 (1) (c));
- sharing markets or sources of supply (Article 4 (1) (d));
- systematically or occasionally applying discriminatory pricing or other conditions to similar transactions (Article 4 (1) (e));
- directly or indirectly refusing the purchase or sale of goods and services (Article 4 (1) (f));
- making the conclusion of contracts subject to the acceptance of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (Article 4 (1) (g)); and
- 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.

In its decisional practice, the Authority resorts to the concept of abuse adopted at EU level, as per settled case-law of the ECJ (e.g. Case 85/76 *Hoffman-La Roche*).

3.2 What connection must be demonstrated between dominance and the abuse?

Historically, some decisions under the previous competition statute (Decree-Law 371/93) required that a causal link between the dominant position and the abuse be demonstrated (summarised, for example, in the 1996 Report by the Competition Council).

However, abuse decisions so far adopted by the Authority make no mention of the need for a causal connection under Article 6 of the Act (despite the fact that the wording of Article 6(1) is identical to its predecessor - Article 3 (1) of Decree-Law 371/93). This indicates that the current construction of Article 6 by the Authority appears to be in line with the case-law of the Community courts, which requires no such causal link.

3.3 Does certain conduct benefit from a safe harbour?

There are no safe harbours for particular types of conduct. If a finding of dominance and a finding of abusive conduct exist, there is no exception to the legal rule of prohibition (as was previously the case under the former Portuguese competition regime).

This is without prejudice to the dominant firm's ability to claim and prove that its conduct was objectively justified, for instance, because the company was defending its legitimate commercial interests (for this and other possible defences, see question 7.1).

Also, for some types of abusive conduct, the applicable legal provisions implicitly reveal conditions under which the conduct is not abusive - e.g. a refusal of access to an essential facility is not abusive if the dominant company can demonstrate that, for operational or other reasons, such access is impossible on reasonable terms.

3.4 Are certain types of conduct considered *per se* illegal, without a need to demonstrate actual negative effects on competition?

Unlike Article 82 of the EC Treaty, Article 6 of the Act is worded in similar fashion to Article 81 in that it prohibits abusive conduct by dominant undertakings which has as its "*object or effect, the prevention, distortion or restriction*" of competition. The statutory reference to a possible anticompetitive object raises the possibility that certain unilateral practices may be deemed illegal (abusive) *per se*, regardless of actual detrimental effects, in line with Article 3(2) of Council Regulation (EC) No 1/2003, OJ [2003] L1/1.

However, there are no indications that the Authority has applied this provision based solely on an anticompetitive object. In its 2007 decision in the *underground ducts* case, the Authority found that refusals to provide adequate and timely access to underground infrastructure had not only an anticompetitive object but also, allegedly, detrimental effects on undertakings seeking access (prevented from expanding their networks according to plan and faced with higher costs and a more difficult access to financing) and on consumers. Similarly, in its 2008 *leased lines* decision, the Authority found that a discount system for leased lines had not only the object but also the effect of restricting competition on the market for leased lines as well as on certain downstream markets and assessed those detrimental effects to competition.

3.5 Can the unilateral conduct of a non-dominant firm be abusive, e.g. does your national law provide for special obligations where a particular customer is in a relationship of dependency?

Yes, in the specific case of the so-called "*abuse of economic dependence*" (Article 7).

This provision prohibits, insofar as it may affect the functioning of the market or the structure of competition, the abusive exploitation by one or more undertakings, of the state of economic dependence of any of its (their) suppliers or clients, due to the absence of an equivalent alternative. An undertaking is understood as having no equivalent alternative when the supply of the product or service in question is provided by a limited number of undertakings and

identical conditions cannot be obtained from other commercial partners within a reasonable delay.

A non-exhaustive list of potentially abusive conduct includes:

- any of the forms of behaviour mentioned in Article 4 (1) of the Act (see question 3.1); and
- the unjustified termination, total or partial, of an established commercial relationship, with due consideration being given to prior commercial relations, the uses of the trade and the agreed contract terms.

4 Types of Abuse

4.1 Does the definition of abuse include both exclusionary and exploitative conduct?

Yes. Despite the fact that the wording of Article 6(1) only refers to the "*abusive exploitation*" of a dominant position, the decisional practice of the Authority has confirmed that both exploitative and exclusionary conduct will be pursued under this provision.

In its 2007 Annual Report, the Authority makes explicit reference to this understanding of the provision's scope: "*The abuse may consist of exclusionary and/or exploitative behaviour. Exclusionary behaviour causes damage to the competitive position of competing undertakings and may, ultimately, result in their exit from the market whereas exploitative behaviour involves taking advantage of the dominant undertaking's market power, ultimately to the detriment of consumers.*".

4.2 To what extent is excessive pricing considered to be abusive?

Excessive pricing is caught by Article 4 (1) (a), which refers to interfering "*(…) in their establishment [of prices] by free market forces, causing them artificially to rise (…)*". This wording - thought for agreements between undertakings, not for unilateral abuses - gives a poor characterisation of the abusive conduct. Arguably, a logical interpretation of this sub-paragraph - taking into account, *inter alia*, the corresponding provision of the EC Treaty (Article 82), which mentions *unfair* prices - would appear adequate.

Given the absence of national decisional practice or case-law on this particular type of abuse, it is not clear what the approach of the Authority or the national courts would be to excessive pricing although, presumably, the decisional practice and case-law at EU-level will be closely followed.

Predatory Pricing

4.3 Is there a price/cost test for evaluating predatory pricing? If so, what is the relevant measure of cost?

Predatory pricing has not yet been sanctioned by the Authority under the Act. In a 1988 case decided under Decree-Law 422/83, of 3 December 1983, by the former Competition Council (Case 1/87 - RAR) a sugar refining company was fined for reducing its prices to the detriment of competing sugar packaging companies, although no conclusions were reached on whether its prices "*covered its packaging costs (variable, fixed or total)*". The decision was based on the anticompetitive object of the pricing policy.

In future cases, the Authority will presumably adhere to the Commission's Guidance in assessing price-based exclusionary conduct (Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Firms, OJ 2009/C 45/02 - "Guidance").

4.4 To what extent is recoupment relevant to the evaluation of predatory pricing?

There is no legal requirement of recoupment for a finding of predatory pricing. Existing decisional practice at national level dates back to 1988 (Case 1/87 - *RAR*) when the requirements of this particular type of abuse were still relatively unexplored at EU-level. The facts of the case show that the predation period was followed by a rise in the prices charged by the dominant undertaking; however, the issue of recoupment does not seem to have played a decisive role in the finding of abuse.

4.5 Is there a specific abuse of margin squeezing?

Margin squeeze issues have not been considered in the decisions issued under Article 6 of the Act. Any situations involving a margin squeeze between upstream (wholesale) and downstream (retail) prices would almost certainly be covered by the general clause on abuse of dominance contained in Article 6(1), if not by Article 4(1) (a) of the Act.

Rebates

4.6 Does the law distinguish between different categories of rebates? Are there certain legal presumptions that apply to particular types of rebates?

The law makes no distinction between different categories of rebates nor does it establish legal presumptions for particular types of rebates. The approach to rebates remains largely unexplored at national level, in particular with regard to loyalty enhancing rebate schemes.

In its 2008 decision in the *leased lines* case, the Authority imposed a Euro 2.1 million fine for a system of quantity discounts, which was applied in a manner that allegedly discriminated between the defendant's own group companies and its competitors (see question 4.14).

4.7 Does the law recognise a "meeting competition" defence?

As a matter of principle, a dominant undertaking should not be *a priori* precluded from protecting its commercial interests by aligning its prices with the (lower) prices of a competitor. However, it is likely that any such commercial alignment would be deemed abusive if it involved pricing below cost (see paragraph 183 of the CFI judgment in Case T-340/03, France Télécom SA v. Commission).

Refusal to Deal

4.8 In what circumstances is a refusal to deal considered abusive and is there a concept of an "essential facility" under your national law?

One of the new features of the 2003 Act was the explicit inclusion of a provision qualifying the refusal to grant access to an essential facility as an autonomous type of abuse - Article 6 (3) (b) (see question 3.1 above).

In the 2007 *underground ducts* decision (currently pending appeal),

a dominant undertaking was fined EUR 38 million for (effective and constructive) refusal to grant access to its network of underground ducts - deemed to constitute an essential facility - to two competitors in the downstream markets for pay-television services, retail broadband Internet access and retail fixed telephony services. The network of underground ducts was considered an essential infra-structure insofar as it could not be replicated in economically reasonable conditions.

According to the Authority, the refusal (which was deemed not to be objectively justified) had the effect of creating barriers to the development of its competitors' networks and preventing access by those competitors to new residential areas where the defendant remained the sole service provider.

Alongside Article 6 (3) (b), refusal to deal is also contemplated in Article 4 (1) (f) as the *direct or indirect refusal to purchase or sell goods and to provide services*, in terms identical to those existing under the previous competition regime.

In its 2003 Annual Report, the Authority argued that adoption of a separate provision for refusal of access to an essential facility did not amount to recognising a new type of infringement because the qualification of this type of behaviour as abusive could already be derived from the general prohibition on refusal to deal; instead, the legislative goal was to emphasise the unlawful nature of the behaviour in the context of progressive de-regulation and privatisation of network industries.

However, the coexistence of two provisions in the Act on refusal to deal but with non-coincident legal conditions raises interpretative doubts on how both provisions should be applied.

In its *underground ducts* decision (2008) the Authority tried to solve some of those doubts by interpreting both provisions in a manner consistent with the case-law of the European Courts and the decisional practice of the Commission, which consider the essential nature of the input (absent from the wording of Article 4 (1) (f) of the Act) as a relevant requirement for a finding of abuse.

Hence, the Authority concluded - in a corrective interpretation of Article 4 (1) f) - that a refusal to supply a competitor is only abusive when an essential facility (i.e. an indispensable input) is involved. Conversely, a refusal to deal with a competitor shall not constitute abuse if it relates to non-essential goods or in relation to which alternative sources of supply exist.

4.9 Is a distinction drawn between termination of supply and *de novo* refusal of supply?

There is no guidance from the Authority or case-law under the Act on whether termination of supply under an existing commercial relationship warrants a different treatment to a *de novo* refusal. Presumably, the Authority will adhere in future to the Commission's understanding that "*the termination of an existing supply arrangement is more likely to be found to be abusive than a de novo refusal to supply*" (Guidance - paragraph 84).

4.10 Is a distinction drawn between a refusal to supply involving intellectual property rights and other refusal to deal cases?

Refusal to supply is dealt with by both Article 4 (1) (f) and Article 6 (3) (b). Although the issue has not been the object of a decision under the Act, it cannot be excluded that intellectual property rights be treated as an essential facility when the other relevant elements of Article 6 (3) (b) apply.

Tying and Bundling

4.11 Does the law distinguish between different forms of tying and bundling?

Tying and bundling both come under Article 4(1) (g) of the Act. There is no guidance from the Authority or case-law under the Act on any criteria according to which different forms of tying/bundling should be distinguished.

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

Tying or bundling are considered abusive when they have as object or effect the prevention, distortion or restriction of competition. This wording, which contrasts with that of Article 82 EC, seems to allow - in theory - a form-based approach to tying and bundling.

The previous practice of the Competition Council - the predecessor to the Authority - on tying cases (*Via Verde* and *Multifrota*, decided in 2002 and 1995 respectively) was prone to a form-based approach to this type of abuse: there was no analysis of the actual effects of the practice in the tied product market nor did the dominant undertakings put forward any efficiencies justifying the practice or an objective justification for the tying.

4.13 In what circumstances would bundling and tying be objectively justified?

To the best of our knowledge, there are no decisions under the Act concerning tying and bundling. However, two of the investigations on abuse of dominance which were closed by the Authority without a finding of infringement (both proceedings were dropped in March 2007) involved allegations of tying and bundling.

One of these cases involved the provision of wholesale broadband services to competing service providers and the circumstance that wholesale provision was conditional upon the retail customer subscribing to a fixed voice offer. The Authority considered that, in the absence of a wholesale line rental offer (subsequently imposed by the sector regulator, ICP-ANACOM) wholesale broadband access could only be provided if the end client had access to the public network under a contract for fixed telephone services.

In the other case, involving possible tying in the form of a cable-based Internet access offer which was conditional to the client also subscribing to the operator's pay-television package, the Authority concluded that alternative broadband offers (namely ADSL-based) were available to consumers.

Discrimination

4.14 Does the mere fact that parties are being treated differently render such conduct abusive or otherwise unlawful in PORTUGAL or does the law require demonstration of actual or likely anti-competitive effects?

Discrimination is described in Article 4 (1) (e) as "*…systematically or occasionally applying discriminatory pricing or other conditions to similar transactions*". Unlike the wording used in Article 82, there is no requirement that the trading partners are put at a competitive disadvantage.

In the 2008 *leased lines* decision (currently pending appeal), an undertaking was fined Euro 2.1 million for establishing and applying a system of rebates to its wholesale leased line tariffs that

apparently favoured its own group companies, to the detriment of competitors (i.e. the system - which included retroactive target rebates based on standardised volumes - was construed in such a manner that companies within the defendant's economic group were given higher discounts than their competitors, granting the former a competitive advantage that was not justified by their respective volume of activity nor by eventual economies of scale). The defendant was found to have infringed the Article 6 prohibition on discrimination (by reference to Article 4 (1) (e)) as well as the provision on the limitation of production, distribution and technical development (Article 4 (1) (c)). Concurrently with Article 6 of the Act, Article 82 (b) and (c) applied to the conduct in question.

In its decision the Authority took into account the effects of the practice in the different markets considered, in particular, how it served to maintain the existing market structure and the dominant firm's position and to impair the development of effective competition in both wholesale and retail markets for leased lines and in other retail markets using those lines as an input for the offer of other communications services. The Authority further tried to assess the quantitative impact of the disputed rebate system, in particular, by comparing the position of each player under the disputed system and the rebate system that replaced it.

Other Abuses

4.15 Are there examples where systemic abuses of administrative or regulatory processes and/or aggressive litigation strategies have been characterised as abusive?

So far, and to the best of our knowledge, enforcement of Article 6 of the Act has not focused on eventual abusive practices related to litigation strategies or corporate abuse of administrative/regulatory processes.

4.16 Are there any examples where a misuse of the standard setting process has been characterised as abusive?

To date, there are no decisions where the misuse of a standard setting process has been characterised as abusive. It should be recalled, however that the prohibition laid down in Article 6 (1) is based on an open clause and therefore, this type of conduct may be sanctioned under the Act.

4.17 Please provide brief details of other noteworthy abuses not covered above.

Article 6(1) of the Act contains a general clause on abuse of dominance which may potentially apply to a wide spectrum of conduct by dominant undertakings. Enforcement of this provision has, so far, resulted in only two decisions by the Authority (both under appeal) which provides limited guidance on what additional types of conduct may be deemed abusive.

5 Public Enforcement

5.1 Which authorities enforce the legislation against abuse of dominance? What is the role of sector- specific regulators?

In accordance with Decree-Law 10/2003 (which approved its respective Statute), the Authority is responsible for enforcing the legislation against abuse of dominance in any sector of the economy. For activities subject to sector-specific regulation, the Act establishes (Articles 15, 27(4) and 29) a general principle of cooperation between the Authority and sector-specific regulators in the application of competition legislation, which translates into the following rules:

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

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

A cooperation protocol has been established between the Authority and the national regulatory authority for the communications sector (ICP-ANACOM).

5.2 What investigatory powers do the enforcement authorities have?

The Authority benefits from ample investigatory prerogatives and enjoys the same rights and powers, and is subject to the same duties, as the criminal police authorities.

The investigatory powers of the Authority include the ability to:

- inquire legal representatives of undertakings or associations of undertakings under investigation and request documents or other elements that are convenient or necessary to establish the facts;
- inquire legal representatives of other undertakings or associations of undertakings as well as any other person whose statements may be of relevance and to request documents or other elements;
- carry out, in the premises of the undertakings or associations of undertakings under investigation, the search, examination, gathering and seizure of copies or extracts of documents whether or not located in an area of restricted access within the premises, whenever those measures are necessary to obtain proof of the alleged infringement; and
- seal any locations within the company's premises where any documents are or may be located for the period of time and insofar as strictly necessary to the execution of its investigative actions.

Searches within a company's premises and the seizure of extracts or copies of any documents must be preceded by a written authorisation issued by a judiciary authority permitting those measures.

In accordance with Article 42 of the general regime on misdemeanours (as approved by Decree-Law 433/82, of 27 October, and subsequently amended), correspondence and telecommunications are explicitly protected and, therefore, may not

be used as evidence in competition infringement procedures. The existing case-law under the Act has, so far, distinguished between opened and unopened correspondence (including e-mails), equating the latter to normal documentation and thus allowing its use in evidence by the Authority.

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

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

The investigation is divided in two stages: during the first stage ("*inquérito*") the Authority undertakes all necessary inquiries (within the scope of its investigation powers - see question 5.2) to identify the relevant anti-competitive conduct and its agents. There are no timescales for the conclusion of this first investigation stage; rather, it will end once the Authority is able to reach a decision to either:

(i) close the investigations, if there is no sufficient evidence that an infringement has occurred; or

(ii) continue with the proceedings , by notifying the accused companies in writing of the "statement of objections" (stating the facts, their legal assessment and applicable sanctions) - second phase ("*instrução*").

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

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

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

(i) orders the closing of the investigation, if there is no sufficient evidence of an infringement; or

(ii) declares that an anti-competitive conduct has occurred, establishes the relevant sanctions (fines and other - see question 5.4) and, if necessary, orders the infringing undertaking to adopt any measures required to put an end to the anti-competitive conduct or its effects, within a stipulated period.

The only timeframe which constrains investigation procedures is that resulting from the limitation periods. Anti-competitive practices are subject to a limitation period of 5 years, which is also the time limit for enforcement of fines and other penalties. In the case of a continued infringement, the 5-year period starts to run from the date on which the infringement ceases.

Whenever the market in question is subject to sector-specific regulation, there are specific rules concerning the procedure and intervention of the relevant regulatory authorities (see question 5.1).

5.4 What are the sanctions and remedies that may be imposed in an abuse of dominance case? Do these include structural remedies?

Abuse of dominance, as any other anti-competitive conduct, is not subject to criminal sanctions under Portuguese law.

Besides ordering that the infringement be brought to an end, the Authority may impose fines for abuse of dominance. The maximum fine is 10% of the participating undertakings' turnover in the previous year (Article 43 (1) (a)).

Directors or officers of infringing undertakings may, in certain circumstances, be subject to an equivalent fine, although the amount of the fine is reduced (Article 47 (3)).

Undertakings forming part of an association that is subject to a fine or a periodic penalty payment are jointly and severally liable for payment of amounts due.

In addition (Article 45), the Authority may, in certain circumstances, impose ancillary sanctions which include (i) the publication, at the offender's expense, of its final decision, in the Official Gazette and a national newspaper; and (ii) in the case of infringements which take place in connection with public procurement procedures (e.g. bid rigging), a deprivation of the right to participate in procurement procedures for the award of public contracts and/or for the award of a license, for a maximum period of 2 years from the final decision.

In the event an undertaking fails to comply with a decision by the Authority imposing a fine or ordering other measures the Authority can impose a periodic penalty payment of up to 5% of the previous year's average daily turnover, for every subsequent day during which the undertaking fails to comply (Article 46).

As for remedies, in the context of an infringement decision the Authority may order the adoption of any measures required to put an end to the anticompetitive practice or its effects within a specified delay (Article 28 (1), (b)).

The law does not empower the Authority to impose any structural remedies (such as the divestment of shareholdings or assets).

Furthermore, although there is no specific legal provision authorising the Authority to arrange for a settlement with infringing undertakings, in practice an informal settlement procedure seems to have been applied in a number of cases. According to publicly available information, the Authority has until now settled at least four investigations. Two of these concerned non-compete clauses in distribution agreements and were subject to commitments from the undertakings concerned to amend the vertical agreements under review.

5.5 Can abusive conduct amount to a criminal offence?

No. The abuse of a dominant position, similarly to any breach of the provisions of the Act, is sanctioned merely as a misdemeanour.

5.6 How often is the legislation enforced in practice?

According to the information which is available on the Authority's website and annual reports, since the Act came into force in 2003, the Authority has adopted 15 infringement decisions (of which only 2 concern abuse of dominance) and has closed another 15 investigations without a finding of infringement (of which 6 involved abusive practices and the application of Article 6).

6 Private Enforcement

6.1 Can the legislation be enforced in private actions before your national courts?

Yes. Besides interim relief (see question 6.2), an individual or undertaking may resort to the courts seeking an indemnification for damages suffered as a result of a third party's abusive conduct. Class actions are also possible under the general regime of Law 83/95, of 31 August 1995.

The basis for a claim for damages will be an infringement of Article 6 of the Act (and/or Article 82 of the EC Treaty) and the injured party may also request that the court order the defendant to cease its unlawful conduct.

It should be noted, however, that there is no specific legal regime applicable to private antitrust actions and thus the general civil law and civil procedure rules apply. The rules of the Civil Code on liability for unlawful acts (tort) require proof (*in casu*, by the plaintiff) of (i) the unlawful behaviour, (ii) the defendant's fault (even if only in the form of negligence), (iii) damages to the plaintiff and (iv) a causal link between (i) and (iii).

6.2 To what extent is interim relief available?

Interim relief can be obtained both from the Authority and from the courts.

According to Article 27(1) of the Act, whenever an investigation indicates that a given practice may cause damage, either to competition or to third-party interests, which is "*imminent, serious and irreparable or difficult to rectify*", the Authority may issue a preventive order for the immediate suspension of said practice, or take other provisional measures. The Authority may do so on its own initiative or acting on a request from an interested party. Provisional measures remain in force for a period not exceeding 90 days, although this may be extended in certain cases. In January 2009, acting under this provision for the first time since its enactment, the Authority ordered the provisional suspension of a promotional campaign launched by a pay-television operator in Portugal, considering there was *prima facie* evidence of an infringement of Article 6.

In addition, undertakings may also request interim relief from the courts, in the form of an *ad hoc* injunction to prevent or put an end to abusive conduct, provided: (i) there is *prima facie* evidence of an infringement; and (ii) liable to cause serious and irreparable damage.

6.3 To what extent are private damages available and can punitive damages be awarded?

Under the applicable legal rules, private damages shall cover the damages caused as well as loss of profits resulting from the infringement. Future damages can be considered provided that they are predictable. When future damages cannot be determined, a decision on the amount of the compensation shall be adopted at a later stage.

Under Portuguese law, monetary compensation shall only occur when natural (non-monetary) compensation is not possible, or when it is not enough to fully repair the damages or when it is excessively burdensome on the debtor.

The measure for the monetary compensation awarded shall be the difference between the injured party's current assets, on the most recent date the court is in a position to assess, and its assets on that same date, had the abusive conduct not occurred.

The rules of tort in Portuguese law are based on compensation for damages effectively incurred and, therefore, the law does not provide for punitive damages.

6.4 How frequent are private enforcement actions before your national courts?

Information on private enforcement actions is scarce and the Authority does not make available figures on this subject. Presumably the number of actions before the Portuguese courts concerning abuse of dominance is not significant. The possibility of follow-on litigation is quite limited - even considering decisions applying fines for cartels or concerted practices - given that a significant number of the Authority's decisions has been annulled on appeal. On the other hand, public enforcement of Article 6 has also been rather conservative, as results from the existence of only two decisions on abuse of dominance since the Act came into force in 2003.

7 Defences

7.1 What defences are available to a firm accused of abusing its dominant position and to what extent are efficiencies taken into account?

The competition act in force until 2003 specifically allowed for possible justification of abusive practices under a set of criteria similar to those established under Article 81 (3) of the EC Treaty. This solution was at odds with the approach of Article 82 and was abolished by the Act.

A firm accused of abusing its dominant position may however counter the finding of abuse by alleging an objective justification for the conduct in terms similar to those accepted under EU competition law.

Considering the possibility recognised at EU-level of an efficiency defence for exclusionary conduct - albeit in the strict terms envisaged by the European Commission's Guidance - the question arises of whether or not the Authority will follow the same approach at national level when applying Article 6 of the Act.

The close connection between national and EU provisions on abuse and the Authority's trend to follow both the decisional practice and the case-law of EU institutions might indicate so. In any event, the Authority appears not to have considered efficiency allegations in the two abuse cases it has decided so far.

8 Recent Developments

8.1 Please provide brief details of significant recent or imminent developments not covered by the above in relation to Portugal.

In 2008 a new legal framework on the organisation and operation of the judiciary was approved (Law 52/2008, of 28 August), bringing about important changes to Portuguese competition law rules concerning appeals against infringement decisions and fines.

As a result, competence to hear appeals brought against decisions by the Authority in infringement proceedings (including abuse of dominance) and administrative proceedings is transferred from the Lisbon Commercial Court to the specialised commercial sections of lower courts. The new judicial organisation framework entered into force on 2 January 2009, but the changes referred to above shall

apply only to selected districts during an experimental period lasting until 31 August 2010.

Furthermore, according to public statements by the Authority's current president, a review of the Act is being studied (the former president of the Authority had already mentioned proposals for amendment of the Act in a parliamentary hearing in 2008). Until the present date, however, no formal proposal for changes has been presented to Parliament (nor has Parliament issued any law authorising the Government to amend the Act).

Possible modifications undergoing assessment may include:

- a strengthening of the Authority's investigatory powers;
- measures aimed at diminishing the level of litigation against the Authority's decisions;
- developing a procedural regime that is specific to competition infringements; and
- eliminating the statutory provision on abuse of economic dependence.

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Our 15-member EU and competition law team, based in Lisbon and Porto, is widely recognised for its in-depth knowledge in all aspects of EU Law and European and Portuguese competition law. We provide comprehensive advice on merger control, dominance, horizontal and vertical restraints and state aids, ensuring expert assistance before the European Commission and the Portuguese Competition Authority, as well as before National and European Courts. We have an extensive experience representing clients on a wide range of industries, such as energy, financial services, communications, healthcare, broadcasting, advertising, land and air transportation, retail, logistics, mining, food and beverages, tourism and agriculture.