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Cartels & Leniency 2021

A practical cross-border insight into cartels & leniency

14th Edition

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1 The Legislative Framework of the Cartel Prohibition

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

The legal basis for the cartel prohibition is Article 9 of the Portuguese Competition Act (Law nr. 19/2012, of 8 May – hereinafter "the Act" – which repealed and replaced, with effect as of 7 July 2012, the previous Portuguese Competition Act, Law nr. 18/2003, of 11 June). Article 9 prohibits and sanctions anti-competitive agreements, practices and decisions by associations of undertakings in terms similar to Article 101 (1) of the Treaty on the Functioning of the European Union (hereinafter the "TFEU").

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

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

The specific substantive provision is Article 9 of the Act, which prohibits agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition, to a considerable extent, in the whole of or in part of the domestic market. The above shall include, in particular, agreements, practices or decisions by associations of undertakings, which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technological development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(e) conclude contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list above (which is in line with Article 101 (1) of the TFEU) is non-exhaustive, and therefore other conducts that have the object or effect of restricting competition to an appreciable extent may be caught by the above-referred prohibition.

1.3 Who enforces the cartel prohibition?

The cartel prohibition (and competition law enforcement in general) is enforced by the Portuguese Competition Authority (*Autoridade da Concorrência*), created in 2003 by Decree-Law nr. 10/2003, of 18 January and currently ruled by Decree-Law nr. 125/2014, of 18 August. The Portuguese Competition Authority (hereinafter "the Authority") is a public entity with the nature of an independent administrative body. It benefits from (i) statutory independence for the performance of its attributions, (ii) administrative, financial and management autonomy, and (iii) independence from an organic, functional and technical perspective. The Authority has sanctioning, supervisory and regulatory powers which are established in Decree-Law nr. 125/2014 and further developed in the Act.

Within the Authority, the investigation of cartels is committed to a dedicated unit called the "Anti-cartel Unit", which was created in order to address the need for reinforcing the Authority's effectiveness of intervention in terms of cartel detection and investigation.

The Authority is responsible for enforcing competition law in any sector of the economy. However, for activities subject to sector-specific regulation, the Act establishes (in Articles 5 (4), 34 (4) and 35) a general principle of cooperation between the Authority and sector-specific regulators in the application of competition legislation, which translates into the following:

- whenever the Authority becomes aware of facts occurring within the scope of sector-specific regulations and likely to be classified as prohibited practices, it shall immediately inform the sector-specific regulator, so as to allow the latter to issue an opinion within a time limit stipulated by the Authority;
- whenever the Authority intends to apply interim measures within the course of an investigation in a market subject to sector-specific regulation, it shall request the opinion of the sector-specific regulator (to be issued in five working days);
- before adopting a final decision, and unless the case is closed without conditions, the Authority shall consult the sector-specific regulator (which shall issue its opinion within the time limit stipulated by the Authority);
- whenever a sector-specific regulator deals, within the scope of its own responsibilities, on its own initiative or at the request of an entity within its jurisdiction, with issues concerning a possible breach of the provisions of the Act, it shall immediately inform the Authority of the procedure and of its essential facts;
- before taking a final decision, the sector-specific regulator shall inform the Authority of the draft decision, so that the Authority issues its opinion within a time limit set for that purpose; and

- in any of the above situations and where applicable, the Authority may decide not to initiate an investigation or to stay an ongoing investigation, for as long as necessary.

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

In order to facilitate cooperation in the enforcement of competition law, the Authority and the sector-specific regulators can enter into bilateral or multilateral protocols.

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

Investigations can be initiated *ex officio* or following a complaint. Ever since June 2017, an online complaints portal (and a dedicated telephone line) is available on the Authority's website, making it easier to report any type of anti-competitive behaviour and allowing for the anonymity of the complainant (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201708.aspx?lst=1&Cat=2017).

The sanctioning powers of the Authority are exercised under a principle of opportunity, which means that the Authority is granted the ability to choose which cases to pursue on the basis of criteria of public interest. Pursuant to Article 7 (2) of the Act, in assessing whether or not to initiate proceedings, the Authority shall take into account aspects such as its previously set priorities in competition policy, the elements of fact and of law brought to the file, the seriousness of the alleged infringement, the likelihood of proof of the infringement and the extent of investigation measures required to adequately fulfil its mission.

If the Authority considers that there are insufficient grounds to act on a complaint, it shall inform the complainant and set a time limit of no less than 10 working days for the complainant to present its observations in writing. If the observations presented within the established deadline do not lead to a different assessment of the complaint, the Authority shall expressly declare, in writing, that the complaint is unfounded or not subject to priority treatment and close it. The complainant may appeal such a decision to the Competition, Regulation and Supervision Court.

If, on the contrary, an investigation is indeed initiated (*ex officio* or otherwise), such investigation shall be divided in two stages. During the first stage ("*inquérito*"), the Authority undertakes all necessary inquiries (within the scope of its investigation powers) to identify the relevant anti-competitive conduct, its agents and to collect evidence to this end. The Act has introduced an indicative period of 18 months following the opening of the case for the conclusion of the first stage. Whenever compliance with such time limit is not possible, the defendant shall be informed of that as well as of the additional time necessary to conclude the investigation.

The first stage ends with a decision of the Authority to either:

(i) close the investigation, if there is not sufficient evidence to conclude that there is a reasonable likelihood of a decision imposing a sanction;
(ii) settle the case by issuing a sanctioning decision within the context of a settlement procedure;
(iii) close the investigation by adopting a decision imposing conditions (to guarantee compliance with commitments submitted by the party concerned in order to eliminate the effects on competition stemming from the practice); or
(iv) continue with the case by initiating the second stage of the investigation ("*instrução*"), with a notification to the defendant of a "Statement of Objections" ("SO").

If an investigation was initiated following a complaint by an interested third party, it cannot be closed pursuant to (i) above, without the complainant being given the opportunity to submit any observations in writing within not less than 10 working days from being informed of the Authority's decision to close the investigation. Unless the complainant's observations reveal, directly or indirectly, a reasonable likelihood of a sanctioning decision being issued, the Authority shall close the case and this decision is subject to appeal to the Competition, Regulation and Supervision Court.

During the second stage of the investigation, the defendant is assured the exercise of its defence rights: it is given a "reasonable period" (not less than 20 working days) to reply to the SO and it may request the Authority to undertake additional evidentiary measures (e.g., witness depositions) and to have its written submissions complemented by an oral hearing. The Authority can refuse additional evidentiary measures found irrelevant to the case or considered to have mainly a delaying purpose.

The Authority may promote additional measures to gather evidence, at its own initiative, even after a reply to the SO has been submitted by the defendant. Any additional evidence included in the case as a result thereof shall be notified to the defendant, who shall have a period of not less than 10 working days to state its views in relation thereto.

The Act expressly recognises the possibility of the Authority issuing a new SO whenever the evidence collected as a result of additional evidentiary measures materially changes the facts initially attributed to the defendant.

The second stage should be concluded within an indicative period of 12 months from the notification of the SO. Whenever compliance with such time limit is not possible, the defendant shall be informed of such fact and of the additional time necessary to conclude the proceedings.

This second stage ends with a decision of the Authority to either:

(i) order the closing of the case without any conditions being imposed;
(ii) order the closing of the case with the imposition of conditions (to guarantee compliance with commitments submitted by the party concerned in order to eliminate the effects on competition stemming from the practice);
(iii) impose a sanction in the context of a settlement decision; or
(iv) declare that a prohibited practice has occurred and, where such practice cannot be justified pursuant to the exemption criteria (please see question 1.5), the decision may be accompanied by an admonition or the imposition of the relevant sanctions (fines and other – please see section 3) and, if applicable, by the imposition of behavioural or structural measures that are indispensable for halting the prohibited practice or its effects.

Structural measures can only be imposed by the Authority when there is no equally effective behavioural measure or when, though existing, such behavioural measure would be more onerous for the defendant than the structural measure.

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

In March 2013, the Authority published its guidelines on the handling of antitrust proceedings (available on the Authority's website in Portuguese only). The guidelines' main aim is to clarify how the Authority acts when handling and investigating antitrust proceedings under the Act. The guidelines include information on the most important steps of the procedure described above.

1.5 Are there any sector-specific offences or exemptions?

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

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

An exemption from the general rule of Article 9 prohibiting anti-competitive agreements is established in Article 10 in terms equivalent to Article 101 (3) of the TFEU. Agreements, practices or decisions by associations of undertakings can be considered justified if they contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, and, cumulatively thereto, they:

(a) allow the users of such goods or services an equitable part of the resulting benefit;
(b) do not impose on the undertakings concerned any restrictions that are not indispensable to attaining such objectives; and
(c) do not afford such undertakings the possibility of eliminating competition in a substantial part of the goods or services market in question.

It is not possible to request from the Authority a prior assessment of agreements, practices or decisions covered by the prohibition of Article 9. The Act fully embraces the self-assessment principle provided at EU level and specifically states that it is the responsibility of the undertakings or associations of undertakings concerned which invoke the justification under Article 10 to provide evidence that the conditions are fulfilled.

Practices prohibited by Article 9 are also considered as justified when, although not affecting trade between Member States, they fulfil all other requirements for the application of a regulation adopted under Article 101 (3) of the TFEU. The Authority may, nonetheless, withdraw this benefit if, in a particular case, it ascertains that the practice at stake has effects incompatible with the conditions for justification laid down here above.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

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

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The act establishes, particularly in Articles 18, 19 and 20, the Authority's general investigatory powers which include the civil/administrative investigatory powers to: (i) carry out compulsory interviews with individuals, either directly or via legal attorney; (ii) order the production of specific documents or information; (iii) require an explanation of documents or information supplied; and (iv) require any public administrative service, including law enforcement agencies, to collaborate with the Authority as necessary to carry out its duties properly.

Also, the Authority can enact the following investigatory measures if authorised by a court or another competent judicial authority: (i) to carry out an unannounced search of business premises; (ii) to carry out an unannounced search of residential premises; (iii) to 'image' computer hard drives using forensic IT tools; (iv) to retain original documents; and (v) to secure premises overnight (e.g. by seal).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

Article 42 of the general regime on administrative offences (approved by Decree-Law nr. 433/82, of 27 October and subsequently amended) establishes (in line with constitutional law) that correspondence and telecommunications are explicitly protected from intrusion, which means that they cannot be seized, recorded and consequently used as evidence in non-criminal procedures such as competition infringement procedures. The earliest case law in respect of search and seizure powers by the Authority imported from Criminal Procedural Law the distinction between opened and unopened letters and applied it to the seizure of emails. As a result, opened emails were considered (similarly to opened letters) to be mere documents and therefore subject to seizure from the Authority, whereas unopened emails (similarly to unopened letters) fell under the category of correspondence, which may not be seized in any administrative offence procedure. This understanding – expressly endorsed by the Authority in its guidelines on the handling of antitrust proceedings – was developed under the previous Competition Act (repealed in 2012) and relied on the criminal procedural law doctrine and case law prior to the enactment of the Law on Cybercrime. The latter, however, establishes that the seizure of electronic email is subject to the same legal regime as correspondence (subject to the prior validation of an examining judge in criminal proceedings) regardless of those emails being opened or unopened, which makes the understanding of the Authority that opened emails should be treated as mere documents a highly disputed one. The admissibility of seizure of emails in competition law investigations is a matter currently under dispute in pending litigation within our jurisdiction.

Nevertheless, the Authority's Press Release 21/2019 (available at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201921.aspx?lst=1&Cat=2019) clarifies that the Authority's draft legislation for the transposition of the Directive 2019/1/EU (the "ECN+ Directive" – please see also question 9.1) foresees the right to access any technological device, including smartphones, tablets or cloud servers to seize evidence of competition infringements.

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

There are no general surveillance powers for conducts sanctioned as administrative offences (as are competition law infringements).

2.4 Are there any other significant powers of investigation?

The Act establishes the Authority's right to search private

premises, which include not only the homes of company shareholders, directors and employees but also "other locations" (including vehicles). These searches must be previously authorised by an examining judge.

The Act expressly provides for the possibility of searches being carried out at lawyers' or doctors' offices, provided that the following safeguards are respected: (i) an examining judge must be present at the search; and (ii) the president of the respective professional Bar must be notified in advance in order to guarantee his presence or representation, if he so wishes.

The Authority is also empowered to seize documents located at lawyers' or doctors' offices, provided that the above-referred safeguards are respected and that the documents are not covered by professional secrecy with one exception: documents covered by professional secrecy that constitute, in themselves, the object or elements via which the infraction is perpetrated can be seized. The exact scope of this provision is, however, not without ambiguity, because the Statute of the Portuguese Bar (Law nr. 145/2015, of 9 September) only allows for seizure in cases of criminal offence.

The Act further empowers the Authority to seize documents covered by banking secrecy (whether or not belonging to the defendant), provided that the seizure is carried out by an examining judge and that there are well-substantiated reasons to believe that the documents are related to an infringement and are of major importance for finding out the truth or in terms of evidence.

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

Searches of business premises are carried out by the Authority's duly appointed employees who shall, for that purpose, bear the credentials issued by the Authority stating the purpose of the investigation and the warrant from the competent judicial authority. The Act establishes that, whenever necessary, the Authority may request the action of the police authorities and, in practice, the Authority is usually accompanied by the police authorities.

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

Searches at private premises have additional (stricter) requirements: the warrant must be issued by an examining judge and shall establish, *inter alia*, the date for the commencement of the search and the possibility of judicial review; if the search is conducted at an inhabited home or in a closed dependence thereof, it must be carried out between 7am and 9pm; and where the search is conducted in the offices of a lawyer or a doctor, the examining judge must be present and the president of the respective professional Bar must be notified in advance in order to guarantee his presence or representation, if he so wishes.

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

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

This view – expressly acknowledged by the General Council of the Portuguese Bar in a legal Opinion issued in 2007 – was confirmed by the judiciary in 2008, when the Lisbon Commerce Court stated that (as national procedural rules do not differentiate between in-house and external lawyers) an in-house lawyer who has been employed to exercise his activity as a lawyer and is registered with the Portuguese Bar shall be subject to the same duties and rules – and therefore shall benefit from the same guarantees and privileges – as external lawyers, in particular in what regards legal professional privilege.

In its March 2013 Guidelines on the handling of antitrust proceedings, the Authority expressly states that, in addition to lawyers registered with the Portuguese Bar, those registered with analogous entities in other countries will also benefit from a similar protection. Thus, the Authority indicates that, when carrying out its investigations, it will extend the scope for protection under legal privilege beyond what was acknowledged by the Court (which only referred to lawyers registered with the Portuguese Bar).

This being said, in the proposal for draft legislation implementing the ECN+ Directive, which the Authority has presented to the Government earlier this year (please see question 9.1), some of the modifications proposed by the Authority would – if approved – introduce a differentiation in the scope of professional secrecy acknowledged to in-house lawyers *vis-à-vis* external lawyers in the context of competition law investigations.

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

For the provisions of the Act regarding seizure of documents covered by professional secrecy, please see question 2.4.

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

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

A significant number of the Authority's decisions condemning companies for anti-competitive practices have been appealed to court and, amongst those, a significant number (especially the earliest cases) have been quashed for violation of the right of defence.

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

Failure to cooperate with the Authority or obstruction of the exercise of the Authority's investigatory powers (either by wilful misconduct or negligence) is sanctioned with a fine, the amount of which may not exceed 1% of the turnover of the year immediately preceding the final decision for each of the undertakings concerned or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings.

Failure to supply information or the supply of false, inaccurate or incomplete information in response to a request by the Authority in the exercise of its powers of sanction or supervision (either by wilful misconduct or negligence) shall be subject to a similar sanction. Until 2015, the only publicly known decision

of the Authority in respect of "non-compliance" with information requests dating back to 2005 concerned a fine of €1,000 imposed on a professional association for supplying incomplete information during an infringement procedure – Proc. nr. 769/05.6TYLSB. The other three fining decisions issued for refusal to provide information to the Authority in the exercise of its powers of supervision were annulled on appeal due to irregularities in the requests for information – Proc. nr. 205/06.0TYLSB.

In 2015, however, the Authority issued three fining decisions for "non-compliance" with its information requests, which can be seen as an indication of the Authority's stricter enforcement of the legal provisions referring to cooperation duties with the Authority. In brief:

- CP Carga was fined €100,000 for having failed to provide the Authority with information on costs requested in the context of an investigation for an alleged abuse of dominance (which was closed in the meantime with no finding of abuse against the company). This fining decision was annulled on appeal (Case nr. 276/15.9YUSTR at the Competition, Regulation and Supervision Court). The Court considered that CP Carga did not breach its cooperation duties when it replied to the Authority that a specific type of cost information did not exist within the company, even though in subsequent investigation measures the Authority found that there was cost information data available within the company that turned out to be relevant to the case. This finding by the Court was largely due to the fact that the initial request was very generic and allowed its addressee different interpretations as to the specific type of cost information sought for/requested by the Authority. The Court's decision was confirmed upon appeal by the Appellate Court of Lisbon.
- Peugeot Portugal was fined €150,000 for having failed to provide the Authority with a copy of its general conditions for extended warranty (which contained a potentially restrictive clause) in reply to a request by the Authority for all documentation available in respect of each of the company's warranty, in the context of an investigation into the company's extended warranty policy for motor vehicles (closed in March 2015 with the imposition, by the Authority, of mandatory conditions based on commitments offered by Peugeot Portugal) – the fining decision was confirmed on appeal by the Competition, Regulation and Supervision Court (Case nr. 273/15.4Y1FDR).
- Ford Lusitana was fined €150,000 for having failed to provide the Authority with a version of the extended warranty contract available on its website, which was different (and included a potentially restrictive clause) to the version sent to the Authority in reply to a request for information in the context of an ongoing supervision process in the automobile sector (closed in September 2015 with the imposition, by the Authority, of mandatory conditions based on commitments offered by Ford Lusitana in respect of its extended warranty policy) – the fining decision was confirmed on appeal by the Competition, Regulation and Supervision Court.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The maximum fine in a cartel case is up to 10% of the turnover of each participating undertaking, or, in the case of associations of undertakings, of the aggregate turnover of its members (which are jointly and severally liable for the fine under certain conditions). The relevant turnover refers to that of the year preceding the issuance of the Authority's final decision, although a 2015 decision by the Court of Appeal shed some doubt on the constitutionality of such provision, considering that it makes the maximum fine vary according to market trends and the timings of the proceedings (judgment of the Appellate Court of Lisbon of 11.03.2015, in Case nr. 204/13.6YUSTR.L1-3).

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

(i) publication in the official gazette and in a national newspaper, at the offender's expense, of the relevant parts of a decision finding an infringement; and/or

(ii) a ban on participating 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.

For the first time, in 2019, the Authority imposed an ancillary sanction upon the "Railway Maintenance Services Cartel" of a two-year ban on participating in public procurement proceedings.

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

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

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Penalties can be imposed not solely on members of the board of the undertaking concerned, but also on persons responsible for the management or supervision of the areas of activity where the infringement occurred.

In cartels, penalties may reach up to 10% of the individual's total annual income in the last complete year of the breach.

The liability of natural persons arises when they knew or should have known of the infringement but failed to take appropriate measures to bring it to an end. However, if a more serious penalty is applicable pursuant to other legal provisions, the latter will apply.

In Portugal, antitrust infringements are not considered criminal infractions and the authority does not have the power to remove or suspend an individual from its functions.

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

The Act refers to the "economic situation of the offender" as one of the aspects to be weighted by the Authority when setting a fine. Thus, financial hardship and inability to pay claims should be factored in regarding the amount of the penalty.

Even prior to the enactment of the Act, the Authority had already signalled that it would be willing to take this criterion into account. In a 2011 decision regarding alleged price-fixing between driving schools established on Madeira Island, the Authority imposed a total fine of €9,865.40 on seven undertakings. To reach this figure, the Authority took into consideration, *inter alia*, the small economic scale of the companies concerned (in terms of turnover and number of employees) and the fact they operated in a market characterised by insularity.

In 2012, the Authority published guidelines regarding the method for establishing fines in antitrust proceedings. These guidelines cover all major types of antitrust infringements, including cartels. In the paper, which on this point closely follows the Commission's view on the issue, the Authority states that it may take account of an undertaking's inability to pay in a specific social and economic context. However, the Authority shall not grant any reduction in the fine on the mere finding of an adverse or loss-making financial situation; a reduction may only be awarded on the basis of objective evidence that the imposition of the proposed fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

3.4 What are the applicable limitation periods?

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

Five years (counting from the date when the decision has become *res judicata*) is also the time limit for the enforcement of the sanctions imposed.

However, these limitation periods are suspended, *inter alia*, for as long as a judicial review is pending, and the total suspensions may last for a three-year period. The period is also interrupted whenever the Authority takes any action for the purpose of the investigation, and each interruption shall start the time running afresh.

In any event, the expiry of these limitation periods occurs on the day on which seven-and-a-half years, plus the eventual suspensions, have elapsed, i.e., a maximum of 10.5 years.

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

There is no specific provision preventing a company from paying the penalties and/or legal costs imposed on its (former or current) employees.

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

Companies are held liable for infringements committed: (i) on their behalf or account by persons occupying a leading position therein (i.e., corporate bodies, representatives and persons holding control over the company's activity); or (ii) by anyone acting under the authority of the persons mentioned in (i) when the latter have breached the supervision or control duties that are incumbent upon them.

It is also worth mentioning that the liability of an undertaking under the Act does not preclude the individual liability of natural persons, nor does it depend on the liability of the latter, in cases where there has been a breach of the duty to cooperate.

Under the general principles of labour and civil law, an employer may claim and seek damages (including legal costs and financial penalties) from an employee if he/she acted wilfully or negligently and his/her action caused the employer's engagement and punishment in the cartel.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Throughout the years, the Authority has been rather reluctant to make use of the parental liability doctrine and, for many years, this possibility was never subject to in-depth examination by the national courts.

However, in June 2017, the Lisbon Appeal Court, in assessing an application lodged by the ANF Group against the Authority's abuse of dominance decision and a judgment by the first instance court, rendered an important ruling (judgment of 14.6.2017 in Case nr. 36/16.0YUSTR.L1), where it expressly stated that, under Portuguese law, a parent company cannot be held liable for competition law infringements perpetrated by a subsidiary if the parent was not itself engaged in the infraction. Given the comprehensive and substantiated reasoning of the Appellate Court in this case, we believe that the same conclusion should apply to cartel conduct.

4 Leniency for Companies

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

The current Leniency Programme is provided for in the Act and further ruled by a Leniency Regulation dealing with the corresponding administrative procedure and complemented by the Authority's own accompanying Explanatory Guidelines on Leniency (covering both substantive and procedural rules). From an objective viewpoint, the scope of the leniency regime in force covers only cartel-type behaviour: the Act refers specifically to agreements or concerted practices between competitors that are aimed at coordinating their competitive behaviour on the market or influencing relevant parameters, specifically through: the fixing of purchase or selling prices or other trading conditions; the allocation of production or sales quotas; the sharing of markets, including collusion in auctions and bid rigging in public procurement; restrictions on imports or exports; or anti-competitive actions against other competitors.

From a subjective viewpoint, leniency may be granted either to companies or to individuals subject to liability for infringements of the Act. The latter includes members of the board of directors or of the supervisory board of legal persons and equivalent entities as well as individuals who are responsible for the direction or supervision of areas of activity where an infringement has occurred. Individuals 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 two types of lenient categories: (full) immunity from the fine; or fine reduction.

Common requirements for immunity and reduction

A company or individual wishing to benefit from immunity or reduction must comply with three conditions:

(i) to cooperate fully and continuously with the Authority from the moment the application is filed, which requires the provision of all the information and evidence in its possession or under its control at the moment or in the future, promptly replying to any information requests, refraining from acts that may hinder the progress of the investigation and refraining from disclosing the existence or content of its application or the intention to submit an application (except if the Authority so authorises in writing);

(ii) to terminate its participation in the infringement except to the extent deemed reasonably necessary by the Authority to maintain the effectiveness of the investigation; and
(iii) not having coerced any of the other companies to participate in the infringement.

Specific requirements for immunity

Immunity from fines is reserved for "first in" situations, but it is no longer required (as in the previous leniency regime) for the information to be presented to the Authority at a stage where no investigation has been initiated.

Hence, immunity is granted to companies or individuals that are the first to supply information and evidence that allow the Authority to either (i) substantiate a request for search and seizure where such information was not available to the Authority, or (ii) detect an infringement (eligible for leniency) where the Authority did not have enough evidence on such infringement.

Specific requirements for the reduction of a fine and relevant thresholds

Reductions of fines are granted to companies or individuals that (though not fulfilling the requirements for immunity) provide the Authority with evidence and information on an infringement with significant added value with respect to the information already in possession of the Authority.

The level of reduction of the fine can be set at: 30%–50% (for the first company/individual to provide evidence or information with significant added value); 20%–30% (for the second company/ individual to provide evidence or information with significant added value); and <20% (for any subsequent companies/individuals to provide evidence or information with significant added value).

For leniency requests presented after the SO, the above-referred thresholds shall be reduced by half.

The Act does not qualify the notion of "significant added value", but it provides that the criteria should be assessed taking into account the information and evidence already in the possession of the Authority. Also, the evidentiary value of the information and the fact that further corroboration might be (un)necessary will also play a relevant role, as stressed in the Explanatory Guidelines on Leniency.

In addition, individuals who cooperate fully and continuously with the Authority will benefit from immunity or a reduction of the fine which would otherwise be applicable even if they do not request such benefits personally.

Up to the present, the following fining decisions by the Authority are known to have been triggered by leniency applications:

- the "Catering Cartel", the investigation of which was triggered by an individual leniency application presented in 2007 by a former director of one of the cartelists, who benefitted from full immunity while his employer and the remaining cartel members and respective directors were all fined. After a court annulment of the initial fining decision (2009) on procedural grounds and its replacement in 2012 by a second (new) fining decision (only partially upheld on appeal), the Appellate Court of Lisbon declared, in March 2015, the dismissal of the whole administrative procedure due to time limitations;
- the "Commercial Forms Cartel" (2012), which resulted in a total fine of €1,797,978.51 imposed upon three of the four companies involved and their respective directors, amounts which were significantly reduced on appeal (to a total of approximately €459,300) as the court decided to apply to the case the more favourable regime of the current Act in terms of fine calculation (please see question 7.1);
- the "Polyurethane Foam Cartel" (2013), which resulted in a total fine of €993,000 imposed upon two of the three companies involved and their respective directors. The two companies sanctioned benefitted from a further fine reduction as they agreed to a settlement during the second stage of the investigation (please see question 6.1);
- the "Pre-Fabricated Modules Cartel" (2015), which resulted in a total fine of €831,810 imposed upon four of the five companies involved. The fine reductions granted resulted not only in leniency reductions but also in reductions resulting from the settlement procedure;
- the "Office Consumables Cartel" (2016), which resulted in a fine of €440,000 imposed upon one cartel participant who applied for leniency and settled and an initial fine of €160,000 imposed upon another company who did not settle and reduced on appeal to €50,000 (this decision was confirmed on appeal by the Appellate Court of Lisbon);
- the "Insurance Cartel" (2019), an investigation which was initiated in 2017 and which resulted in the highest fine applied by the Authority until that point in time (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201916.aspx?lst=1&Cat=2019) totalling more than €54 million imposed upon five insurance companies and several respective directors. One of those companies gained full exemption from the fine by being the first one to come forward under the Leniency Programme, and two others benefited from a reduction of the fine, having settled on a fine of €12 million, closing the investigation. With regard to the remaining two companies and individuals that did not settle, the investigation was only closed afterwards and a fine of approximately €42 million was imposed. This latter fining decision was appealed in Court and the process is currently ongoing; and
- the case on "Exchange of sensitive commercial data in the banking sector" (2019), which involved 14 banks and led to the imposition of total fines in the amount of €225,000,000. The investigation was triggered in 2012 by a leniency applicant which benefited from an exemption from the fine. A second leniency applicant benefitted from a 50% fine reduction. The fining decision was subject to appeal (currently pending in Court).

Investigations pursued by the Authority on the basis of leniency applications do not always result in fining decisions: in the course of 2017, the Authority closed with commitments two investigations of information exchange systems in the context of two associations (the "Association of Specialized Credits Institutions Portuguese" and the "Portuguese Association for Leasing, Factoring and Renting") which had been initiated as the result of leniency applications presented in separate proceedings – see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201721.aspx?lst=1&Cat=2017 and http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201719.aspx?lst=1&Cat=2017.

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

The Leniency Regulation (issued in January 2013) expressly establishes a marker system for immunity applicants. A marker may be granted either at the Authority's own initiative or in reply to the immunity applicant's request, provided that, in any event, the immunity applicant supplies the Authority with the following minimum information (in line with the ECN Model), in its initial request: name and address of the leniency applicant; information with regard to the participants in the alleged cartel;

the products and/or services and territory covered; an estimate of the duration of the cartel; the nature of the alleged cartel conduct; information on any past or possible future leniency applications to any other competition authorities in relation to the alleged cartel; and a justification for the request for a marker.

The immunity applicant shall be given a period of no less than 15 days to complete the initially submitted immunity application; a different deadline may be set by the Authority if so justified for reasons of cooperation with other competition authorities within the EU, pursuant to Regulation (EC) no. 1/2003. Failure to complete the initial request within the established deadline shall lead to refusal of the leniency application and any documents that have been delivered shall be returned to the applicant or, upon express request by the latter, retained by the Authority and assessed under the cooperation criteria, to be taken into account by the latter when setting the amount of the fine.

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

The possibility to present oral applications was introduced with the Leniency Programme adopted in 2012.

The Leniency Regulation establishes that oral applications are initially presented at a meeting with the Authority together with all relevant evidence of the cartel in the possession or under the control of the applicant. Oral applications are recorded at the Authority's premises and, after verification of content by the applicant, are subject to transcription and signed by the applicant.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Act rules in detail on the issue of confidentiality and access to the leniency application and related documents. It imposes upon the Authority an obligation to classify as confidential the leniency application as well as all the documents and information submitted for the purposes of immunity or reduction.

The defendant shall be granted access to the leniency application and related documents and information for the purposes of preparing its reply to the SO; however, copies of those documents will only be possible if so authorised by the leniency applicant. Access by third parties is dependent upon authorisation by the leniency applicant.

In relation to oral statements, a defendant which has orally applied for leniency shall not be given access to copies of its statements and third parties shall be prevented from accessing such information/documentation.

Law nr. 23/2018, of 5 June, which implements Directive 2014/104/EU ("the EU Private Enforcement Directive") further protects leniency applicants by establishing that courts may not determine the submission of evidence which includes leniency applications and settlement proposals (except for revoked settlements). On the contrary, supporting documents and information provided together with the leniency application are not expressly excluded from disclosure by court order even though they may benefit from a special disclosure regime if they qualify as documents prepared specifically (by an individual or undertaking) for the purposes of an Authority procedure. In that case, disclosure by the court can only be ordered after the Authority procedure has been concluded (a similar rule being applicable to revoked settlement proposals).

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

The definite decision to grant or refuse immunity from a fine or a fine reduction is taken by the Authority only at the end of the proceedings. Since one of the requirements to benefit from leniency is to cooperate fully and continuously with the Authority from the moment the application is filed (please see question 4.1), this means the "continuous cooperation" should last until the final decision on the proceedings is adopted.

If, during the course of the investigation, the Authority considers that the applicant is no longer cooperating, the leniency status will be withdrawn.

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

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

There is no "leniency plus" or "penalty plus" policy under the leniency regime currently in force.

5 Whistle-blowing Procedures for Individuals

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

Individual leniency is possible for members of the board of directors or the supervisory board of legal persons and equivalent entities as well as for individuals who are responsible for the direction or supervision of areas of activity within a company or equivalent legal entity where an infringement has occurred.

Individual leniency abides by similar criteria and follows the same procedure as corporate leniency. In the event of individual application, the leniency will only benefit the applicant, not the company (contrary to corporate leniency, which may benefit individuals – please see question 4.1).

Outside the scope of the Leniency Programme, any individual (either a director, an employee or any third party) may submit a complaint to the Authority implicating other individuals or companies in a suspected cartel. The Authority's approved form (available on its website) should be used for that purpose. The practice of the Authority has also been to accept anonymous complaints.

Once the Authority has decided to initiate an investigation pursuant to a complaint, it cannot close the case without granting the complainant the opportunity to submit observations on the proposed decision beforehand (please see question 1.4).

6 Plea Bargaining Arrangements

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

Apart from the Leniency Programme, the Act empowers the Authority to enter into two types of plea-bargaining arrangements in respect of antitrust infringements in general. On the one hand, the Authority may accept binding commitments from the parties in exchange for dropping the proceedings without

concluding that there has been an infringement (case closure with conditions – please see question 1.4). On the other hand, it may enter into a settlement procedure that will allow for a swift decision and a reduction of the fine.

According to publicly available information, the Authority has so far used the settlement procedure in the following antitrust cases: the "Polyurethane Foam Cartel" (decided in 2013); the "Pre-Fabricated Modules Cartel" (decided in 2015); the "Office Consumables Cartel" (decided in 2016); the "Insurance Cartel" (partly settled in 2018); and the "Railway Maintenance Services Cartel" (partly settled in 2018/2019). Commitment decisions are also frequent in decision-making practice. However, according to the March 2013 guidelines regarding the conduct of antitrust proceedings, the Authority shall typically not accept commitments in cartel cases.

Settlement proceedings may pose an advantage where parties are ready to acknowledge their participation in a cartel and accept their liability for it, but wish to shorten the procedure and obtain a reduction of the fine.

Neither the Act nor the guidelines mentioned above clarify the amount of reduction expected to be received in settled cases, and this aspect has been highly criticised by practitioners. Nevertheless, reductions of fines under settlement proceedings and under the Leniency Programme are cumulative.

In the "Polyurethane Foam Cartel" (the first antitrust settlement decision), the Authority granted to the undertakings and individuals involved significant reductions, ranging from 38%–40%, in addition to the discount from leniency. Those percentages were significantly reduced to 10% in the subsequent "Pre-Fabricated Modules Cartel" of 2015. In the 2016 "Office Consumables Cartel" and in the remaining settlements issued afterwards (see above), the Authority has not disclosed the reduction awarded to companies that settled the cases. This opacity in the Authority's approach to fine reductions for settlement procedures is not in line with the Authority's goal of reinforcing the transparency of its activity.

The facts to which a party in a settlement procedure has confessed cannot be judicially appealed. As a rule, third parties are not allowed to access settlement submissions contained in the file and other undertakings concerned in the case are only allowed to see those documents for the purposes of preparing their defence, but no copy of these can be made without due authorisation by the author of the settlement proposal. In the 2016 "Office Consumables Cartel", only one of the undertakings concerned accepted the settlement, whereas the remaining companies were subject to a separate decision finding an infringement. In the more recent cases mentioned above (the "Insurance Cartel" and the "Railway Maintenance Services Cartel"), there were also hybrid settlement decisions, which means that the companies which did not settle were subject to separate fining decisions (respectively, in August 2019 and March 2020).

7 Appeal Process

7.1 What is the appeal process?

Decisions handed down by the Authority in cartel cases are subject to appeal to a specialised court dealing with competition, regulatory and supervisory matters.

Appeals against final decisions are lodged within 30 working days. The Authority will then have an additional 30-working-day period to forward the records to the public prosecution office and to enclose its own allegations or other information deemed relevant. The public prosecutor can only withdraw the accusation if the Authority gives its consent.

The court holds full jurisdiction to review decisions whereby the Authority has imposed a fine or periodic penalty payment, and thus may reduce or increase the amount of such sanctions.

Up to the present date, the court has never increased the amounts of fines prescribed by the Authority. The Competition, Regulation and Supervision Court actually ruled (in the appeal concerning the "Commercial Printed Forms Cartel") that the levels of fines provided in the current Act may be generally more favourable for companies and individuals than those resulting from the 2003 competition legislation, essentially because under the current Act: (i) the relevant year on which to base the amount of a fine is that before the adoption of the Authority's final decision, whereas under the 2003 law the relevant year was the last full year of the infringement (this may be relevant if the economic situation of the defendants subsequently deteriorated, although, as mentioned in question 3.1, the Court of Appeal deemed that the setting of the fine based on the turnover preceding the decision may raise constitutional issues); (ii) the limits of the fines applicable to individuals are now set at 10% of their annual remuneration, whilst under the 2003 legislation individuals were liable for fines of up to half of those imposed on their companies; and (iii) there is an express requirement for the economic situation of the defendant to be taken into account in the calculation of the fine (although the general regime on administrative offences, applicable to both the 2003 and 2012 acts on a subsidiary basis, already provided for consideration of this criterion).

The court may reach a final decision in an appeal with or without a previous court hearing, but in the latter case only if the Authority, the public prosecutor and the defendant do not object thereto. If there is a court hearing, the court shall rule on the basis of the evidence presented in the hearing, as well as on the proof gathered during the administrative proceedings.

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

The Authority has an autonomous right to appeal.

The Authority is bound to publish on its website court rulings issued on appeals lodged in antitrust cases.

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

According to the Act, an appeal does not as a general rule suspend a company's requirement to pay the fine. However, there is one exception and one exemption to this rule, without prejudice to the constitutional doubts that it raises.

The exception concerns decisions that impose structural measures, in which case the effects of these decisions will be automatically suspended once the appeal is lodged.

The exemption is available for appellants in the case of decisions imposing fines or other sanctions: the appellant may ask the court to suspend the effects of the decision when the execution of such decision would cause considerable harm and the appellant offers to provide a guarantee *in lieu*, in which case the suspension of effects will depend on the guarantee actually being provided within the time limit prescribed by the court.

In 2016, the Constitutional Court ruled that the absence of suspensive effect attached to the appeal did not breach the fundamental law (Judgment nr. 376/2016 of 8 June 2016, in Case nr. 1094/2015). However, later that year the same Constitutional Court issued a second ruling on the matter and this time it decided that the provision of the Act that does not suspend the obligation to pay the fine in case of appeal or requires a company to provide a guarantee instead is indeed unconstitutional (Judgment nr. 674/2016 of 13 December 2016, in Case nr. 206/16). In 2018,

the Constitutional Court ruled again in favour of the unconstitutionality of the referred provision (Judgment nr. 445/2018 of 2 October 2018, in Case nr. 1378/2017). This decision was appealed to the Grand Chamber of the Constitutional Court due to an alleged contradiction with a previous ruling and the prevailing understanding since 2019 is that such provision does not breach the Constitution (Judgment nr. 776/2019 of 17 December 2019, in Case nr. 1378/2017 and Judgment nr. 173/2020 of 11 March 2020, in Case nr. 202/18).

If, as a result of future appeals, the Constitutional Court finds a provision to violate the fundamental law in three judicial reviews, the court is entitled to open an *ex officio* procedure that may result in a declaration of unconstitutionality with statutory general force, which would bar national courts from applying the provision at stake.

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

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

8 Damages Actions

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

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

Law nr. 23/2018, of 5 June, which implements the EU Private Enforcement Directive, confers binding evidentiary value (in the form of a non-rebuttable presumption) on final decisions adopted by the Authority or on final judicial rulings on appeal. Such binding evidentiary value concerns the existence, the nature, the duration and the material, personal and territorial scope of an antitrust infringement for the purposes of a follow-on damage action. In addition, final decisions or rulings by competition authorities or courts of other Member States are given a qualified evidentiary value (in the form of a rebuttable presumption) regarding the existence, nature, duration and material, personal and territorial scope of an antitrust infringement for the purposes of a follow-on damage action.

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

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

Law nr. 83/95, of 31 August, as amended by Decree-Law nr. 214-G/2015 establishes the legal framework applicable to the representative action ("*ação popular*"), which can be used in the context of a private antitrust class action. The aim of these actions is to defend collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Under this framework, any natural person, association or foundation (the latter two in cases which are directly connected with their scope) should be capable of bringing a private antitrust class action before a Portuguese court based on the breach of competition law rules. Companies, on the contrary, may not use the representative action procedure.

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

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

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

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

Law nr. 23/2018, of 5 June, which implements the EU Private Enforcement Directive introduces a set of specific rules in respect of representative actions for damages claims for antitrust breaches, in particular insofar as (i) it extends the legal standing to bring forward such representative actions to associations and foundations for the defence of consumers' rights and to associations of undertakings whose associates are affected by the infringement of competition law in question, and (ii) rules on aspects such as the identification of injured parties, the quantification of damages and the receipt, management and payment of damage compensations with the purpose of facilitating the feasibility of representative actions for antitrust infringements in the context of an "opt-out system".

To the best of our knowledge, Portugal's first-ever class action for private competition law damages was lodged earlier in 2015, but it refers to a redress claim for damages caused by an abuse of a dominant position and not by a cartel. Indeed, the collective damages claim was presented by the "Portuguese Competition Observatory" on behalf of all pay-TV consumers allegedly damaged by the conduct of pay-TV operator Sport TV, previously fined for having abused its dominant position in the market for conditional access premium sports channels by applying a discriminatory remuneration system in the distribution agreements for Sport TV television channels.

8.3 What are the applicable limitation periods?

Under the general civil law rules currently in force, the right to compensation under the tort liability regime is subject to a time limitation of three years from the moment when the injured party becomes aware of his right to make a claim for damages.

The law implementing the EU Private Enforcement Directive increases the referred limitation period to five years from the moment when the injured party becomes aware or can reasonably be assumed to have become aware: (i) of the behaviour in question and the fact that it constitutes an infringement of competition law; (ii) of the identity of the infringer; and (iii) of the fact that the infringement of competition law caused harm to it, even if it was not aware of the full extent thereof.

A different limitation period is proposed for small and medium-sized enterprises and for leniency applicants that benefited from immunity from a fine in relation to injured parties which are not their purchasers or suppliers. Such limitation period shall be five years from (i) the date of termination of an executive action for lack of seizable assets, (ii) the date of the bankruptcy finding by the court, or (iii) the date of any other final court decision establishing the inability of the remaining co-infringers to pay. New rules are also proposed for the counting of and suspension of the limitation period, which are broadly in line with the solutions of the EU Private Enforcement Directive.

The foregoing is without prejudice for a general 20-year limitation period (counting from the harmful event).

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

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

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

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

The law implementing the EU Private Enforcement Directive expressly acknowledges the right of a defendant to use a passing-on defence to sustain that the claimant did not suffer all or part of the damages claimed because of overcharges passed on to its customers and clarifies that the respective burden of proof lies with the defendant.

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

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

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

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

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

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

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

Law nr. 23/2018, of 5 June, establishes procedural fines that are specifically aimed at conduct in breach of certain rules on access to evidence in the context of damages actions.

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

To the best of our knowledge, there have been no successful private antitrust damages actions so far for cartel conduct.

9 Miscellaneous

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

In line with previous years, the competition policy priorities for 2020 set out by the Authority at the end of 2019 (available in Portuguese at http://www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/Prioridades%20da%20Pol%C3%ADtica%20de%20Concorr%C3%AAncia%20para%202020.pdf) confirm the intention of the Authority to keep a vigorous watch on cartel practices, acting either on its own initiative or by reactive means (e.g., the Leniency Programme). Following the analysis developed in 2019 on the impact of digital ecosystems, algorithms and big data on competition, the Authority will prioritise its internal capacity on this matter through the creation of a dedicated task force, in order to better address the challenges posed by the digital economy to the implementation of competition law. The Authority's priorities also include maintaining its advocacy work to improve the detection of collusive behaviour and to raise awareness regarding restrictive practices. Furthermore, the Authority has set a goal to become more transparent and accountable through the development of an intuitive access to its website.

The implementation of the ECN+ Directive is already in preparation in Portugal and a public consultation on a first drafting of a preliminary proposal took place between 26 October 2019 and 15 January 2020. A report of such public consultation was issued on 31 March 2020 (available in Portuguese at http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Proposta%20de%20Anteprojeto%20apresentada%20ao%20Governo%20%E2%80%93%20%20Relat%C3%B3rio%20da%20Consulta%20P%C3%BAblica.pdf), and a revision and amendment of the current Act are deemed necessary by the Authority. Despite the significant investigative powers already conferred upon the Authority and its institutional legal framework as an independent agency, the proposal for the revision of the Act (available in Portuguese at: http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Proposta%20de%20Anteprojeto%20apresentada%20ao%20Governo%20%E2%80%93%20Vers%C3%B5es%20Comparadas%20de%20Diplomas%20a%20Alterar.pdf) includes a number of modifications in aspects that are of relevance in the context of cartel investigations, sanctioning and the respective procedures in order to allegedly apply the law more effectively.

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

Please refer to the preceding question.

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Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
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