The Dominance and Monopolies Review

Third Edition

Editor
Maurits Dolmans

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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Editor
Maurits Dolmans

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
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Richard Davey

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CONTENTS

Editor's Preface vii
Maurits Dolmans

Chapter 1 AUSTRALIA 1
Ayman Guirguis, Richard Flitcroft and Jackie Mortensen

Chapter 2 BELGIUM 23
Damien MB Gerard

Chapter 3 BRAZIL 44
Ana Paula Martinez

Chapter 4 CANADA 63
Arlan Gates and Eva Warden

Chapter 5 CHINA 81
Zhan Hao, Song Ying, Li Xiang and Guo Huiyang

Chapter 6 COSTA RICA 96
Edgar Odio

Chapter 7 EUROPEAN UNION 107
Thomas Graf and Henry Mostyn

Chapter 8 FINLAND 127
Anna Kuusniemi-Laine, Salla Mäntykangas-Saarinen and Kiti Karvinen

Chapter 9 FRANCE 139
Antoine Winckler, François Brunet and Frédéric de Bure

Chapter 10 GERMANY 158
Stephan Barthelmess and Tilman Kuhn

Chapter 11 GREECE 174
Alexandra Mikroulea

Chapter 12 INDIA 189
Anand S Pathak

Chapter 13 INDONESIA 204
Rahmat SS Soemadipradja and Verry Iskandar

Chapter 14 ITALY 217
Matteo Beretta and Gianluca Faella

Chapter 15 JAPAN 238
Kozo Kawai, Ryutaro Nakayama, Madoka Shimada and Takahiro Azuma

Chapter 16 KENYA 253
Dominic Rebelo and Ciru Longden

Chapter 17 MEXICO 264
Luis Gerardo García Santos Coy, Mauricio Serralde Rodríguez and Jorge Kargl Pavía

Chapter 18 NETHERLANDS 277
Erik Pijnacker Hordijk

Chapter 19 POLAND 296
Jarosław Sroczyński and Łukasz Wieczorek

Chapter 20 PORTUGAL 311
Nuno Ruiz

Chapter 21 SLOVENIA 318
Andrej Fatur and Helena Belina Djalil

Chapter 22 SPAIN 332
Francisco Enrique González-Díaz and Ben Holles de Peyer

Chapter 23 SWEDEN 346
Ulf Öberg, Magnus Schmauch and Hanna Pettersson

Chapter 24 SWITZERLAND 372
Nicolas Birkhäuser and Andreas D Blattmann

Chapter 25 TURKEY 392
Gönenç Gürkaynak

Chapter 26 UNITED KINGDOM 403
Paul Gilbert

Chapter 27 UNITED STATES 421
Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon

Appendix 1 ABOUT THE AUTHORS 435

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS ... 455

EDITOR'S PREFACE

As this new edition of *The Dominance and Monopolies Review* will show, several of the trends that were apparent in the previous few years have continued – except that commitment decisions in Europe seem to be falling out of favour and the Commission is returning to more old-fashioned punitive enforcement. Most obvious perhaps is the ongoing disruption of traditional sectors of the economy by the emergence of digital services and online distribution. This has led to a series of cases and pending investigations in various jurisdictions involving online and IT firms, including companies as diverse as Amazon (Germany, India); HRS (Germany); Booking.com (Germany, France); Expedia (Germany); Intel (EU); Motorola (EU); Samsung (EU); Google (EU, Brazil, Canada, India); PMU (France); Vente-privee.com (France); OnlinePizza Norden (Sweden); Snapdeal and Flipkart (India); Qualcomm (China, EU, Korea, Taiwan, US); IDC (China); and Tencent (China).[1]

Two trends in this context deserve special attention. The first is the threatened re-emergence of form-based analysis, at the expense of the economic analysis of dominance and foreclosure effect in abuse cases; the second is the ongoing politicisation of the competition process.

The first trend is perhaps the most surprising and disappointing. When the Commission adopted its decision in *Intel* in 2009, it followed in part its own guidance as set out in the notice on the application of Article 102 of the TFEU[2] by including a

1 The editor and his firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

2 European Commission, Guidance on enforcement priorities in applying Article 82 of the EC Treaty, 2009/C 45/02, available at: http://ec.europa.eu/competition/antitrust/art82/guidance.pdf.

detailed analysis of the restrictive effects of Intel's discounts. [3] Although there is debate about the finding of facts in the case, the Commission at least tried to demonstrate actual foreclosure of equally efficient competitors. On appeal, however, the General Court of the European Union held that this was unnecessary, because the rebates in question were 'by their very nature' abusive.[4] There was no need to review the exclusionary effects, the Court held, or to apply an 'equally efficient competitor' test.

The court thus threw cold water on the hopes of the antitrust community that the court would apply a 'more economic approach'. It can be argued that the judgment was no surprise since exclusivity discounts had always been considered an abuse, or that it was not as bad as it sounded since the judgment was still based on economic theories. It is true, for instance, that where it can be shown that a customer's full demand is contestable, the judgment can be distinguished on the facts because the dominant firm does not leverage market power.[5] Moreover, as pointed out in the EU chapter of this book, the court stated that the 'as-efficient competitor' test is still relevant for non-conditional pricing practices. Finally, we still have the *Post Danmark* case, where the court held that Article 102 does not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market […]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient.'[6]

Even that scant comfort, however, is now under threat. The recent opinion of the Advocate-General in *Post Danmark II*, which came out in May 2015, includes unhelpful statements.[7] Advocate-General Kokotte rejects arguments that the 'as-efficient competitor' test should be applied, fulminating not only against the test, but against 'expensive economic analyses' more generally and the 'disproportionate use of the resources of the competition authorities and the courts'.[8] The Advocate-General also opines that there is no need for foreclosure to exceed any *de minimis* threshold,[9] leaving open the question of why competition law should be applied to conduct that cannot be shown to have had much of an effect at all on competition. Perhaps she was impressed by the thought that the case involved retroactive discounts, leveraging a non-contestable share of 70 per cent protected by a statutory monopoly. It is to be hoped that this kind of thinking is applied only where 'the abusive nature is immediately shown' (i.e., in the

3 Case COMP/C-3 /37.990 *Intel*, Commission decision of 13 May 2009, paragraphs 1,002 to 1,577.

4 Case T-286/09 *Intel*, judgment of 12 June 2014, paragraphs 85, 88.

5 See various articles in the first issue of the *Competition Law & Policy Debate*, 2015/1 CLPD.

6 Case C-209/10, *Post Danmark A/S v. Konkurrenceradet*, judgment of 27 March 2012, EU:C:2012:172, paragraphs 21–22.

7 Case C-23/14, *Post Danmark A/S II*, Opinion of Advocate General Kokott delivered on 21 May 2015, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=164331&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=480796.

8 Ibid., paragraphs 66–73.

9 Ibid., paragraph 85-94.

case of clear *per se* abuses)[10] but recent developments in pending EU cases are worrying – with the Commission issuing a statement of objections in the *Google* case for supposed foreclosure in product comparison services in spite of the dynamic nature of that sector and the great success of competitors such as Amazon, eBay and others in the shopping sector, which dwarf Google's shopping service.

The chapter on US developments contains a similarly troubling case. In a judgment concerning an exclusive dealing policy of a pipe-fitting manufacturer – admittedly, under Section 5 of the Federal Trade Commission (FTC) Act – the US Court of Appeals for the Eleventh Circuit in April 2015 affirmed the FTC's decision that the conduct was illegal because: '[t]he governing Supreme Court precedent speaks not of "clear evidence" or definitive proof of anticompetitive harm, but of "probable effect".'

Perhaps surprisingly, the chapter on China shows a spark of hope for economists. It discusses the case of *Qihoo 360 v. Tencent*, following Qihoo 360's accusing Tencent of abusive practices in instant messaging. The Supreme Court of China conducted a careful analysis, including a review of economic factors. It held that while the usage share of Tencent's instant messaging services was above 80 per cent, it nonetheless could not be found dominant in the market for instant messaging services. It took into account that in a two-sided market for free services, Tencent had no power over price, and had to keep innovating in order to counter dynamic competition, in a market where users engaged in multi-homing and could switch if the quality of Tencent's service deteriorated relative to that of its rivals. *Qihoo 360 v. Tencent* is rightly branded a landmark case and an example for other authorities and courts to consider.[11]

As to the second trend, politicians' attempts to influence competition cases are not new, of course. But 2014 saw a worrying intensification, at least at the European level. The French and German governments, for instance, at the instigation of national publishers and others, have put private and public pressure on the European Commission to pursue new and unprecedented theories of harm in the IT sector.[12] They are targeting in particular what is called the 'GAFA', an acronym for some of the main non-EU online service companies, demanding extraordinary remedies including trade secret disclosures and structural measures.[13] They solicited support from the

10 Ibid., paragraph 75.

11 Other such examples can be found in Germany and Brazil: *Verband Deutscher Wetterdienstleister eV v. Google*, Reference No. 408 HKO 36/13, Rechtbank Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

12 Joint Letter from Ministers Sigmar Gabriel (Germany) and Arnaud Montebourg (France), to Commissioner, Joaquin Almunia on 16 May 2014, available at www.magazinemedia.eu/wp-content/uploads/Translation_Letter_SG-AM_2014-05-28.pdf. See also the letter sent to the Commission by four German ministers in May 2015, available at www.bmwi.de/BMWi/Redaktion/PDF/A/anschreiben-der-minister-an-eu-kommissare,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

13 'Projet de loi pour la croissance, l'activité et l'égalité des chances économiques (EINX1426821L)'; see: www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=E1BDCC

European Parliament, which went as far as adopting a resolution requesting the break-up of an internet company based outside the EEA for alleged abuse of dominance, without any investigation (let alone proper review) of facts, law, or economics.[14] The notion of 'punishment before trial' may be amusing as literary entertainment,[15] but is profoundly troubling when coming from a European institution. Nor is the European Parliament alone in Brussels in raising questions. A commissioner was reported making statements in a pending case suggesting that complaints are 'well-founded' before a statement of objections was even sent.[16] He is said to have stated: 'We [Europe] need two to three global players. This applies to software, and hardware and all of these [online sectors].' 'If you look at America, which is comparable in size, or Korea, Japan, China, they have very strong powers and we need that too.'[17] On another occasion, he is quoted saying that 'The European Union should regulate internet platforms in a way that allows a new generation of European operators to overtake the dominant US players' and the goal was to 'replace today's web search engines, operating systems and social networks'.[18] Such statements could be understood not only to prejudge the outcome, but also to suggest protectionist objectives.

Competition Commissioner Vestager wisely tried to calm the waters,[19] and the President of the European Commission appears to be aware of the risks.[20] Nonetheless, every Commissioner has a vote in competition cases. Article 41 of the Charter of

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E5C4C26E5B3A7E9115CBB2458B.tpdila07v_2?idDocument=JORFDOLE000029883713&type=general&typeLoi=proj&legislature=14.

14 European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2014/2973(RSP)), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0071+0+DOC+XML+V0//EN&language=EN.

15 'Let the jury consider their verdict,' the King said […]. 'No, no,' said the Queen. 'Sentence first — verdict afterwards.' *Alice's Adventures in Wonderland,* Lewis Carroll.

16 *Welt am Sonntag,* 12 April 2015, p. 1, 'EU will härter gegen Google vorgehen', available at www.welt.de/print/wams/article139419627/EU-will-haerter-gegen-Google-vorgehen.html.

17 29 September 2014, Oettinger's Comments to EU Parliament; video recording of the Parliament hearing: www.elections2014.eu/en/new-commission/hearing/20140917HEA64706, relevant statements at 2:04:50.

18 Speech by Commissioner Oettinger at Hannover Messe, 'Europe's future is digital', https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital_en; *Economist*, 'Nothing to stand on', 18 April 2015, at www.economist.com/news/business-and-finance/21648606-google; *New York Times*, 'Europe's Google problem', 28 April 2015, www.nytimes.com/2015/04/28/opinion/joe-nocera-europes-google-problem.html?_r=0.

19 Statement by Commissioner Vestager on antitrust decisions concerning Google, Brussels, 15 April 2015. 'We will be exclusively guided by the facts, the evidence and by the EU's antitrust rules.' Available at: http://europa.eu/rapid/press-release_STATEMENT-15-4785_en.htm.

20 Minutes of the 2122nd meeting of the Commission held in Brussels (Berlaymont) on Wednesday 15 April 2015, http://ec.europa.eu/transparency/regdoc/rep/10061/2015/EN/10061-2015-2122-EN-F1-1.PDF.

Fundamental Rights of the European Union therefore requires every Commissioner, and the College as a whole, to handle proceedings impartially.[21] Thus, before a Commissioner reaches a conclusion, she or he should examine every element and each piece of evidence with an open mind, and reserve judgment until all rights of defence have been exhausted. Even the *appearance* of pre-judgment should be avoided.[22] And 'it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence'.[23]

Statements that appear to prejudge the outcome of the case, or even prejudge elements of a decision such as whether a defendant has a '*de facto* monopoly' before the firm has been fully heard, undermine the credibility of the law, the process and the European Commission itself.[24] A legitimate question arises whether a Commissioner in such a situation should not be recused from the decision-making, to avoid the appearance of bias. The Hon Justice Barling (now a chairman of the UK Competition Appeals Tribunal) recently set an example of integrity when he recused himself in *Sky v. Ofcom* merely on the ground that he had given a thoughtful speech on a relevant topic after the case had been decided by the CAT, and before it was remitted back to the CAT by the Court of Appeal.[25] He stated, appropriately, that 'my own view of whether I would deal with the remitted matter impartially and in accordance with my judicial oath is not relevant: it is the appearance which is important in this context'.[26]

Questions about appearance of pre-judgment are even more sensitive when, as in the European Commission, the team that investigates the defendant is also the one conducting the hearing, briefing the College of Commissioners, and writing the decision.[27] The requirement of impartiality encompasses not only 'subjective

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21 Article 41(1)(a) of the CFR guarantees 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'. Under Article 6(1) of the TFEU, the CFR 'shall have the same legal value as the Treaties'.

22 See, e.g., ECtHR, Appl. No. 22330/05, *Olujić v.Croatia*, 5 February 2009, paragraph 63 ('in respect of the question of objective impartiality even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done"').

23 See, e.g., ECtHR Appl. No. 58442/00, *Lavents v. Latvia*, 28 November 2002, paragraphs 118–121; and ECtHR Appl. No. 22330/05, *Olujić v. Croatia*, 5 February 2009, paragraphs 61–68.

24 See, e.g., Levy and Rimsa, 'Why Competition Commissioners Should Be Cautious in Commenting Publicly On Active Antitrust Cases', 36 *ECLR* 1 (2015).

25 Ruling (Constitutional Tribunal), 26 and 27 March 2014, *Sky UK Limited, Virgin Media, the Football Association Premier League and British Telecommunications plc v. Office of Communications & Ors*. Available at http://catribunal.org.uk/files/1156-59_Judgment_CAT_9_060515.pdf.

26 Ibid., paragraph 83.

27 See, e.g., *R v.Gough* [1993] UKHL 1 (Lord Goff) ('But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was

impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice' but also 'objective impartiality, insofar as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the *institution* concerned'.[28] Even with the best of intentions, and recognising the excellence and intellectual integrity of many Commission officials, is it humanly possible for a team that has spent one or two years intensely investigating and prosecuting a case, to avoid the risk of unconsciously interpreting and screening information in a way that confirms their beliefs or hypotheses? Where investigation, hearing and decision are prepared by the same team, there is a serious risk of confirmation bias.[29] Reinforcing this concern is the longstanding, but still surprising, fact that the College of Commisisoners does not read the parties' briefs and does not attend oral hearings. Not even the Commissioner for Competition participates. In other words, the decision is prepared by a Commissioner (and is adopted by a College) without direct personal knowledge of the facts and the proceedings, based on hearsay, set out in internal documents and summaries to which the parties have no access, and that are prepared by a team that has acted as detective and prosecutor. As the OECD warned, '[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique'.[30] Incidental internal procedures, such as devil's advocate teams and peer review panels, are useful, but are only stopgaps. In light of the quasi-criminal nature of EU infringements proceedings, under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms,[31] the proper solution would be to separate the investigative team from the team that prepares the Commission decision, which should include the Commissioner, and for the latter team to review the statement of objections and the response, as well as to attend the oral hearing. There is no chance that this will happen in the coming year, but it is hoped that the discussion on this topic will finally be taken seriously.

I would like to thank my colleagues Nicholas Levy and Andris Rimsa for their thoughts, as well as all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this third edition of *The Dominance and Monopolies Review*. I look forward to seeing what evolutions 2015

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acting impartially, his mind may unconsciously be affected by bias […]').

28 Emphasis added, Case C-439/11 P *Ziegler v.Commission*, EU:C:2013:513, paragraphs 154–155; Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v.UFEX and Others*, EU:C:2008:375, paragraph 54; and Case C-308/07 P *Gorostiaga Atxalandabaso v.Parliament*, EU:C:2009:103, paragraph 46.

29 See, e.g., RS Nickerson, 'Confirmation bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175–220 ('the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand').

30 'OECD Country Studies – Competition Law and Policy in the European Union' (2005), p. 62, see also pp. 61, 63–69, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/35908641.pdf.

31 See, e.g., Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures?' (2009) 34 *European Law Review* 817.

holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* and *Post Danmark II* (conditional pricing) and the European Commission decision in *Gazprom* and *Google*, the *Qualcomm* investigations in various countries, and the US authorities' reviews of practices of patent assertion entities and privateers, which are also directly relevant for the EEA and other jurisdictions.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2015

Chapter 20

PORTUGAL

Nuno Ruiz[1]

I INTRODUCTION

Article 11 of Law 19/2012 (the Competition Law), prohibits the abuse, by one or more undertakings, of a dominant position in the domestic market or in a substantial part of it. Article 11 gives a number of examples of abuses, including:

a imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

b limiting production, markets or technical development to the detriment of consumers;

c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d making the conclusion of 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; and

e refusing access to a network or to other essential facilities.

Article 12 of the Competition Law also prohibits the abuse of economic dependence to the extent that such a practice affects the way the market or the competition operates. This is the case where one or more undertakings abuse the economic dependence under which any of their suppliers or customers may find themselves as a result of the fact that an equivalent alternative is not available. The Competition Authority never applied this rule.

The Competition Law is applicable to state-owned undertakings and to undertakings to which the state has granted special or exclusive rights. Undertakings that have been legally entrusted with the management of services of general economic

1 Nuno Ruiz is a partner at Vieira de Almeida & Associados.

interest are subject to competition law to the extent that it does not create an obstacle to their specific mission.

The current Competition Law significantly enhanced the Competition Authority's capacity for action, strengthening its powers of inspection, sanction and supervision.

In performing its duties, the Competition Authority is guided by the public interest in the promotion and defence of competition and may therefore establish its priorities accordingly regarding the matters that it is called upon to investigate. The Competition Authority may act on its own initiative or upon complaint. However, it only has the duty to open infringement proceedings whenever the public interest is at stake.

Tackling abuses of dominant position was among the Competition Authority priorities for 2013 and 2014 – apparently this is no longer the case in 2015.

So far the Competition Authority has issued no formal guidance on the application of Article 11 of the Competition Law. It has stated, however, that national rules on the abuse of a dominant position will be applied in accordance with the European Commission decisions and with the rulings of the Court of Justice of the European Union.

It is interesting to note that in its decisions the Competition Authority tends to consider the abuses as infringing the Competition Law and Article 102 of the TFEU.

II YEAR IN REVIEW

i Order of Chartered Accountants

In May 2010 the Order of Chartered Accountants (OTOC) was sentenced to pay a fine of €229,300 for restrictive practices in the market of compulsory training for chartered accountants (the *OTOC* case). OTOC had published a Training Regulation through which it artificially segmented the market of compulsory training, reserving for itself a third of that market and stipulating criteria for the admission of other training entities and for the approval of their training activities.

The Competition Authority found that, by establishing a Training Regulation that had as its object and effect the restriction of competition in the market of specialised training as defined by OTOC itself, OTOC infringed the prohibition of decisions by associations of undertakings that restrict competition.[2]

The Competition Authority considered that OTOC, as the regulator of the chartered accountant profession, simultaneously abused its dominant position on the market that OTOC itself created, deciding which competitors could enter such market, charging fees for both market access and for the exercise of the profession concerned. The Competition Authority determined the cessation of these practices and their effects upon the application of a periodic penalty payment of €500 per day of delay in complying with the decision.

OTOC decided to bring proceedings against the authority's decision. The Lisbon Commerce Court sustained the Competition Authority decision but reduced the fine. OTOC then appealed to the Lisbon Court of Appeal, which referred several interpretation questions to the Court of Justice of the European Union. These issues

2 Article 4 of the Competition Law, similar to Article 101 of the TFEU.

were clarified in its judgment of 28 February 2013.[3] The Court of Justice ruled, however, on the basis of Article 101(1) of the TFEU. The judgment of the Lisbon Court of Appeal of January 2014 confirmed the Competition Authority decision and the Lisbon Commerce Court ruling.

On December 2014 the Constitutional Court rejected a claim brought by OTOC against the Court of Appeal ruling. OTOC now has to pay the fine and to modify its Training Regulation, bringing it in line with competition rules.

ii Sport TV

In June 2013 the Competition Authority adopted an infringement decision against Sport TV on the grounds of it having abused its dominant position in the market of premium sport television channels. A fine of €3.7 million was applied.

Sport TV, a company jointly controlled by Controlinveste, an undertaking holding a dominant position in the wholesale market for football television rights, and by ZON, the most important player in the pay-TV market, had allegedly applied more favourable distribution conditions to its shareholder ZON, discriminating against its competitors MEO and Cabovisão.

Sport TV appealed to the Competition, Regulation and Supervision Tribunal (Competition Tribunal) against the decision. In June 2014 the Competition Tribunal upheld the Competition Authority decision and reduced the fine to €2.7 million. This ruling was confirmed by the Lisbon Court of Appeal in March 2015.

iii Market intelligence

In March 2015 the Competition Authority adopted a statement of objections against undertakings suspected of a collective margin squeeze abuse in the market of market intelligence services.

iv Commitments in the sport television rights case

In December 2014 the Competition Authority announced that a number of commitments were offered by Controlinveste and PPTV in order to close the investigation related to their portfolio of sport television rights resulting from contracts with the vast majority of football clubs.

The Competition Authority has concluded that the existing agreements between Controlinveste and the football clubs participating in the first and second championships organised by the Portuguese League may have the effect of foreclosing the market and therefore infringe competition rules.

The foreclosure effect was attributed to: (1) the excessive duration of the exclusive rights; (2) the rights of preference granted to PPTV by the football clubs; (3) the suspension mechanism allowing for the extension of the contractual duration whenever a football club is relegated to the league below.

In order for the case to be closed Controlinveste and PPTV offered the following commitments: (1) not to conclude new contracts with exclusivity longer than three

3 See Case C 1/12.

years, with rights of preference and with suspension mechanisms; (2) in relation to existing contracts, grant the football clubs the right to terminate said contracts by the end of 2015/2016, waive the rights of preference and allow the clubs to ignore the suspension mechanism.

The commitments were submitted by the parties under Article 23 of the Competition Law. Unlike Article 9 of Regulation (EC) 1/2003 in the event that commitments are offered and accepted under Article 23 of the Competition Law, the Competition Authority will not acknowledge the existence of an infringement.

III MARKET DEFINITION AND MARKET POWER

Both the Competition Authority and the Portuguese courts use the same criteria as the European Commission and European Court of Justice when dealing with concepts such as 'relevant market', 'dominant position', 'unilateral conduct' and 'collective dominance'. The approach to market definition and to market power may be more or less economics-based depending on the requirements of the case.

As a general policy statement the Competition Authority expressed the view that, to determine the existence of an abuse of dominant position, it is necessary, first, to determine whether the allegedly dominant undertaking holds a dominant position. This requires the identification of the relevant product (or service) and the geographical markets.

For the Competition Authority an undertaking may be in a dominant position when, because of its position of economic strength, it has the ability to behave to an appreciable extent independently of its competitors, its suppliers and its clients. This position may be due to the characteristics of the undertaking (its market share, financial capacity or vertical integration) or to market characteristics (barriers to entry or expansion, network effects or legal obstacles to entry).

IV ABUSE

i Overview

The Competition Authority broadly defines the abuse of a dominant position as an unlawful exploitation by one or more undertakings of their market power having an anti-competitive object or effect and resulting in harm to customers and the exclusion of competitors.

Since the Competition Law does not provide an exhaustive list of abuses the Competition Authority tends to have an effects-based approach and not to revert to *per se* abuses. This allows for the recognition of the existence of less common or *sui generis* abuses in some decisions (see the *OTOC* case, *supra*). However the existence of *per se* abuses is not excluded.

In theory the Competition Authority acknowledges the distinction between an abusive conduct and competition on the merits but, in practical terms, it deviates sometimes from such distinction (see the *Ducts* and *Broadband* cases). The courts have been more consistent in establishing a frontier between the abuse of market power and competition on the merits (see the *Ducts* case).

For the Competition Authority, holding a dominant position confers on the undertaking concerned a special responsibility, the scope of which must be considered in light of the case's specific circumstances.

Therefore, conduct that would be deemed lawful when carried out by a non-dominant undertaking may constitute an infringement when adopted by a dominant undertaking.

ii Exclusionary abuses

The Competition Authority has dealt with exclusionary abuses in some cases. The *Ducts* case concerned a refusal to deal, in particular, a refusal of access to essential facilities. The *Leased Lines* and *Broadband* cases concerned margin squeeze and predation. The abuse identified in the *OTOC* case could be viewed as exclusive dealing. Leveraging was the subject matter of the *Sugalidal* case.

iii Discrimination

Discrimination was discussed mainly in three cases: the *Leased Lines*, the *Broadband* and the *Sport TV* cases (see *supra*). In said decisions the Competition Authority took the view that, as a rule, volume rebates should not be considered as a form of unlawfully restricting competition. However, the issue of discriminatory pricing was raised taking in consideration the circumstances of the case: the dominant firm was the sole beneficiary of the higher discounts.

iv Exploitative abuses

Exploitative abuses were discussed in the *Origination Prices* case. The investigation and the warning letter sent to all three mobile operators in Portugal proved that the Competition Authority does not set aside the possibility of intervening in situations of excessive pricing.

V REMEDIES AND SANCTIONS

i Sanctions

A fine of up to 10 per cent of the turnover of the year immediately preceding the final decision by the Competition Authority may be imposed in cases of abuse of a dominant position. Daily penalty payments may also be imposed in cases of non-compliance with a Competition Authority decision determining the adoption of any specific measures or remedies (see the *Sugalidal* case).

ii Behavioural remedies

Infringement decisions often impose behavioural measures appropriate to bring the infringement to an end and to avoid persisting violations of competition rules.

iii Structural remedies

Infringement decisions can impose structural measures necessary for halting the prohibited practices or their effects. According to the Competition Law structural

measures can only be imposed when there is no behavioural remedy that would be equally effective or, should it exist, it would be more onerous for the party concerned than the structural measures themselves. The Competition Authority has to date never imposed structural measures.

VI PROCEDURE

The Competition Authority may act on its own initiative or upon a complaint. Apart from informal contacts there are no procedures aimed at ensuring that undertakings obtain guidance on individual cases.

Complaints must be presented according to a specific form approved by the Competition Authority. If the Competition Authority deems that a complaint is either groundless or does not fall within its competition policy priorities, it must inform the complainant. The same applies whenever, once an investigation has been initiated, the Competition Authority concludes that there is no reasonable likelihood that an infringement decision will be adopted. In both cases, the complainant may present its comments and appeal against the Competition Authority's decision to drop the case.

In case the Competition Authority opens an investigation and further decides to pursue the case it must issue a statement of objections and give the defendant the opportunity to express its views, to produce exculpatory evidence and to request for additional investigation to be conducted.

In infringement proceedings the burden of proof of any justification lies with the undertakings or associations of undertakings accused of breach of competition law.

As a rule, inquiries should be concluded within 18 months and, in the event of a statement of objections, the final decision should be adopted within 12 months of its issuance.

The Competition Law allows the defendant to negotiate with the Competition Authority with a view to defining the conditions necessary to closing the investigation and to obtain a fine reduction, upon condition of acknowledging liability for the infringement. The Competition Law also allows the defendant to start negotiations with a view to closing the investigation without acknowledging liability, upon commitment to cease the practices that were the object of complaint.

In the *Sugalidal*, *Origination Prices* and *Sport TV rights* cases the Competition Authority has preferred to obtain a swift commitment related to the change of behaviour of the undertakings rather than to pursue a lengthy investigation that would lead to the application of a penalty but would be unable to quickly solve the competition problem. Such arrangements are expected to become more frequent.

Whenever investigations indicate that an abuse is on the point of doing serious and irreparable harm to competition, the Competition Authority can, at any phase in the proceedings, issue an interim measure ordering the undertaking to immediately suspend the practice or to adopt any other temporary measure needed for restoring competition, or required for the final decision on the case to be effective. These urgent measures may remain in force for a period of no longer than 90 days, unless an extension is granted, duly substantiated, for no longer than 180 days.

VII PRIVATE ENFORCEMENT

In Portugal private antitrust enforcement has played a modest role until now. However, damages deriving from abuse of a dominant position may be recovered in civil courts. Civil courts are also competent to decide on whether interim relief should be granted and on the type of conduct that should be expected from a dominant firm.

There are no special rules for calculating the compensation for damages deriving from the abusive conduct. Compensation is aimed at putting the plaintiff in the position he or she would have been in had the tort not taken place.

The decision of the Competition Authority in the *Broadband* case has been used in two follow-on actions for damages. One is still pending and the other was dismissed because of the statute of limitations. A follow-on action has also been filed against Sport TV's discriminatory conduct.

At the present stage Portuguese courts are not bound by Competition Authority decisions, even in cases where it has been reviewed and confirmed by the Competition Tribunal and the Lisbon Court of Appeal.

Whether collective actions will provide effective compensation for damages caused to consumers remains to be seen in the case of a follow-on collective action also brought against Sport TV.

VIII FUTURE DEVELOPMENTS

The Competition Law was updated in 2012. There are a number of unsettled points of law that still require clarification. The *Market Intelligence* case is expected to raise interesting issues on collective dominance, collective abuse and margin squeeze.

Appendix 1

ABOUT THE AUTHORS

NUNO RUIZ

Vieira de Almeida & Associados

Nuno Ruiz was a legal adviser to the European Law Department of the Ministry of Justice (1981 to 1982); assistant professor of international economic relations and community law at the University of Lisbon, Faculty of Law (1982 to 1997); assistant professor of competition law at the Institute for European Studies of the Portuguese Catholic University (1983 to 1992); member of the Portuguese Competition Council (1984 to 1998); assistant professor of competition law at the European Institute of the University of Lisbon, Faculty of Law (1985 to 1999). He has also been a legal adviser to the European Commission and to the United Nations in several programmes for the development of competition law in Latin America (1998 to 2001). He was a partner at Botelho Moniz, Magalhães Cardoso & Ruiz (1987 to 1999) and at PMBGR (1999 to 2001). He joined Vieira de Almeida & Associados in 2002 as partner, heading the EU and competition law practice.

VIEIRA DE ALMEIDA
& ASSOCIADOS
Av. Duarte Pacheco, 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
nr@vda.pt
www.vda.pt