Chapter XX

PORTUGAL

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I INTRODUCTION

Article 11 of Law 19/2012 of 8 May (the Competition Act) 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 Act also prohibits the abuse of economic dependence to the extent that such a practice affects the way the market or 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 no equivalent alternative being available. The Competition Authority has seldom applied this rule.

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

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The 2012 Competition Act significantly enhanced the Competition Authority's capacity for action, having strengthened its powers of inspection, sanction and supervision.

In the performance of 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 exclusionary abuses of dominant position is among the Competition Authority priorities for 2016.

So far the Competition Authority has issued no formal guidance on the application of Article 11 of the Competition Act. It has stated, however, that national rules on the abuse of a dominant position will be applied in accordance with the decisions of the European Commission 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 both Article 11 of the Competition Act and Article 102 of the TFEU.

II YEAR IN REVIEW

i Market intelligence

On 31 December 2015 the Competition Authority fined Associação Nacional das Farmácias (ANF) and three companies part of the ANF Group (Farminveste – SGPS, SA, Farminveste – Investimentos, Participações e Gestão SA and HMR – Health Market Research, Lda) a total of €10.3 million for collective margin squeezing in market intelligence services.

The Competition Authority concluded that the ANF Group operated in the market for sale of pharmacies' commercial data, through Farminveste – Investimentos, Participações e Gestão S.A. and, since 2009, with the creation of HMR – Health Market Research, also in the market for output of pharma market studies based on that data.

In view of the ANF Group's activity in both markets, the Competition Authority concluded that between 2010 and 2013 the prices charged by the ANF Group for pharmacies' commercial data (upstream market), when compared to those charged for pharma market studies based on that data (downstream market) did not leave an equally efficient competitor active in this latter downstream market a sufficient margin to cover its other production costs.

ii Football broadcasting rights

December 2015 saw the beginning of a fully fledged war for the broadcasting rights to the Portuguese football premier league between the NOS Group and the PT Group, the two main players in the Portuguese pay-TV market, as well as in the markets for the increasingly pervasive multiple-play services.

Broadcasting rights to football matches in Portugal are marketed on an individual basis (club by club). The NOS Group, which in addition to leading the Portuguese markets for pay-TV and multiple-play services, also jointly controls Sport TV, the dominant player in the market for premium sports channels in Portugal, secured a significant set of broadcasting rights, most notably to home matches played by Benfica, Sporting and Braga football clubs.

The Competition Authority issued a press release in mid-February to inform that it was assessing the matter under its supervisory powers. In view of Sport TV's dominance in

the market for premium sports channels and the possible disappearance of its sole competitor Benfica TV as a premium sports channel in the future, dominance issues are expected to play a pivotal role in the Competition Authority's analysis.

III MARKET DEFINITION AND MARKET POWER

Both the Competition Authority and the Portuguese courts use the same criteria as the European Commission and the 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 ascertain that the allegedly dominant undertaking indeed holds a dominant position. This requires the identification of the relevant product (or service) and geographic market(s).

Similarly to the EU institutions, 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 anticompetitive object or effect and resulting in harm to customers or in the exclusion of competitors.

Since the Competition Act 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). 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 specific circumstances of the case.

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 predation and margin squeezing, this latter having also been the issue in the *Market Intelligence* case. 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. 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 into 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).

The Competition Authority issued Guidelines on fining methodology in December 2012, which are in line with the European Commission's Guidelines on the subject.

The Competition Act also provides for accessory penalties; namely, the publication of an extract from the Competition Authority's decision in the official gazette as well as in one of the highest circulation newspapers in the relevant geographic area (national, regional or local), and in the case of infringements connected with public procurement, exclusion of participation in public tenders for up to two years.

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 Act 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 submitted 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 of an infringement decision being adopted. In both cases, the complainant may file comments and, in case the Competition Authority does not change its view, appeal the Competition Authority's decision to close 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 Act 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 Act also allows the defendant to start negotiations with a view to closing the investigation without acknowledging liability, upon commitments to cease the practices object of investigation.

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.

Various antitrust proceedings have been closed with commitments in the past year, especially with respect to vertical restrictions. Such arrangements are thus expected to become more frequent also in proceedings for abuse of dominance.

Whenever investigations indicate that an abuse is on the point of causing 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 90-day extensions are granted, duly substantiated, the Competition Authority having to issue its decision in the proceedings within 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 damages deriving from 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 following its sanctioning by the Competition Authority for discriminatory conduct. The lawsuit – the very first damages class action for competition law infringement in Portugal – is still pending a court decision. Whether collective actions will provide effective compensation for consumers harmed by antitrust practices remains thus to be seen.

At the present stage Portuguese courts are not bound by Competition Authority decisions, even in cases where they have been reviewed and confirmed by the Competition Tribunal and the Lisbon Court of Appeal. The implementation of the EU Directive on antitrust damages actions shall provide an incentive to the filing of further damages actions, by making the Competition Authority's decisions binding on courts.

The draft Act for the Implementation of the EU Directive on antitrust damages actions was under public consultation between 26 April and 27 May.

VIII FUTURE DEVELOPMENTS

The Competition Law was updated in 2012. There are a number of unsettled points of law that still require clarification and that the Competition Authority has often been requested to issue guidelines on, notably as regards access to the file and confidentiality.

With the upcoming implementation of the EU Directive, private enforcement is not only expected to undergo a major overhaul but also to become an ever-increasing driving force of competition law enforcement in Portugal.

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