THE DOMINANCE AND MONOPOLIES REVIEW

Fifth Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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PREFACE

Previous editions of the *Dominance and Monopolies Review* spoke of the law of abuse of dominance undergoing evolutionary – rather than revolutionary – change. Although we do not yet see competition lawyers mounting the barricades, abuse of dominance law appears to be entering a phase of more rapid development. Increasing international protectionism in industrial policy, overlapping parallel investigations, novel theories of harm deployed in rapidly changing markets, and around 100 jurisdictions applying competition law (often in starkly different ways) mean that it is harder than ever before for businesses to understand how to regulate their conduct.

This Fifth Edition of *The Dominance and Monopolies Review* is, therefore, more welcome than ever. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, as well as providing a review of the regime's enforcement activity in the past year and a prediction for future developments. From the thoughtful contributions of the specialist chapter authors, this editorial – as in previous years – attempts to identify a common theme to global competition enforcement. This year's theme is 'fairness'.

Competition regulators have recently emphasised that they see the role of competition enforcement as ensuring that everyone has a 'fair chance', creating 'fair conditions' in the markets, 'keeping markets fair' and sending 'a message of fairness'. It is fair enough in political discourse to explain competition policy in simple terms, but using them as criteria for a finding of infringement creates serious risks of antitrust populism, endangering the rule of law. It is not always clear what is meant by 'fair'. Fairness can mean different things to different people in different countries at different times – for example, equality (everybody should receive the same), equity (rewards are somehow allocated in proportion to deservedness) or need (those with the greatest need are protected).

And some concepts of fairness can be diametrically opposed to the goals of competition law. Equality of outcomes (i.e., the notion that everyone should receive an equal share) contradicts the purpose of competition. Equality of resources, cooperation, and sharing of information may facilitate the ultimate evil of antitrust – collusion. Equality of treatment (in the EU at least) is inconsistent with the principle that only dominant companies are subject to special responsibilities. And fairness in the sense of sharing assets conflicts with the rule that only essential facilities and state monopolies have a duty to assist rivals. Indeed, requiring such asset-sharing depresses innovation and investment in resources. The invocation of 'fairness' appears to be a tool to justify political intervention in the decision-making process, and creates the risk of arbitrary decision-making.

This is not to say that fairness has no role in competition law. But in our view, fairness is best achieved by relying on the following more precise and better-defined concepts: consumer welfare and allocative efficiency as the goal of competition law; competition on the merits

as the criterion for assessing a firm's unilateral conduct; proportionality and 'useful effect' as benchmarks for remedies; and due process and the rule of law as the hallmark of a proper procedure for applying the law.

The developments from the last year described below illustrate how 'fairness' can be applied in different ways in the antitrust context. While ostensibly these cases may refer to fair pricing, fair conduct, or fair processes, at core they are about one of the four concepts outlined above.

The first development is the return of unfair or excessive pricing cases – at least on the eastern side of the Atlantic. In the UK, the Competition and Markets Authority (CMA) imposed a record £85.2 million fine on Pfizer (as well as a £5.2 million fine on Flynn Pharma) for increasing the price of an anti-epilepsy drug by 2,600 per cent overnight. The EU Commission has recently opened a probe into Aspen Pharma's pricing of cancer drugs, with its press release referring to 'unjustified price increases of up to several hundred per cent'. (The Italian authority has already adopted an infringement decision against Aspen concerning the same conduct.) And Gazprom's recently proposed commitments to the EU Commission include price review mechanisms based on competitive price benchmarks. In *Facebook*, the German antitrust authority is reviewing Facebook's imposition of allegedly unfair privacy terms.

The renewed focus on excessive pricing is not only limited to Europe. In China, an authority has imposed fines on five gas suppliers that were determined to be charging customers unfairly high prices. In Israel, declarations of excessive pricing have led to class actions against Tamar (in the natural gas market) and Tnuva (in the dairy product market).

By contrast, Patricia Brink of the US Department of Justice recently discussed whether excessive prices are a matter for competition enforcement. She stated, 'in the United States, both historically and at present, the answer is an unequivocal no'. Ms Brink pointed to the statement by Justice Scalia in *Trinko* that the opportunity to charge monopoly prices is what attracts business acumen, induces risk taking, promotes innovation and encourages economic growth.

The conflicting positions, however, are not necessarily irreconcilable. In the CMA's *Pfizer/Flynn* decision, the drug at issue, phenytoin sodium, was first synthesised in 1908 and has not changed since then. Flynn acquired the distribution rights in 2012, at the time phenytoin sodium was debranded (and, therefore, no longer subject to price regulation). Around 48,000 patients in the UK still take the capsules, and these patients cannot be changed to a new manufacturer's product without risking therapeutic failure and toxic side effects. The CMA considered that the 2,600 per cent price increase at the time of debranding was excessive compared to the costs incurred and a reasonable rate of return. In these circumstances, it is quite difficult to see on its face how the decision risks restricting innovation or investment in the way that worried Justice Scalia in *Trinko*. The CMA's reasoning is that the fact epilepsy patients are locked in to one manufacturer's drug permitted the excessive price hike; the price had nothing to do with risk taking, investment, or innovation because there had not been any in very many years.

This is presumably what Advocate General Wahl had in mind when, in his recent opinion in the Latvian collecting society case, he advised that an excessive price cannot exist in a free and competitive market. Concerns only arise if there are legal barriers to entry or expansion and there is a legal monopoly (which, in effect, existed in the CMA case because official guidance prohibited switching patients to a different manufacturer's drug).

Indeed, the excessive-pricing cases are rare examples of enforcement against exploitative abuses – where a firm uses its market power or privileged position to extract rents from consumers directly, thereby reducing consumer welfare. As Advocate General Wahl recently advised, the prices are abusive because 'being excessively high, they exploit customers'. That requires there to be an excess (a 'significant difference') between the price actually charged and the competitive price, and for there to be no valid justification for the difference. In our view, referring to a more amorphous 'unfairness' standard makes this already difficult task only more tricky.

The second development concerning fairness is the continued focus on the licensing of standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. In 2015, China's NDRC fined Qualcomm $975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission (KFTC) followed suit, fining Qualcomm $854 million. In essence, Qualcomm engaged in a variety of interrelated behaviours that together excluded rivals from the market and allowed Qualcomm to impose unfair terms and conditions: a refusal to license SEPs to rival modem chipset makers, thus requiring device makers who buy and use these chipsets to take a licence directly from Qualcomm. Qualcomm then imposed unfair terms on device makers, including a royalty-free cross-licence that provided it with a unique advantage over rival chipset makers (Qualcomm was the only chipset maker that could offer its customers the full package of SEPs and non-SEPs, including patents from all other device makers). If device makers objected to the demand to cross-license their patents for free, Qualcomm refused to supply chipsets. 'No license, no chips', as the US Federal Trade Commission put it in a parallel claim against Qualcomm.

The Taiwan Fair Trade Commission is investigating similar conduct. Likewise, in January 2017, in conjunction with Apple initiating litigation against Qualcomm, the US FTC sued Qualcomm for its SEP licensing practices. Finally, the European Commission is poised to adopt decisions against Qualcomm for selective predatory pricing and loyalty rebates. This series of investigations and cases on three continents is worth watching closely.

In a related development, a UK court has ruled, for the first time, on what constitutes a FRAND rate. Mr Justice Birss held that that there is only one FRAND rate, and this should be determined (as a first step) by looking at a wide range of comparable licences.[1] In terms of the interaction with competition law, the judge found that there is no correlation with what is a contractual FRAND offer and what is anticompetitive. For a price to be excessive under Article 102 TFEU, it has to be 'substantially more than FRAND' (i.e., the price can be 'unfair' and in breach of the contractual FRAND promise, but still not 'unfair' according to competition law). Conversely, the judge found that a price can be discriminatory and in breach of the contractual FRAND promise only if it also violates competition law – a discrepancy that remains puzzling and may be explored on appeal.

The underlying purpose of the FRAND undertaking is to secure a fair and reasonable reward for innovation while avoiding a hold-up and holdout. Competition law can intervene to prohibit the conduct of SEP owners if they use their market power gleaned through the standard to restrict competition (e.g., through premature litigation). The touchstone for

1 The judge held that the FRAND terms are the terms that a truly willing licensor and truly willing licensee would agree upon in the relevant negotiation in the relevant circumstances absent irrelevant factors, such as hold-up and holdout.

the assessment is whether the conduct deviates from competition on the merits and harms the competitive process. The difference in what is 'fair' in the contractual FRAND promise and in competition law contexts (identified by Mr Justice Birss) confirms the inherent ambiguity underlying 'fairness' as a concept. The concepts developed in SEP cases could also appropriately be applied in other cases where IP owners violate legitimate expectations and use hold-up techniques to extract unreasonable royalties.

The third development concerns the debate, discussed in previous editorials, of the circumstances in which a full effects analysis is necessary to prove an abuse of dominance. Advocate General Wahl's Opinion in *Intel*, discussed in the EU chapter of this book, affirms the general proposition that competition law analysis should not be purely abstract and should not deal with mere possibilities. Outside the narrow exceptions of 'by nature abuses', a 'fully-fledged effects analysis must be performed'. This is because, ultimately, 'EU competition rules seek to capture behaviour that has anticompetitive effects'. (In *Unwired Planet,* Mr Justice Birss similarly recently held that outside 'by nature' abuses, 'a close analysis of the actual effects would be required'.)

The move to a more rigorous effects analysis is mirrored in other jurisdictions. In Australia, proposed new legislation will introduce an effects standard for assessing unilateral conduct. The Competition Commission of India in *XYZ v. REC Power Distribution Company Ltd* confirmed that establishing a denial of access abuse in India requires proving 'anti-competitive effect/distortion in the market in which denial has taken place'. This reinforces older statements from the Indian Competition Appellate Tribunal in *Schott Glass* that, unless the conduct at issue harms competition and, ultimately, consumers, there can be no abuse. And in the KFTC's *Qualcomm* decision, the exclusionary effects caused by Qualcomm's conduct were an important part of the case, with the KFTC insisting on such proof as a precondition to finding an infringement.

In these instances, the courts' and authorities' enforcement is not guided solely by seeking to achieve a 'fair' outcome. Rather, the cases examine the factual, legal and economic circumstances to assess whether there is a deviation from competition on the merits and harm to the competitive process. Those are the circumstances in which an abuse of dominance can properly be established.

The fourth development on 'fairness' relates to the continued international focus on due process. Here, the picture is mixed. In relation to competition law in Korea, for example, Gregory Sidak wrote a colourful open letter to President Trump criticising the KFTC's decision in the *Qualcomm* case as being based on an 'autocratic brand of due process.' But a review of the KFTC's process in that case shows that it complied with and perhaps even surpassed many international norms on due process: for example, Qualcomm received access to the authority's file, had the opportunity to rebut the KFTC's preliminary concerns, appeared at multiple hearings and could cross-examine witnesses. The investigative team was completely separate from the decision-makers (the Commissioners), and the latter all read the entire file and attended all hearings. Qualcomm can also appeal the decision to an active and discerning judiciary – which has several times in the past overturned KFTC decisions. This is a contrast with the European Commission, where the case team is directly involved in both investigation and decision-making, and the Commissioner for Competition (let alone the College of Commissioners that decides the cases) does not read the file and does not attend the hearing. As explained in previous prefaces, this situation creates a serious risk of confirmation bias and, thus, undermining due process.

In contrast to Korea, there are troubling developments in India, where the government has passed legislation to dissolve the specialist Competition Appellate Tribunal (COMPAT), and replace it with a more general tribunal focused on company law. Worryingly, the legislation follows a number of high-profile instances of the COMPAT overturning decisions made by the Competition Commission of India (CCI) on due process grounds (e.g., *Hiranandani* and *GSK*). Even more worryingly, the legislation permits the government to remove tribunal members at any time by paying them three month's salary. These developments undermine one of the most basic principles of 'due process' in competition enforcement – that a full appeal on facts and law to an independent judiciary must always be available.

In conclusion, in our view it is unhelpful to discuss 'fairness' as the yardstick of competition law enforcement. Fairness is too subjective and vague a criterion for authorities to decide cases, or for firms to determine their commercial conduct. Experiments conducted by Kahnemann, Knetsch and Taylor show that humans have irrational conceptions of what constitutes a fair price.[2] For example, consumers perceive changes in price as unfair even if they are rational, reasonable and good for consumers in the long run. And consumers were almost unanimous in concluding that any increase in price because of a decrease in competition – for example, because of a store temporarily closing – was unfair. Importing these irrational biases into competition policy creates serious risks or arbitrary and inefficient results.

Instead, we should stick to the more objective and precise concepts of consumer welfare, competition on the merits, proportionality and due process. These concepts, which capture the same goals as 'fairness', are less ambiguous, relatively well defined in case law and less susceptible to lead to outcome-focused – instead of fact-driven – results.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fifth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions – or even revolutions – 2017 holds for the next edition of this book.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2017

2 Kahnemann, Knetsch, and Taylor, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, *American Economic Review*, Vol. 76, No. 4 (September 1986), pp. 728–741.

Chapter 19

PORTUGAL

Nuno Ruiz and André Fojo[1]

I INTRODUCTION

Article 11 of Law No. 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 sets out 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.

While Article 11 of the Competition Act follows in substance Article 102 of the Treaty on the Functioning of the European Union (TFEU),[2] Article 12 of the Competition Act also prohibits the abuse of economic dependence, which has no comparable black letter provision in the European Union competition legal framework. 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, to the extent that such a practice affects the way the market or competition operates. Infringements of this nature have rarely been found by the competition enforcer.[3]

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.

The public enforcer of competition rules is the Portuguese Competition Authority (PCA), an independent administrative body. In 2012, a specialised court for competition matters was established (the Competition Court) and considers appeals from decisions rendered by the PCA.

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1 Nuno Ruiz is a partner and André Fojo is an associate at VdA Vieira de Almeida.

2 One of the purposes of the reform of the former competition act undertaken in 2012 was to push for further harmonisation of national rules with the EU competition legal framework.

3 In 2000, beer producers Centralcer and Unicer were found to have committed this type of abuse in the beer market by the extinguished Council of Competition.

The 2012 Competition Act significantly enhanced the PCA's capacity for enforcement action, in particular with regard to its powers of inspection, sanction and supervision.

In the performance of its duties, the PCA is guided by the public interest in the promotion and defence of competition and may, therefore, set its priorities according to the matters that it is called upon to investigate. The PCA 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.

The PCA is legally bound to publish its competition policy priorities for the next year in the last quarter of each year.

The report on competition policy priorities for 2017 has been published and continues to set the tackling of exclusionary abuses of dominant position as a priority.

So far the PCA has issued no formal guidance on the application of Article 11 of the Competition Act. However, the PCA's statements and its decisional practice reflect the understanding that national rules on the abuse of a dominant position will be applied in accordance with the decisional practice of the European Commission and with the rulings of the Court of Justice of the European Union (CJEU).

It is interesting to note that the PCA has consistently applied both Article 11 of the Competition Act and Article 102 TFEU as a joint legal basis in its decisions. This is because in practice, most of the dominance cases investigated by the PCA have been found to affect trade between Member States.

II YEAR IN REVIEW

i Royalty-collecting societies

Back in 2014, MEO – Serviços de Comunicações e Multimédia SA (MEO), a provider of retail television services, filed a complaint against royalty-collecting society Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes (GDA) for abuse of dominance position, alleging that GDA had been charging discriminatory wholesale tariffs for artists' rights licences.

The PCA rejected the complaint even if it considered that GDA was dominant and had effectively been charging discriminatory prices for equivalent transactions. The PCA ultimately concluded that the practice was not likely to place MEO at a significant competitive disadvantage against its competitors.

MEO challenged the dismissal before the Competition Court, which stayed the proceedings and lodged a request for preliminary ruling to the CJEU on 13 October 2016.[4]

In substance, the Competition Court asks the CJEU to clarify in what circumstances the application of discriminatory prices to equivalent transactions amounts to an abuse of dominant position, in particular to interpret the concept of placing an undertaking at a competitive disadvantage vis-à-vis its competitors enshrined in subparagraph (c) of the second paragraph of Article 102 TFEU.

4 Case C-525/16, *Meo Serviços de Comunicação e Multimédia* v. *Autoridade da Concorrência*.

ii Market intelligence

On 31 December 2015, the PCA fined Associação Nacional das Farmácias (ANF) and three companies that are 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 PCA concluded that the ANF Group operated in the market for sale of pharmacies' commercial data, through Farminveste – Investimentos, Participações e Gestão SA 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 PCA 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.

On 20 October 2016, following an appeal by the ANF Group, the Competition Court confirmed the PCA's findings, namely that the ANF Group engaged in margin-squeezing in the market for intelligence services, thereby preventing actual and potential competitors from competing and entering the market.

The judicial review by the Competition Court did, however, result in a reduction of the level of the fine imposed on the ANF Group, which on account of the practices and markets affected, was set at €6.9 million.

ii Postal services

On 12 August 2016, the PCA sent a statement of objections to CTT – Correios de Portugal, SA (CTT), the incumbent postal operator, outlining its preliminary view that the company abused its dominant position by refusing access to its standard mail delivery network to its competitors, in potential breach of national and EU competition rules.

In particular, the PCA's press release outlines that CTT used its control over the only nationwide standard mail delivery network in Portugal – considered by the PCA as an essential facility – to prevent entry or expansion of competitors in the national market for standard mail services.

iii Wholesale of tobacco products

In 2015, the PCA rejected a complaint (without opening an investigation) filed by the Portuguese Association of Tobacco Wholesalers against Tabaqueira – the dominant company in the tobacco market – for abuse of dominance and abuse of economic dependence, claiming that the dominant undertaking had imposed unfair trading conditions on tobacco wholesalers.

On appeal, the Competition Court upheld the PCA's rejection decision. However, the complainant challenged the judgment and appealed to the Portuguese Supreme Court, which rendered its judgment on 19 January 2017 in favour of the Portuguese Association of Tobacco Wholesalers, ordering the PCA to open an investigation against Tabaqueira for abuse of dominant position and abuse of economic dependence.

The judgment was based – to a large extent – on procedural grounds. In essence, as the complaint was filed under the former Competition Act, the PCA was, at that time, bound by the legality principle, which entailed a legal duty to investigate all complaints formally filed.

III MARKET DEFINITION AND MARKET POWER

Both the PCA and the Portuguese courts use the same criteria as the European Commission and the CJEU 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 PCA 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 PCA 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 because of 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 PCA 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 PCA 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[5] case). However, the existence of *per se* abuses is not excluded.

In theory, the PCA 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*[6] and *Broadband*[7] cases). The courts have been more consistent in establishing a frontier between the abuse of market power and competition on the merits.

For the PCA, 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.

5 The PCA found that the Order of Chartered Accountants had enacted a regulation that artificially segmented the market, reserving for itself a third of that market.

6 The PCA concluded that the incumbent operator unjustifiably refused access to its underground ducts network to its competitors. This decision was annulled by the courts.

7 Portugal Telecom allegedly abused its dominant position in the wholesale and retail markets for broadband access. The PCA found that Portugal Telecom restricted competition by imposing artificial prices, margin squeeze and discrimination to competing operators, in particular by defining and applying wholesale tariffs that did not allow competitors to offer retail services in a profitable manner. This decision was not confirmed by the courts. In a private action case brought by Optimus against Portugal Telecom, civil courts found no evidence of abusive conduct and of damage.

ii Exclusionary abuses

The PCA 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[8] 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*[9] case.

As noted above, the PCA also issued in 2016 a statement of objections to the national incumbent postal operator concerning an alleged refusal of access to its standard mail delivery network to its competitors.

iii Discrimination

Discrimination was discussed mainly in three cases: the *Leased Lines*, the *Broadband* and the *Sport TV* cases. In said decisions the PCA 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 main beneficiary of the higher discounts.

An interesting development to follow will be the ruling of the CJEU in the royalty collecting society tariff discrimination case mentioned above and its impact on the judgment of the Competition Court, notably with regard to the interpretation of the concept of placing an undertaking at a competitive disadvantage *vis-à-vis* its competitors of subparagraph (c) of the second paragraph of Article 102 TFEU.

iv Exploitative abuses

Exploitative abuses were discussed in the *Origination Prices* case. The investigation and the warning letter sent to all three mobile operators informing them that they were charging excessive prices in Portugal proved that the PCA 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 adopted by the PCA 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 PCA decision determining the adoption of any specific measures or remedies (see the *Sugalidal* case).

The PCA 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 PCA's decision in the Official Gazette as well as in one of the highest

8 A case where the incumbent telecoms operator had systematically applied discriminatory conditions to equivalent transactions thereby restricting competition by preventing other operators from competing on equal terms in the market for leased lines and in the market downstream.

9 The PCA concluded that Sugalidal, a manufacturer of tomato products, abused its dominant position by engaging in anticompetitive tied sales practice in its contractual terms with growers of tomatoes for industrial use.

circulation newspapers in the relevant geographic area (national, regional or local),[10] 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 PCA has to date never imposed structural measures.

VI PROCEDURE

The PCA 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 PCA. If the PCA 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 PCA concludes that there is no reasonable likelihood of an infringement decision being adopted. In both cases, the complainant may file observations and, in case the PCA does not change its view, appeal the PCA's decision to close the case.

If the PCA opens an investigation and further decides to pursue the case, it must issue a statement of objections and give the defendant the opportunity to access the file, 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 PCA 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 PCA 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. Likewise, in a case concerning

10 As observed in the *Market Intelligence* case.

an alleged abuse of dominance by Tabaqueira, the dominant undertaking in the cigarettes market, *vis-à-vis* its wholesalers, the PCA accepted the commitments proposed by Tabaqueira to its distribution agreements and closed the investigation.

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 PCA 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 PCA 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 PCA in the Broadband case has been used in two follow-on actions for damages. One was dismissed because of the statute of limitations. In the other one, the court found no evidence of abusive conduct and of damage.

A follow-on action has also been filed against Sport TV following its sanctioning by the PCA for discriminatory conduct. The lawsuit 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 PCA's decisions, even in cases where they have been reviewed and confirmed by the Competition Court and the Lisbon Court of Appeals. The implementation of the EU Directive on antitrust damages actions shall provide an incentive to the filing of further damages actions, by making the PCA's decisions binding on courts.

The PCA was commissioned by the government to draft a proposal for the transposition of the EU Directive on antitrust damages actions.

The draft Act for the transposition of the EU Directive on antitrust damages actions was under public consultation between 26 April and 27 May 2016 and is currently in the final stages of the legislative process to adopt the measure.

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 PCA has often been requested to issue guidelines on, notably as regards access to the file and confidentiality. In this regard, the PCA stated that it had in view the publication of a best practices manual concerning confidentiality claims

in competition proceedings. Guidance in confidentiality claims would be an important step towards increasing transparency and facilitating interaction of parties to competition proceedings with the PCA.

Going forward, an increase of the PCA's enforcement activity is likely to be observed, as it has carried out a series of dawn raids in the first months of 2017, in line with the intensification of its investigative action as set out by its 2017 priorities.

Finally, with the upcoming transposition 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.

Appendix 1

ABOUT THE AUTHORS

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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); and 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 VdA in 2002 as partner, heading the EU and competition law practice.

ANDRÉ FOJO

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André Fojo is an associate lawyer at VdA. He graduated from the Portuguese Catholic University, Faculty of Law, where he also obtained an LLM in EU Law. Before joining the firm, he worked as a law clerk in the antitrust & competition practice of Latham & Watkins LLP in Brussels and was a *stagiaire* at the Court of Justice of the European Union.

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