The Dominance and Monopolies Review

Editor
Maurits Dolmans

Law Business Research

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CONTENTS

EDITOR'S PREFACE

This publication is a testament to the proliferation of abuse of dominance legislation around the world. Its coverage considers legislative provisions that have, in the case of the United States, been in existence since 1890, to some, in jurisdictions such as China and India, that have been introduced in the past few years or, in Malaysia's case, last year. This diversity of jurisdictions has led to a multiplicity of differing approaches and indicates, as underlined by the national and supra-national surveys contained in this book, the real need for greater legal certainty and clarity in both the future drafting and application of laws governing abuse of dominance.

The disparities in the approaches taken by different and even well-established jurisdictions can be significant. As an example, a contrast may be drawn between the law of the United States and the European Union.

In the United States, Section 2 of the Sherman Act[1] is in certain respects being narrowly construed and applied by the courts, the Department of Justice (most notably through its Guidelines) and, to some extent, the Federal Trade Commission ('FTC'). This may be attributed to a wish to reduce the burdens of US litigation, in light of the costs imposed by the discovery system and the risks created by trial by jury, awards of treble damages, as well as the litigation incentives inherent in contingency fees and class actions.

By contrast, the approach taken by the European Union in the application of Article 102 of the Treaty of the Functioning of the European Union ('TFEU') goes too far in the opposite direction. For much of the life of Article 102 TFEU and its predecessors, the European Commission and courts have embraced a form-based rather than effects-based approach. The high-water mark of this may be seen in the

1 15 USC Section 2.

Commission decisions and subsequent court judgments in *British Airways*[2] and *Tomra*,[3] where it was sufficient to show that the conduct in question was merely liable to affect competition, rather than having to prove actual effects and harm to consumers. This form-based application may stifle pro-competitive conduct, taking into account the essentially political decision-making in large cases, the risk of confirmation bias (where the investigator is the prosecutor, judge and executioner), the slow and therefore costly procedure, the risk of high fines and opportunistic follow-on damage claims, and the marginal judicial review of prohibition decisions by the General Court and the Court of Justice of the European Union. The combination of these factors is a powerful disincentive for a possibly dominant undertaking to engage in any competitive conduct that may be found to constitute abuse.

Given the influence of European Union abuse of dominance law, particularly on emerging jurisdictions such as India and China (where similar factors apply to an even larger extent), the use of a form-based analysis may have a negative impact on the development of the law far beyond Europe's borders.

A happy medium or Mid-Atlantic point needs to be found between these divergent approaches. The law of abuse of dominance in Europe (and all jurisdictions that emulate Europe) needs to move away from the form-based approach that has characterised the analysis of abuse of dominance in favour of an effects-based analysis. The institutional groundwork for a turn towards the application of a more economic analysis may have been put in place by the creation of the office of the Chief Competition Economist in 2003 and the publication of the 'Guidance on the Commission's Enforcement Priorities'.[4] Subsequently, in the decisions of the European Commission and judgments of the courts, there have been signs of an incipient analytic shift; both *Microsoft*[5] and, more recently, *Post Danmark*[6] show a growing acceptance of the need for a more effects-based consideration of the abuse of dominance. As the European Court of Justice commented in *Post Danmark*:

> *[…] not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.*[7] *[…] in order to assess the existence of anti-competitive effects […] it is necessary to consider whether that pricing policy, without*

2 Case C-95/04 P, *British Airways plc v. Commission* ('*British Airways*'), judgment of 15 March 2007.

3 Case C-549/10P, *Tomra*, judgment of 19 April 2012.

4 OJ, C45/7, 24 February 2009.

5 Case T-201/04, *Microsoft Corporation v. Commission* ('*Microsoft*'), judgment of 17 September, 2007.

6 Case C-209/10 *Post Danmark v. Konkurrencerådet* ('*Post Danmark*'), judgment of 27 March 2012. Note that this was the Grand Chamber of the Court.

7 Ibid., paragraph 22.

> *objective justification, produces an actual or likely exclusionary effect, to the detriment of competition, and, thereby, of consumers' interests.*[8]

It is hoped that the change of tack signalled by *Post Danmark* will be continued in future abuse of dominance cases. The forthcoming decision of the court in *Intel* should act as a marker of the progress of this change, hopefully confirming the growing acceptance and, indeed, necessity of the adoption of an effects-based analysis in the enforcement of European abuse of dominance law. For those jurisdictions that have drawn heavily on the European legal framework in the creation of their own systems for the regulation of abuse of dominance, most notably India and China, further lessons concerning the need to abandon the *per se* approach and adopt an effects-based approach should be taken from the recent European experience.

On both sides of the Atlantic, the European and FTC Commissioners have, when dealing with the practicalities of abuse of dominance enforcement, in some cases shown a laudable willingness to find practical solutions in fast-moving markets. The growth, in particular, of the innovative use of consent decrees in the United States and commitment decisions within the European Union, is to be welcomed. These settlement tools create advantages for both competition authorities and market parties in reducing not only the regulatory and enforcement burden but in cutting the timelines for cases from up to 10 years (resulting in remedies that may be too late to keep pace with developments in the market) to periods of months or a few years. At the same time, we cannot ignore the fact that the use of such settlement procedures also brings some disadvantages for the development of the law; in an area where there are limited numbers of decisions, a lack of new precedents or guidance is of some concern.

As highlighted by the European Court of Justice in *Alrosa*,[9] settlement procedures may afford competition authorities a wide degree of discretion in the resolution of abuse of dominance cases. Especially given the absence of any in-depth judicial analysis of commitments, this discretion must be exercised with care and responsibility. The factors mentioned above may drive the Commission into adopting adventurous and novel interpretations of the law, and compel companies to agree to settlements to refrain from energetic rivalry that could, in fact, harm the interest of consumers.

Despite the scope for a harmonisation of approaches, there will probably never be total convergence between the law and practice governing the regulation of abuse of dominance in the United States and the European Union or, more generally, on a worldwide basis. There are some important differences between the relevant provisions of US and EU law. As can be seen in the different analysis of the *Rambus* 'patent trap', the respective concepts of 'monopolisation' (which does not require a dominant position at the time the offensive conduct occurs) and 'abuse' (which requires a finding of dominance) can lead to very different assessments of the same conduct.[10] The total lack of a concept of an exploitative abuse in US law is another fundamental difference. The purpose of

8 Ibid., paragraph 45.

9 Case C-441/07P, *Commission v. Alrosa Company Limited* ('*Alrosa*'), judgment of 29 June 2010.

10 *Rambus Inc v. FTC*, 522 F.3d 456 (D.C. Cir 2008) and Case COMP/ 38.636 *Rambus Inc*.

this book, as shown by the contributions it contains, is to allow for the beginning of an understanding of the differences and similarities, and their implications, between laws governing unilateral conduct in some of the major competition jurisdictions of the world.

In the coming year, there are likely to be further interesting case law developments, notably from the technology and energy sectors, areas that have been the subject of increased scrutiny by competition authorities. Of particular note will be the forthcoming decisions from the European General Court in *Intel*[11] and of the European Commission in *Samsung*[12] and *Motorola*.[13] More generally, both patent trolling and privateering are likely to come under increased scrutiny from not only the US and EU competition authorities but, probably, the competition authorities in many of the jurisdictions analysed in this book. Watch this space.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to the inaugural edition of *The Dominance and Monopolies Review*. I am personally grateful for the invaluable assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what 2013 holds for future editions of this work.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2013

11 T-286/09 *Intel v. Commission*.

12 Case COMP/39.939 *Samsung – Enforcement of UMTS standards essential patents*.

13 Case COMP/39.985 *Motorola – Enforcement of GPRS standard essential patents*.

Chapter 17

PORTUGAL

Nuno Ruiz[1]

I INTRODUCTION

Law 19/2012 ('the Competition Law'), published in the Official Gazette of 8 May, approved the new legal framework for competition, repealing Law 18/2003 of 11 June. All decisions adopted by the Portuguese Competition Authority on abuses of dominant position were, until now, grounded in Law 18/2003.

The Competition Law is also 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.

Article 11 of 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.

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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 basic rule on the prohibition of the abuse of dominant position remains very much the same; however, the new 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.

The Competition Authority has announced its priorities for 2013. Among them is combatting the abuse of dominant positions whatever the form they take, since they affect the capacity of undertakings to compete and, ultimately, have an impact on effective competition.

In this respect the Competition Authority acknowledged that its decisions in cases of abuse of a dominant position have not been upheld by the courts 'due to the economic complexity of argumentation needed for the burden of proof required from the Competition Authority' and that it should reassess its approach to these types of cases, 'both in terms of obtaining the expert evidence that will stand up in court and of requesting cooperation from the European Commission as *amicus curiae*'.

Until now 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.

It is interesting to note that in all the decisions taken by the Competition Authority the abuses were considered to be an infringement of the Competition Law and of Article 102 TFEU. Both the concept of dominance and the concept of abuse were widely discussed between the Authority and the defendants, in light of the administrative practice of the European Commission and of the Court of Justice case law. The same approach has been followed by national courts when reviewing the Competition Authority decisions.

II YEAR IN REVIEW

In about 10 years of activity the Competition Authority has adopted five decisions on abuse of a dominant position, all under Law 18/2003 (former competition law). Three of these cases were against Portugal Telecom and another was against the Order of Chartered Accountants. In March 2013, in the presentation of the balance of its term before Parliament, the President of the Competition Authority mentioned the existence of a fifth decision finding an abuse of a dominant position; however, this decision has not yet been made public.

The first case of abuse of a dominant position led to the imposition of a €38 million fine on Portugal Telecom ('the *ducts* case'). The Competition Authority concluded that the incumbent operator unjustifiably refused access by competitors TVTEL and Cabovisão to its underground ducts network. The Competition Authority found that the ductwork of Portugal Telecom was an essential facility for the purpose of passing cables and electronic communications networks and that, by refusing access to this facility, Portugal Telecom restricted competition in downstream markets, in particular in the markets for pay-TV, broadband internet access and fixed telephony.

Portugal Telecom appealed to the Lisbon Commerce Court, which acquitted the company. The Lisbon Court of Appeal confirmed the judgment of the Lisbon Commerce Court. Following closely the Lisbon Commerce Court decision, the Lisbon Court of Appeal concluded that there was no evidence that the sections of Portugal Telecom's duct system to which TVTEL and Cabovisão were not given access were an essential facility for the supply of pay-TV, broadband internet access and fixed telephony services. The Lisbon Court of Appeal also concluded that even if the duct sections in question had been found to be indispensable for the supply of the above-mentioned services, there was no evidence that the refusals to grant access thereto were unjustified or discriminatory.

The Lisbon Court of Appeal confirmed that an undertaking that is dominant in the market for certain infrastructures used for the supply of telecommunications services has the right to reserve those infrastructures to it, provided that they can be replicated or as long as there are other alternatives for the supply of such services.

The second case of abuse of a dominant position was related to the behaviour of Portugal Telecom in the wholesale markets for leased lines, in particular to the system of discounts applied by the company in the provision of these services ('the *leased lines* case'). In September 2008 the Competition Authority imposed a €2.1 million fine on Portugal Telecom.

The Competition Authority found that in 2003 and 2004, Portugal Telecom was the sole supplier of wholesale services of terminating segments and analogue trunk segments of leased lines, and that in the wholesale provision of digital trunk segments its market share was always above 86 per cent. As a consequence, Portugal Telecom's offer in the wholesale leased lines markets was indispensable for the provision of electronic communications services at the retail level.

According to the Competition Authority, Portugal Telecom had systematically applied discriminatory conditions to equivalent transactions thereby restricting competition by preventing other operators from competing on equal terms, not only in the markets for leased lines but also in the markets that use leased lines as an input for the provision of electronic communications services (for instance fixed telephony, broadband internet access or mobile communications services, among others).

Portugal Telecom appealed to the Lisbon Commerce Court also in this case and again the Lisbon Commerce Court acquitted the company. The Court concluded that the different discount levels applied to different volumes of sales and that, therefore, the transactions to which the discounts applied were not comparable with each other. Moreover, the grid of rebates was not atypical, and the Competition Authority did not provide evidence that the system was not objectively justified, that it could not have a transaction-specific cost justification and that it was aimed at restricting competition.

The third case of abuse of a dominant position investigated by the Competition Authority also concerned Portugal Telecom ('the *broadband* case'). In February 2009, the Competition Authority considered that there had been an abuse of a dominant position by the companies Portugal Telecom and ZON (a company providing cable TV and broadband internet access).

When the conducts in question took place (2002 and 2003) ZON was part of the Portugal Telecom Group and was the main pay-TV operator. The Portugal Telecom Group was dominant in the wholesale and retail markets for broadband internet access. In the wholesale market, the Portugal Telecom Group was the sole provider of services to third parties. Thus, Portugal Telecom's wholesale offer, known as 'Rede ADSL PT', was indispensable for the provision of broadband internet access and other electronic communications services by competing operators. In the retail market for broadband internet access, the companies of the Portugal Telecom Group held a market share above 70 per cent.

The Competition Authority concluded that Portugal Telecom had restricted competition by imposing artificial prices, margin squeeze and discrimination. The abuse would have consisted in defining and applying wholesale tariffs that did not allow competitors to offer retail services in a profitable manner. In addition, through the system of discounts that was included in its wholesale offer, Portugal Telecom systematically applied dissimilar conditions to equivalent transactions, favouring the Portugal Telecom Group companies. According to the Competition Authority, Portugal Telecom's conduct would have given rise to a reduction of the retail market share of its competitors, to the market exit of an operator and to another operator suspending its offer to any new clients. As a consequence, the Competition Authority decided to impose a €45.016 million fine on Portugal Telecom and a €8.046 million fine on ZON, in the total amount of €53.062 million.

Portugal Telecom appealed to the Lisbon Commerce Court. The company argued that the wholesale offer was defined and launched by imperative of the regulatory framework then in force, having been authorised and supervised since the beginning by the telecoms regulator, ICP-ANACOM. Portugal Telecom considered that, in these circumstances, it should not be condemned by the Competition Authority based on behaviour that was timely validated by the competent regulatory authority. Its wholesale prices were cost-oriented and could hardly be lower. On the other side, retail prices applied by Portugal Telecom were market prices, consequently optimal for the consumer and compatible with those applied by other competitors that rendered the same services based on their own network infrastructure. Portugal Telecom was not a price setter at the retail level.

As regards the discrimination and margin squeeze allegation, Portugal Telecom also claimed that the Competition Authority had not proved that the discount conditions of the wholesale offer had no objective justification and further argued that the margin squeeze test had been inadequately interpreted and applied, since the 'as efficient competitor test' had not been properly applied. As a matter of fact, when establishing the existence of margin squeeze, the Competition Authority took into account not Portugal Telecom's costs but the costs of its closest competitor.

The courts never settled this case. The time limit of the prescription period has been reached pending the appeal before the Lisbon Commerce Court, and the court did not rule.

In the last known decision of the Competition Authority on abuse of dominant position, issued 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 (Article 4 of the Competition Law, similar to Article 101 TFEU).

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 has, however, sustained the Competition Authority decision. 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 were clarified in its judgment of 28 February 2013 (see Case C 1/12). The Court of Justice ruled, however, on the basis of Article 101(1) TFEU. The judgment of the Lisbon Court of Appeal is still awaited and it is expected to confirm the Competition Authority decision and the Lisbon Commerce Court ruling. The existence of abuse may, however, not be upheld.

Finally, it is important to mention two additional cases of alleged abuse of a dominant position that have not ended in the adoption of a condemnation decision.

In 2009 the Competition Authority ordered the undertaking Sugalidal to put an end to the anti-competitive practices included in its contracts with tomato growers ('the *Sugalidal* case'). Sugalidal is a manufacturer of tomato products and the practices analysed concerned the contracts signed in each season with the tomato growers and the tomato growers' organisations.

Following the opening of the case and the competition-law concerns expressed by the Competition Authority, Sugalidal submitted the commitment to put an end to the anti-competitive practices in the market of tomatoes for industrial use, in particular to the obligation to use Heinz variety seeds in their production. This variety was marketed in Portugal exclusively by another undertaking part of the group to which Sugalidal belongs.

After analysis, the Competition Authority concluded that there was an abuse of a dominant position by Sugalidal, in the form of tying purchases, which was not justified by the efficiency gains. The abuse of the dominant position consisted in a tied sales practice by means of the processing contracts with the growers and the growers' organisations making the acquisition of fresh tomatoes (the tying product) conditional on the use of Heinz seeds in their production (the tied product).

Following the Competition Authority intervention, the defendant undertook to eliminate the contract clause on the preference for tomatoes of a Heinz variety seeds, to adapt the contract to the imminent merger between Sugalidal with another undertaking and to issue a circular to the growers' organisations, informing them of the elimination of the tying contract clause.

In light of these guarantees, the Competition Authority has decided to drop the case for as long as the undertaking complies with the commitments.

The second case of alleged abuse that has not been the subject matter of a decision so far relates to the prices charged by mobile operators for the origination of telephone calls to special services and non-geographic numbers ('the *origination prices* case').

In January 2012 the Competition Authority informed all three Portuguese mobile operators that it had concluded that they were charging excessive prices for originating calls in their one networks. Each one of them was considered to have a monopoly power in originating the calls and the prices charged were considered to be excessive taking into account the relevant costs and the prices applicable to similar services.

The Competition Authority gave the mobile operators until the end of July 2012 to adjust their prices in order not to face infringement procedures. All of them rebutted the authority's allegations but ultimately reduced their origination prices.

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, in order 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 in a certain relevant market. This requires the identification of the relevant product (or service) and the geographic markets.

For the Competition Authority an undertaking may be in a dominant position when, due to 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, *supra*). 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, *supra*).

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

As already mentioned 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 two cases: the *leased lines* and the *broadband* cases (see *supra*). In both 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 (see *supra*). 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 case of abuse of a dominant position. Daily penalty payments may also be imposed in case of non-compliance with a Competition Authority decision determining the adoption of any specific measures or remedies (see the *Sugalidal* case, *supra*).

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 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* and *origination prices* 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. Under the new Competition Law it is expected that such arrangements will 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 plays a modest role. 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. Whether collective actions are available remains to be settled.

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 still pending before the Lisbon civil courts. Civil courts are, however, not bound by the Competition Authority decision, even in cases where it has been reviewed and confirmed by competent courts (now the special court for competition and regulation matters).

VIII FUTURE DEVELOPMENTS

The Competition Law was updated in 2012. There are a number of unsettled points of law that still require clarification. This clarification is not to be found in a new revised law. In the near future the Competition Tribunal and the civil courts are expected to play an important role in ensuring that questions get proper answers.

Appendix 1

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