THE DOMINANCE AND MONOPOLIES REVIEW

SIXTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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PREFACE

In last year's edition of *The Dominance and Monopolies Review*, we noted that abuse of dominance rules appeared to be entering a phase of more rapid development. For once, our predictions were not far off the mark. 2017 saw authorities reach decisions imposing record fines based on novel theories of harm applied to rapidly changing markets; overlapping parallel investigations have become the norm, rather than the exception; and 'hipster antitrust' – a call to replace the consumer welfare standard with a broader public interest test – has emerged as a serious challenge to contemporary economic orthodoxy. Carl Shapiro recently went so far to claim that 'antitrust is sexy again'.[1]

The sixth edition of *The Dominance and Monopolies Review* seeks to navigate these choppy waters. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year, and offers a prediction regarding future developments. From the thoughtful contributions of the specialist chapter authors, we identify four trends.

First, we observe growing clamour on both sides of the Atlantic for more competition enforcement. In May 2017, Senator Elizabeth Warren stated: 'It's time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books.' In September, *The Economist* argued that 'the world needs a healthy dose of competition to keep today's giants on their toes and to give others in their shadow a chance to grow'. And *The New York Times* has associated declining competition with rising inequality: 'with competition in tatters, the rip of inequality widens'.

These statements are sometimes accompanied by a plea to abandon consumer welfare as the lodestar of antitrust in favour of a broader, multi-factored public interest test – and even a 'fairness' test.[2] The underlying concern is that large corporations wield too much influence, collect too much data and undermine traditional industries by siphoning off the large majority of profits. The response, it is argued, should be to break up these companies, which would, according to Scott Galloway, 'oxygenate' the economy and 'prune [the] firms [that have] become invasive, cause premature death and won't let other firms emerge'.[3]

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1 Carl Shapiro, 'Antitrust in a Time of Populism', 24 October 2017, available at https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

2 M Dolmans and W Lin, 'Fairness and Competition Law, a Fairness Paradox', *Concurrences* No. 4-2017 4, 2017, available at https://www.concurrences.com/fr/revue/issues/no-4-2017/articles/fairness-and-competition-law-a-fairness-paradox-85119.

3 Scott Galloway, 'The Case for Breaking Up Amazon, Apple, Facebook and Google,' 8 February 2018, available at http://www.stern.nyu.edu/experience-stern/faculty-research/case-breaking-amazon-apple-facebook-and-google.

We are concerned that many of these calls seek to address broader societal problems – such as widening wage inequality, declining democratic institutions, and rising global populism and intolerance – rather than a problem in the competitive process.[4] We do not think that a reduction of competition is the cause or effect of these societal issues. Attempting to use antitrust to address problems not directly related to competition would backfire. Antitrust laws are ill-suited for remedying political problems in society, and introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

Instead, enforcement should always focus on whether a dominant firm engages in conduct that departs from legitimate competition on the merits and that excludes equally efficient rivals. That is a fact-intensive inquiry that requires balancing procompetitive business justifications with exclusionary conduct. The analysis turns on the specific conduct at issue and its effects in the market,[5] not the size of a firm or its success or reach into other areas, or political issues.

In April 2018, Daniel Crane published a fascinating case study applying modern antitrust principles to the rise of fascism in 1930s Germany.[6] The study is especially germane given today's calls to broaden the consumer welfare standard to help arrest the decline in contemporary democracy. Crane argues that applying contemporary economically-orientated antitrust principles could have prevented the rise of *IG Farben* – the chemical cartel that supported the rise of Nazism and the perpetuation of its atrocities. He concludes: 'If the *Farben* story can be generalized—an important caveat since this is just the beginning of an inquiry—that would suggest that antitrust law need not be reformulated to safeguard political liberalism, that what is good for consumers is good for democracy.'

Secondly, the past year has seen authorities pursue an increasing number of excessive pricing cases. In the UK, the Competition and Markets Authority (CMA) fined Pfizer and Flynn £85 million for suddenly increasing the prices of an anti-epilepsy drug; the CMA has two other excessive cases against Actavis and Concordia in the pipeline. In China, the National Development and Reform Commission imposed fines on two companies for engaging in excessive pricing in the pharmaceutical sector. In Italy and in Spain, and at the European Commission, excessive pricing cases concerning Aspen's pricing of cancer drugs are ongoing.

Excessive pricing cases present the familiar paradox that it is not illegal to hold a monopoly; the natural consequence of a monopoly is to price above the competitive level; and finding a price above the competitive level to be illegal treats the monopoly as illegal. The excessive pricing cases observed during the past year traverse this paradox by following specific fact patterns in the pharmaceutical industry. In each case:

a the price rises were sudden and substantial;

b the products concerned were essential or had very high demand inelasticity;

4 M Dolmans, R Zimbron, J Turner, 'Pandora's box of online ills: technology solutions, regulation, or competition law?', *Concurrences* No. 3-2017 (colloquium, Pembroke College, Oxford, 22 May 2017), available at http://www.rpieurope.org/Events2017/Dolmans2.pdf.

5 Alexander Waksman, 'Bad Science, Abuse and Effects in Online Markets', *CPI*, 29 November 2017, available at https://www.competitionpolicyinternational.com/bad-science-abuse-and-effects-in-online-markets.

6 Daniel Crane, 'Antitrust and Democracy: A Case Study from German Fascism', Law and Economics Research Paper Series, University of Michigan, Paper No. 18-009, April 2018.

c the products had been in the market for a long time; and
d the price rise does not appear to be explained by cost or market changes.

It is not obvious that these findings could be transposed to other situations. Hence, in his opinion in *AKKA/LAA* (the *Latvian collecting society* case), Advocate General Wahl advised: 'there is simply no need to apply that provision [excessive pricing] in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.' Accordingly, in our view, excessive pricing cases will (and should) remain rare and exceptional, other than where there are long-term barriers to entry, as in patents that are essential for standards. We hope that the renewed appetite to bring such cases does not stretch the concept of an exploitative abuse to address policy issues beyond the scope of competition law.

Thirdly, the past year was notable for the European Court of Justice's long-awaited judgment in the *Intel* case. Intel had offered customers discounts if they exclusively installed its chipsets in categories of their computers. The European Commission found this to be abusive and imposed a €1 billion penalty. The EU General Court upheld the European Commission's decision, treating Intel's arrangements as akin to *per se* abusive. The Court of Justice has set that judgment aside, making clear that competition rules do not seek to protect less-efficient rivals or prevent them leaving the market. Instead, what matters is an 'exclusionary effect on competitors considered to be as efficient' as the dominant firm.

Advocate General Wahl in his *Orange Polska* opinion and the Court of Justice in its subsequent *MEO* judgment have reaffirmed the importance of establishing anticompetitive effects as a necessary element of an infringement of Article 102 TFEU, emphasising once more that only the exclusion of equally-efficient competitors is problematic. This mantra now appears to be firmly entrenched in the minds of the EU courts, and it will be interesting to see how the European Commission and national authorities react.

The European Commission, for example, appears to take the view that *Intel* largely imposes a procedural requirement, with Commissioner Vestager noting that 'in practical terms, our main conclusion is that you won't see fundamental change'. The European Commission has also argued that 'The benefit of ascertaining whether something is, in fact, true, is not necessarily worth the cost'.[7] However, an effects analysis can be conducted quickly and efficiently: in last year's *Ice Cream* case, for example, the UK CMA opened and closed an investigation in six months, and conducted an effects analysis in a 13-page decision. The European Commission, for its part, frequently conducts detailed economic analyses – under significant time pressures – when assessing mergers. Stricter standards ought to apply when analysing unilateral conduct, because rights of defence are fully engaged.

Fourthly, we could not let this editorial pass without commenting on the divergent global approach to investigating Google's conduct in search. Over the past few years, courts and authorities in the UK, Germany, Brazil, Canada, the US and Taiwan have held that Google's search designs are procompetitive. Last year, the Competition Commission of India joined the consensus by rejecting complaints against Google's search designs and ranking of search results (the CCI identified a narrow concern with the way that Google labels its Flights Commercial Unit, asking for Google to display an enhanced disclaimer). Similarly, in

7 European Commission submission to OECD, Roundtable on Safe Harbours and Legal Presumptions in Competition Law, 5 December 2017, ¶ 15.

December 2017, the Russian Federal Antimonopoly Service authority dismissed complaints against Google's search designs.

Against this background, the European Commission's decision to impose on Google a record-breaking fine of €2.42 billion looks increasingly like an outlier, and perhaps a politically inspired one. The European Commission considers that the different way that Google ranks and displays groups of ads for product offers compared to free results for comparison shopping services amounts to unlawful favouring.

Google has appealed the decision to the General Court in Luxembourg. In Google's view, the product ads at issue are enhanced ad formats that help users find relevant products and are more efficient for advertisers. Showing ads in clearly marked advertising space separate from free results is not favouring; it is how Google monetises the free search service it offers to users. In addition, Google has no obligation to supply rivals with access to its search results pages because it is not an essential facility. Google also points to a thriving product search space, where Amazon (not Google) is the leading player. Finally, while the Court of Justice has espoused the equally efficient competitor benchmark, nowhere does the European Commission's *Shopping* decision discuss whether supposedly marginalised comparison shopping services were equally efficient.

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 sixth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
May 2018

Chapter 19

PORTUGAL

Ricardo Bordalo Junqueiro and Ana Kéri[1]

I INTRODUCTION

The current Portuguese competition law framework is provided by the Competition Act,[2] which is applicable to all economic activities in the private, public and cooperative sectors.

Article 11 of the Competition Act, mirroring Article 102 of the Treaty on the Functioning of the European Union (TFEU),[3] prohibits the abuse by one or more undertakings of a dominant position in the domestic market or in a substantial part of it. This provision sets out a number of examples of abuses, notably:

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, without precedent in the European Union competition legal framework, prohibits the abuse of economic dependence. 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.[4]

State-owned undertakings and undertakings to which the state has granted special or exclusive rights are also subject to the Competition Act. Furthermore, undertakings that have

1 Ricardo Bordalo Junqueiro is a partner and Ana Kéri is a senior consultant at Vieira de Almeida.

2 The 2012 Competition Act (Law No. 19/2012 of 8 May), which entered into force on 7 July 2012, replaced the 2003 Competition Act (Law 18/2003, of 11 June) and the 2006 Leniency Act (Law 39/2006, of 25 August).

3 The Competition Act has, further to the former competition law framework, enhanced the harmonisation of national rules with the EU competition legal framework.

4 In 2000, beer producers Centralcer and Unicer were found to have committed this type of abuse in the beer market by the defunct Council of Competition. The Portuguese Competition Authority, created in 2003, has not adopted an infringement decision based on this provision to date.

been legally entrusted with the management of services of general economic interest, or are by their nature legal monopolies, are subject to the Competition Act to the extent that its enforcement does not create an obstacle to the fulfilment of their specific mission.

The Portuguese Competition Authority (PCA) is the public law entity and independent administrative body responsible for competition law enforcement: its action and inspection, sanction and supervision powers were significantly enhanced with the 2012 enactment of the new Competition Act. The PCA's decisions are subject to appeal to the Competition, Regulation and Supervision Court (Competition Court), a specialised court for competition matters established in 2012.

To date, the PCA has issued no formal guidance on the application of Article 11 (or Article 12) of the Competition Act. Nevertheless, the PCA's statements and its decisional practice show that national rules on abuse of dominant position are supposed to be applied in accordance with the decisional practice of the European Commission (EC) and with the rulings of the Court of Justice of the European Union (CJEU).

The PCA has consistently applied both Article 11 of the Competition Act and Article 102 of the TFEU as a joint legal basis in its decisions, as the cases at stake have been found by the PCA to affect trade between Member States. However, in one case,[5] the Competition Court found that only Article 11 was breached.

Furthermore, the prosecution of dominant abuses has consistently been outlined by the PCA as one of its annual policy priorities.

II YEAR IN REVIEW

i Royalty-collecting societies

On 19 April 2018, the CJEU ruled on *Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*,[6] declaring that when a dominant undertaking applies discriminatory prices to its commercial partners in the downstream market, the concept of 'economic disadvantage' under Article 102(c) of the TFEU must be interpreted in the sense that this behaviour might have as an effect the distortion of competition among those partners. Furthermore, the CJEU considered that the determination of such 'competitive disadvantage' does not require proof of an effective and measurable deterioration of the competitive position. It shall thus be based on an overall analysis of the relevant circumstances of the case, which allows the conclusion that the referred-to behaviour influences the costs, profits or other relevant interests of one or several of those partners in a way that that such behaviour is susceptible of affecting the referred-to position.

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

5 In the *Sport TV* case, the PCA had found that Sport TV had abused its dominant position for applying a discriminatory remuneration system in the distribution agreements for Sport TV television channels entered into between the company and the operators of subscription-based television services. The Competition Court confirmed the PCA's ruling, although reducing the amount of the fine.

6 Case C-525/16, MEO, *Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*.

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

The PCA decision was challenged by MEO before the Competition Court, which stayed the proceedings and lodged a request for the preliminary ruling referred to above to the CJEU on 13 October 2016, which was first subject to the opinion of the Advocate General Nils Wahl.[7]

ii Market intelligence

On 22 June 2017, the Lisbon Appeal Court issued a ruling confirming the PCA's finding that the National Association of Pharmacies (ANF) had abused its dominant position, although the PCA substantially reduced the amount of the fine to €815,000.[8] The reduction of the fine was due to the fact that the Appeal Court considered that the parent company of the ANF group, which constituted the main part of the group turnover, should not be responsible for the infringement.

On 31 December 2015, the PCA had originally imposed a fine totalling €10.3 million on 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) for abuse of a dominant position in the markets for Portuguese pharmacies' data and for the commercialisation of market studies based on such data. The PCA found that between 2010 and 2013, the ANF Group had practised a collective margin squeezing in market intelligence services, as the prices charged for pharmacies' commercial data (upstream market) would not allow an equally efficient competitor to operate in the downstream market of pharma market studies based on that data.

The ANF group appealed the PCA decision to the Competition Court, which, on 20 October 2016, 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 had already resulted 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. This fine was further reduced by the Lisbon Appeal Court.

iii Postal services

On 28 December 2017, the PCA submitted to public consultation the commitments offered by Correios de Portugal, SA (CTT) in the proceedings opened by the authority for the abuse of dominant position by the company. These commitments aimed at expanding the scope of CTT's postal network access offer available to competing postal operators.[9]

These commitments followed a statement of objections (SO) issued by the PCA on 12 August 2016 to the incumbent postal operator, in which it stated, on a preliminary basis, that CTT had abused its dominant position by refusing its competitors access to its standard mail delivery network, in potential breach of the national and EU competition rules. The

7 Opinion of Advocate General Wahl on case C-525/16, delivered on 20 December 2017.

8 The amount of the fine had already been reduced by the Competition Court, as described below.

9 PCA press release no. 23/2017, of 28 December 2008, available at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201723.aspx?lst=1&Cat=2017.

PCA considered CTT's only nationwide standard mail delivery network in Portugal as an essential facility, and that the company's behaviour could potentially cause restrictive effects on competition by creating obstacles to the development of effective competition in the market for standard mail services.

Should the case be closed with commitments (as envisaged in the public consultation), it will be the first time that the PCA accepts commitments to close a case after issuing an SO.

iv Wholesale of tobacco products

On 19 January 2017, the Portuguese Supreme Court issued its judgment in favour of the appellant, Portuguese Association of Tobacco Wholesalers (APAT), ordering the PCA to open an investigation against Tabaqueira for abuse of dominant position and abuse of economic dependence. The judgment, mainly based on procedural grounds, held that the complaint had been filed under the former Competition Act, pursuant to which the PCA was bound by the legality principle, which entailed a legal duty to investigate all complaints formally filed.

In 2015, the PCA had rejected a complaint (without opening an investigation) filed by APAT against Tabaqueira for abuse of dominance and abuse of economic dependence, claiming that Tabaqueira, holding a dominant position in the tobacco market, had imposed unfair trading conditions on tobacco wholesalers.

Although the Competition Court upheld the PCA's rejection decision, APAT challenged the judgment and appealed to the Portuguese Supreme Court.

III MARKET DEFINITION AND MARKET POWER

In its dominance case practice, and absent a legal definition or national guidelines on the matter, the PCA and the Portuguese courts have adopted similar approaches with regard to basic concepts such as 'relevant market', 'dominant position', 'unilateral conduct' and 'collective dominance' as are found in the criteria set by the European Commission and developed by the European courts.

The PCA has expressly stated that '[i]n 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 relevant market',[10] which requires the identification of the relevant product (or service) and geographic market (or markets). Depending on the requirements of a case, the PCA uses a more or less economics-based approach regarding the market definition and market power.

Thereafter, and as per European Union practice, an undertaking is deemed to be in a dominant position where it is ascertained that, due to its position of economic strength, it has the ability to behave, to an appreciable extent, independently of its competitors, suppliers, clients and, ultimately, consumers. 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), or to both.

10 See PCA website, http://www.concorrencia.pt/vEN/Praticas_Proibidas/Anti-competitive_practices/Abuse_of_dominant_position/Pages/Abuse-of-dominant-position.aspx.

IV ABUSE

i Overview

Although the 2012 Competition Act does not provide for a definition of dominance, it states that 'the abusive exploitation, by one or more undertakings, of a dominant position in the national market or a substantial part of it is prohibited'. The PCA also considers that abuse of dominance consists of an unlawful exploitation by one or more undertakings of their market power having an anticompetitive object or effect and resulting in the exploitation of customers or the exclusion of competitors.[11]

The Competition Act provides for a non-exhaustive list of abuses, and the PCA, in line with the European Commission and the European courts' practice, has increasingly adopted an effects-based approach (see *Market intelligence*). This allows for the recognition of the existence of less common or *sui generis* abuses in some decisions (see *OTOC*[12]).

The distinction stated by the PCA between an abusive conduct and competition on the merits is sometimes not reflected in its practice (see *Ducts*[13] and *Broadband*[14]), with the courts being more prone to establish the respective line.

Following the European case law, the PCA considers that 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 each case. This special responsibility is not, in itself, an abuse. However, it translates into the idea (also present in the EU case law) that a dominant undertaking has a special responsibility towards the market and the competitive process, which means that a conduct that would be deemed lawful when carried out by a non-dominant undertaking may constitute an infringement when carried out by a dominant undertaking.

In an abuse of economic dependence, which is not expressly foreseen by European Union competition law, the exploitation targets the economic dependence of another undertaking due to the absence for the latter of an equivalent alternative for the supply of goods or the provision of services. Its main elements are, thus:

a the vertical relationship between the undertakings involved;
b the state of dependence due to the absence of equivalent alternatives;
c the abusive conduct of the dominant undertaking; and
d the effects on the market's functioning or the structure of competition.

11 See PCA website, http://www.concorrencia.pt/vEN/Praticas_Proibidas/Anti-competitive_practices/Abuse_of_dominant_position/Pages/Abuse-of-dominant-position.aspx.

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

13 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.

14 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, the civil courts found no evidence of abusive conduct or damage.

ii Exclusionary abuses

The PCA has dealt with exclusionary abuses in some cases. The *Ducts* case concerned a refusal to deal, and in particular, a refusal of access to essential facilities. The *Leased Lines*[15] and the *Broadband* cases concerned predation and margin squeezing, which was also the centre of the *Market intelligence* case. Leveraging was the subject matter of the *Sugalidal*[16] case.

Refusal of access seems also to be at stake in *Postal services*, with reference to the standard mail delivery network, which was subject to a 2016 SO by the PCA to the national incumbent postal operator.

iii Discrimination

Discrimination has been discussed mainly in three cases: *Leased lines*, *Broadband* and *Sport TV*. In the respective decisions, the PCA considered that, as a rule, volume rebates should not be regarded as a form of unlawfully restricting competition. However, the issue of discriminatory pricing was raised taking into consideration the circumstances of each case, in which the dominant firm was the main beneficiary of higher discounts.

The recent ruling of the CJEU in the *Royalty Collecting Society tariff discrimination* case described above may in the future have an impact on the judgments of the Competition Court and other competition authorities with regard to the interpretation of the concept of placing an undertaking at a competitive disadvantage in relation to competitors under Subparagraph (c), Paragraph 2 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

Abuse of dominance is sanctioned at several levels.

First, and similarly to the European Union's competition legislation framework, a fine of up to 10 per cent of the turnover of the year immediately preceding a final decision adopted by the PCA may be imposed. For the assessment of fines, the PCA, in December 2012, issued Guidelines on the fining methodology that are in line with the European Commission's Guidelines on the subject.

Secondly, in cases of non-compliance with a PCA decision determining the adoption of any specific measures or remedies,[17] the PCA may impose daily penalty payments.

15 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 downstream market.

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

17 See the *Sugalidal* case.

Further accessory penalties may also be imposed, including the publication of an extract from the PCA'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),[18] and, in the case of infringements connected with public procurement, exclusion from participation in public tenders for up to two years.

ii Behavioural remedies

According to the Competition Act, infringement decisions regarding restrictive practices may, and often do, impose behavioural measures appropriate to bring an infringement to an end and to avoid persisting violations of the competition rules.

iii Structural remedies

Structural measures necessary for halting prohibited practices or their effects may accompany infringement decisions when there is no behavioural remedy that would be equally effective or, should it exist, would be more onerous for the party concerned than the structural measures themselves. To date, the PCA has never imposed structural measures.

VI PROCEDURE

To exercise its sanctioning powers, the PCA may act on its own initiative or upon a complaint. Although the PCA is receptive to informal contacts, there is no formal procedure that offers guidance on individual cases.

Complaints must be submitted according to a specific form approved by the PCA. Since June 2017, parties can opt to submit their complaints online through the 'Complaints Portal'. Although the PCA shall make a record of each and every complaint that is submitted, the decision to initiate administrative offence or supervisory proceedings is dependent on:

a the priorities of the current competition policy;
b the elements of fact and of law brought by the parties to the file; and
c the seriousness of the alleged infringement, the likelihood of proving its existence, and the extent of investigation required to make possible the PCA's mission to ensure compliance with the respective provisions of the Competition Act and the TFEU.

If the PCA decides not to initiate proceedings or concludes, after an investigation has been initiated, that there is no reasonable likelihood of an infringement decision being adopted, it must inform the complainant, which may file observations and, in the event that 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 an SO and give the defendant the opportunity to access the file, express its views, produce exculpatory evidence and request that additional investigations be conducted.

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

In principle, the PCA shall conclude inquiries within 18 months and, in the event of an SO, the final decision should be adopted within 12 months of its issuance.

18 As observed in *Market intelligence*.

During the course of an investigation, the PCA allows defendants to enter into a settlement discussion with a view to defining the conditions necessary to close the investigation and to obtain a fine reduction conditioned on acknowledging liability for an infringement. With a view to closing investigations, the Competition Act also accepts the submission of commitments to cease the practices that are the object of investigation without acknowledging liability.

Commitments have been well accepted by the PCA in the past, leading to the close of several investigations, in particular with respect to vertical restrictions, and have also become more frequent in proceedings for abuse of dominance. For instance, in *Sugalidal* and *Sport TV*, the PCA opt for swift commitments related to changes of behaviour of the undertakings instead of pursuing a lengthy investigation that, despite imposing a penalty, would not provide a swift solution to the problem. In *Tabaqueira*,[19] the commitments proposed by Tabaqueira regarding its distribution agreements were also accepted by the PCA, which subsequently closed the investigation.

In cases where an investigation indicates that an abuse is on the point of causing serious and irreparable harm to competition, the PCA may, at any phase in the proceedings, issue interim measures ordering the involved 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 and duly substantiated, with the PCA having to issue its decision in the proceedings within 180 days.

VII PRIVATE ENFORCEMENT

Pending the entry into force of the Antitrust Damages Directive,[20] proceedings to recover damages deriving from abuse of a dominant position in Portugal are based on the rules set out in the Civil Code and in the Civil Procedure Code.[21] Until then, 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.[22] Claims for damages, so far, have been subject to the general principles and provisions applicable to civil liability, as there are no special rules for calculating damages deriving from abusive conduct. Compensation is currently aimed at putting a plaintiff in the position he or she would have been in had the tort in question not taken place, with no provision for the award of punitive damage. However, under the new legal diploma, 'the duty to indemnify comprises not only the damage caused, as well as the benefits that the injured party stopped obtaining as a consequence of the injury, calculated since the moment that the damage occurred', plus interest.

19 A case concerning an alleged abuse of dominance by Tabaqueira, the dominant undertaking in the cigarettes market, in relation to its wholesalers.

20 Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union.

21 Law No. 23/2018, of 5 June 2018 transposes the Antitrust Damages Directive. The *vacatio legis* period of the diploma will last for 60 days following its publication. After the entry into force of the new diploma (on 4 August 2018), the rules will follow the EU Directive, with the Portuguese Civil Code and the Civil Procedure Code being applicable subsidiarily.

22 The new diploma provides that after its entry into force, the Competition Court will be competent to judge the private enforcement proceedings based on infringements to competition law, including Articles 11 and 12.

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, the court found no evidence of abusive conduct or 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. Thus, whether collective actions will provide effective compensation for consumers harmed by antitrust practices remains to be seen.

The current legal framework does not bind the Portuguese courts to PCA decisions, even in cases where they have been reviewed and confirmed by the Competition Court and the Lisbon Court of Appeals: consequently, it is evident that the strength and extent of private antitrust enforcement in Portugal is undermined by this current state of play. The implementation of the Antitrust Damages Directive may change this scenario by providing an incentive to file further damages actions, notably by making the PCA's decisions binding on the courts.

VIII FUTURE DEVELOPMENTS

2017 was a remarkable year in terms of the PCA's enforcement activity: the PCA carried out an unprecedented number of dawn raids in various sectors, including touristic river cruises, driving schools, retail distribution and insurance.

2018 marks 15 years of the existence of the PCA, during which time its priorities have been broadened to encompass all fields in order to ensure overall the promotion and defence of competition.

Nevertheless, the PCA still faces a few challenges that require clarification and further action. For instance, the following are continually stated by the PCA to be two of its main concerns and purposes: the conclusion and issuing of guidelines on the applicability of Article 11, and access to files and confidentiality, so as to ensure the promotion of transparency and the interaction of parties in competition proceedings with the PCA.

Finally, the entry into force of the Antitrust Damages Directive will bring major challenges to, and the much-expected enhancement of, competition law enforcement in Portugal.

Appendix 1

ABOUT THE AUTHORS

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Ricardo Bordalo Junqueiro joined Vieira de Almeida in 2018 as partner in the EU and competition law practice, where he regularly works on transactions in the electronic communications, energy, pharmaceutical, financial, media and infrastructure sectors. Ricardo also works on all regulatory matters involving electronic communications.

He graduated the Portuguese Catholic University, Faculty of Law. Ricardo holds a master of law (LLM) in EU law from the Department of Law, University of Essex, and undertook postgraduate studies in EU competition law at King's College London, University of London.

He also attended the advanced programme in regulatory economy and competition at the Portuguese Catholic University's Faculty of Economic and Entrepreneurial Sciences.

Before joining Vieira de Almeida, Ricardo was a partner at Cuatrecasas until 2017. Between August 2013 and December 2016, he was of counsel at Cuatrecasas.

Between 2002 and 2013, he worked at Vieira de Almeida as a lawyer in the competition and EU groups, actively participating in transactions in the electronic communications, pharmaceutical, infrastructures and postal sectors.

Between 2005 and 2006, he was in charge of the Vieira de Almeida office in Brussels.

Ricardo has authored several works in competition law, notably *Abuse of Dominant Position*, Almedina, 2012.

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