The Dominance and Monopolies Review

Second Edition

Editor
Maurits Dolmans

Law Business Research

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EDITOR'S PREFACE

Since the last (and indeed first) edition of this book, the law on monopolies and abuse of dominance has undergone evolutionary rather than revolutionary changes. Many of the sectors that regulators focused on in the past few years (most notably the digital economy, telecommunications and energy) unsurprisingly continue to be the subject of regulatory and judicial scrutiny. From the vantage point of 2014, the growing internationalisation of regulators' antitrust priorities and focus has continued, with intensifying enforcement in China and India and emerging economies. Books such as *The Dominance & Monopolies Review* make common trends both more apparent and capable of being comparatively analysed.

This editorial picks out three developments. First, while authorities in different countries may select similar or even the same cases, the substantive analysis may still diverge, and insufficient attention appears to be given to comity. Second, internationalisation of antitrust enforcement has given rise to globalisation of lobbying efforts, which can feed a potentially dangerous politicisation of antitrust policy especially in large and visible cases. Antitrust enforcement should be based on cold facts and the rule of law. Third, to end on a positive note, the means of resolving these types of case is shifting: settlements with, and commitments to, antitrust regulators are used increasingly to obtain more rapid and practical results where parties show an interest in avoiding protracted litigation.

As some of the more significant abuse cases in the past year underline, the European Commission and the US Federal Trade Commission (FTC), as well as authorities such as those in India and China, have a tendency to focus on similar issues and even the same cases. The *Google* case is one example; the issue of standard essential patents (SEPs) is another. This should be no surprise in an increasingly global and interdependent economy, in particular in worldwide markets for new technology, and where antitrust authorities exchange information and cooperate in the International Competition Network and organisations such as the OECD.

Despite the parallel focus, there remain divergences in analysis. This was thrown into relief by the different conclusions reached by the various authorities and courts in their analysis of Google's search business. In January 2013, after 19 months, the FTC

closed its investigation into Google's business practices. As to the most important issues, including the complaint that Google had changed its search algorithm to demote rivals, and Google's alleged practice of promoting its own vertical properties, the FTC found that Google's practices improved its products and were pro-competitive.[1] Indeed:

> *The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of 'competition on the merits' and the competitive process that the law encourages.*

Also:

> *Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information.*

Given the huge political pressure on the FTC to bring a case, this was a courageous decision. Nor was the FTC alone, since courts in Germany and Brazil came to the same conclusion.[2] The European Commission took a different approach: it agreed on the first point, concluding that:

> *the objective of the Commission is not to interfere in Google's search algorithm.*[3]

In contrast, however, it raised preliminary concerns with regard to the allegedly favourable display of links to Google's specialised search services on the ground that these links might divert traffic from rivals,[4] and it extracted commitments from Google (see below). Some other antitrust authorities seem poised to go even further, and appear

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1 'Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File No. 111-0163 (3 January 2013)' (FTC Google Search Statement), at www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. 'FTC to Make Announcement Concerning Its Investigation of Google', FTC press release of 3 January 2013, at www.ftc.gov/news-events/press-releases/2013/01/ftc-make-announcement-concerning-its-investigation-google. While the author represented Google in the EU case, this analysis reflects personal views only and this editorial was not written at the client's request nor discussed with Google.

2 *Verband Deutscher Wetterdienstleister e.V. v. Google*, Reference No. 408 HKO 36/13, Court of Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

3 Commissioner Almunia, statement of 5 February 2014, http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm.

4 Press release of 25 April 2013, 'Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns', IP/13/371.

determined to decide against Google on both points whatever the evidence. It is striking that leading antitrust authorities would come to such different conclusions, especially since the evidence of 'diversion' was thin, and the evidence that the goal is to improve search services is so clear. Where the FTC noted, for instance, that

> *other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anti-competitive exclusion of rivals*

the EC or certain other authorities would counter simplistically that firms with a dominant position have a special responsibility and are not allowed to practise what non-dominant firms are free to do, ignoring the point that if non-dominant firms successfully engage in the same conduct, they cannot be found to leverage dominance, and *prima facie* seek to improve products or achieve efficiencies. Dominant firms should be allowed to do so too. Competition on product improvement is in the consumers' interest.

As the *Google* case unfortunately illustrates, manipulation of public opinion is increasingly a factor in highly visible and large antitrust proceedings. The global level and intensity of lobbying by complainants in this case is unprecedented, with competitors using trade associations to advocate views with an appearance of objectivity.[5] Publishers (with commercial goals that include objectives unrelated to the issues in the case, such as the quest for ancillary copyright for news snippets) are seen to use news fora they control to stir up public opinion and mobilise politicians. Lobbyists have long mustered support from US senators, but a new development is the lobbying of members of the European Parliament – including even its president – who may think that placating publishers or lobbyists helps them in elections. Parliamentarians are heard to speak out publicly with strong convictions, as if they have carefully evaluated the facts, the law, and the economic policies. But antitrust enforcement should be a cold-headed judicial or investigative process, with decisions based on facts, law and economics, not politics. If this politicisation continues (and if the European Courts do not curb it), it could muddy the boundary between consumer welfare and manipulated political goals, potentially turning important assessment tools such as marketing tests into opinion polls, and undermining the rule of law. That would not be in the consumer interest.

At the time of writing, at least, vice president Almunia has stood up against attempts to steer him away from confirming the *Google* commitments (see below). But in

5 Nick Mathiason, 'Microsoft in row over lobby tactics', *The Observer* (UK), 23 September 2007. www.theguardian.com/business/2007/sep/23/money.digitalmedia; Robert A Guth and Charles Forelle, 'Microsoft Goes Behind the Scenes', *Wall Street Journal*, 24 September 2007, http://online.wsj.com/news/articles/SB119059784609936938; www.telegraph.co.uk/technology/8184065/Dark-forces-gunning-for-Google.html; Vlad Saviv, 'What is FairSearch and why does it hate Google so much?' 12 April 2013, www.theverge.com/2013/4/12/4216026/who-is-fairsearch; Greg Keizer, 'Microsoft not fooling anyone by using FairSearch front in antitrust complaint against Google', 9 April 2013, www.computerworld.com/s/article/9238267/Microsoft_not_fooling_anyone_by_using_FairSearch_front_in_antitrust_complaint_against_Google.

highly visible cases, there is a concern that populist, political or protectionist temptations will cloud the clarity of analysis that should be the norm in antitrust investigations. In some countries, there are even more worrying hints of unreliable procedures, lack of protection of confidential information, potentially arbitrary process and decision-making and inadequate substantive analysis. Apart from political opportunism and a populist streak in policy choices, some authorities appear tempted to free ride on others' efforts and to outshine each other by extracting greater remedies than their colleagues whatever the merits of the case. There is in some cases also an apparent desire to protect local players against foreign firms, rather than focusing solely on consumer interest. These are dangerous developments. With the increasing proliferation of competition laws, greater attention to facts and the rule of law is required. The need for comity – and specifically greater respect for decisions by authorities in the country of origin of the defendant with respect to worldwide practices – is stronger than ever (provided of course that due process is followed, and national bias is avoided in the country of origin).

The *Google* case is interesting also in that it illustrates another trend – a positive one this time. To meet the EU concerns, Google offered commitments to resolve concerns and avoid long drawn-out proceedings and appeals. Having gone through three iterations, the commitments look likely to be adopted by the summer of 2014 (four years after the opening of formal proceedings).[6] Standards is another area where settlements played a significant role. In early 2013, the US FTC announced that Motorola LLC had agreed to a Consent Order to address allegations that it had reneged on its FRAND obligations not to pursue injunctions against users of Motorola's SEPs who were supposedly willing licensees.[7] The European Commission followed suit in early 2014, accepting commitments offered by Samsung (patterned on Google's agreement with the FTC).[8] The commitments lay out how SEP holders might approach their obligations with regard to willing licensees so as to avoid being found to have violated antitrust rules (as will, it is hoped, the Court of Justice's preliminary ruling in *ZTE v. Huawei*).[9] The common approach taken by both the FTC and the European Commission signals (as

6 Press release of 5 February 2014, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', IP/14/116.

7 'Agreement Containing Consent Order, In the Matter of Google Inc', FTC File No. 121-0120 (3 January 2013).

8 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' (29 April 2014), available at http://europa.eu/rapid/press-release_IP-14-490_en.htm; EC MEMO/14/322, 'Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions' (29 April 2014), available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm; 'Case Comp/C-3/39.939 – Samsung Electronics, Enforcement of UMTS standard essential patents, Final Commitments' (3 February 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf; and Commitment Decision (29 April 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

9 Case-170/13, *Huawei Technologies v. ZTE*, OJ 2013 C. 215/5.

vice president Almunia recently commented) a significant moment of convergence.[10] It is expected that this convergence will be mirrored in jurisdictions such as India and China, where issues around essential patents have recently also become the subject of investigation and litigation.[11]

The use of commitments and settlements in dominance and monopoly proceedings is to be welcomed, especially in dynamic markets, as it may lead to expeditious and efficient resolution of issues. In Europe, after the 'procedural modernisation' embodied in Regulation 1/2003,[12] the Commission has so far settled two-thirds of its abuse cases by way of commitments.[13] The advantages from the defendants' perspective (at the cost of trustee oversight and a binding decision that can be enforced even if breaches are technical and have no negative impact on competition) are that fines are avoided; there is no factual finding of abuse that can be used as a basis for private damage claims; no legal precedent is established; firms are not embroiled in decade-long appeal proceedings; and parties avoid disputes about implementation of otherwise vague and generally worded remedy orders that can poison the relationship with the authorities. From the plaintiffs' perspective, these points can be seen as disadvantages (especially the absence of precedent when new types of abuses are alleged), but this may be outweighed by the advantage that a solution is found relatively quickly. Consumers benefit as well.

This is not to say that settlements are always beneficial, as already mentioned in last year's editorial. There is a risk of regulatory hold-up, where an antitrust authority extracts concessions in unprecedented cases, using the threat of excessive fines, long and expensive proceedings, extensive discovery, political decision-making, absence of adequate judicial review and expensive follow-up private damage claims as leverage. Not all commitments are truly 'voluntary' in this light. This does not apply to the same extent in the US, where parties have a more real choice of whether to use a negotiated procedure, in view of the role of the courts in infringement proceedings.

In the past 10 years, commitments have thus come to occupy an important and generally efficient position in the enforcement process in both the United States and, particularly, the EU. The process is, however, far from perfect. In Europe, the Commission has in practice reversed the sequence of the procedure prescribed by Regulation 1/2003: instead of first issuing a preliminary assessment and then negotiating commitments, it

10 Speech of 20 September 2013, 'Competition Enforcement in the knowledge economy', SPEECH/ 12/629. For an overview of the minor policy differences, see Koren W Wong-Ervin, Federal Trade Commission, 'Global Approaches To Standard-Essential Patents', 6 May 2014.

11 In the recent case of *Huawei v. InterDigital, Inc*, and the NDRC's ongoing investigations of Qualcomm and Interdigital, Inc in China, and, in India, the CCI's investigation in *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, 50/2013, 12 November 2013; and *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 76/2013, 16 January 2014.

12 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Regulation 1/2003), OJ L 1, 04.01.2003.

13 Of the 43 cases the Commission has dealt with since 1/2003 came into effect, 28 were settled by way of commitments and 15 by way of prohibitions.

tends to do the reverse. This has meant that defendants do not know the Commission's theory of harm in sufficient detail, and are more or less groping in the dark about how to address the Commission's concerns (although they will generally know at a high level from State of Play meetings what the overall issues are). Without a focused theory of harm, not only is legal certainty and clarity eroded, but there is also a risk that the Commission may move beyond what is strictly required to remedy its concerns, and instead seek to achieve political goals. On balance, however, the practice of accepting commitments is to be welcomed as a practical and realistic way of addressing concerns in the interest of consumers in a timely manner while reducing the expense and risks of full enforcement. It is hoped that authorities elsewhere will emulate this example, without succumbing to the temptation of regulatory hold-up.

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 this second edition of *The Dominance & Monopolies Review*. I am personally grateful for the assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what evolutions or, indeed, revolutions, 2014 holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* (conditional pricing) and the European Commission decision in *Gazprom*, and the US authorities' reviews of conditional pricing, and of the practices of patent assertion entities (PAEs) and privateers, which are directly relevant also for the EEA and other jurisdictions.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2014

Chapter 17

PORTUGAL

Nuno Ruiz[1]

I INTRODUCTION

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

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

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

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

d making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and

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

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

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

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

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

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

Combatting abuses of dominant position, whatever form they take, was among the Competition Authority priorities for 2013 and still is one of its priorities for 2014.

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. National courts when reviewing the Competition Authority decisions have followed the same approach.

II YEAR IN REVIEW

In about 11 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, another against the Order of Chartered Accountants and the last one, dated June 3013, against Sport TV.

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. 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 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.

Portugal Telecom appealed to the Lisbon Commerce Court. The Lisbon Commerce Court acquitted the company because it concluded that the different discount levels were 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 conduct 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. 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 its wholesale prices were cost-oriented, could hardly be lower and were validated by the competent regulatory authority. 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 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 of January 2014 confirmed the Competition Authority decision and the Lisbon Commerce Court ruling.

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

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

Sport TV appealed against the decision.

Finally, there are two important additional cases of alleged abuse of a dominant position, which have not concluded with 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.

The Competition Authority concluded that Sugalidal, through tying purchases, which were not justified by efficiency gains, committed an abuse of a dominant position. Sugalidal made the acquisition of fresh tomatoes (the tying product) conditional upon the use of Heinz seeds in their production (the tied product).

Following the opening of the case and the competition-law concerns expressed by the Competition Authority, Sugalidal committed to put an end to the infringement, in particular to the obligation to use Heinz variety seeds in the production of the tomatoes. 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.

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 sixth abuse of a dominant position. This decision has not yet been made public.

III MARKET DEFINITION AND MARKET POWER

Both the Competition Authority and the Portuguese courts use the same criteria as the European Commission and European Court of Justice when dealing with concepts such as 'relevant market', 'dominant position', 'unilateral conduct' and 'collective dominance'.

The approach to market definition and to market power may be more or less economics-based depending on the requirements of the case.

As a general policy statement the Competition Authority expressed the view that, to determine the existence of an abuse of dominant position, it is necessary, first, to determine whether the allegedly dominant undertaking holds a dominant position 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, because of its position of economic strength, it has the ability to behave to an appreciable extent independently of its competitors, its suppliers and its clients. This position may be due to the characteristics of the undertaking (its market share, financial capacity or vertical integration) or to market characteristics (barriers to entry or expansion, network effects or legal obstacles to entry).

IV ABUSE

i Overview

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

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

In theory the Competition Authority acknowledges the distinction between an abusive conduct and competition on the merits but, in practical terms, it deviates sometimes from such distinction (see the *ducts* and *broadband* cases, *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 three cases: the *leased lines*, the *broadband* and the *Sport TV* cases (see *supra*). In the said decisions the Competition Authority took the view that, as a rule, volume rebates should not be considered as a form of unlawfully restricting competition. However, the issue of discriminatory pricing was raised taking in consideration the circumstances of the case: the dominant firm was the sole beneficiary of the higher discounts.

iv Exploitative abuses

Exploitative abuses were discussed in the *origination prices* case (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 cases of abuse of a dominant position. Daily penalty payments may also be imposed in cases of non-compliance with a Competition Authority decision determining the adoption of any specific measures or remedies (see the *Sugalidal* case, *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 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. 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. One is still pending and the other was dismissed because of the statute of limitations. 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

ABOUT THE AUTHORS

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