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Portugal – Commentary

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PORTUGUESE COMPETITION LAW

by Miguel Gorjão-Henriques, Miguel Sousa Ferro
Sérvulo & Associados

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Portugal – Commentary

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Portugal – Commentary

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1. Introduction

1. Portuguese Competition Law consists primarily of Law Nr. 18/2003, of 11 June (hereinafter ‘Competition Law’), which replaced Decree-Law Nr. 371/93, of 29 October, and of Decree-Law Nr. 10/2003, of 18 January, which created and adopted the Statutes of the Portuguese Competition Authority (the *Autoridade da Concorrência*, hereinafter ‘PCA Statutes’, ‘Competition Authority’ or ‘PCA’, respectively).

2. This basic framework has been completed by:

- (a) Law Nr. 39/2006, of 25 August (hereinafter ‘Leniency Act’), implemented by Regulation Nr. 214/2006, of 22 November (hereinafter ‘Leniency Regulation’);
- (b) Regulation Nr. 9/2005, of 3 February, on prior assessment of agreements (hereinafter ‘Regulation Nr. 9/2005’);
- (c) Regulation Nr. 120/2009, of 17 March, which adopted the merger notification form (hereinafter ‘Regulation Nr. 120/2009’);
- (d) Regulation Nr. 1/E/2003, of 3 July, setting the fees applicable to merger assessment procedures (hereinafter ‘Regulation Nr. 1/E/2003’); and
- (e) PCA guidelines on the procedure for prior assessment of mergers.

3. So far, the Competition Law has been revised three times, by Decree-Law Nr. 219/2006, of 2 November (trying to impose stricter time limits for merger control procedures – see *PCA general guidance on the revision of the Competition Law by Decree-Law Nr. 219/2006*), by Decree-Law Nr. 18/2008, of 29 January (implementing the EU Public Procurement Directives, introduced a new typified accessory penalty in case of bid rigging offences) and by Law Nr. 52/2008, of 22 August (judiciary reform law). Presently, the Government announced and presented to Parliament a bill proposal for the creation of a specialized Court for competition and regulation issues (Proposal 32/XI, of 22 Jun. 2010, available at, <www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=35425>).

4. Generally, the Competition Law closely follows EU Competition Law. The 2003 reform took into account, to a certain extent, the adoption of Regulation (EC) Nr. 1/2003 and the strengthening of the mechanisms for decentralized enforcement. However, the three-person Commission nominated by the socialist XIV Government in 2002 (presided by Mr António Guterres) to Draft the legislation and the new national Competition Authority¹ delivered its work to the new XV Government (then presided by Mr José Manuel Durão Barroso) prior to the publication of Regulation Nr. 1/2003, although it had access to some previous working versions of the document as they were being discussed in the then EC Council of Ministers.

5. Since the 2003 Laws, the PCA enforces all competition rules, including the restrictive practices and the merger control. No area, even when subject to Sectoral regulation, is excluded from the Competition Law. Moreover, unlike the former 1993 Competition Law, all merger control lies with the NCA and not the Government, even in the financial and insurance sectors.

6. Similarly to Article 106(2) of the Treaty on the Functioning of European Union (TFEU), Article 3(2) of the Competition Law excludes its applicability to practices of undertakings legally charged with the management of services of general economic interest or which have the nature of legal monopolies, whenever such application would impede, in law or in fact, the fulfilment of the particular mission entrusted to them.

7. Decree-Law Nr. 370/1993, of 29 October, relating to individual practices restricting trade (prohibiting, regardless of the existence of a dominant position, for example,

1. Composed of prof. J. L. Cruz Vilaça, Miguel Gorjão-Henriques and Isabel Oliveira Vaz.

discriminatory prices or terms of sale, sales at loss, etc.), continues to be applied despite widespread criticism of its continued validity. While little information is available, beyond the context of appeals, it is known that, in 2008, for example, the PCA decided nine cases under this law, leading to the imposition of fines totalling EUR 109,169. In the same period, the Competition Authority's litigation department closed thirty-four cases relating to infringements of this law, which it had been called to participate in, and sixty-seven other cases were still pending.² In parallel, several instances of private enforcement continue to be brought before National Courts.³

8. However, since the interdiction of these practices does not fall strictly within the concept of Competition Law, as it is commonly understood, it shall not be presented herein. Nonetheless, a translation of this Act has been provided.

9. A factor which significantly hinders profound analysis of the Competition Law, in its practical dimension, is that decisions on restrictive practices are not published by the PCA, although they are generally referred to in the annual reports and some times object of press releases. It thus becomes impossible to have a full picture and a clear understanding of the positions this Authority has taken on any specific issue, aside from what limited information may be found in press releases and annual reports.

10. Finally, it must be highlighted that there is an ongoing process of overall revision of the Competition Law, to address shortcomings identified since 2003. A draft bill has already been presented to the Government, but has not been made publicly available. It is expected that a draft bill will eventually be subject to public consultation, before the final stages of its adoption.

2. Institutions Responsible for Enforcement

11. Enforcement of the Competition Law is entrusted to the PCA, created in 2003 to assume the tasks previously awarded to the Ministry of Economy's Directorate-General for Trade and Competition and to a Competition Council.

12. The PCA is an independent regulatory authority, with financial and administrative autonomy.⁴ Its activities are subject to general competition policy guidelines set by the Government, as well as to oversight by the Ministry of Economy, within the limits set by law. Specifically, this Ministry must approve the Authority's plan and budget, its activities reports and annual accounts and certain acts with financial or budgetary implications, together with the Ministry of Finance.⁵ The PCA's independence is further ensured by the strict conditions for termination of Board Members' mandates.⁶

13. The Board of the PCA is composed of one chairperson and two or four other members (so far, always two). Board members are appointed by the Council of Ministers, upon proposal from the Ministry of Economy, and must be persons of recognized competence, with experience in relevant fields. They are awarded mandates of five years, renewable once, subject to partial renewal after three years, in order to ensure continuity.⁷ Board members are subject to a strict incompatibilities and impediments regime, preventing them, *inter alia*, in the two years following the end of their mandate, from maintaining professional relationships with entities that were the subject

2. According to the information provided in the *Annual Activity Report*, available at <www.concorrencia.pt/download/Adc_Relatorio_actividades2008.pdf>, 19–21.

3. For recent examples of private enforcement see the Judgments of the Lisbon Court of Appeals of 8 Apr. 2010 (Case Nr. 3130/08.7TVLSB.L1-8), and of 5 Mar. 2009 (Case Nr. 686/2009-6).

4. Articles 1 and 4 of the PCA Statutes.

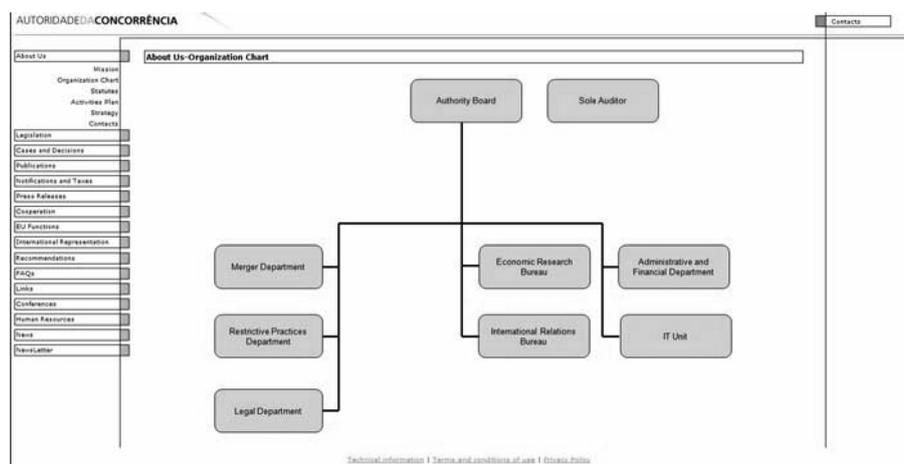
5. Articles 4 and 33 of the PCA Statutes.

6. Article 15 of the PCA Statutes.

7. Articles 12 and 13 of the PCA Statutes.

of PCA proceedings during their mandate.⁸ For that reason, the law foresees a compensation, based on the European Court of Justice (ECJ) applicable regimen.

14. The PCA has in excess of 110 staff. Aside from supporting units, its activities are divided in a Merger Department, a Restrictive Practices Department, a Litigation Department and an Economic Research Bureau. In its webpage (www.concorrencia.pt), the PCA organization is presented in this way:



15. The PCA is primarily entrusted with the following tasks:⁹
- (i) monitoring compliance with and enforcing Competition Law;
 - (ii) exercising competition-related competencies awarded to national administrative authorities by EU Law;
 - (iii) encouraging the spread and implementation of practices favouring competition and of a competition culture among economic operators and the general public;
 - (iv) publishing guidelines on competition policy;
 - (v) cooperating and accompanying the activity of competition authorities of other countries, as well as cooperating with EU and international bodies in the area of competition policy and assisting the representation therein of the Portuguese State;
 - (vi) promoting research in the area of protection of competition, namely through initiatives and protocols of association or cooperation with public and private entities;¹⁰ and
 - (vii) contributing to the improvement of the Portuguese legal system in all areas that may affect free competition.
16. Within the scope of these tasks, the PCA has been awarded powers to:¹¹
- (i) impose sanctions (after identifying and investigating practices capable of infringing national and Community Competition Law) and interim measures;
 - (ii) exercise supervisory functions:
 - (a) Carrying out studies, inquiries, inspections and audits;

8. Article 14 of the PCA Statutes.

9. Article 6(1) of the PCA Statutes.

10. As an example of such initiatives, the PCA has recently partnered with the Institute for Economic, Financial and Tax Law of the University of Lisbon to publish a tri-monthly journal entitled *Regulation and Competition*.

11. Article 7 of the PCA Statutes.

- (b) Deciding on administrative proceedings relating to the compatibility of agreements between undertakings with Competition Law; and
- (c) Deciding on administrative proceedings concerning merger operations subject to prior notification.
- (iii) exercise regulatory functions:
 - (a) Approving or proposing the adoption of regulations;
 - (b) Issuing general recommendations and directives; and
 - (c) Proposing and ratifying codes of conduct and manuals of good practice for undertakings or associations of undertakings.

17. It should be noted that, while the Competition Law does not explicitly foresee the possibility of closing investigations into restrictive practices through commitment decisions, the PCA has more than once considered that this option (or something similar) is available to it. That occurred in misdemeanor procedures relating to agreements and concerted practices (*Unicer*, proc. 1/03, of 28 December 2004; *Bayer Crop Science*, 10/06, de 28 June 2007; or *Nestlé, Delta et al.*, of 6 July 2008), to Article 7 abuses of economic dependence (*Unibetão, Secil et al.*, 1/06, of 1 March 2007) and, more recently, in a case where the PCA stated that the company was abusing its dominant position (*Sugalidal*, proc. 8/08, of 15 October 2009, v. <www.concorrenca.pt/download/comunicado2009_20.pdf>).

18. Undertakings, public authorities and other entities are subject to obligations of cooperation with the PCA in the discharge of its duties.¹² Special care has been taken to ensure coordination with sectorial regulatory authorities – a mutual obligation of cooperation and information is foreseen, and proceedings relating to restrictive practices or mergers in activities subject to sectorial regulation must only be decided by the PCA after consulting the respective regulatory authority,¹³ with some procedural specificities under the Competition Law.

19. Initially, all PCA decisions were appealed to the Commercial Court of Lisbon. With the implementation of the new judicial reform law (Law Nr. 52/2008), it is foreseen that PCA decisions would be gradually appealed to the territorial competent Commercial Panels, with possible review by the respective Court of Appeals. However, although some pilot circumscriptions were created (Alentejo Litoral, Baixo-Vouga and Greater Lisbon Northeast) and the reform was due to be applied in full as from 1 September 2010, Law Nr. 3-B/2010 deferred the full application to the future, stating that the implementation procedure must be completed as from 1 September 2014).

20. Further review by the Supreme Court is excluded, in the case of decisions applying fines or other penalties, except in very specific and rare situations (based on formal issues, rather than substantial ones).¹⁴

21. In the meantime, after a strong criticism by judicial operators and of the PCA itself regarding the solutions envisaged by the Judiciary Reform law, the Government announced, in April 2010, plans to create a specialized Court for the areas of competition, regulation and financial supervision, to be located in Santarém, which will apparently centralize all appeals relating to the PCA and from some other Sectoral regulators, like the Stock and Exchange Commission (*Comissão do Mercado de Valores Mobiliários*), the securities or the telecommunication regulators.¹⁵ The bill (Proposal 32/XI is still pending before the Parliament and will probably be adopted till the end of 2010).

22. In the case of prohibited mergers, notifying parties may appeal the PCA's decision to the Minister of Economy, who may authorize the merger 'whenever the resulting benefits to fundamental national economic interests exceed the inherent disadvantages for competition'.¹⁶

12. Articles 8 and 9 of the PCA Statutes.

13. Articles 15, 27(4) and (5), 29 and 39 of the Competition Law.

14. Articles 50, 52, 54 and 55 of the Competition Law.

15. Press release available at: <www.portugal.gov.pt/pt/GC18/PrimeiroMinistro/Noticias/Pages/20100425_PM_Not_Santarem.aspx>.

16. Articles 33(1) and 34 of the PCA Statutes.

3. Anticompetitive Agreements, Decisions and Concerted Practices

3.1. Introduction

23. Wording of Articles 4 and 5(1) of the Competition Law are quite similar to Article 101 TFEU.

24. Article 4(1) contains the prohibition and provides that:

[a]greements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, are prohibited, in particular those which:

- a) Directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them artificially either to rise or fall;
- b) Directly or indirectly fix other transaction conditions effected at the same stage or different stages of the economic process;
- c) Limit or control production, distribution, technical development or investments;
- d) Share out markets or sources of supply;
- e) Systematically or occasionally apply discriminatory pricing or other conditions to equivalent transactions;
- f) Directly or indirectly refuse to purchase or sell goods or services;
- g) Subject the signing of contracts to the acceptance of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

25. Infringements are punished even if they result merely from negligence.¹⁷

3.2. Effects Theory and Concept of Undertaking

26. In accordance with Article 1(2) of the Competition Law, these restrictive practices are prohibited to the extent that they 'take place or have or may have effects in the territory of Portugal', in line with the EU Competition Law's effects theory.

27. The concept of undertaking and the single economic entity doctrine have also been taken on (Article 2). That being said, the PCA has not yet been taken the single economic entity doctrine to its full consequences. Although the Competition Law allows for the fining of foreign companies, it has never fined the foreign parent company when a national subsidiary has been found to participate in a restrictive practice. This may be partly explained by the Lisbon Commercial Court's refusal to accept this doctrine – so far, it has argued that it would correspond to imposing strict liability, which is forbidden by the subsidiarily applicable General Regime for Administrative Offences.¹⁸ As far as we know, the issue has never been tested on appeal.

¹⁷. Article 43(6) of the Competition Law.

¹⁸. Judgment of the Lisbon Commercial Court of 2 May 2007, *Vatel et al. v. Portuguese Competition Authority*, 6–8.

3.3. Prohibited Practices

28. While there are some differences in relation to Article 101 TFEU, the drafting of Article 4(1) was generally meant to incorporate clarifications brought by EU case-law, and thus is meant to ensure the harmonization of national and EU Competition Law.

29. Thus, the reference to the irrelevance of the form which agreements may take expresses the principle affirmed by the ECJ in such cases as *ACF Chemiefarma* (Case Nr. 65/86) or *Tepea* (Case Nr. 28/77). Similarly, the explicit requirement of an ‘appreciable’ impact takes on the *de minimis* doctrine, adopted by the ECJ since *Völk v. Vervaecke* (Case Nr. 5/69).

30. The examples of restrictive practices have also undergone similar adaptations. The Competition Law clarifies that these provisions apply to both horizontal and vertical agreements (*Consten and Grundig*, Case Nr. 56/64 etc.), and that a restriction of competition should be found to exist even if the agreement was meant to reduce prices. Refusal of purchase or sale has been added as an example of restrictive practice, in accordance with EU case-law (see e.g., *Papiers peints be Belgique*, Case Nr. IV/426, upheld on appeal in Case Nr. 73/74).

31. One characteristic which does not seem to be clearly provided for in EU case-law, but which is to some extent influenced by Commission practice, is the elimination of the requirement that discriminatory practices should place undertakings at a disadvantage on a downstream market in order to be considered restrictive of competition.

32. In accordance with Article 4(2) of the Competition Law – the equivalent provision to Article 101(2) TFEU – practices prohibited by Article 4(1) are automatically ‘null and void’, unless they are exempted as described below. As a consequence of being null and void, agreements, concerted practices and decisions by associations of undertakings prohibited by Article 4 (and not exempted under Article 5) do not produce any legal effects. If only part of the agreement is prohibited by the Competition Law, but it is concluded that the agreement or decision would not have been taken without the part which is null, then the entire agreement or decision should be considered null and void.

3.4. Exemption

33. In accordance with Article 5(1) of the Competition Law, practices prohibited by Article 4(1) are considered justified when they meet the four conditions also present in Article 101(3) TFEU – the two provisions are identical, and the same system of self-assessment, as a general rule, applies.

34. No block exemptions have been adopted under national law. However, Article 5(3) of the Competition Law has effectively incorporated into the internal legal order all block exemptions adopted under EU law, extending their scope to practices with effects on Portuguese territory, but which do not affect trade between Member States.

35. In parallel to Article 29 of Regulation (EC) Nr. 1/2003, in specific cases, as long as the agreement, decision or practice in question is not (also) subject to EU Competition Law, the PCA may withdraw the benefit of the block exemption, if ‘it ascertains that a practice covered by it has effects incompatible with’ Article 5(1).¹⁹ This option has, so far, never been used.

19. Article 5(4) of the Competition Law.

3.5. Finding of Inapplicability

36. Article 5(2) foresees a mechanism similar to that of Article 10 of Regulation (EC) Nr. 1/2003. Under this provision, upon request from the parties to an agreement or decision potentially prohibited by Article 4, the PCA may carry out a prior assessment meant to ascertain whether the practice is indeed prohibited by Article 4(1), or whether it may be justified under Article 5 of the Competition Law.

37. The applicable procedure has been specified in Regulation Nr. 9/2005, of 3 February. Crucially, so as to avoid potential conflicts with decisions of the European Commission, the prior assessment procedure is only available for practices which are not subject to EU Competition Law, i.e., which do not have an effect on trade between Member States.²⁰

38. When only one or some of the undertakings participating in the practice in question have submitted the request for prior assessment, no decision will be considered before it has been shown that all participating undertakings have been informed of the request, and a single representative (contact point) should be appointed.²¹

39. A decision finding that a practice may be justified under Article 5(1) of the Competition Law will always be granted for a limited (renewable) period and may be subject to the fulfilment of certain conditions.²²

40. Upon receipt of such a request (which should be presented using a specific form annexed to the Regulation), the PCA publishes a notice in two national newspapers, inviting interested parties to submit comments.²³ The procedure is subject to the payment of a fee varying – depending on total turnover of the undertakings concerned – between EUR 7,500 and EUR 25,000.²⁴

41. The most significant difference in relation to Article 10 decisions by the European Commission is the nature of a ‘paid service’ – the Regulation does not, in principle, allow the PCA to refuse to answer a request submitted by an undertaking on the grounds of lack of public interest in clarifying the issue.

42. There has so far been no example of the PCA adopting a decision under this provision.

4. Abuse of Dominant Position

4.1. Introduction

43. The basic provision relating to the prohibition of abuses of dominant positions is identical to the first paragraph of Article 102 TFEU. In accordance with Article 6(1) of the Competition Law: ‘One or more undertakings shall not engage in the abusive exploitation of a dominant position in the national market or a substantial part of it, with the object or effect of preventing, distorting or restricting competition’.

44. The requirement of an effect on trade between Member States has been replaced, in national law, with the requirement of an effect on Portuguese territory (see further Section 3.2).

45. Infringements are punished even if they result merely from negligence.²⁵

20. Article 1(2) of Regulation 9/2005.

21. Article 2(2) and (3) of Regulation 9/2005.

22. Article 6(2) of Regulation 9/2005.

23. Article 4 of Regulation 9/2005.

24. Article 10(1) of Regulation 9/2005.

25. Article 43(6) of the Competition Law.

4.2. Concept of Dominant Position

46. A definition of dominant position has been included in Article 6(2) of the Competition Law. An individual dominant position has been defined as: ‘An undertaking [being] active in a market in which it faces no significant competition or in which it predominates over its competitors’.

47. The concept summarizes the essence of the existing EU case-law, starting with *United Brands* (Case Nr. 27/76). Although the lack of precedent, we believe that the concept will be understood and applied in line with the EU case law.

48. A collective dominant position is defined as: ‘Two or more undertakings [acting] in concert in a market in which they face no significant competition or in which they predominate over third parties’. Interestingly, this clarification contributes little to an approximation to the interpretations put forward by the ECJ (e.g., *Compagnie Maritime Belge Transports*, Case Nr. C-395/96 etc.). There has so far never been a finding of collective dominance by the PCA.

49. Interestingly, the Lisbon Commercial Court has stated that it believes these are not definitions of what constitutes a dominant position, but instead mere examples. In any case, the Court then proceeded to present its own definition, based on the case-law of the ECJ:

an undertaking holds a dominant position when its market power is significant and stable in time, granting it economic power and independence such that it may act on the market without having to take into account the possible reactions of competitors and/or of consumers, being able, *inter alia*, to modify the price of the product or service to its own benefit.²⁶

4.3. Concept of Abuse

50. Differently from Article 102 TFEU, Article 6(1) of the Competition Law indicates that a dominant undertaking’s conduct may be considered abusive by ‘object or effect’.

51. As in the second paragraph of Article 102 TFEU, Article 6(3) of the Competition Law provides examples of behaviours which may be considered abusive. However, national law has chosen to do so by referring to the list of restrictive practices in Article 4 (i.e., collective practices). Considering that the PCA has shown itself willing to adhere to the EU case law, no significant discrepancy should be expected in relation to European practice.

The only example of abusive conduct specifically mentioned in Article 6(3) was meant to ensure the inclusion in the Competition Law of a form of the essential facilities doctrine:

refusal, upon appropriate payment, to provide any other undertaking with access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, always excepting that the dominant undertaking demonstrates that, for operational or other reasons, such access is not reasonably possible.

The Lisbon Commercial Court has indicated that, even though this example of abuse was absent from the previous national legislation, that does not mean it was not prohibited before the new Competition Law.²⁷

52. The PCA has only arrived at three findings of infringements of Article 6 (and Article 102 TFEU) – see below Section 6.3.1. One of these cases, concerning essential

26. Judgment of the Lisbon Commercial Court of 2 Mar. 2010, 142.

27. Judgment of the Lisbon Commercial Court of 2 Mar. 2010, 151.

facilities, the first to Article 6 case to be subject to judicial review, was struck down by the Lisbon Commercial Court, on the basis of lack of sufficient evidence to conclude that the telecommunications network at stake in that case could be considered an ‘essential facility’. An appeal is pending before the Lisbon Appeals Court.

4.4. Abuse of Economic Dependency

53. As in a few of the other Member States legal orders, the Competition Law includes an interdiction of abuse of economic dependency (abuse of a relative dominant position), inherited from the previous legislation, although mitigated in its wording, bearing in mind some of lessons of comparative law then available.

54. The interdiction is found in Article 7(1) of the Competition Law, phrased as follows:

Insofar as it may affect the functioning of the market or the structure of the competition, one or more undertakings shall not engage in the abusive exploitation of the economic dependence on it or them of any supplier or client on account of the absence of an equivalent alternative.

55. Infringements are punished even if they result merely from negligence.²⁸

56. The absence of an equivalent alternative – the essential component in demonstrating the existence of a relative dominant position – is deemed to exist when ‘the supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings’, and ‘the undertaking cannot obtain identical conditions from other commercial partners in a reasonable space of time’.²⁹

As for the types of conduct which may be considered abusive, Article 7(2) once again refers to the examples mentioned in Article 4(1) and further adds that:

unjustified cessation, total or partial, of an established commercial relationship, with due consideration being given to prior commercial relations, the recognised usage in that area of economic activity and the contractual conditions established.

57. The PCA has never adopted a decision finding an infringement of this provision, lending support to the contention of some doctrine that this figure is destined to disappear from the Competition Law. On the other hand, the PCA has investigated alleged infringements of Article 7, following complaints, and in one case has decided to close proceedings after receiving certain commitments from the targeted undertaking (no details are publicly available),³⁰ which seems to suggest it may be willing to continue to enforce this provision.

5. Mergers and Joint Ventures

5.1. Introduction

58. The main provisions of national law concerning merger control are to be found in Articles 8 to 12 (substantive rules) and 30 to 41 (procedural rules) of the Competition Law, as well as in Article 34 of the Statutes of the PCA.

59. The Portuguese merger control system is exclusively based on prior notification. It closely mirrors the EU merger control system, but some differences exist due primarily to

28. Article 43(6) of the Competition Law.

29. Article 7(3) of the Competition Law.

30. Decision of the PCA of 1 March 2007, *Unibetão et al.* (Case Nr. 01/06).

varying national options and to the fact that the Competition Law preceded by one year the adoption of Regulation (EC) Nr. 139/2004.

60. The concept of ‘merger’ – or ‘concentration’ – is presented in Article 8 of the Competition Law, closely following the wording of Article 3 of Regulation (EC) Nr. 139/2004. It covers, mergers, the acquisition of control and the full function joint ventures.

61. Regarding the acquisition of control model, the most notable difference is the absence of an explicit requirement of a ‘change of control on a lasting basis’, although the spirit of the law is the same, and the specific provisions meant to exclude cases of non lasting change in control have been retained.

5.2. Obligation of Prior Notification

62. Concentrations must be notified whenever the turnover threshold or the market share threshold are met.

63. Turnover threshold is set at EUR 150 million net sales in Portugal of the group of undertakings taking part in the concentration, as long as the individual turnover in Portugal of at least two of these undertakings exceeds EUR 2 million.³¹

64. Turnover is calculated in accordance with the same method followed under the EU Merger Control Regulation. The most substantial difference seems to be that a provision similar to the second paragraph of Article 5(2) of that Regulation is missing, so that it is arguable whether two or more transactions consisting in the acquisition of parts of undertakings, taking place within a two-year period between the same persons or undertakings, should be treated as separate concentrations or as a single one.

65. But Portugal also keeps a market share threshold. Unlike in the EU merger control but as it happens in several member states, a merger must (also) be notified when, considering all the participating undertakings, it ‘creates or reinforces a share exceeding 30% of the national market for a particular good or service or for a substantial part of it’.³²

66. This notification threshold has been subject to some criticism and arguably the market share needed to create the notification obligation ought to be raised to levels where a dominant position may be easily found. Also, it should be stressed that the PCA considers that if an undertaking without any presence in the Portuguese market acquires control or merges with a company holding at least 30% of the market share, the operation must be notified, even if no creation or reinforcement (but mere transfer) occurs.

67. When at least one of the thresholds is met, but still in line with the previous Regulation 4064/89, the merger must be notified ‘within seven working days of conclusion of the agreement or, where relevant, of the publication date of the preliminary announcement of a takeover bid, an exchange offer or of a bid to acquire a controlling interest in a shares issuing company put up for trade in a regulated market’.³³ The precise moment when this occurs has been clarified in the Competition Authority guidelines on the procedure for prior assessment of mergers (paragraphs 14–22).

68. It should be noted that the notification is only deemed to have been completed when all the required documents and information have been provided and after the payment of the respective fee³⁴ (merger filing fees have been set by Regulation Nr. 1/E/2003, of 3 July).

31. Article 9(1)(a) of the Competition Law.

32. Article 9(1)(b) of the Competition Law.

33. Article 9(2) of the Competition Law, in the wording of Decreto-Lei nr- 219/2006.

34. Articles 32 and 56(1)(a) of the Competition Law.

69. The obligation to notify rests with the undertaking(s) acquiring control or merging into a single entity.³⁵ Whenever this obligation rests on more than one person, a common representative must be appointed.³⁶

70. The notification must be presented using the form adopted by Regulation Nr. 120/2009, of 17 March.³⁷ Although no specific form for simplified notification is available, several parts of the notification form are indicated as not having to be filled in whenever, with due justification, the concentration clearly does not raise competitive concerns.

71. After a complete notification is received, the Authority publishes an announcement of its essential elements in two national newspapers, at the expense of the authors of the notification, inviting interested third parties to submit comments within a deadline of at least ten days.³⁸

72. If a concentration subject to mandatory notification fails to be notified to the Competition Authority, it may open proceedings of its own initiative to assess the concentration, and may impose a fine (even in case of negligence) of up to 1% of the previous year's turnover for each of the undertakings who were under the obligation to notify.³⁹ The PCA may also act *ex officio* if it becomes aware that a concentration was approved (explicitly or tacitly) on the basis of false or inaccurate information regarding essential circumstances, or if the undertakings in question have disregarded, in part or in full, obligations or conditions imposed in the approval decision.⁴⁰

5.3. Obligation to Suspend the Implementation of a Concentration That Must Be Notified

73. Just as under the EU Merger Regulation, concentrations subject to prior notification may not be put into effect before they have notified and have been the object of an explicit or tacit positive decision of the Competition Authority.⁴¹

74. The implementation of a concentration in violation of this obligation implies that the respective legal transactions are not valid,⁴² and may lead to the imposition of a fine of up to 10% of the previous year's turnover for each of the undertakings upon whom the obligation rested.⁴³

75. However, to avoid conflicts with the obligations deriving from Securities Law, public bids to purchase or exchange offers that have been duly notified to the PCA may be implemented, 'provided that the acquirer does not exercise the voting rights attached to the securities in question or exercises them solely to protect the full value of its investment' on the basis of a derogation granted by the PCA.⁴⁴

76. Indeed, the PCA may, upon a duly substantiated request, grant derogations from the obligation to suspend the implementation of a concentration, based upon an assessment of the impact of such derogations on competition on the market(s), and it may in parallel impose conditions and obligations so as to guarantee effective competition.⁴⁵

77. Finally, it should be noted that any legal acts relating to a concentration will be null and void if they contravene a PCA decision: (i) prohibiting the concentration;

35. Article 31(1) of the Competition Law.

36. Article 31(2) of the Competition Law.

37. Article 31(3) of the Competition Law.

38. Article 33 of the Competition Law.

39. Articles 40(1)(a) and 43(3)(a) of the Competition Law.

40. Article 40(1)(b) and (c) of the Competition Law.

41. Article 11(1) of the Competition Law.

42. Article 11(2) of the Competition Law.

43. Article 43(1)(b) of the Competition Law.

44. Article 11(3) of the Competition Law.

45. Article 11(4) of the Competition Law.

(ii) imposing conditions; or (iii) ordering measures for the re-establishment of effective competition.⁴⁶

5.4. Appraisal of Concentrations

78. The PCA analyses concentrations so as to ‘determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market, in the interests of the intermediate and final consumer’.⁴⁷ Ancillary restraints are expressly included in this assessment.⁴⁸

79. Concentrations are to be prohibited if they ‘create or strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it’, and to be authorized if they fail to do so.⁴⁹ Thus, the criterion from the previous EU Merger Regulation is still used in the national legislation.

80. The assessment of concentrations should take into account, *inter alia*, a list of factors which mostly relate to usual competitive considerations during merger analysis by the European Commission, but which also include ‘the contribution that the concentration makes to the international competitiveness of the Portuguese Economy’.⁵⁰ However, this is no longer an autonomous criteria, like it was under the previous legislation.

81. The creation of a full function joint venture may also lead to assessments under the national provisions equivalent to Article 101 TFEU, whenever it is found that the objective of creating such an undertaking is to coordinate the competitive behaviour of independent undertakings.⁵¹

82. If a concentration is prohibited by the PCA, the notifying parties may lodge an appeal before the Minister of Economy, within thirty days from the notification of the decision. The latter may, with a duly justified decision, authorize the concentration ‘whenever the resulting benefits to fundamental national economic interests exceed the inherent disadvantages for competition’, potentially imposing certain conditions and obligations to mitigate any negative impacts on competition.⁵² So far, this has occurred in just one case (*Brisa/AEO/AEA*) with a favorable outcome for the appellant.

5.5. Examination of the Notification and Initiation of Proceedings

5.5.1. Pre-filing Contacts

83. To speed up the examination of concentrations once the triggering event has taken place, as at the EU level, a pre-filing mechanism is available.⁵³

84. This mechanism has been specified in the Competition Authority guidelines on the procedure for prior assessment of mergers, which were explicitly prepared so as to mirror the European Commission’s best practices in this respect. The procedure is entirely voluntary and confidential and it may be initiated as soon as the parties can demonstrate

46. Article 41 of the Competition Law.

47. Article 12(1) of the Competition Law.

48. Article 12(5) of the Competition Law.

49. Article 12(3) and (4) of the Competition Law.

50. Article 12(2) of the Competition Law.

51. Article 12(6) of the Competition Law.

52. Article 34 of the PCA Statutes.

53. Article 9(3) of the Competition Law.

their ‘intention’ to conclude the concentration agreement or to launch a public takeover bid, as long as a notification triggering event has not yet occurred. In any case, it should be initiated within a ‘reasonable deadline’ before the formal filing, to be assessed according to the specific circumstances of the case, but which should not be less than fifteen working days.

85. The undertakings which will be subject to the duty to notify and who wishes to use the pre-filing mechanism, must present a formal request to the Competition Authority, accompanied by a brief description of the concentration, with the elements indicated in the Guidelines⁵⁴ and, if possible, by a draft version of the notification form (which should in any case be presented by the end of the pre-filing contacts). Unless the concentration clearly raises no competitive concerns, pre-filing meetings will usually be held between the notifying parties and the Competition Authority.

86. Whatever preliminary position may be taken by the Competition Authority during pre-filing contacts is not binding upon it, and may technically be reversed in the subsequent formal analysis of the notification (although we know of no example of such reversal).

5.5.2. Phase I Proceedings

87. After receiving a complete notification of a concentration, the PCA has thirty working days to decide: (i) that the concentration is not subject to mandatory notification; (ii) not to oppose the concentration (potentially, with conditions and obligations); or (iii) to initiate Phase II proceedings, whenever it has doubts as to whether the concentration meets the approval criteria.⁵⁵ An absence of a decision within this deadline leads to tacit approval.⁵⁶

88. Within this deadline, the Competition Authority must complete the evidence-taking, namely by requesting additional information or documents from the notifying parties. Such requests must be made with a ‘reasonable time limit’ for reply and they suspend the thirty working days deadline for a decision, starting from the first working day after the one on which the request was sent and ending on the day immediately after the receipt of the full reply. Formal (binding) requests for information may also be addressed to third parties (public or private), but these do not suspend the deadline.⁵⁷

89. Both during Phase I and Phase II, the PCA may not arrive at a decision without first hearing the notifying parties and any interested third parties that have submitted comments against the approval of the concentration (except in the case of non-opposition decisions, where there have been no opposing comments by third parties). Such hearings also suspend the deadline for decisions.⁵⁸

5.5.3. Phase II proceedings

90. When the PCA concludes the Phase I investigation by deciding to proceed to an in-depth investigation, it must arrive at a final decision within a maximum of ninety working days from the date of notification: (i) not to oppose the concentration (potentially, with conditions and obligations); or (ii) to prohibit the concentration and, if it has already been implemented, to order the appropriate measures to re-establish effective competition. An absence of a decision within the deadline leads to tacit approval.⁵⁹

54. Paragraph 27 of the Competition Authority guidelines on the procedure for prior assessment of mergers.

55. Article 35(1), (2) and (3) of the Competition Law.

56. Article 35(4) of the Competition Law.

57. Article 34 of the Competition Law.

58. Article 38 of the Competition Law.

59. Article 37 of the Competition Law.

91. Within this period, additional inquiries may be carried out, the same rules as in Phase I proceedings being applicable. However, the ultimate deadline may be not be suspended for more than ten working days.⁶⁰ In accordance with a *contra legem* interpretation delivered by the PCA its general guidance, the ninety working days deadline may be exceeded whenever this derives from suspensions following requests for information. Furthermore, in an interpretation that is yet to be tested before the courts, the Competition Authority has stated that the maximum suspension of ten working days only applies during Phase II and that it refers to each request for information (rather than globally to all requests for information within Phase II). It may be argued that this interpretation has significantly impaired the fulfilment of the Decreto-Lei 219/2006 objectives of ensuring that the appraisal of notified concentrations would not exceed a reasonable period.

6. Enforcement and Judicial Review

6.1. Procedural Provisions Applicable to Restrictive Practices

6.1.1. Powers of Investigation and Inspection

92. In what concerns the exercise of its powers of investigation and inspection, the PCA, represented by its institutional bodies and employees, is awarded the 'same rights and powers and is subject to the same duties as criminal police institutions'. In practice, this translates into similar powers to those held by the European Commission, although some procedural differences arise from the subsidiary applicability of national criminal law.

93. Thus, the PCA may: question legal representatives of undertakings or associations of undertakings (directly related to a suspected infringement or not) and ask them to provide documents and information deemed useful; search for, examine, gather, copy and take extracts from written or other documentation at the premises of undertakings or associations of undertakings involved (with a warrant from the legal authorities); to seal premises of undertakings under certain circumstances; and to require the cooperation of any other public administration services, including criminal police bodies.⁶¹

94. Requests for information from undertakings, associations of undertakings or any other persons or bodies must include the following information: (i) legal basis and purpose; (ii) deadline for reply; (iii) applicable penalties for non-compliance; and (iv) instructions to identify confidential information (duly justified) and to provide non-confidential version. The default deadline for replies to requests for information from the PCA is thirty days.⁶²

95. It should be noted that these powers apply not only within the scope of the competencies to sanction anticompetitive behaviours, but also to supervise the markets, reason for which the PCA can – and does occasionally – request information from undertakings outside any specific infringement proceeding. As an example, it has for some time continuously monitored the fuel market, on the basis of periodical reporting obligations imposed on the undertakings in that sector.

60. Article 36 of the Competition Law.

61. Article 17 of the Competition Law.

62. Article 18 of the Competition Law.

6.1.2. Proceedings

96. Proceedings relating to infringements of Articles 4, 6 and 7 of the Competition Law, as well as of Articles 101 and 102 TFEU, are governed by Articles 22 to 29 of the Competition Law and, subsidiarily, by the general regime for misdemeanour offences (which is, in turn, complemented by the Criminal Procedure Code).⁶³ This means *inter alia* that these proceedings are subject to the principle of the adversarial system and other such general principles.⁶⁴

97. Notifications of undertakings may be carried out personally (if necessary, with police assistance) or by registered letter with proof of delivery. In the latter case, the letter must be sent to the head office of the undertaking in Portugal (or abroad, when no office exists in Portugal), to the legal representative or to the place of business of its legal agent, appointed for that purpose. If the notification cannot be carried out in these terms, it is deemed to have been carried out on the third (national) or seventh (international) working day after dispatch of the registered letter.⁶⁵

98. The PCA is obliged to open an inquiry whenever it ‘becomes aware, from whatever source, of possible practices prohibited by Articles 4, 6 and 7’ (and, by logical imperative, also of Articles 101 and 102 TFEU).⁶⁶ In practice, complaints from individuals and undertakings are frequently presented to the Competition Authority, which is careful to meet its obligation to follow-up and reply to complainants. Several, if not most, of the restrictive practices cases seem to have been spurred by complaints.

99. To assist the Competition Authority in its supervisory duties, direct and indirect or independent administrative services of the State are under an obligation to inform the Authority if they become aware of such possible practices.⁶⁷

100. After completing an inquiry, the PCA must decide to initiate proceedings, by notifying the undertakings or associations of undertakings in question, if it finds ‘that there is sufficient evidence of infringement of the competition rules’.⁶⁸ The rights of complainants are protected by requiring the Authority to consult with them before closing an inquiry without opening infringement proceedings.⁶⁹ It is unclear, however, to what extent a decision of the PCA not to open infringement proceedings may effectively be challenged before the courts. While a complainant may find it easy to show standing, the discretionary margin for the PCA’s assessment should make it difficult to reverse such a decision (in parallel to the control of similar decisions of the European Commission by the General Court).

101. The notification of a Statement of Objections to the undertakings concerned sets a ‘reasonable period’ for the accused to comment in writing on the suspected infringements, and possibly to request further inquiries for evidence taking.⁷⁰ Such requests may only be rejected when the additional evidence would clearly be irrelevant or merely dilatory, and the Authority may of its own initiative promote further evidence gathering, as long as the principle of the adversarial system is abided by.⁷¹ The presentation of comments in writing may be replaced, upon request within five days of the notification, by an oral hearing, which must take place before the expiry of the deadline previously set for the comments in written form.⁷²

102. The members of the Board of the PCA and all its employees are ‘bound to secrecy with respect to the facts that come to their knowledge in the exercise of their duties and

63. Article 22 of the Competition Law.

64. Article 19 of the Competition Law.

65. Article 23 of the Competition Law.

66. Article 24(1) of the Competition Law.

67. Article 24(2) of the Competition Law.

68. Article 25(1) of the Competition Law.

69. Article 25(2) of the Competition Law.

70. Article 26(1) of the Competition Law.

71. Article 26(3) and (4) of the Competition Law.

72. Article 26(2) of the Competition Law.

may not be revealed', under the general terms of the law.⁷³ Any evidence gathered must be kept confidential to the extent that this is necessary to safeguard the legitimate interests of the undertakings in question.⁷⁴

6.1.3. Types of Decisions

103. The PCA has been empowered, during the investigation or evidence-taking phase, to order any interim measures deemed necessary to immediately re-establish effective competition or to preserve the usefulness of a potential final decision, as long as 'the investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third party interests'.⁷⁵ In principle, such measures should not remain in force for longer than 90 working days, but extensions may be imposed 'for sound reasons'.⁷⁶ Provisional measures were decreed in January 2009 against ZON Multimedia (see Press Release 1/2009, of January 6). No further information is publicly available regarding this specific procedure.

104. The adoption of interim measures is generally preceded by a hearing of the targeted undertakings, 'unless such action shall put the objective or effectiveness of the [interim measures] at serious risk', and if this arises in a market subject to Sectoral regulation, the Sectoral regulator should also, in principle, be given an opportunity to express its opinion (within five working days).⁷⁷

105. Upon completion of the evidence gathering phase, the restrictive practices department presents a report to the Board of the PCA, which, on the basis of those recommendations, should then adopt a final decision: (i) ordering that no further action be taken; (ii) declaring an infringement of the Competition Law and ordering corrective measures; (iii) applying fines or other penalties provided in the Competition Law; or (iv) grant an individual exemption to an agreement. If the practice occurs in a market under specific regulation, and except for the first type, the proposed decision should be previously notified to the Sectoral regulator, that may deliver its opinion⁷⁸

106. The Competition Law does not explicitly provide for the adoption of commitment decisions. However, it has become a practice of the PCA to close proceedings without a finding of infringement after accepting commitments from undertakings, although it is not entirely clear the legal basis under which such commitments are made binding. So far, the following cases have been closed after the acceptance of commitments: (i) *Unicer* (Case Nr. 01/03); (ii) *Unibetão* (Case Nr. 01/06); (iii) *Bayer CropScience* (Case Nr. 10/06)⁷⁹; and (iv) *Sugalidal*.⁸⁰ For the first two cases, no details were made public on the nature of these commitments or of the suspected infringements that led to them.

6.2. Fines and Other Sanctions

107. The Portuguese Competition Authority is empowered to impose fines, periodical penalty payments and additional penalties, both for infringements of national and European Competition Law.

73. Article 36 of the PCA Statutes.

74. Article 26(5) of the Competition Law.

75. Article 27(1) of the Competition Law.

76. Article 27(2) of the Competition Law.

77. Article 27(3) to (5) of the Competition Law.

78. Article 28 of the Competition Law.

79. Press release available at: <www.concorrencia.pt/download/comunicado2007_16.pdf>.

80. Press release available at: <www.concorrencia.pt/download/comunicado2009_20.pdf>.

108. Just as under Regulation (EC) Nr. 1/2003, fines of up to 10% of the previous year's turnover for each of the participating undertakings (or 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour) may be imposed for restrictive practices (illegal agreements, concerted practices, decisions of associations of undertakings, abuses of dominant position and abuses of economic dependence), for disregarding a decision of the PCA ordering preventive measures, and for the unlawful execution of concentrations before notification or before obtaining an approval decision.⁸¹

109. Also similarly to the powers of the European Commission, the PCA may impose fines of up to 1% of the previous year's turnover for each of the undertakings for: (i) failure to comply with the duty to notify a concentration; (ii) failure to supply or the supply of false, inaccurate or incomplete information in response to an official request from the PCA; and (iii) failure to cooperate with the PCA or obstruction of the exercise of its powers of investigation and inspection.⁸²

110. The criteria used for the determination of fines are generally described in article 44 of the Competition Law. However, unlike the Commission and the ECJ case law, in Portugal, because there are no published guidelines for the setting of fines, and the decisions on restrictive practices are not published, it becomes virtually impossible to identify precisely the methodology followed by the PCA. In any case, the Competition Law requires that the setting of fines take into account the:

- (a) Seriousness of the infringement for the maintenance of effective competition in the Portuguese market;
- (b) Advantages enjoyed by the defendant as a result of the infringement;
- (c) Repeated or occasional nature of the infringement;
- (d) Extent of participation in the infringement;
- (e) Cooperation with the Authority, until the close of the administrative proceedings;
- (f) Offender's behaviour in eliminating the prohibited practices and repairing the damage caused to the competition.⁸³

111. In at least one case, the Competition Authority considered the potential effect on trade between Member States as an aggravating factor.⁸⁴ Under this understanding, whenever EU Competition Law is applicable to restrictive practices identified by the PCA, this in itself justifies an increase in the fine.

112. The highest fine ever imposed by the PCA was EUR 53 million, in the *Portugal Telecom (broadband internet)* case.⁸⁵ Previously, the highest fine had been EUR 38 million, in the *PT Comunicações (Ducts)* case, also concerning an abuse of a dominant position, although this latter fine was annulled by the Lisbon Commercial Court. The decision has been appealed by the Competition Authority. Fines for cartels and other unlawful agreements have ranged from EUR 180,000 to EUR 15.8 million (adding the individual fines of participating undertakings). Fines for decisions of associations of undertakings have ranged from EUR 76,000 to EUR 250,000.

113. Fines may also be imposed on individuals, including on the undertakings directors, 'when they know or should know of the infringement yet fail to take the appropriate measures to terminate it immediately, unless a more serious penalty is applicable in pursuance of another legal provision'.⁸⁶ There has already been one precedent of fines imposed on directors. In the *mass catering* case⁸⁷ (which was also the first and only use so far of the Leniency Act), in addition to the fines imposed on the undertakings themselves, five administrators and managers of the participating undertakings were fined a total of EUR 20,000.

81. Article 43(1) and (2) of the Competition Law.

82. Article 43(3) of the Competition Law.

83. Article 44 of the Competition Law.

84. See <www.concorrenca.pt/download/comunicado2009_16.pdf>, at 3.

85. Press release available at: <www.concorrenca.pt/download/comunicado2009_16.pdf>.

86. Article 47(3) of the Competition Law.

87. See press release at: <www.concorrenca.pt/download/pressrelease2009_24.pdf>.

114. The Competition Law awards the PCA the right to impose periodic penalty payments of up to 5% of the average daily turnover in the preceding year of the undertaking in question, for each day of delay in compliance with a decision of the Authority imposing a penalty, ordering certain measures, or following a failure to notify a concentration upon initiation of own-initiative proceedings, or failure to supply information or supplying misleading information in a merger notification procedure.⁸⁸ In the *OTOC* case (see below), in addition to the fine, a periodic penalty payment of EUR 500 per day was imposed to ensure compliance with the decision.⁸⁹ In the *PT Comunicações (ducts)* case, the maximum daily periodic penalty payment was imposed.⁹⁰

115. Finally, the PCA has also been given the power to impose additional penalties (in parallel with the fine), specifically: (i) ordering the publication of its decision in the official journal (*Diário da República*) and in a newspaper with a circulation corresponding to the geographic scope of the relevant market; and (ii) ordering the ‘suspension of the right to participate in procurement procedures relating to works, concessions of public works and public services, rental or acquisition of goods and services, as well as procedures aimed at awarding licenses or authorizations’, for a maximum period of two years, when such procedures were at the origin of the infringement.⁹¹

116. The PCA has not been given the power (unlike the European Commission) to impose structural remedies.

117. Proceedings aimed at the enforcement of sanctions are subject to status of limitations of five years, except for those leading to fines of up to 1% of the undertakings’ previous year’s turnover, in which case a deadline of three years applies. Sanctions themselves are subject to a period of limitation of five, ‘from the date on which the decision determining its application becomes final or *res judicata*’. The period of limitation is suspended or interrupted in accordance with the terms of the general regime for administrative offences.⁹²

The courts have repeatedly confirmed that sanctions imposed by the PCA are analogous to criminal sanctions. Indeed, the Competition Law itself refers to the general regime for administrative offences as subsidiary law, and this in turn refers to the Criminal Code for any matters not specifically regulated therein.

6.3. PCA Enforcement Precedents

6.3.1. Restrictive Practices

118. There have been relatively few decisions of the PCA finding restrictive practices ever since its creation in 2003. Furthermore, none of these decisions have been made public – even in non-confidential versions.

119. Infringements of Article 4 of the Competition Law, and occasionally also Article 101 TFEU, have been identified in the following cases (notwithstanding subsequent annulments in some):⁹³

- (i) *Centro Hospitalar de Coimbra* (Case Nr. 06/03): five companies were fined a total of EUR 3.3 million for bid rigging relating to a pharmaceutical product;

88. Article 46 of the Competition Law.

89. See press release available at: <www.concorrenca.pt/download/comunicado2010_06.pdf>.

90. See judgment of the Lisbon Commercial Court of 2 Mar. 2010, 1.

91. Article 45 of the Competition Law.

92. Article 48 of the Competition Law

93. A table with further details on these cases, as well as on those that were filed without a finding of infringement, may be consulted at: <www.concorrenca.pt/proc_dec/prc.asp>. It should, however, be noted that this table is not exhaustive (compare, e.g., cases mentioned in the 2008 Annual report, available at: <www.concorrenca.pt/download/Adc_Relatorio_actividades2008.pdf>, at 16) and it is not kept strictly up to date.

- (ii) *Cerealís et al.* (Case Nr. 06/04): Ten companies were fined a total of EUR 9.6 million for a cartel in the bread making industry;
- (iii) *Veterinarians Association* (Case Nr. 28/04), *Dentists Association* (Case Nr. 29/04) and *Doctors Association*: these Professional Associations were fined, respectively, EUR 76,000, EUR 160,000 and EUR 250,000 for setting minimum prices (and in the latter case also maximum prices) for the performance of certain services;
- (iv) *Complementary diagnostic means* (Case Nr. 04/05): five companies were fined a total of EUR 15.8 million for bid rigging – just as in Case Nr. 06/03, a public tender promoted by a hospital was at stake. This decision was subsequently readopted, addressing only four companies, with a total fine of EUR 13.4 million;
- (v) *SIC/PT/TV Cabo* case: two companies were fined a total of EUR 3 million for a partnership agreement relating to cable television services containing certain anticompetitive clauses;
- (vi) *Agepor* (Case Nr. 07/04): a fine of EUR 195,000 was imposed on an association of navigation agents for unlawful setting of maximum prices for the provision of certain services;
- (vii) *Nestlé Portugal* (Case Nr. 31/04): a fine of EUR 1 million was imposed for unlawful competitive restrictions in agreements relating to the supply of coffee to hotels, restaurants and coffee shops;
- (viii) *Vatel et al.* (Case Nr. 21/05): four undertakings were fined a total of EUR 911,000 for an eight year long market sharing and price fixing cartel;
- (ix) *Aeronorte* (Case Nr. 20/05): two undertakings were fined a total of EUR 308,000 for bid rigging relating to a tender for purchase of airborne firefighting means; and
- (x) *Rebonave* (Case Nr. 06/06): three undertakings were fined a total of EUR 185,000 for a price fixing and market sharing cartel relating to towing services in the Setúbal harbor;
- (xi) *Mass catering*:⁹⁴ five undertakings were fined a total of EUR 14.7 million for a bid rigging and market sharing agreement in the market for provision of meals and management services for cafeterias and restaurants;
- (xii) *OTOC*: the Chamber of Certified Accountants was fined EUR 229,000 for a decision that unjustifiably restricted the market for mandatory training services to certified accountants (as well as for an abuse of a dominant position).

120. Although a few more alleged infringements of Article 6 of the Competition Law and Article 102 TFEU have been investigated, only four have led to an infringement decision.

121. On 2 August 2007, following complaints by cable Tv (and potential triple-play) competitors, the PCA found that Portugal Telecom had abused its dominant position by refusing to grant access to its underground ducts, thereby preventing competitors from developing their own networks (essential facilities case). A fine of EUR 38 million was applied.⁹⁵ However, on appeal, the Lisbon Commercial Court considered that the PCA had failed to prove the nature of essential facility of the network in question, or to demonstrate the unjustified refusal of access, and consequently revoked the decision.⁹⁶ An appeal is now pending in this case before the Lisbon Court of Appeals, and the PCA has suggested that a preliminary ruling be requested from the ECJ.⁹⁷

122. On 1 September 2008, Portugal Telecom was found to have abused its dominant position on wholesale market for circuit leasing. The Competition Authority concluded that PT had been operating a tariff and discount system for circuit leasing, between

94. See press release at: <www.concorrencia.pt/download/pressrelease2009_24.pdf>.

95. Press release available at: <www.concorrencia.pt/download/comunicado2007_13.pdf>.

96. Judgment of the Lisbon Commercial Court of 2 Mar. 2010.

97. Press release available at: <www.concorrencia.pt/download/comunicado2010_03.pdf>.

March 2003 and March 2004, which favoured intra-group undertakings to the detriment of competitors. A fine of EUR 2.1 million was imposed.⁹⁸

123. On 2 September 2009, Portugal Telecom (and ZON, which, at the time, belonged to the same single economic unit) was again found guilty of an abuse of dominant position, this time for margin squeeze, discriminatory practices and stifling of capacity and technological development on the wholesale and retail broadband internet markets.⁹⁹ A total fine of EUR 53 million was imposed.

124. On 18 May 2010, the PCA found that the Chamber of Certified Accountants had abused its dominant position (together with an unlawful decision of an association of undertakings), granted to it by its powers to regulate the activity, by restricting access of competitors to the provision of services it provides itself. A fine of EUR 229,000 was imposed.¹⁰⁰

6.3.2. Merger Control

125. The PCA's practice in merger control differs drastically from the one concerning restrictive practices, both in number of decisions and in the transparency of the proceedings.

126. Over 450 concentrations have been analysed by the Competition Authority ever since its creation in 2003, and the decisions are publicly available in a searchable database on the PCA's website.¹⁰¹ This extensive decision-making practice provides a significant level of legal certainty as to the expectable approach of the Competition Authority on most merger control issues.

6.4. Judicial review of PCA decisions

127. The judicial review of decisions adopted by the PCA is governed by the Competition Law, the Statutes of the PCA and, subsidiarily, the general regime for misdemeanour offences or, in the case of administrative procedures not leading to the imposition of fines or sanctions, by the Administrative Courts Procedural Code.¹⁰²

128. Decisions of the PCA applying fines or other sanctions are subject to appeal (with suspensive effect) to the Commercial Court of Lisbon and, arguably, in the near future, to the Specialized Court that is being proposed by the Government. This is a major change since the Judiciary Reform of 2008 adopted the view that, for the future, the competent Commercial Panel would be that of the undertaking's respective jurisdiction, or to the Commercial Panel existing in that jurisdiction's district, or, if none exists within the district, to the Lisbon Commercial Court. It should be noted that all appeals were centralized in the Commercial Court of Lisbon until Law Nr. 52/2008, of 22 August.¹⁰³

129. Other decisions of the PCA (e.g., procedural decisions and administrative acts) are subject to appeal to the same courts, but do not, as a rule, suspend the effects of the acts in question.¹⁰⁴

98. Press release available at: <www.concorrenca.pt/download/pressrelease2008_15.pdf>.

99. Press release available at: <www.concorrenca.pt/download/comunicado2009_16.pdf>.

100. Press release available at: <www.concorrenca.pt/download/comunicado2010_06.pdf>.

101. Available at: <www.concorrenca.pt/bdoc/concluidos.aspx>.

102. Article 49 and 53 of the Competition Law. Article 38 of the PCA Statutes has been partially derogated by the amendments introduced in the Competition Law by Law Nr. 52/2008, of 22 August.

103. Article 50(1) and (2) of the Competition Law. Law Nr. 52/2008 was only implemented, so far, in three specific districts: Alentejo Litoral, Baixo-Vouga and Greater Lisbon Northeast. Law Nr. 33-B/2010 postponed the full entry into force of Law Nr. 52/2008 Judiciary Structure and determined that the process should be completed in 1 Sep. 2014.

104. Article 50(3) and 54 of the Competition Law.

130. Generally, such judicial reviews are subject to appeal only to the level of the Courts of Appeal (i.e., one level of appeal).¹⁰⁵ Thus, the Supreme Court will seldom be called to rule on issues relating to decisions adopted by the PCA. The same is not true regarding appeals against a PCA administrative decision, which can actually be appealed directly to the Supreme Court if they refer exclusively to matters of law.¹⁰⁶

131. The PCA cooperates in such court proceedings with the Public Prosecution Service (*Ministério Público*), as described in Article 51 of the Competition Law, but has an independent right of appeal.¹⁰⁷

132. The decision of the Minister of Economy on an appeal relating to an interdiction of a concentration is subject to judicial review, under the same terms as above.¹⁰⁸

133. There have been at least fourteen appeals of decisions of the PCA, all of them to Lisbon Commercial Court, to which in several cases followed an appeal to the Lisbon Court of Appeals. A list of these court proceedings and a description of their outcome is available at <www.concorrenca.pt/decisoaes_judiciais/default.asp>.

134. The Constitutional Court has at least been called four times to address issues relating to the Competition Law, but it has not identified any infringement of the Constitution.¹⁰⁹

6.5. Private Enforcement

135. Private enforcement of Competition Law in Portugal must still be described as an exceptional occurrence. There is, so far, no centralized database of National Court proceedings where issues of Competition Law are raised. The creation of such a database has been one of the suggestions put forward for the revision of the Competition Law.

136. Two first instance cases, both from 2005, have been communicated to the database of national judgments created by the European Commission,¹¹⁰ concerning distribution agreements. Ironically, in both these cases, the courts decided against the applicability of EU Competition Law, even though nationwide markets were at stake.

137. The Oporto Court of Appeals annulled an exclusive agreement for purchase of milk, on the basis of a violation of Article 4 of the Competition Law.¹¹¹ On the other hand, it found that there was no infringement of that provision in an agreement concerning the purchase of coffee that also contained an exclusivity clause, given its specific circumstances.¹¹² In an earlier case, it refused to apply the competition rules on uncertain grounds, but apparently arguing the (highly questionable) absence of an economic activity in that case (which dealt with services provided by a gym).¹¹³

138. There have been at least two cases concerning the enforcement of Competition Law to the broadcasting of football games and respective rights, one of which was appealed to the Supreme Court.¹¹⁴

105. Article 52 of the Competition Law.

106. Article 55 of the Competition Law.

107. Article 51 of the Competition Law.

108. Article 54(1) of the Competition Law. *See also* Article 38(2) of the PCA Statutes.

109. Judgment Nr. 593/2008 in Case Nr. 397/08 and Judgment Nr. 596/2008 in Case Nr. 1170/07, both decided in 10 Dec. 2008 by the 2nd section of the Constitutional Court; Judgment Nr. 203/2009 in Case Nr. 529/07, of 29th Apr. 2009 (1st section); and Judgment Nr. 632/2009 in Case Nr. 103/08 (1st section), of 3 Dec. 2009.

110. Available at: <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms_code=prt>.

111. Judgment of the Porto Court of Appeals of 3 Nov. 2009.

112. Judgment of the Porto Court of Appeals of 12 Apr. 2010.

113. Judgment of the Porto Court of Appeals of 9 May 2007.

114. *See* Judgment of the Lisbon Court of Appeals of 2 Nov. 2000; and Judgment of the Lisbon Court of Appeals of 10 Nov. 2009, followed by the Judgment of the Supreme Court of 29 Apr. 2010.

139. The Supreme Court of Justice has also been called to assess claims of abuse of a dominant position in a case concerning a contract for the supply of certain business information services.¹¹⁵

7. Leniency Policy

140. The Portuguese leniency regime for Competition Law infringements is set out in the Leniency Act (Law Nr. 39/2006, of 25 August) and Leniency Regulation (Regulation Nr. 214/2006, of 22 November). It is applicable to cartels prohibited by Article 101 TFEU and/or by Article 4 of the Competition Law. It was modeled on the EU leniency regime, in the context of the effort of harmonizing EU Competition Law enforcement.

141. Its subjective scope is wider than the EU's leniency regime: since the Competition Law allows for the fining of undertakings' executives (members of the board of directors), the leniency programme has also been extended to them.¹¹⁶ The only enforcement of this regime, so far, arose precisely from an application by an undertaking's executive, who was granted immunity.¹¹⁷

142. The number of beneficiaries and the types and timing of available reductions of fines also vary somewhat from the EU regime:

- (a) Before an investigation has been opened into the practice in question:
 - (i) Immunity to the first undertaking/executive to make a valid application (and meets the remaining requirements);¹¹⁸
- (b) After an investigation has been opened, but before the undertakings in question have been notified thereof:
 - (i) Reduction of at least 50% to the first undertaking/executive;¹¹⁹
 - (ii) Reduction of up to 50% to the second undertaking/executive.¹²⁰
- (c) After an investigation has been opened:
 - (i) Special or additional reduction of the fine for one infringement to the first undertaking/executive to denounce additional collective infringements.¹²¹

143. In what concerns qualification requirements, the Leniency Act focuses on evidence allowing for the 'confirmation of the existence' of an infringement (rather than for carrying out a targeted inspection).

8. Special Sectors

144. Whenever the PCA acts in an area covered also by Sectoral regulation, the Competition Law envisages particular forms of cooperation, without prejudice to the legal powers conferred to the Competition Authority to ensure the effectiveness of the Competition Law.

145. Specifically, upon becoming aware of a potential competition infringement in a regulated sector (e.g., telecommunications, electricity, water, financial services, etc.) the PCA should inform and consult the relevant regulatory authority. On the other hand,

115. Judgment of the Supreme Court of 24 Apr. 2002.

116. Article 8 of the Leniency Act.

117. See Press Release Nr. 24/2009 ('CA imposes fines on five mass catering undertakings'), available at: <www.concorrencia.pt/download/pressrelease2009_24.pdf>.

118. Article 4 of the Leniency Act.

119. Article 5 of the Leniency Act.

120. Article 6 of the Leniency Act.

121. Article 7 of the Leniency Act.

if a Sectoral regulatory authority becomes aware of such a potential infringement, it should inform the PCA, and it should not adopt a decision on competition-related matters without having previously consulted the PCA.¹²² The Competition Authority may decide to proceed the case on its own, thus precluding the Sectoral Regulator competence in the specific matter. However, no decision may be delivered without giving the Sectoral Regulator the opportunity to express its views.

146. Similar cooperation requirements apply to mergers.¹²³ In at least one case, the PCA has prohibited a merger, not because of competition policy considerations, but based on the recommendations of the Sectoral regulator. In the *Ongoing/Prisa/MediaCapital* case (Case Nr. 41/2009), the concentration was blocked on the grounds that the Regulatory Authority for the Media concluded that the operation in question would jeopardize plurality in the media. Interestingly, and unlike it happens in any other area, the Opinion of the Media Regulator (*Entidade Reguladora para a Comunicação Social*, ERC) is binding upon the PCA, when it is delivered on the grounds of protection pluralism in the media (see Law Nr. 18/2003 and Article 4(2) of Law Nr. 32/2003, of 22 August (Television Act)).¹²⁴

147. Aside from the awarding of legal force to European Sectoral block exemptions, in cases of exclusive application of the Competition Law,¹²⁵ and excluding *ex ante* regulation by Sectoral regulators, there are no national provisions regulating competition in specific sectors.

148. The PCA has devoted special attention to some sectors of the economy, leading to general studies on the state of competition, namely, in the postal sector,¹²⁶ waters, fuel and gas sectors,¹²⁷ wholesale energy provision,¹²⁸ and on the markets for gyms and health clubs.¹²⁹

9. Future Developments

149. A review of the Competition Law is currently underway, and a draft bill has apparently been presented to the Government, but it has not been made public. It is expected that the Government will submit the proposed amendments to public consultation, once it is satisfied that they are ready for that stage.

150. In this regard, the Portuguese Association of Competition Lawyers (Círculo dos Advogados Portugueses de Concorrência) has put forward several proposals for improvement, which may be obtained, upon request, from info@capdc.pt.

151. The Government has recently announced its intention to create a court specialized in matters of competition, regulation and financial supervision, including Competition Law, which would be based in Santarém and, presumably, would centralize all cases relating to the judicial review of decisions adopted by the PCA. The proposed bill (Nr. 32/XI) is still pending before the Parliament.

122. Articles 15 and 29 of the Competition Law.

123. Article 39 of the Competition Law.

124. Kept transitorily in force by Article 98(2) of Law Nr. 27/2007, of 30 July (new Television Act).

125. Article 5(3) of the Competition Law.

126. See press release available at: www.concorrenca.pt/download/comunicado2010_08.pdf.

127. See, e.g., www.concorrenca.pt/download/comunicado2009_06.pdf and www.concorrenca.pt/Conteudo.asp?ID=1761.

128. See www.concorrenca.pt/Conteudo.asp?ID=1670.

129. See press release available at: www.concorrenca.pt/download/comunicado2009_03.pdf.

10. Conclusion

152. Portuguese Competition Law is inspired in and closely follows EU Competition Law. While several differences have been identified, the general orientation of the Portuguese Competition Authority to adhere to the interpretations adopted by the European Commission and, mainly, the ECJ, limits, as far as legally possible, the impact of such differences. The ongoing process of revising the Competition Law is expected to contribute to a further degree of harmonization with European law.

153. While there is an extensive and fairly detailed decision-making practice of the PCA in the field of merger control, there have been few decisions relating to restrictive practices, and these are not published, making the enforcement of Articles 101 and 102, and their national equivalents, by the PCA less transparent and accessible.

154. A significant divergence of Portuguese Competition Law from the options retained at EU level continues to be the interdiction of abuse of economic dependence and the continued existence (although never enforced, since the creation of the PCA) of a law on individual practices restricting trade. The latter, in particular, does not seem to square with the evolution of competition policy and the contemporary approach to public regulation of market behaviour.