COMPETITION LAW IN WESTERN EUROPE AND THE USA

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This section is up-to-date as at December 2013

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P/C

1. Introduction and Sources of Portuguese Competition Law

1. The Portuguese Competition legislation has undertaken a significant change during 2012, with the approval of a new competition act – Law 19/2012, of 8 May, the so-called *Regime Jurídico da Concorrência* ('Competition legal regimen', hereinafter '2012 Competition Act'), replacing Law 18/2003, of 11 June (hereinafter, "2003 Competition Act"), and the leniency regimen established by Law 39/2006, of 25 August. The 2012 Competition Act entered into force in 7 July 2012 and it was followed by the adoption of a number of Guidelines.

2. Reference should be made to the pre-legislative procedure circumstances and procedure, quite different than the one followed in the reform that led to the 2003 competition law (Law 18/2003). At the time, the Portuguese Government appointed a three-person committee[1] to draft the new Competition Act (which, in turn, replaced Decree-Law 371/93, of 29 October, the "1993 Competition Act") and to prepare the creation of a Competition Authority (the current *Autoridade da Concorrência*, hereinafter, 'PCA' or 'Competition Authority'). This legislation was passed without a public consultation. However, this time, the Government based its efforts on draft proposals prepared by the PCA itself, submitted the draft government proposal to a public consultation procedure and, immediately after, to a working group appointed by the Minister for Economy and Employment.[2]- [3]Another distinctive feature was the fact that the new legislation was highly influenced by terms of the economic and financial assistance programme to Portugal – the so-called *Memorandum of Understanding* between the Portuguese Government and the international institutions involved, e.g., the IMF, the European Commission and the European Central Bank.

3. In fact, both the *Portugal – Memorandum of Economic and Financial Policies* (MEFP, §40)[4] and the *Portugal – Memorandum of Understanding on Specific Economic Policy Conditionality*, adopted on 17 May 2011 (hereinafter, the *MoU*) and executed under Decision 2011/344/EU imposed the approval of a new competition law as one of the conditions to the EUR 78*bis* loan to the Portuguese Republic. With this goal in mind, it set basic guidelines for the would be 2012 Competition Act.[5] In our view, this

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1. This commission was presided by the now ECJ judge Prof. José Luís da Cruz Vilaça, Mrs. Isabel Oliveira Vaz and Miguel Gorjão-Henriques.
2. Created with the purpose of evaluating the draft proposal under public consultation procedure from 4 Nov. 2011 until 5 Dec. 2011 (available at: http://www.portugal.gov.pt/pt/GC19/ConsultaPublica/ConsultasEmCurso/Pages/ConsultasEmCurso.aspx), and presided by Marta Neves (Head of the Cabinet of H.E. the Minister), Eduardo Lopes Rodrigues (Cabinet of the Minister for Economy and Employment), Margarida Rosado da Fonseca (Esame – Portuguese Government, currently Head of the Merger Department at the Competition Authority), Manuel Sebastião (the then President of the Board of the AdC), António Ferreira Gomes (since October 2013 President of the Board of the AdC), Mariana Tavares (PCA), Carlos Botelho Moniz (then President of the *Círculo dos Advogados Portugueses de Direito da Concorrência*) and Miguel Gorjão – Henriques (President of the *International Chamber of Commerce Portugal Competition Commission* and partner at Sérvulo & Associados).
3. Then, the proposal was approved by the Council of Ministers of the XIX Constitutional Government on 26 Jan. 2012 and submitted to the Parliament on 7 Feb. 2012, where it was finally approved by the Parliament (*Assembleia da República*) on 22 Mar. 2012, promulgated by the President of the Republic on 27 Apr. 2012 and published, as previously said, on 8 May 2012.
4. See http://www.portugal.gov.pt/pt/GC19/Documentos/PCM/MEFP_20110517.pdf.
5. Under the MEFP, the government assumed the commitment that it would '*(i) submit to Parliament a law revising the Competition Law, clearly separating rules on competition enforcement procedures and penal procedures, and (ii) establish a new Court on Competition Matters and introduce greater specialization of*

pre-condition was surprising, given the broad consensus in the Portuguese literature that the 2003 Competition Act was well structured and substantially correct and that the existing problems were mostly at the level of enforcement, as the international recognition of the Competition Authority confirmed. Indeed, the 2003 Competition Act and the creation of the PCA – through Decree-Law 10/2003, of 18 January – represented a significant qualitative step in the evolution of the competition law and competition culture in Portugal, despite the procedural shortcomings it faced in the Court*s* (which already may have justified some particular changes to the 2003 Competition Act). Also, the 2003 Competition Act included a clause allowing for changes that may emerge from changes at EU level (Article 61), like the changes in the merger control legislation that occurred in 2004 with Regulation (EC) 139/2004. It is also worth noting that some of the major modifications introduced with the 2012 Competition Act may raise significant impediments to an effective public enforcement in the future.

4. As said, the basic legal framework for competition rules are now concentrated in the 2012 Competition Act, but reference should also be made to the Statutes of the Competition Authority, adopted by Decree-Law 10/2003, of 18 January (PCA Statutes). A new version of PCA Statutes was to be approved in 2013, as foreseen in the new Framework-Law of Administrative Independent Authorities with regulatory powers (article 3 of Law 67/2013, of 28 August – *Lei-quadro das entidades administrativas independentes com funções de regulação da actividade económica dos setores privado, público e cooperativo*, hereinafter *Framework Law for Regulatory Agencies*).

5. Between December 2012 and February 2013, the PCA, in the use of its regulatory powers and under the new Competition Act, launched several public consultations that led to the adoption of a series of guidelines and orientations. These guidelines regard the issues of: (1) Leniency[6] (Regulation 1/2013, of 29 November 2012), (2) the Competition Policy Priorities for 2013 (adopted on 24 December 2012),[7] (3) the Guidelines regarding the calculation of fines (adopted on 26 December 2012),[8] (4) the

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judicial functions (structural benchmark)'. According to the MoU, under '*Competition, public procurement and business environment*', the '*Objectives'* were defined as the ones that would *'*[e]*nsure a level playing field and minimise rent-seeking behaviour by strengthening competition and sectoral regulators; (. . .); reduce administrative burdens on companies; (. . .).', in particular considering the following points: Competition and sectoral regulators*

(. . .)

Take measures to improve the speed and effectiveness of competition rules' enforcement. In particular:

i. *Establish a specialised court in the context of the reforms of the judicial system [Q1-2012].*

ii. *Propose a revision of the competition law, making it as autonomous as possible from the Administrative Law and the Penal Procedural Law and more harmonized with the European Union competition legal framework, in particular: [Q4-2011]:*

- *simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensure effective enforcement of competition law;*
- *rationalize the conditions that determine the opening of investigations, allowing the competition authority to make an assessment of the relevance of the claims;*
- *establish the necessary procedures for a greater alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the ex ante notification of a concentration operation;*
- *ensure more clarity and legal certainty in the application of Procedural Administrative law in merger control;*
- *evaluate the appeal process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings. (. . .)'*.

6. Approved by the PCA Board (Conselho) on 29 Nov. 2012, it was made public on its website on 4 December and published in the Official Journal of 3 Jan. 2012 (no English version is available yet – See http://www.concorrencia.pt/vPT/Praticas_Proibidas/O_programa_de_clemencia/Documents/Relatorio_NotaInformativa_Clemencia2012.pdf; and http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Regulamento_Clemencia_2013_1.pdf.

7. See http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/PressRelease_AdC_201217.aspx.

8. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201218.aspx.

Guidelines regarding the preliminary evaluation in merger proceedings (adopted on 31 December 2012),[9] and (5) the Guidelines regarding priorities in the use of its sanctioning powers (adopted on 1 February 2013).[10] Furthermore, the PCA has also launched a public consultation concerning (6) Draft Guidelines on the economic analysis of horizontal mergers (on 1 February 2013)[11] and a (7) Preliminary Report on the merger notification forms Regulation (on 6 February 2013),[12] finally approved and published in the Official Journal (*Diário da República*) on 14 February 2013, as Regulation No. 60/2013 of 25 January (DR, II series, nr. 32, of 14 February 2013, pp. 6353–6360).[13]

6. As before, the 2012 Competition Act closely follows European Union (EU) competition law and increases the convergence with the EU legislation. As it happens since the 2003 Competition Law, the PCA enforces competition rules in all areas of economic activity independently of its nature. No area, even when subject to sectoral regulation, is excluded from the 2012 Competition Act.

7. Similarly to Article 106(2) of the Treaty on the Functioning of European Union (hereinafter, TFEU), Article 4(2) of the 2012 Competition Act submits to the competition regimen the undertakings legally entrusted with the management of services of general economic interest or which have the nature of legal monopolies, to the extent that the enforcement of these provisions does not create an obstacle to the fulfilment of their specific mission, either in law or in fact.

8. Several instances of private enforcement continue to be brought before the National Courts, and with success.[14] Although some commentators have sustained that private enforcement actions should have also been submitted to the new Specialised Court (see *infra*), the fact is that the new legislation does not confer and empower this Court with private enforcement actions (be they stand alone or follow on actions) that, accordingly, are to be brought before common courts.

9. It should also be noted that, under Article 7(3) of the 2012 Competition Act, the PCA must publish, in the last trimester of each year, the priorities for the enforcement of competition policy in the following year. Guidelines were for 2013 [15] and 2014[16].

2. Institutions Responsible for Enforcement

2.1. The Portuguese Competition Authority (PCA)

10. The public enforcement of the 2012 Competition Act is entrusted in exclusivity to the PCA (Article 5(1))), created in 2003 to assume the tasks previously awarded to the

9. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201219.aspx.
10. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201305.aspx.
11. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orientacao_para_a_Analise_Economica_de_Operacoes_de_Concentracao_Horizontais.pdf.
12. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Relatorio_Preambular_Formulario_Notificacoes.pdf.
13. Available through the PCA webpage in: http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Regulamento_2013_60_Formularios_de_Notificacao.pdf.
14. For recent examples of private enforcement see the Judgments of the Lisbon Court of Appeals of 8 Apr. 2010 (Case No. 3130/08.7TVLSB.L1-8), of 5 Mar. 2009 (Case No. 686/2009-6) and of the Supreme Court of Justice, dated 20 Jun. 2013, Case no. 178/07.2TVPRT.P1.S1, *Toyota Portugal*.
15. See http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/PressRelease_AdC_201217.aspx.
16. See http://www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/AdC_Prioridades_2014.pdf.

Ministry of Economy's Directorate-General for Trade and Competition and to a Competition Council.

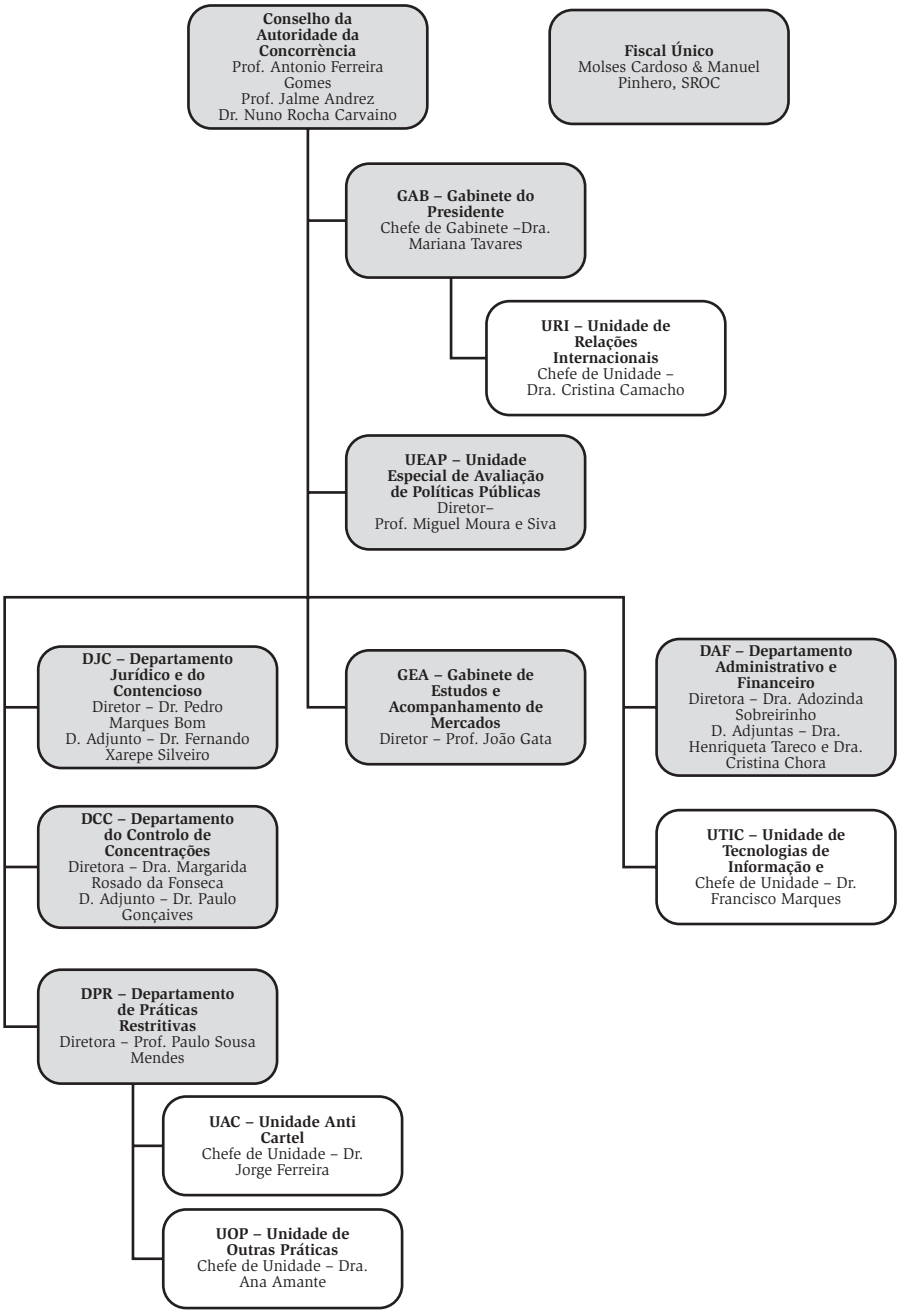
11. The PCA is an independent regulatory authority with financial and administrative autonomy.[17] Its activities are subject to general competition policy guidelines set out by the Government and to limited oversight by the Ministry of Economy, within the limits set by law. Specifically, this Ministry must approve the Competition Authority's plan and budget, its activities reports and annual accounts and certain acts with financial or budgetary implications, together with the Ministry of Finances.[18] The PCA's independence is further ensured by the strict conditions for termination of the Board Members' mandates.[19] The PCA is also accountable before the Parliament, according to Article 6 of the 2012 Competition Act which reinforces the political legitimacy and the accountability of the Board and its members. According to the new Article 6, not only the Parliament must hold an annual general debate on competition policy but also the members of the Board – and not just the Board itself – are to appear before the relevant parliamentary committee 'whenever required to do so' (Article 6(2) of the 2012 Competition Act).

12. The Board (named 'Conselho', i.e., Council) of the PCA is composed of one chairperson and two or four other members. Board members are appointed by the Council of Ministers, upon proposal from the Ministry of Economy, and should be individuals of recognised competence and with experience in relevant fields.[20] On 16 September 2013, the new President of the PCA, Prof. António Ferreira Gomes, and a new Member of the Board, Mr Nuno Rocha de Carvalho, were sworn into office by the Minister of Economy, António Pires de Lima. The third member Prof. Jaime Andrez, continues from the previous Board for a limited period of time.

13. Board members are subject to a strict regimen of incompatibilities and impediments, preventing them, *inter alia*, in the two years following the end of their mandate, from maintaining professional relationships with entities that were the subject of any PCA proceedings during their mandate.[21] For that reason, the PCA Statutes foresaw a compensation regimen, based on the EU law regimen applicable to the European Court of Justice (ECJ).

14. The PCA has currently around eighty persons in its staff.[22] Aside from supporting units, the new organizational structure announced in October 2013 is divided in a Merger Department, a Restrictive Practices Department (under which two special units were created – the Anti-Cartel Unit and the Unit for Other Restrictive Practices), a Legal and Litigation Department and an Economic Research Bureau. Additionally, a Special Unit for the Assessment and Evaluation of the Public Policies was also created. In its webpage (http://www.concorrencia.pt), the PCA's organizational structure is currently presented in this way:[23]

17. Articles 1 and 4 of the PCA Statutes.
18. Articles 4 and 33 of the PCA Statutes.
19. Article 15 of the PCA Statutes.
20. Articles 12 and 13 of the PCA Statutes.
21. Article 14 of the PCA Statutes and Art. 19 of the new Framework-Law For Regulatory Agencies.
22. Data provided to the Parliament by Prof. Manuel Sebastião, on 14 Mar. 2013, and available at http://www.concorrencia.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/2012-03-14_COFAP.pdf.
23. According to the Communication of the new organizational structure, in 7 Oct. 2013 – Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_2013 20.aspx.


Conselho da Autoridade da Concorrência
Prof. Antonio Ferreira Gomes
Prof. Jalme Andrez
Dr. Nuno Rocha Carvaino
Fiscal Único
Molses Cardoso & Manuel Pinhero, SROC
GAB – Gabinete do Presidente
Chefe de Gabinete –Dra. Mariana Tavares
URI – Unidade de Relações Internacionais
Chefe de Unidade – Dra. Cristina Camacho
UEAP – Unidade Especial de Avaliação de Políticas Públicas
Diretor– Prof. Miguel Moura e Siva
DJC – Departamento Jurídico e do Contencioso
Diretor – Dr. Pedro Marques Bom
D. Adjunto – Dr. Fernando Xarepe Silveiro
GEA – Gabinete de Estudos e Acompanhamento de Mercados
Diretor – Prof. João Gata
DAF – Departamento Administrativo e Financeiro
Diretora – Dra. Adozinda Sobreirinho
D. Adjuntas – Dra. Henriqueta Tareco e Dra. Cristina Chora
DCC – Departamento do Controlo de Concentrações
Diretora – Dra. Margarida Rosado da Fonseca
D. Adjunto – Dr. Paulo Gonçaives
UTIC – Unidade de Tecnologias de Informação e
Chefe de Unidade – Dr. Francisco Marques
DPR – Departamento de Práticas Restritivas
Diretora – Prof. Paulo Sousa Mendes
UAC – Unidade Anti Cartel
Chefe de Unidade – Dr. Jorge Ferreira
UOP – Unidade de Outras Práticas
Chefe de Unidade – Dra. Ana Amante

15. According to its Statutes, the PCA is primarily entrusted with the following tasks:[24]

(i) Monitoring compliance with and enforcing the Competition Act.
(ii) Exercising competition-related competencies awarded to national administrative authorities by EU Law, namely by Regulation (EC) nr. 1/2003.
(iii) Encouraging the spread and implementation of practices favouring competition and 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, also, 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.[25]
(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:[26]

(i) Investigate and punish undertakings or associations of undertakings for practices breaching national and or EU Competition Law.
(ii) Adopt interim measures of protection.
(iii) Exercise supervision powers functions:
  (a) Carrying out studies, inquiries, inspections and audits.
  (b) Deciding on administrative proceedings concerning merger operations subject to prior notification.
(iv) Regulatory functions:
  (a) Approving or proposing the adoption of regulations with *erga omnes* effect.
  (b) Issuing general recommendations and directives.
  (c) Proposing and ratifying codes of conduct and manuals of good practice for undertakings or associations of undertakings.

2.2. Sectoral Regulators

17. In 2003 Competition Act and for the first time, the Portuguese legislation addressed the issue of the relationship between the PCA, as the competent authority to ensure the public enforcement of the Competition legislation, and the sectoral regulators. Both under the 2003 and 2012 Competition Acts, special care has been taken in order to ensure coordination with sectoral regulatory authorities and cope with positive and negative conflicts of competence. On one hand, a mutual obligation of cooperation and information is foreseen and proceedings relating to restrictive practices or to mergers in activities subject to sectoral regulation must only be decided by the PCA after

24. Article 6(1) of the PCA Statutes.
25. As an example of such initiatives, the PCA 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*.
26. Article 7 of the PCA Statutes.

consulting the respective regulatory authority.[27] On the other hand, the supremacy of the PCA is acknowledged. Basically, besides the general cooperation clause (Article 5(4)), there are two regimens under the 2012 Competition Act, one applicable to the coordination between both entities in the field of restrictive practices enforcement procedures (Article 35) and other in the merger control procedures (Article 55).

2.3. Other Public Bodies

18. Undertakings, public authorities and other entities are subject to obligations of cooperation with the PCA in the discharge of its duties[28] (PCA Statutes, article 9). Initially, all the PCA decisions were appealed to the Commercial Court of Lisbon. However, since 2008, the legislator intended to move apart from this model to a more decentralized one through the new Law No. 52/2008 on the Judicial Reform. This paradigm shift was not made effective and was subject to profound criticism. Under the *MoU*, the Government agreed to the idea of creating a Specialised Competition Court (the so-called Specialised Court in Competition, Regulation and Supervision – the TCRS), centralising *inter alia* all proceedings relating to the appeals against Competition Authority decisions, as well as other sectoral regulators, such as, *inter alia*, the Stock and Exchange Commission or the Telecommunications Regulator.

19. The TCRS has been installed and is functioning in Santarém, an ancient and wonderful middle size city *circa* 65 km from Lisbon, since 1 April 2012.[29] The TCRS rulings were initially subject to appeal to the territorially competent Court of Appeal ('Tribunal da Relação'), in Évora, a city *circa* 110 km southeast of Lisbon but, since the new judiciary reform, the appeals are to be lodged before the Lisbon Court of Appeal (Article 188(5) of Law 62/2013, of 26 August). Law 62/2013 commanded pending appeals to be transferred to the Lisbon Court of Appeals but the latter has recently denied its competence whenever the pending appeal was already subject to distribution at the Évora Court of Appeal.

20. The TCRS has full jurisdiction to hear appeals against decisions that apply fines (and/or penalties), and has unlimited jurisdiction, being able to reduce, maintain or increase fines (and/or periodic penalty payments) ordered by the PCA.

21. An appeal to the TCRS or even to the Lisbon Court of Appeal does not have suspensive effect over the PCA's decision, except for structural measures imposed therein under Article 29(4) (Article 84(4) of the 2012 Competition Act). In the case of decisions imposing fines or other sanctions, the party affected may request on appeal that the decision has suspensive effect, in case it demonstrates that (i) the implementation of the decision may cause considerable harm, and (ii) offer to pay a guarantee within the time limit set by the Court. No reference is made to the possibility of the TCRS dispensing the presentation of a guarantee, even if there is a failing firm case.

22. Further review by the Supreme Court is excluded, except in appeals in case of administrative proceedings and only whenever matters of law are at stake (Article 93(2)(3) 2012 Competition Act).

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27. Articles 5(4), 34(4) and (6), 35, 55, 61(3) and 62(2) and (3) of the Competition Act. See also Art. 4(4) of Law 2/99, of 13 January, as amended by Art. 95 of the Competition Act.
28. Articles 8 and 9 of the PCA Statutes.
29. Law 46/2011, of 24 June; Decree-Law 67/2012, of 20 March; and Ministerial Order 84/2012, of 29 March.

3. Anti-competitive Agreements, Decisions and Concerted Practices

3.1. Introduction

23. The wording of Articles 9 and 10(1) of the 2012 Competition Act has been rendered nearly identical to Article 101 TFEU.

24. Article 9(1) contains the prohibition and provides that:

> Agreements between undertakings, concerted practices between undertakings and decisions by associations of undertakings, which have as their object or effect the prevention, distortion or restriction of competition, in the whole or in a part, and to a considerable extent, of the national market, are prohibited, in particular those which:
>
> a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> b) limit or control production, markets, technological development or investments;
> c) share markets or sources of supply;
> d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> e) make the conclusion of contracts subject to acceptance by other parties of supplementary 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 (Article 68(3) of the 2012 Competition Act).

3.2. Effects Theory and Concept of Undertaking

26. In accordance with Article 2(2) of the 2012 Competition Act, restrictive practices are prohibited to the extent that they take place 'on Portuguese territory or whenever these practices have or may have an effect there'.

27. The concept of undertaking and the single economic entity doctrine have also been taken on the Article 3 of the 2012 Competition Act, in a wording more adapted to the historical formulation by the ECJ. That being said, the PCA has not yet taken the single economic entity doctrine to its full consequences. Although it 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 refusal of the Lisbon Commercial Court to accept this doctrine – so far, it has been argued that it would correspond to imposing strict liability, which is forbidden by the General Regime of Administrative Offences (which remains applicable subsidiarily).[30] As far as we know, the issue has never been tested on appeal.

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

3.3. Prohibited Practices

28. The 2012 Competition Act purposely revised the rule concerning restrictive practices – Articles 9 and 10(1) – so as to fully harmonize it with Article 101 TFEU.

29. It eliminated the clarifications previously included so that the case law of the ECJ could be taken into account. However, one clarification that remained was the explicit requirement of an 'appreciable' impact, which takes on the *de minimis* doctrine adopted by the ECJ since *Völk v. Vervaecke* (Case No. 5/69).

30. In accordance with Article 9(2) of the 2012 Competition Act – the provision equivalent to Article 101(2) TFEU – practices prohibited by Article 9(1) are automatically 'null and void', unless they are 'justified' under Article 10 (in its turn, equivalent to Article 101(3) TFEU), as described below. As a consequence of being 'null and void', agreements, concerted practices and decisions by associations of undertakings prohibited by Article 9 (and not exempted under Article 10) do not produce any legal effects. If only a certain part of the agreement is prohibited by the 2012 Competition Act, 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, under the Civil Code provisos (Articles 292 and 293).

3.4. Exemption

31. In accordance with Article 10(1) of the 2012 Competition Act, practices prohibited by Article 9(1) are considered justified when they meet the four conditions also provided in Article 101(3) TFEU – the two provisions are identical, and the same system of self-assessment applies. This approach is similar to that resulting from Regulation (EC) 1/2003.

32. Article 10(1) expressly states that:

> Agreements, concerted practices or decisions by associations of undertakings may be considered justified, should they thereby contribute to improving production or distribution of goods or services or to promoting technical or economic progress if cumulatively they:
>
> a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
> b) Allow the users of these goods or services an equitable part of the resulting benefits;
> c) Do not impose on the undertakings concerned any restrictions which are not indispensable to the attainment of these objectives;
> d) Do not afford such undertakings the possibility of eliminating competition from a substantial part of the market for the goods or services at issue.

33. Article 10(2) of the 2012 Competition Act has clarified the distribution of the burden of proof by stressing that it is for the undertakings or associations of undertakings wishing to benefit from an exemption to demonstrate that the conditions of Article 10(1) are met.

34. It is worth noting that no block exemptions have been adopted by the Portuguese legislator or by the PCA, in the past. However, Article 10(3) of the 2012 Competition Act continued the solution provided in the 2003 Competition Act and effectively incorporates 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. There is some criticism in the legal

doctrine on whether this solution is legitimate (see Manuel Porto/Victor Calvete, annotation to article 10 in *Lei da Concorrência – Comentário conimbricense*, Miguel Gorjão-Henriques (Dir.), Manuel Lopes Porto/J. L. Da Cruz Vilaça *et al.* (Coord.), Almedina, Coimbra),

35. In tandem to Article 29 of Regulation (EC) 1/2003, as long as the agreement, decision or practice in question is not (also) subject to EU Competition rules, the PCA may withdraw the benefit of the block exemption, 'should there be, in any specific case, a practice involved that produces effects incompatible [with Article 10(1)]'.[31] This option has, so far, to our knowledge, never been used.

3.5. Finding of Inapplicability

36. Although the 2003 Competition Act foresaw a mechanism similar to the one provided in Article 10 of Regulation (EC) 1/2003, even if with fewer restrictions in terms of motivation (i.e., not limited to cases of public interest), the 2012 Competition Act, and partially in sequence to European case law developments,[32] has eliminated the legal basis for parties to a potentially prohibited agreement or decision to ask the PCA to carry out a prior assessment.[33]

4. Abuse of Dominant Position

4.1. Introduction

37. The basic provision relating to the prohibition of abuses of a dominant position has also been rendered identical, *mutatis mutandis*, to the first paragraph of the Article 102 TFEU. In accordance with the Article 11(1) of the 2012 Competition Act: 'Any abuse by one or more undertakings of a dominant position in the domestic market or in a substantial part of it is prohibited.'[34]

38. The requirement of an effect on trade between Member States has been replaced, under the national law, with the requirement of an effect on Portuguese territory.

39. And once again, infringements are punished even if they result merely from negligence.[35]

4.2. Dominant Position

40. Whereas previously the concept of dominant position was defined in the 2003 Competition Act itself in Article 6(2)[36] as 'An undertaking that is active in a market in

31. Article 10(4) of the 2012 Competition Act.
32. See ECJ Judgment of 3 May 2011, *Tele 2 Polska* (C-375/09).
33. As a result of this reform, Regulation 9/2005, regulating the procedure applicable to such requests, previously adopted by the Competition Authority, will cease to be in force.
34. Previously, the sentence also included: 'with the object or effect of preventing, distorting or restricting competition'.
35. Article 68(3) of the Competition Act.
36. Article 6(2) of Law 18/2003) states that: 'The following are to be understood as having a dominant position in the market for a particular good or service:

which it faces no significant competition or in which it predominates over its competitors', the new Competition Act, following the logic of literal harmonization with EU Competition rules no longer provides a definition. The Commercial Court of Lisbon, based on the definition laid down in the Competition Act considered that:

> [a]n 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.[37]

Also, a *collective* dominant position was previously defined as '[t]wo or more undertakings [acting] in concert in a market in which they face no significant competition or in which they predominate over third parties' (cfr. *Compagnie Maritime Belge Transports*, Case No. C-395/96 etc.). So far, there has never been a finding of collective dominance by the PCA.

41. The elimination of the legal definitions of individual or collective dominant position, together with the demonstrated tendency of the Courts and the PCA to follow the case law of the ECJ, should also promote harmonization between the national and the EU legal orders.

4.3. Concept of Abuse

42. As in the second paragraph of Article 102 TFEU, Article 11(2) of the new Competition Act provides examples of behaviours which may be considered abusive.

43. The former Competition Act indicated that any behaviour indicated in the examples laid down in Article 4(1) could constitute a case for abuse, if adopted by one or more undertakings in a dominant position. Also, it acknowledged that an abuse could result from denying access to an essential facility (Article 6(3)(b) of Law 18/2003). The Lisbon Commercial Court correctly considered that the definition of dominant position given by the law would be a starting point and, furthermore, that the identification of eventual abusive conduct should be treated as examples of prohibited conduct. The Court then proceeded to present its own definition, based on the case law of the ECJ.

44. Except for the 'essential facilities' rule, the 2003 Competition Act did not include an autonomous list of abusive behaviour but indicated that any behaviour that would amount to a restrictive practice under Article 4(1) could be considered as abusive, if adopted by one or more undertakings in a dominant position. This solution was subject to some extent to criticism but was superseded by 2012 Competition Act, which uses the examples of abusive conduct provided for in Article 102 TFEU, except for the *essential facilities* clause that is kept identified as:

> To refuse access for another undertaking to a network or other essential facilities that it controls, when appropriate payment for such is available, in a situation where the other undertaking cannot therefore, in fact or in law, act as a competitor of the undertaking in a dominant position in the market, upstream or downstream, unless the

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a) An undertaking that is active in a market in which it faces no significant competition or in which it predominates over its competitors;
b) Two or more undertakings that act in concert in a market in which they face no significant competition or in which they predominate over third parties.'

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

> dominant undertaking can demonstrate that, for operational or other reasons, such access cannot reasonably be provided.[38]

45. The Lisbon Commercial Court has indicated that, even though this example of abuse was absent from the previous national legislation (Decree-Law 371/93), that did not mean that it was not prohibited.[39]

46. A very well-known case of alleged abuse of dominance under the 2003 Competition Act to be subject to a judicial review concerned essential facilities. It was struck down by the Lisbon Commercial Court, on the grounds of insufficient evidence to conclude that the telecommunications network at stake could be considered as an 'essential facility'. On 20 December 2010, this judgment was further confirmed by the Lisbon Court of Appeal.

4.4. Abuse of Economic Dependency (*Relative Dominant Position*)

47. As in other EU Member States legal orders, the 2012 Competition Act includes as a restriction of competition the abuse of economic dependency (abuse of a relative dominant position). This was inherited from the previous legislation, although modified in its wording in 2003 and greatly influenced by the French legislation. This legal prohibition is still, nonetheless, highly controversial in Portugal. Some commentators argue that it should be reinforced while others simply sustain that it should be eliminated. The interdiction is currently found in Article 12 of the 2012 Competition Act as follows:

> It is prohibited for one or more undertakings to abuse the economic dependence under which any of its supplier or customer may find itself as a result of the fact that any equivalent alternative is not available, to the extent that such a practice affects the way the market or competition operate.

48. Again, infringements are punished even if they result merely from negligence.[40]

49. The absence of an equivalent alternative – which is the essential component in demonstrating the existence of a relative dominant position – is deemed to exist when '[t]he supply of the goods or service at issue, specifically at the point of distribution, is controlled by a restricted number of undertakings', and 'the undertaking cannot find identical conditions from other commercial partners within a reasonable time scale'.[41]

50. As for the types of conduct which may be considered abusive, Article 12(2) refers to the examples mentioned in Article 11(2), with the exception of the refusal of access to essential facilities, and further adds the following:

> Any unjustified break, total or partial, in established commercial relations, bearing in mind previous commercial relations, recognized practices in that particular economic activity and the contractual conditions that have been set down.

51. Yet the truth is that the PCA has never adopted a decision finding an infringement of this provision. While several authors have contended for some time that the

38. Article 11(2)(e) of the Competition Act.
39. Judgment of the Lisbon Commercial Court of 2 Mar. 2010, 151.
40. Article 68(3) of the Competition Act.
41. Article 12(3) of the Competition Act.

abuse of dominant position tends to disappear from the national competition Law, the fact is that it survived the 2012 review process and made it to the new Competition Act.

52. Despite that, the PCA has investigated alleged infringements of this provision following complaints and (at least) in one case it has decided to close proceedings after receiving certain commitments from the targeted undertaking (no details are publicly available),[42] which suggests it may be willing to continue to enforce this provision. The prohibition is also enforceable before the common civil courts in private enforcement stand alone or follow on actions.

5. Mergers and Joint Ventures

5.1. Introduction

53. The main provisions of national Law concerning merger control are to be found from Articles 36 to 41 (substantive rules) and from Articles 42 to 59 (regarding procedural rules) of the 2012 Competition Act, as well as in Article 34 of the PCA Statutes.

54. The Portuguese merger control system is exclusively based on prior notification by the participating companies. It closely mirrors the EU merger control system despite some differences which still exist, primarily due to varying national options.

55. The concept of 'merger' or 'concentration' presented in Article 36 of the 2012 Competition Act, closely follows the wording of Article 3 of Regulation (EC) No. 139/2004. Indeed, it covers mergers, the acquisition of control, full-function joint ventures and acquisition of a part of an undertaking.

56. While the 2003 Competition Act included no explicit requirement as to the 'change of control [. . .] on a lasting basis', the 2012 Competition Act expressly includes this requisite, completing the harmonization with EU Law.

5.2. Obligation of Prior Notification

57. Concentrations must be notified by the undertakings concerned whenever any of the thresholds are met.

58. A first threshold is the turnover. On this basis, the threshold is now set at Euro (EUR) 100 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 5 million.[43] Under the 2003 Competition Act, the relevant thresholds were set at EUR 150 million and EUR 2 million, respectively.

The turnover is calculated in accordance with article 39 of the 2012 Competition Act, closely following under the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation).[44] The 2012 Competition Act introduces now a provision similar to the second paragraph of Article 5(2) of that Regulation, so that when there are '[t]wo or more concentrations between the same natural or legal persons within a period of two years, even when individually considered as not being subject to prior notification, are considered a single concentration subject to prior notification when the concentrations together reach the

42. Decision of the PCA of 1 Mar. 2007, *Unibetão* et al. (Case No. 01/06).
43. Article 37(1)(c) of the Competition Act.
44. Official Journal L 24, 29 Jan. 2004, p. 1–22.

turnover' which gives rise to the duty to notify the last operation concerned before its implementation.[45]

59. The 2012 Competition Act also maintains two other alternative notification thresholds based on market share criteria. The notification of the concentration is deemed necessary when, through the concentration, a market share exceeding 30% is *acquired* (i.e., 0% concentrates with an undertaking already holding +30%), *created* (e.g., 10%+20%) or *reinforced* (e.g., 30%+1%), although this only happens when a minimum EUR 5 million net turnover threshold is met by, at least, two of the undertakings involved (*de minimis*).[46] Additionally, another market share threshold was introduced which relates to the acquisition, creation or reinforcement of a market share which is already over 50%.[47] In this situation, the need to ascertain the turnover is dispensed. Also, by adding the reference 'acquisition' of a market share, the legislator meant to legitimize the former practice of the PCA of considering the 0% + 30% as a situation subject to mandatory notification.

60. These notification thresholds were subject to criticism and this may have lead the Government and Parliament to raise the thresholds to a level where a dominant position may be easily found (50%) and to impose that a market threshold of 30% would only justify a merger notification whenever linked to a turnover threshold. However, these thresholds are perfectly comprehensive in light of the small scale of some product or service markets in Portugal and also result from the political decision to keep the turnover threshold at a disproportionate value, when compared with most EU Member States. Indeed, a significant part of the country's economy would otherwise run the risk of being outside the control of the PCA if the notification thresholds were solely based on the undertakings' turnovers.

61. Since the market share threshold is assessed by reference to the national market (or to a substantial part thereof), the determination of the market shares does not entirely follow the usual methodology for the determination of the geographical scope of the relevant market. On the one hand, this provision has been interpreted as excluding mandatory notification in the case of mergers that create market shares exceeding 30% in a given local market, as long as the market share in the entire national territory (or at a substantial part thereof) remains below that threshold. On the other hand, when the relevant market – for the purpose of competition analysis – is wider than the national geographical relevant market (e.g., Iberian or European markets) the decision on whether to notify or not implies a separate calculation of market share in a (fictional) Portuguese market.

62. When at least one of the thresholds is met, the merger must be notified. As a new example of harmonization with EU law, no mandatory deadline for notification is now provided, thus following the solution adopted under Regulation (EC) No. 139/2004.[48] Also in this regard, harmonization with EU law was critical. On the one hand, the operation may be notified at any time after the parties concerned have concluded the agreement but, on the other, it may not be implemented before a non-opposition decision (or an approval with conditions and or obligations) by the PCA or to the decision considering that the operation is not covered by the merger control procedure.

63. Finally, the parties may also notify the operation on a voluntary basis, following the demonstration of a 'serious intention to conclude an agreement, or, in the case of a public offer of acquisition or exchange, where they have publicly announced the intention to make such an offer'.[49]

45. Article 38 of the Competition Act.
46. Article 37(1)(b) of the Competition Act.
47. Article 37(1)(a) of the Competition Act.
48. Article 37(2) of the Competition Act.
49. Article 37(4) of the Competition Act.

64. It should also 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 fee[50] (merger filing fees have been set by Regulation No. 1/E/2003, of 3 July).

65. The obligation to notify rests with the undertaking(s) acquiring control or merging into a single entity.[51] Whenever this obligation rests on more than one person, a common representative must be appointed.[52]

66. The notification must be presented using the form adopted by Regulation No. 60/2013, of 25 January.[53] The new merger notification form constitutes a significant yet limited change over the former one, although allowing for some simplification (adoption of a simplified model for certain mergers) following the criteria laid down by the European Commission. Also, it deals with some of the previously identified flaws and clarifies some of the issues the PCA faces under the former notification model. The Regulation No. 60/2013 also intends to carry out the necessary revisions to accommodate the provisions of the 2012 Competition Act.

67. Regrettably, despite having been suggested during the public consultation, the PCA continues to require the notification to be presented in Portuguese. This means that foreign undertakings will continue to have to count on the time required for the translation of the form when managing their submission deadlines. Also, due to the amount of information required even under the 'simplified procedure', it seems that the opportunity of creating a real simplified procedure (e.g., for mere market share *acquisition* operations, as it was proposed in the Public Consultation period) is, for now, lost. The regimen of confidentiality of business secrets will also require the undertakings involved a careful consideration when notifying or transmitting information to the PCA. Finally, savings for companies could be better achieved if, under a simplified procedure, notification taxes would be significantly reduced.

68. After a complete notification is received, the PCA provides for the publication of the 'key elements of the concentration in two of the daily papers with a large nationwide circulation, at the expense of the notifying party'. It also sets a time limit of at least ten working days for interested third parties (i.e., who may be affected by the concentration) to submit their observations.[54] It is also the practice of the PCA to publish an online announcement.

69. Since there is no mandatory deadline to notify and the major limitation is, of course, the fact that a merger may not be executed before it is notified and approved by the PCA, the failure to notify, in itself, is no longer considered to be an administrative offence. Currently, it is the implementation of a concentration before it has been approved (or despite its prohibition by the PCA), and/or the violation of the conditions or obligations imposed upon the concentration by the PCA that may lead to a fine of up to 10% of the undertaking's turnover in the preceding year.[55]

70. *Ex officio* proceedings may be opened if the PCA becomes aware (i) that a concentration was implemented less than five years earlier without having been notified; (ii) that a concentration was approved (explicitly or tacitly) on the basis of false or inaccurate information regarding essential circumstances; (iii) if the undertakings *in question* have disregarded, in part or in full, obligations or conditions imposed in the

50. Articles 45 and 94(1)(a) of the Competition Act.
51. Article 44(1) of the Competition Act.
52. Article 44(2) of the Competition Act.
53. DR, II series, nr. 32, of 14 Feb. 2013, pp. 6353–6360, available through the PCA webpage in: http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Regulamento_2013_60_Formularios_de_Notificacao.pdf.
54. Article 47(2) of the Competition Act.
55. Articles 68(1)(f) and (g) and 69(2) of the Competition Act.

approval decision; or even (iv) when undertakings fail to cooperate with the PCA or obstruct the exercise of its powers.[56]

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

71. As already mentioned, concentrations subject to prior notification may not be put into effect before they have been notified and, consequently, before they have been the object of an explicit or tacit positive decision by the Competition Authority.[57] The implementation of a concentration in violation of this obligation therefore implies that the respective legal transaction cannot produce legally binding effects.[58]

72. To avoid conflicts with the obligations deriving from Securities Law, public takeover bids and/or exchange offers that have been duly notified to the PCA may be implemented, 'provided the acquiring party does not exercise the voting rights inherent in the shareholding at issue or exercises them merely with a view to protecting the full value of its investment on the basis of a derogation granted' by the PCA.[59]

73. The PCA may, upon a duly substantiated request, grant derogation from the obligation to suspend the implementation of a concentration, based upon an assessment of the impact of such derogation on the competition. If necessary, the PCA may also impose certain conditions and obligations to ensure effective competition.[60] Such decisions are not subject to appeal before the Court.[61]

74. Finally, it should be noted that any legal acts relating to a concentration will be null and void if they contravene a PCA decision that: (i) prohibits the concentration; (ii) imposes conditions; or (iii) orders measures for the re-establishment of effective competition.[62]

5.4. Appraisal of Concentrations

75. The PCA analyses concentrations 'in order to determine their effects on the structure of competition, taking into consideration the need to preserve and foster, in the interests of intermediate and final consumers, effective competition in the domestic market or in a substantial part of it'.[63] Ancillary restraints (i.e., restrictions directly related with the implementation of the concentration and necessary for it) are expressly included in this assessment.[64]

76. Concentrations are to be prohibited if they are 'likely to create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant' and, of course, to be authorized if they fail to do so.[65] Again, the approximation to the EU rules is clear: whereas the 2003 Competition Act mentioned the creation or strengthening of a dominant position as the decisive criterion, the 2012 Competition Act

56. Articles 56 and 58 of the Competition Act.
57. Article 40(1) of the Competition Act.
58. Article 40(6) of the Competition Act.
59. Article 40(2) of the Competition Act.
60. Article 40(3) and (4)(b) of the Competition Act.
61. Article 40(5) of the Competition Act.
62. Articles 50(3) and 53(4) of the Competition Act.
63. Article 41(1) of the Competition Act.
64. Article 41(5) of the Competition Act.
65. Article 41(3) and (4) of the Competition Act.

has adopted the criterion used by the EU Merger Regulation and kept the reference to a dominant position as an example of those situations.

77. The assessment of concentrations should take into account a list of factors which mostly relate to the usual competitive considerations during a merger analysis by the European Commission.[66] The 2003 Competition Act also mentioned the assessment of 'the contribution that the concentration makes to the international competitiveness of the Portuguese Economy', but this is no longer included in the 2012 Competition Act as this was a mere industrial policy consideration which was clearly out of line with the objectives of the competition rules that the PCA is committed to pursue.

78. The creation of a full-function joint venture may also lead to an assessment under the national provisions equivalent to Article 101 TFEU (Article 9), whenever the objective of creating such joint undertaking is to coordinate the competitive behaviour of the undertakings that remain independent.[67]

79. Under the PCA's Statutes, if a concentration is prohibited the notifying parties may lodge an extraordinary appeal before the Minister responsible for the 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 those negative impacts.[68] So far, this has occurred in just one case (*Brisa/AEO/AEA)* with a favourable outcome for the appellant.

5.5. Examination of the Notification and Initiation of Proceedings

5.5.1. Pre-filing Contacts

80. As at EU level, in order to speed up the examination of mergers once the triggering event has taken place, a pre-filing mechanism is available.[69] This mechanism has been specified in the PCA's Guidelines on the procedure for prior assessment of mergers,[70] built upon its experience in the preliminary evaluation of mergers and explicitly prepared so as to mirror the European Commission's best practices. The procedure is entirely voluntary and confidential and it may be initiated as soon as the parties demonstrate their 'serious intention' to conclude the concentration agreement or to launch a public takeover bid. In any case, the procedure should be initiated before or after the signing of the respective contracts (or equivalent) within a 'reasonable deadline' to be assessed according to the specific circumstances of the case, but which should not be less than fifteen working days.

81. The undertakings subject to the duty to notify and willing to use the pre-filing mechanism must present a formal request to the PCA, accompanied by a brief description of the concentration and including the elements indicated in the Guidelines.[71] If possible, they shall attach a draft version of the notification form (which should in any case be presented at the end of the pre-filing contacts). Unless the concentration clearly raises no competitive concerns, pre-filing meetings are usually held between the notifying parties and the Competition Authority. The procedure is provided in those Guidelines and it is characterized by informality and confidentiality. These contacts will tend to be conducted on the basis of a draft version of the filled-out notification form.

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66. Article 41(2) of the Competition Act.
67. Article 41(6) of the Competition Act.
68. Article 34 of the PCA Statutes.
69. Article 37(4) and (5) of the Competition Act.
70. See note 9: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201219.aspx.
71. Paragraph 27 of the Competition Authority guidelines on the procedure for prior assessment of mergers.

82. Whatever preliminary position taken during the pre-filing contacts phase, the PCA is not bound to it and may technically reverse the subsequent formal analysis of the notification (although there is no example of such reversal in Portugal). In fact, the PCA has committed itself to acting within the confines of the principle of good faith and it is expected, although not legally enforceable, that it should maintain the same opinion in the following formal notification, as long as the basis for the previous assessment remains unaltered.

5.5.2. Phase I Proceedings

83. After receiving a complete notification, 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 (the so-called in-depth investigation phase or Phase II proceedings), whenever the concentration at issue raises serious doubts as to its compatibility as to an effective competition in the domestic market or a substantial part thereof.[72] An absence of a decision within this deadline leads to tacit approval.[73]

84. Within these deadlines, the PCA 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 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.[74]

85. During Phase I and Phase II, the PCA may only adopt a decision after making a preliminary hearing, normally in writing, of the notifying parties and any interested third parties that may have submitted comments concerning the projected notification of the merger (except in the case of non-opposition decisions, where there have been no opposing comments by third parties). Such hearings also suspend the time limit for decisions.[75]

5.5.3. Phase II Proceedings

86. When the PCA concludes the Phase I investigation by deciding to proceed to an in-depth investigation, it must render a final decision within a maximum of ninety working days from the date in which the PCA decided: (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 time limit leads to tacit approval.[76]

87. Within this period, the PCA may also carry out additional inquiries. Whereas in the 2003 Competition Act it was foreseen that any suspension due to additional inquiries could not exceed ten working days,[77] this is no longer mentioned in the 2012 Competition Act. Instead, it has now been foreseen that the ninety working days deadline

72. Article 50(1) and (2) of the Competition Act.
73. Articles 49(1) and 50(4) of the Competition Act.
74. Article 49 of the Competition Act.
75. Article 54 of the Competition Act.
76. Articles 52 and 53 of the Competition Act.
77. Since Decree-Law 219/2006. In accordance with the *abrogating* interpretation at the time adopted by the PCA, the limits laid down in 2006 applied only to Phase II proceedings and meant that the PCA could stop

may be extended by the PCA for an additional twenty working days, maximum, but only upon the request from the notifying party or with its agreement.[78]

6. Enforcement and Judicial Review

6.1. Procedural Provisions Applicable to Restrictive Practices

6.1.1. Introduction

88. There is no doubt whatsoever that the 2012 Competition Act may represent a major change in the public enforcement of competition law in Portugal. Until now, the enforcement procedures followed closely the General Regime of Administrative Offences, although some specific features were already introduced in Law 18/2003. However, the 2012 Competition Act clearly goes way beyond the 2003 Competition Act in building a more autonomous and special regimen departing from the General Regime of Administrative Offences. As a matter of fact, although the latter still keeps its subsidiary force, (i.e., it is still applicable whenever the situation is not specifically regulated in the 2012 Competition Act)[79] the fact is that, as it was agreed in the context of the *MoU*, it is now established an extended and comprehensive procedural regimen in what regards enforcing the rules that prohibit anti-competitive restrictive practices (Articles 13–35). However, the solutions adopted by the 2012 Competition Act lead to the existence of several distinct administrative procedure rules applied to misdemeanour offences of the Competition Act provisions. One for restrictive practices, to which we make reference under this chapter, another for misdemeanour practices relating to mergers and a third to other misdemeanour infringements of the 2012 Competition Act. This situation was clearly pointed out to the Government and the PCA during the public consultation but led to no significant change in the legislation.

89. It is worth mentioning the fact that the 2012 Competition Act explicitly allows the PCA to open proceedings for the violation of Articles 101 and 102 of the TFEU or intervene in procedures opened within the European Competition Network (ECN). The PCA will apply to the same procedural rules that are valid in the exercise of its sanctionatory powers under the national law (of course, without prejudice *inter alia* to specific Regulation (EC) 1/2003 provisions) and may impose sanctions, including fines, to the undertakings infringing Article 101 or 102 TFEU. This represents an evolution when compared to the case law of the then competent Commercial Court of Lisbon, that stated that the infringement of either Article 101/102 TFEU could be considered by the PCA in determining the applicable fine but the misdemeanour was the same, although if an effect on trade occurs this could amount to an aggravating circumstance.

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the clock as many times as the PCA wished as long as any suspension resulting from a request for information would be limited to ten working days. This interpretation and its implications regarding a tacit approval of a merger were not tested before the courts. At the time, it was argued that this interpretation had significantly impaired the fulfilment of the objective of Decree-Law 219/2006, which revised the Competition Act so as to ensure that the analysis of notified concentrations could not drag on for excessive periods.

78. Article 52(3) of the Competition Act.

79. Article 13(1) of the Competition Act.

6.1.2. Principle of Prioritization

90. The 2012 Competition Act confers upon the PCA some discretion in exercising its legal powers as to pursuing and punishing the undertakings for the infringement of the competition rules (Article 7(2) of the Competition Act). This represents a major change although we have been sustaining that Article 266 of the Constitution does not allow for a derogation of the legality principle valid under Portuguese constitutional, administrative and criminal or misdemeanour law. That is even more significant in the case of independent administrative authorities like the PCA, for that discretion would increase the problems of legitimacy and the democratic deficit of such entities. Although the principle of prioritization applies to all PCA's legal powers (Article 7(1)), it assumes a specific nature when the exercise of sanctionatory powers against restrictive practices is at stake (Article 7(2)). According to this provision:

> The Competition Authority shall exercise its sanctioning powers on a case-by-case basis, whenever the public interest of pursuing and punishing infringements of competition rules determines the initiation of administrative offence proceedings, taking into account in particular the priorities in competition policy and the elements of fact and of law brought by the parties to the file, as well as the seriousness of the alleged infringement, the likelihood of being able to prove its existence and the extent of investigation required to fulfill as well as possible its mission to ensure compliance with Articles 9, 11 and 12 of this law and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

As it results fairly clear, the rule is based on the classic ECJ *Automec* case, as the opening of an infringement procedure is mandatory whenever there is an overriding public interest in persecuting or punishing violation of competition rules. If there is a complaint and the PCA decides not to act, the plaintiff must have the opportunity to express himself and, if he does so, the PCA must close the case through a decision that may be appealed to the TCRS (Article 8).

6.1.3. Powers of Investigation and Inspection

91. While under the 2003 Competition Act the PCA was provided with the 'same rights and powers and [it was] subject to the same duties as criminal police institutions', the PCA now retains only the powers explicitly provided in the Competition Act and in its Statutes. This means that the reference to the powers which are generally attributed to criminal police institutions was eliminated. In practice, the PCA has now similar powers to those held by the European Commission, although some procedural differences arise from the subsidiary applicability of national misdemeanour law (General Regimen of Administrative Offences) and, on a second level of subsidiarity, criminal law.

92. The PCA holds extensive powers in this regard. It may question undertakings and other persons (directly related to a suspected infringement or not), either personally or through their legal representatives (Article 18) and or request documents and information deemed necessary or useful. Also, the PCA may carry out on site searches (be it *dawn raids* or inspections under its supervision powers), examinations, as well as collect and seize accounting data or other documentation, irrespective of the devices where they are stored or saved at the premises of the undertakings or associations of undertakings involved (although with a warrant from the competent judicial authorities), seal off premises of undertakings under certain circumstances (with a warrant from the

competent judicial authorities); and to request assistance from any other public administration services, including the police.[80]

93. An important innovation of the 2012 Competition Act, introduced in accordance with the goal of harmonizing with EU Competition Law, is the power of the PCA to conduct searches at the private premises of partners, members of the board and employees or anyone who collaborates with the undertakings suspected of infringing Article 9 or 11 of the Competition Act, or Article 101 or 102 of the TFEU (again, with a warrant from the competent judicial authorities).[81]

94. Further specifications have also been added to the 2012 Competition Act regarding the regime applicable to the seizure of documents, which must be, depending on the circumstances, authorized, ordered or validated *a posteriori* by the competent judicial authority.[82]

95. The Competition Authority may request for information from undertakings, associations of undertakings or any other persons or bodies, provided that it includes the following elements: (i) the legal basis for the person receiving the request to be required to provide information, his legal status and the purpose of the request; (ii) the deadline for that person or undertaking to reply; (iii) the applicable penalties for non-compliance; and (iv) the instructions to identify confidential information and to provide non-confidential version. The default deadline for replies is ten working days.[83]

96. It should also be noted that these powers apply not only within the scope of the PCA's competences to sanction anti-competitive behaviours, but also to supervise the market and carry out market studies.[84] For that reason, the PCA can – and occasionally does – request information from any other undertakings outside any specific infringement proceeding. As an example, the PCA has for some time continuously monitored the fuel market, on the basis of periodical reporting obligations imposed on the undertakings of that sector. On site inspections under supervision powers may only occur, in any case, after some procedural steps and if the undertaking (or association of undertakings) accepts the inspection (Article 63). If the inspection is not allowed, the PCA may return if a warrant from a jurisdictional authority (generally, the Public Prosecutor office –Ministério Público) is obtained. If an inspection takes place, the undertaking and all the people involved are subject to the duty to cooperate fully with the PCA.

6.1.4. Proceedings

97. Proceedings relating to the infringements of Articles 9, 11 and 12 of the 2012 Competition Act, as well as of Articles 101 and 102 TFEU, are now governed by Articles 13-35 of the Competition Act and, subsidiarily, by the General Regime for Administrative Offences (which is, in turn, complemented by the Criminal Process Code).[85] This means *inter alia* that these proceedings are subject to the principle of the adversarial system and other such general principles.

98. The notification of a procedural act shall be made by means of a registered letter or personally (if necessary, with the assistance of the police). In the former case, the letter must be sent to the undertaking's registered head office in Portugal (or, if there be none such, at the registered head office in the foreign country) and/or to the legal representative or to the place of business of its legal agent, when so appointed. If the notification is made by post, it is presumed to have been made on the third (national) or seventh (international) working day after the dispatch of the registered letter. Whenever

80. Article 18 of the Competition Act.
81. Article 19 of the Competition Act.
82. Article 20 of the Competition Act.
83. Articles 15 and 43(2) of the Competition Act.
84. Articles 43(1) and 64 of the Competition Act.
85. Article 13(1) of the Competition Act.

the party in question cannot be found or refuses to receive the notification, that party is 'deemed to have been notified by means of a publication on one of the daily newspapers with a large nationwide circulation, containing a summary of the announcement'.[86]

99. To assist the PCA in its supervisory duties, all public entities – specifically those which are part of any direct, indirect or autonomous administrative structure of the Portuguese Government, as well as independent administrative authorities – have an obligation to inform the Authority if they become aware of possible prohibited competition practices.[87]

100. It should be noted that Law 18/2003 did not explicitly foresaw the possibility of closing investigations of restrictive practices through commitment or settlement decisions. However, under that former regimen, the PCA has more than once considered that this possibility (or something similar) was available. That occurred in infringement procedures relating to agreements and concerted practices (*Unicer*, 1/03, of 28 December 2004; *Bayer Crop Science*, 10/06, of 28 June 2007; or *Nestlé, Delta* et al. of 6 July 2008), to abuses of economic dependence (*Unibetão, Secil* et al. 1/06, of 1 March 2007) and even in a case where the PCA publicly declared that the undertaking was abusing its dominant position (*Sugalidal*, 8/08, of 15 October 2009). This is an area where the 2012 Competition Act introduced major changes, both in restrictive practices and merger proceedings, as it will be further developed ahead.

101. Investigations should be concluded whenever possible and within a period of eighteen months after the decision to initiate the case is completed, although this is not a binding deadline.[88] After that period, the PCA must initiate the prosecution proceedings by means of notifying the undertakings concerned in the case, 'whenever it concludes on the basis of the investigation undertaken that there exists a reasonable likelihood of a decision imposing a sanction'.[89] If the PCA decides to dismiss the complaint during this phase, the complainants have the right to 'respond in writing with regard to the issues that may be of interest for the decision on the case, as well as with regard to the evidence submitted and to request actions to be taken with regard to complementary evidence considered to be of use', as well as 'request an oral hearing to complement the written reply'.[90]

102. If the investigation was initiated following a complaint, when it concludes on the basis of the available information, that there is no reasonable likelihood of a decision imposing a sanction, the PCA shall inform the complainant of the decision not to open an infringement proceeding (and the reasons for that decision). The PCA shall also set a time limit for the latter to submit any observations in writing, thus protecting its rights.[91] Nevertheless, the decision to close the case can be challenged before the Court (see Articles 8 and 24; although not expressly provided for, this must also occur in the instruction phase).

103. The notification of an undertaking of the decision to open an infringement proceeding – comparable to the European Commission's statement of objections – sets a (un)'reasonable time limit' of at least twenty working days for the party concerned in the case, to reply to the statement of objections in writing with regard to the issues that may be of interest for the decision on the case, as well as with regard to the evidence submitted and to request further inquiries to be taken with regard to complementary evidence considered to be of use.[92] Such requests may only be refused when the

86. Article 16 of the Competition Act.
87. Article 17(3) of the Competition Act.
88. Article 24(1) and (2) of the Competition Act.
89. Article 24(3)(a) of the Competition Act.
90. Article 25(1) and (2) of the Competition Act.
91. Article 24(4) of the Competition Act.
92. Article 25(1) of the Competition Act.

complementary evidence would clearly be irrelevant or a mere delaying tactic.[93] The Authority may also undertake additional actions of its own initiative with regard to further evidence.[94] As mentioned before, the written comments may be complemented, upon request from the party concerned in the case, by an oral hearing.[95]

104. During prosecution proceedings, the Competition Authority shall have 'due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets'.[96] Particularly, 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 may not be revealed', under the general terms of the law.[97] Any evidence gathered must be kept confidential to the extent that this is necessary to safeguard the legitimate interests of the undertakings in question.[98]

6.1.5. Types of Decisions

105. During the investigation phase, the PCA is empowered to issue any interim measures deemed necessary to immediately re-establish effective competition or to preserve the effectiveness of a potential final decision, as long as 'investigations indicate that the practice subject to proceedings is on the point of doing serious and irreparable harm to competition, or damage making competition difficult to reinstate'.[99] In principle, such measures should not remain in force for longer than ninety working days, 'except if extension for the same periods is granted, dully substantiated, and the decision on the investigative phase shall be made within a maximum of 180 days'.[100] Precautionary measures were imposed in January 2009 against *ZON Multimedia* (see Press Release 1/2009, of January 6).[101] Accordingly, the PCA has ordered the suspension of a campaign[102] in order to safeguard the useful effect of any decision that may be taken in pursuance of Article 34(1) of the Competition Act. The interim measure was tacitly revoked and never gave rise to a condemnation decision.

106. The adoption of interim measures must be preceded by a hearing of the parties concerned, 'except in the case where this could seriously jeopardize the aim or the effectiveness of the measures'.

107. Upon completion of the prosecution proceedings, the Restrictive Practices Department presents a prosecution report to the Board of the PCA, which, on the basis of those recommendations, shall then adopt a final decision: (i) declaring that there has been a prohibited practice but in so doing consider such a practice justified; (ii) declaring that a prohibited practice has taken place, most likely accompanied by an admonition or the imposition of fines and other sanctions be it behavioural measures or of structural measures necessary for halting the prohibited practices or their effects; (iii) imposing a sanction in the context of a settlement decision; (iv) ordering the case to be closed with the imposition of conditions; or (v) ordering the case to be closed

93. Article 25(3) of the Competition Act.
94. Article 25(3) and (4) of the Competition Act.
95. Articles 25(2) and 26 of the Competition Act.
96. Article 30(1) of the Competition Act.
97. Article 36 of the PCA Statutes.
98. Articles 31 and 32 of the Competition Act.
99. Article 34 of the Competition Act.
100. Article 34(2) of the Competition Act.
101. See Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200901.aspx?lst=1&Cat=2009.
102. '*MyZONcard*' promotional campaign, which consists of the allotment of a loyalty card to present and future ZON/TV Cabo customers. With this card, from 2 Jan. 2009, costumers could benefit from free cinema tickets (on the conditions associated with the campaign) in the cinema auditoriums owned or managed by ZON Lusomundo Cinemas SA (*ZON Lusomundo*).

without the imposition of any conditions.[103] Except for the last scenario, whenever the issue concerns prohibited practices with an effect on a market subject to a sectoral regulation, a decision by the PCA shall be preceded by an opinion from the sectoral regulatory authority concerned.[104]

108. As said, the 2012 Competition Act does explicitly provide for the adoption of commitment decisions and decisions with the imposition of conditions.[105] In fact, since the former Competition Act, it has become a practice of the PCA to close the case following the imposition of conditions after accepting commitments submitted by the party concerned in the case, as long as they are likely to eliminate the effects on competition stemming from the practices at issue. The following cases are some examples where the PCA accepted commitments: (i) *Unicer* (Case No. 01/03); (ii) *Unibetão* (Case No. 01/06); (iii) *Bayer CropScience* (Case No. 10/06);[106] (iv) *Sugalidal*[107] and; (v) *Nestlé Portugal, S.A.* (Case No. 31/04).[108] In the first two cases, no details were made public on the nature of these commitments or of the suspected infringements that led to them.

109. Settlement procedures are introduced in the law in the inquiry phase (see Article 22) or in the instruction phase (Article 27). These settlement negotiations may occur during 'the course of the investigation' and may be initiated by the PCA or the defendant's initiative. In any case, the settlement submission must be lodged by the defendant and, if the PCA agrees with its terms, it may be 'converted into a definitive decision imposing a sanction'. Although the decision may be appealed against, the Competition Act states that 'facts confessed through the decision cannot be subject to judicial review'. Access to the settlement submissions by third parties may only occur if authorized by the defendant ('the author of the proposal').

110. Under the 2012 Competition Act, before approving a decision to close the case with conditions, the PCA shall 'publish on its Internet site and in two newspapers with large nationwide coverage, at the expense of the party concerned in the case, a summary of the case, the identification of the party concerned in the case, and the essential elements of the commitments proposal'.[109] The decision shall identify the undertakings, the facts imputed to them, the object of the investigation, the objections expressed, the conditions set out by the PCA, the obligations of the undertaking as to the commitments, and the way that compliance with the commitments shall be monitored.

111. The decision to close the case with conditions does not conclude that an infringement to the law has occurred, but makes it mandatory for the undertaking to comply with the commitment(s). The PCA may, within two years, 'reopen any case that has been closed with conditions whenever (i) there has been a substantial change in the facts on which the decision was based; (ii) the conditions are not being complied with; and, (iii) the decision to close the case is deemed to have been based on false, inaccurate or incomplete information'.

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103. Article 29 of the Competition Act.
104. Article 34(3), (4) and (6) and, also, Art. 35 of the Competition Act.
105. Articles 23 and 28 of the Competition Act.
106. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200716.aspx?lst=1&Cat=2007.
107. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200920.aspx?lst=1&Cat=2009.
108. See Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200813.aspx.
109. Article 23(4) of the Competition Act.

6.2. Fines and Other Sanctions

112. The 2012 Competition Act does make an important change to the structure of the previous legislative framework regarding the proceedings and powers of the PCA. In fact, there was a substantial strengthening of the powers to investigate and impose sanctions in the fight against anticompetitive practices. The PCA is therefore empowered to impose fines, periodical penalty payments and additional penalties, both for infringements of national and EU Competition Law.

113. As in Regulation (EC) No. 1/2003, fines of up to 10% of the turnover of the year immediately preceding the final decision issued by the Competition Authority for each of the undertakings concerned (or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings) may be imposed for (i) restrictive practices (prohibited agreements, concerted practices, decisions of associations of undertakings, abuses of dominant position and abuses of economic dependence), (ii) non-compliance with the conditions, obligations or measures imposed on the undertakings by the Competition Authority, and (iii) implementation of a concentration between undertakings before there has been a decision of non-opposition.[110]

114. Also, similarly to the powers of the European Commission, the PCA may impose fines of up to 1% of the turnover of the year immediately preceding the final decision issued by the Competition Authority for each of the undertakings concerned for the following administrative offences: (i) failure to provide information or providing false, inaccurate or incomplete information in response to a request of the PCA under its sanctioning powers or under its supervisory powers and during studies, examinations and audit; (ii) not assisting the PCA or obstructing it in the exercise of its powers of investigation and inspection; (iii) unjustified failure to appear as a complainant, witness or expert, during a case where notification has been duly served.[111] Under the 2003 Competition Act, both the determination and setting of the amount of the fines did not replicate the same methodology generally followed by the European Commission. Also, a significant lack of transparency existed since the decisions were not made public and the elements on which the ECJ supported the respect of the legality principle by Regulation 1/2003 up to 10% turnover sanctions, like the *Degussa* case, were clearly not complied with by the PCA. The 2012 Competition Act tried to intervene in two complementary directions. First, imposing transparency obligations towards the PCA, in order to prescribe the mandatory obligation to publish the infringement decisions. Second, prescribing the need for the PCA to adopt public and transparent criteria for implementing Article 69 criteria on the determination of the concrete measure of the fine ('8 – The Competition Authority, under its regulatory powers, shall provide *guidelines* containing the methodology for setting the amount of the fines, in accordance with the criteria defined in this law'), that were finally adopted on 26 December 2012.[112]

115. The new document was admittedly inspired by and closely follows the methodology set out in the 2006 European Commission's Guidelines on the calculation of fines. As Sérvulo pointed out during the public consultation, this may come to raise legal issues, particularly but not exclusively given the drastic distancing from the previous administrative and judicial practice. The expected significant increase on the amount of the fines does raise serious concerns as the appeals from PCA decisions will no longer have, as a rule, a suspensory effect and the TCRS exercises full jurisdiction, being able to increase the amount of the fine.

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110. Articles 68(1) and 69(2) of the Competition Act.
111. Articles 68(1) and 69(2) and (3) of the Competition Act.
112. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201218.aspx.

116. In at least one case (the *Portugal Telecom (broadband internet)*), the Competition Authority considered the potential effect on trade between Member States as an aggravating factor.[113] Under this approach, whenever EU Competition Law is applicable to restrictive practices identified by the PCA, this will generally justify an increase on the amount of the fine.

117. The highest fine ever imposed by the PCA was EUR 53 million in the *Portugal Telecom (broadband internet)* case (see below).[114] Previously, the highest fine had been EUR 38 million, in the *PT Comunicações (Ducts)* case, also concerning an abuse of a dominant position. This latter fine was annulled by the Lisbon Commercial Court and, consequently, the decision was revoked and, on 20 December 2010, the Lisbon Court of Appeal confirmed the Lisbon Commercial Court's judgment (see below).

118. Fines for cartels and other unlawful agreements have ranged from EUR 9,865 to EUR 14.7 million. However, fines for decisions of associations of undertakings have ranged from EUR 76,000 to EUR 1.9 million.

119. One of the most relevant new features under the 2012 Competition Act is the fact that the responsibility of legal persons or equivalent entities does not preclude individual responsibility for any natural person. Indeed, the liability for administrative offences not only covers natural persons but the range of people who may be held liable is now broader. In addition to the members of the board of directors of the legal person or equivalent entity, those responsible for the management or supervision of the areas of activity where there has been an administrative offence are also liable to a sanction when, knowing or having the duty to know of an infringement committed, they have not adopted appropriate measures to terminate it forthwith. The fine set for natural persons cannot exceed 10% of their annual income deriving from the exercise of their functions in the undertaking concerned, in the last full year when the prohibited practice occurred. For this purpose, the concept of remuneration is very broad in character and includes salaries, earnings, gratifications, percentages, commissions, holdings, subsidies or bonuses, attendance vouchers, emoluments and additional payments, even if periodical, fixed or variable, as part of a contract or not, and any other payments as defined for income tax assessment, earned as a result of work or connected with this work and constituting an economic advantage for the beneficiary.[115]

120. There have been few decisions that imposed fines on directors. For example, in the *mass catering* case[116] (which was also the first following a leniency application), 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. Also, in *Copidata* (December 2012), the PCA, in addition to the fines imposed on the undertakings, three administrators of the participating undertakings were fined a total of EUR 6,000. Finally, in the *Flexible Polyurethane Foam case* (on 18 July 2013), in addition to the fines imposed on the companies, the PCA applied EUR 7,000 in fines to five administrators of the participating undertakings.

121. The PCA may also impose periodic penalty payments to a maximum of 5% of the average daily turnover in the year immediately before the decision, per day of late payment, in the following situations: (i) non-compliance with a Competition Authority decision that has imposed a sanction or the adoption of specific measures; (ii) non-notification of a merger operation subject to prior notification.[117] In the *OTOC* case (see

113. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200916.aspx?lst=1&Cat=2009.
114. Press release available at: www.concorrencia.pt/download/comunicado2009_16.pdf.
115. Articles 73 and 69(4) and (5) of the Competition Act.
116. See press release at: www.concorrencia.pt/download/pressrelease2009_24.pdf.
117. Article 72 of the Competition Act.

below), in addition to the fine, a periodic penalty payment of EUR 500 per day was also imposed to ensure compliance with the decision.[118]

122. Furthermore, 'when the seriousness of the infringement and the fault of the party concerned so justifies', the PCA has also been given the power to impose accessory sanctions (i.e., in tandem with the fine) specifically: (i) ordering the publication of its decision in the Official Journal of the Portuguese Republic (*Diário da República*) and in a national, regional or local newspaper with a large circulation, according to the relevant geographical market, at the expense of the party concerned, with this publication containing an extract of the decision imposing a sanction; and (ii) ordering the ban on the right to take part in the procedures for public works contracts, public service concessions, leasing or acquisition of movable assets or the acquisition of services or procedures involving the award of licenses or authorizations, for a maximum period of two years, in those cases where the practice that has led to an administrative offence punishable with a fine has occurred during or because of such procedures.[119]

123. Finally, under the 2012 Competition Act, the PCA has been given the power (just like the European Commission) to impose structural remedies necessary for halting the prohibited practices or their effects on competition Law. However, like under Article 7 of Regulation 1/2003, the application of these structural measures is subject to a strict test of proportionality and they may only be imposed 'can only be imposed when there is no behavioural measure that would be equally effective or, should it exist, it would be more onerous for the party concerned in the case than the structural measures themselves'.[120]

124. Proceedings aimed at the enforcement of sanctions are subject to a statute of limitation of five years, except for those leading to fines of up to 1% of the undertaking's turnover of the year immediately preceding the final decision issued by the PCA (see above). The statute of limitation for sanctions is counted from the 'day in which the decision to apply it has become definitive or has reached the stage where there are no more appeals [*res judicata*]' The statute of limitation is interrupted by the notification to the party concerned in the case or by the notification to this person of any act by the PCA which affects him personally. In addition to that, it may also be suspended (i) for 'the period when a Competition Authority decision is the subject of judicial review', and also (ii) from 'the date that the case is sent to Office of the Public Prosecutor until its return to the Competition Authority'.[121] This means that the limitation period for material infringements of the Competition Act may go up to ten and a half years.

125. The courts have repeatedly confirmed that sanctions imposed by the PCA are analogous to criminal sanctions. Indeed, the 2012 Competition Act itself refers to the General Regime for Administrative Offences as subsidiary law, and this, in its turn, refers to the Criminal Code for any matters not specifically regulated therein.

6.3. PCA Enforcement Precedents

6.3.1. Restrictive Practices

126. There is a steady increase on the number of decisions finding restrictive practices, since the creation of the PCA in 2003. Infringements of Article 9 of the Competition Act

118. See press release available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_Competition-Authority-fines-OTOC-for-the-adoption-of-an-anti-competitive-decision.aspx?lst=1&Cat=2010.
119. Article 71 of the Competition Act.
120. Article 29 of the Competition Act.
121. Article 74 of the Competition Act.

and, occasionally, also of Article 101 TFEU, have been identified in the following cases (notwithstanding subsequent annulments from the Courts in some of them):[122]

(i) *SIC/PT/TV Cabo* case (Case No. 14/01): two companies were fined a total of EUR 3 million for a partnership agreement relating to cable television services containing certain anti-competitive clauses (e.g., exclusive distribution). On appeal with the Lisbon Court of Appeals, the proceedings were declared null.

(ii) *Centro Hospitalar de Coimbra* (Case No. 06/03) and *Complementary diagnostic means* (Case No. 04/05): The PCA opened proceedings against five major pharmaceutical companies relating to collusive tendering in public procurement for supply contracts of blood glucose monitoring reagents (i.e., reagents used for diagnosing and controlling diabetes). The Competition Authority judged that there was an anti-competitive practice (price-fixing in public tendering procedures for hospitals between 2001 and 2004) and decided to fine five companies – *Abbott Laboratórios*, *Bayer Diagnostics Europe, Johnson & Johnson*, *Menarini Diagnósticos* and *Roche Farmacêutica Química* a total of EUR 3.3 million. During the same year, the PCA also imposed on the same companies a EUR 15.8 million fine for price-fixing in thirty-six tendering procedures, between 2001 and 2004, in twenty-two Portuguese hospitals. At the time, the pharmaceutical company *Bayer* accepted the decision and paid the fine whereas the other enterprises contested it, lodging an appeal with the Lisbon Commercial Court and, later, with the Lisbon Court of Appeal. The Lisbon Commercial Court decided to join the two cases and, in April 2007, referred the cases back to the PCA, ordering the repetition of some procedural steps. Yet, the new decision does not differ significantly from the previous ones as the PCA considered that there was significant evidence that the pharmaceuticals met regularly in sectoral associations between 2001 and 2004 and exchanged information on blood glucose reagent prices in hospital tendering procedures, ultimately entering into an agreement to fix such prices. The new decision addressed the companies with a total fine of EUR 13.4 million (although, this time, only four of them). The Lisbon Court of Appeal partially upheld the decision and maintained the fine imposed by the Lisbon Commercial Court (which, in turn, had also upheld the PCA's ruling) on *Abbott Laboratórios*, though it reduced that imposed on *Menarini Diagnósticos*. In the latter case, it considered that a single infringement of a permanent nature had existed which encompassed all the infringements that occurred in the public tenders. With regard to the defendant *Johnson & Johnson*, the Lisbon Appeal Court announced that the administrative-law proceedings had lapsed since the company had already paid the fine.

(iii) *Moageiras* (Case No. 06/04): Ten flour-milling companies were fined a total of EUR 9 million for implementing a concerted practice with the intention of fixing prices in the bread making industry. After a successful appeal from the defendants with the Lisbon Commercial Court, the proceedings were declared null. The PCA appealed to the Lisbon Court of Appeal but the latter upheld the decision of the Lisbon Commercial Court.

(iv) *Agepor* (Case No. 07/04): a fine of EUR 195,000 was imposed on an association of navigation agents for unlawful setting of maximum prices. On appeal, the Lisbon Commercial Court upheld the PCA's decision although it had reduced the amount of the fines.

122. 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: http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisoes_da_AdC/Praticas_Colusivas/Paginas/lista.aspx. It should, however, be noted that this table is not exhaustive (compare, e.g., cases mentioned in the 2012 PCA's Annual Report, available at: http://www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Relatorio-de-Actividades/Documents/Adc_Relatorio_actividades2012.pdf, at 16) and it is not kept strictly up to date.

(v) *ATRAM* (Case No. 23/04): an admonition decision was imposed on the Portuguese National Association of Public Transport and Road Transport of Goods (ATRAM), for a decision of this association of undertakings towards a collective refusal to provide certain services. On appeal, the Lisbon Commercial Court acquitted the defendant.

(vi) *Veterinarians Association* (Case No. 28/04), *Dentists Association* (Case No. 29/04) and *Medical Association* (Case No. 07/05): these three Professional Associations were fined, respectively, EUR 76,000, EUR 160,000 and EUR 250,000, also with the accessory sanctions of an extract of the decision imposing a sanction for setting minimum prices for the performance of certain services. Both the Veterinarians and the Medical Associations lodge an appeal with the Lisbon Commercial Court but the latter upheld the PCA's decision although it had reduced the amount of the fines.

(vii) *Nestlé Portugal* (Case No. 31/04): a fine of EUR 1 million was imposed on Nestlé for unlawful competitive restrictions in agreements relating to the supply of coffee to hotels, restaurants and coffee shops. After a successful appeal from the company, the PCA adopted a decision to close the case with conditions such as the former withdraw the restrictive clauses from its distribution contracts.

(viii) *Aeronorte* et al. (Case No. 20/05): two undertakings were fined a total of EUR 308,000 for bid rigging relating to a tender for the purchase of airborne firefighting means. On appeal, the Lisbon Commercial Court declared the proceedings null and acquitted the defendants.

(ix) *Vatel* et al. (Case No. 25/05): four undertakings were fined a total of EUR 911,000, also with the accessory sanctions of an extract of the decision imposing a sanction for an eight year long market sharing and price-fixing cartel. On appeal, the Lisbon Commercial Court upheld the PCA's decision although it had reduced the amount of the fines.

(x) *Rebonave* (Case No. 06/06): three undertakings were fined a total of EUR 185,000 for a cartel consisting of fixing prices, dividing customers and establishing and monitoring a compensation mechanism relating to towage services at the port of Setúbal. Both the Lisbon Commercial Court (which drafted a summary of the decision in order to be published by the companies in relevant newspapers) and then, the Lisbon Court of Appeal, upheld the PCA's decision. Most importantly, the Constitutional Court considered that the interpretation adopted by the PCA of certain provisions of the Competition Law relating to the criterion of assessment of the amount of fines did not infringe the Portuguese Constitution.

(xi) *Mass catering* (Case No. 02/07):[123] five undertakings were fined a total of EUR 14.7 million for bid rigging and market-sharing agreements in the market for provision of meals and management services for cafeterias and restaurants. In addition to the fines imposed on the undertakings, five administrators and managers of the participating undertakings were fined a total of EUR 20,000. On 19 July 2013, the new Competition, Regulation and Supervision Court upheld the PCA's decision but reduced the amount of the fines.[124]

(xii) *Driving Schools case* (Case No. 06/08): seven companies were fined a total of EUR 9,865 for a collusive concerted practice by unlawfully setting the prices charged by driving schools for driving lessons relating to Category B (light) vehicles in the city of the Funchal, Madeira. On 27 February 2012, the Lisbon

123. See press release at: < http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_CA-imposes-fines-on-five-mass-catering-undertakings.aspx?lst=1&Cat=2009.

124. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201316.aspx?lst=1&Cat=2013.

Commercial Court upheld the Competition Authority's decision which was not subject to any further appeal.[125]

(xiii) *OTOC* (Order of Official Technical Accountants): On 14 May 2010, the PCA imposed a EUR 300,000 fine, and the accessory sanctions of an extract of the decision, to the Association of Chartered Accountants and declared its internal rules concerning professional training void. Additionally, a periodic penalty payment of EUR 500 per day was also imposed to ensure compliance with the decision. The PCA argued that not only the Association unjustifiably restricted the market and abused its dominant position (by reserving exclusively for itself the provision of one third of the market) on the market for mandatory training services to certified accountants, but also it developed an arbitrary criteria for the approval of external entities capable of providing that training. On appeal, the Lisbon Commercial Court upheld the decision of the PCA concerning the existence of an illegal decision taken by an association of undertakings although it reduced the amount of the fine to EUR 90,000. In turn, the Lisbon Court of Appeals decided to submit a preliminary ruling to the Court of Justice of the European Union (ECJ) regarding the application of EU competition rules to a professional bar such as OTOC. The ECJ ruled that a regulation such as the Training Credits Regulation, adopted by a professional association such as the OTOC, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU.[126]

(xiv) *ANEPE – National Association of Parking Lot Enterprise case*: The PCA applied a EUR 1.9 million fine on the National Parking Association due to a recommendation issued to its members advising them to increase prices by given percentages in response to changes to their fee system introduced by the government. In fact, the Association recommended its members to charge an 'entry fee' (i.e., a fixed amount to be paid by the user for entry to the parking lot), to be added to the first fifteen-minute parking period, in combination with a 2.5% price rise or, alternatively, a 15% price rise. Both the Lisbon Commercial Court and the Lisbon Court of Appeals upheld the PCA's decision.[127]

(xv) *Copidata* (Case No. 08/10): In December 2012, the PCA applied EUR 1.8 million in fines, and the accessory sanction of publishing an extract of the decision imposing a sanction, to undertakings in the printing sector. As a result of a Leniency application by *Copidata*, its competitors *Contiforme, Formato* and *Litho Formas* were convicted for price-fixing and a cartel market sharing. In addition to the fines imposed on the undertakings, three administrators of the participating undertakings were fined a total of EUR 6,000.[128]

(xvi) *Conforlimpa/Number One case:* The PCA applied EUR 315,000 in fines to *Conforlimpa* and *Number One*, two companies operating in the professional cleaning services sector, which were found guilty of collusion in the presentation of bids in various public invitations to tender. On 24 July 2012, the Lisbon Commercial Court upheld the PCA's decision.[129] An appeal is now pending with the Lisbon Court of Appeal.

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125. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201203.aspx?lst=1&Cat=2012.
126. See ECJ Judgment of 28 Feb. 2013, *OTOC* (C-1/12).
127. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201312.aspx?lst=1&Cat=2013 and http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201202.aspx?lst=1&Cat=2012.
128. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201216.aspx?lst=1&Cat=2012.
129. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201211.aspx?lst=1&Cat=2012.

(xvii) *Baxter v. Glint case*: The PCA applied EUR 400,000 in fines, with the accessory sanctions of an extract of the decision imposing a sanction to Baxter and Glintt, two pharmaceutical companies which were found guilty of making and carrying out an anti-competitive price-fixing agreement. On 12 September 2011, the Lisbon Commercial Court upheld the PCA's decision.[130] Both undertakings lodged an appeal with the Lisbon Court of Appeal but, on 10 July 2012, the Court dismissed the defendant in its entirety.

(xviii) *Lactogal* (Case No. 04/10): In July 2012, the PCA applied EUR 340,000 in fines to the largest Portuguese dairy company for resale price maintenance (i.e., a vertical (minimum) price-fixing fixing) in its distribution contracts with hotels, restaurants and cafés. On 24 May 2013 (less than a year later), the new Competition, Regulation and Supervision Court passed its first judgment on competition matters and upheld the PCA's decision. However, an appeal is still pending before the Porto Administrative Court.

(xix) *Flexible Polyurethane Foam case*: On 18 July 2013, the PCA applied EUR 990,000 in fines to three companies (which represent almost 90% of this market) for forming a cartel on the market for the manufacture of flexible polyurethane foam for the comfort industry, during ten years. In addition to the fines imposed on the undertakings, five administrators of the participating undertakings were fined a total of EUR 7,000. This decision was not subject to any further appeal.[131]

127. However, although a few more alleged infringements of Article 11 of the Competition Act and Article 102 TFEU have been investigated by the PCA, only a few have led to an infringement decision.

128. On 1 August 2007, following complaints by cable tv (and potential triple-play) competitors, the PCA found that Portugal Telecom (the Portuguese former incumbent telecommunications company) had abused its dominant position by refusing to grant access to its underground ducts, thereby preventing competitors from developing their own networks (the so-called essential facilities). EUR 38 million in fines, and the accessory sanction of publishing an extract of the decision, was applied.[132] However, on appeal, the Lisbon Commercial Court considered that the PCA failed to prove the 'essential facility' nature of the network in question and consequently revoked the decision.[133] On 20 December 2010, this judgment was confirmed by the Lisbon Court of Appeal. However, the PCA appealed, once again, arguing that the decision of the Lisbon Court of Appeal should be declared null on the grounds that the Court was obliged to request the ECJ to give its preliminary ruling and failed to do that. However, on 6 March 2012, the Lisbon Court of Appeal upheld its own decision of 20 December 2010 and dismissed the PCA's appeal. Finally, on 9 May 2012 (decision which was confirmed later, on 26 June 2012), the Constitutional Court dismissed an appeal from the PCA. This decision cannot be subject to any further appeal.

129. On 1 September 2008, once again, Portugal Telecom (PT) was found to have abused its dominant position on the wholesale market for rented telecommunication circuits. The PCA concluded that the company had been operating an unlawful tariff and discount system for circuit leasing, between March 2003 and March 2004, as it favoured its intra-group undertakings to the detriment of competitors. As a result, the

130. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201210.aspx?lst=1&Cat=2012.
131. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201319.aspx?lst=1&Cat=2013.
132. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200713.aspx?lst=1&Cat=2007.
133. Judgment of the Lisbon Commercial Court of 2 Mar. 2010.

PCA imposed EUR 2.1 million in fines.[134] However, on appeal, the Lisbon Commercial Court considered that the PCA had failed to prove that the application of the tariff and discount system necessarily constituted an abuse of PT's dominant position, and consequently revoked the decision. An appeal is now pending with the Lisbon Court of Appeal. However, it should be noted that the proceeding reached the statute of limitations, although it has not been declared yet by the Courts.

130. In December 2008, following a complaint, the PCA found the Lisbon *Breadmakers' Association* (AIPL) guilty of breaching the competition rules by adopting a 'decision by an association of undertakings' with the purpose of preventing, restricting or distorting competition, by means of exchanging information on prices. More specifically, the PCA argued that the AIPL applied uniform and concerted increases in the price of flour and applied EUR 1,177 million in fines and the accessory sanction of publishing an extract of the decision. On 25 June 2010, the Lisbon Commercial Court upheld the PCA's decision. Later, on 28 December 2011, the Lisbon Court of Appeal reduced the amount of the fine to EUR 850,000. Finally, on 1 October 2012, the Constitutional Court dismissed an appeal from the AIPL. This decision cannot be subject to any further appeal.

131. 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.[135] A total fine of EUR 53 million was imposed, which was the highest ever in Portugal. However, the Lisbon Commercial Court declared that the proceeding reached the statute of limitations and, as a result, no decision as to the substance of the case was taken by the court.

132. As mentioned before, on 14 May 2010, the PCA found that the OTOC 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 300,000 was imposed but, on appeal, the Lisbon Commercial Court reduced it to EUR 90,000 (see *supra*).[136]

133. In April 2012 (Case No. 10/8), the PCA concluded that, in the year 2006, Roche Farmacêutica Química abused its dominant position in the context of public tender procedures opened by several public hospitals for the supply of a number of pharmaceutical products. The investigation carried out by the PCA followed a complaint filed by a pharmaceutical competitor in those public tenders. However, after taking into account all the mitigating circumstances related to the good cooperation of the defendant throughout the procedure, as well as the occasional nature of the infringement, the PCA only applied a fine of EUR 900,000.

134. On 6 June 2013, following a complaint by cable TV operator *Cabovisão* in 2009, the CA found that Sport TV (a provider of pay television premium-content sports channels to national television operators) had abused its dominant position and imposed a fine of EUR 3.7 million. Sport TV's abusive conduct was based on the discriminatory nature of the commercial conditions that it imposed in its distribution agreements for

134. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200815.aspx?lst=1&Cat=2008.
135. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200916.aspx?lst=1&Cat=2009.
136. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201006.aspx.

the sale of premium television sports channels, mainly the minimum carriage fee Sport TV charged to the other operators.[137]

6.3.2. Merger Control

135. 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.

136. Over 600 concentrations (61, just in the year 2012) have been analysed by the Portuguese Competition Authority since its creation in 2003, and the decisions are publicly available in a searchable database on the PCA's website.[138] This extensive decision-making practice comes with the result of providing a significant level of legal certainty as to the expectable approach of the Competition Authority on most merger control proceedings.

137. Only recently, however, a fine was applied for failure to notify a merger. In fact, on 28 December 2012 (Case No. Ccent. 47/2009), PCA considered that the National Pharmacy Association (ANF), Farminveste 3 and Farminveste failed to notify the acquisition of control of ParaRede/Glintt and opened an ex officio merger control procedure. The concentration was eventually approved but failure to notify lead to the application of EUR 150,000 in fines, corresponding to 0.05% of the turnover of both ANF and Farminveste.

138. However, highly influenced by the *DOJ/FTC Horizontal Merger Guidelines*, the publication of the PCA's Guidelines regarding the preliminary evaluation in merger proceedings (adopted on 31 December 2012)[139] is an extensive (125 pages) description of the economic principles used on the analysis of mergers and acquisitions between competitors. Notwithstanding the potential fragilities, once adopted, the document shall constitute a very significant contribution to the PCA's efforts to increase transparency in the enforcement of its competition policy. It should also be noted that this document contains the PCA's proposal to adopt the first national Guidelines on market definition.

6.4. Judicial Review of PCA Decisions

139. The judicial review of the decisions adopted by the PCA is governed by the Competition Act, by the Statutes of the PCA and, subsidiarily, by the General Regime of Administrative Offences.[140] In the case of administrative procedures not leading to the imposition of fines or sanctions, the judicial review is governed by the Administrative Court Procedural Code.[141]

140. The decisions applying fines or other sanctions are subject to appeal to the Specialized Court on Competition, Regulation and Supervision (TCRS), created in 2011. However, under the 2012 Competition Act, such appeals do not suspend the effects of the decision, except for those that impose structural measures.[142] Yet, in the case of final decisions imposing fines or other sanctions, the party concerned may request, on appeal, that the decision shall have suspensive effect by (i) demonstrating that, if implemented,

137. Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201315.aspx?lst=1&Cat=2013.
138. Available at: www.concorrencia.pt/bdoc/concluidos.aspx.
139. See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201219.aspx.
140. Article 83 of the Competition Act.
141. Article 91 of the Competition Act. Art. 38 of the PCA Statutes was partially derogated by the amendments introduced by the new Competition Act.
142. Article 84(4) of the Competition Act.

the decision would cause him considerable harm; and by (ii) offering to pay a guarantee in lieu (i.e., a financial guarantee). Other decisions of the PCA (e.g., procedural decisions and administrative acts) are subject to appeal to the same TCRS, but do not, as a rule, have a suspensive effect, unless it is explicit in the interim measures handed down.[143]

141. Generally, those judicial reviews are subject to appeal only to the level of the Courts of Appeal (i.e., one level of appeal).[144] Therefore, the Supreme Court will not, as a rule, be called to rule on issues relating to decisions adopted by the PCA. The same is not true for appeals in administrative cases, which can actually be appealed directly to the Supreme Court should they focus exclusively on issues of law.[145]

142. The PCA cooperates in these proceedings with the Office of the Public Prosecutor (*Ministério Público*), as described in Article 87(2) of the 2012 Competition Act. The latter is, itself, also legitimately entitled to appeal.[146]

143. Finally, it should be noted that the Constitutional Court has been called at least four times to address issues relating to the Competition Act, but, so far, it has identified no infringement of the Constitution whatsoever.[147]

6.5. Publicity of Enforcement Decisions

144. The fact that, until the publication of the 2012 Competition Act, the decisions on restrictive practices were not published by the PCA (although they are generally referred to in the annual reports and sometimes they were even subject to press releases) is clearly a factor which has significantly hindered an in-depth analysis of the 2012 Competition Act, in its practical dimension. Thus, it becomes impossible to have a full picture and a clear understanding of the positions this Authority has taken in the past, aside from the limited information which may be found in press releases and annual reports. This situation is expected to change with the new Competition Law, since Article 90 specifically provides for the online publication of the non-confidential version of decisions in restrictive practices and merger procedures, as well as for Court rulings following appeals.

6.6. Private Enforcement

145. 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 the issues of Competition Law may be raised. The creation of such a database has been one of the suggestions put forward under the revision procedure of the competition legislation.

146. In fact, so far, only two first instance cases, both from 2005, have been communicated to the database of national judgments created by the European Commission,[148] and both concerning distribution agreements. Ironically, the Courts decided, on both cases, against the applicability of EU Competition Law, even though nationwide

143. Article 92(2) of the Competition Act.
144. Article 89(1) of the Competition Act.
145. Article 93 of the Competition Act.
146. Article 51 of the Competition Act.
147. Judgment No. 593/2008 in Case No. 397/08 and Judgment No. 596/2008 in Case No. 1170/07, both decided on 10 Dec. 2008 by the 2nd section of the Constitutional Court; Judgment No. 203/2009 in Case No. 529/07, of 29 Apr. 2009 (1st section); and Judgment No. 632/2009 in Case No. 103/08 (1st section), of 3 Dec. 2009.
148. Available at: http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms_code=prt.

markets were at stake. Generally speaking, an investigation project still in course led by Prof. Leonor Rossi[149] identified until 2012 twenty-five cases where competition law was discussed.

147. The Porto Court of Appeals has already annulled an exclusive agreement for purchase of milk, on the basis of a violation of Article 4 of the former competition law.[150] Additionally, given its specific circumstances, it found that there was no infringement of that provision in an agreement concerning the purchase of coffee which also contained an exclusivity clause.[151] In an earlier case, this Court of Appeals refused to apply the competition rules on uncertain grounds, but apparently argued the (highly questionable) absence of an economic activity in that case (which dealt with services provided by a gym).[152]

148. However, 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.[153]

149. The Supreme Court has also been called to assess claims of abuse of a dominant position in a case concerning a supply agreement of certain business information services.[154]

7. Leniency Policy

150. The Portuguese Leniency regime for Competition infringements was first enacted in 2006 and it is now covered by the 2012 Competition Act.[155] Additionally, the PCA has already adopted its Leniency Regulation – Regulation 1/2013, of 29 November 2012.[156] According to the legislator, leniency applications (i.e., immunity from fines or a reduction of fines) may now only be granted in administrative offence proceedings concerning agreements or concerted practices between competitors (i.e., horizontal agreements) prohibited by Article 101 TFEU and/or by Article 9 of the 2012 Competition Act. The former 2006 regimen was not so clear cut and it arguably may have involved vertical restraints. However, there is no known case of a leniency application regarding vertical restraints in Portugal.

151. The subjective scope of the leniency regime under the 2012 Competition Act is wider than the one from the EU: in fact, under the Portuguese regimen, the members of the board of directors or the supervisory board of legal persons and equivalent entities, as well as those responsible for the executive management or supervision of areas of activity where an administrative offence has occurred may also benefit from immunity from fines or reduction of fines.[157] The first case concerning the enforcement of this

149. With Miguel Sousa Ferro, at the time member of Sérvulo EU/Competition law team.
150. Judgment of the Porto Court of Appeal of 3 Nov. 2009.
151. Judgment of the Porto Court of Appeal of 12 Apr. 2010.
152. Judgment of the Porto Court of Appeal of 9 May 2007.
153. See Judgment of the Lisbon Court of Appeal 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.
154. Judgment of the Supreme Court of 24 Apr. 2002.
155. Articles 75–82 of the Competition Act.
156. Approved by the Board of the PCA on 29 Nov. 2012, it was made public on its website on 4 December and published in the Official Journal of 3 Jan. 2012 (no English version is available yet – See http://www.concorrencia.pt/vPT/Praticas_Proibidas/O_programa_de_clemencia/Documents/Relatorio_NotaInformativa_Clemencia2012.pdf; and http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Regulamento_Clemencia_2013_1.pdf.
157. Articles 76 and 79 of the Competition Act.

regime, so far, arose precisely from an application by an undertaking's executive, who was granted immunity.[158]

152. The number of beneficiaries and whether the PCA shall grant total immunity or just a mere reduction of the fine, will depend not only on the order in which the party concerned submits the information and the evidence, but also on the extent to which it represents an added value for the investigation and/or a conclusive evidence in establishing that there was an infringement.[159]

153. Regulation 1/2013/AdC is the first administrative regulation to be published under Article 80 of the 2012 Competition Act. An English form of the abbreviated submission form is also provided.[160] It is worth mentioning that, with far reaching powers conferred upon the PCA under the 2012 Competition Act, it is expected a significant increase of leniency procedures in the near future should the Authority resume a proactive attitude regarding the public enforcement of restrictive practices prohibitions under Article 9 that it failed to adopt in the past years.

154. The PCA did not include some of the suggestions that were made in the public consultation but expressly admitted, in the final wording, that leniency applications may be submitted through email (clemencia@concorrencia.pt), which allows for speedier submissions. Regulation 1/2013/AdC also admits that the PCA may adopt a 'mark-up' submission, although that is not deemed automatically and the PCA may grant an extended deadline (of at least fifteen working days) in order for the leniency applicant to complete its application.

8. Special Sectors

155. Whenever the PCA acts in an area covered also by a Sectoral regulation, the 2012 Competition Act now envisages particular forms of cooperation, without prejudice to the legal powers conferred to the Competition Authority to ensure the effectiveness of the Law.

156. Specifically, if the PCA becomes aware of a potential competition infringement in a regulated sector (e.g., telecommunications, electricity, water, financial services, etc.), it should inform and request the opinion of the Sectoral Regulatory Authority. However, if the latter, within the scope of its responsibilities, and on its own initiative or at the request of an entity within its jurisdiction, becomes aware of such a potential infringement, it should inform the PCA, prior the adoption of any decision on competition-related matters.[161] This is explained by the fact that the PCA may decide to initiate prosecution proceedings 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 own views.

157. Similar cooperation requirements apply to mergers.[162] In the *Ongoing/Prisa/MediaCapital* case (Case 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 any other area, the Opinion of the Media Regulator (*Entidade Reguladora para a Comunicação Social*, ERC) is

158. See Press Release No. 24/2009 ('CA imposes fines on five mass catering undertakings'), available at: www.concorrencia.pt/download/pressrelease2009_24.pdf.
159. Article 78 of the Competition Act.
160. See Regulation 1/2013/AdC, available at http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Regulamento_Clemencia_2013_1.pdf.
161. Article 35 of the Competition Act.
162. Article 55 of the Competition Act.

binding upon the PCA, when it is delivered on the grounds of protection pluralism in the media (see Article 95).

158. Aside from the awarding of legal force to EU block exemptions, in cases of exclusive application of the Competition Act[163] – and excluding *ex ante* regulation by Sectoral regulators – there are no national provisions regulating competition in specific sectors. As a result, 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,[164] Telecommunications,[165] food distribution,[166] waters, fuel and gas sectors,[167] energy[168] and on the markets for gyms and health clubs.[169]

9. Future Developments and Conclusions

159. Portuguese Competition Law has suffered an extensive process of renovation, with the adoption of the 2012 Competition Act. The PCA (*Autoridade da Concorrência*) considered that the new act and the new instruments it provides the PCA with, namely for a more efficient public enforcement of the restrictive practices prohibition, are fundamental for the promotion of a competition culture and the repression of anti-competitive behaviour. Reinforced powers for seizure, apprehension of documentation and searches also in households will certainly demand a courageous and yet sensible attitude from the PCA, in order for the constitutional rights of defendants to be respected in investigatory proceedings for the extent of the powers conferred to and the reformation of the judicial review process allows for a legitimate doubt on whether a more effective enforcement will be achieved at the expenses of the economy itself, under an unbalanced and unprotective legislation for defendants and, even, for plaintiffs.

160. The 2012 Competition Act further enhances the coherence with EU competition law in all areas of competition law, although it maintains certain specificities considered appropriate for a medium sized country with an open economy and a still growing awareness about the benefits of a full competitive economy.

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163. Article 10(3) of the Competition Act.
164. See press release available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_Competition-Authority-completes-assessment-of-competition-in-the-postal-sector.aspx?lst=1&Cat=2010.
165. See press release available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_CA-releases-Annual-Monitoring-Report-on-the-Electronic-Communications-Markets.aspx?lst=1&Cat=2010; http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_Competition-Authority-completes-analysis-of-mobile-communications-price-rises.aspx?lst=1&Cat=2010; http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_Competition-Authority-releases-Report-on-Consumer-Mobility-in-the-Electronic-Communications-Sector.aspx?lst=1&Cat=2010; and http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/PressRelease_AdC_201112.aspx?lst=1&Cat=2011.
166. See press release available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/PressRelease_AdC_20110.aspx?lst=1&Cat=2010.
167. See, e.g., http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_Competition-Authority-begins-publication-of-Monthly-Bulletin-of-Liquid-Fuel-Statistics.aspx?lst=1&Cat=2009 and http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_Final-Report-on-the-In-depth-Analysis-of-the-Liquid-Fuel-and-Bottled-Gas.aspx?lst=1&Cat=2009.
168. See http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_Competition-Authority-concludes-Report-on-Wholesale-Electricity-Prices.aspx?lst=1&Cat=2009 and the recent http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201321.aspx.
169. See press release available at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_The-Competition-Authority-has-concluded-its-investigation-into-anti-competitive-practices-in-the-gymnasium-and-health.aspx?lst=1&Cat=2009.

161. In merger control, harmonization is not fully achieved. Particularly due to a turnover threshold established in unreasonably high values, quite unprecedented in economies of EU Member States of similar size, a market share bi-dimensional threshold is kept whilst the objectives laid down in the 2011 *MoU* of enhancing legal security and reducing the administrative burdens on companies may yet be achieved. Another particularity of the 2012 Competition Act, alas inherited from the previous legislations, is the institute of abuse of economic dependence (relative dominant position abusive conduct).

162. With a renovated Board, the PCA is bound to a more effective and active attitude towards advocacy, compliance and public enforcement of competition law, both national and EU. Because of the known frailties of the law and of human nature, it is suggested that the PCA understands that with greater power comes greater responsibility.