

# Dominance

*Contributing editors*

**Thomas Janssens and Thomas Wessely**



**2016**

**GETTING THE  
DEAL THROUGH** 

GETTING THE  
DEAL THROUGH 

# Dominance 2016

*Contributing editors*

Thomas Janssens and Thomas Wessely  
Freshfields Bruckhaus Deringer

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015  
No photocopying without a CLA licence.  
First published 2003  
Twelfth edition  
ISSN 1746-5508

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of December 2015, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Global Overview</b>	<b>7</b>	<b>Greece</b>	<b>108</b>
Onno Brouwer, Thomas Janssens, Thomas Wessely and Joanna Goyder Freshfields Bruckhaus Deringer		Cleomenis Yannikas Dryllerakis & Associates	
<b>Australia</b>	<b>12</b>	<b>Hong Kong</b>	<b>114</b>
Elizabeth Avery, Adelina Widjaja and Morelle Bull Gilbert + Tobin		Jenny Connolly, Nicholas French, Timothy Lamb and Elske Raedts Freshfields Bruckhaus Deringer	
<b>Austria</b>	<b>18</b>	<b>India</b>	<b>121</b>
Thomas Lübbig and Franz Stenitzer Freshfields Bruckhaus Deringer		Shweta Shroff Chopra and Harman Singh Sandhu Shardul Amarchand Mangaldas & Co	
<b>Belgium</b>	<b>24</b>	<b>Indonesia</b>	<b>127</b>
Laurent Garzaniti and Tone Oeyen Freshfields Bruckhaus Deringer		Ardian Denny Sidharta and Verry Iskandar Soemadipradja & Taher	
<b>Brazil</b>	<b>31</b>	<b>Ireland</b>	<b>133</b>
Carlos Francisco de Magalhães, Gabriel Nogueira Dias, Francisco Niclós Negrão and Thais de Sousa Guerra Magalhães e Dias – Advocacia		Helen Kelly and Kate Leahy Matheson	
<b>Canada</b>	<b>36</b>	<b>Israel</b>	<b>140</b>
Susan M Hutton Stikeman Elliott LLP		Mattan Meridor, Lior Saar and Moran Aumann Agmon & Co, Rosenberg Hacoheh & Co, Law Offices	
<b>China</b>	<b>47</b>	<b>Italy</b>	<b>145</b>
Nicholas French, Ninette Doodoo, Vivian Cao, Donghao Cui and Tracy Lu Freshfields Bruckhaus Deringer		Gian Luca Zampa and Tommaso Salonicco Freshfields Bruckhaus Deringer	
<b>Colombia</b>	<b>55</b>	<b>Japan</b>	<b>157</b>
Ximena Zuleta-Londoño and Alberto Zuleta-Londoño Cardenas & Cardenas Abogados		Akinori Uesugi and Kaori Yamada Freshfields Bruckhaus Deringer	
<b>Croatia</b>	<b>59</b>	<b>Korea</b>	<b>164</b>
Marijana Liszt and Tin Oraić Posavec, Rašica & Liszt		Sung Man Kim Lee & Ko	
<b>Denmark</b>	<b>65</b>	<b>Luxembourg</b>	<b>170</b>
Martin André Dittmer, Erik Kjær-Hansen and Michael Meyer Gorrissen Federspiel		Léon Gloden and Carmen Schanck Elvinger, Hoss & Prussen	
<b>Ecuador</b>	<b>70</b>	<b>Malaysia</b>	<b>176</b>
Daniel Robalino-Orellana and David Toscano Ferrere Abogados, Ecuador		Sharon Tan Suyin Zaid Ibrahim & Co	
<b>European Union</b>	<b>75</b>	<b>Mexico</b>	<b>182</b>
Thomas Wessely and Angeline Woods Freshfields Bruckhaus Deringer		Rafael Valdés Abascal and José Ángel Santiago Ábrego Valdés Abascal Abogados SC	
<b>Finland</b>	<b>84</b>	<b>Morocco</b>	<b>187</b>
Erkko Ruohoniemi and Satu-Anneli Kauranen Merilampi Attorneys Ltd		Corinne Khayat and Maija Brossard UGGC Avocats	
<b>France</b>	<b>90</b>	<b>Netherlands</b>	<b>192</b>
Maria Trabucchi and Jérôme Fabre Freshfields Bruckhaus Deringer		Onno Brouwer, Paul van den Berg and Frouke Heringa Freshfields Bruckhaus Deringer	
<b>Germany</b>	<b>101</b>	<b>Norway</b>	<b>201</b>
Ulrich Scholz and Tim Vohwinkel Freshfields Bruckhaus Deringer		Siri Teigum and Odd Stemsrud Advokatfirmaet Thommessen AS	

<b>Portugal</b>	<b>205</b>	<b>Spain</b>	<b>233</b>
Mário Marques Mendes and Pedro Vilarinho Pires Gómez-Acebo & Pombo		Francisco Cantos and Rafael Piqueras Freshfields Bruckhaus Deringer	
<b>Romania</b>	<b>211</b>	<b>Switzerland</b>	<b>238</b>
Raluca Vasilache, Anca Jurcovan and Andreea Opreșan Țuca Zbârcea & Asociații		Martin Ammann, Christophe Rapin and Renato Bucher Meyerslustenberger Lachenal	
<b>Russia</b>	<b>216</b>	<b>Turkey</b>	<b>245</b>
Alexander Viktorov Freshfields Bruckhaus Deringer		Gönenç Gürkaynak and K Korhan Yıldırım ELİG, Attorneys-at-Law	
<b>Singapore</b>	<b>222</b>	<b>United Kingdom</b>	<b>251</b>
Lim Chong Kin and Scott Clements Drew & Napier LLC		Alastair Chapman, Deba Das and David Gallagher Freshfields Bruckhaus Deringer	
<b>Slovenia</b>	<b>227</b>	<b>United States</b>	<b>259</b>
Andrej Fatur and Helena Belina Djalil Fatur Law Firm		Thomas Ensign and Christine Laciak Freshfields Bruckhaus Deringer	

# Portugal

Mário Marques Mendes and Pedro Vilarinho Pires

Gómez-Acebo & Pombo

## General

### 1 Legislation

**What is the legislation applying specifically to the behaviour of dominant firms?**

The Portuguese Constitution (article 81) lists the following among the general principles of economic organisation and as primary duties of the state:

- ensuring the efficient functioning of the market to guarantee balanced competition between undertakings;
- opposing monopolistic forms of organisation;
- pursuing abuses of dominant position and other practices that may harm the general interest; and
- guaranteeing the protection of the interests and rights of the consumer.

The Constitution has evolved from the original 1976 version to reflect the various (indeed, somewhat conflicting) political, social and economic concerns of the legislature. That said, the principles referred to above, along with the recognition of private property, private enterprise and consumer protection, show that competition is seen as an essential element of the Portuguese economic system.

The Portuguese competition regime went through a significant reform in 2012 with the adoption of a new Competition Act, Law No. 19/2012 of 8 May (the Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (the former Competition Act).

The Act largely follows the rules established at EU level, and addresses agreements between undertakings, decisions of associations of undertakings and undertakings' concerted practices, as well as the abuse of a dominant position, the abuse of economic dependence, concentrations and state aid. The Act also includes the leniency regime for immunity or reduction of fines imposed for breach of competition rules, which was formerly set forth in a separate statute (Law No. 39/2006 of 25 August 2003).

Decree-Law No. 125/2014 of 18 August 2014 adopted and approved the new statutes of the Competition Authority (the Authority), superseding Decree Law No. 10/2003 of 18 January 2003, which created the Authority (which replaced the Directorate General for Trade and Competition and the Competition Council, the administrative entities formerly entrusted with the enforcement of competition law) and approved its former statutes.

As regards appeals, Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court), which was established in the town of Santarém, effective from 30 March 2012. The Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Competition Authority.

Also relevant are:

- the general regime on quasi-criminal minor offences (enacted by Decree-Law No. 433/82 of 27 October 1982), which applies, on a subsidiary basis, to the administrative procedure on anti-competitive agreements, decisions and practices, and to the judicial review of sanctioning decisions;
- the Penal Code and the Code of Criminal Procedure, both applying on a subsidiary basis to quasi-criminal minor offences, by virtue of the general regime on quasi-criminal minor offences; and
- the Civil Code and the Code of Civil Procedure, regarding civil liability for anti-competitive infringements.

### 2 Non-dominant to dominant firm

**Does the law cover conduct through which a non-dominant company becomes dominant?**

No. The Act does not take issue with an undertaking becoming dominant or attempting to become dominant.

The acquisition or reinforcement of a dominant position, as a result of a concentration may, however, be scrutinised under the rules in the Act regarding merger control (articles 36 to 59 of the Act).

### 3 Object of legislation

**Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?**

The Act does not mention any specific interests to be protected by the prevention and prosecution of abuses of a dominant position.

Nevertheless, article 81(f) of the Constitution (see question 1) specifically mentions 'the general interest' as a value to be protected against abuses of a dominant position.

### 4 Non-dominant firms

**Are there any rules applying to the unilateral conduct of non-dominant firms? Is your national law relating to the unilateral conduct of firms stricter than article 102?**

The Act essentially follows article 102 of the Treaty on the Functioning of the European Union (TFEU).

Further, unilateral anti-competitive behaviour by both dominant and non-dominant undertakings is taken into account in cases of an 'abuse of economic dependence'. Article 12 of the Act prohibits the abusive exploitation by one or more undertakings of the economic dependence on them by any suppliers or clients due to the absence of an equivalent alternative, insofar as it affects the market functioning or the structure of the competition.

An equivalent alternative is considered not to exist when:

- the supply of the goods or services in question, notably the distribution service, can only be provided by a restricted number of undertakings; or
- an undertaking cannot obtain identical conditions from other trading parties within a reasonable time frame.

The following may be considered abusive:

- carrying out any of the practices mentioned in article 11(2) (a) (b) (c) and (d) of the Act (corresponding to behaviour that may amount to abusive practices, see question 15); and
- partial or total termination of an established commercial relationship without justification, taking into account past commercial relationships, the accepted trade usages in the concerned sector of economic activity and the applicable contract terms.

In addition, there is special legislation governing unilateral commercial practices (Decree-Law No. 166/2013 of 27 December 2013) dealing with unfair competition prohibitions such as price and non-price discrimination, sale below cost and refusal to sell.

## 5 Sector-specific control

### Is dominance regulated according to sector?

The Act's provisions, including those on dominance, apply to all economic activities taking place in the Portuguese market or having effects therein, be they permanent or occasional, in the private, public and cooperative sectors, as per article 2 of the Act.

Sector regulators are entrusted with the generic power to ensure effective competition in the corresponding regulated markets. For instance, in the specific case of telecoms, according to Law No. 5/2004 of 10 February 2004, as amended, the sector regulator, the National Communications Authority, may declare which companies, if any, have significant market power, and impose duties on them, such as transparency, non-discrimination in access to interconnection, accounting separation, and price control and cost accounting (article 66). It should, nevertheless, be noted that the above powers do not include those of establishing or pursuing abuses of a dominant position under article 11 of the Act.

Dominance issues related to merger control may also be subject to specific rules in what concerns the intervention of sector regulators, for example, in the insurance, banking and media sectors.

## 6 Status of sector-specific provisions

### What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

The Act vests in the Authority the power to investigate and sanction an abuse of dominant position under article 11 of the Act.

However, sector regulators may be called upon to deal with matters involving competition aspects. This imposes on all the authorities involved a duty of cooperation, which is broadly outlined in article 9(2) of the Authority's statutes (Decree-Law No. 125/2014, of 18 August 2014), and is further detailed in the Act.

As such, whenever an infringement occurs in a sector subject to specific regulation, the Authority shall immediately inform the corresponding regulatory authority so that this latter may submit observations. Further, before the adoption of the final decision the Authority shall obtain an opinion from the relevant regulatory authority, except in the case of a decision of closure of a case without conditions. Likewise, when a sectoral regulatory authority assesses a practice that may amount to a violation of competition rules it shall immediately inform the Authority. In this latter case, the sectoral authority, before issuing a final decision, shall submit a draft thereof to the Authority in order to obtain its opinion.

## 7 Enforcement record

### How frequently is the legislation used in practice?

Under the previous competition regimes (which were in force between 1983 and 2003) there were 19 reported decisions regarding abuses of a dominant position and abuses of economic dependence. Ten decisions resulted in acquittal, and nine gave rise to the application of sanctions (fines in seven of them). The ancillary penalty of paying for the publication of the Authority's sanctioning decision in a nationally distributed newspaper was also frequently imposed.

Under the Act, and although several investigations into reported abuses of dominance have been carried out or are at present under way, only six condemning decisions have so far been adopted. The first three cases involved the Portugal Telecom (PT) Group, the telecoms incumbent in Portugal: in the first case in 2007, the Authority fined PT Comunicações, a subsidiary of Portugal Telecom, €38 million for refusal of access to its underground conduits network to competitors Tvtel and Cabovisão, a decision that was annulled by the Lisbon Court of Commerce on 2 March 2010, this annulment having been confirmed by the Appellate Court of Lisbon (see question 24). The second decision fined PT Comunicações €2.1 million in 2008 for abuse of a dominant position in the wholesale markets for the lease of communication circuits, a decision that was revoked by the Lisbon Court of Commerce on 29 February 2012, which acquitted PT. The third decision fined the PT Group and the ZON Group an aggregate amount of €53.062 million (with a €45.016 million fine on the PT Group and a €8.046 million fine on the ZON Group) for abuse of a dominant position between 22 May 2002 and 30 June 2003 in the wholesale and retail broadband access markets (see question 34), a decision that was revoked by the Lisbon Court of Commerce on 4 October 2011, which acquitted the defendants. In addition, on 12 April 2012, the Authority imposed on Roche

Farmacêutica, a local subsidiary of Roche, a fine of €900,000 for abuse of a dominant position related to a discount system applied by Roche to public hospitals within public tenders proceedings in 2006. Further, in a decision announced on 18 May 2010, the Authority fined the Portuguese Association of Chartered Accountants (OTOC) €229,300 for adopting anti-competitive practices in the market of mandatory training for chartered accountants, a decision that was partially confirmed by the Lisbon Court of Commerce, which lowered the fine to €90,000. A subsequent appeal has been lodged by the OTOC with the Appellate Court of Lisbon, which confirmed the Lisbon Court of Commerce's decision. Finally, on 20 June 2013, the Authority imposed on Sport TV Portugal a fine of €3.73 million for abuse of a dominant position in the national market for television channels of conditioned access with premium sport content, a fine that the Specialised Court (see question 1) decreased to €2.7 million. This latter decision has been confirmed by the Appellate Court of Lisbon.

## 8 Economics

### What is the role of economics in the application of the dominance provisions?

Owing to its budget and recruitment policy, the Authority has the internal economic expertise that the former competition authorities lacked. The greater importance of solid economic analysis to the handling of cases is evident. Undertakings are coping well with the higher level of sophistication of economic analysis. Nevertheless, it is not yet clear how such improvements will be interpreted by the courts.

## 9 Scope of application of dominance provisions

### To whom do the dominance provisions apply? To what extent do they apply to public entities?

The notion of an 'undertaking' adopted in the Act is very broad, in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it operates.

Under the Act, as in the former Competition Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

## 10 Definition of dominance

### How is dominance defined?

Article 11 of the Act, contrary to article 6 of the former Competition Act, does not include a definition of dominance. It is expected that in establishing dominance the Authority shall follow EU case law as well as its past practice under the former competition regimes.

## 11 Market definition

### What is the test for market definition?

According to the Authority's decision practice, the Authority follows, in its methodology of definition of the relevant markets, the 'Commission Notice on the definition of a relevant market for the purposes of Community competition law' (Official Journal C372, 9 December 1997). The relevant product market comprises all those products and services that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned supply their products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas (see the *Sport TV Portugal* decision referred to in question 7).

## 12 Market-share threshold

### Is there a market-share threshold above which a company will be presumed to be dominant?

The Act does not rely on market-share thresholds to establish dominance.

**13 Collective dominance**

**Is collective dominance covered by the legislation? If so, how is it defined?**

Yes. As regards the definition, see question 10.

**14 Dominant purchasers**

**Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?**

Yes. The Act applies to dominant purchasers. Although none of the decisions on abuse of dominant position so far adopted by the Authority concern dominant purchasers, there should be no differences in the application of the law to dominant suppliers.

**Abuse in general****15 Definition**

**How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?**

Article 11(1) of the Act does not give an express legal definition of abuse. It states that 'the abusive exploitation, by one or more undertakings, of a dominant position in the national market or a substantial part of it is prohibited.' It is, therefore, an open clause, with a potentially broad scope of application.

Nonetheless, article 11(2) of the Act gives examples of abusive practices, as follows:

- directly or indirectly fixing purchase or sale prices or other unfair trading conditions (article 11(2)(a));
- limiting production, distribution or technical development to the prejudice of consumers (article 11(2)(b));
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (article 11(2)(c));
- making the signing of contracts conditional on the acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts (article 11(2)(d)); and
- refusing to provide, upon appropriate remuneration, access to an essential network or other essential infrastructures controlled by the dominant undertaking to any other undertaking, when without such access this latter undertaking cannot, for factual or legal reasons, compete with the dominant undertaking in the upstream or downstream markets, unless the dominant undertaking demonstrates that, for operational or other reasons, the access is reasonably impossible (article 11(2)(e)).

**16 Exploitative and exclusionary practices**

**Does the concept of abuse cover both exploitative and exclusionary practices?**

The examples mentioned in article 11(2) of the Act include examples of both exploitative and exclusionary practices.

**17 Link between dominance and abuse**

**What link must be shown between dominance and abuse?**

Under the competition regime in place prior to the former Competition Act, there was considerable debate on whether a causal link had to be established between the dominant position and the abuse. In a 1996 statement, the Competition Council (one of the former competition authorities) seemed to consider that such a test had to be met, although more recent decisions showed some dissension within the Council on that subject.

In the 1995 *Multiflora* case, the Competition Council decided that a company that was dominant in the tachograph equipment market was abusively taking advantage of that position in order to get better results in the market for tachograph paper, a market where it was not dominant. This type of approach is expected to be followed by the Authority, notably taking into consideration the broad scope of article 11(1) of the Act.

**18 Defences**

**What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?**

In principle, defences based on objective justifications (such as objective necessity or meeting competition) or efficiencies may be discussed under the Act, which, as stated, closely follows article 102 TFEU.

**Specific forms of abuse****19 Price and non-price discrimination**

Article 11(2)(c) of the Act refers to the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (see question 15). The Authority's decisions in *PT Comunicações* (2008) and in *PT Group/ZON Group* (2009) (see questions 7 and 34) punished, respectively, PT Comunicações and PT Group and ZON Group for discriminatory conditions regarding equivalent services. Likewise, in the *Sport TV* decision (see questions 7, 27 and 38) the practice in question was the consistent application of discriminatory conditions to equivalent transactions (the system of remuneration in agreements for distribution of the Sport TV Portugal channels).

**20 Exploitative prices or terms of supply**

The open clause of article 11(1) of the Act will exclude any other forms of exploitation (see question 15). The decision of the former Competition Council in *Tabaqueira II* (1997) condemned discriminatory minimum purchase obligations under the competition regime in force before the former Competition Act.

**21 Rebate schemes**

The same principle as in question 20 should apply. In addition, article 11(2)(c) of the Act prohibits the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The decision of the former Competition Council in *Martini* (1987) sanctioned the application of a discriminatory rebate scheme to certain classes of customers.

**22 Predatory pricing**

Article 11(2)(a) of the Act should apply (see question 15). The decision of the former Competition Council in *RAR* (1988), concerning a sugar refiner and packager, punished predatory pricing in the packed sugar market.

**23 Price squeezes**

Article 11(2)(a) and (c) of the Act should apply (see question 15). In the above-mentioned decision adopted in *PT Group/ZON Group* (2009) (see questions 7, 19 and 34), the Authority punished the PT Group and the ZON Group for margin squeeze.

**24 Refusals to deal and access to essential facilities**

Article 11(2)(e) of the Act expressly outlaws the refusal to facilitate access to a network or to essential facilities (see question 15). The decision of the former Competition Council in *Auto-Sueco* (1995) stated that the dominant importer of heavy lorries abusively tried to prevent an operator in a downstream market (urban waste disposal vehicles) from entering the market by refusing to deal with it.

Further, one of the decisions so far adopted by the Authority regarding the abuse of a dominant position concerns the refusal, by PT Comunicações (PTC), a Portugal Telecom subsidiary, to grant access to its underground conduits network, which is considered an essential facility by PTC's competitors TvTel and Cabovisão (see question 7). Nonetheless, as previously mentioned, on 2 March 2010, the Lisbon Court of Commerce annulled this condemning decision, based on the Authority's failure to provide sufficient proof that there had been an unjustified or discriminatory refusal of access to an essential facility. The annulment was subsequently confirmed by the Appellate Court of Lisbon.

**25 Exclusive dealing, non-compete provisions and single branding**

The open clause of article 11(1) of the Act should apply. Former Competition Council decisions concerning these issues include:

- *Moraes & Wasteels* (1987) on the exclusive purchase obligation and purchase-price fixing;

- *Luso* (1987) regarding market partitioning between distributors of the same brand; and
- *Tabaqueira I* (1988) concerning the imposition of an exclusive dealing obligation on tobacco wholesalers.

## 26 Tying and leveraging

Article 11(2)(d) of the Act prohibits making the signing of contracts conditional on the acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts (see question 15).

In *Via Verde* (2002), the former Competition Council decided that the service under discussion – the issuing of receipts to users – and the identification and prosecution of infringers on the automatic toll payment of the Lisbon bridges involved tying; the provider of the service of automatic toll payment was subsequently fined for abuse of a dominant position.

## 27 Limiting production, markets or technical development

Article 11(2)(b) of the Act prohibits limiting production, distribution or technical development to the prejudice of consumers (see question 15). In the above-mentioned decision adopted in *PT Group/ZON Group* (2009; see questions 7, 19, 23 and 34), the Authority also punished the PT Group and the ZON Group for limiting production, distribution, technical development and investment in respect of the services concerned. In the *Sport TV* decision (see questions 7, 19 and 38) the Authority also considered that the behaviour of Sport TV Portugal limited the production, distribution, technical development and investment.

## 28 Abuse of intellectual property rights

Leaving aside issues that are typically dealt with under the Industrial Property Code, article 11(1) of the Act may certainly apply.

## 29 Abuse of government process

In terms of judicial procedure, specific provisions apply in the case of bad faith litigation, which comprises the abuse of judicial procedure, where fines are applied by the court and damages awarded when proved by the other party.

Although there is no known case in Portugal of an investigation of abuse by misuse of administrative procedures, it cannot be excluded that article 11(1) of the Act may apply to such cases.

## 30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Mergers may be scrutinised by the Authority under the merger control provisions of the Act, and a merger shall be prohibited if it creates significant impediments to effective competition in the Portuguese market or in a substantial part of it, in particular if such impediments result from the creation or strengthening of a dominant position.

There is no known case in Portugal in which mergers or acquisitions have been investigated as structural abuses.

## 31 Other types of abuse

As stated above, article 11(1) of the Act constitutes an open clause with a potentially broad scope of application. Accordingly, types of abuse not covered by the previous questions may be sanctioned under the Act.

## Enforcement proceedings

### 32 Prohibition of abusive practices

**Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?**

Illegality of abusive practices derives from article 11 of the Act, which is directly applicable.

### 33 Enforcement authorities

**Which authorities are responsible for enforcement and what powers of investigation do they have?**

The responsibility for enforcing the competition regime rests with the Competition Authority (see question 6).

The Authority is a public entity endowed with administrative and financial autonomy, which has been granted statutory independence to perform its activities, without prejudice to the competence of the government as regards competition policy.

The Authority has extensive powers of investigation and inspection. Among other powers, it can, notably:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examinations, collection and seizure of extracts from accounting records or other documentation at the premises, lands or transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, issued upon an Authority's substantiated application);
- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, issued upon an Authority's substantiated application); and
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the Authority's functions.

The proceedings carried out by the Authority after it has opened an inquiry must ensure that the parties involved are given a hearing and comply with the other principles of the adversarial system.

## 34 Sanctions and remedies

### What sanctions and remedies may they impose?

Abuse of dominance per se is considered a quasi-criminal minor offence (see question 1). The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, etc) since there are no criminal sanctions for competition law offences.

In relation to sanctions for quasi-criminal minor offences, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 11 of the Act or article 102 TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase;
- for the non-compliance with behavioural or structural remedies imposed by the Authority; or
- for non-compliance with a decision ordering interim measures.

In the case of any of these infringements being carried out by individuals held responsible under the Act (see below) the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, the refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the Authority are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority, for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In the case of any of these infringements being carried out by individuals held responsible under the Act (see below) the applicable fine ranges from 10 to 50 units of account (each unit of account at present amounting to €102).

Further, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from 2 to 10 units of account.

Additionally, should the infringement be considered sufficiently serious, the Authority can impose, as ancillary sanctions, the publication, at the offender's expense, of an extract of the sanctioning decision in the Official Gazette and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market, or, in the



case of competition law infringements carried out during, or due to, public procurement proceedings, the prohibition for a maximum of two years from participating in proceedings for entering into public works contracts for concessions of public works or public services for the lease or acquisition of goods or services by the state or for the granting of public licences or authorisations.

The Authority may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in the year immediately preceding that of the final decision, per day of delay, counted from the date established in the notification, where the undertakings do not comply with an Authority decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity), or by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out are also liable when holding leading positions they act on behalf or on the account of the legal entity, or knowing or having the obligation to know the infringement they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings whose representatives were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment are jointly and severally responsible for paying the fine, unless they have expressed in writing their opposition to the infringement.

Further, the Authority's decisions declaring the existence of a restrictive practice may include the admonition or the application of other fines and other sanctions set forth in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy that is equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

In addition, the Authority may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause a serious damage, irreparable or difficult to repair. The interim measures may be adopted by the Authority *ex officio* or upon request by any interested party and shall be effective until they are revoked and for a period of up to 90 days, extendible for equal periods

#### Update and trends

Since the last decision in which it imposed fines for abuse of a dominant position – a decision adopted on 20 June 2013, in which the Competition Authority imposed on Sport TV Portugal a fine of €3.73 million for abuse of a dominant position, which the Specialised Court lowered to €2.7 million, an amount subsequently confirmed by the Appellate Court of Lisbon – the Competition Authority has not adopted any other decision imposing sanctions for abuse of a dominant position. According to the Competition Authority's public records, all subsequent dominance cases were closed by the Competition Authority without conditions.

Still, according to the Competition Authority's public records, on 24 March 2015, the Competition Authority has adopted a statement of objections against four undertakings, regarding a possible abuse of a dominant position in the market intelligence sector. The practice at issue is an alleged abuse of a dominant position in the form of margin squeeze. The Competition Authority has not made public any further details on the case.

within the time-limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such a hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested. The highest fine ever imposed was the one levied on the PT Group and the ZON Group, in which the Authority fined the said groups an aggregate amount of €53.062 million (€45.016 million on the PT Group and €8.046 million on the ZON Group), for abuse of a dominant position between 22 May 2002 and 30 June 2003 in the wholesale and retail broadband access markets. The sanctioned abusive practices included retail margin squeeze, discriminatory conditions regarding equivalent services and limiting production, distribution, technical development and investment in respect of the services concerned. As stated above (see question 7) this decision was revoked by the Lisbon Court of Commerce on 4 October 2011, which, on the grounds of the applicable statute of limitations acquitted the defendants.

#### 35 Impact on contracts

##### What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

Contractual clauses that substantiate or have as an effect practices prohibited by the Act are null and void as a result of their being contrary to the law, according to article 280(1) of the Civil Code. In principle, this merely involves the nullity of the specific clause in the contract and not of the whole contract, unless, as per article 292 of the Civil Code, it is proved that the parties would not have signed the contract without the invalid clause.

## GÓMEZ-ACEBO & POMBO

Mário Marques Mendes  
Pedro Vilarinho Pires

marquesmendes@gomezacebo-pombo.com  
pvpres@gomezacebo-pombo.com

Avenida Duque de Ávila, No. 46, 6th floor  
1050-083 Lisbon  
Portugal

Tel: +351 21 340 86 00  
Fax: +351 21 340 86 08  
www.gomezacebo-pombo.com

**36 Private enforcement**

**To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?**

Third-party claims for damages are dealt with under the general principles and provisions applicable to civil liability as provided for in the Civil Code. Standard liability requirements are the existence of unlawful conduct (the abusive behaviour), injury to the claimant and a causal link between the two. The purpose of this liability is merely to repair damage, and, therefore, there is no award of punitive damages.

Any injured party has individual standing. Class actions, whereby individual litigants or associations may, under certain conditions, sue in representation of injured parties, are provided for in Law No. 83/95 of 31 August 1995, and article 31 of the Code of Civil Procedure, and may, in principle, be applicable to competition law injuries.

As for the possibility of a dominant firm being ordered to grant access, supply goods or services or conclude a contract, as stated in question 34, the Authority's decisions declaring the existence of a restrictive practice may include the admonition or the application of other fines and other sanctions set forth in the Act and, if required, the imposition of behavioural or structural remedies to put an end to the restrictive practice or to the

effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy that is equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

As regards courts, although they may adopt decisions whereby a party is ordered to refrain from practices prohibited by law, such as an abuse, we are of opinion that, under the Portuguese legal system, within the framework of the Act, they cannot impose obligations on a specific contract.

**37 Availability of damages**

**Do companies harmed by abusive practices have a claim for damages?**

See question 36.

**38 Recent enforcement action**

**What is the most recent high-profile dominance case?**

In 2014, and in 2015 up to the time of writing, there were no dominance cases decided by the Authority. According to the Authority's public records, there is one pending dominance case in which the Authority has adopted a statement of objections regarding a possible abuse of a dominant position in the market intelligence sector.

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Executive Compensation & Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



*Dominance*  
ISSN 1746-5508



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law