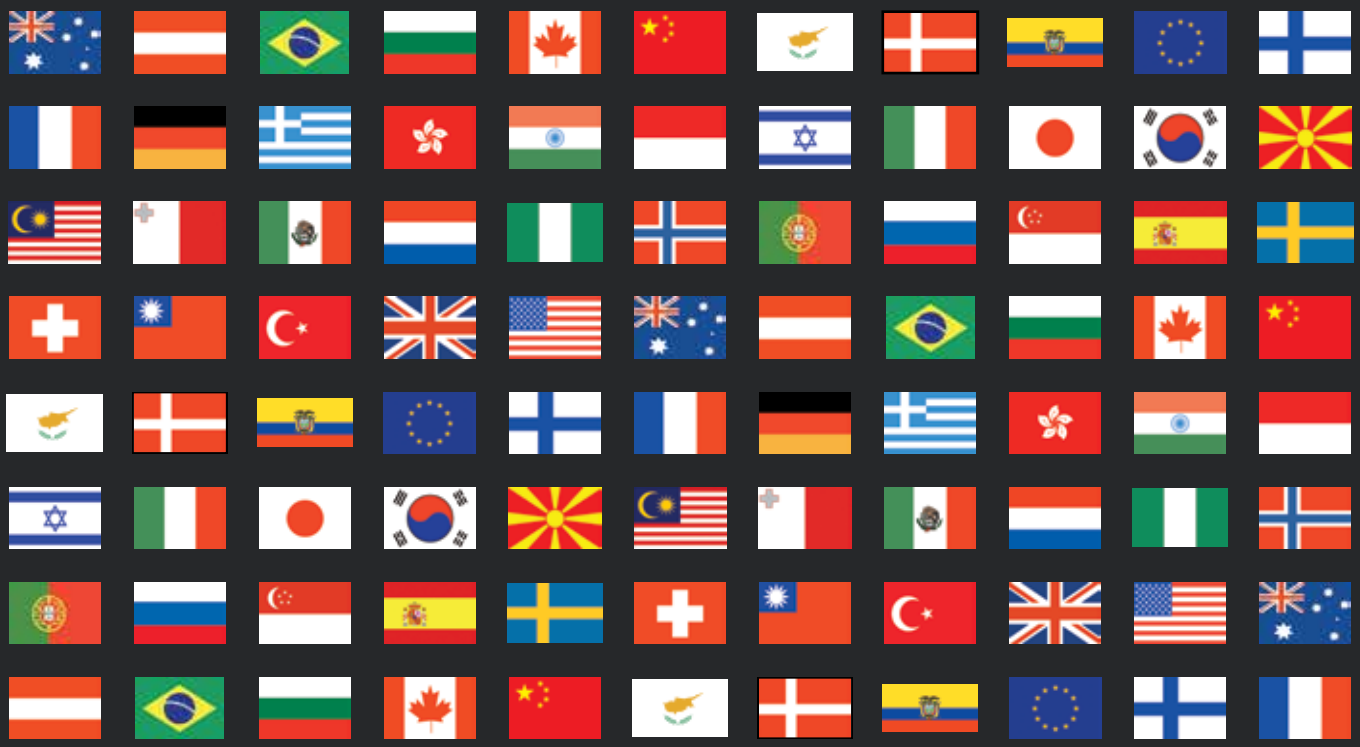
Cartel Regulation

Contributing editor
A Neil Campbell



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GETTING THE DEAL THROUGH

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Cartel Regulation 2017

Contributing editor
A Neil Campbell
McMillan LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Portugal

Mário Marques Mendes and Alexandra Dias Henriques

Gómez-Acebo & Pombo

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Portuguese Constitution 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 (if not 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a significant reform in 2012 with the adoption of a new Competition Act, Law No. 19/2012 of 8 May (the Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (the former Competition Act).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).

Decree-Law No. 125/2014 of 18 August adopted and approved the new statutes of the Competition Authority (the Authority), superseding Decree-Law No. 10/2003 of 18 January, which created the Authority 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 as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Authority.

Also relevant are:

- Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure;
- 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 anticompetitive agreements, decisions and practices, and to the judicial review of sanctioning decisions;
- the Penal Code and the Criminal Procedure Code, both of which apply 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 Civil Procedure Code regarding civil liability for anticompetitive infringements.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Cartel matters are investigated and decided by the Authority. There is no separate prosecution authority.

According to its statutes the Authority is an independent administrative entity endowed with administrative and financial autonomy, management autonomy and organic functional and technical independence and with own assets. As per the statutes, the Authority's mission is the promotion and defence of competition in the public, private, cooperative and social sectors, in compliance with the principle of market economy and freedom of competition having in view the efficient functioning of the markets, the optimal allocation of resources and the interests of consumers.

The responsibilities of the Authority include:

- ensuring compliance with national and EU competition laws, regulations and decisions;
- implementing practices that may promote competition and develop a competition culture among economic operators and the public in general;
- establishing priority levels as regards matters which the Authority is called to assess, under the competition legal regime;
- releasing, notably among the economic operators, guidelines deemed relevant for the competition policy;
- following the activity of, and establishing cooperation links with, the EU institutions, national, foreign and international entities with responsibilities in the area of competition;
- promoting research in the area of competition law;
- contributing to the improvement of Portuguese legal regimes in all areas relevant to competition;
- carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition; and
- ensuring the technical representation of the Portuguese state in EU or international institutions in competition policy matters, without prejudice to the powers of the Foreign Affairs Ministry.

The Authority is composed of two bodies: the Board of Directors and the Sole Supervisor, supported by the organisation required for the performance of the Authority's responsibilities, established in an internal regulation.

The Board of Directors is the highest body of the Authority and is responsible for the definition of the Authority's action and by the management of the Authority's services. The Board of Directors consists of a chair and up to three other members. A vice president may also be appointed as long as in total an odd number of members is maintained. The members are appointed by the Council of Ministers upon the proposal of the minister for economic affairs and pursuant to the hearing of the competent Parliament commission.

The Sole Supervisor is responsible for the control of the legal, regular and sound management of the Authority's assets and financial management, and also carries out an advisory role to the Board of Directors. The Sole Supervisor is a chartered accountant or a chartered accountancy firm appointed by joint decision of the ministers responsible for

financial and economic affairs. The Sole Supervisor must be an auditor registered with the Securities Market Commission or, if this is not adequate, a chartered accountant or a chartered accountancy firm member of the Chartered Accountants Chamber.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Following a long-awaited reform of the competition regime, Law No. 19/2012 of 8 May 2012 superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (see question 1). Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition regime. Meanwhile, Decree-Law No. 125/2014 of 18 August has enacted the Authority's statutes, superseding Decree-Law No. 10/2003 of 18 January.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 9 of the Act, in line with article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, in whatever form, having as their object or effect to prevent, distort or restrict competition in the whole or part of the national market to a considerable extent. It then lists some of the behaviour that may be prohibited, including:

- directly or indirectly fixing purchase or sale prices or any other transaction conditions;
- limiting or controlling production, distribution, technical development or investments;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making a condition of the signing of contracts the acceptance, by the other parties, of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Cartels are likely to correspond to one or more of these situations. Furthermore, acts not listed under article 9 may naturally fall within its scope, provided that the conditions for its application are fulfilled.

Only significant restrictions of competition are relevant, excluding de minimis infringements.

The Authority has already interpreted article 9 of the Act in the sense that infringements the object of which is to prevent, distort or restrict competition (as opposed to infringements the effects of which are to prevent, distort or restrict competition) are infringements per se, insofar as they are prohibited because they represent a danger to competition whether or not they produce the effects that they potentiate (see, for instance, the Authority's decision in case 1/2011 regarding competitive restrictive practices in the production, processing and marketing of flexible polyurethane foam).

Infringements to article 9 of the Act constitute quasi-criminal minor offences and are punished as either intentional (cases where undertakings act intentionally and aware of the unlawfulness of their conduct) or negligent (violation of duties of care) behaviours (see articles 67 and 68 of the Act).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Under the 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.

According to article 10(1) of the Act, agreements, decisions and practices prohibited under article 9 may be considered justified, provided that they contribute to improving the production or distribution of goods and services or to promoting technical or economic development. Similarly, to the provisions of article 101(3) TFEU, this exemption will only apply when, cumulatively, they:

- allow the consumers of those goods and services a fair share of the resulting benefit;
- do not impose on the undertakings concerned any restrictions that are not indispensable for attaining these objectives; and
- do not afford such undertakings the possibility of eliminating competition in a substantial part of the product or service market in question.

Undertakings that invoke the above justification bear the burden of proof of the aforesaid conditions.

Agreements, decisions or practices are also deemed justified when, though not affecting trade between member states, they satisfy the remaining application requirements of a block exemption regulation adopted under article 101(3) TFEU. This benefit may be withdrawn by the Authority if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Act.

As far as regulated sectors are concerned, the Authority's responsibilities are to be carried out in cooperation with the corresponding regulatory authorities. The Act establishes a mutual information obligation regarding possible anticompetitive behaviour in those sectors (see question 8) establishing the terms of their reciprocal cooperation.

6 Application of the law

Does the law apply to individuals or corporations or both?

The notion of 'undertaking' adopted in the Act is very broad and 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 is financed. Groups of undertakings are treated as a single undertaking where they make up an economic unit or maintain ties of interdependence or subordination among themselves. See question 16 regarding the liability of individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act applies to restrictive practices occurring in Portugal or that may have an effect within it.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Proceedings regarding infringements of article 9 of the Act, as well as infringements of article 101 TFEU that the Authority initiates or in which it is called to intervene, are governed by the Act and, on a subsidiary basis, by the quasi-criminal minor offences regime (see question 1). The most relevant steps are as follows.

Inquiry

Initiating an inquiry: principle of opportunity

Under the Act, the Authority may initiate an inquiry ex officio or upon a complaint. In this respect, it should be noted that the Act has adopted the principle of opportunity, pursuant to which, in exercising its powers, the Authority shall be subject to the criteria of public interest in the promotion and defence of competition, and on the basis of such criteria it may grant different degrees of priority in handling the matters it is called to assess. In deciding whether proceedings for infringement of competition rules shall be initiated, the Authority shall take into account:

- the competition policy priorities;
- the elements of fact and of law that are submitted to the Authority;
- the seriousness of the possible infringement;
- the likelihood of proving the existence of the infringement; and

- the scope of the investigation activity required to perform the mission of ensuring compliance with national and EU competition rules.

The Authority has meanwhile adopted the guidelines on the priorities in exercising sanctioning powers and on the investigation in proceedings regarding competition restrictive practices.

As regards processing of complaints, the Authority shall register all complaints received and initiate the corresponding proceedings. However, if on the basis of the information available the Authority considers that there are no sufficient grounds for acting, it shall inform the complainant granting a delay of no less than 10 working days to submit observations. If such observations are submitted by the complainant within the prescribed deadline but the Authority does not change its position, declaring that the complaint has no grounds or should not be granted priority, such decision may be appealed to the Specialised Court (see question 14). Conversely, in the absence of the timely submission of the observations, the case is closed.

Scope

Within the framework of the inquiry, the Authority shall carry out all the investigation actions required to establish the existence of an infringement and of the corresponding infringers, and to collect evidence.

Settlement proceedings

During the inquiry phase, the Authority may fix a deadline to the concerned undertaking of no less than 10 working days to express in writing its intention of participating in discussions with the Authority aiming at a possible submission of a settlement proposal. During the inquiry phase, the concerned undertaking may also submit in writing to the Authority its intention of initiating the said discussions.

A concerned undertaking participating in settlement discussions shall be informed, 10 working days before the start of such discussions, of the facts that are attributed to it, of the evidence supporting the application of a sanction and of the limits of the fine.

At the end of the discussions, the Authority notifies the concerned undertaking to submit a settlement proposal within a deadline of no less than 10 working days. The Authority may either reject the proposal (a decision that cannot be appealed) or accept it. In this latter case, the Authority shall prepare the draft settlement document, which it notifies to the concerned undertaking. The concerned undertaking shall, within a deadline of no less than 10 working days prescribed by the Authority, confirm that the draft settlement document reflects the settlement proposal. In the absence of such confirmation:

- the draft settlement document becomes ineffective;
- the infringement proceedings shall continue; and
- the settlement proposal is deemed revoked and cannot be used as evidence against any undertaking involved in the settlement proceedings.

The draft settlement document is converted into a definitive sanctioning decision upon the above confirmation by the concerned undertaking and upon payment of the applied fine. Facts included in the decision can no longer be used in other infringement proceedings and the facts confessed by the concerned undertaking cannot be rebutted in an appeal. Furthermore, a reduction of fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings.

Closure with conditions

The Authority may also accept commitments offered by a concerned undertaking that are likely to eliminate the effects on competition of the practices under scrutiny, closing the case with conditions attached aimed at guaranteeing compliance with the commitments offered. Before approving a decision to close the case with conditions attached, the Authority shall publish on its website and in two major national newspapers, at the expense of the concerned undertaking, a summary of the case, fixing a deadline of no less than 20 working days for submission of observations by interested third parties. The Authority may, within two years, reopen the case closed with conditions attached if:

- a substantial change in the facts on which the decision was grounded has occurred;
- the conditions attached to the decision are not complied with; or
- the closure decision was grounded on false, inaccurate or incomplete information.

Decision

The inquiry must be concluded within a maximum deadline of 18 months. However, if such deadline cannot be met, the Council of the Authority (the Authority's decision-making body) shall inform the concerned undertaking of that fact, indicating the period required for the completion of the inquiry. Upon completion of the inquiry, the Authority may:

- start the investigation phase notifying the concerned undertaking of the statement of objections, when the Authority concludes that, on the basis of the findings, there is a reasonable possibility of adoption of a sanctioning decision;
- close the case when the findings do not allow for the conclusion that there is a reasonable possibility of adoption of a sanctioning decision;
- put an end to the proceedings adopting a sanctioning decision within settlement proceedings; or
- close the file with conditions attached, under the terms referred to above.

If the inquiry has been initiated following a complaint and the Authority considers, on the basis of the findings, that there is no reasonable possibility of adoption of a sanctioning decision, the Authority informs the complainant thereof, fixing a deadline of no less than 10 working days for the submission of observations. If such observations are submitted and the Authority's position remains unchanged, the latter shall adopt an express closure decision, which may be appealed to the Specialised Court (see question 14).

Investigation

Scope

In the statement of objections, the Authority shall fix to the concerned undertaking a deadline of no less than 20 working days to submit written observations on the matters that may be relevant to the decision and on the evidence gathered, and to request complementary evidence it may deem convenient. In the observations submitted, the concerned undertaking may request an oral hearing. Upon reasoned decision, the Authority may refuse to undertake additional action with regard to complementary evidence if it considers that the request has mere delaying purposes. The Authority may also carry out additional collection of evidence, even after the submission of the written observations by the concerned undertaking and its oral hearing. In this latter case, the Authority shall notify the concerned undertaking of the evidence gathered, fixing a deadline of no less than 10 working days for submission of observations. Furthermore, whenever the new evidence substantially changes the facts initially attributed to the concerned undertaking, the Authority shall issue a new statement of objections, the above applying mutatis mutandis. Pursuant to the Act, the Authority has adopted guidelines on the investigations and procedural steps.

Settlement proceedings

In its observations regarding the statement of objections, the concerned undertaking may also submit a settlement proposal, in which case the proceedings shall be suspended for a period established by the Authority that cannot exceed 30 working days. The remaining steps of the settlement proceedings are largely similar to those indicated above in respect of the submission of a settlement proposal during the inquiry phase.

Closure with conditions

During the investigation phase, the Authority may also close the case with conditions attached, under the same terms as those referred to above.

Decision

The investigation must be concluded within a maximum deadline of 12 months from the notification of the statement of objections. However, if such deadline cannot be met, the Council of the Authority shall inform the concerned undertaking thereof, indicating the period required for the completion of the investigation. Upon completion of the investigation, the Authority may:

- declare the existence of a restrictive practice and, if applicable, consider such practice justified under article 10 of the Act;
- adopt a sanctioning decision within settlement proceedings;
- close the case with conditions attached, under the terms referred to above; or
- close the case without conditions.

Decisions declaring the existence of a restrictive practice may include the admonition or the application of fines and other sanctions set 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 equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

Interim measures

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 that is 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, extendable for equal periods within the time limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such 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.

Liaison with sectoral regulators

Whenever the infringement occurs in a sector subject to specific regulation, the Authority shall immediately inform the corresponding regulatory authority so that the latter may submit observations. Furthermore, prior to the adoption of the final decision, the Authority shall obtain a prior opinion from the relevant regulatory authority, except in the case of a decision of closure of the 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 to obtain its opinion.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Act enhanced the extensive powers of investigation already granted to the Authority by the former Competition Act. Under the Act, in investigating restrictive practices the Authority may, 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, examine, collect and seize extracts from accounting records or other documentation at the premises, land 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); or
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the Authority's functions.

In addition, in the case of a grounded suspicion that, in the domicile of shareholders, board members or employees, or other workforce of undertakings or associations of undertakings, evidence of infringements to article 9 of the Act or to article 101 TFEU may be found, the Authority may, upon decision by the competent judge issued upon an Authority's substantiated application, carry out searches in such domiciles. A search in an inhabited house, or in a locked part thereof, may only be carried out from 7am to 9pm, otherwise being null and void. Searches in the office of an attorney-at-law or doctor may only be carried out in the presence of a judge, who shall previously inform the chair of the local attorneys' bar or doctors' association, as applicable, so that he or she, or a delegate thereof, may be present. These rules apply, mutatis mutandis, to searches elsewhere, including vehicles of shareholders, board members or employees or other workforce of undertakings or associations of undertakings.

Seizure of documents must be authorised, ordered or confirmed by a decision of the judicial authority. Seizure of documents in the office of an attorney-at-law or doctor, which are subject to professional secrecy, is not permitted unless such documents are the object or an element of the infringement, otherwise being null and void. Seizure of documents in a credit institution, which are subject to banking secrecy, is carried out by the competent judge when there are grounded reasons to believe that such documents are related to the infringement or are of great interest to establish the facts.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Following the decentralisation carried out under Council Regulation No. 1/2003, cooperation between national competition authorities, including the Authority and the European Commission, takes place in the framework of the European Competition Network. Besides such cooperation, the Authority is also a member of the ECA (European Competition Authorities Association). Furthermore, at a multilateral level, the Authority cooperates within international organisations, including the OECD and the UNCTAD. The Authority also participates in multilateral cooperation networks, such as the International Competition Network, the Portuguese Speaking Countries Competition Network and the Iberian-American Competition Network. At a bilateral level, the Authority cooperates through technical cooperation protocols and projects of mutual interest with other competition authorities (Brazil, China, Mozambique, Singapore, Spain, Turkey, France and Austria). According to the last Activities' Report available, in 2015 the Authority participated in 45 European and international meetings. In the same Report the Authority underlines the cooperation with the Spanish Authority and the organisation of the seventh edition of the Iberian Competition Forum, held in Lisbon in October 2015.

Furthermore, under Council Regulation No. 1/2003, the following EU competences were taken up by the Authority at the national level:

- the investigation of infringements of articles 101 and 102 TFEU;
- the withdrawal of the application of EU block exemption regulations to acts leading to effects incompatible with article 101(3) TFEU within the national territory, or in a section of it presenting all the characteristics of a separate geographical market;
- the rejection of infringement claims or the suspension of procedures when the alleged infringement is being investigated by the European Commission or another member state's competition authority;
- assistance with the European Commission's inspections of undertakings or associations of undertakings within the national territory; and
- inspections or other investigative measures in the national territory, applying the respective national legislation, on behalf of another member state's competition authority or on request from the European Commission, to determine the existence of a violation of articles 101 or 102 TFEU.

11 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

See question 10 as regards the interplay between the Portuguese and the EU jurisdictions. According to the Authority's public records, within the framework of Council Regulation No. 1/2003, in 2004 one case was referred to the Authority within the European Competition Network (see the Authority's 2004 Activity Report, page 25).

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

See question 8.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof concerning accusations of anticompetitive behaviour rests with the Authority. However, exemptions such as those mentioned in question 5 must be proved by the alleging parties. As regards the level of proof at the end of the enquiry phase (see question 8), the decision to start the investigation phase is taken on the basis of a balance of probabilities, conversely, taking into account criminal procedure principles, such as the in dubio pro reo principle, which apply to quasi-criminal minor offences by virtue of the general regime on quasi-criminal minor offences (see question 1), the level of proof required for the final decision is the procedural certainty that without any reasonable doubt is formed by the decision maker.

14 Appeal process

What is the appeal process?

As stated above, Law No. 46/2011 of 24 June determined the creation of the Specialised Court to handle competition, regulation and supervision matters, as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Authority.

Under the current regime, the Authority's sanctioning decisions (typically involving anticompetitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the effects of the Authority's decision, except for decisions that impose structural remedies as established in the Act. Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis of the allegation that the enforcement of the decision may cause it considerable harm and if such party offers a guarantee, and provided such guarantee is submitted within the time limit set by the court. The Specialised Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment, and can reduce or increase the corresponding amounts.

As regards an appeal of the Authority's final decision condemning the concerned undertaking, it must be lodged within a non-extendable deadline of 30 working days. During a (also non-extendable) deadline of 30 working days, the Authority shall forward the file to the public prosecutor. The Authority may attach to the file written conclusions, together with elements or information it deems relevant for the Court's decision, and shall also indicate and submit the relevant evidence. The Authority shall further be given the opportunity to bring to the hearing any elements deemed relevant for the decision and to have a representative participating in such hearing. Although the Court may in certain cases decide by means of a court order without prior hearing, the Authority, the public prosecutor or the concerned undertaking may oppose such decision. The Court's final decision, as well as all decisions other than routine decisions that do not involve the refusal or the recognition of any right, must be notified to the Authority. The withdrawal of the case by the public prosecutor depends on the Authority's agreement. The Authority has standing to autonomously appeal from the Court's decisions (other than routine decisions).

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

The duration of the appeal proceedings depends on the complexity of the cases and of the concerned courts' workload. It may nevertheless last longer than 12 months.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, disturbance of public auction or tender, etc), since there are no criminal sanctions for competition law offences. Cartel activity per se is considered a quasi-criminal minor offence.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In relation to sanctions for quasi-criminal minor offences, under the Act, 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 9 of the Act or article 101 TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase (see question 8);
- for non-compliance with the behavioural or structural remedies imposed by the Authority (see question 8); or
- for non-compliance with a decision ordering interim measures.

In cases where any of these infringements is 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, 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 cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine ranges from 10 to 50 'account units' (each account unit currently amounting to €102).

Furthermore, 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 two to 10 account units.

Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed double of the higher limit of the fines applicable to the infringements in question.

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 of Portugal and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market; or
- in cases 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 Portugal 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.

In relation to civil sanctions, anticompetitive agreements, decisions and practices are considered null and void (except where they are considered justified; see question 5), and civil liability may also arise for the damage caused (see question 20).

The calculation of the above-mentioned fines must follow the mandatory criteria established in the Act (see question 17). In addition, on 20 December 2012, the Authority published Guidelines regarding the methodology to be used in the application of fines. In drafting these Guidelines, the Authority took into consideration the European Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003. The Authority's Guidelines only apply to cases in which the inquiry phase (see question 8) was initiated after the Act came into force. Furthermore, the Authority states in the Guidelines that they are not aimed at allowing for the prior calculation of the actual fines to be applied but rather at providing information necessary for the understanding of the methodology followed by the Authority in fixing such fines.

According to the Authority's public decision record, which appears on the Authority's website and only includes definitive decisions (ie, decisions that either were not subject to judicial review, or were subject to appeal and the final judicial decision has already been adopted), and in cases where the Authority has determined that an infringement occurred, the Authority has imposed fines except in those cases where it has exempted the concerned undertakings from the fines pursuant to the application of the leniency regime.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Under the Act, the following circumstances may be considered relevant for setting the amount of the fines:

- the seriousness of the infringement in terms of affecting effective competition in the Portuguese market;
- the nature and size of the market affected by the infringement;
- the duration of the infringement;
- the level of participation in the infringement by the concerned undertakings;
- the advantages that the offending concerned undertakings have enjoyed as a result of the infringement, if possible to determine;
- the behaviour of the concerned undertakings in putting an end to the restrictive practices and in repairing the damages caused to competition;
- the economic situation of the concerned undertakings;
- records of previous competition infringements carried out by the concerned undertakings; and
- cooperation with the Authority until the close of the administrative proceedings.

Consideration of the above circumstances is mandatory for the Authority. However, the absence of a hierarchy and the consideration of circumstances not listed above leave room for discretion.

Furthermore, as stated above, on 20 December 2012 the Authority published Guidelines regarding the methodology to be used in the application of fines (see question 16).

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As stated in question 16, in the case of competition law infringements carried out during, or due to, public procurement proceedings, the Authority can impose, as an ancillary sanction, a 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.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As stated above (see questions 15 and 16) cartel activity per se is considered a quasi-criminal minor offence and does not involve the application of criminal sanctions, without prejudice to the application of general criminal law if the behaviour in question also corresponds to a specific criminal offence.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

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. The standard liability requirements are the existence of an illicit act (the anticompetitive behaviour), injury to the claimant and a causal link between the two. The purpose of this liability is merely to repair damage (ie, to restore the situation that would have existed if the event that determines the need for the reparation had not occurred). The amount of compensation shall be measured by the difference between the actual patrimonial situation of the damaged party and the patrimonial situation of such party that would exist if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct, but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action. Predictable future damage shall be taken into account for this purpose. Undeterminable future damage, on the contrary, shall be the object of a subsequent procedure and decision.

Any injured party has individual standing.

In the case of indirect purchasers' claims, passing on shall be taken into account in determining the actual damages that may be claimed.

The EU Directive on Antitrust Damages Actions (Directive 2014/104/EU), which must be implemented into national law by 27 December 2016, will bring about substantial changes in the general framework referred to above.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

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 and article 31 of the Code of Civil Procedure, and may, in principle, be applicable to competition law injuries. The process is governed by ordinary civil procedure rules.

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Act establishes the leniency rules in article 75 et seq. In addition, as stated above (see question 1) the Authority has adopted Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure.

Under the Act, the Authority can grant immunity or reduction of fines in procedures for quasi-criminal minor offences that concern agreements and concerted practices between competitors prohibited by article 9 of the Act and (where applicable) article 101 TFEU, which are aimed at coordinating the competitive behaviour of the undertakings or at influencing relevant competitive conditions.

To obtain full immunity, an applicant must:

- be the first undertaking to inform the Authority of its participation in an agreement or a concerted practice, as long as it provides information and evidence which, in the Authority's discretion, enables the latter:
- to substantiate a request for searches or seizure of data, provided that the Authority, at the time the information and evidence are submitted, does not have sufficient elements to perform such acts; or
- to establish the existence of an infringement, provided that, at that moment, the Authority does not have sufficient evidence of the infringement available.
- cooperate fully and continuously with the Authority from the moment of the initial request by:
- providing all data and evidence already obtained or to be obtained in the future;
- responding immediately to any request for information;
- avoiding acts that may endanger the investigation; and
- not informing the other participants in the concerted practice;
- putting an end to its participation in the infringement before it provides the Authority the information and evidence, except as reasonably required, in the Authority's opinion, to preserve the investigation effectiveness; and
- not having coerced other undertakings to participate in the breach.

The information and evidence to be provided must contain complete and precise information on:

- the agreement or concerted practice;
- the undertakings involved, including the objectives, activity and way of operation;
- the product or service concerned; and
- the geographical scope, the duration and the manner in which the breach has been carried out.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

As stated above, under the leniency rules set forth in the Act, the Authority can grant immunity or reduction of fines.

The Authority shall grant a reduction of fines to undertakings which, not being eligible to immunity, submit information and evidence that adds significant value to those already in the possession of the Authority and provided the conditions are met regarding cooperation with the Authority and putting an end to the infringement (see question 22).

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

As regards full immunity, as noted above, only the first undertaking to provide information and evidence may obtain full immunity from fines.

Concerning the reduction of the fine, the corresponding level of reduction is determined by the Authority as follows:

- a reduction from 30 to 50 per cent granted to the first undertaking that provides information and evidence;
- a reduction from 20 to 30 per cent granted to the second undertaking that provides information and evidence; or
- a reduction of up to 20 per cent granted to the subsequent undertakings that provide information and evidence.

In fixing the fine, the Authority shall take into account the order of submission of the information and evidence, as well as their added value for the investigation. If a leniency application is submitted after the notification of the statement of objections (see question 8) the above reduction limits are reduced by half.

25 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

See questions 22, 23 and 30.

26 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See questions 22 and 23.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Authority shall classify as confidential the leniency application as well as the documents and information provided by the applicant.

For the purpose of preparing the observations in response to the statement of objections, a concerned undertaking shall be granted access to the leniency application and to the related documents and information by the Authority. However, the concerned undertaking shall not be allowed to make copies of such elements unless authorised by the leniency applicant. Third parties' access to the leniency application and to the related documents and information shall require the leniency applicant's consent.

The concerned undertaking shall not be granted access to copies of its oral statements and third parties shall have no access to them.

The above rules apply to both full (immunity) and partial (reduction of fines) leniency.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Under the Portuguese leniency regime, the Authority is not granted the power to enter into arrangements such as plea bargains. Settlements

Update and trends

The leniency regime and settlement proceedings continue to assume an important role in the investigation and decision of cartels by the Authority. Both instruments have been put in place in the Authority's first hybrid case in which, in May 2016, a Portuguese company was condemned to pay a fine in the amount of €440,000 for anticompetitive practices in the office supplies industry. The case was pending against five companies on suspicion of cartel in the form of price fixing and market sharing. For the remaining four companies investigated, against which was adopted by the Authority a statement of objections in September 2015, the proceedings continue.

In October 2015 took place the IV Lisbon Conference, an international event organised by the Authority attended by more than 300 delegates encompassing the top professions and academia from Portugal and abroad.

Last but not least, the Authority has engaged in consistent direct actions (eg, sessions regarding fighting collusion in public procurement proceedings), aimed at alerting companies and the general public to the competition law rules and principles.

are permitted under the terms described above, and a reduction in fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings (see question 8). In its most recent cartel decisions, the Authority, in determining the amount of the fines, took into account the cooperation of the companies during the investigation through the use of both the leniency regime and the settlement proceedings.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

Individuals and employees of an undertaking who are responsible for the direction or surveillance of the area of activity in which an infringement occurred, may be granted immunity or reduction of fines if they fully and continuously cooperate with the Authority, even if they have not requested such benefits.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

As stated above, Regulation No. 1/2013 sets out the leniency administrative procedure.

Under Regulation No. 1/2013, a leniency request is made by means of an application addressed to the Authority and must include:

- the object of the application, specifying whether it is a request for immunity or for a reduction in fine, or both;
- the identification of the applicant, the capacity in which the application is filed (ie, a company or the members of its board of directors or equivalent entities, or the individuals responsible for management of supervision of the sector of activity concerned in the infringement) and the corresponding contacts. In the case of legal entities, the information shall include the identification of the current members of the board of directors as well as of the members of such board during the duration of the infringement;
- detailed information on the alleged cartel;
- the identification and contact details of the undertakings involved in the alleged cartel, as well as of the current members of their boards of directors and of the members of such boards during the duration of the infringement;
- identification of other jurisdictions where a leniency application has been filed in respect of the same infringement; and
- other information deemed relevant for the request for immunity or reduction of the fine.

Together with the leniency application, the applicant shall submit all the evidence in its possession or under its control.

The leniency application must be submitted at the Authority's head office by any means, notably:

- telefax (+351 217902 093);
- mail addressed to the Authority's head office;
- email sent to the address clemencia@concorrencia.pt with an electronic signature; or
- hand delivery, notably in a meeting with the Authority's services in charge of the investigation.

Submission of a written application can be replaced by oral statements made in a meeting with the Authority's services in charge of the investigation. Such statements shall be accompanied by all the evidence in the possession of or under the control of the applicant. The statements shall be recorded in the Authority's head office with an indication of their time and date. Within the time frame established by the Authority, the applicant confirms the technical accuracy of the recording and, if necessary, corrects the statements. In the absence of any comment from the applicant, the recording is considered approved by the applicant. The transcription of the statements must be complete and accurate and shall be signed by the applicant.

The request for immunity or reduction of fine shall be deemed made on the date and at the time of its receipt at the Authority's head office. The Authority shall provide a document confirming receipt of the application and the date and hour of its submission.

In special cases and upon reasoned request, the Authority may accept a simplified leniency application if the applicant has filed, or is filing, a leniency application with the European Commission and the Commission is in the situation provided for in the Commission Notice on cooperation within the network of competition authorities (2004/C 101/03). The application shall, in these cases, be made in Portuguese or English according to the form attached to Regulation No. 1/2013 or by oral statements. The Authority shall provide a document confirming the receipt of the simplified application and the date and hour of its submission. If the Authority starts an investigation of the infringement, it shall request that the applicant completes the application within a time frame of no less than 15 days, which, if applicable, shall include a Portuguese translation of a simplified application filed in English. If the application is not completed or the Portuguese translation is not filed within the established deadline, the application shall be refused. If an application is filed only for the purposes of immunity and this latter is no longer available (see question 23), the Authority shall inform the applicant that the application may be withdrawn or completed for the purposes of reduction of the fine. If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed.

Upon receipt of a written or oral application for immunity or reduction of fine, the Authority may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of no less than 15 days for the completion of the application by the applicant. To benefit from the marker, the applicant must indicate in the application:

- its name and address;
- information on the alleged cartel, and on the products, services and territory affected;
- an estimate of the duration of the alleged cartel;
- whether other applications for immunity or reduction of fines have been filed or are planned to be filed with other competition authorities regarding the alleged cartel; and
- the justification for the marker.

If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed. If the application is not completed, the application shall be refused. Following an analysis of the application, the Authority shall notify the applicant if it considers that the requirements for immunity are not met, in which case the applicant may, within 10 days of such notification, withdraw the application or request the Authority that this latter is considered for the purposes of reduction of the fine.

As regards an application for reduction of a fine, if the Authority considers, on a preliminary basis, that the information and evidence submitted by the applicant adds significant value to that already in its possession, it shall inform the applicant of its intention to grant a reduction of the fine, indicating the level of the applicable reduction.

The aforementioned rules governing the application for immunity or reduction of fine apply. If the Authority considers, on a preliminary basis, that the information and evidence submitted by the applicant does not add significant value to those already in its possession, it shall notify the applicant, in which case this latter may, within 10 days of such notification, withdraw the application. (See also question 23.)

Immunity or reduction of fines shall only be granted if all the requirements set forth in the Act are fulfilled (see questions 22 and 23). The final decision on immunity or reduction of fines shall be taken in the final decision of the proceedings adopted by the Authority at the end of the investigation (see question 8).

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As stated, Law No. 19/2012 superseded Law No. 18/2003, the previous competition statute, and, in respect of leniency, Law No. 39/2006. Pursuant to the Act, the current regime, including in respect of leniency provisions, should be reviewed in accordance with the evolution of the EU competition regime (see question 3).

Defending a case

32 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The defendant can request the consultation of the case file and obtain, at his or her own expense, any extracts, copies or certificates. Nevertheless, the Authority can refuse access to the file until the notification of the statement of objections in cases where the proceedings are subject to secrecy and whenever it considers that such access may harm the investigation. The 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. In order to respond to the statement of objections, the defendant may also have access to the application for immunity from the fine or reduction of the fine, and to the documents and information submitted for the purpose of immunity or reduction, though no copy can be made unless authorised by the applicant.

33 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

Employees can be interviewed or requested to provide information or documents relevant to an investigation by the Authority. In such cases, joint representation of a corporation and employees by the same counsel may constitute a conflict of interest under article 94 of the Portuguese Bar Association Legal Regime.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The representation by counsel of multiple corporate defendants may be acceptable to the extent it does not raise any conflicts of interest (see question 32).

35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

In principle, nothing seems to prevent a corporation from voluntarily paying the costs or penalties (or both) imposed on its employees, or from reimbursing employees for such costs or penalties.

36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines, or other penalties and private damages awards are not tax-deductible.

37 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The ne bis in idem principle, which is essentially the equivalent of the double jeopardy principle, applies in the framework of quasi-criminal minor offences and therefore applies to cartel infringements (see question 1). However, in applying the principle, the Authority shall take into account whether the infringement previously sanctioned is the same as that subject to its assessment, in terms of both the specific behaviour in question and the territory where it occurred or had effect.

As regards liability for private damage claims, the overlapping liability for damages shall be taken into account, notably in the determination of the actual amount of damages that may be claimed before the Portuguese jurisdiction (see question 20).

GÓMEZ-ACEBO & POMBO

Mário Marques Mendes **marquesmendes@gomezacebo-pombo.com**
Alexandra Dias Henriques **adhenriques@gomezacebo-pombo.com**

Avenida Duque de Ávila, n.º 46, 6.º
1050-083 Lisbon
Portugal

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

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

See questions 8 (in respect of the settlement proceedings and of the closure of the case with conditions attached) and 22 to 30 (on the leniency regime). In addition, the behaviour of the undertaking concerned in putting an end to the restrictive practices and in repairing the damages caused to competition may be taken into account in the determination of the amount of the fine, under the framework described in question 17. We are not aware of any decisions in which the Authority has explicitly taken into account the pre-existence or the commencement of compliance programmes in determining the level of the fine.

Getting the Deal Through

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Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
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Corporate Governance
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Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
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
Shareholder Activism & Engagement
Ship Finance
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