ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2013

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A practical cross-border insight into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for the cartel prohibition is Article 9 of the recently-enacted Portuguese Competition Act (Law nr. 19/2012, of 8 May - hereinafter "the Act"). The Act repealed and replaced, with effect as of 7 July 2012, the previous Portuguese Competition Act (Law nr. 18/2003, of 11 June) without, however, introducing any substantial changes to the legal basis for the cartel prohibition or to the nature of such prohibition. Hence, Article 9 prohibits and sanctions anti-competitive agreements, practices and decisions by associations of undertakings (in terms similar to Article 101 (1) of the Treaty on the Functioning of the European Union, hereinafter "TFEU").

Similarly to all other infringements of competition law, cartels are considered administrative offences (misdemeanours) and not criminal offences. As a result thereof, they are penalised with fines and other ancillary sanctions (see section 3 below).

1.2 What are the specific substantive provisions for the cartel prohibition?

The relevant substantive provision is Article 9 of the Act, which prohibits agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition, to a considerable extent, in whole or in part of the domestic market. The above shall include, in particular agreements, practices or decisions by association of undertakings, which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technological development or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list above (which has been slightly changed in relation to the previous law and is now more in line with Article 101 (1) of the TFEU) is non-exhaustive, and therefore, other conducts that have the object or effect of restricting competition to an appreciable extent may be caught by the above-referred prohibition.

1.3 Who enforces the cartel prohibition?

The enforcement of competition law in Portugal is entrusted to the Portuguese Competition Authority (*Autoridade da Concorrência*), which was created in 2003 by Decree-Law nr. 10/2003, of January 18. The Authority is a public entity with statutory independence for the performance of its attributions and enjoys administrative and financial autonomy. The Authority has sanctioning, supervisory and regulatory powers which are established in Decree-Law nr. 10/2003 and further developed in the Act.

The Authority is, furthermore, responsible for enforcing competition law in any sector of the economy.

For activities subject to sector-specific regulation, however, the Act establishes (Articles 5 (4), 34 (4) and 35) a general principle of cooperation between the Authority and sector-specific regulators in the application of competition legislation, which translates into the following rules:

- whenever the Authority becomes aware of facts occurring within the scope of sector-specific regulations and likely to be classified as prohibited practices, it shall immediately inform the sector-specific regulator, so as to allow the latter to issue an opinion, within a time-limit stipulated by the Authority;
- whenever the Authority intends to apply interim measures within the course of an investigation in a market subject to sector-specific regulation, it shall request the opinion of the sector-specific regulator (to be issued in five working days);
- before adopting a final decision and unless the case is closed without conditions, the Authority shall consult the sector-specific regulator (who shall issue its opinion within the time-limit stipulated by the Authority);
- whenever a sector-specific regulator deals, within the scope of its own responsibilities, on its own initiative or at the request of an entity within its jurisdiction, with issues concerning a possible breach of the provisions of the Act, it shall immediately inform the Authority of the procedure and of its essential facts;
- before taking a final decision, the sector-specific regulator shall inform the Authority of the draft decision, so that the Authority issues its opinion within a time-limit set for that purpose; and
- in any of the above situations and where applicable, the Authority may decide not to initiate an investigation or to stay an on-going investigation, for as long as necessary.

Cooperation with sector-specific regulators is, thus, based on consultation mechanisms according to which the Authority, in the course of investigations it conducts, obtains an opinion from other regulators.

In order to facilitate cooperation in the enforcement of competition law the Authority and the sector-specific regulators can enter into bilateral or multilateral protocols.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

One of the novelties of the recently-enacted Act is the adoption of a principle of opportunity, pursuant to which the Authority is now recognised the ability to choose which cases to pursue on the basis of a criteria of public interest. In assessing whether or not the public interest of pursuing and punishing infringements of competition rules determines the initiation of proceedings, the Authority shall take into account, in particular (Article 7 (2) of the Act) its previously set priorities in competition policy, the elements of fact and of law brought to the file, the seriousness of the alleged infringement, the likelihood of proof of the infringement and the extent of investigation required to adequately fulfil its mission.

Investigations can be initiated *ex officio* or following a complaint. When the Authority considers that there are insufficient grounds to act on a complaint, it shall inform the complainant and set a time-limit of no less than 10 working days for the complainant to present its observations in writing. If the observations presented within the established deadline do not lead to a different assessment of the complaint, the Authority shall expressly declare, in writing, that the complaint is unfounded or not subject to priority treatment and close it. The complainant may appeal such a decision to the Competition, Regulation and Supervision Court.

If, on the contrary, an investigation is indeed initiated (*ex officio* or otherwise), it shall be divided in two stages: during the first stage ("*inquérito*") the Authority undertakes all necessary inquiries (within the scope of its investigation powers) to identify the relevant anti-competitive conduct, its agents and to collect evidence to this end. The Act has introduced a maximum time-limit for conclusion of the first stage, which is 18 months after the decision to initiate the case. Whenever compliance with such time-limit is not possible, the defendant shall be informed of such fact and of the additional time necessary to conclude the investigation.

The first stage will end with a decision of the Authority to either:

(i) close the investigations, if there is no sufficient evidence to conclude for a reasonable likelihood of a decision imposing a sanction;

(ii) settle the case by issuing a sanctioning decision within the context of a settlement procedure;

(iii) close the investigations by adopting a decision imposing conditions (to guarantee compliance with commitments submitted by the party concerned in order to eliminate the effects on competition stemming from the practice); and

(iv) continue with the case by initiating the second stage of the investigation ("*instrução*"), with a notification to the defendant of a "Statement of Objections" ("SO").

Investigations initiated pursuant to a complaint by an interested third party may not be closed as referred to in (i) without the complainant being given the opportunity to submit any observations in writing within not less than 10 working days from being informed of the Authority's decisions to close the investigation. Unless the complainant's observations reveal directly or indirectly a reasonable likelihood of a sanctioning decision being issued, the Authority shall close the case and this decision is subject to appeal to the Competition, Regulation and Supervision Court.

During the second stage of the investigation, the defendant is assured the exercise of its defence rights: it is given a "reasonable period" (not less than 20 working days) to reply to the SO and it may request the Authority to undertake additional evidentiary measures (e.g., witness depositions) and to have its written submissions complemented by an oral hearing. The Authority can refuse additional evidentiary measures found irrelevant to the case or to have mainly a delaying purpose.

The Authority may promote additional measures to gather evidence, on its own initiative, even after a reply has been submitted by the defendant. Any additional evidence included in the case as a result thereof shall be notified to the defendant, who shall have a period of not less than 10 working days to state its views in relation thereto.

The Act now expressly recognises for the possibility of the Authority issuing a new SO whenever the evidence collected as a result of additional evidentiary measures materially changes the facts initially attributed to the defendant.

The second stage should be concluded within a maximum period of 12 months from the notification of the SO. Whenever compliance with such time-limit is not possible, the defendant shall be informed of such fact and of the additional time necessary to conclude the proceedings.

This second-stage will end with a decision of the Authority to either:

(i) order the closing of the case without any conditions being imposed;

(ii) order the closing of the case with the imposition of conditions (to guarantee compliance with commitments submitted by the party concerned in order to eliminate the effects on competition stemming from the practice);

(iii) impose a sanction in the context of a settlement decision; and

(iv) declare that a prohibited practice has occurred and, where such practice cannot be justified pursuant to the exemption criteria (see question 1.5), the decision may be accompanied by an admonition or the imposition of the relevant sanctions (fines and other – see section 3) and, if applicable, by the imposition of behavioural or structural measures that are indispensable for halting the prohibited practice or its effects.

Structural measures are a novelty of the Act and can only be imposed when there is no equally effective behavioural measure or when, though existing, such behavioural measure would be more onerous for the defendant in the case than the structural measures.

Whenever the market in question is subject to sector-specific regulation, there are specificities concerning the procedure and the intervention of the sector-specific regulator (see question 1.4).

1.5 Are there any sector-specific offences or exemptions?

The Act applies equally across all sectors of the economy and to all economic activities in the private, public or cooperative sectors.

Companies that are legally charged with the management of services of general economic interest or which have the nature of legal monopolies shall be subject to the provisions of the Act only to the extent that those provisions do not constitute an impediment in law or in fact to the fulfilment of the mission they have been entrusted with.

An exemption from the general rule of prohibition of anti-competitive agreements laid down in Article 9 is foreseen in Article 10 for those agreements, practices or decisions by associations of undertakings that can be considered as justified, because they

contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, and, cumulatively thereto, they:

a) allow the users of such goods or services an equitable part of the resulting benefit;

b) do not impose on the undertakings concerned any restrictions that are not indispensable to attaining such objectives; and

c) do not afford such undertakings the possibility of eliminating competition in a substantial part of the goods or services market in question.

It is no longer possible to request from the Authority a prior assessment of agreements, practices or decisions covered by the prohibition of Article 9. The Act has fully embraced the self-assessment principle provided at EU level and specifically states that it is the responsibility of the undertakings or associations of undertakings concerned to invoke the justification and provide evidence that the conditions are fulfilled.

Practices prohibited by Article 9 are also considered as justified when, though not affecting trade between Member States, they fulfil all other requirements for application of a regulation adopted under Article 101 (3) of the TFEU. The Authority may, nonetheless, withdraw this benefit if, in a particular case, it ascertains that the practice at stake has effects incompatible with the conditions for justification laid down here above.

1.6 Is cartel conduct outside Portugal covered by the prohibition?

Cartel conduct outside Portugal will, in principle, be covered by the prohibition to the extent that the practice has, or is liable to have, effects in the Portuguese territory. This follows from the general rule laid down in Article 2 (2) of the Act according to which, subject to the exception of the international obligations of the Portuguese State, the Act is applicable to restrictive competition practices and concentrations between undertakings which take place or have or may have effects in the territory of Portugal.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	Yes*	N/A
Carry out an unannounced search of residential premises	Yes*	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	N/A
■ Right to retain original documents	Yes*	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes*	N/A

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

In accordance with Article 42 of the general regime on misdemeanours (as approved by Decree-Law 433/82, of 27 October, and subsequently amended), correspondence and telecommunications are explicitly protected and, therefore, may not be used as evidence in competition infringement procedures. The existing case-law under the Act has, so far, distinguished between opened and unopened correspondence: correspondence (including e-mails) that has already been opened is considered as normal documentation and is thus subject to be used as evidence by the Authority; only that correspondence which remains unopened (including unread e-mails) will be considered as correspondence *stricto sensu* and thus benefit from protection.

2.3 Are there general surveillance powers (e.g. bugging)?

There are no general surveillance powers foreseen for conducts that merely infringe competition rules.

2.4 Are there any other significant powers of investigation?

The Act – which has significantly broadened the scope of the Authority's investigatory and fact-finding powers – expressly establishes the Authority's right to search (with authorisation by an examining judge) private premises, which include not only the homes of company shareholders, directors and employees but also "other locations" (including vehicles).

The Act expressly provides for the possibility of searches being carried out at lawyers' or doctors' offices provided that certain particular safeguards are respected, namely: the examining judge must be present at the search and the president of the respective professional bar must be notified in advance in order to guarantee his presence or representation, if he so wishes.

The Act further extends the Authority's powers in relation to the seizure of documents: seizure can extend to documents located at lawyers' or doctors' offices provided that the above-referred safeguards are respected and that the documents are not covered by professional secrecy (with one exception for documents covered by professional secrecy that constitute, in themselves, the object or elements *via* which the infraction is perpetrated; in that case, and according to the Act, such documents can be seized). The exact scope of this provision is, however, not without ambiguity because the Statute of the Portuguese Bar (Law nr. 5/2005 of 26 January) only allows for seizure in cases of criminal offence.

The Act further provides for the possibility of seizures of documents (whether or not belonging to the defendant) covered by banking secrecy provided that the seizure is carried out by an examining judge and that there are well-substantiated reasons to believe that the documents are related to an infringement and are of major importance for finding out the truth or in terms of evidence.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of businesses premises are carried out by the Authority's duly appointed employees who shall, for that purpose, bear the

credentials issued by the Authority stating the purpose of the investigation and the warrant from the competent judicial authority. The Act establishes that, whenever necessary, the Authority may request the action of the police authorities. In practice, the Authority is usually accompanied by the police authorities.

The law does not impose any obligation for the Authority's investigators to wait for legal advisors to arrive, but companies under inspection have the right to have legal advisors present at the diligence.

Searches at private premises have additional (stricter) requirements: the warrant must be issued by an examining judge and shall establish, *inter alia*, the date for the commencement of the search and the possibility of judicial review; if the search is conducted at an inhabited home or in a closed dependence thereof, it must be carried out between 7 am and 9 pm; where the search is conducted in the offices of a lawyer or a doctor, the examining judge must be present and the president of the respective professional bar must be notified in advance in order to guarantee his presence or representation, if he so wishes.

2.6 Is in-house legal advice protected by the rules of privilege?

Under Portuguese Law, the protection given by the rules on legal professional privilege (which is protected by the Constitution, the Penal Code and the Lawyers Act) covers both independent lawyers and in-house lawyers which are members of the Portuguese Bar since they are subject to the same professional and ethical duties.

In a legal Opinion issued in 2007, the General Council of Portuguese Bar expressly acknowledged that in-house lawyers benefit from the rules on legal privilege in the context of enquiries by the Authority.

This view has been confirmed by the judiciary in 2008, when the Lisbon Commerce Court decided on an appeal brought against a decision of the Authority that refused the restitution of documents (i) seized from the office of the company's in-house counsel (which was also his professional domicile), and/or (ii) prepared by the in-house counsel but seized elsewhere in the company's premises, during a surprise inspection conducted by the Authority.

The Court began by acknowledging that in investigations carried out by the Authority (even if a potential breach of provisions of the TFEU is at stake) national procedural rules shall apply. Those rules do not differentiate between in-house and external lawyers: an in-house lawyer who has been employed to exercise its activity as a lawyer and is registered in the Portuguese Bar shall be subject to the same duties and rules – and therefore shall benefit from the same guarantees and privileges – as external lawyers, in particular in what regards legal professional privilege. The Commerce Court ordered the restitution of the documentation seized as a consequence.

The protection given by national rules of legal professional privilege is therefore broader than the one resulting from the application of the case-law of EU courts and, as a result, the regime applicable to in-house legal advice may differ depending on whether Portuguese national rules or EU rules apply.

For the (new) provisions of the Act regarding seizure of documents covered by professional secrecy, see question 2.5 above.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The rights of companies / individuals being investigated comprise essentially the following: right to access the file; right to exercise the defence according to the adversarial principle; right to a hearing; and the right to appeal against interlocutory and final decisions adopted by the Authority.

Most of the Authority's decisions condemning companies for anticompetitive practices have been appealed to court and it is interesting to note that several of them have been quashed for violation of the right of defence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Failure to co-operate with the Authority or obstruction of the exercise of the Authority's investigatory powers (either by wilful misconduct or negligence) is sanctioned with a fine, which amount may not exceed 1% of the turnover of the year immediately preceding the final decision for each of the undertakings concerned or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings.

Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by the Authority in the exercise of its powers of sanction or supervision (either by wilful misconduct or negligence) shall be subject to a similar sanction.

According to public information, the Authority has adopted some of these "non-compliance" decisions in respect of information requests. For example, in 2005, the Authority imposed a fine of €1,000.00 on a Professional Association for supplying incomplete information during an infringement procedure, which was confirmed by the Court on appeal (Proc. nr. 769/05.6TYLSB). In that same year, the Authority imposed fines ranging from €79,939.39 - €94,850.11 on three companies for refusing to provide information to the Authority in the exercise of its powers of supervision. The fines were annulled by the court on appeal (Proc. nr. 205/06.0TYLSB) due to irregularities in the requests for information.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The maximum fine in a cartel case is up to 10% of the turnover of each participating undertaking, or, in the case of associations of undertakings, of the aggregate turnover of its members (which are jointly and severally liable for the fine under certain conditions). The relevant turnover refers to that of the year preceding the issuance of the Authority's final decision.

In addition to these penalties, if the seriousness of the infringement and the liability of the offender so justify, the Authority may impose ancillary sanctions of two kinds:

(i) publication in the official gazette and in a national newspaper, at the offender's expense, of the relevant parts of a decision finding an infringement; and

(ii) a ban to participate in procurement proceedings if the infringement found has occurred during, or as a consequence of, such proceedings. This sanction may only last for a maximum period of 2 years.

Moreover, and whenever deemed necessary, the Authority may impose a periodic penalty payment in cases of non-compliance with a decision imposing a penalty or ordering the application of certain measures. This may result in a payment of up to 5% of the average daily turnover of the infringing undertaking in the year preceding the decision for each day of delay.

Civil law sanctions may also arise, notably, all prohibited agreements and concerted practices are null and void; also, parties that have suffered losses as a result of a cartel infringement may seek compensation in court (see section 8).

3.2 What are the sanctions for individuals?

The Act entails a number of amendments concerning sanctions applicable to individuals.

Penalties can now be imposed not solely on members of the board of the undertaking concerned, but also on persons responsible for the management or supervision of the areas of activity where the infringement occurred.

The maximum amount of the fine was also reviewed. In cartels, penalties may go up to 10% of the individual's total annual income in the last complete year of the breach.

Liability of natural persons arises when they knew or should have known of the infringement but failed to take appropriate measures to bring it to an end. However, if a more serious penalty is applicable pursuant to other legal provision, the latter will apply.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Act refers to the 'economic situation of the offender' as one of the aspects to be weighted by the Authority when setting a fine. Thus, financial hardship and inability to pay claims should be factored in, in the amount of the penalty.

Even prior to the (new) Act, the Authority had already signalled that it would be willing to take this criterion into account. In a 2011 decision regarding an alleged price fixing between driving schools established in Madeira Island, the Authority imposed a total fine of €9,865.40 on seven undertakings. To reach this figure, the Authority took into consideration, *inter alia*, the small economic scale of the companies concerned (in terms of turnover and number of employees) and the fact they operated in a market characterised by insularity.

On 8 August 2012, the Authority launched a public consultation on future guidelines regarding the method for establishing fines in antitrust proceedings. These draft guidelines cover all major types of antitrust infringements, including cartels. In the paper, which in this point follows closely the Commission's view on the issue, the Authority states that it may take account an undertaking's inability to pay in a specific social and economic context. However, the Authority shall not grant any reduction in the fine on the mere finding of an adverse or loss-making financial situation; a reduction may only be awarded on the basis of objective evidence that the imposition of the proposed fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

3.4 What are the applicable limitation periods?

Another important change brought about by the Act concerns the limitation periods, which have been considerably extended in favour of the Authority.

As a general rule, sanctioning proceedings for cartel offences (similarly to other prohibited practices) are subject to a 5-year limitation period. The issue of when this limitation period starts to run will ultimately depend on the type of infringement at stake; for instance, in the case of continuing infringements, the 5-year period only starts to run from the date on which the infringement ceases.

Five years (counting from the date when the decision has become *res judicata*) is also the time-limit for the enforcement of the sanctions imposed.

However, these limitation periods are suspended, *inter alia*, for as long as a judicial review is pending, and total suspensions may last for a 3-year period (in the former law, it was 6 months). The period is also interrupted whenever the Authority takes any action for the purpose of the investigation, and each interruption shall start the time running afresh.

In any event, expiry of these limitation periods occurs on the day on which 7.5 years, plus the eventual suspensions, have elapsed, i.e., a maximum of 10.5 years.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no specific provision preventing a company from paying the penalties and/or legal costs imposed on their (former or current) employees.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Companies are held liable for infringements committed: (*i*) on their behalf or account by persons occupying a leading position therein (i.e., corporate bodies, representatives and persons holding control over the company's activity); or (*ii*) by anyone acting under the authority of the persons mentioned in *(i)* when the latter have breached the supervision or control duties that are incumbent upon them.

It is also worth mentioning that the liability of an undertaking under the Act does not preclude the individual liability of natural persons, nor does it depend on the liability of the latter, in the case where there has been a breach of the duty to cooperate.

Under the general principles of labour and civil law, an employer may claim and seek damages (including legal costs and financial penalties) from an employee if he/she acted wilfully or negligently and his action caused the employer's engagement and punishment in the cartel.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The leniency programme enacted in 2006 was repealed with the entry into force of the Act which contains the provisions which rule on the (new) leniency regime. Besides the relevant provision of the Act, the new leniency regime will, in the near future, be complemented by a regulation dealing with the correspondent administrative procedure. This regulation was recently subject to public consultation and, once adopted, will replace Regulation nr. 214/2006 of 22 November, currently still in force.

From an objective viewpoint, the scope of the (new) leniency regime was narrowed down so as to cover only cartel-type behaviour. The Act refers specifically to agreements or concerted practices between competitors that are aimed at coordinating their competitive behaviour on the market or influencing relevant parameters, specifically through the fixing of purchase or selling price or other trading conditions, the allocation of production or sales quotas, the sharing of markets, including collusion in auctions and bid-rigging in public procurement, restrictions on imports or exports or anti-competitive actions against other competitors.

From a subjective viewpoint leniency may be granted either to companies or to individuals subject to liability for infringements to the Act. The latter include members of the board of directors or of the supervisory board of legal persons and equivalent entities as well as individuals who are responsible for the direction or supervision of areas of activity where a misdemeanour has occurred. Individuals may apply for leniency on behalf of the company or individually (in the last case, immunity or special reduction will only benefit the applicant).

There are two types of lenient categories: (full) immunity from the fine; or fine reduction.

Common requirements to immunity and reduction

A company or individual wishing to benefit from immunity or reduction must comply with three conditions:

(i) to cooperate fully and continuously with the Authority from the moment the application is filed, which requires providing all the information and evidence in its possession or under its control at the moment or in the future, promptly replying to any information requests, refraining from acts that may hinder the progress of the investigation and refraining from disclosing the existence or content of its application or the intention to submit an application (except if the Authority so authorises in writing);

(ii) to terminate its participation in the infringement except to the extent deemed reasonably necessary by the Authority to maintain the effectiveness of the investigation; and

(iii) not having coerced any of the other companies to participate in the infringement.

Specific requirements for immunity

Immunity from fines is reserved to 'first in' situations but it is no longer required (as in the previous leniency regime) that the information be presented to the Authority at a stage where no investigation has been initiated.

Hence, immunity is granted to companies or individuals that are the first to supply information and evidence that allow the Authority to either (i) substantiate a request for search and seizure where such information was not available to the Authority, or (ii) detect an infringement (eligible for leniency) where the Authority did not have enough evidence on such infringement.

Specific requirements for a reduction of fine and relevant thresholds

Reductions of fines are granted to companies or individuals that (though not fulfilling the requirements for immunity) provide the Authority with evidence and information on an infringement with significant added value with respect to the information already in possession of the Authority.

The level of reduction of the fine can be set at: 30%-50% (for the first company/individual to provide evidence or information with significant added value); 20%-30% (for the second company/individual to provide evidence or information with significant added value) and <20% (for any subsequent companies/individuals to provide evidence or information with significant added value).

For leniency requests presented after the SO, the above referred thresholds shall be reduced by half.

The Act does not qualify the notion of "significant added value" but it refers that the criteria should be assessed taking into account the information and evidence already in the possession of the Authority. Also, it is likely that the evidentiary value of the information at stake will also play a relevant role (as stressed by the Draft Information Note on Leniency procedure subject to public consultation until September 2012).

In addition, individuals who cooperate fully and continuously with the Authority will benefit from immunity or reduction of the fine which would otherwise be applicable even if they do not request such benefits personally.

In accordance with the publicly available information, up until now the Authority has only issued fining decisions triggered by a leniency application. This occurred in the 2009 'catering cartel', which was triggered by the leniency application of a former director of one of the cartelists, who disclosed the infringement and benefited from full immunity. His former employer and the directors of the other companies in the cartel were all fined (the fining decision was, nonetheless, subsequently annulled by the Court on procedural grounds).

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is currently (under Regulation nr. 214/2006 of 22 November) no formal 'marker' system in place, in the sense that a leniency applicant will not receive a notification stating its rank in the proceedings. However, both before and after the application is filed it is possible to contact informally the Authority and ask for an indication on the subject.

It is, at present, uncertain whether the new Regulation – which will replace Regulation nr. 214/2006 – will provide for a marker system. The Draft Regulation subject to public consultation did not foresee such possibility, an omission which was somewhat at odds with the (underlying) intention to bring the procedure system closer to the ECN Leniency Model Programme. It is not possible at this stage to anticipate whether the Authority will change the draft in order to accommodate potential concerns that have been raised during the public consultation in relation to the absence of a marker system in the Portuguese leniency regime.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The regulation currently in force does not permit oral applications. However, the draft Regulation put to public consultation expressly rules on the possibility to present oral application, which will be one of the novelties of the new leniency procedure.

Judging from the content of the draft regulation, an oral application will initially be presented at a meeting with the Authority together with all relevant evidence of the cartel in the possession or under the control of the applicant. Oral applications are recorded at the Authority's premises and, after verification of content by the applicant, they are subject to transcription.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The Act rules in detail on the issue of confidentiality and access to the leniency application and related documents. It imposes upon the Authority an obligation to classify as confidential the leniency application as well as all the documents and information submitted for the purposes of immunity or reduction.

The defendant shall be granted access to the leniency application and related documents and information for the purposes of preparing its reply to the SO; however, copies of those documents will only be possible if so authorised by the leniency applicant. Access by third parties is dependent upon authorisation by the leniency applicant.

In relation to oral statements, the defendant which has orally applied for leniency shall not be given access to copies of its statements and third parties shall be prevented from accessing such information / documentation.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The definite decision to grant or refuse immunity from fine or fine reduction is taken by the Authority only at the end of the proceedings. Since one of the requirements to benefit from leniency is to cooperate fully and continuously with the Authority from the moment the application is filed (see question 4.1), this means the 'continuous cooperation' should last until the final decision on the proceedings is adopted.

If during the course of the investigation, the Authority considers that the applicant is no longer cooperating, the leniency *status* will be withdrawn.

However, the cooperation initially given will still be relevant for other purposes, in particular, considering that the level of cooperation with the Authority during an investigation is one of the criteria used to establish the amount of a fine under the Act (see question 3.3).

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no longer "leniency plus" or "penalty plus" policy under the (new) leniency regime (introduced by the Act).

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Individual leniency is possible for members of the board of directors or the supervisory board of legal persons and equivalent entities as well as for individuals who are responsible for the direction or supervision of areas of activity within a company or equivalent legal entity where a misdemeanour has occurred.

Individual leniency abides to similar criteria and follows the same procedure as corporate leniency. In the event of individual application, the leniency will only benefit the applicant, not the company (contrary to corporate leniency, which may benefit individuals – see question 4.1).

Outside the scope of the leniency programme, any individual (either a director, an employee or any third party) may submit a complaint to the Authority implicating other individuals or companies in a suspected cartel. The Authority's approved form (available on its Internet site) should be used for that purpose. The practice of the Authority has also been to accept anonymous complaints.

Once the Authority has decided to initiate an investigation pursuant to a complaint it cannot close the case without previously granting the complainant the opportunity to submit observations on the proposed decision (see question 1.4).

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Apart from the leniency programme, the Act empowers the Authority to enter into two types of settlement arrangements in respect to antitrust infringements in general. On the one hand, the Authority may accept binding commitments from the parties in exchange for dropping the proceedings without concluding for the existence of an infringement (case closure with conditions – see question 1.4). On the other hand, it may enter into a settlement procedure that will allow for a swift decision and a reduction of the fine.

According to publicly available information, the Authority has never used the settlement procedure. Conversely, commitment decisions – albeit only recently provided for expressly in the law – are becoming increasingly frequent in the decision-making practice. However, the Authority has recently launched a public consultation on future guidelines regarding the conduct of antitrust proceedings, and in the draft paper the Authority considers that it will typically not accept commitments in cartel cases.

Settlement proceedings may pose an advantage where parties are ready to acknowledge their participation in a cartel and accept their liability for it, but wish to shorten the procedure and obtain a reduction of the fine.

Neither the Act nor the draft guidelines mentioned above clarify the amount of reduction expected to be received in settled cases, and this aspect has been highly criticised in the public consultation. Nevertheless, reductions of fine under settlement proceedings and under the leniency programme are cumulative.

The facts to which a party in a settlement procedure has confessed cannot be judicially appealed. As a rule, third parties are not allowed to access settlement submissions contained in the file and other undertakings concerned in the case are only allowed to see those documents for the purposes of preparing their defense, but no copy of these can be made without due authorisation by the author of the settlement proposal.

7 Appeal Process

7.1 What is the appeal process?

Decisions handed down by the Authority in cartel cases are subject to appeal to a specialised court dealing with competition, regulatory and supervisory matters.

Appeals against final decisions are lodged within 30 working days. The Authority will then have an additional 30 working-day period to forward the records to the public prosecution office and to enclose its own allegations or other information deemed relevant. The public prosecutor can only withdraw the accusation if the Authority gives its consent to it.

The court holds full jurisdiction to review decisions whereby the Authority has imposed a fine or periodic penalty payment, and may reduce or increase the amount of such sanctions.

The court may reach a final decision with or without a previous court hearing, in the latter case only if the Authority, the public prosecutor or the defendant do not object thereto. If there is a court hearing, the court shall rule on the basis of the evidence presented

in the hearing, as well as on the proof gathered during the administrative proceedings.

The court decision is subject to one further appeal and the Appellate Court will finally rule on the case.

The Authority has an autonomous right to appeal.

The Authority is bound to publish on its internet website court rulings issued on appeals lodged in antitrust cases.

7.2 Does an appeal suspend a company's requirement to pay the fine?

As a general rule, no. This is one of the key changes of the Act. However, there is one exception and one exemption to this rule.

The exception concerns decisions that impose structural measures, in which case the effects of these decisions will be automatically suspended once the appeal is lodged.

The exemption is available for appellants in the case of decisions imposing fines or other sanctions: the appellant may ask the court to suspend the effects of the decision when the execution of such decision would cause considerable harm and the appellant offers to provide a guarantee *in lieu*, in which case the suspension of effects will depend on the guarantee actually being provided within the time-limit prescribed by the court.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Testimonial evidence is permitted and the witnesses can be subject to cross-examination by the counterparty.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Damages actions for loss suffered as a result of any breach of the Act (including, therefore, for cartel conduct) follow general civil law and civil law procedures. Hence, private antitrust liability depends on the fulfillment of the five cumulative requirements established in the Portuguese Civil Code for tort liability, which are: (1) a conduct (act or omission) controllable by human resolution; (2) the conduct's unlawfulness; (3) the imputation of the conduct to a wrongdoer; (4) the existence of damages; and (5) a causal link between the conduct and the damages.

There is no material difference in terms of substantive and procedural law between follow-on and stand-alone actions. In the former, however, the Authority's final decision can serve as *prima facie* evidence that an infringement of competition law (requirements (1) to (3) above) has occurred, and therefore, the position of the claimants is likely to be stronger from the outset (even though, pursuant to the applicable procedural rules, the Authority's decision shall be freely evaluated by the judge).

Finally, one should not exclude the possibility of a damages claim being brought under contractual liability in cases where a contract exists between the wrongdoer and the entity suffering the damage and there is a breach of a contractual obligation or of any ancillary duty.

8.2 Do your procedural rules allow for class-action or representative claims?

Law nr. 83/95 of 31 August, establishes the legal framework applicable to the representative action ('*acção popular*'), which can be used in the context of a private antitrust class action. To our knowledge, however, the Portuguese representative action has never been triggered on the grounds of a competition law breach. The aim of these actions is to defend collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Under this framework, any natural person, association or foundation (the latter two in cases which are directly connected with their scope) should be capable of bringing a private antitrust class action before a Portuguese court based on the breach of competition law rules. Companies, on the contrary, may not use the representative action procedure.

Our national procedure can be qualified as an opt-out system, as the claimant automatically represents by default all the holders of similar rights or interests at stake who did not opt out, following, *inter alia*, the public notice regarding the submission of the representative action before the court.

The liable party must compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the conduct in question.

In the representative action the court is not bound by the evidence gathered or requested by the parties and, as a general rule, has the power to collect the evidence that it deems appropriate and necessary.

The claimant may seek redress for damages suffered; the law determines that the compensation of rights' holders that cannot be individually identified shall be determined globally. The right to compensation shall be time-barred within 3 years from the delivery of the court decision that has acknowledged the existence of such right.

8.3 What are the applicable limitation periods?

The right to compensation under the tort liability regime is subject to a time-limitation of 3 years from the moment when the injured party becomes aware of his right to make a claim for damages.

If contractual liability were at stake, the time-limitation would be 20 years.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Portuguese Civil Code determines that the injured party has the right to claim for loss suffered and lost profits resulting from the illegal conduct. Reparation of damages shall only take the form of pecuniary compensation either if natural reconstitution is impossible or does not fully repair the damage suffered or is excessively costly for the debtor.

The indemnity shall be the difference between the pecuniary situation of the claimant on the most recent date that can be taken into account by the court and the pecuniary situation in which the claimant would be in the absence of those damages. Thus, the measure of loss which shall be compensated in an antitrust damage case will be the difference between the claimant's actual position and the situation the claimant would have been were it not for the illegal conduct.

In light of the above, the defendant may use a passing-on defence to sustain that the claimant did not suffer all or part of the damages

claimed because of overcharges passed on to its customers.

Such a defence, although permissible, may entail non-negligible difficulties in practice as the defendant may find it difficult to prove that the passing-on has actually occurred.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The general provisions of the Regulations of procedural fees apply. Procedural fees include (broadly) court fees ("*taxa de justiça*") and court expenses. Court fees are due and charged for the procedural initiative of the party and depend on the amount of the claim or claims at stake in the proceedings as well as on the complexity of the case. Court expenses relate to the costs of certain procedural acts or services.

In light of the particulars of a given case (in particular, the amount of the claims at stake) it is possible to estimate approximately the procedural fees to be charged in the proceedings.

Procedural fees and expenses are charged in different moments throughout the procedure to both parties.

The final court decision (or a decision that finally decides any procedural incidents or appeals) will rule on the liability for costs, the general rule being that the losing party will be liable for payment of the procedural costs in the proportion of its loss.

If the Court decision convicts the defendants to the fulfilment of joint and several obligations, the liability as to procedural fees shall also be joint and several.

Plaintiffs in representative actions will benefit from an exemption of court fees in accordance with Article 4 (1), b) of the Portuguese Court Fees Act.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To the best of our knowledge there have been no successful private antitrust damages actions so far for cartel conduct.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Portuguese legal competition framework has been deeply revised in 2012, with the entry into force of Law nr. 19/2012, of 8 May 2012. The adoption of a new competition act constitutes a structural benchmark of Portugal's Economic and Financial Assistance Programme agreed in May 2011 with the European Commission, the European Central Bank and the International Monetary Fund.

The Act brings a number of changes, including in the field of the fight against cartels. Those changes have been highlighted along the previous sections and concern mainly the following issues: (*i*) the Authority is no longer bound by the principle of legal duty in initiating and conducting antitrust investigations and sanctioning infringements, and is now allowed to follow a principle of opportunity and to rank its priorities; (*ii*) the Act assigns substantial new powers to the Authority in terms of investigation, search and seizure (which are not always adequately balanced against private rights of defence and due process of law); and (*iii*) the appeal process entails a number of constraints on the principles of the presumption of innocence and the right to a fair trial, raising serious constitutional questions.

Further to the enactment of the new law, the Authority launched a series of public consultations on several future guidelines and one regulation that will be most relevant for cartel proceedings. The guidelines concern, *inter alia*, the method for calculation of fines, procedural steps in settlement arrangements, degrees of priority defined by the Authority for the exercise of its sanctioning powers, the leniency programme, and a set of best practices in antitrust proceedings. The regulation deals specifically with the leniency procedure. These guidelines and the regulation are expected to be adopted soon.

9.2 Please mention any other issues of particular interest in Portugal not covered by the above.

Please refer to the preceding question.

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