PRIVATE ENFORCEMENT OF COMPETITION LAW IN PORTUGAL (I): AN OVERVIEW OF CASE-LAW

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Abstract: *This paper summarizes the results of research carried out into the private enforcement of competition law in Portugal since its inception. Its aim is to provide a more accurate view of judicial precedents and to create an extensive basis for the identification of practical problems and the proposal of adequate solutions. It also aims at providing a source for the quoting of national judicial precedents relating to competition law issues.*

1. INTRODUCTION

One of the innovations of European competition policy in the new century was an increased attention paid to the issue of private enforcement of

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competition law, in stride with the decentralization of EC Competition Law enforcement carried out by Regulation (EC) 1/2003. This Regulation eliminated the Commission's monopoly on exemptions under (current) Art. 101(3) TFEU and explicitly empowered national judges to apply Arts. 101 and 102 TFEU in their entirety[1].

Having noticed the stark contrast between the number of competition cases arising out of private and public enforcement of competition law on both sides of the Atlantic (in the USA, the vast majority of cases arise from private enforcement, while in the EU this figure is marginal), the Commission set out to get a clearer picture of what exactly was going on in the Member States in this respect, and to find ways to promote private enforcement[2].

For the purposes of this paper, "private enforcement" of competition law shall be understood to refer to the enforcement by public or private parties of competition rules before national courts, beyond the scope of the powers of the Portuguese Competition Authority (PCA) or of the European Commission (EC), and otherwise regardless of the cause of action or the remedy sought[3]. Thus, appeals against decisions of the PCA are excluded, but so-called follow-on actions are included (i.e. litigation between economic agents concerning competition damages arising from practices identified by a competition authority). "Competition law", for this purpose", shall refer to rules concerning individual and collective anticompetitive practices, excluding merger control and state aid rules.

When faced with a putative infringement of competition law, a private party may: (i) choose to complain to the PCA, whose subsequent decision may eventually be subject to judicial review by the specialized Competition, Regulation and Supervision Court, and to appeal before the Évora Court of Appeal; (ii) choose to enforce the competition rules before the civil courts, through common declaratory actions, with the possibility of an appeal to the territorially competent Court of Appeal and, ultimately, to the Supreme

1 Woods, Sinclair & Ashton, 2004: 31. Before Reg. (EC) 1/2003, because of the Commission's monopoly on exemption, national judges called to apply (current) Art. 101 TFEU could only verify whether the agreement in question infringed article 101(1) and, if so, whether it benefited from a category exemption or whether it had been notified to the European Commission in order to benefit from an individual exemption, under Art. 101(3). If it had not been notified, the agreement was automatically null and void, even if it did meet the requirements of Art. 101(3).

2 See, e.g.: European Commission, 2005; and European Commission, 2008a.

3 As elsewhere clarified: *"In its simpler version, «private enforcement» frames the litigation and the means of judging it within private civil and procedural law (the civil law approach)"* (Sérvulo Correia, 2010: 89).

Court (STJ); (iii) choose to enforce the competition rules before the civil courts in collective (opt-out) suits, through the representative right of popular action (a right that is also awarded to certain legal persons), with the same possibility of appeal.

An additional possibility is to resort to alternative dispute settlement mechanisms, and specifically to arbitration. Given the difficulty in identifying and collecting data on arbitration proceedings relating to competition law, disputes settled in this manner have not been included in the scope of the present paper. However, the authors have reason to believe that a significant number of disputes concerning, *inter alia*, competition rules in Portugal have been solved through arbitration[4].

There seems to be a generalized belief among legal practitioners that there is almost no private enforcement of competition law in Portugal. Several factors may account for this. On the one hand, previously published papers have mentioned none at all or only a handful of private enforcement cases[5]. On the other hand, there is no functioning database of court cases relating to competition law (despite the legal obligation arising from Art. 15(2) of Regulation (EC) 1/2003).

It is very difficult to identify cases of private enforcement of competition law in Portugal, and worse still to get an all encompassing view, as our research clearly showed.

Regarding data related to the Appeal Courts and the Supreme Court, searches through keywords and references to legislation in the online database www.dgsi.pt and in the published compilations seem to provide a reasonably broad sample, but not an exhaustive one. A serious flaw in the online database is that it occasionally contains only the summary of the judgments, or omits part of the full text (and, as a rule, the names of the parties), making it difficult

4 As expressed in another paper, there may even be reason to believe that competition law is invoked more frequently before arbitral tribunals than before civil courts (although this assessment was made in the framework of a much more limited understanding of the number of cases before civil courts) – Sousa Ferro, 2007:286. In this regard, see: Cruz Vilaça, Nápoles & Choussy, 2004: 135; and Antunes, 2001: 133. Authors experienced in such arbitrations have noted their empirical perception of an increasing number of occasions when competition law is invoked in arbitration procedures – see Morais, 2007. For an analysis of the legal issues arising in arbitration procedures relating to competition law, see Trabuco & Gouveia, 2010, as well as the 1998 Activity Report of the Portuguese Competition Council.

5 See, e.g.: Ruiz, 1998; Gorjão-Henriques & Vaz, 2004; Cruz Vilaça, Nápoles & Choussy, 2004; Sousa Ferro, 2007; Botelho Moniz & Rosado da Fonseca, 2008; Rosado da Fonseca & Nascimento Ferreira, 2009; Sérvulo Correia, 2010; Vieira Peres & Maia Cadete, 2011 (contrast evolution since Vieira Peres & Maia Cadete, 2009); Coutinho de Abreu, 2011.

or impossible to understand the full extent, or even the context and the result of the discussion of the competition law issues. To remedy this shortcoming, whenever possible, copies of the original judgments were obtained with the extremely helpful and quick assistance of the Courts' libraries and archives, for which we are most grateful.

The greatest difficulty lies in identifying first instance rulings which were not appealed. These are generally only known to the parties involved. While the authors were aware of some such cases directly, we are indebted to legal practitioners who were kind enough to identify others. It has not always been possible to identify or obtain the first instance ruling preceding a case for which appeal judgments have been quoted. There is reason to believe that there may be, throughout the country, a significant number of cases where competition law issues were raised in private litigation and which have not yet been identified.

This being said, we believe that the sample obtained in the underlying research is broad enough to allow for conclusions concerning general tendencies and trends in the approach of Portuguese courts to the private enforcement of competition law, as well as the contexts in which such issues are brought before them.

The first part of this paper will be dedicated to describing the precedents of private enforcement of competition law before Portuguese courts. A second part will identify and discuss general characteristics and trends in the case-law, deriving conclusions and suggestions for the road ahead.

It is not our aim, presently, to discuss the legal and structural background for the private enforcement of competition law. While of great relevance, such a discussion would far exceed the desired length of this paper. It was thought best to leave that for a second paper, to follow, which will focus specifically on analyzing and tackling some legal and practical hurdles.

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While this partly accounts for why this paper is published in English, this option was taken also in reaction to the European dimension of the concern with the evolution of private enforcement of competition law in the Member States. The situation in Portugal has been of particular interest

to foreign scholars because of the existence of an opt-out collective redress system (popular action).

With this audience in mind, it should recalled that Portuguese Competition Law began with the adoption of Decree-Law 422/83, of 3 December, in the framework of the preparations for accession to the EU. This was subsequently replaced by Decree-Law 371/93, of 29 October, followed by Law 18/2003, of 11 June. Most recently, this law too has been replaced by a new version of the Portuguese Competition Act – Law 19/2012, of 8 May. From its inception, Portuguese Competition Law closely mirrored EU Competition Law, and every single reform has pushed further towards harmonization.

The only significant difference between EU and Portuguese Competition Law is that the latter also prohibits abuses of economic dependence (relative dominant position). This report also includes private enforcement cases that raised this provision. On the other hand, there are provisions in a separate legislation prohibiting unfair commercial practices – Decree-Law 370/93, of 29 October. As these cases fall outside the scope of what is generally described as Competition Law, private enforcement cases relating to this Decree-Law have not been included in this paper.

2. DESCRIPTION OF CASE-LAW

2.1. Cases where competition law was discussed

2.1.1. JSS *et al.* v. Tabaqueira[6]

The first two known cases of private enforcement of competition law in Portugal[7] both related to the same practices of Tabaqueira, a company which held a legal national monopoly on tobacco growth and over 90% of the national cigarettes market.

In *JSS et al v Tabaqueira*, the applicants were a group of wholesale distributors of tobacco products who held contracts with Tabaqueira, and who received certain special discounts not granted to other distributors. Although the contracts were entered into after the first Portuguese Competition Act had been adopted, it was only in 1986 that Tabaqueira, a company with 98% of the relevant market, took steps to eliminate these discriminatory clauses from its distribution contracts, allegedly because it considered that those

6 SC, 31 October 1991. Appeal from Lisbon AC, 6 March 1990.

7 Not counting an earlier case where the competition rules were deemed irrelevant – see below section 2.2.

clauses were forbidden by Portuguese and (after 1986) EC Competition Law. At that time, it stopped granting the respective discounts to the previously favoured distributors. Almost two years later, Tabaqueira was indeed fined by the competition authority for abuse of dominant position, but on different grounds, and it had previously already received (at least) a statement of objections from the European Commission concerning, *inter alia*, discriminatory practices on the Portuguese tobacco markets.

In short, therefore, Tabaqueira had unilaterally removed preferential clauses of certain distributors on the grounds that these were now null and void under Competition Law.

The Lisbon Appeal Court disagreed. It stated that the discounts were connected to objective factors justifying a difference in treatment between the distributors (sales volume, compliance with marketing rules, local prestige, etc.). As a result, Tabaqueira could not claim that the clauses were unlawful, under Competition Law, as a basis for a unilateral amendment of the agreements. However, a different legal basis (specific regulation of pricing of tobacco products) did lead the Court to find that the discounts in question had been unlawfully granted.

It was not entirely clear which legal provisions were being applied.

The Supreme Court confirmed the ruling in relation to the objective justification of the discounts in question. It also affirmed, on a general note, that Portuguese competition law should be interpreted in accordance with the (current) TFEU.

However, while the Lisbon Appeal Court had seemingly recognized the applicability of (current) articles 101 and 102 TFEU (even if only in general terms, limiting its subsequent analysis to national law), the Supreme Court stated that the contracts in question were not governed by EU Competition Law (there was no effect on trade between Member States, despite the fact that the court was confronted with essentially two types of standard form contracts, which were identical for the entire national territory).

2.1.2. JCG *et al.* v. Tabaqueira[8]

Once again, a group of Tabaqueira's wholesalers sued it on the very same grounds as in the previous case, asking to be compensated for the discounts denied to them after the imposed contractual amendments.

8 SC, 8 July 1993. Appeal from Lisbon AC, 18 April 1991.

In this case, the first instance court concluded that the clauses in question were indeed prohibited by (current) articles 101 and 102 TFEU and by the national provision equivalent to article 101 (only).

The Lisbon Appeal Court considered that the practices in question were governed by both articles 101 and 102 TFEU (it found that there was an effect on trade between Member States based on the size of the company in question) and their national equivalents. Even though it did not discuss relevant market definition, clearly influenced by the decision of the competition authority, it found that Tabaqueira had a dominant position based on its extremely high market share (98% in cigarettes, 68% in cigars and cigarillos).

Tabaqueira had imposed an exclusivity clause, which the Court saw as an unlawful loyalty mechanism intended to exclude competitors and inextricably linked to the advantage granted through the special discounts. This issue had not been discussed by the Court in the previous ruling.

Returning to the point that had been discussed, however, the Court considered that the refusal of discounts to other distributors (who did not meet the previously deemed objective conditions) was, in fact, an abuse of a dominant position. This time around, looking at what appeared to be the very same facts, the Court considered that the difference in treatment was not justified.

Despite mentioning in passing the provisions of the Treaty, the Court focused its analysis on the Portuguese Competition Act. It concluded by expressly identifying an infringement only of the national provision on abuse of dominant position, even though it had mentioned the provision on unlawful agreements as well. Adding to the doubts about which provisions were indeed infringed, the Court invoked article 101 and its national equivalent as a basis for declaring the agreements null and void.

To conclude, in stark contrast to the previous case, the Court found that Tabaqueira had lawfully invoked an infringement of Competition Law as grounds for amending the contracts and terminating the discounts in question.

The Supreme Court went very much the other way, adhering to the position it had already expressed in the previous case. Even though Tabaqueira had received a statement of objections from the European Commission concerning its practices (which, quite intriguingly), the court described as relating to a violation of the Portuguese Competition Act), the Supreme

Court considered that it found no facts indicating a possible impact on trade between Member States, thus excluding the applicability of EU Competition Law. Consequently, it also refused the request for a referral to the ECJ.

As for Portuguese Competition Law, the Supreme Court dismissed Tabaqueira's defense in very brief and unexpected terms: *"There is no violation of article 13* [equivalent to current Art. 101 TFEU], *because the agreements in question have not been shown to have as their object or effect to prevent, distort or restrict competition on the Portuguese market. There is also no violation of article 14* [equivalent to current Art. 102 TFEU], *because it has not been shown that the defendant abused its dominant position on the Portuguese market in the sense that the said agreements had as their object or effect to prevent, distort or restrict competition on this market"*.

2.1.3. Entreposto de Vila Nova de Gaia[9]

In a dispute between Butler Nephew & Comp. and the Secretary of State for Foodstuffs, the applicant challenged the latter's decision to forbid it from using its own facilities in Vila Nova de Gaia to store table wines, on the basis of an exclusivity awarded by law to the "Entreposto de Vila Nova de Gaia" for the storage of such wines in contexts other than export. According to the applicant, *inter alia*, this law was in violation of the EC Treaty, including (current) articles 101, 106 and 108 TFEU[10].

The argument was rejected by the Supreme Administrative Court. It found that article 101 TFEU was not applicable to the decision of the Secretary of State. As for article 106 TFEU, it found that the law in question did not grant special or exclusive rights to any undertakings because the "Entreposto de Vila Nova de Gaia" was not an undertaking, but merely a *"zone with a special purpose where any company can act, as long as it meets the legal requirements"*.

2.1.4. Petrogal v. Correia, Simões & Companhia *et al.*[11]

In 1993, a dispute before the Lisbon Judicial Court between Petrogal and two of its retailers led to a referral to the ECJ. In essence, Petrogal had concluded

9 Supreme Administrative Court, 2 July 1992.

10 The applicant also alleged an infringement of article 3(b) of Decree-Law 422/83, i.e. a forbidden practice in restriction of trade (outside the scope of competition law), consisting in applying discriminatory conditions to identical situations. This argument was also set aside by the Supreme Administrative Court, which found that the provision was not applicable to the facts of the case.

11 Lisbon JC, 21 November 1994. ECJ, 10 November 1993.

fuel supply contracts with these retailers, in 1982, providing for exclusivity for a period of 15 years. Upon the unilateral termination of these contracts by the retailers in 1990, Petrogal sued for damages and the retailers argued, in their defense, that the excessive duration of the contract's exclusivity clause infringed (current) article 101 TFEU and a block exemption Regulation (they also mentioned, but did not precisely invoke an infringement of, national competition law).

The first instance court submitted a referral to the ECJ (the only example we were able to identify of this procedure being used by the national courts in the context of private enforcement of competition law), asking whether the terms of the contract in question breached the conditions imposed by a block exemption Regulation.

The ECJ replied that it seemed the national court was working under the wrong assumption that the Regulation in question laid *"down the conditions for the validity of service station agreements under Community competition rules"*, when it merely defined conditions to benefit from a category exemption and, "[i]*n the event that an agreement does not fulfill all the conditions for exemption laid down by such a Regulation, it does not follow that it is contrary to Article* [101(1)] *of the Treaty. In such a case, it is for the national court to determine whether the agreement is compatible with that provision*"[12].

The ECJ further noted that, due to a grandfather clause, *"an agreement dating from before the date of accession concluded for an indefinite period or for more than 10 years may benefit from the exemption provided for by Regulation No 1984/83 until the date when it expires or, at the latest, until 31 December 1997, provided that as from 1 January 1989 at the latest its terms were made consistent with the requirements of Articles 10 to 13 of that regulation, with the exception of the requirement laid down in Article 12(1)(c) of the regulation relating to the duration of the agreement"*[13].

While the issue was not raised, this judgment may also be read as implicitly confirming that such contracts between Portuguese undertakings

12 ECJ, 10 November 1993, §§7-8. The proceedings before the Lisbon Judicial Court confirm that the court considered only two possible consequences for not meeting the conditions foreseen in the block exemption: (i) that the exemption is excluded and the agreement is necessarily null and void; (ii) that the exemption is excluded and the agreement will be null and void in its entirety only if the clause in question were deemed essential to the contract, which might allow for the reduction of the duration of the contract to the maximum permitted.

13 ECJ, 10 November 1993, §13.

(considering the probable presence of bundles of identical agreements, under the *Delimitis* case-law[14]) are capable of affecting trade between Member States, and therefore of being subject to EU competition law.

Also of interest in this case were the submissions to the ECJ on behalf of the Portuguese State, which affirmed as the Government's position, *inter alia*, the following:

(i) exclusive purchasing agreements (such as the one in question) undeniably restrict competition and may fall under (current) article 101 TFEU (§§19-24);
(ii) the agreement in question was subject to competition law even though Petrogal was a State-owned company (§25);
(iii) although preceding the block exemption, the agreement in question could benefit from it, if it met its conditions, which it did not (§§36-38); and
(iv) as long as such a reduction is, *in concreto*, allowed by national civil law, there is nothing to prevent the exclusivity clause of such a contract from being reduced to the maximum permissible duration (instead of being declared null and void in its entirety) (§§43-56).

The Lisbon Judicial Court never issued a substantive final ruling on this case, as the parties arrived at a settlement (which included a reduction of the amount to be paid by the defendants).

2.1.5. Júlio Canela Herdeiros v. Refrige[15]

In what appears to be the only private enforcement case to have passed through the Évora Appeal Court, a wholesale distributor sued the representative of Coca-Cola in Portugal for damages arising from a refusal to supply, alleging a violation of the national equivalent to (current) article 101 TFEU, as well of a provision relating to unfair commercial practices. The first instance court rejected the application, and the Appeal Court and the Supreme Court rejected the subsequent appeals.

14 ECJ, 28 February 1991.

15 SC, 21 March 1996. Appeal from Évora AC, 23 February 1995. Appeal from the Santarém Judicial Court.

The Évora Appeal Court seemingly rejected the possibility of tort liability arising from an infringement of the Portuguese Competition Act[16], an interpretation that was corrected by the Supreme Court, who confirmed this possibility, referring to article 483 of the Civil Code as the source of the relevant requirements: voluntary fact, unlawfulness, attribution of the fact to the injuring party, damage and causality. Regarding the unlawfulness requirement, the Supreme Court noted its two types: (i) violation of a subjective right of a third party; and (ii) violation of a legal provision protecting the interests of third parties. It then concluded that such a liability suit falls into the second type, stressing that the Portuguese Competition Act (also) aims at protecting the private interests of economic agents, without however granting them a subjective right[17].

The Court which will now handle all appeals from the specialized Competition, Regulation and Supervision Court applied a classic civil law approach and argued that the practice in question did not fall within the scope, and was not relevant for the purposes, of the Portuguese Competition Act, in essence, because it had no effect on consumers, relating merely to a change of distributors by a manufacturer[18].

The remainder of the Supreme Court judgment falls outside the scope of the present report, as it focused exclusively on the alleged unfair commercial practice, without tackling the alleged infringement of the national equivalent to article 101 TFEU. It concluded that the applicant had not met its burden of proof, essentially because it failed to show that the termination of contractual

16 According to the Appeal Court: *"It is here, we believe, that the Applicant's request fails, as it derives the right to the compensation it believes to be owed to it from a behaviour it considers in violation of the competition rules* (...)*, when, in our opinion, such a right would necessarily require the demonstration that the Defendant failed to comply with the contract it held with the Applicant"* – Évora AC, 23 February 1995.

17 The judgment is unclear on this point and, at the time, one author had a rather different reading of it, stressing that, until 1996, the leading case-law of the Supreme Court denied the admissibility of claims for damages based on infringements of Portuguese competition law, although there were signs that this tendency had reversed itself in 1997 – see Ruiz, 1999:24.

18 *"Going through the preamble of Decree-Law 422/83 and the regime set out in it, one must conclude that the situation at hand is not caught by the provisions of this law, which aimed at defending competition so as to «ensure consumers a diversified choice of goods and services, at the best conditions of quality and price» and «to stimulate undertakings to rationalize, as much as possible, the production and distribution of goods and services and to constantly adapt themselves to technical and scientific progress». That this position is the right one is evidenced by the following question: if one admits that the agreement between the Applicant and the Defendant allowed the latter to end the agreement when it saw fit, where is the infringement of the competition rules if the Defendant informs the other party that it will no longer distribute its products? We confess we see no infringement"* - Évora AC, 23 February 1995. For another ruling that rejected the applicability of competition law to vertical agreements, see below the *Cravo e Serrano v. Jorge Silva* case.

relations was done in a manner that was not usual in the trade in question. In so doing, it clarified the distribution of the burden of proof, applying article 342(1) of the Civil Code[19].

2.1.6. Cravo e Serrano v. Jorge Silva[20]

The applicant sued an entrepreneur for breach of contract, seeking damages. At stake were two franchising agreements, relating to so-called 1,5 euro shops ("Loja dos Trezentos"), that included exclusive supply and pricing clauses, both of which the franchisee infringed. This led the franchisor to revoke the contracts and activate the penalty clauses.

In court, the franchisee invoked competition law as a defence, arguing that the agreements were null and void for breach of (current) article 101 TFEU and its national equivalent.

The first instance court rejected this argument. The Coimbra Appeal Court, in its first pronouncement on competition law (as far as we were able to determine), upheld its ruling, but in a manner that suggests some fundamental misconceptions circa this branch of the law. It began by stating that such an agreement, between non-competitors, had *"nothing to do with the possibility of preventing, restricting or distorting competition*". In other words, the court seemed to deny the relevance of the national equivalent of article 101 when analyzing vertical agreements.

Even though it is not clear whether the franchisee had invoked an abuse of dominant position (at least the court does not mention this provision), the court then argued that there could be no dominant position, as the wide range of products sold in these stores could be found in *"any other establishment"*.

It added that, in any case, the franchisee would not be able to invoke competition law in its defence, as that would amount to *"venire contra factum proprium*" (it had entered freely into the contract).

Finally, the applicability of (current) article 101 TFUE was rejected, on the grounds that this type of store could not affect trade between Member States (given their size and the value of the goods traded in them).

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19 Under art. 342(1) of the Civil Code, it *"is for the party invoking a right to prove the facts constituting the alleged right"*. No. 2 of the same article further states that it *"is for the party against whom a right is invoked to prove the facts that impede, modify or extinguish that right"*.

20 Coimbra AC, 5 May 1998.

2.1.7. Sport Lisboa Benfica v. Olivedesportos[21]

In a case whose outcome was closely monitored by football fans, the Lisbon Appeal Court overturned a first instance ruling concerning contracts signed between a football club and a sports managing company, awarding the latter exclusive broadcasting rights over the club's football matches. It was concluded that these contracts infringed (current) article 101 TFEU and its national equivalent. Similar agreements had been entered into with other premiere league football clubs.

The Court considered that such an exclusive arrangement restricted competition, as it did not allow other companies to acquire broadcasting rights directly from the football clubs. In essence, a monopoly was created, allowing Olivedesportos to impose on broadcasters whatever price and conditions it wished. As the defendant had not invoked the benefit of the exemption clause, and given the distribution of the burden of proof, the Court concluded that the agreements were null and void.

The appeal to the Supreme Court was never decided, as a subsequent change in the management of the football club led to a settlement. To this day, Olivedesportos still holds exclusive contracts for broadcasting rights with the main Portuguese football clubs.

2.1.8. Tabou Calzados v. Ramiro da Conceição Maia[22]

A Spanish shoe supplier sued a Portuguese retailer for damages, alleging failure to pay an invoice. The defendant replied that the supplier had infringed a contractual clause granting it exclusive distribution rights in a local radius, as well as a clause setting up a form of selective distribution system, and that it had accordingly rescinded the contract and returned the goods in question. The first instance court not only dismissed the application, but fined the supplier for litigation in bad faith.

The Lisbon Appeal Court affirmed that both clauses restricted competition (but did not define the relevant market or discuss whether such a restriction was significant or should instead be considered *de minimis*) and were forbidden by the national equivalent of article 101 TFEU. It then noted that this would generally be true of any exclusive or selective distribution agreement, which did not mean that they could not be economically justified,

21 Lisbon AC, 2 November 2000. Appeal from the Lisbon Judicial Court.

22 Lisbon AC, 9 April 2002.

under the national equivalent of article 101(3). However, in this specific case, it found no justification for the clauses *sub judice* and declared them null and void.

The Court applied only national competition law, affirming (without stating its reasons) an absence of effect on trade between Member States. Nonetheless, it referred to Community law for conceptual clarification of national law and highlighted the parallelism of solutions between the two legal orders.

Several relevant clarifications of general scope were made, including: that the national equivalent to article 101 applies to vertical agreements; that only a potential effect need be demonstrated; that agreements are encompassed regardless of the form they take; and that the nullity of agreements under Competition Law can be raised on the court's own initiative.

2.1.9. Reuters v. Mundiglobo[23]

In its defense against a suit for failure to pay invoices, the defendant argued that Reuters had sold the same financial information services to other clients at lower prices, and that this constituted an abuse of a dominant position, under the national equivalent of (current) article 102 TFEU. It produced no evidence regarding the alleged discriminatory practices, the relevant market definition or the alleged dominant position. On the other hand, it requested that the applicant produce several invoices to other clients for the same services (which it did), and the applicant did not challenge the assertion that, at the time, it held 90% of the market as defined by the defendant.

The first instance court considered it had been proven that there were different prices charged for the same services and that, at the time of the facts in question, Reuters held a *"dominant position on the market for the supply, through data terminal, of news and financial information in real time, through a dedicated data line"*. It is not apparent what evidence was at the basis of this judgment or how this precise definition came to be used by the court.

The same court clarified the distribution of the burden of proof thus: it is for the party who invokes the infringement to *"demonstrate beyond any reasonable doubt"* that its conditions are met. It also noted that it is very difficult for the party to meet this burden in such cases. It expressed a preference for evidence of dominance in the form of statistical data, adding that this presented the

23 SC, 24 April 2002. Appeal from Lisbon AC, 24 May 2001. Appeal from Lisbon JC, 1 September 1999.

party with an added difficulty, given the lack of reliable national statistical data.

Surprisingly, the court mentioned only two facts which the party had to prove in this case, and in so doing demonstrated a rather singular (and far more demanding) perception of the concept of dominant position: (i) the market share of the undertaking in question; and (ii) that the position of *"economic dominance is as strong as to make it so that other companies such as the defendant have no real possibility (i.e. economically viable) of acquiring the products supplied by undertakings such as the applicant, or others which it can put to the same use (which have the same value in terms of use), in economic terms, without submitting itself (surrendering) unconditionally and without appeal to the diktat of the applicant"*.

It is worth recalling that the Competition Act applicable at the time (DL 422/83) not only included a legal definition of dominant position, which the Court did not resort to, but also a legal presumption of dominance above a market share of 30%. The court had not included the alleged market share in the list of proven facts, but it did state that, at the time, Reuters *"dominated a very large share of the market"*. Regardless, the legal presumption was not even mentioned, and the court concluded that, because the defendant had other companies on the market it could acquire the same services from, and it acted under the principal of contractual freedom, Reuters could not be found to have infringed competition law.

It is telling that, throughout this entire discussion, the court mentioned only articles of the Civil Code, and not once referred to the Competition Act. Thus, this first instance judgment stands as an example of a purely civil law approach that entirely disregards the content of the Competition Act.

Before the Lisbon Appeal Court, the defendant argued, inter alia, that the court did not apply the Competition Act and that it could not have concluded that there was no dominant position, after it had already accepted the existence of this position as a proven fact. Indeed, it seems relatively clear that the first instance court prematurely included a legal conclusion in the list of proven facts.

This background may account for why the Appeal Court asked whether the contract was null and void due to the applicant being in an *"excessively dominant position"*, a phrasing that proved to be unconnected to the court's subsequent analysis.

After quoting the relevant provisions of the Competition Act, the Lisbon Appeal Court confirmed the distribution of the burden of proof (referring to article 342(2) of the Civil Code) and noted that, in order to demonstrate the existence of discriminatory practices, the defendant had to show that the other companies in question were its competitors and that the *"commercial positioning"* of Reuters in relation to them was *"objectively equivalent"*.

It further noted that the time at which the different contracts were entered into was also relevant to establish the existence of discrimination. Thus, because the other contracts were older, their lower prices could not, in themselves, be taken as proof of discrimination. In the words of the court, *"there is nothing to prevent a supplier of services, on its own initiative, from increasing the price of its services in relation to contracts entered into at a later date"*. It can be argued that such an understanding, so closely tied to the principle of contractual freedom, almost completely deprived the prohibition of discriminatory practices of its *effet utile*. It also inevitably led to the conclusion that the defendant had not met its burden of proof.

The defendant subsequently challenged this interpretation of the requirements of unlawful discrimination before the Supreme Court, which, in turn, managed to introduce a new level of legal confusion into the case. Although the defendant had claimed an abuse of dominant position, and the Supreme Court itself correctly identified the corresponding provision in its description of those arguments, it ended up discussing only the existence of an "abuse of economic dependence", which does not seem to have been invoked.

As a result, this case includes a number of important clarifications on the requirements applicable to the identification of a "relative dominant position" (economic dependence), in strict adherence with French doctrine, but did not contribute to understanding the conditions for the existence of an "absolute dominant position". In this discussion, the Court combined references to the national equivalent of article 102 in the first Portuguese Competition Act, and to the prohibition of abuse of economic dependence in the second Act, then in force, suggesting that the two prohibitions were, for a reason unbeknown to us, not autonomous in the mind of the Court.

The distribution of the burden of proof was also clarified, the Supreme Court reaffirming that it is for the party invoking an abuse to prove the existence of the (relative/absolute) dominant position.

In the end, the Court concluded that, not only had the (relative) dominant position not been proven, but there were also no indications of an unlawful discriminatory pricing practice.

2.1.10. Coffee distribution cases

We identified 4 cases dealing with coffee supply contracts between a manufacturer/distributor and retailers, which included exclusivity clauses in excess of 5 years (e.g. 5,5 years) and minimum purchase obligations, as compensation for certain investments made by the supplier in equipment for the retailer's establishment. In the four cases, the supplier sued the retailers after they had infringed the exclusivity clause and/or the minimum purchase clause, in all four cases competition law was raised as a defense, as rendering the clauses in question null and void, and in all four cases the supplier was successful.

Nestlé Portugal v. Campo Doce[24]

In this case, the competition law arguments were rejected by both the first instance court and the Oporto Appeal Court. The latter considered that the contract in question fell within the *de minimis* category (*"considering the quantities to be acquired – monthly average of 100 kg – it cannot in any way be deemed that the contract jeopardized competition on a substantial part of the coffee market"*), and was therefore not forbidden by the national equivalent to article 101 TFEU. There was no discussion of the borders of the identified market. The Court showed a predisposition to uphold contracts freely entered into, stating that *"it was the defendant itself that had expressed an interest in consuming only the coffee of the applicant and, in sequence to that expression of will, bound itself not to sell competing products"*.

The Court further included brief considerations hinting at the possibility of economic justification of the exclusivity (*"The holder of the concession thus specialized itself in the sale of the applicant's products, which undoubtedly contributes to improving distribution. On the other hand, the exclusive purchase restriction seems to be indispensable or, at least, to promote an effective improvement of the product's distribution"*). A minimum purchase clause was also deemed not to be restrictive of competition, with the following justification: *"this obligation is binding only upon the contracting parties and does not prevent the creation of other distributors"*.

24 Oporto AC, 9 March 2004. Appeal from Oporto JC, 17 June 2003.

Nestlé Portugal v. Carcafé[25]

In the second case, before the first instance court (there was no appeal in this case), the defendant argued that the clauses infringed the national equivalent of Art. 101 TFEU and the prohibition on abuse of economic dependence, still under Decree-Law 371/93. The court considered that the facts in question (having concluded in November 2003) were already governed by the new Competition Act (Law 18/2003). In rather unfortunate phrasing, the court stated that this Act *"transposed Regulation (EC) 1/2003 into the national legal order"*.

Astonishingly, the court denied the applicability of the national equivalent of Art. 101 TFEU to vertical agreements: *"it underlies the scope of this provision that such practices should result from a horizontal concertation between companies with the aim of dominating the market and restricting competition. In other words, the rule in question is not applicable to vertical relations* (…) *and therefore is not applicable in this specific case"*.

As for the alleged abuse of economic dependence, it considered, once again surprisingly, that Art. 7 of the Competition Act was applicable *"both to horizontal relations* (…) *and to vertical relations"*. Highlighting that the burden of proof was on the defendant to show the existence of a dominant position or of economic dependence, the court noted that the defendant had failed to put forward any arguments in that respect, and therefore dismissed the argument.

The court further drew a questionable distinction between a restriction of competition and a restriction of trade and, as showed the same predisposition as the Oporto Appeal Court to uphold contracts freely entered into: *"Merely as an additional argument, it is our understanding that such a contractual imposition does not constitute a practice restricting competition* (…) *but only, at the most, a practice restring trade. Indeed, before entering into the contract, the defendant had the option to choose between the several companies active on the coffee distribution market and to choose the one it deemed to offer it the best conditions. Thus, being bound to the exclusive purchase of the applicant's coffee during a certain period of time does not constitute, in itself, a practice that distorts or excludes competition with other companies in the sector, but instead is a practice that restricts the coffee trade during that same period of time"*.

25 Oporto JC, 6 January 2006.

Acting on a complaint, in a decision issued in April 2006, shortly after the previous judgment, the Portuguese Competition Authority fined Nestlé Portugal 1 million euros for an infringement of the national equivalent of article 101 TFEU. It considered that the exclusivity clauses exceeding 5 years (or allowing for unilateral renewal by Nestlé after 5 years if the minimum quantities had not been purchased) in Nestlé's coffee distribution contracts were forbidden and could not be exempted[26]. In other words, the PCA identified an infringement of competition law in the same contracts that the courts, in private enforcement actions, had rejected the presence of an infringement. The PCA also made it a point to reaffirm that this provision is applicable both to vertical and to horizontal agreements (it was the first PCA decision concerning vertical agreements).

Nestlé Portugal v. Café da Palha[27]

Although initiated prior to the authority's enforcement decision, and therefore not a "follow-on action", the third case was decided by the first instance court after the above mentioned decision of the PCA. This case stands as a precedent for the way the courts react, in private enforcement suits, to: (i) requests for prior assessment of the lawfulness of agreements; and (ii) decisions of the PCA concerning the practices in question (the issue of *res judicata*).

The defendant had invoked an infringement of the national equivalents of articles 101 and 102 TFEU, as well as an abuse of economic dependence. The first instance court dismissed the argument, affirming that only an analysis of the agreement's specific effects on the market could lead to the conclusion that it indeed restricted competition, and whether such a restriction was significant. It also noted that an economic approach was required, implying the following was required: definition of the relevant market and the determination of whether the entry or expansion in the market of other competitors had been foreclosed (restriction of inter-brand competition). It concluded that no facts had been proven to allow for such findings. The Appeal Court described this judgment as an *"exemplary work"*, including in

26 See Portuguese Competition Authority, Press Release no. 9/2006.

27 Oporto JC, 15 September 2006 (we were not able to consult the text of this judgment); Oporto AC, 1 March 2007.

this assessment the lower court's analysis of the competition rules, *"which were assessed in depth"*.

The first instance court had not been confronted with any PCA decision, merely with the defendant's request to the PCA for an assessment of the lawfulness of the agreement in question. The Oporto Appeal Court affirmed that such a request, submitted after the initiation of the civil suit, *"did not require, nor did it determine, the suspension of the instance (see art. 276 of the Civil Procedural Code) nor was the suspension at any point requested by the parties on those grounds. And it didn't imply a suspension of the instance because such a request* (…) *was not a prejudicial question in relation to the object of these proceedings, since the PCA's activity could not lead to a declaration of the nullity or inexistence of the contract between the applicant and the defendant, nor the carrying out of an economic assessment that had been alleged by the defendant in its decisive elements, but only «the declaration of the lawfulness or unlawfulness on any agreement* (…)*, as well as the compliance with the requisites for justification foreseen in* [the national equivalent to Art. 101(3)]», *as is affirmed in Ministerial Order 1097/93.* (…) *The a quo court was not obliged by any legal provision to wait for the result of the prior assessment of the lawfulness of the contract requested by the defendant before issuing its judgment"*.

It was also clarified that, even though the PCA's decision had been adopted before the judgment, *"facts included in decisions by administrative authorities (even in misdemeanor cases) cannot be considered to be notorious facts rendering it possible, under article 514 of the Civil Procedure Code, for the court to know those facts without them having been alleged and proven"*. It should be noted that this does not mean that the same rule does not apply if the relevant facts have previously been alleged and the decision can be used to confirm a legal interpretation of those facts.

The defendant submitted the PCA's press release concerning the Nestlé decision[28] together with the appeal, and the court deemed it admissible, as it could not have been produced earlier. However, it found that *"the defendant has not alleged facts but merely legal concepts taken directly from the law, failing to indicate for each of those concepts the specific facts which would illustrate them, simply identifying the provisions it deemed to have been infringed. And since the evidentiary documents are not sufficient to substitute the non alleged facts, serving instead to demonstrate facts that have been alleged, when such an allegation is*

28 It should be recalled that such PCA decisions were, at the time, not made public.

lacking it cannot be overcome by the production of any document". It hadn't even been alleged that the PCA's decision was final and that it related to the same contract in question in these proceedings.

As for whether the court was bound by the legal assessment previously carried out by the PCA, it was affirmed that: *"it is settled, under the rules governing* res judicata *(arts. 671, 674-A and 674-B of the Civil Procedure Code), that a decision of an administrative authority, even in misdemeanor proceedings, does not lead to* res judicata *in other proceedings*".

It was also noted that the decision in question had not declared the contracts in themselves null and void, but only the infringing clauses. In this specific case, this meant that only the unilateral renewal clause would be deemed null and void, and this would not affect the outcome of the dispute.

"C" v. "B"[29]

In another civil suit relating to a breach of contract, a coffee distributor sought damages from a retailer who had failed to comply with minimum purchase volumes set in a coffee supply contract, that also included a minimum of six years exclusivity. Alternatively, as the retailer had invoked the nullity of the agreement, the applicant asked that the contract be deemed null and void and that the retailer be required to return the sum advanced as compensation for the exclusivity.

The first instance court deemed the contract to be valid and ordered the retailer to pay the sum corresponding to the respective sanction.

On appeal, the defendant once again raised the nullity of the contract, *inter alia* for breach of EU competition law. Specifically, the exclusivity clause was alleged to be prohibited by (current) article 101 TFEU and by Regulation (EC) 2790/99. While the national competition law had not been invoked, the Appeal Court noted that its analysis should be deemed to be subsumed in the application of the European provisions, highlighting the primacy of article 101 TFEU (by reference to doctrine).

The first instance court had considered that EU rules were inapplicable, for lack of "direct applicability" in the legal internal order (not conferring rights directly to private parties). The Oporto Appeal Court dismissed this interpretation, noting that it ran counter to *"the principle of primacy of Community law included in article 8 of the Constitution of the Portuguese*

29 Oporto AC, 14 April 2010.

Republic". It further quoted national doctrine highlighting the direct effect of this specific provision.

The court concluded that: *"the inclusion in such a contract of an exclusivity clause for a period of six years, automatically renewed if not previously denounced and with the possibility of extending the initial period, if the agreed volume of purchases is not reached within that period, in itself, does not breach Community competition rules, particularly* [current article 101(1) TFEU]". To arrive at this conclusion, it stressed that the mere fact that the conditions of the block exemption were not met did not mean that the contract was *ipso facto* forbidden. It was still necessary to assess whether all the conditions for prohibition under article 101(1) TFEU were met[30].

Although, in principle, one should not discuss the applicability of the block exemption without first finding a restriction of competition in violation of article 101(1), this step had initially been skipped by the court. Finally turning to that assessment, it considered that the contract was not forbidden by that provision because, even if there could be a potential effect on trade between Member States, the restriction would not be significant (*de minimis*), even if the analysis were restricted to national competition law. The court showed that it was aware of the *Delimitis* case-law[31] concerning bundles of identical agreements, but no facts had been alleged that allowed it to make that assessment, and the burden of proof concerning the significant restrictive nature of the agreement had not been met.

The appeal was dismissed in its entirety.

2.1.11. Carrefour v. Orex Dois[32]

Carrefour sued one of its suppliers for damages amounting to 7.000 euros, arising from an alleged failure to pay promotional services rendered. The supplier, in turn, asked for compensation (amounting to 49.000 euros) for "opening" charges imposed by Carrefour. Two supply contracts had been executed, the latter in force for one year (1999). In October 1999, Carrefour moved its purchases to a competitor of the defendant. While, in the first

30 As stressed in Vieira Peres & Maia Cadete, 2010: 202, this means that *"an exclusive coffee supply agreement, in force for a period of six years and subject to automatic renewals, does not per se infringe article 101* [TFEU]*"*.

31 ECJ, 28 February 1991.

32 Lisbon AC, 24 November 2005.

instance, the applicant obtained only 85 euros compensation, the defendant was entirely successful in its claim.

The Lisbon Appeal Court considered that Carrefour's conduct implied an unlawful (unjustified) unilateral revocation of the contract. It found that the promotional services were invoiced to the defendant at the same time as that revocation (when only the products of a competitor would be sold at these supermarkets), constituting a clear abuse of contractual good faith.

As for the defendant's claim, it had argued that Carrefour had unlawfully imposed "referencing" and "opening rappel" charges (relating to the opening of new stores). It was deemed proven that such charges were imposed in exchange for the initiation of the contractual relation, that they were not justified by benefits or services rendered, and that they were not objectively linked to the supplies in question, according to usual commercial practices.

On these grounds, the Lisbon Appeal Court found, *inter alia*, an infringement of the national equivalent of Art. 101(1) TFEU, noted that Carrefour had failed to demonstrate that the requirements for exemption were met, and, as a result, declared the contracts in question null and void. Given the retroactive effect of this declaration, Carrefour was ordered to return the payments made by the defendant under those contracts (e.g. 49.000 euros).

Thus, this case stands out as the only example we were able to identify of a successful damages claim based on competition law in Portugal. That being said, it can also be argued that this is essentially an unjust enrichment type of claim, and thus not entirely satisfactory as a precedent for a successful damages claim under competition law.

2.1.12. Beer cases

In *Central de Cervejas v. B*[33], a beer manufacturer/distributor sued a retailer for breach of exclusivity and minimum purchase contractual clauses. The retailer invoked, as a defense, an infringement of article 101 TFEU and a block exemption regulation, The first instance court considered the contract null and void, not under EU competition rules, but under Portuguese competition law, even though that law had not been invoked by the defendant. The Lisbon Appeal Court upheld the ruling, but the SC considered that several arguments raised by the appellant had not been addressed by the court, including that

33 SC, 13 January 2005; Lisbon AC, 9 July 2003.

the contracts fell in the *de minimis* category and that it would in any case benefit from individual exemption under the national equivalent of article 101(3). The case was returned to the Lisbon Appeal Court for revision, but we are not familiar with the outcome of the case.

In *Sociedade Central de Cervejas v. Carmo Nascimento*[34] and in *Sociedade Central de Cervejas v. Factorfina*[35], retailers were sued by a beer manufacturer/distributor seeking damages for breach of contract and raised competition law as a defense. The contracts included exclusive and minimum purchase obligations.

In an approach that qualitatively distinguished itself, the court rejected the argument on the grounds of *de minimis*. It first applied (current) article 101 TFEU, relying on an *amicus curiae* brief (i.e. an opinion rendered upon request) submitted by the Portuguese Competition Authority, and on the case-law of the ECJ, together with the Commission's *De Minimis* Communication, to exclude the presence of a significant restriction of competition, correctly following the *Delimitis*[36] test that takes account of the cumulative effects of an ensemble of identical agreements.

Although it is possible that this step was included in the *amicus curiae* brief, and very likely not to have been challenged by the party, it is worth noting that the court did not discuss the definition of the relevant market upon which this conclusion rested, merely following the definition found in previous decisions of the Portuguese Competition Authority.

In relation to the Portuguese Competition Act, it arrived at the same solution, affirming the parallelism with European Competition Law and stating (n accordance with the position expressed by the Competition Authority) that, although the letter of the law itself did not include a requirement for a significant impact on competition, that was nonetheless the interpretation most fitting with its aims (teleological approach). Thus, while explicitly stating that the court was not bound by the case-law of the ECJ when interpreting national competition law, the court argued that: *"the rules in question, of internal and community law, are very similar, both in their text and, in what really matters, in their intentions, and, accordingly, nothing*

34 Lisbon JC, 14 March 2005. See Botelho Moniz & Rosado da Fonseca, 2008: 769-770.

35 Lisbon JC, 2 November 2005. See Botelho Moniz & Rosado da Fonseca, 2008: 770.

36 ECJ, 28 February 1991.

prevents us from resorting to the same hermeneutic processes, which are all the more logical within the more limited context of the internal market".

It should be noted that both cases were handled by the same judge, who ordered that the judgments be forwarded to the European Commission, in accordance with article 15(2) of Regulation (EC) 1/2003. This accounts for why these two cases (and no others) have been included in the Commission's database on private enforcement of competition law in Portugal, as this practice has not been adopted by other judges.

A later case, dealing with the same company and the same market, led to the very same result. In *Sociedade Central de Cervejas v. O Difícil da Alameda*[37], a retailer was sued for damages arising from a breach of a contract that included minimum purchase and exclusivity obligations. The first instance court found in favour of the applicant without a single reference to competition law. The Lisbon Appeal Court and the Supreme Court also found for the applicant, rejecting the retailer's defense based on the nullity of the contract, for violation of competition law, finding that the agreement in question fell within the *de minimis* category.

The Supreme Court phrased this finding rather unfortunately, noting that this meant that the Portuguese Competition Act was *"not applicable to the contract in question, since, in order for that contract to be subject to that law, it would have to have as its object or effect to prevent, distort or restrict competition, in whole or in part, on the national beer market. And this potential effect on competition would have to be relevant, or significant, as has been uniformly affirmed and settled in Community competition law and national competition law"* (the Court quoted an early ECJ Judgment concerning *de minimis*[38]). While useful for the reaffirmation of the *de minimis* principle, we would argue that it should be understood that the Court meant to say that *de minimis* renders the prohibition inapplicable (in this case, Art. 4 of Law 18/2003), paraphrasing the quoted ECJ case-law, and not that it renders the Portuguese Competition Act itself inapplicable. The applicability of the Competition Act does not depend on the presence of a (potential) significant impact on competition, but merely on the contract or practices in question falling within its scope, as defined in its Art. 1.

37 Lisbon JC, 28 April 2010. Lisbon AC, 7 June 2011. SC, 17 May 2012.

38 ECJ, 9 July 1969.

It should be noted that the Supreme Court affirmed the *de minimis* nature of the agreements, even when viewed together with *"the other contracts of the same type entered into by the* [supplier]*"*, adding that they held *"little weight in the national market"*, but failed to refer to any data that could confirm this perception. Just as had already been stressed by the Lisbon Appeal Court (while rejecting the relevance of statements of one of the parties in other court proceedings), the SC highlighted that the burden of proof in this regard fell on the person alleging an infringement and that no evidence (or even claim) had been put forward, *"inter alia, concerning the relevance of the total volume of sales indirectly made by the* [supplier] *under these contracts, compared to the total volume of the market, both internal and European"*. On the other hand, it deemed that the supplier had *"succeeded in demonstrating that, given its small market share* [which is not mentioned]*, the business in question is insignificant in the relevant market"*.

Incidentally, the Lisbon Appeal Court reaffirmed that competition rules may be invoked on the court's own initiative, as well as the direct effect of (current) articles 101 and 102 TFEU (confirmed by the Supreme Court).

The defendant had misguidedly argued that the contract was forbidden by an EU block exemption regulation, as the exclusivity clause exceeded the maximum duration of 5 years. Just as the Oporto Appeal Court had decided in *"C" v. "B"* (see above, *Coffee distribution* cases), the Lisbon Appeal Court excluded the applicability of the block exemption before determining if the contract was prohibited by article 101(1) and its national equivalent. The Supreme Court also declared the block exemption inapplicable, but its view on such regulations may have been ill-expressed, as it seemed to suggest that, if one of the conditions for a block exemption is not met, this means that the applicability of article 101(3) TFEU is excluded[39].

The Supreme Court further argued that the contract placed before it could not affect trade between Member States (in the sense of article 101 TFEU), given the retailer's small size and because the agreements had only produced legal effects within Portugal (nothing indicates that the Court was aware of the ECJ's *Delimitis* case-law concerning bundles of agreements[40]).

39 A precedent to this misunderstanding of the role of block exemptions in competition law can be found in case *Petrogal v. Correia, Simões & Companhia et al.*, described above.

40 And this, despite having noted that the contract was identical to many others of the same type by the company in question.

Nonetheless, the SC did add, to be comprehensive, that the agreement wouldn't be forbidden by EU Competition Law, for the same reasons explained in the analysis of national competition law (i.e. *de minimis*).

2.1.13. Slaughterhouse[41]

This case concerned a dispute between shareholders of a slaughterhouse and a meat processing company. The shareholders were companies that resorted to the services of the co-owned slaughterhouse. The applicants asked, *inter alia*, that clauses included in a shareholders agreement concerning price fixing be deemed null and void on the grounds that it included a breach of competition law. An injunction was also sought to ensure that the conduct foreseen in those clauses would not be followed in practice even after their annulment. The applicants were successful both before the first instance court and the Appeal Court.

In short, the shareholders' agreement determined maximum price gaps to be set for the services of the slaughterhouse between the different shareholders and established a preferential treatment in relation to other clients, including reserving certain areas for the exclusive use of shareholders. The Lisbon Appeal Court noted that this scheme meant that different prices would potentially be charged to shareholders and non-shareholders for the same services (i.e. different prices for identical services). It considered this to be a discriminatory practice, in breach of the national provision equivalent to article 101 TFEU, rendering the clauses in question null and void.

This judgment is particularly noteworthy for its confirmation of the applicability of competition law to shareholders' agreements. Also noteworthy is the fact that, in essence, the court denied the owners of a company the right to preferential treatment (at least in what concerns pricing) when acquiring that company's services.

2.1.14. Milk distribution[42]

This case involved a milk farmer and a milk distributor. The first had committed to sell all its production to the latter for as long as it was still indebted to it as result of a loan agreement (with a duration of 20 months), and to pay an additional amount as compensation if it breached the exclusivity obligation.

41 Lisbon AC, 5 March 2009.

42 Oporto AC, 3 November 2009.

In the context of litigation concerning breach of contract and damages, the milk farmer argued that such an exclusivity clause was prohibited by (current) articles 101 and 102 TFEU, by the national provision equivalent to article 101 TFEU and by the national provision concerning abuse of economic dependence. As a result, it argued, the penalty clause associated to the breach of that obligation also had to be considered null and void.

The Oporto Appeal Court did not dwell on the references to EU Law, limiting its analysis to the Portuguese Competition Act, and without requiring discussion of a possible abuse of economic dependence. It considered that the clause clearly restricted competition – the farmer could not obtain better prices for its milk, and other milk purchasers could not compete to acquire milk from this farmer. Furthermore, it deemed it a supplementary obligation that is not, by its nature or usual commercial practice, connected to a loan agreement. Thus, it deemed such a clause to be in breach of the national provision equivalent to article 101 TFEU, rendering the associated penalty clause also null and void.

Particularly relevant in this case was the fact that the applicant had not raised the competition law argument before the first instance court. Nonetheless, the Appeal Court considered the plea admissible, as it fell under one of the exceptions to the rule that no new arguments may be submitted on appeal. Specifically, the rules of competition law may be invoked on the courts' own initiative, and therefore the fact that the applicant had not raised them in the first instance was not relevant.

2.1.15. VSC & FPF v. RTP[43]

Once again (as in *Sport Lisboa Benfica v. Olivedesportos*), a dispute concerning football broadcasting rights led to litigation involving arguments based, *inter alia*, on competition law. Radiotelevisão Portuguesa (RTP), the public broadcaster, was ordered by a first instance court to pay compensation to a football club (Vitória Sport Club) for damages arising from the broadcasting of a football game without the authorization of the Portuguese Football Federation, as was required by UEFA Regulations.

The Lisbon Appeal Court reversed the ruling, finding, *inter alia*, that third parties were not bound by the UEFA Regulations and that, in any case, those Regulations were null and void under EU Competition Law. The version

43 SC, 29 April 2010. Appeal from Lisbon AC, 10 November 2009.

of the UEFA Regulations in question had been notified to the European Commission, which had considered that they restricted competition under (current) article 101(1) TFEU, and could not be exempted under article 101(3).

The court stressed this and abundantly quoted European Commission decisions and judgments of the European Court of Justice relating to these Regulations. It considered that UEFA was an "undertaking", for the purposes of applying competition law, and that the broadcasting of international football games affected trade between Member States. It defined the relevant market as that for the broadcasting of sports events, by reference to the practice of the European Commission (via doctrine). Adhering to the Commission's conclusion, the Court declared the UEFA Regulation in question to be null and void to the extent that it required an authorization of a third party for the broadcasting of football matches. It also stressed that the fact that a new version of the UEFA Regulation had subsequently been approved by the European Commission could not alter the lawfulness of the clause included in the previous version.

The appeal to the Supreme Court did not tackle competition law issues.

It is worth noting that only EU Competition Law was applied in this case. Portuguese Competition Law was neither invoked nor mentioned at any stage.

2.1.16. Automobile insurance[44]

In this case, an automobile repair shop sued an insurance company for damages and sought an injunction against what it deemed to be an unlawful boycott of its services. In essence, the applicant alleged that the insurance company began demanding that it repair cars insured by it with used parts or non-authentic parts, so as to drive down costs, and that, upon its refusal, it eventually refused to pay for repairs of the vehicles of insured parties at this establishment, diverting the cars to other repair shops. The applicant deemed this to be, *inter alia*, an infringement of the national equivalent to article 101 TFEU.

The argument was dismissed by the Guimarães Appeal Court on the grounds that no agreement had been shown to exist between the repair shop and the insurance company (or between the latter and other repair shops)

44 Guimarães AC, 4 January 2011.

that could be found to be prohibited by that provision. It had merely been shown that the insurance company had insurance agreements with its clients and that it informed them that it refused to have commercial relations with the repair shop in question.

2.1.17. Goodyear v. Eurovidal[45]

In a dispute between a tire distributor and a retailer, where the latter sought damages arising, *inter alia*, from an alleged abuse of economic dependence, prohibited by national competition law, the Lisbon Appeal Court confirmed the 1st instance judgment to the extent that the retailer had not met the burden of proof concerning the existence of economic dependence.

As in previous cases where this provision was invoked, the court quoted and drew inspiration from French and national doctrine, reaffirming clarifications on its purpose, scope and requisites. The depth of the analysis, as shown in the judgment, was significantly more profound than in previous cases. The court seems to have given special relevance to the following facts, in finding an absence of economic dependence: despite the notoriety of the brand and its exclusive supply of certain types of vehicles, the products in question accounted for only a third of the retailer's turnover, and it derived significant profit margins from trading in these goods; crucially, it was concluded that the retailer could and indeed did obtain supplies in competing products from other brands, and that a change in supplier would not imply significant structural changes to the company.

An appeal is pending before the Supreme Court.

2.1.18. Pending cases

TV TEL v. Portugal Telecom

In March 2004, TV TEL Grande Porto sued Portugal Telecom for damages of 15 million euros resulting from an alleged abuse of dominant position[46]. The practices in question – refusal of access to ducts for the installation of electronic communications networks – were the object of a Decision of the PCA, which was annulled by the Lisbon Commercial Court

45 Lisbon AC, 4 October 2011.

46 See Portugal Telecom Annual Report 2011, available at: http://www.telecom.pt/NR/rdonlyres/805C6FA3-FD5C-4A1D-848E-DB34B5942901/1459993/CONTAS_PORT.pdf, p. 49.

on 2 March 2010. This judgment was confirmed by the Lisbon Appeal Court on 22 December 2010. To our knowledge, the final ruling in the civil suit has not yet been issued.

Optimus & Oni v. Portugal Telecom

In March 2011, Optimus initiated a follow-on action, suing Portugal Telecom before the Lisbon Judicial Court for alleged damages arising from an infringement previously identified by the Portuguese Competition Authority. As one of the companies active on the downstream markets, victim of the alleged abuse, Optimus sued Portugal Telecom for damages amounting to 11 million euros. Oni joined the suit in October 2011, asking for 1,5 million euros in damages[47]. To the best of our knowledge, the case is still pending.

The practices in question were the subject of a PCA decision in September 2009 (case no. 05/03), which imposed on Portugal Telecom a fine of 45 million euros for abuse of dominant position in 2002-2003. The decision was appealed to the Lisbon Judicial Court, but the case was closed in 2011 due to being time-barred. This may raise interesting issues concerning the extent to which the PCA's decision may influence the decision in the civil suit.

Interlog v. Apple

In February 2012, the former sole distributor of Apple products in Portugal, filed a 40 million Euro suit before the Judicial Court of Funchal against the Ireland-based company for damages arising from alleged abuses of dominant position (prohibited by article 102 TFEU and its national equivalent) and of economic dependence (prohibited by article 7 of the Portuguese Competition Act in force at the time)[48].

The applicant alleges several exclusionary and exploitative practices, including: fixing of prices and discounts; imposition of orders and delivery delays; definition of quantities to be supplied to clients; refusal to sell goods and abuses in repair and maintenance services; prohibition of exports to other Member States of the EU; application of discriminatory conditions; imposition of an unfavourable agreement and illegal termination of the commercial relationship; etc. This case is still pending.

47 See, e.g.: http://mobile.economico.pt/noticias/pt-reserva-24-mil-milhoes-para-eventuais-perdas-de-processos-judiciais_143064.html.

48 Funchal JC, 2012.

2.2. Cases where the relevance of competition law was excluded

In a dispute before the Lisbon Labour Court, to avoid paying compensation to a worker, an employer invoked in its defense that the clause of the collective bargaining agreement which prohibited that worker from being fired, in that case, was in violation of the principle and rules of free competition on the market, specifically the national provision equivalent to article 101 TFEU. The employer had not signed this agreement, but it had been rendered binding onto it by Ministerial decree. The Constitutional Court dismissed the argument, in essence on the grounds that the legislation in question protected constitutional rights and principles which, in this case, had to be considered to rise above that of the protection of competition[49].

Two other cases also focused on collective bargaining agreements, relating to workers in the cleaning services sector, and involving the workers, the Association of Companies Supplying Cleaning Services and Similar Activities, the Union of Workers in Reception, Security, Cleaning and Similar Activities, a Chamber of Commerce and Industry, a company and a private person. Competition law was raised as a defense, not by the workers or their Union.

In *Maria da Conceição et al. v. Climex et al.*[50], the appellant invoked the invalidity of the collective bargaining agreement, under competition law. The Lisbon Appeal Court pointed out that the agreement in question, and the legal framework on which it rested, implemented a constitutional right to job security and that, not only was the protection of competition a relative goal that could be set aside by higher constitutional principles, but also it did not find any infringement of rules aimed at protecting competition on the market, as the agreement in question merely extended to another sector a provision included in legislation. It based this finding on the Constitutional Court's ruling in the previously described case.

While it was not possible to consult the full version of the judgment, the Supreme Court concluded that a specific clause of the collective bargaining agreement did not infringe the national provision equivalent to article 101 TFEU (or that the latter was not applicable).

49 CC, 12 July 1990.

50 SC, 30 June 1993. Appeal from Lisbon AC, 30 September 1992.

In *Cleaning services association II*[51], the applicants asked for an injunction (to get their jobs back) and for back and future pay, based on an infringement of the respective collective bargaining agreement. They argued, *inter alia*, that, by giving one company access to the workforce under more favourable terms, the collective bargaining agreement was in breach of (current) article 101 TFEU and its national equivalent. The first instance court dismissed the applicability of national and EU competition law to the matter at hand on the (surprising) grounds that these rules only apply to undertakings and *"not to unions, political parties, legal persons of public utility* [charities], [or] *associations"*. The Appeal Court and the Supreme Court did not have to discuss the issue, as they restricted their conclusions to the issue of inadmissibility.

In *Ilídio Monteiro & Graciete Monteiro v. Banco de Fomento & Exterior*[52], the applicants, partners of a construction company, reacted to enforcement proceedings by a bank whose activities were subject to special legislation. They invoked, *inter alia*, a breach of EU Competition Law (the legislation in question allegedly infringed [current] article 106, read in conjunction with article 101 TFEU) and of the Portuguese Competition Act.

The first instance Court rejected the application, as did the Lisbon Appeal Court. The applicability of the Treaty provisions was rejected, on the grounds the activity in question was not economic in nature and that there was no effect on trade between Member States. As for national competition law, the Court affirmed that the non-commercial banking activities in question were governed by specific legislation and were not encompassed by the Portuguese Competition Act.

In *Camilo Fernandes Lda v. Ford*[53], *Viaturas e Máquinas da Beira*[54], and *AA v. Renault*[55], the block exemption regulation for motor vehicle distribution agreements (Regulation EC 1475/95) was invoked by car manufacturers in support of an argument unrelated to competition law, seeking to limit compensation available to the former dealers under general civil law, following the termination of their contracts. The Supreme Court rightfully dismissed

51 SC, 6 June 2007. Appeal from the Labour Court of Ponta Delgada.

52 Lisbon AC, 3 October 2002.

53 SC, 21 April 2005. Appeal from Oporto AC, 3 April 2004.

54 SC, 5 March 2009.

55 SC, 24 January 2012. Appeal from Lisbon AC, 12 May 2011.

the relevance of the Regulation for the point the parties were attempting to make. Less fortunately, the Supreme Court added that such a Regulation could not be applicable because at stake were relations between Portuguese companies, with no *"cross-border objective connection"*. Arguably, the Court seemed to believe that a case has to involve trade between companies established in different Member States in order for there to be an effect on trade between Member States and, therefore, for EU Law to be applicable.

In *Camilo Fernandes Lda v. Ford*, the first instance court[56] had summed up as follows (in a footnote) the reasons behind the irrelevance of EU Competition law for the determination of the civil law rules applicable to concession agreements: *"the Community rules and principles* [of competition law] *invoked by the defendant have neither the purpose nor the effect of defining the substantive regime applicable to a concession agreement – since they relate exclusively to the Community regulation of competition, indicating the clauses that are admissible and inadmissible in light of article* [101 TFEU] (…). *In short, these regulations are only aimed at defining the conditions for exemption and notification of certain categories of agreements to the European Commission, implying nothing concerning the substantive regime to which those agreements are subject in each Member State"*. These conclusions were backed up by references to a judgment of the Supreme Court, as well as to case-law of the ECJ, and to Portuguese and foreign doctrine. The competition law issue was not discussed before the Oporto Appeal Court.

In *"G" v. "N"*[57], a textile retailer sued a manufacturer for damages resulting from the cancellation of an order. The Lisbon Appeal Court agreed with the first instance court in dismissing the suit. One of the legal basis invoked by the retailer was an abuse of economic dependence and the fact that a clause in the agreement was prohibited by national competition law. Surprisingly, the Lisbon Appeal Court dismissed the relevance of the national provision equivalent to article 101 TFEU on the argument that, since the clause in question was an essential condition of the agreement, if it were to be deemed null and void, then the entire agreement would be null and void and, as a result, the (contractual) justification for the compensation sought would disappear, rendering the issue *moot*. It added that the appellant had not met its burden of proof in what concerned the existence of economic dependence.

56 Judgment of the Vila Real Judicial Court, reproduced in Oporto AC, 3 April 2004.

57 Lisbon AC, 12 September 2006.

In *"B" v. "C" (Gym user)*, an individual asked for provisional measures against a gym of which she was a member, for unlawfully refusing her access to the facilities[58]. It was alleged that this was the only nearby gym with the type of classes sought by this individual. Amongst other legal basis, it was argued that the behavior of the gym owners constituted an infringement of the Portuguese Competition Act. While the first instance court apparently addressed this issue (in terms we are unaware of), the Oporto Appeal Court merely stated that any argument relating to that law was misplaced, as it found in this case no *"economic activities revealing practices in restriction of competition or concentrations between companies"*, referring to article 1 of the PCA. No further justification or explanation was given.

2.3. Cases where competition law was raised but not discussed

The *DECO v. Portugal Telecom*[59] case stands alone as the only example of the national legislation on popular action being used in an attempt to enforce competition law. Essentially, Portugal Telecom had imposed, in 1999, an "activation charge", for all its clients and for all phone calls (a similar practice had occurred in 1998).

Acting under Law 83/95, of 31 August, which grants, *inter alia*, consumer protection associations the right to initiate court proceedings to protect diffuse interests, such as public health, the environment, etc, the Portuguese Consumer Protection Association sued the company, asking that it be ordered to return the unlawful charge to all clients. One of the legal bases invoked was an abuse of dominant position, but the courts declared the application successful on other grounds, without discussing competition law.

According to Portugal Telecom's financial report of 2004, the case ended in a settlement between DECO and Portugal Telecom, on 15 March 2004, to the estimated value of 120 million Euro. No direct payment was made. Instead, *"PT did not charge its customers for their national, regional and local calls on March 15, 2004* [National Consumers' Day], *and on 13 consecutive Sundays between March 21, 2004 and June 13, 2004". "PT also agreed to reimburse any customer who makes a claim for his portion of the 1998 call set-up charges"*[60]. The two complaints that had in the meantime been made by DECO were

58 Oporto AC, 9 May 2007.

59 SC, 7 October 2003. Appeal from Lisbon AC, 12 November 2002.

60 See Mulheron, 2008: 77-78.

withdrawn in June 2004. A total of approximately two million Portugal Telecom customers were represented, and only five persons opted out.

Competition law is not specifically mentioned in the non-exhaustive enumeration of the type of interests encompassed by Law 83/95, of 31 August, and so, to this day, there may be doubts as to whether and to what extent *actio popularis* is available for private enforcement of competition law. In the very least, what can be said is that, in this case, right up to the Supreme Court, the admissibility of the part of the application dealing with competition law was not rejected. We shall deal with this issue in further detail in the upcoming second part of this paper.

Another issue discussed in this case was that of the admissibility of two separate *actio popularis* running simultaneously and autonomously. The Lisbon Appeal Court considered that these proceedings could be decided independently from another popular action introduced by DECO against Portugal Telecom because they were based on different facts (*maxime*, they related to different time periods) and because different remedies were sought (the first action was not aimed at obtaining compensation for damages).

This judgment may also be referred to as an example of cases being admitted, relating essentially to the same facts, but in subsequent years. Indeed, DECO initiated two separate proceedings regarding the same practices in 1998 and in 1999, and the Lisbon Appeal Court confirmed that both were admissible.

In *"B" v. "C" & "D"*[61], a case concerning the sale of an establishment (gym) allegedly subject to a non-compete clause, the court noted that such situations may be governed by national competition law, as well as by (current) Article 101 TFEU, but its findings on the facts of the case made it unnecessary to discuss the issue.

In *"B" & "C" v. "D"*[62], a case concerning alleged exclusionary practices associated to an entertainment machines distribution agreement, competition law was invoked among other legal basis, but the court did not get to discuss it, as it found that the claim was time-barred.

61 Oporto AC, 15 October 2004.

62 Oporto AC, 10 July 2006.

3. GLOBAL ANALYSIS OF THE PRIVATE ENFORCEMENT OF COMPETITION LAW IN PORTUGAL

3.1. Overview

While it is certainly true that there is a limited number of cases of private enforcement of Competition Law in Portugal, since its inception, almost 30 years ago, such cases are, by far, not as rare as is generally assumed.

All in all, between December 1983 and May 2012, we have identified: (i) 25 cases where competition law was discussed[63]; (ii) 10 cases where the relevance of competition law was excluded; and (iii) 3 cases where competition law issues were raised but not discussed. The following comments rest on this sample and should therefore all be understood to be preceded by the safeguard "as far as we were able to determine".

Contrary to what is widely believed [64], there has been at least one judgment in Portugal which awarded damages to a private party on the basis of an infringement of competition law[65]. There has, however, never been judicial consideration of the passing-on defence (e.g. the argument that a client cannot claim damages from its supplier on the grounds that it has already passed on those damages to its own clients) or of indirect damages (e.g. damages suffered by clients further along the distribution chain, who were not the direct victims of the competitive infringements).

With the exception of the *DECO v. Portugal Telecom* case (where the issue was resolved without applying competition law), there has never been a collective redress or consumer protection case. There has also never been a judgment in a proper follow-on case (i.e. a case initiated by undertakings or clients that suffered damages as a result of infringements of competition law identified by the competition authorities before the initiation of the proceedings), despite the clear advantages of such cases in terms of ease of proof[66].

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63 Including 1 case of which we know only through an ECJ judgment and 3 cases that are still pending (where it may be assumed that competition law will indeed be discussed).

64 European Commission, 2008b: 1; Cruz Vilaça, Nápoles & Choussy, 2004; Sousa Ferro, 2007: 285.

65 See, above, the description of the *Carrefour v. Orex Dois* case.

66 The *TV TEL v. Portugal Telecom* case is not strictly speaking a follow-on action, as it seems to have been initiated before the adoption of the PCA decision addressing the same practices, but it may nonetheless be included in this category, as it will raise the issues typical of such actions. The *Optimus & Oni v. Portugal Telecom* case, now pending, seems to be the first follow-on case, *stricto sensu*, to come before national courts.

In the majority of cases, competition rules were invoked as a defence. On the other hand, competition law has been successfully invoked (i.e. the court accepted the legal argument of the party raising the competition issue) in a few cases, although clearly in the minority[67]. This should not be understood as implying a general reluctance of national courts in identifying infringements of competition law. The truth is that, in the majority of cases, in particular in defensive contexts, the alleged infringement was raised with little or no hope of success. It may also be argued that the case-law suggests a tendency to protect the "little guy" from perceived abuses by large companies.

There is a clear dominance of a particular type of case in the private enforcement of competition law field in Portugal. Of the 25 cases where competition law was discussed and applied by the courts, 18 dealt with relations between a manufacturer and its distributors or retailers (vertical relations). 5 cases related to the supply of services and 2 others to sports broadcasting rights. Recently, there has been a visible increase in the average amount of damages being sought in court, taking into account those cases still pending.

Judges in first instance generalist courts cannot be expected to master all the complexities of competition law, and so it is not surprising that first instance rulings tend to reveal an approach to the enforcement of the Competition Act that is insufficiently nuanced. That being said, there are excellent examples of courts which, particularly by resorting to *amicus curiae* briefs from the Competition Authority and to national and European precedents, have produced insightful judgments in intricate cases[68]. On the other hand, some first instance judges have shown such a degree of unwillingness to apply competition law, adopting a traditional formalistic, civil law approach to competition law based disputes, such as to put into question the very right of access to justice[69].

For a discussion of PCA decisions that could have led to follow-on actions, see Coutinho de Abreu, 2011: 111-113.

67 See, above, the description of the following cases: *Sport Lisboa Benfica v. Olivedesportos*; *Tabou Calzados v. Ramiro da Conceição Maia*; *Slaughterhouse*; *Milk distribution*; *VSC & FPF v. RTP*; and *Carrefour v. Orex Dois*.

68 See, above, the description of the *Sociedade Central de Cervejas v. Carmo Nascimento* and the *Sociedade Central de Cervejas v. Factorfina* cases, as well as the *Nestlé Portugal v. Café da Palha* case.

69 See, above the description of the *Reuters v. Mundiglobo* case.

At the other end of the spectrum, the Supreme Court has displayed resistance in embracing the private enforcement of competition law. While no judgment clearly stands out as groundbreaking, there are several examples of rather blunt rulings.

For one thing, we were unable to identify a single example of the Supreme Court applying EU competition rules in this context. This Court has repeatedly refused to acknowledge the applicability of the Treaty to internal situations, even when the first and second instance court had done so or when the European Commission itself had deemed EU Law applicable to similar practices of that undertaking[70]. As a result, it has also refused to refer questions to the European Court of Justice. It has stated that EU competition law is only applicable to cases involving trade between companies established in different Member States (applying a classic formal understanding of undertaking in this assessment, rather than the competition law concept of undertaking) or with some other kind of objective cross-border link[71].

As for the Supreme Court's discussions of Portuguese competition law, its conclusions have either been rendered after a mere cursory reference to the topic or they have been completely off the mark, as when it discussed the requirements for abuse of economic dependence in a case where an abuse of dominant position had been invoked[72].

Within this sample, the Lisbon Appeal Court stands out as the most active in this domain, having been most often confronted with competition law issues. It is also the court that has shown the greatest qualitative evolution in its approach to competition cases.

One conclusion that seems inevitable is that there is a wide gap between the theory of competition law and its enforcement in practice, particularly in what concerns the expectable depth of analysis and the standard of proof. There has, for example, never been a proper discussion of how to identify a dominant position, or a discussion of the definition of the relevant market, or a "by the book" application of article 101(3) (or its national equivalent).

70 See, above, the description of the *JSS et al v. Tabaqueira* and *JCG et al v. Tabaqueira* cases.

71 See, above, the description of the *Camilo Fernandes Lda v. Ford* case.

72 See, above, the description of the *Reuters v. Mundiglobo* case.

3.2. Quotable precedents

Given the perceived uncertainty among legal practitioners concerning the attitude of national courts towards suits for damages based on infringements of competition law, it seems useful to highlight some of the general principles and issues that have already been affirmed in the case-law, and which may be invoked as (naturally, non-binding) precedents:

- Admissibility of tort suits based on infringement of competition law:
  - all the cases discussed in section 2.1 implicitly recognize the admissibility of such suits, but some have done so explicitly and clarified the applicable requisites[73];
- EU competition law and its relation to national competition law:
  - national competition law should be interpreted in light of EU competition law[74];
  - primacy of article 101 TFEU, when also applying the national equivalent (article 8 of the Portuguese Constitution)[75];
  - articles 101 and 102 TFEU have direct effect in the internal legal order[76];
  - even when EU law is not applicable, it may be referred to for conceptual clarification of national law, given the parallelism of solutions[77];
  - recognition of prior Commission decisions declaring a contested agreement to be null and void under the TFEU[78];
- Distribution of the burden of proof:
  - applicability of article 342 of the Civil Code[79];
  - it is for the claimant to demonstrate the significantly restrictive nature of the agreement[80];

73 SC, 21 March 1996.

74 SC, 31 October 1991. See also: Lisbon JC, 14 March 2005; Lisbon JC, 2 November 2005.

75 Oporto AC, 14 April 2010.

76 Oporto AC, 14 April 2010; Lisbon AC, 7 June 2011; SC, 17 May 2012.

77 Lisbon AC, 9 April 2002.

78 Lisbon AC, 10 November 2009.

79 Lisbon AC, 24 May 2001.

80 Lisbon AC, 7 June 2011; SC, 17 May 2012.

  - it is for the undertaking wishing to benefit from an individual exemption to prove that the requisites of article 101(3) TFEU, or its national equivalent, are met[81];
  - it is for the party invoking an abuse to prove the existence of the (relative/absolute) dominant position[82];
  - to prove abusive discriminatory practices, the claimant must demonstrate, *inter alia*, that different conditions were offered to other companies who were its competitors and that the *"commercial positioning"* of the supplier in relation to them was *"objectively equivalent"*[83];
- Objectively justified differences in pricing are not unlawfully discriminatory[84];
- Broad concept of "undertaking" in competition law[85];
- Interpretation of article 101:
  - agreements are encompassed by this provision regardless of the form they take (including shareholder agreements)[86];
  - agreements that do not significantly restrict competition are not forbidden by article 101 or its national equivalent (*de minimis*)[87];
  - exclusive or selective distribution agreements are generally forbidden by article 101(1) TFEU and/or its national equivalent, but may be economically justified under article 101(3) and/or its national equivalent[88];
  - the national equivalent to article 101 TFEU applies to vertical agreements[89];

81 Lisbon AC, 24 November 2005.

82 SC, 24 April 2002; Oporto JC, 6 January 2006.

83 Appeal from Lisbon AC, 24 May 2001.

84 SC, 31 October 1991. Appeal from Lisbon AC, 6 March 1990. See, however: Lisbon AC, 18 April 1991.

85 Lisbon AC, 10 November 2009.

86 Lisbon AC, 9 April 2002; Lisbon AC, 5 March 2009.

87 Oporto AC, 9 March 2004; Oporto AC, 14 April 2010; Lisbon AC, 7 June 2011; Lisbon JC, 14 March 2005; Lisbon JC, 2 November 2005; SC, 17 May 2012.

88 Lisbon AC, 9 April 2002. See also: Oporto AC, 9 March 2004.

89 Lisbon AC, 9 April 2002.

  - it is sufficient to demonstrate a potential restrictive effect of the collective practices[90];
  - the collective effects of bundles of identical agreements should be taken into account when assessing an individual agreement, in accordance with the *Delimitis* case-law[91];
- Clarification of the requisites of economic dependence[92];
- Justification of market definition on the basis of prior decisions of the European Commission and the PCA[93];
- Courts are not obliged to suspend proceedings to await a decision of the PCA, if a request has been submitted by a party (following the initiation of the proceedings) for prior assessment of the lawfulness of the agreement in question[94];
- It is not enough for a party to produce a PCA decision concerning the unlawfulness of the practices in question, if it has not alleged the facts that allow for that legal conclusion[95];
- A decision of the PCA concerning the practices in question does not lead to *res judicata* – courts are not legally bound by it in private enforcement cases[96].
- If the PCA adopts a decision concerning the practices in question after the end of the trial phase in the first instance, it may still be produced as evidence before the Appeal Court[97];
- Infringements of competition law may be raised on the court's own initiative (and, as a result, it is admissible for a party to raise this legal issue on appeal, even when it failed to do so before the first instance

90 Lisbon AC, 9 April 2002.

91 Oporto AC, 14 April 2010.

92 SC, 24 April 2002; Lisbon AC, 4 October 2011.

93 Lisbon AC, 10 November 2009. See also the two *Tabaqueira* cases.

94 Oporto AC, 1 March 2007.

95 Oporto AC, 1 March 2007.

96 Oporto AC, 1 March 2007.

97 Oporto AC, 1 March 2007.

court; a court may also apply national competition law, even exclusively, when only EU competition law was invoked)[98].

3.3. Thoughts on the future

The possible ways to address the shortcomings of private enforcement in Portugal are well known, not only because they do not differ from the solutions discussed at the broader European level, but also because some Portuguese authors have already repeatedly stressed them. This paper aims at providing a solid working basis for these assessments, rather than at being innovative in the presentation of possible solutions. Furthermore, only the second (upcoming) part of this analysis will allow for a more accurate basis from which to derive duly justified recommendations.

That being said, we would like to recall some of the main solutions already put forward by such notable scholars as Prof. Sérvulo Correia[99] and Prof. Luís Morais[100], to which we fully subscribe:

(i) centralization of the private enforcement of competition law in a specialized court (specifically, the same court that centralizes all appeals relating to decisions of the Portuguese Competition Authority)[101];
(ii) promotion of training actions for judges[102];
(iii) promotion of training actions for lawyers;
(iv) legal clarification of cooperation mechanisms between the courts and the Competition Authority (and European Commission, giving effect to article 15 of Regulation (EC) 1/2003), explicitly providing

98 Lisbon AC, 9 April 2002; Oporto AC, 3 November 2009; Oporto AC, 14 April 2010; Lisbon AC, 7 June 2011; SC, 13 January 2005. In the latter, after the first instance court had applied the national competition act exclusively, when only EU competition law had been invoked, the SC noted that it may be debated whether such an initiative of the court, without the parties having been given the chance to comment on it, may be deemed to infringe the adversarial principle, but did not need to resolve this issue in the specific case, as the nullity had not been invoked).

99 Sérvulo Correia, 2010: 114-117.

100 Morais, 2011: 31.

101 Making the argument for the need for a specialized court in what concerns appeals of decisions of the PCA (extendable to private enforcement): Mendes Pereira, 2009: 439; e Martinho, 2010: 264.

102 For a few years now, there have been several training actions for judges in competition law, including those promoted annually by the European Institute and the Institute for Economic, Financial and Fiscal Law, both of the Lisbon Law School.

for the possibility of *amicus curiae* briefs by the PCA, at the request of the courts or on its own initiative[103];

(v) mandatory communication by the courts of cases where the application of competition law is raised, and management and online publication by the PCA of a database;

(vi) explicitly providing for the possibility of staying court cases while awaiting relevant decisions of the competition authorities (or their appeals in court)[104]; and

(vii) adoption of measures concerning arbitration in competition law disputes.

A very specific problem that has surfaced in our analysis of the case-law is the occasional difficulty in fully assimilating the ECJ's case-law relating to the criterion of effect on trade between Member States, and in applying the *de minimis* criterion[105]. While both issues have already been the subject of Communications of the European Commission, it would probably prove useful to have national general guidance on these issues, adopted by the Portuguese Competition Authority, ideally based on hypothetical specific scenarios that are most likely to be faced by the courts.

With the hope of making a small contribution along the lines of these possible solutions, the authors shall contribute the judgments mentioned throughout this paper for a database to be created and managed by the European Institute of the Lisbon Law School.

4. CONCLUSION

Our research has shown that there are far more examples of private enforcement of competition law in Portugal than has so far been generally thought, and that there has even been a successful claim for damages. While this collection is hopefully far more than a "tip of the iceberg", we are convinced that there must still be a significant number of cases that have not yet been collected or identified.

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103 Highlighting the importance of amicus curiae briefs in such cases: Cruz Vilaça, Nápoles & Choussy, 2004: 121.

104 This seems to already be the practice of the courts – see, above, the description of the *TV TEL v. Portugal Telecom* and *Optimus & Oni v. Portugal Telecom* cases.

105 See, in this regard, e.g.: Sousa Ferro, 2010.

Generally, with the notable exception of the Supreme Court, the precedents of private enforcement of competition law in Portugal paint a picture of a national judicial system that is receptive to tackling competition law issues, albeit rightfully demanding in what concerns the burden of proof. A willingness to seek guidance in *amicus curiae* briefs and to follow precedents set by European case-law or by decisions of the PCA or the European Commission also broadly emerges.

Recent cases show that there is a growing awareness among medium and large companies of the possibility to sue for damages arising from infringements of competition law, but there are also signs of significant reluctance in initiating such suits, as evidenced by the (almost complete) absence of follow-on suits in Portugal. On the other hand, consumer cases continue to be entirely inexistent, despite the opt out system under the popular action Act.

Given the geographically disperse pattern of first instance cases allied with the lack of "space to think" for these judges (certainly overburdened with intellectual multi-topic tasking) we cannot expect the Appeal Courts to "save the day", time and again, nor have all the Appeal Courts shown the same depth in the analysis of competition law cases. One should also not expect the Appeal Courts to repeatedly and successfully overturn first instance rulings that require complete legal restructuring, while at the same time laying foundations that are attractive enough for the (conservative) Supreme Court to embrace. Everyone would benefit from the concentration of know-how and from the availability of centralized data if the private enforcement of competition law were to be centralized in a single court, such as the recently created Competition, Regulation and Supervision Court.

REFERENCES

CASE-LAW

Coimbra Appeal Court (Coimbra AC)
1998 Judgment of 1998/05/05, *Cravo e Serrano v. Jorge Silva* (case no. 84/97)
Constitutional Court (CC)
1990 Judgment of 1990/07/12, *"A" v. "B"* (case no. 102/89)
Évora Appeal Court (Évora AC)
1995 Judgment of 1995/02/23, *Júlio Canela Herdeiros v. Refrige* (case no. 452/94)
European Court of Justice (ECJ)
1969 Judgment of 1969/07/09, *Völk* (5/69), ECR (1969) 295
1991 Judgment of 1991/02/28, *Stergio Delimitis* (C-234/89), ECR (1991) I-935
1993 Judgment of 1993/11/10, *Petrogal* (C-39/92), ECR (1993) I-5659
Guimarães Appeal Court (Guimarães AC)
2011 Judgment of 2011/01/04, *"A" v. "B"* (case no. 3164/08.1TBVCT.G1)
Funchal judicial Court (Funchal JC)
2012 "Varas de Competência Mista, 1ª Secção", *Interlog v. Apple Sales International* (case no. 135/12.7TCFUN, application in February 2012, pending)
Lisbon Appeal Court (Lisbon AC)
1990 Judgment of 1990/03/06, *JSS et al v. Tabaqueira* (case no. 2426)
1991 Judgment of 1991/04/18, *JCG et al v. Tabaqueira* (case no. 4202)
1992 Judgment of 1992/09/30, *Maria da Conceição et al v. Climex et al* (case no. 7709-4)
2000 Judgment of 2000/11/02, *Sport Lisboa Benfica v. Olivedesportos* (case no. 60506)
2001 Judgment of 2001/05/24, *Reuters v. Mundiglobo* (case no. 3801/2001)
2002 Judgment of 2002/04/09, *Tabou Calzados v. Ramiro da Conceição Maia* (case no. 494/02)
2002 Judgment of 2002/10/03, *Banco de Fomento & Exterior* (case no. 5223/02-8)
12 November 2002 Judgment of 2002/11/12, *DECO v. Portugal Telecom* (case no. 3724/02-7)
2003 Judgment of 2003/07/09, *Central de Cervejas v. B*
2005 Judgment of 2005/11/24, *Carrefour v. Orex Dois* (case no. 6882/2005-8)
2006 Judgment of 2006/09/12, *"G" v. "N"* (case no. 2721/2006-7)
2009 Judgment of 2009/03/05, *"D" & "G" v. "C", "AF", "I" & "M"* (case no. 686/2009-6)
2009 Judgment of 2009/11/10, *VSC & FPF v. RTP* (case no. 4292/1999.L1-S1)

2011 Judgment of 2011/05/12, *AA Sociedade de Automóveis da Maia v. Renault Portuguesa* (case no. 39/2000.L1.S1)
2011 Judgment of 2011/06/07, *Sociedade Central de Cervejas v. O Difícil da Alameda* (case no. 3855/05.9TVLSB.L1-7)
2011 Judgment of 2011/10/04, *Goodyear v. Eurovidal* (case no. 107/2001.L1)

Lisbon Judicial Court (Lisbon JC)

1994 Judgment of 1994/11/21 ("7.º Juízo Cível"), *Petrogal c. Correia, Sim*ões & Cª et al (case no. 550/1990)
1999 Judgment of 1999/09/01 ("1.º Juízo Cível"), *Reuters v. Mundiglobo* (case no. 299/95)
2005 Judgment of 2005/03/14, *Sociedade Central de Cervejas v. Carmo Nascimento* (case no. 8942/03)
2005 Judgment of 2005/11/02, *Sociedade Central de Cervejas v. Factorfina* (case no. 67/02)
2010 Judgment of 2010/04/28, *Sociedade Central de Cervejas v. O Difícil da Alameda* (case no. 3855/05.9TVLSB)

Oporto Appeal Court (Oporto AC)

2004 Judgment of 2004/03/09, *Nestlé Portugal v. Campo Doce* (case no. 6904/03)
2004 Judgment of 2004/04/03, *Camilo Fernandes Lda v. Ford* (case no. 841/04)
2004 Judgment of 2004/10/15, "B" v. "C" & "D" (case no. 0434478)
2006 Judgment of 2006/07/10, *"B" & "C" v. "D"* (case no. 0653357)
2007 Judgment of 2007/03/01, *Nestlé Portugal v. Café de Palha* (case no. 529/07-3)
2007 Judgment of 2007/05/09, *"B" v. "C"* (case no. 0731258)
2009 Judgment of 2009/11/03, *"B" v. "C"* (case no. 572/07.9 TBVLC.P1)
2010 Judgment of 2010/04/14, *"C" v. "B"* (case no. 8615/08.2TMBTS.P1)

Oporto Judicial Court (Oporto JC)

2003 Judgment ("5ª Vara Cível, 2ª Secção") of 2003/06/17, *Nestlé Portugal v. Campo Doce* (179/02; archive no. 721637)
2006 Oporto Judicial Court judgment ("8ª Vara Cível, 2ª Secção") of 2006/01/06, *Nestlé Portugal v. Carcafé* (2034/04.7TVPRT; archive no. 805835)
2006 Oporto Judicial Court judgment ("8ª Vara Cível, 1ª Secção") of 2006/09/15, *Nestlé Portugal v. Café de Palha* (4374/04; archive no. 812596)

Supreme Administrative Court

1992 Judgment of 1992/07/02, *Entreposto de Vila Nova de Gaia* (case no. 028316)

Supreme Court (SC)

1991 Judgment of 1991/10/31, *JSS et al v. Tabaqueira* (case no. 079744)

1993 Judgment of 1993/06/30, *Maria da Conceição et al v. Climex et al* (case no. 3639)
1993 Judgment of 1993/07/08, *JCG et al v. Tabaqueira* (case no. 081441)
1996 Judgment of 1996/03/21, *Júlio Canela Herdeiros v. Refrige* (case no. 087823)
2002 Judgment of 2002/04/24, *Reuters v. Mundiglobo* (case no. 01B4170)
2003 Judgment of 2003/10/07, *DECO v. Portugal Telecom* (case no. 03A1243)
2005 Judgment of 2005/01/13, *Central de Cervejas v. B* (case no. 04B4031)
2005 Judgment of 2005/04/21, *Camilo Fernandes Lda v. Ford* (case no. 04B3868)
2007 Judgment of 2007/06/06, *Trabalhadores de Serviços de Portaria, Vigilância, Limpeza, Domésticas e Actividades Diversas v. Câmara de Comércio e Indústria de Ponta Delgada et al* (case no. 06S4608)
2009 Judgment of 2009/03/05, *Viaturas e Máquinas da Beira v. BB* (case no. 09B0297)
2010 Judgment of 2010/04/29, *VSC & FPF v. RTP* (case no. 4292/1999.L1-S1)
2012 Judgment of 2012/01/24, *AA Sociedade de Automóveis da Maia v. Renault Portuguesa* (case no. 39/2000.L1.S1)
2012 Judgment of 2012/05/17, *Sociedade Central de Cervejas v. O Difícil da Alameda* (case no. 3855/05.9TVLSB.L1.S1)

BOOKS AND ARTICLES

Antunes, L. P.
2001 Intervenção em Conselho Económico e Social, *Mesa Redonda: a Concorrência e os Consumidores*, Lisboa, p. 133.

Botelho Moniz, C. & Rosado da Fonseca, M.
2008 "Portuguese Report to FIDE Congress XXIII – The modernization of European competition law – first experiences with Regulation 1/2003", in APDE, *Estudos de Direito Europeu: Congressos da FIDE – Relatórios Portugueses 1990-2008*, Principia, 2009, p. 736.

Coutinho de Abreu, J.
2011 "Private enforcement of competition law in Portugal", in Velasco San Pedro, L. A. *et al.* (eds.), *Private enforcement of competition law*, Lex Nova, p. 101.

Cruz Vilaça, J. L., Nápoles, P. M. & Choussy, D.
2004 Information on Portugal quoted in D. Waelbroeck, d. Slater & g. Even-Shoshan (eds.), *Study on the conditions of claims for damages in case of infringement of EC Competition rules – Comparative Report*, Ashurst, Brussels, 31 August 2004, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

European Commission

2005 "Green Paper - Damages actions for breach of the EC antitrust rules", COM(2005)672, 19 December 2005, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT.

2008a "White Paper on Damages Actions for Breach of the EC antitrust rules", COM(2008)165, 2 April 2008, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0165:EN:NOT.

2008b "Executive summary and overview of the national report for Portugal", available at: http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/portugal_en.pdf.

Gorjão-Henriques, M. & Vaz, I.

2004 "Portuguese Report to FIDE Congress XXI – Competition law and competition policy in the European Union: the reorganization oft he competition law application system, may it prosper?", in APDE, *Estudos de Direito Europeu: Congressos da FIDE – Relatórios Portugueses 1990-2008*, Principia, 2009, p. 621.

Martinho, H. G.

2010 "Tribunais especializados, concentração de competências e o futuro tribunal da concorrência, regulação e supervisão", (2010) 1(3) *Revista de Concorrência e Regulação*, p. 253.

Mendes Pereira, M.

2009 *Lei da Concorrência Anotada*, Coimbra: Coimbra Editora.

Morais, L. S.

2007 "Aplicação do Direito da Concorrência, nacional e comunitário, por Tribunais Arbitrais: o possível papel da Comissão Europeia e das Autoridades Nacionais de Concorrência nesses processos", Presentation at the Portuguese Competition Authority, 15 October 2007, available at: http://www.pazferreira.pt/xms/files/Trabalhos_Cientificos/Acessiveis_para_Consulta/LM-confADC-15-10-07.pdf.

2011 "Integrating Public and Private Enforcement of Competition Law - Legal and Jurisdictional Issues", paper presented at the 16th Annual Competition Law and Policy Workshop (European University Institute, Florence), 17/18 June 2011, available at: http://www.institutoeuropeu.eu/images/stories/16_th_Annual_Competition_Law-LMORAIS-DRAFT-14-6-2011-v-2.pdf.

Mulheron, R.

2008 "Competition law cases under the opt-out regimes of Australia, Canada and Portugal", Research Paper, available at: http://www.bis.gov.uk/files/file49008.pdf.

Rosado da Fonseca, M. & Nascimento Ferreira, L.

2009 "Portugal", in *The International Comparative Legal Guide to: Enforcement of Competition Law 2009*, Global Legal Group, available at: http://www.iclg.co.uk/khadmin/Publications/pdf/3010.pdf, p. 118.

Ruiz, N.

1998 "Portuguese Report to FIDE Congress XVIII – National application of Community competition law in Portugal", in APDE, *Estudos de Direito Europeu: Congressos da FIDE – Relatórios Portugueses 1990-2008*, Principia, 2009, p. 351.

1999 "A aplicação do direito comunitário da concorrência em Portugal", *Documentação e Direito Comparado*, no. 77-78, available at: http://www.gddc.pt/actividade-editorial/pdfs-publicacoes/7778-a.pdf, p. 6.

Sérvulo Correia, J. M.

2010 "The effectiveness and limitations of the Portuguese system of competition law enforcement by administrative and civil procedural means", in MATEUS, A., MOREIRA, T. (eds.), *Competition law and economics: advances in competition policy enforcement in the EU and North America*, Edward Elgar, p. 85.

Sousa Ferro, M.

2007 "A obrigatoriedade de aplicação do Direito Comunitário da Concorrência pelas autoridades nacionais", *Revista da Faculdade de Direito de Lisboa*, pp. 271-351.

2010 "Práticas restritivas da concorrência: súmula orientada para a prática judicial", E-book of the Training Course for National Judges on Competition Law, European Institute of the Lisbon Law School, available at: http://www.institutoeuropeu.eu/images/stories/E-book.pdf.

Trabuco, C. & Gouveia, M. F.

2010 "A arbitrabilidade das questões de concorrência no direito português: the meeting of two black arts", available at: http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/miscellaneous/A_arbitrabilidade_das_questoes_de_concorrencia__C_Trabuco_e_M_Gouveia.pdf.

Vieira Peres, J. & Maia Cadete, E.

2009 "Portugal", in I. K. Gotts (ed.), *The Private Competition Enforcement Review*, 2nd ed., Law Business Research, available at: http://www.mlgts.pt/xms/files/Publicacoes/Artigos/573.pdf, p. 138.

2010 "Portugal", in I. K. Gotts (ed.), *The Private Competition Enforcement Review*, 3rd ed., Law Business Research, available at: http://www.mlgts.pt/xms/files/Publicacoes/Artigos/2010/Private_Competition_Enforcement_Review.pdf, p. 202.

2011 "Portugal", in I. K. Gotts (ed.), *The Private Competition Enforcement Review*, 4th ed., Law Business Research, p. 260.

Woods, D., Sinclair, A. & Ashton, D.

2004 "Private enforcement of Community competition law: modernisation and the road ahead", in *Competition Policy Newsletter*, number 2, 2004 (summer), p. 31.