COMPETITION LAW AND THE COMPETITION, REGULATION AND SUPERVISION COURT

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Abstract: *This paper provides a global overview of the practice of the Portuguese Competition, Regulation and Supervision Court in competition law matters, since its beginning on 30 March 2012. It covers both quantitative and statistical analysis and the most relevant legal issues discussed.*

1. INTRODUCTION

The present text concerns the judicial practice of the Competition, Regulation and Supervision Court (hereinafter TCRS)[1] in competition law matters, from its beginning on 30th March 2012[2] to the present date.

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* Judge of the Competition Court since September 2013. The present text corresponds to a presentation made at the 4th Portuguese-Spanish Conference on Competition Law, Lisbon, 25-26 January 2018.

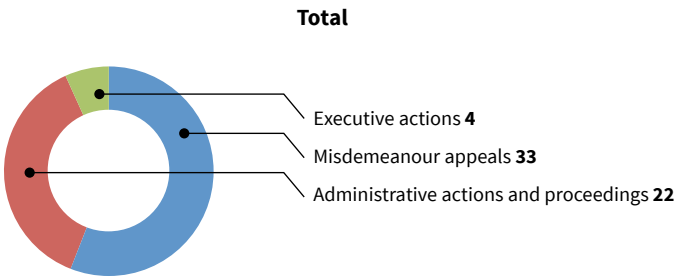
1 It is the first Court of the Portuguese legal system with specialized jurisdiction to decide on: (i) appeals of the decisions of the Competition Authority (hereinafter AdC) issued in infringement procedures regarding competition (infringement of national rules and articles 101 and 102, both of TFEU) and regarding other infringements foreseen in the current Competition Law, approved by Law no. 19/2012, of 8th of May; (ii) appeals of decisions issued by the AdC in administrative proceedings foreseen in the current Competition Law and other decisions laid down in the same legal framework and where an appeal is possible, the most relevant being the decisions issued by AdC in merger control proceedings and in infringement proceedings regarding competition; (iii) executive actions to ensure the enforcement of the decisions (cf. article 112(2) indent a), and article 112(3), of *Lei da Organização do Sistema Judiciário*, approved by Law no. 62/2013, of 26th August, as originally worded). At the moment, the Court does not have jurisdiction to decide *private enforcement* actions arising from competition law infringements. The transposition of Directive 2014/104/UE, of the European Parliament and the Council, of 26th November 2014, which proposal of national law is under discussion and gives the TCRS, at least, some competences on this matter, is ongoing.

2 Cf. Regarding the legal regimes which were underlying its creation and installation: Decree-Law no. 46/2011, of 24th June; Decree-Law no. 67/2012, of 20th March; and Ordinance no. 84/2012, of 29th March.

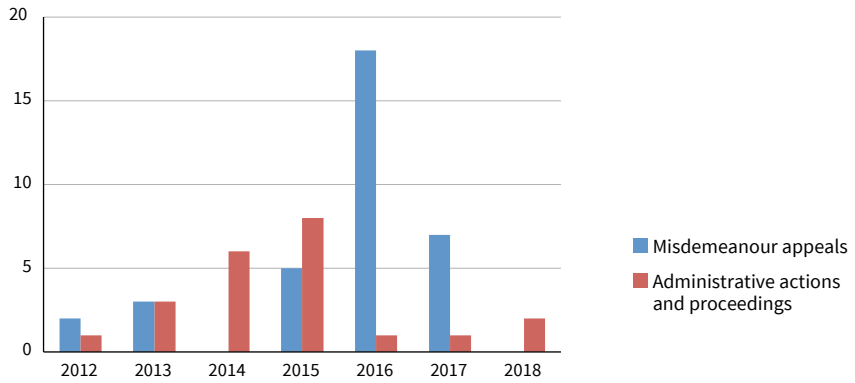
In particular, the analysis will focus on three topics: (1) Characterization of the litigation; (2) Performance of the Court; (3) Most relevant legal issues.

2. CHARACTERIZATION OF THE LITIGATION

Starting with the Court cases, that is, the number of actions filed from March 2012 until the present date, the figures are the following:



In terms of annual evolution and considering the most relevant types of cases, in particular appeals of infringement proceedings and administrative actions and proceedings, the data obtained is the following:



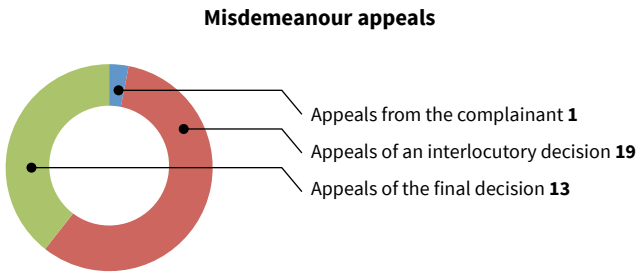
This data allows for the conclusion that we are not dealing with a high number of cases. This is not surprising, given that those who work in this area of the law know that the distinctive factor is not quantity, but the complexity.

In fact, the complexity is certainly one of the factors which justify the number of filed cases.

In terms of future prospects, it can be accepted as possible that the number of actions to be lodged will be increased, following the trend which is registered in 2016 and 2017 in what regards the appeals of infringement decisions and which was particularly due to the appeals against *Autoridade da Concorrência*'s (AdC) interlocutory decisions, which correspond to the majority of the appeals which were lodged those years. The increase of these types of appeals was due to the amendment of the rule concerning the admissibility of AdC's interlocutory decisions' appeals under the current Competition Regime, which is more permissive[3] and which practical application only began to be registered in 2016.

Regardless of admitting an increase, for the above referred reasons, in any event, it is not excluded that the litigation in this field will reach a high number of cases.

As for the *diversity* and in what concerns appeals of infringement decisions, the 33 filed cases cover the following types of appeal:

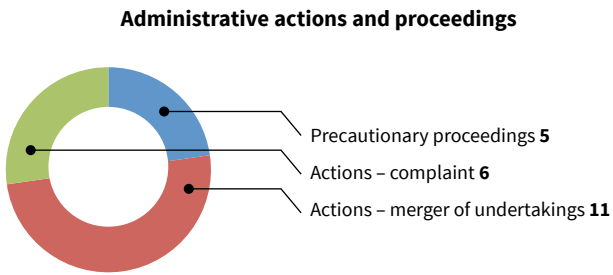


3 The previous regime, laid down in article 50(2), of Law no. 18/2003, of 11th June, which referred to article 55(2), of the *Regime Geral das Contraordenações* (approved by Decree-Law no. 433/82, of 27th September, as originally worded), did not admit the appeal of interlocutory decisions with merely internal procedural effects. Currently, the rule, laid down in article 84(1), of the current Competition Act (approved by Law no. 19/2012, of 8th May), is the admissibility of appeals of AdC's decisions which are not subject to appeal by nature is not expressly foreseen in the law.

In what concerns substantive law matters, specifically on appeals of final infringement decisions, the data are the following:

Practice/infringement	Case number	Matter
Horizontal collusive practices	88/12.1YUSTR	Agreement and concerted practice of exchange of sensitive information
	38/13.8YUSTR	Customer allocation and price fixing agreements
	36/17.2YUSTR	Customer allocation and price fixing agreements
	322/17.1YUSTR	Market allocation agreement
	420/17.1YUSTR	Decision by an association of undertakings
Vertical collusive practices	18/12.0YUSTR	Price fixing agreements
	102/15.9YUSTR	Geographical market allocation agreement
Abuse of dominant position	204/13.6YUSTR	Abusive price discrimination
	36/16.0YUSTR	Margin squeeze
Other	45/13.0YUSTR	Execution of a suspended merger operation – infringement of art. 11, 1, of the revoked Competition Law
	273/15.4YUSTR	Failure to provide or provision of false, inexact or incomplete information – article 68(1), indent h), of the current Competition Regime.
	276/15.9YUSTR	
	352/15.YUSTR	

In what regards administrative actions and proceedings, the pertinent data is the following:



The conclusion to be reached, based on the provided data, is that, although not all types of appeals nor all possible matters set forth by law have been used, still there was some diversity, both in procedural terms and in substantive terms.

With regard to the *parties involved and procedural dialectics,* it has been registered, on the first place, the predominance of legal persons. Only in three

appeals from infringement decisions[4] (one of which was not admitted[5]), natural persons[6], in the quality of claimant/defendant ("*arguido*") or accused ("*visado*") in the infringement procedures have intervened.

Secondly, the parties in legal proceedings are normally undertakings of a considerable size, which can be seen by looking at the conditions under which a merger is subject to the obligation of notification[7], as well as the imposition of several fines by the Portuguese Competition Authority (AdC) in proceedings concerning an infringement of competition law[8].

Thirdly, the debate and the exchange of arguments are an important element of the proceedings, namely as a result of the legal counsel chosen by the parties, as well as the economic nature of the technical opinions that are sometimes joint to the case file.

Finally, it is relevant to report the following elements, concerning the outcome achieved by applicants/appellants:

Type of proceeding		Outcome	Numbers
Appeals against infringement decisions	Appeals against intermediate decisions	Totally unfounded	13[9]
		Totally well-founded	1
		Partially well-founded	4
	Appeals against final decisions finding a violation	Totally unfounded	3
		Totally well-founded	2
		Partially well-founded	5[10]

4 Cases no. 44/12.0YUSTR, no. 88/12.1YUSTR and no. 38/13.8YUSTR.

5 Case no. 44/12.0YUSTR.

6 According to the Portuguese Competition Legal Regime, natural persons can also be liable for competition infringements, namely the members of the board of directors of legal persons and equivalent entities, as well as those responsible for the management or supervision of areas of activity where a misdemeanour is practiced – cf. article 73(6) and (7), of Law no. 19/2012, of 08.05.

7 See article 37(1) of the Portuguese competition Act (Law no 19/2012).

8 Case no. 88/2.1YUSTR, in which the AdC imposed a fines of € 5.207.746,61, € 6.778.686,20 and € 1.742.124,83 and Cases no. 204/13.6YUSTR, 102/15.9YUSTR and 36/16.0YUSTR, in which the AdC imposed the sums of € 3.730.000, € 8.770.000 and € 9.080.000.

9 It includes judgments which have not become *res judicata* yet.

10 "Partially well-founded" means that the amount of the fine was reduced on an average of 60,95%, as regards the following cases: case no 38/13.8YUSTR, with a decrease of 60% ; case no 102/15.9YUSTR, 56%; case no 204/13.6YUSTR, 28%; case no 36/16.0YUSTR, 92% (since the defendant, to whom the highest fine had been imposed, was acquitted); case no 36/17.2YUSTR, 68,75%.

Type of proceeding		Outcome	Numbers
Lawsuits and administrative proceedings	Lawsuits and proceedings against decisions taken in merger control proceedings	Totally unfounded	8[11]
		Totally well-founded	0
		Partially well-founded	0
	Lawsuits concerning complaint proceedings	Totally unfounded	2[12]
		Totally well-founded	2[13]
		Partially well-founded	1[14]

When it comes to lawsuits and proceedings within the framework of merger control proceedings, the stated data demonstrates a non-existent success rate. This may be due to the fact that the type of judicial control applicable to appeals against decisions within merger control proceedings is different from the one conducted within the framework of appeals against decisions finding a violation of competition law (as further developed). Such difference is less cognoscible in lawsuits concerning complaint proceedings, since some of them – namely the ones which were totally well-founded – were judged taking into account the repealed version of the Portuguese competition Act, therefore entailing different requirements when compared to the current regime of articles 7 and 8.

3. PERFORMANCE OF THE COURT

Concerning the workload of the Court, the following chart demonstrates its pending cases, i.e., the ones which are still awaiting a decision on the merits:

Case no.	Type of appeal	Lodging Date	Current situation
77/16.7YUSTR	Appeal against a decision finding an infringement of competition law	12.04.2016	Proceedings are stayed since 13 of June 2016 due to a request for preliminary ruling before the ECJ

11 There is a judgment of the TCRS that is not *res judicata* yet – case no 233/06.9TYLSB.

12 There is a judgment of the TCRS that is not *res judicata* yet – case no 3/16.3YQSTR.

13 These two cases were judged within the framework of the previous versions of the Portuguese competition act that has been repealed, where the legality principle was still in force, meaning that the AdC was bound to start proceedings after a complaint of an alleged practice of an anticompetitive practice.

14 This judgment is not *res judicata* yet – 4/17.4YQSTR.

Case no.	Type of appeal	Lodging Date	Current situation
322/17.1YUSTR	Appeal against a decision finding an infringement of competition law	02.08.2017	Proceedings are suspended since 13.11.2017 due to an appeal before the Constitutional Court on the effects of an appeal against an AdC decision
291/16.5YUSTR-A	Appeal against an intermediate decision	26.09.2017	The court had to wait for information concerning case no. 291/16.5YUSTR. Currently, the period for the parties to submit observations on the possibility of having Court deciding by means of an order has not expired yet
420/17.1YUSTR	Appeal against a decision finding an infringement of competition law.	22.12.2017	The appeal was admissible and currently the period for the parties to submit observations on the effects of such appeal is still pending
1/18.2YQSTR	Appeal against a decision closing an investigation.	22.12.2017	Written phase
2/18.0YQSTR	Appeal against the final decision within merger control proceedings	28.12.2017	Written phase

The above mentioned data shows there are no significant procedural delays.

This outcome might be explained by a second element that shall be taken into account when assessing the TCRS's performance: its *procedural promptness*. In this regard, it is worth noting the following average time within which the TCRS decides:

Type of proceedings	Average time (days)
Appeals against intermediate decisions	105
Appeals against final decisions finding an infringement	266
Administrative actions	430
Precautionary proceedings	102

We acknowledge two situations in which the right to appeal against an AdC decision became time barred during the judicial procedure:

- Case no 88/12.1YUSTR, where it is worth noting that the restrictive practice was partially declared as time barred by the TCRS, since it resulted from the hearing that such practice had stopped between September and December of 2004. The case was lodged at the TCRS on 5th

of December 2012 i.e., by the end of the limitation period of 8 years. The extent of the restrictive practice concerning the exchange of information became time barred in February 2015, while the appeal before the Lisbon Court of Appeal was still pending.

- Case no 36/17.2YUSTR was lodged on the 18th of January 2017 and the TCRS's decision, which was confirmed by the Lisbon Court of Appeal, found two violations, one that ceased in November 2008 and was declared as time barred and another one that stopped on the 19th of October 2009 and became time barred on the 19th of October 2017.

Turning now to the review of TCRS decisions by higher courts, the following data is worth mentioning:

Outcome	Numbers
Annulled	4[15]
Overturned	3
Partially overturned	2
Confirmed	12

Taking the above mentioned data into account, we can conclude that the TCRS has decided all the cases where that was possible. It did so in a really prompt way, albeit the inherent complexity of such cases. Likewise, time barred actions did not derive from the excessive length of the proceedings before the TCRS. Finally, there was not an unusual number of overturning decisions by higher courts, especially when what was at stake was a diverging legal understanding.

4. MOST RELEVANT LEGAL ISSUES

15 Only two decisions were annulled on the grounds of lack of reasoning: the first judgment within the case no 38/13.8YUSTR, which partially confirmed the AdC decision, reducing the amount of the fine. After some changes, this decision was entirely confirmed by the Lisbon Court of Appeal; and the first judgment within the case no 3/14.8YQSTR, due to a failure to rule, which was then overcome by keeping the same reasoning; although the decisions within the cases 1/16.7YUSTR e 90/16.4USTR, concerning appeals of AdC's intermediate decisions were also annulled, this was due to different legal understandings regarding article 85 of the Portuguese competition Act. It is worth noting that there are different understandings even within the Lisbon Court of Appeal, as case no 20/16.3YUSTR demonstrates.

Regarding the *restrictive practices of competition and other infractions foreseen in the New Competition Regime*, the most relevant legal issues in what concerns *the procedural area* were related to the effect of appeals in administrative offence proceedings – both of the interlocutory decisions and of the final condemnatory decisions – and to the issue of business secrecy.

The issue concerning the effect of appeals in administrative offence proceedings is related to Article 85, paragraph 4 and paragraph. 5 of the current Competition Regime, whose application to appeals from interlocutory decisions leads, if this understanding is to be accepted, always to a devolutive effect. This was not the understanding adopted by the Competition Court, particularly in the proceedings no. 90/16.4YUSTR, 20/16.6YUSTR and 194/16.3YUSTR. However, the decisions rendered in the first two cases were appealed, and the Lisbon Court of Appeal held that the appeal had a devolutive effect under the abovementioned rules.

As regards appeals of the final condemnatory decisions, the Competition Court declared the material unconstitutionality of Article 84 paragraph.4 and paragraph 5 of the current Competition Regime[16] in the proceedings no. 273/15.4YUSTR, no. 352/15.8YUSTR and no. 322/17.1YUSTR. In the first, the Constitutional Court, in the decision no. 376/2016[17], did not confirm the interpretation of the lower court. In relation to the second, judgement no. 674/2016 was delivered, rendering "unconstitutional *the rule that establishes that the judicial appeal of decisions of the Competition Authority imposing a fine has, as a rule, a devolutive effect, whereby a suspensive effect only can be attributed to it if the execution of the decision causes to the person concerned a considerable harm and the person concerned lodges a security, in its replacement, within the period fixed by the court, irrespective of its economic availability, interpretatively extracted from the paragraphs 4 and 5 of Article 84 of Law no. 19/2012 of 8 May*"[18]. Regarding the third proceedings, the appeal is

16 The content of these rules is as follows: "*4 – The appeal shall have a purely devolutive effect, except for decisions implementing structural measures determined in accordance with Article 29 paragraph 4, the effect of which is suspensive. 5 – In the case of decisions imposing fines or other penalties provided for by law, the person concerned may, when lodging an appeal, request the suspensory effect of the appeal where the execution of the decision causes it considerable harm and the concerned party offers to provide security in replacement, being the attribution of this effect conditioned to the effective provision of security within the period set by the court.*".

17 Published on www.tribunalconstitucial.

18 It should be noted that following an appeal of the Competition Authority to the Plenary, under Article 79-D paragraph. 1 of the Constitutional Court Law (LCT), based on the existence of a contradiction between

still pending. It should also be noted that in proceedings 420/17.1YUSTR a contradictory procedure between the parties involved in the proceedings is ongoing regarding this issue.

The issue of business secrecy will be addressed by my colleague, Judge Sérgio Sousa.

With regard to *substantive law and collusive practices*, I will start by highlighting the definition of the nature of the agreements that restrict competition, which may be instantaneous or permanent infringements, with potentially decisive implications for the limitation period of the administrative offence proceedings[19]. Among others, the Competition Court considered restrictive agreements to be a permanent infringement, in particular in proceedings no. 88/12.1YUSTR and no. 36/17.2YUSTR.

It should also be pointed out that the decisions of the Competition Court, in the proceedings no. 18/12.0YUSTR and no. 36/17.2YUSTR, clarified that the mere agreement is sufficient to deem proven the practice of the infraction, and it is irrelevant for its consummation that it has or not been executed.

As regards to the *abuse of a dominant position*, the abusive second-line discrimination, as an abuse of operation, was the central theme of proceedings no. 204/13.6YUSTR, and it was considered that it presupposed the scope of obtaining advantages for the company in a dominant position which, in the absence of such market power, could not obtain it. The Court also took a position on the admissibility of economic justification for the abuse of a dominant position and it was stated that the burden of proof lies with the company in a dominant position.

On the other hand, in the proceedings no. 36/16.0YUSTR a margin squeeze was discussed, with atypical delineations, since in the downstream market the dominant company had no customers other than the vertically integrated company. It was understood that it is *conceptually possible to have margin squeeze without there being competitors in the downstream market who are both customers of the dominant company in the upstream market and vertically integrated*, it was pointed out that considering the contrary would entail "*unduly reducing the effectiveness of Article 102 of the Treaty on the Functioning*

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the two final decisions, the Constitutional Court held, in judgment no 281/2017, that such an action was inadmissible, since the legislative dimensions assessed in one and in the other case were different.

19 If it is understood that it concerns a permanent infringement, the limitation period for the procedure begins with the termination of the agreement – cf. Article 119 paragraph 2 sub-paragraph (a) of the Criminal Code, ex vi Article 32, of the RGCO.

of the European Union (§ 58) and, in addition, also of Article 11 of the NRJC, and that the effect of competition may be caused, as the TJ points out, not only by excluding competitors already existing in the market, but also by creating barriers to the entry of new competitors". It should also be noted that the Lisbon Court of Appeal included the specific case also in the figure of excessive prices.

Regarding the general issues, at the substantive level, two topics should be highlighted: the responsibility of the parent company; and the material constitutionality of Article 69 paragraph 2 of the current Competition Regime[20].

The first was discussed in the proceedings no. 36/16.0YUSTR, and the Competition Court concluded in the affirmative, not on the basis of European case-law regarding this matter, but on the basis of Article 16 of the RGCO, and on the grounds that the mother company had a duty as guarantor, having practised the infraction by omission. This view was rejected by the Lisbon Court of Appeal, which led to the acquittal of the appellant.

As regards the second, it was analysed in this proceedings, as well as in proceedings no. 204/13.6YUSTR, having the Competition Court concluded in both cases that the rule is not materially unconstitutional. This decision was confirmed in this part by the Lisbon Court of Appeal in proceedings no. 36/16.0YUSTR. In the proceedings no. 204/13.6YUSTR, the Lisbon Court of Appeal understood (although without impact on the fine imposed in the first instance) that this rule offends the legality principle, because it implies *the variation in time of the maximum value of the fine depending of the market, the diligence of the sanctioning authority and the complexity of the procedure*. In the appeal brought before the Constitutional Court, in the summary decision no. 216/2016, and confirmed by the decision no. 400/2016, another perspective was taken, and it was decided *not to consider unconstitutional the rule in paragraph 2 of article 69 of Law No. 19/2012, of 8 May, regarding the regulatory segment that establishes the turnover of the agent as a criterion for determining the maximum value of the applicable fine*.

In relation to the *decisions of the Competition Authority in administrative proceedings*, the first and fundamental question in this type of action, because it is, first of all, decisive for the very design of the initial application and the feasibility of the requests, whether in the case of mergers of companies or in the case of complaint procedure, is the type of judicial control carried out in

20 The content of that rule is as follows: *the fine ... may not exceed 10% of the turnover in the year immediately preceding the final conviction handed down by the Competition Authority by each of the infringing companies or, in the case of an association of companies, of the aggregate turnover of affiliated companies.*

respect of substantive decision-making criteria, in particular whether it concerns full or meritorious control, a limited control or a mere legality control.

The position taken by the Competition Court was to recognize the existence of discretionary segments in the final merits decision of the Competition Authority in respect of mergers, in particular in the proceedings no. 3/13.5YQSTR, 5/15.7YQSTR and 8/15.1YQSTR, and, consequently, a mere legality control, albeit with different formulations. Particular emphasis should be given to the court decision no. 3/13.5YQSTR, which dealt with the matter in-depth, verifying moreover that the only question to be decided consisted precisely in the *related acts and discretionary powers of the Competition Authority in the merger controls*.

It should also be noted that this position was validated by the Lisbon Appeal Court, in the judgment delivered in the precautionary procedure no. 5/15.7YQSTR-C, which included, among other things, the following: "*the ADC under the merger control procedure has administrative and regulatory discretionary (but not arbitrary) to determine whether or not that transaction is liable to create significant barriers to effective competition in the domestic market or in a substantial part thereof (…). In accordance with the administrative case-law regarding this matter, in order for the appealed Court to challenge the meaning of the decision of the Authority it would be necessary to show that the Court of Auditors exceeded the margin of discretion which it had, that is to say that: (i) it violated some applicable rule or some principle of administrative and regulatory activity; (ii) its decision is based on factual assumptions that do not correspond to reality; (iii) the existence of a manifest error of appreciation, i.e. a palmar error, visible to the naked eye and without any expert opinion on the subject*."

Regarding the denunciation procedure, foreseen in the current NRJC, the only unappealable decision[21] that, until now, has addressed this issue has been the decision rendered in the proceedings no. 11/15.1YQSTR, which was revoked by the Supreme Court of Justice because it was understood that Law no. 18/2003 was applicable and, contrary to the current regime, under such law the Competition Authority was subject to the principle of legality.

21 There are two proceedings in which this issue has been addressed, namely decisions no. 3/16.3YQSTR and 4/17.4YQSTR, however, such decisions have not yet become final.