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PRIVATE ENFORCEMENT OF COMPETITION LAW: ECONOMIC RATIONALITY AND THE PORTUGUESE JUDICIAL SYSTEM

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Abstract: This paper is aimed at assessing the economic rationality of options taken in the Portuguese judicial system, in what concerns the private enforcement of competition law, as well as to suggest practical solutions for its optimization. It does so by relying on the analysis of a very extensive basis of empirical data relating to private enforcement precedents in Portugal. The analysis takes into account the proposed draft for the transposition in Portugal of the Private Damages Directive and assesses its potential impact on the economic rationality of the system. While the paper focuses specifically on the Portuguese legal order, its conclusions may also prove to be relevant for other Member States.

I. INTRODUCTION

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The present paper is based on the author's ongoing work in a research project entitled "Portuguese Case-law in Competition Law". This project is co-ordinated by Professor Eduardo Paz Ferreira and by the author, under the auspices of the Centre for Research in European, Economic, Financial and Tax Law (CIDEEFF) of the University of Lisbon Law School.

This research project is aimed at, on a first level, gathering, divulging and analysing all the case-law of Portuguese courts which has applied or which has discussed the application of national or EU competition rules, within public enforcement or private enforcement, in all the areas of this branch of the law.

Its second level goals are to contribute to the deepening of the study of competition law in Portugal, to raise awareness of the reality of the enforcement of competition law in national courts and to promote a debate on the solutions set out in the law, taking into account the interpretations that have been adopted by the courts.

The idea for the present paper arose from the analysis of the data in the framework of this research project, but also from the author's participation in the committee of experts advising the Portuguese Competition Authority in the drafting of the bill for transposition of Directive 2014/104/EU (the Private Enforcement Directive).

Among the issues which are presently being debated, in the framework of the transposition of the Directive, is the organization of the national judicial system when it comes to the private enforcement of competition law. Naturally, it is impossible to fully dissociate that debate from the judicial system options for the public enforcement of the same branch of the law.

Thus, this paper reflects the author's assessment and contribution to this ongoing policy debate.

II. CONCEPT OF PRIVATE ENFORCEMENT OF COMPETITION LAW

For the purposes of this paper, private enforcement of competition law encompasses all circumstances in which a person, whatever its nature (including public and private persons), pursues legal action before a judicial authority, or an analogous body with binding powers over the parties (e.g. arbitration or mediation), in which EU or national competition rules are invoked in defense of that person's rights or interests, or of collective or diffuse interests, and where the enforcement of fines or other measures by administrative authorities is not directly in question. It must also include any proceedings meant to prepare or to implement the previously described legal actions.

Thus, it is easier to understand and define the scope of private enforcement negatively, by excluding the administrative side and the judicial review of the public enforcement of competition law.

In what concerns the substantive scope of competition law (namely, in what is relevant for its private enforcement), it includes articles 101 and 102 TFEU and their national equivalents, but also abuse of economic dependence (article 12 of the Portuguese Competition Act), State aid rules and, potentially, merger control.

It should be noted that these private enforcement proceedings can (and are) heard by civil courts, administrative courts, tax courts, labour courts, etc., and thus under the corresponding (different) procedural rules.

Usually, when one thinks of private enforcement of competition law, one thinks of so-called *follow-on* actions, in which a person that suffered damages as a result of an anticompetitive practice identified by an administrative authority (European Commission or NCA), asks to be compensated for those damages. One commonly hears experts express the conviction that

most private enforcement cases will be *follow-on*. Indeed, the Private Enforcement Directive was clearly drafted with this line of thinking, as it is primarily aimed at providing solutions for follow-on actions to decisions identifying cartels.

However, both in Portugal and in the other Member States, empirical studies show that this assessment is incorrect when it comes to the past, and there is no reason to expect it to be true in the future. Most cases so far in Portugal have been *stand-alone*. In a universe of 97 cases, only 4 were *follow-on*, and 3 others were mixed (i.e., did follow, in part, an administrative decision, but were broader). The other 90 were *stand-alone* actions (93%).

This being said, as a basis for the following analysis, it is important to be aware of a distinction between what may be called "major" and "minor" cases. Regardless of whether they are follow-on or stand-alone, some cases require in-depth analysis of several competition law issues, while others – at least insofar as competition law is concerned – require only a decision on a small point of the law and the core of the judgment deals with other branches of the law. Some require analyzing facts and fitting them into the competition legal framework, others do so only at a rather superficial level. It may also be argued that a difference between "major" and "minor" cases should be established on the basis of practical reality (were the issues really discussed in depth), rather than from theoretical possibility (should they have been discussed in depth). But for the purposes of this paper this latter distinction is less useful, as we should be more interested in what should be than in what actually was.

When one looks at the collection of private enforcement cases that have been brought in Portugal, only 9 are obvious examples of "major" cases[2].

[2] Major cases: Apple (135/12.7TCFUN), Onitelecom (2271/11.8TVLSB), Salvador Caetano (178/07.2TVPRT), NOS v PT (I) (2242/11.4TVLSB), NOS v PT (II) (1774/11.9TVLSB), COGECO (5754/15.7T8LSB), OdC (7074/15.8T8LSB), Cabovisão (16725/15.3T8LSB), Goodyear (107/2001).

III. DATA SET AND STATISTICAL REALITY: MACRO PERSPECTIVE

The analysis underlying the present paper is based on a data set spanning 29 years – from 1988 to the present[3].

It should be kept in mind that, while this is the most exhaustive collection of private enforcement judgments ever carried out in Portugal, there are solid reasons to believe that a very significant number of cases have not yet been identified and included in this data set. Cases which did not go beyond the first instance, or which were appealed but were not published in online or paper sources are particularly hard to identify and so should be deemed to be under-represented.

As far as private enforcement is concerned, the data set includes a total of 541 court rulings, in 203 cases. This means that there has been an average of 18,7 court rulings, and an average of 7 cases with issues of competition law in the context of private enforcement, per year, since 1988.

However, the figure is misleading, as it includes a large number of cases which are the repetition of the same dispute with the tax authorities ("Instituto da Vinha" cases). Thus, if this dispute is counted a single time[4], the adjusted total number of cases is 97. The vast majority of cases deal with restrictive practices (88), and a minority (if "Instituto da Vinha" cases are counted only once) deal with State aid (9).

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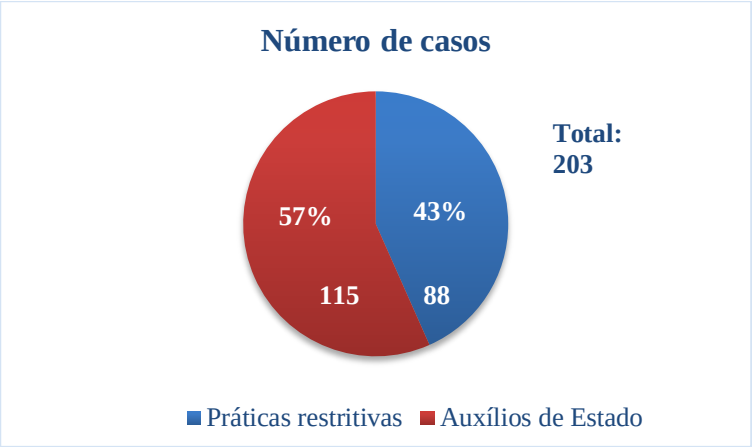
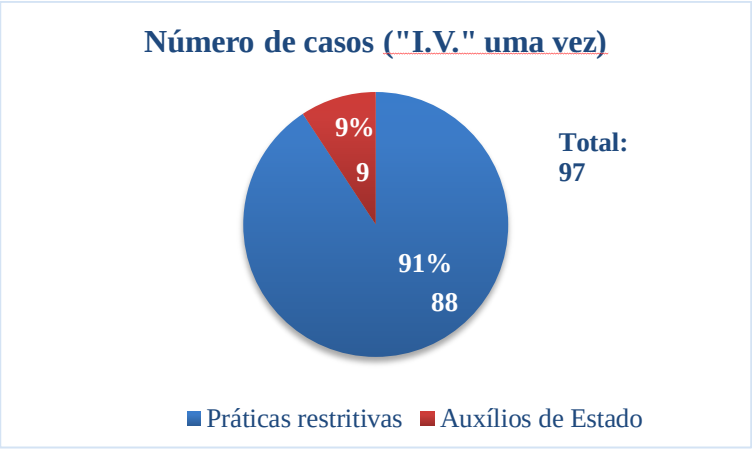
[3] Available online at: http://www.cideeff.pt/projects/Group-III-Market-Failures-in-a-Globalized-Economy-Institutional-Approaches/78/.

[4] There is some value to taking into account the 107 times (so far identified) where the "Instituto da Vinha" case has come before the courts. Indeed, this does represent a significant effort for the courts involved. However, this effort is reduced by the fact that the disputed issue is the same and, therefore, the research, analysis and conclusions may be reused from one case to the other. Furthermore, the courts handling these cases are always the same, which diminishes the relevance of taking into account all of these cases in the discussion on the organization of the judicial system.



Média: 7 casos por ano



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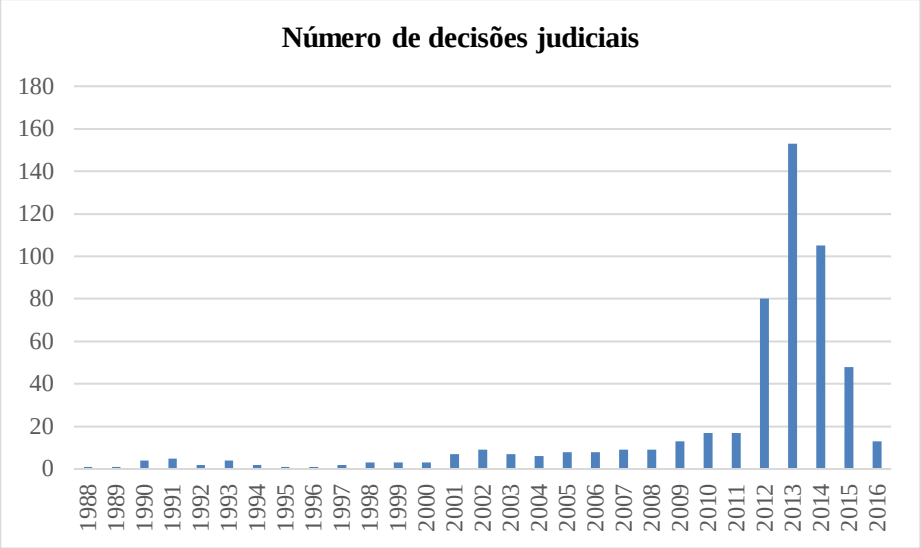
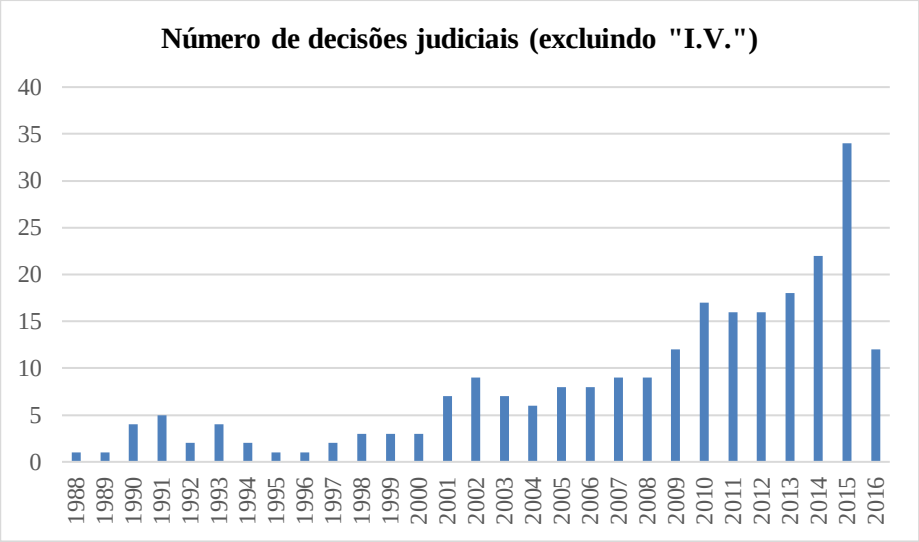
A purely quantitative assessment shows a clear trend for an increase in the number of national court rulings in the context of the private enforcement of competition law. This is true even if one excludes the inflationary effect of the "Instituto da Vinha" case.





However, this yearly data must be assessed with care. In all likelihood, the process of identifying judicial cases is all the more imperfect the farther back in time we go (namely due to

the recent development and improvement of the online publication of 2nd and 3rd instance judgments). Thus, one should expect a certain positive quantitative bias in the figures of decisions in recent years. That being said, even allowing for such a bias, it seems fair to conclude that there has been a tendency for at least a small increase in the number of decisions each year.

We are aware of only 6 pending cases, almost of which are major cases. But this should not be a trusted indicator of the evolution of the number of cases, given that the existence of cases where these issues have been raised is usually only known after their conclusion, with some delay.

The adoption of the Private Enforcement Directive and its transposition into national law – to occur by the end of 2016 –, as well as the large number of academic and practitioner-led public initiatives surrounding this transposition process, is likely to accentuate this tendency for an increase in the number of antitrust private enforcement cases before Portuguese courts. But there is no reasons, so far, to expect this accentuation to be very significant.

In the last 5 complete years (from 2011 to 2015), there have been a total of 106 rulings (without "Instituto da Vinha"), with an average of 21,2 per year. From 2011 to 2015, there was a 212% increase in the number of decisions each year.

If we were to assume the above mentioned accentuation of the trend, and estimate an increase of 250% in the number of decisions over the next 5 years, we would arrive in 2020 with a total of 265 court rulings over that period, and an average of 53 rulings per year (in all instances and courts). The author believes this is probably as optimistic an outlook as is reasonable, presently, in terms of expecting a growth in the private enforcement of competition law in Portugal.

However, the large percentage of these cases would not be "major" cases, as described in the previous section. In fact, only 9 cases in the reference timeframe can be described as

"major" cases, and they led to the adoption of 19 court rulings, i.e., an average of 3,8 rulings per year, and only 18% of all the rulings adopted in this period.

Applying this percentage to the optimistic above mentioned optimistic projection, we would conclude that, even in that scenario, in the 2016/2020 period, only 9,5 rulings per year would be adopted, in all instances and courts, in "major" private enforcement cases.

It should also be noted that, for these purposes, the world "ruling", as included in the data set, is not necessarily a judgment. The figures are inflated with the presence of several procedural decisions (e.g., preliminary hearing, joining documents…).

Because of this, working with numbers of cases, instead of decisions, may be more clarifying.

It is harder to quantify the number of cases per year because of the absence of information on the dates in which all the cases was initiated. For the sake of this exercise, we have counted cases in the period 2011-2016, by including those that have at least one decision within this period, or that are currently pending (this method leads to an artificial inflation of the number which would be arrived at if a more accurate distribution per year could be possible).

According to this method, in the period 2011/2016 we know of 54 cases (counting "Instituto da Vinha" only once), i.e. an average of 9 cases per year. Applying the same method of optimist extrapolation, we arrive at an average of 22,5 cases, per year, until 2020.

In short, the data set allows for a *well-grounded expectation that Portuguese courts will only be confronted, at most, with 22,5 cases of private enforcement of competition law per year, in the following 4 years. Only 4 of these should be expected to be "major" cases.*

IV. CURRENT JUDICIAL SYSTEM OPTIONS AND STATISTICAL REALITY: MICRO PERSPECTIVE

Presently, in Portugal, there are no special rules regarding jurisdiction or the distribution of cases raising issues of private enforcement of competition law.

Thus, as it stands, the Portuguese judicial system is organised in such a way that any national court, and any judge within each court, of any instance and any specialty, may be called on to interpret and apply competition rules in the context of private enforcement actions.

Our data set shows that these issues have been (and should be expected to continue to be) raised before civil courts, administrative and tax courts, labour courts, arbitral tribunals, etc., from all over the country.

If we count every single occurrence of the "Instituto da Vinha" case, then the courts which have heard the highest total number of cases in this area are, surprisingly, by far, the Supreme Administrative Court (131) and the Viseu Administrative and Tax Court (107).

If we register that case as a single occurrence, we obtain the following distribution of cases:

Distribution of cases per court (1988 / 2016) (in order of number of cases)	
Higher Courts	**No. cases**
Supreme Court of Justice	23
Supreme Administrative Court	16
Constitutional Court	4
2nd Instance Courts	**No. cases**
Lisbon Appeal Court	41
Oporto Appeal Court	15
Southern Administrative Appeal Court	13
Northern Administrative Appeal Court	5
Coimbra Appeal Court Guimarães Appeal Court	3

Évora Appeal Court	1
1st Instance Courts	**No. cases**
Civil Court - Lisbon	35
Administrative Court - Sintra	8
Civil Court - Oporto	6
Administrative Court - Oporto	4
Administrative Court – Braga Administrative Court – Lisbon Civil Court - Funchal	2 (3 courts)
Administrative Court – Almada Administrative Court – Aveiro Administrative Court – Castelo Branco Administrative Court – Coimbra Administrative Court – Leiria Administrative Court – Ponta Delgada Administrative Court – Viseu Civil Court – Braga Civil Court – Celorico de Beira Civil Court – Espinho Civil Court – Gondomar Civil Court – Matosinhos Civil Court – Marco de Canaveses Civil Court – Oeiras Civil Court – Ponta Delgada Civil Court – Santarém Civil Court – São João da Pesqueira Civil Court – Sintra Civil Court – Vale de Cambra Civil Court – Valongo Civil Court – Viana do Castelo Civil Court – Vila Nova de Cerveira Civil Court – Vila Real Commercial Court - Lisbon Labour Court – Lisbon Labour Court – Ponta Delgada Labour Court – Aveiro Arbitral Tribunal	1 (28 courts)
Unknown	11

Several important conclusions can already be drawn from this data:

(a) The vast majority of courts in Portugal have never been confronted with a case where an issue of competition law has been raised;
(b) Within the courts which have been confronted with a competition law issue, two thirds have seen only one case (ever); and
(c) Even the two courts which have heard the highest number of cases (the Lisbon Appeal Court and the Lisbon Civil Court), have been confronted with an average of 1,4 and 1,2 (respectively) private competition law cases, per year, since 1988.

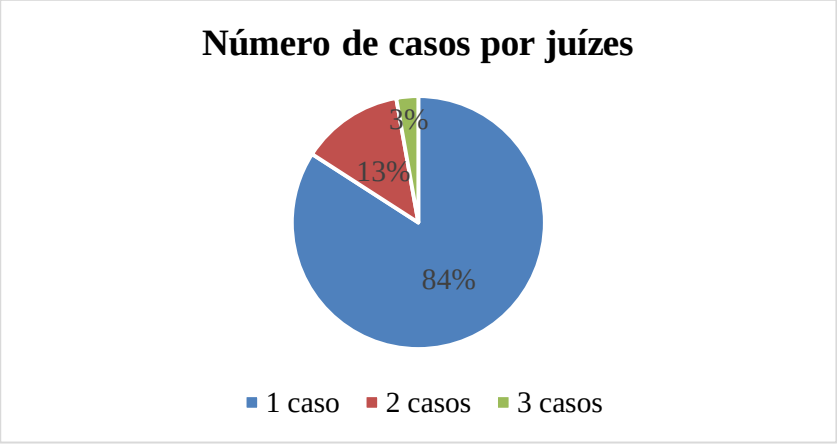
However, an analysis by court provides a distorted view of judicial experience with competition law cases. Experience is not acquired by a court, but by a judge. Since a court has many judges, and they change with time, the fact that the same court has heard several competition law cases says very little about the wealth of knowledge which has been effectively acquired and can be reused from one case to another.

Indeed, as mentioned at the beginning, there are presently no formal rules which allow for the centralization of private competition cases, at any national court, in one or some judges. Our data set shows that there aren't even any such informal practices in place, or at least that they have not been successful.

In this regard, looking at the "Instituto da Vinha" case is particularly useful. We don't have any data on which judges have heard these cases in the first instance court, but we do know that, at the Supreme Administrative Court, even though it is fundamentally the same case repeated 107 times, it has had 12 different rapporteur judges.

But if we again focus on the universe of cases excluding "Instituto da Vinha", our data set gives us a total number of 107 judges who have heard competition cases (the judge is unknown

in 216 of the decisions collected)[5]. Within these 107, we find the following distribution of number of competition cases:



According to official data, there are currently at least 2100 judges in Portugal[6].

The main conclusions to be drawn from this data are:

(a) The vast majority of judges in Portugal – in excess of 90% - should not expect to ever be called to hear a case with an issue of private enforcement of competition law;

(b) Of those who will be confronted with such a case, the vast majority (84%) should expect to be confronted with only 1 case in their entire career;

(c) No Portuguese judge has, so far, ever been called to decide on more than 3 private competition law cases in their entire career;

(d) From 1988 to the present, only 3 judges have been called to hear 3 private competition cases. One of these is from the Lisbon Appeal Court, one from the Supreme Administrative Court, and another from the Southern

[5] In the case of collective courts, these figures refer only to the rapporteur judge.

[6] Available at: https://www.csm.org.pt/juizes/estatistica; and http://www.cstaf.pt/STATS%202015/S%C3%A9rie%20-%20N%C3%BAmero%20de%20Ju%C3%ADzes.pdf.

Administrative Appeal Court[7].

In short, the data set leads us to conclude that, *with the existing rules* (and practices) on jurisdiction and distribution of cases among judges, *the vast majority of Portuguese judges will never be confronted with a competition law case, and even those who are, will be called to decide such a case a very small number of times in their entire career*.

V. JUDGES' TRAINING IN COMPETITION LAW

One of the most dangerous fallacies for the organization of a judicial system is that "judges know the law". Too often, legal-political choices are made on the basis of the unreasonable, absurd idea that any human being, no matter how extraordinary, may be capable of being familiar with, much less proficient in, all the areas of the law.

There is an underlying problem of societal perception. As a general rule, the members of our society are more inclined to believe in the vastness of knowledge and in the need for specialization in some areas of knowledge, rather than in others. Thus, we tend to accept that if someone has a medical problem affecting their skin, they should see a dermatologist, or an oncologist in the case of cancer. Far from surprising, it is expected that a generalist medical practitioner will do little more than identify an issue an redirect the person to the professional who has specialised in that issue.

Differently, we tend to believe that lawyers should know the law in its entirety or, at least, the greater part of it. In a slightly more sophisticated but still inaccurate approach, some believe that, even if lawyers do not know the law, they should be able to quickly find out what the law is by researching it.

[7] The latter two have been faced with public tendering cases, which do not raise the type of competition issues one tends to imagine when one thinks of private enforcement of competition law.

But this is simply not so.

Focusing specifically on the competition law, we are faced with an extremely broad field of the law which is significantly differentiated from most others due to its reduced degree of legal codification. Problems of civil law or tax law, for example, may be complex and have difficult interpretations, but, generally, trained jurists should be able to correctly identify the legal issues and the legal provisions that apply to them. And there are branches of the law which, even if you have never studied them, do not present major difficulties other than identifying the legal diplomas in force and reading through their provisions.

Competition law is very different. In competition law, a number of factors come together to make it so that you need very specific and extensive training in this specific field before you can even be in a position to correctly identify the legal issues that are raised in a given case. Without wanting to be exhaustive, the following factors may be listed: (i) the substantive provisions of this law are extremely succinct and, by themselves, are insufficient to grasp the substance of the law; (ii) the substance of the law is determined by the conjugation of the written rules and the case-law, which means that knowledge of the jurisprudence is indispensable for even a basic understanding of this branch of the law; (iii) substantive rules rely widely and deeply on economic concepts; and (iv) many of the legal solutions outright contradict the legal solutions in other branches of the law in which jurists are primarily trained (*maxime* civil law, commercial law and company law), and are therefore counterintuitive to them, requiring a profound change of mindset.

As a result, too often we find national judgments which affirm interpretations of competition law that are outrageously incorrect. One might expect this problem to be less felt in the higher courts, because of a smaller workload and greater time and resources for research. But, actually, the Portuguese Supreme Court has been the national court most consistently "off

the mark" in its pronouncements on competition law[8].

We should start from the assumption that the vast majority of judges currently sitting have had no formal training in competition law during their undergraduate degree. Indeed, competition law has only very recently started to be included in undergraduate degrees, and only in a minority of Portuguese law schools. Even those who now include some training in it at the undergraduate level, do so in an extremely basic manner (which may be an overstatement), dedicating to it, at most, a handful of hours within a broader course.

Less than the 10% of the judges currently sitting are between the ages of 25-35 and, thus, have any chance of having remotely heard about competition law while at Law School.

It is possible that some judges have taken postgraduate degrees that offer at least one course in competition law, but there is no evidence of this and academic and professional experience suggests that this would, at most, be limited to a handful of occurrences. It should be noted that none of the 3 judges currently sitting at the Competition Court attended any formal postgraduate course in competition law, although they have, since their appointment, attended a number of continuous training initiatives and seminars on competition law.

On the other hand, Portugal is the EU Member State which, in relative and absolute terms, has trained the highest number of judges in competition law, through special training actions sponsored by the European Commission. According to EC data[9], 1034 trainees have attended these courses.

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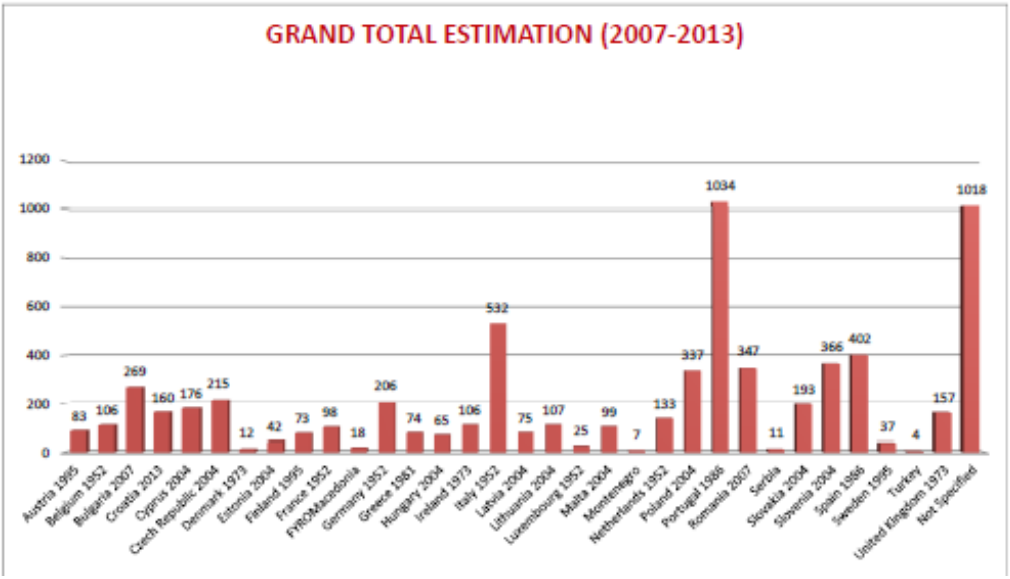
[8] In one of its most recent judgments (judgment of 3 April 2014, in case no. 627/09.5TVLSB.L1-7), despite a thoroughly researched and reasoned judgment coming from the Lisbon Appeal Court which stated otherwise, it affirmed that competition law does not apply to intra-brand restrictions and that a supplier and an independent retailer were the same "undertaking" for the purposes of applying competition law.

[9] Available at http://ec.europa.eu/competition/court/general_geographical_impact_en.pdf.



The figure leaves us somewhat skeptical. Even allowing for a high incidence of repeat trainees throughout the years, this would still suggest that about a quarter or a third of all Portuguese judges have attended a training course in competition law.

These trainings tend to last one day or two (approximately 6 or 12 hours of training) and are inevitably meant to provide a very basic understanding of all the subject matters. It is very difficult to assess to what extent any such course prepares judges to hear competition law cases, but – namely based on the analysis described in the following section – it seems fair to state that any such preparation would probably be insufficient.

VI. PARAMETERS FOR ASSESSMENT OF ECONOMIC RATIONALITY

In order to arrive at some quantification of the economic rationality of options in the organization of the judicial system, we must first quantify, somehow, the amount of time it takes for a judge to be prepared to hear a case raising competition law

issues.

This is an extremely complex and necessarily imperfect exercise, for several reasons. First and foremost, some cases require understanding only a very specific, limited issue of competition law, while others require an in-depth knowledge of one or more areas of competition law; and any quantification of the amount of time needed to study a given subject is fundamentally subjective. That being said, for the purposes of the position which will is defended in this paper, it is sufficient to make a crude approximation.

So far as Portuguese courts are concerned, competition law is composed of 5 main areas: collective practices, abuse of dominant position, abuse of economic dependence, merger control and State aid. The data set shows that national courts have been repeatedly faced with cases that require knowledge of all of these areas except merger control. And while some areas are more prevalent in some courts than others (e.g., State aid issues have tended to be raised only before administrative courts), past realities and theoretical possibilities suggest that, generally speaking, issues of any of these areas can appear before any court (predominantly before civil and administrative courts).

If a judge wants to gain a basic understanding of any given area of competition law, the most likely course of action is to consult a "manual" of some sort. He/she may choose to read short introductions to competition law, which in Portugal tend to be found in broader manuals dedicated to EU Law or to Economic Law. There is, however, no single source which can easily be pointed to as an example, namely any one which adequately summarises the law for all those areas, meaning judges would probably have to consult more than one doctrinal source. In any case, in a minimalistic approach, if a judge is willing to read 100 pages, he/she may have a basic overview of these areas of competition law.

Given the novel and highly technical nature of the

material, it seems fair to assume, roughly, an average reading rate of 4 minutes per page. If so, this first introductory glance would require an investment of 400 minutes. As an abstract figure, it seems rather manageable. This, of course, assumes access to the reading materials, which, in practice, is not always guaranteed.

The problem is that such a basic understanding will hardly ever be sufficient.

It seems to be undisputed among practitioners that, not only does competition law have a very gradual and mild learning curve, but, because of its case-law basis, it requires constant new inputs of effort.

The history of our own judicial system provides anecdotal – and yet, I believe, persuasive – evidence of this. When appeals within the public enforcement of competition law were centralized at the Lisbon Commercial Court, the judges at this court went through a two – three year process where the approach and the content of their decisions changed very noticeably, and at least one has publicly stated that earlier decisions would later have been decided differently. Much the same phenomenon has more recently been observed after the creation of the Competition, Regulation and Supervision Court.

Thus, perhaps much more useful than a quantification in terms of hours of study/research needed, is the realization that, as has been shown by the experience of our judges who have specialized in competition law, it takes at least 4 or 5 cases for magistrates to have sufficient opportunity to study competition law to an extent that provides them with a sufficiently broad understanding of this field of the law, as a necessary basis for a more in-depth research of specific issues that arise in any given case. But also, and perhaps even more importantly, it takes at least that many case to alter mindsets and to acquire a gut-feeling for the solution of cases in accordance with competition law principles and spirit.

This also ties in with the common sense intuition that a judge who knowns he/she will have only 1 or 2 cases that raise competition issues, in his/her entire career, has very little economic incentive to significantly study this area of the law. It is, thus, not surprising that, in practice, in so many cases, judges have shown a tendency to decide the cases on strictly procedural grounds or to "appear" to apply competition law when in fact doing so with civil law approaches.

Thus, my contention (admittedly, without decisive evidence) is that *there is a very gradual learning curve and a critical mass of cases (at least 4) per judge must be reached* before a sufficiently high standard of knowledge and interpretation of competition law is reached.

As we have seen, in the field of private enforcement, this critical mass has never been reached in Portugal (in the field of public enforcement, it has already been reached for a – so far, roughly estimated – number of at least 6 judges, even though they have not all continued to hear competition cases). Furthermore, existing rules and practices for distribution of cases per court and per judge mean that it is highly unlikely that this critical mass will ever be reached.

VII. TRANSPOSITION OF DIRECTIVE 2014/104/EU AND ITS IMPACT

The adoption of Directive 2014/104/EU has spurred a major revision of the rules applying to the private enforcement of competition law in all EU Member States. The Directive is, however, entirely silent on the point which is specifically tackled by this paper. It imposes no obligations on the Member States when it comes to the organization of their judicial system and the jurisdiction and allocation of private competition cases in their national courts.

That being said, when transposing this Directive, each

State is, of course, free to introduce whatever rules it sees fit in that regard[10].

In the case of Portugal, the proposed preliminary draft submitted to public consultation by the Portuguese Competition Authority includes rules that go beyond the Directive and address jurisdiction and distribution of private enforcement cases, introducing important changes to the existing rules.

Thus, article 22 of the proposal introduces changes to articles 54, 67 and 112 of the Law on the Organisation of the Judicial System (Law 62/2013), the impact of which may be summarised as follows:

(i) In the first instance, the Competition, Regulation and Supervision Court (Santarém) is given exclusive jurisdiction over private enforcement cases whose application is based "exclusively" on competition infringements (damages or declaration of nullity), cases for the exercise of the right of return between co-infringers and requests of access to evidence instrumental to those other cases (falling under the scope of the transposition diploma).

(ii) Under existing provisions, the 5 Civil Appeal Courts may create a section specialized in competition, regulation and supervision. Under the proposal, if this is not done, then all private competition cases should be distributed to the same civil section. At the Lisbon Appeal Court, each such section has between 10 and 14 judges.

(iii) At the Supreme Court of Justice, competition private enforcement cases will always be distributed to the same civil section – each section has 9 judges.

On the surface, these new provisions centralize the judgment of competition private enforcement cases in all instances. However, if we apply these provisions to the cases identified in

[10] Indeed, it might even be boldly argued that EU law's principle of effectiveness may actually require such rules. Certainly, the data we have analysed seems to give some credence to that argument.

our data-set, one must conclude that their impact will likely be far more limited than is first apparent.

The transposition provisions apply only to the civil jurisdiction, meaning that all private enforcement cases raised before other courts, such as the administrative or labour jurisdictions, remain unaffected.

As for the cases that fall within the civil jurisdiction, the way the jurisdiction of the Competition Court (TCRS) was drafted is extremely restrictive. Several alternatives were discussed but all raised significant legal problems.

Of the 97 identified cases, only 5 seem to safely fall within this jurisdiction[11], and even then with doubts for a couple of them. All cases where competition law was raised as a defence fall outside the scope of the TCRS' jurisdiction. All cases where competition law was raised by the applicant alongside other legal arguments (civil law, commercial law, unfair practices, etc.) are excluded.

In essence, the provision means that lawyers will have to carefully draft their applications, referring only to competition law, if they wish the case to be heard by the Competition Court. In many cases, however, this will not be easy or even possible. If their rights are based on competition law and other branches of the law, a lawyer might infringe his/her duties by leaving out certain legal arguments. It may be possible to start two actions in two separate courts, with separate legal grounds, asking that one be suspended until the latter is decided, but this option involves a lot of uncertainty and is far from ideal.

If the characteristics and proportion of cases identified in our data-set were to continue in the following years, and taking into account the recent trend for a greater number of cases falling within this category, the provisions of the transposition diploma would mean that *only circa 10% of all private enforcement cases*

[11] *Apple, Cabovisão v Sport TV, Cogeco v Sport TV, NOS v PT, Observatório da Concorrência v Sport TV.*

will be centralized at the TCRS.

Based on the date in which those 5 cases were initiated and on the described limitations of the provisions, applying the same assumption made above as to the gradual increase in the number of cases, it seems unlikely that all of our estimated 4 major cases per year, until 2020, will fall within the jurisdiction of the TCRS. It seems more reasonable to *estimate an optimistic number of 2/3 cases per year*.

But because this court also hears public enforcement cases, *the critical mass of competition cases* mentioned above *will undoubtedly be reached at the TCRS, per judge.* The only factor which can get in the way of this critical mass being reached is the instability in the judges sitting at this court. So far, only one judge has remained there since its inception (2012), and may choose not to continue. The other two sitting presently are not yet guaranteed a permanent position, their allocation being revised each year.

Thus, the proposed transposition would ensures that most of the "major" cases would be heard, in the first instance, by judges who, in principle, have the conditions to specialise in the enforcement of competition law. But the vast majority of competition private enforcement cases will continue to be heard by generalist judges who will see competition law raised before them once, maybe twice in their entire career.

As for the second and third instances, the impact of the provisions of the transposition diploma is even smaller.

Only the Lisbon Appeal Court (as the court which hears appeals from the TCRS and from the Lisbon courts, where a large number of major companies have their seat) has any chance of having judges that will reach the critical mass of competition cases. However, as things stand, public enforcement cases are heard by the criminal section, and private enforcement cases will be heard by a civil section, so the total number of cases is diluted. Because of the large number of judges in each section,

unless an internal informal rule develops to distribute competition private enforcement cases to the same one or two judges within the respective civil section, it is not guaranteed that any Lisbon Appeal Court judge, in a civil section, will reach the identified critical mass of competition cases.

The Supreme Court of Justice does not hear public enforcement cases, and so these cannot contribute to the critical mass. Again, in the absence of an internal informal rule allowing one or two judges to specialise in these cases, it is unlikely that any Supreme Court judge will reach the critical mass of competition cases.

VIII. JUDICIAL SYSTEM OPTIONS

On a theoretical level, the legislator has a number of options to organise the judicial system, when tackling the issue of who interprets and applies competition law. The following (or a combination thereof) seem to be the most relevant:

(i) Decentralised system (general jurisdiction rules apply); and
(ii) Partly centralised system (some private competition cases are heard by a specialized court);
(iii) Decentralised system with referral or advisory mechanisms.

i) Decentralised system

This is the option that exists today (prior to the transposition of Directive 2014/104/EU).

We have already tried to show that this option is profoundly irrational from an economic perspective. It requires over 2000 judges to be sufficiently familiar with competition law to be able to correctly identify legal issues from the onset of the case and to have a sufficient basis to carry out additional

research into the specific legal issues raised.

We believe this places a manifestly unreasonable burden upon judges, the necessary consequence of which is – as demonstrated in practice – the frequent refusal to apply competition law or the misinterpretation and misapplication thereof.

ii) Partly centralised system

I start from the realization that any option to centralize cases at the TCRS (or any other single court), as such, is not viable beyond that which has already been foreseen in the transposition diploma. Indeed, the issue was extensively debated during the drafting of the proposal and it became clear that there was no better alternative. There are many cases in which competition law is raised as a defense, or when it is raised by the applicant but as a "minor" issue, and it would make no sense to include these in a provision centralising jurisdiction for "competition cases".

There are also cases in which competition law might be considered the "major" issue, and other arguments in law could be considered "minor". But it is impossible, in practice, to centralise such cases at a single court, because the legal criterion for the awarding of jurisdiction would have to be based on considerations about predominance of one legal argument over another, which may not be possible at all and, even if they were, would be highly subjective and create too much legal uncertainty.

As such, as discussed above, while this option is certainly a step in the right direction, it is insufficient, by itself, to guarantee that competition law is effectively abided by and enforced in the vast majority of private competition cases.

iii) Decentralised system with referral or advisory mechanisms

For the cases which will continue to be heard by "generalist" courts, under the general rules of jurisdiction, it is possible to identify at least three options that may still guarantee that competition law issues will be dealt with by specialists:

a) a binding referral mechanism to a specialized court;
b) a mechanism whereby specialists provide binding legal advice to judges; and
c) a mechanism whereby specialists provide non-binding legal advice to judges

The first option would be, as far as we know, novel in our legal order. Portugal does have preliminary referral mechanisms, but they are limited to situations where a first instance court, identifying a plurality of cases on the same legal issue and a presence or risk of contradictory judicial rulings, asks a Supreme Court to settle that issue, before the case is returned to it for final decision.

This would be different. This would be a first instance court suspending proceedings to ask another court (of the same level – e.g. TCRS –, or a higher court – e.g. Lisbon Appeal Court or Supreme Court) to state the law and possibly also to apply it to the facts of the case in regards to issues of competition law, before returning the file for final decision.

Depending on how it were implemented, this option might allow for the centralisation of the decision of these matters in a number of judges that would reach the critical mass of competition cases. However, aside from the political and cultural (and possibly even constitutional) obstacles that such an option would run into – making its adoption highly unlikely –, it would likely lead to a greater delay in the final decision of the case, when compared to the other two options. Also, it would leave many problems unsolved, as the referral would probably have to take place after the facts of the case have been established, and that already requires an in-depth understanding of the law to be

applied[12].

As for resorting to specialists who would advise the court, it seems to be the simplest, most expedient solution. Depending on how it is implemented, it may also be the most cost-effective solution.

It should be noted that our legal order already provides examples of such practices and even legal mechanisms by which this solution may be implemented in practice.

Thus, for example, despite the elimination of specialised military courts, we still have military judges, who are called to apply military law when a common court is confronted with a case that raises such an issue. And the Public Prosecutors' Office has military advisors (see Law 101/2003).

However, the number of cases per year, even if one were to include public and private enforcement, may not be such as to justify having even one specialist in competition law permanently on staff at the Ministry of Justice (or at another entity).

Alternatively, we could resort to service providers, potentially pre-qualified through a public tender. While this could raise issues in regards to independence and deontology, such issues could certainly be tackled through usual incompatibility and impediments provisions. And they would be much less relevant if the opinion of the legal specialist were not binding on the court, which is the most likely scenario.

Procedural law already allows judges to ask for outside expert opinions when the complexity of the matter justifies it. But these provisions are not sufficient for this purpose. First, it

[12] One should not be misled to believe that it is sufficient for judges to study the legal issues raised in their specific case before adopting the judgment (final ruling), or, in other words, that it is sufficient to tackle competition law issues only at that final stage. In fact, without an encompassing understanding of the law that they will have to apply later on, some of their decisions in earlier stages of the cases may be flawed and irremediably distort the outcome. Thus, for example, if a judge does not understand the requirements of an abuse of dominant position, he/she will not be capable of drafting an appropriate set of facts to be proven at trial, and is likely to resist attempts by lawyers to include facts whose relevance will not be clear to him/her.

is unheard of for judges to use this mechanism to obtain legal advice, because of the idea that the judge should "know the law", so it is only used for advice of experts from other fields of knowledge (economists, engineers…). Second, expert advice must be paid for, and is usually quite expensive, making the use of this mechanism viable only in cases where the disputed amounts are quite significant. But this same problem exists in any option of appointing "service providers".

While it is not easy to assess the cost effectiveness of both solutions, which would depend, namely, on the number of cases and judges' decision to use this facility, it seems likely that, if an expert could be retained on a yearly (or longer) contract, so as to be consulted by any national judge faced with (public or private) competition law issues – and possibly also to provide advice to the Government on matters of competition law –, the costs of the salary would probably be inferior to the potential costs of service providers. This option also has the advantage of allowing each judge to assign different costs for the intervention of the expert, depending on the characteristics of the case (possibly merely symbolic costs), meaning that expert advice could become feasible for judges even in cases where the amount being disputed is smaller or the litigators (or one of them) are incapable of financing the consultation of an expert.

This final issue should be of particular concern to the legislator, if we are to guarantee an effective rule of law. Otherwise, the judicial system will continue to be organised in such a way that the protection of competition law will be available only to those with deep financial resources.