1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

Identify and explain any specific instances where market competition and innovation concerns haven been specifically addressed by copyright law or caselaw in your country. This may include by means of:

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

Besides the decisions by the Portuguese Competition Authority, there is no known concern regarding these definitions. In the field of Copyright, most Court Decisions assume that the holders of rights have been granted exclusive rights, which are akin to property rights, therefore, users and all third-parties are required to respect them and any infringement must be terminated, either by refraining from unlawful use or by negotiating or paying for a license. Most Court decisions encompass an order to pay an "*astrainte*" or daily penalty to be charged for as long as the infringement takes place, which is foreseen by art. 829-A of the Civil Code.

Outside the field of Copyright and Neighbouring Rights it is much easier to find such definitions.

See below 1.4.

1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

There are, at least, two cases where E&L were claimed as a justification for unauthorised use of copyrighted works. In none of the Decisions was that claim successful. The first decision, by the Supreme Court of Law is dated 17 November of 2011, and it is a very interesting case, where the defendant is a reputed academic, in charge of the Celebration of 150 years of Caricature in Portugal, who organised a book encompassing several caricatures and satirical drawings from various authors, presented as a catalogue, claimed to be made for scientific and cultural purposes, in which there was financial support from the Government in view of the offering of several samples to entities and institutions, as a prestige edition. However, the Court reasoned that only 14 from the 40 works from the well-known artist Vasco Castro were regarded as strictly necessary and encompassed by the quotation exception. The other 26 were in excess and should have been subject to authorisation by the author. Therefore, the Defendant was sentenced to pay for damages. The quotation exception has been defined as corresponding only to a short and incidental use of a work that doesn't cause any prejudice to the interest of the work itself.

The second case was decided by the Appeal Court of Lisbon, on 18 November 2014, where the first defendant wrote and organised a book, that was published by the second defendant, in celebration of a Museum's 10th anniversary, which included several photographs taken from works of art that had been featured in public exhibitions, and, as such, had been included in a catalogue. Such use, that had been tacitly authorised, did not, however, legitimise the subsequent inclusion of 46 photographs of one author, 18 reproductions of sculptures and 2 drawings of another author, as well as two book covers and 6 photographs of a third author. The defendant claimed that the subsequent publishing of a book, written by himself and based on the exhibition catalogues had been made with cultural purposes, namely the spreading of art and culture. However, once again, the Courts didn't accept such justification, stating that the quotation exception should be limited to the strictly necessary in order to support own theories or criticism. As a consequence of that, the Court sentenced the author of the book to pay for damages incurred by the authors of the reproduced works.

1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or "joint-tariffs", "one-stop-shops" … and explain their impact in the market.

In Portugal, CMOs are ruled according to a very detailed and comprehensive legal act, namely Law nr. 26/2015 of 14 April, modified and republished by Decree-Law nr. 100/2017 of 23 August (CMO Law), and Decree-Law nr. 89/2019 of 04 July, apart from some sparse references in the Copyright and Related Rights Code (CRRC) and complementary legislation. In this answer, all the future references to legal provisions should be understood as referring to the CMO Law, unless a different source is indicated.

The CMO Law does not establish, much less require, that each category of rightholders is to be represented by one and only CMO, so, in theory, there is a legal possibility of different CMOs representing the same category of rightholders. A minimum of 10 rightholders can set up a CMO, and each CMO may represent different categories of rightholders, or focus on one specific category.

In Portugal, collective management is not the general rule, and it is only mandatory in certain specific cases, such as:

- Private copy "levies": the collection, management and distribution of income is performed by AGECOP in the name of all the other CMOs which are Members of AGECOP. There is also a legal reference to rightholders who are not members but are presumably represented by existing CMOs in relation to private copy levies.

- Cable retransmission rights, that are also to be made effective under mandatory collective management, except for broadcasting organisations.

- Artists, players or performers' rights are also subject to mandatory collective management in the case where they enter into contract with audiovisual or cinematographic producers and are entitled to equitable remuneration.

- Phonogram and Video producers are entitled to an equitable remuneration in case of communication to the public of phonograms and videos published for commercial purposes, to be shared in equal parts with artists, players or performers, which turns it into mandatory collective management, even though the law doesn't explicitly say so.

Extended collective licences are only applicable to authors rights in the case of satellite broadcasting, except for cinematographic or other types of audiovisual works.

The CMO Law has also introduced the logics of ECL in the standard legal procedure for collective negotiation between CMOs and entities representing different types of users: the extension of agreements reached by collective bargaining is to be applied to all the users that fall under their objective requirements, regardless of their membership of those users' associations that are contractually bound by such agreements.

The CMO Law clearly establishes that Competition Law is applicable to CMOs. Nevertheless, the same Law strongly encourages cooperation between CMOs, namely by imposing a One-Stop Shop for licensing acts of public performance, which is actually a legal imposition that was meant to be implemented in one-year time counting from the entry in force of Law nr. 26/2015. However, the status of relationship between SPA and the other CMOs, namely GDA, AUDIOGEST

and GEDIPE, predicts several difficulties in its enforcement - of which IGAC is in charge - and a most likely failure. The also predictable result is users having a one-stop shop for author's rights and, in parallel, another one-stop shop for all the other rights, namely neighbouring (aka related) rights.

The following text is a quote from such article 37:

"1- Collective Management Organisations representative of the different categories of Rightholders, together with the entities representative of users shall make publicly available the so-called «joint licensing one-stop shops» which encompass: i) Licensing procedures for public performance of works, phonograms and videos; ii) A single procedure; iii) Licenses which are issued in representation of the respective Rightholders."

"3-The Licensing one-stop shops must ensure:

- *a) the effective application of the general tariff applied by the various Collective Management Organisations and the distribution of the amounts collected;*
- *b) the autonomous determination of their respective tariffs, through the mechanisms provided for in this law;*
- *c) the allocation of respective operating costs depending on the amount of compensation awarded to each of the collective management entities;*
- *d) efficient and transparent management of the licensing service;*
- *e) effective control of licenses issued on behalf of the various Collective Management Organisations, in equitable and parity terms;*
- *f) speed and ease of access to licensing by the interested users;*
- *g) autonomy of its organization and functioning in relation to Collective Management Organisations.*

4- In the absence of agreement between Collective Management Organisations, or between these and the entities representing users, for the implementation of the joint licensing One-Stop Shops, IGAC, which is the Regulatory Authority, within the Ministry of Culture, must hear from the entities involved and mediate with a view to seeking its entry into operation.

5- Should the absence of an agreement continue to exist, IGAC [shall] propose to the Member of Government responsible for the area of culture, [the adoption of] appropriate measures for the effective implementation of licensing mechanisms.

6- The provisions of this article shall be without prejudice to the possibility of Collective Management Organisations to promote and issue, simultaneously, autonomous licensing and to exercise, separately, the rights entrusted to its management, in relation to all users who have neither requested nor obtained licensing or permission through the joint One-stop shops pursuant to the preceding paragraphs."

The One-Stop Shop provision requires that autonomy between participating CMOs is to be preserved, as well as the different tariffs and distribution schemes, that are to be set autonomously. It also requires the equitable distribution of operating costs, efficiency and transparency, equality and parity, speed and easy access, and finally, autonomy between the One-Stop Shop's organisation and each participating CMO.

The Law further states that One-Stop Shop licensing does not preclude the possibility for each CMO to establish and issue its own autonomous licensing and separately exercise the rights

entrusted to it, in relation to all the users which did not manage to obtain licensing via the One-Stop Shop mechanism.

So far, the seven existing CMOs have not been able to implement the One-Stop Shop required by law. In that case, the Law states that the Regulatory Authority (IGAC, within the Ministry of Culture) is responsible for enacting the mechanism, overcoming the lack of understanding between the different CMOs. However, this task has not been carried on yet by IGAC.

There is also a provision in the CMO Law for the joining of CMOs, that may or may not originate a new CMO, for the common pursuit of some CMOs purposes, jointly representing their respective Members.

1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. …)

In the audiovisual market, the main example of fostering market competition seems to be the case of the Pay-Tv Premium Channel Sport-TV:

On 08.04.2004, the Portuguese Competition Authority issued a non-prohibition decision regarding the acquisition by PPTV and PT CONTEÚDOS of a share of Pay-Tv channel "Sport TV" sold by RTP (public service broadcaster) under several commitments, namely the non-discriminatory distribution of "Sport TV" channels. It was the case Ccent. 47/2003 PPTV/PT Conteúdos/Sport TV, which may be summarized as follows:

- PPTV operates in the field of sports rights for TV broadcasts and advertising;
- SPORT TV is a television broadcaster specialized in sports events programming that also buys and trades in broadcasting and advertising exploitation rights;
- The sale of RTP's share in Sport TV includes, as an essential feature, the acquisition and exploitation by Sport TV, in exclusivity, the broadcasting rights for Super League from 2004/2005 to 2007/2008, namely the 33 games which the law requires to be openly broadcast (FTA);
- One of the relevant markets affected was the market of exclusive rights for broadcasting football games which take place on a yearly basis involving national teams;
- Another relevant market was that of multimedia sports contents for distribution through the different media (internet, mobile communications);
- It encompasses a wholesale market where the supply is made of football clubs, Portuguese Football Federation, UEFA and a retail market: the TV operators that are interested in broadcasting sports events;
- The Competition Authority agreed that exclusive rights should not be granted by more than 3-4 years (this sets out a time limit for the grant of broadcasting rights and serves as a guideline to determine the duration of the organisers' exploitation right);
- Sport TV service should be provided in non-discriminatory terms as far as marketing and distribution is concerned. Prices should be set up in several tiers in regard of the number of subscribers, according to economically proportional criteria considering the past growth, scaled investments and services provided by operators.

- In particular, these terms should not lead to eliminating the smaller operators.

- One of the positive features of the operation was that all three FTA broadcasters would be allowed to bid for 33 games that the Television Broadcast Law requires to be broadcast FTA instead of remaining with RTP (public broadcaster).

- In fact, the Television Broadcasting Law (Law nr. 27/2007 of 30.07.2007, modified by Laws nrs. 8/2011 of 11.04.2011, 40/2014, of 09.07.2014, 78/2015 of 29.07.2015 and 7/2020 of 10.04.2020) implements the so called Audiovisual Media Services Directive (Directive 2010/13/UE of the Parliament and the Council of 10.03.2010) and, in its article 32, determines an obligation falling on those television broadcasters that acquire exclusive rights for the total or partial, either by live coverage or deferred coverage, of any non-political events that may be subject to wide public interest, are required to make the footage available for the purpose of short news reporting, on a fair, reasonable and non-discriminatory basis, to wireless nation-wide coverage and non-conditional access broadcasters;

- These non-exclusive rights' beneficiary broadcasters must, nevertheless, be allowed to choose freely the footage from the transmitting broadcaster's signal with, at least, the identification of their source. Such extracts shall be used only for general news programmes. The list of events is annually published by the Government;

- The compensation terms must be in line with the market terms and conditions and, in case of litigation, the Audiovisual Regulator may settle the difference by means of mandatory arbitration, at the request of either Party;

- Art 33 of that Law further states that those who organise shows and other public events taking place in national territory as well as those who acquire exclusive rights over such events may not oppose the broadcasting of short extracts for news coverage purposes by any broadcasters either national or non-national;

- These broadcasters are even allowed to make use of the broadcasting signal of the holder of primary transmission rights or make use of footage captured by its own cameramen, protected by the legislation that allows the media to have access to any public venues, subject to the specific protection of the exclusivity rights for broadcasting the game in itself (what goes on during the regulatory time, within the four lines that define the football field);

- Short news extracts must, however, fulfil the following conditions, to protect exclusive rights:

  a) Be restricted to the length that is strictly indispensable to the perception of the essential content, considering the nature of the event and limited to (90) ninety seconds;

  b) Be exclusively broadcast on regular general news programmes and may only be used in on-demand audiovisual media services if the same programme is offered on a deferred bases by the same media service provider;

  c) Be broadcast within the 36 hours immediately following the event, except in case of later justified inclusion in current events, for news purposes;

  d) Expressly identify the source, in case the primary broadcaster's signal is used.

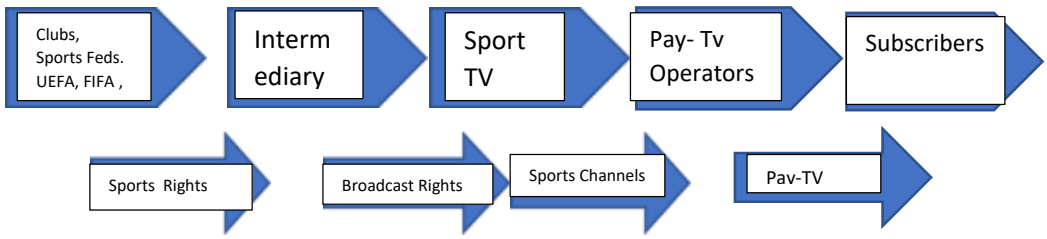
On 14.06.2013 the Competition Authority decided to penalise Sport TV for discriminatory access to the Premium Sports Content channel applied to Pay-Tv operators. This was PRC2010/02 Sport Tv – Abuse of Dominant Position, which may be summarized as follows:

- Sport Tv acknowledges to hold 100% of the relevant market, and that its importance and/or the essential nature of its availability for all the players in the Pay-Tv market are self-evident, according to the statement of the various representatives of such operators. This is confirmed by a study made by Maksen consultants for APRITEL (Telco/ISPs Association).

- The relevant market is the Premium Sports Contents Broadcasting Market, where the supply is made by distributors or intermediaries to whom the rights over Premium Sports Contents have been granted, and demand is formed by TV broadcasters that are interested in the broadcasting of such contents.

- It encompasses the broadcasting rights of the football games which take place on a yearly basis involving national teams (Main League, Second League, Portugal Cup, National Team, European Championship, Europe League and, on a four year basis, the European Football Tournament and the World Football Tournament).

- The value chain is represented as follows:



- These Premium Content are nor easily replaceable by other types of Content;

- The relevant Pay-Tv market is composed of the retail service of television broadcasting signal and a certain package of channels, which may be complemented by Premium Tv Channels in exchange for a certain price.

On 31.07.2014, the Competition Authority issued a prohibition decision regarding the acquisition by Controlinveste Media-SGPS, S.A., ZON Multimédia- Serviços de Telecomunicações e Multimédia, S.G.P.S. S.A. and Portugal Telecom, S.G.P.S. S.A. of the joint control of Sport TV Portugal, S.A., Sportinveste Multimédia, SGPS. S.A. and PPTV- Publicidade de Portugal e Televisão S.A. This was the subject of case Ccent 4/2013 Controlinveste*ZON Optimus*PT/Sport TV*Sportinveste*PPTV, of which the most important features are as follows:

- Some of the relevant markets affected by such operation are the following:

  - Premium Sports Contents Broadcasting Market – this encompasses the broadcasting rights of the football games which take place on a yearly basis involving national teams (Main League, Second League, Portugal Cup, National Team, European Championship, Europe League and, on a four-year basis, the European Football Tournament and the World Football Tournament);

- Pay-TV channels featuring Premium Sports Content Market – this encompasses the production, broadcasting and making available of the broadcasting signal of the football games which take place on a yearly basis involving national teams:
  - The rights are sold directly by their original holders (the football clubs) or by agents, such as TEAM (UEFA agent) and ISL (FIFA agent) to television broadcasters (such is the case of international sports tournaments):
    - Portuguese Football League sells all the rights to PPTV, and PPTV sells to Sport TV;
    - Portuguese Football Federation sells Portugal Cup right to Olivedesportos and Olivedesportos sells to Sport TV and other television channels.
- Premium Sports Contents for the Internet Market – this is the market where certain contents are traded, such as voice, data and video, corresponding to sports, especially football, more precisely where the games involve national teams;
- Premium Sports Contents for Mobile Phones Market – this encompasses the commercial exploitation of broadcasting rights of voice, data and video corresponding to sports moments related to football, more precisely where the games involve national teams;
- Internet Sports Contents Supply Retail Market – This corresponds to the acquisition of access to Sports Contents through the Internet by end users/consumers.
  - In the latter two markets, SIMM trades in sports contents for new media, as audiovisual clips taken from the games' recordings, summaries of the games, broadcasting rights to be used by customers operating Internet websites and apps for mobile phones and for mobile communications operators that retail these contents to end users/consumers, international competitions excluded.

- The Competition Authority acknowledged the importance of sports rights for competition among Pay-TV operators, Premium contents, in particular, namely the First League games. This importance is revealed both at the level of relevance for the end users/consumers' choice, as for production costs, as well as source of potential differentiation. Several consultant studies point in that direction. Maksen study, from 2010, made for APRITEL presents a set of conclusions and data pointing in that direction: contents are key drivers for Pay-Tv business, being essential, from the final customer's perspective, for an adequate television content supply.

- In Portugal, consumers affiliation with sports and cinema contents is extremely high, the latter being an anchor for the viability of any Pay-Tv offer.

- The Decision endorsed the conclusion of an academic study, by Professor Luis Cabral, for the Portuguese Professional Football League, saying that the primary market was twisted by the fact that there was only one intermediary (PPTV/OLIVEDESPORTOS) buying all the broadcasting rights to the clubs, which explained the low price obtained by the clubs. It is a monopsony with no potential competition, protected by barriers to entry.

- The Decision also referred to another report on Media Rights owned by the Portuguese Professional Football League, by Oliver & Ohlbaum Associates, Ltd, dated 12.07.2012 highlighting the relevance of sports rights, League games in particular, concluding that the matches between the 3 big clubs are the propelling factor for the value of Pay-Tv and that

football is fundamental for the Pay-Tv offer- 36% of respondents said that they would switch to another provider if it was the only way to watch football games.

- Another study, made by Eurogroup Consulting for Benfica SAD, dated 14.07.2012 concluded that access to the contents of one individual Club (Benfica) would justify a switch of Pay-Tv subscription.

- In fact, some major Clubs had concluded deals with Portugal Telecom (PT) and were able to sell contents that are different from the official games, as well as the rights to broadcast all the games played at home. This represents half the games where the major Club is a contender and goes to show that, at least, some form of competition was beginning to emerge.

- In conclusion, the CA decided to issue a prohibition for the operation to prevent the elimination of competition by removing PT's incentive to compete in the Premium Sports Broadcasting Rights Market, in the Pay-Tv featuring sports content market and also in the downstream markets.

1.5.- By any other means?

N. A.

2. A STUDY CASE: DATA ECONOMY

Data is called the "new oil" for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)

Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc.) available either online, in digital form or in analogue form.

2.1.- Is "machine reading" an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

Machine reading may be excluded from the concept of reproduction under art 75 of the Portuguese Copyright and Neighbouring Rights Code, as long as it implies a temporary reproduction act which is transient and instrumental, and an essential and integral part of a technological process exclusively whose sole purpose is to enable a transmission on a network between third parties by an intermediary or a lawful use of a protected work, as long as it doesn't have independent economic significance.

2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

The first step of the Portuguese public administration towards implementation of a Digital Government, having as tool the information and communication technologies was the creation, in 1991 of INFOCID -Interdepartmental System of Information to the Citizen by the Government Resolution 18/913 using videotext technology as an open an integrated information system aimed at providing information to the citizen by thematic areas on all administration services.

In 1994, Government Resolution nr. 117/94 created, within INFOCID and as a specific area, the SIAE (Business Support Information System), aiming at providing administrative information of interest to economic agents o how to start, develop, and modernize economic activities.

In 1995, with the Internet expansion, in the 90s, the first public websites and portals appear, INFOCID website is created and accessible from any part of the World.

In 1997, the General Plan Options[1] identify as a principal vector the "Open State" which refers to the acquisition of ICT equipment, stronger use of ITC and an improvement of online public Service. That year, the Information Society Mission presented a Green Paper for IS in Portugal[2].

In 2000, Government Resolution nr. 114/2000 of 18 August created Interdepartmental Commission for Information Society (CISI) and Government Resolution 143/2000 of 27 September adopts several measures aimed at massifying e-commerce by the Public Sector. Government Resolution nr. 156/2000 of 16 November, following the strategy of spreading the Information Society for the Public Service, created the Direct Public Service, which, in 2001 turned INFOCID into the Public Service Portal consisting of a basic platform of Civil, Commercial and Real Estate Registry, within INFOCID website, where 200 -300 requests were registered on a daily basis[3].

These projects were coordinated by the Administration Modernization Secretary, until 2001, when supervision was transferred to the Institute for the Innovation in State Administration (IIAE), then, in 2002, when it was transferred to the Institute for the Management of Citizen's Shops (IGLC).

In July 2000, the Internet Initiative was presented, setting as its goal the availability of all administrative forms on the Internet until 2002, the possibility of online submission in 2003 and the provision of all public services online until 2005.

In 2001 the General Plan Options[4] consist of the POSI (Information Society Operative Program) which adopt three important steps: (i) external evaluation of public entities' websites; (ii) wide discussion of a report on e-shopping by the Public Services; (iii) compulsory electronic salaries processing for all public entities with more than ten employees (Government Resolutions nr.22/2001 of 1st March, 32/2001 of 2nd March and Decree-Law nr. 106/2001 of 6th April).

In April 2002, a new Government strategy transferred this subject from Science and Technology ministerial area to the Government Presidency to be directly coordinated by the Prime-Minister.

In 2002, Government Resolution nr. 135/2002 created the Mission Unit for Innovation and Knowledge (UMIC, or Agency for Knowledge) aiming at implementing the Government measures in the field of Innovation, Information Society and Electronic Government. UMIC produced two strategic and operational reports: Action Plan for the Information Society and Action Plan for Electronic Government (which is part of the former). These Plans have set the guidelines for modernization and simplification of Public Administration, and implemented emblematic electronic services in the field of use of ICT (Information and Communication

[1] Law nr. 52-B/96 of 27, September.

[2] Billim, J and Neves, B. (2007) Governo Eletrónico em Portugal : o caso das Cidades e das Regiões Digitais (Electronic Government in Portugal: the case of Digital Cities and Regions), pages 5- 7.

[3] Fonseca, F. and Carapeto, C. (2009) *Governação, Inovação e Tecnologias- o Estado Rede e a Administração Pública do Futuro*, 1.ª Ed., Sílabo, Lisboa *apud* Marques, M. (2016) A Governação Pública na era Digital: O caso Português, *RIGC* Vol XIV nr. 27 Enero-Junio 2016.

[4] Law nr. 30-B/2000 of 29 December.

Technologies), such as Electronic Procurement, Citizen Portal, Interoperability, Rationalization of Communication Costs, Electronic Shopping, Portal of Public Administration and of the Public Servant, Unified National and Social Security Information System and Unique Document for Vehicle Registration and the Integrated Civil, Commercial, Real Estate and Notary Registry System[5], Digital Cities and Digital Regions, Electronic Vote experiences, National Electronic Safety Infrastructure, Online Scientific Library, Virtual campuses, Wideband for Schools, etc.

At a certain point, the issue of "private commercial data" in a "public product" became critical and risked infringement of Directive 2003/98/EC on private reuse of public sector information (Open Data Directive)[6].

In 2004, Decree-Law nr. 98/2004 created the Citizen's Portal, an initiative that involved all the Ministries and some of the most representative civil society entities aiming to become the privileged access point to all public administration services on the Internet.

In March 2004, INFOCID as well as Direct Public Service, under IGLC coordination, was turned off and disconnected, and redirected to Citizen's Portal. The contents available from INFOCID were also included in the Citizen's Portal. It was a very innovating service, which identified and integrated online the most useful online services for both citizens and businesses, managing content which was organized by interest areas and life situations. In terms of sophistication, the starting version was 50% informative, 30% interactive and 20% transactional[7].

In 2005, within the goals of Lisbon Strategy, the Government created the Technology Plan with programs such as "Empresa na Hora" (Ready-made Companies)[8], "Marca na Hora" (Ready-made Trademark"), Unified Vehicle Document, Citizen's Id Card, Connecting Portugal, Public Administration e-Invoice, SIMPLEX, among many others. Simplex is a consolidated program that aims to simplify and dematerialise the relation with the Public Administration in every domain.

All the information on SIMPLEX can be obtained at http://historico.simplex.gov.pt/english.html

The first SIMPLEX was created in 2006, and it also envisaged the fostering of an increase in the trust of citizens in Public Services, as it becomes easier to get licenses and permissions and to accomplish other formalities or, on the contrary, to wave such procedures so that, in the medium term, Portugal becomes more competitive, reducing the "red-tape" costs for business.

In 2006, the Businesses' Portal was created, aiming at becoming the main channel for electronic access to public administration addressed at businesses, according to a One-Stop Shop philosophy. The starting version included more than 400 services to business which were already available at the Citizen's Portal. The Portal was organized by events in the life of a Company, according to UMIC (2011), by sets of information of interest, such as creation, management, and extinction. "Online Company" was one of the most relevant services provided with the Portal, dematerializing the act of creating a Company, which could now be done immediately and all in one place, enabling it to start its business activity immediately upon creation. Another useful

[5] Carapeto, C. e Fonseca, F (2014), Administração Pública- Modernização, Qualidade e Inovação, Ed. Sílabo, Lisboa, p. 42.

Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information in OJ L 345, 31/12/2003 P. 0090 - 0096[6] available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0098:EN:HTML

[7] Fonseca, F. e Carapeto, C. (2009) *ob. cit*., p. 245

[8] Decree-Law n.º111/2005 of 8 July (https://dre.pt/application/file/235844).

functionality is the Company's Electronic File, consisting of a specific area reserved to business where all online procedures and documents are stored (UMIC, 2011). A Licensing Catalogue was also made available. This was a first step in the direction of Transparency, aiming at facilitating research of data which is necessary to any business activity, such as the regulatory authority, the applicable legislation, documentation, and relevant contacts. Currently, licensing may also be requested online.

In 2007, there were around 465 services available for Businesses, such as 9 consumption simulators (water, electricity, taxes, social security) and 21 guides on areas of potential interest for businesses.

Decree-Law 116/2007 created the Agency for the Modernization of Administration (AMA), assuming the definition of strategic guidelines and cross-sector policies in terms of ICT. AMA was the public institute responsible for promoting and developing administrative modernization in Portugal. Its activities are divided into three areas: public service delivery, digital transformation, and administrative simplification. It also assumed IGLC objectives, as well as the Centres for Business Formalities within the Economy and Innovation Ministry, as it was called by that time, and so the coordination of both Citizen's and Businesses' Portals became the competence of AMA, under the authority of the Secretary of State for Modernization of Administration. AMA was created within the scope of the Restructuring Program of the Central Administration of the State (PRACE), and resulted from the extinction, by merger, of the Management Institute of the Citizen Shops, IP (IGLC), of the transfer of duties of the Institute of Support to Small and Medium Enterprises and Innovation, IP (IAPMEI), who succeeded in managing the Business Shops, and the transfer of assignments from the Agency for Knowledge Society, I.P. (UMIC), to whom it succeeded in the field of electronic administration, namely in the management of the Citizen and Business Portals and in the development of infrastructural projects, such as the Citizen Card and the interoperability platform.

Decree-Law nr. 92/2010 implemented Directive 2006/123/CE also known as the "Services Directive" and a Public Administration One-Stop Shop was created, providing all the data which is necessary to the development of an activity or rendering of services in Portugal.

Decree-Law nr. 321/2009 approved the organization of the XVIII Constitutional Government and established simplification and dematerialization of licensing frameworks as a major guideline, to follow-up the direction set up by the EU reducing administrative costs over citizens and businesses in order to stifle the economy. The first initiative, that became a benchmark of framework simplification, was "Licenciamento Zero" ("Zero Licensing") simplifying access to several economic activities, through Citizen's Portal and Businesses' Portal, involving optimization of resources.

Regulation nr. 131/2011 restructured the Licenses Catalogue and created the Electronic One-Stop Shop under the new name "Balcão do Empreendedor" ("Entrepreneur Desk") accessible through Businesses' Portal.

Law 36/2011 of 21 June determined the adoption of open standards in the Public Information Systems, and awarded AMA the competence to set up the National Digital Interoperability Regulation, to be approved by Government Resolution.

The Administrative Modernization Agency, IP (AMA) was the public institute that carried out the duties of the Minister of State Modernisation and Public Administration in the areas of administrative modernization and simplification and electronic administration, under the

supervision of the Secretary of State for Innovation and Administrative Modernization (following the terms of Decree-Law nr. 43/2012, of 23 February, with the changes contained in Decree-Laws nr. 126/2012, of 21 June and 20/2018, of 23 March).

In 2013 the Prime Minister established digitisation as a rule for public services as the main instrument of the State's Administration modernization. Decree-Law nr. 73/2014 and 74/2014 reinforced this idea and the need to think about the main point of contact between citizens and Companies with the Public Service: based on the strategy for digitisation of Public Services, it was established that public services must, if allowed by their nature, besides direct in-person contact, implement digital services through the Internet. This strategy allowed the Public Services to continue operating with small disruption during the recent sanitary crisis.

In March 2015, the Businesses' Portal was disconnected and redirected to Citizen's Portal. The latter strategically became the electronic access privileged channel for Public Administration Services, gathering all the relevant information available from Citizen's Portal, with a revamped modern design, providing a centralised access point for all the relevant business information in the interplay with the Public Administration.

In January 2018, the Government Resolution nr. 2/2018 updated the Regulation approved by Resolution nr. 91/2012 of 8 November which defines technical specifications and digital formats to be adopted by the Public Administration, stating that the adoption of open standards is essential in order to ensure technical and semantic interoperability, in global terms, within the Public Administration, for the interplay between the Citizen or the Business in relation to the availability of content and services. This will foster independence from software providers or applications.

Currently, all these public services are integrated on the portal ePortugal, progressively encompassing new functionalities.

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

The most relevant evidence produced so far is the fact that public services continued to be rendered without any major disruption during the pandemic, and that businesses and citizens have been increasingly satisfied with the amount of data available from the public sector.

However, the Resilience and Recovery Plan, recently approved by the EU Commission, still focuses most of its investments in the further digitisation of several areas of Public Service.

According to Catarina Fitas Chiolas[9], some characteristics inherent to an Electronic Public Service customer-oriented are the following:

- Customer life cycle-oriented, implying the existence of cross-procedures between different structures;
- Incorporation and meeting the expectations and requests made by the customer;
- Availability beyond business hours, including non-stop shopping whenever possible;
- Availability and reachability through discrete channels;
- Simplification of use, accessible and user-friendly interfaces.

[9] Chiolas, C. (2017) Master Thesis on Public Management – SACSJP/UA, p. 36.

In 2006, a first set of reports presented evidence of the progresses achieved by Portugal in terms of online sophistication, it improved from the 12th position to the 11th position, from 2001 to 2006 (51 to 83 points) and as regards total online availability, it increased from 32 to 60 points[10].

Another Report [11] claimed that even though not always citizen-centred, most public entities are significantly online, and the State is on the Internet a reflexion of its own organic structure and not according to the problems that the Citizen must resolve. Therefore, focusing on the Citizen, interoperability, Public Servant's involvement, simplification of procedures and KPIs (Key Performance Indicators) are of the essence for the effective implementation of e-Government.

More recently, according to the eGov Benchmark 2010, released by the European Commission, Portugal evolved from a position below the European average, to a leadership position as regards availability and sophistication of online public services. In the edition held in October 2004 release, Portugal still occupied the 16th position on availability and 14th on sophistication. Portugal evolved in the use of ICT and special attention was given to electronic government"[12].

3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:

3.1.- "Essential facilities" doctrines to foster the development of downstream markets

See 1.4

3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?

On 30 July of 2009, CABOVISÃO, one of the cable-TV distributors, filed a complaint against Sport TV, a company operating in the premium sports television market, ZON-TV Cabo, ZON Multimedia and ZON Conteúdos, companies operating in the cable Pay-TV market, on account of an alleged breach of competition law in the field of media and content and electronic communications.

Cabovisão acused Sport TV of abuse of dominant position, on account of the tariff structure applied to the licensing of its premium TV-programming services, regarded as beneficiary to its competitor ZON TV Cabo. This practice would amount to discriminatory transaction conditions for equivalent benefits, namely because of the discounts that benefited the company with the higher penetration rate, according to different technologies, which would always be ZON TV Cabo, incidentally, the owner of Sport TV. Other Pay-Tv operators would have to pay more and to report a higher number of subscribers in order to reach the threshold required as a minimum.

Cabovisão invoked several other terms deemed abusive and unnecessary, such as the request of confidential information in relation to its wholesale offer; subjecting Cabovisão to the previous clearing of permission for promotional activities regarding the Premium Pay-TV service; compulsory retransmission of advertising messages contained in the Premium Pay-Tv Service.

[10] Capgemini (2006) Online Availability of Public Services: How is Europe Progressing?
[11] Vector21 and PWC (2006) "E-Government in Portugal: the digital offer by the Portuguese State".
[12] Marques, M (2016) A Governação Pública na era Digital: O caso português, *RIGC* Vol XIV nr. 27 Enero-Junio 2016.

Cabovisão also invoked alleged negative profit margins associated with access to the Premium Pay-Tv Service, which it regards as being a clear hint of predatory pricing and margin crushing. This behaviour amounts to market foreclosure, damaging both competitors and consumers.

The Portuguese Competition Authority joined this Case (PRC-04/2003) with pending cases PRC 02/2010 and PRC01/2010 which had been filed by CABOVISÃO's complaint dated 21 July 2005, broadly about the same subject (alleged imposition of unreasonable access conditions to the TV service).

In 2003, 14 June, the Competition Authority decided that there was, in fact, an infringement of article 102 UEFT as well as a breach of the national competition law, qualifying the discriminatory pricing as an abuse of dominant position, and sentenced Sport TV (alone) to a penalty of 3,730 million euros plus the need to publicize the decision in the Official Gazette (Diário da República, II Série) and, at least, in one newspaper of national dimension.

Sport TV was considered to hold a monopoly in the market of sport events broadcasting rights. The premium content it produces could not be reproduced or replicated by any other provider. Its discriminating behaviour was deemed to affect the downstream market of Pay-Tv operators.

Sport TV had benefited from this illicit scheme from January 2005 up to March 2011, when it put an end to the requirement of a minimum average threshold of subscribers and a minimum penetration rate. Some Pay-Tv operators actually left the market on account of not being able to compete, also for lack of this important premium Pay-Tv content in their commercial offer.

In 2014, 4 June, the Court of Competition, Regulation and Supervision confirmed that decision, reducing the penalty to 2,7 million euros and suppressing the obligation to publicize the sentence, on account of Law nr. 18/2003 of 11 June being replaced by Law nr.19/2012 of 8 May.

This Court decision analysed the case with a high degree of thoroughness, addressing and rejecting. one by one, the arguments put forward by Sport TV, with the single exception of one: the Court acknowledged that the case does not have cross-border impact, it only affects the national market. Sport TV could not provide a sufficient justification for having introduced the requirements of NAM (minimum absolute subscribers number) and TPM (minimum penetration rate, of 19%). These two features were found unnecessary for the economic sustainability of Sport TV, and furthermore, damaging to smaller Pay-Tv operators that incurred in negative margins to be able to offer the premium content: they had to use a false number of subscribers.

Sport TV arguments related to the positive effects of those features in terms of promotional efforts to be carried out by Pay-Tv operators – to achieve a balance in Sport Tv - or to the need to avoid free-riding/piracy were unsuccessful. The Court agreed with the Competition Authority in that the tiered price was itself adequate as stimulus for increasing the number of subscribers.

Sport TV was also unsuccessful in claiming that the relevant market should not be limited to sports broadcasting rights involving yearly events and national teams, because the Court, once again, validated the Competition Authority's decision based on the demand and supply substitutability, as well as potential competition – the three possible sources of competitive pressure over the prices. As a second line discrimination, it affects the downstream market, one where Sport TV is not active. In fact, there is no competitor in the market where it operates.

The upstream market would be the premium sports' events broadcasting rights, where Sport TV also holds a monopoly position (only considering the national sports events as relevant) and the

downstream market would be the Pay-Tv market, where sports contents could not be regarded as substitute for other premium content, such as films, adult content, children programmes, etc.

An abuse of dominant position corresponds to a behaviour through which the dominant undertaking exploits the possibilities offered by its market power to directly cause damage to its customers or business partners, such as, for example, providers.

As Miguel Moura e Silva[13] explains, the case-Law definition, according to the leading case "United Brands", mentions "a scope of advantages and benefits for the dominant undertaking which, in the absence of that economic power, it would not be able to enjoy". Price discrimination may be an instrument of profit maximisation, by segmentation of demand; however, an abuse may occur even in the absence of a direct advantage for the dominant undertaking. This is an aspect to which the EU institutions have not paid enough attention, and it encompasses (a) excessive prices; (b) unequitable terms and (c) discrimination[14].

According to Ricardo Bordalo Junqueiro [15] there are three different degrees of discrimination:

(i) First-degree or perfect: each customer pays a different price for a product unit equal to the maximum amount that s/he is willing to pay (rare and theoretical);
(ii) Second-degree: the undertaking offers a choice in the price to be paid, by applying quantitative discounts;
(iii) Third-degree: the undertaking differentiates between groups of consumers and applies different prices according to the specific group.

After quoting several previous cases, judged by the CJEU, the Court considered that a second-degree discrimination does not require any additional consequence other than the competitive disadvantage itself. There is no need to demonstrate a probable, either potential or concrete market foreclosure or any other effect, which would be typical for market exclusion practices.

The concrete combination of the tiered price scheme with TPM and NAM led to average different prices for different operators, regardless of the criteria for determination of the price. The Court didn't find the tiered scheme to be damaging, only the application of TPM and NAM. This ultimately led Sport Tv to put an end to this practice as of 1st April 2011. This behaviour, as well as the general cooperative attitude on behalf of Sport TV led the Court to lower the penalty to 2,7 million euros.

In 2015, 11 March, the Lisbon Court of Appeal confirmed the decision of the Court of Competition, Regulation and Supervision considering that the fact that such non-exclusion aimed practices have not merited priority consideration by the Commission of the EU do not exclude their illicit nature as a form of abuse of dominant position, noting that, in this particular case, despite being unnecessary, there was, indeed, a severe damage to smaller Pay-Tv operators, who paid different prices in relation to historic operators, with negative margins.

However, CABOVISÃO had also filed a civil claim against Sport TV, ZON- TV Cabo, ZON Multimedia and ZON Conteúdos, for alleged violation of articles 102 of the EUFT and art 6 of the national Competition Law, asking for a compensation in the amount of 9.148.011€, corresponding to excess in prices paid for Sport TV premium programming services and interest.

[13] Silva, M. (2010) *O Abuso de Posição Dominante na Nova Economia*, Teses, Almedina, Coimbra, p.427.
[14] Pereira, M. (2009) Lei da Concorrência Anotada, Coimbra Ed, Coimbra, p. 173.
[15] Junqueiro, R. (2012) Abusos de Posição Dominante, Almedina, p. 383.

Sport TV replied that the statute of limitations (three years for civil damages claim) prevented CABOVISÃO from succeeding, given the fact that in 18 July 2011 both parties had entered into an Amendment to the Sport TV supply contract by which the form of remuneration was modified (ban of TPM and NAM with retroactive effects starting the 1st April 2011). By that time, the Claimant had already calculated the precise amount of the damages.

In 2019, 28 March, the CJEU decided in Case 637/17 (*Cogeco Communications Inc. v Sport TV Portugal, S.A,. Controlinvest SGPS, S.A. and NOS SGPS, SA*) that:

1. Article 22 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union must be interpreted as meaning that that directive is not applicable to the dispute in the main proceedings.
2. Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority.

Still the claim was rejected for having been filed too late, regarding the statute of limitations.

The Lisbon Court of Appeal decided in 05.11.2020 that since art 102 EUFT was not applicable to the Case, there was no room for any suspension imposed by Directive 2004/14/EU, acting retroactively regarding the need to protect the Claimant in relation to the deadline for filing its complaint. So, the compensation claim was not considered, on account of having been filed late.

3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

N.A.

3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting …

The Copyright and Related Rights Code contains four provisions that address the issue of unfair remuneration, of which the most important is art. 49. It states that in case the intellectual creator or his/her successors have transferred or burdened his/her rights of exploitation and, as a consequence of that action, and the terms thereof, suffer a major patrimonial loss, due to an evident disproportion between the income obtained and the profits generated by the beneficiary, a supplementary compensation may be claimed, based on the exploitation results.

A similar solution applies to the case of work for hire/made for an employer, under art 14(4): in case copyright is attributed to the person who ordered the making of the work, should the intellectual merit of the creation notably exceed the expected performance - zealous as it may have been - or if the utility or advantage obtained from the work was neither included nor foreseen by the remuneration agreed.

A third case is also foreseen in art 105(3) in relation to the publishing contract, stating that "*even though the price has been globally set, the author is entitled to supplementary remuneration if*

both the rightholder and publisher agree on a substantial modification of the work, such as a refunding or extension."

The fourth and last case is in art. 170 of the Code, relating to the case of translation, awarding the same right (to supplementary remuneration) when the publisher, agent, producer or any other entity uses the translation beyond the limits set up or agreed under the Code.

However, there is no Case-Law related to these four provisions, at least within the published cases. The future act implementing Directive (EU) 2019/790 will also introduce some provisions along these lines, namely on account of art. 20.

The law protects also the rightsholder against unfair terms and conditions by stating that any act of transmission or burdening of an exclusive right must be specified in writing. As such, any disposal of the work that is valid for the future exploitation according to modalities that are unknown at the time of transmission, is null and void, except in case of full transmission of copyright, which must be formalised by the Notary on a public deed.

The main principle informing these provisions is the civil principle of balanced and fair terms, that intervenes whenever there is a need to impose a solution that is more equitable or fair.

The Copyright and Neighbouring Rights Code allows for different forms of remuneration setting, it may be either a lumpsum or a percentage on the price of each sample, in case of a published work, a fixed amount per stage performance or a percentage of the income obtained by the sale of tickets.

The Portuguese Case-Law follows the CJEU as it states that equitable remuneration aims at compensating the rightsholder for the loss of income generated without his/her permission, so either it is possible to estimate such losses departing from the income generated by the exploitation or one should look to the amount that the tortfeasor should have paid as a license.

In 30.11.2000, the Arbitration Court that established the amounts to be paid by cable retransmission operators have set up a clear distinction between "*a forfait*" remuneration and a percentage of income generated, setting up a fixed amount to be applied per subscription.

In both cases, remuneration may be fixed or variable: the latter case applies to operators where there are differences in the circumstances that determine the amounts or when such circumstances change in time. The former applies when all operators are subject to the same payment even though the circumstances may change in time.

In 27.01.2009, the Porto Appeals Court, set up its concept of "equitable remuneration" closely following art 13 Enforcement Directive: "the compensation [for copyright infringement damages] may be based upon those remunerations that would have been obtained in case the tortfeasor had requested permission to use the rights in question. These represent, as a rule, a minus in relation to those damages, this being why the current law doesn't allow the setting up of any "quantum" below such remunerations." (…) "In case where it is impossible to establish the actual amount of damages incurred, the Court may, in alternative, and provided there is no objection on behalf of the injured party, set up ex officio, a fixed amount based upon equity and having as a guiding principle and minimum threshold, the amount of such remuneration.

This seems to reject the possibility of setting up "punitive damages", where the Court awards a compensation beyond the actual amount of damages incurred but leaves out the possibility of

reinforcement of coercive measures such as an "*astrainte*" or daily penalty to be charged for as long as the infringement takes place, which is foreseen by art. 829-A of the Civil Code.

The Law 26/2015 of 14 April, modified and republished by Decree-Law nr. 100/2017 of 23 August (CMO Law), and Decree-Law nr. 89/2019 of 04 July, generally referred to as CMO Law, went quite further away from these General Principles and regulated in detail the so-called "General Tariff-setting"procedure, distinguishing between collective and individual tariff setting on account of the representativeness of users involved in the negotiation. This circumstance determines how compulsory the negotiation procedure is for CMOs. Once the tariffs are agreed, contracts must be made in writing and deposited with IGAC, the regulatory Authority, within the Ministry of Culture.

According to the CMO Law, CMO's activity must respect the following principles and criteria, only to name those that may apply to the setting up of tariffs[16]:

a) Transparency;

b) Democratic organization and management;

c) Participation by the members;

d) Fairness in the sharing and distribution of income collected as a CMO;

e) Non-discrimination, equity, reasonableness and proportionality in the setting of tariffs and fees;

f) Efficient and economic management of the resources available;

g) Moderation of administrative fees;

h) Non-discrimination between national and foreign members;

i) Management control, by the adoption of adequate internal procedures;

In addition, tariffs must reflect the economic value of the rights and be the result of a real market negotiation[17]. They must consider, namely, the economic value of the use of the repertoire for different categories of beneficiaries, correspond to the fair remuneration of rightsholders for the use of their works, phonograms, videos, performances or broadcastings and, whenever possible, the measure of real use[18].

In the relationship with users, negotiations are subject to the principles of *bona fide* and transparency[19], included the need to provide complete information to allow the collection of applicable tariffs[20]. General licensing terms must reflect objective and non-discriminatory criteria namely concerning applicable tariffs.

Tariffs only need to be deposited with IGAC and publicized on IGAC's website, as well as on the CMO's website in order to become effective[21].

[16] Art 10th nr. 1
[17] Art 38th nr. 3
[18] Art 38th nr. 4
[19] Art 36th nr. 1
[20] Art 36th nr. 1
[21] Art 38th, nr. 1-2

Users may complain to IGAC, as the supervisory authority for Copyright and Related Rights[22].

In addition, following a recent legal amendment, the Intellectual Property Court of Lisbon is now prepared to decide on matters related with licensing and any other contracts executed by and between rightholders or CMOs representing them and users or user associations. It has widened its competence to encompass any claims related to the performance, lack of performance, validity, effectiveness, interpretation of contracts and acts having for purpose the creation, transmission, burdening, disposal, licensing and permission of use of copyright, related right and intellectual property rights in any modality available within the law.

According to art 27 nr. 1 g) of CMO Law, CMOs are obliged to engage in licensing, in non-discriminatory, equitable and reasonable terms, through the payment of the established remuneration or tariff. CMOs are also legally required to engage in negotiations for the uses required by third parties, as well as remunerations not subject to licensing or authorisation. The latter only applies when the interested parties represent a significant number of users from the relevant areas. In that case, the negotiation should establish the general terms, including general tariffs, with associations whose members exploit or use protected works or performances or in the case where an equitable remuneration is due.

The CMO Law has detailed deadlines and provisions to ensure that the negotiation procedure is not interrupted or undermined by lack of cooperation on either side of the bargain. During the negotiations, there may be a unilaterally established tariff, to be taken into consideration by the closing of the procedure.

During the course of negotiations, the previously set tariffs shall apply or interim licenses are to be issued, so that the use of CMO's repertoire is never carried on without a proper licensing, to be replaced by the terms finally agreed between the Parties. In case of disagreement there is also a provision for arbitration.

There is also the possibility that, after a failure in the negotiating procedure, a collective negotiating procedure takes place, provided the entities are in fact, representative of users. In case of failure of the first negotiating procedure, there may still be an individual negotiating procedure, which applies only to one user, in case there is no previous agreement or tariff in force which applies to that specific type of use.

In case of agreement, or unilaterally establishing of tariffs, the result is to be deposited with the IGAC and made available to everyone in its website, namely https://www.igac.pt/atos-de-deposito. This deposit in necessary for agreed tariffs to be valid and legally binding, not only for the parties that negotiated such terms, but for all the users who fall under the same category, with no "opting out" clause.

Resorting to any of the above referred forms of negotiation is not exclusive of the possibility for any of the users to file a Court complaint in order to obtain the necessary license or for the CMOs to react against the unlawful use of their repertoire. This provision applies whenever the remuneration or compensation to be determined is not in exchange of a free use or a legal license expressly provided for by the law.

The current version of the Law is complemented by the general Arbitration and Mediation Law.

[22] Art. 49th nr. 4

Decree-law nr. 100/2017 of 23 August introduced a few additional rules to the general tariff setting procedure, reinforcing the role of Arbitration procedures and the need to ensure that the negotiation of tariffs is made in real market terms. There is also a provision aimed at the setting up of an especially low tariff for legal persons carrying on non-profit purposes/activities.

Such reinforcement is very welcome considering that arbitration was only prescribed for cable retransmission, by Decree-Law 333/97 of 27 November and the two most relevant cases so far relate to this precise situation: Arbitral Decisions of 30.11.2000 and 10.04.2012.

In the latter Decision, the Arbitral Court decided that an equitable tariff should present a reasonable relation with the economic value of the performance, which implies a consideration of the exploitation context, in search of balance between the interest of artists and that of broadcasters and, indirectly, the public in general. Hence, the justification for the setting up of minor tariffs without reducing those previously in force. PTC dropped the allegation of "abuse of dominant position", so this claim has not been decided. Nevertheless, the same complaint was filed by PTC in 24 June and 22 October 2014, in regard of alleged discriminatory practices towards PTC and its competitor ZON TV Cabo (currently named NOS) but it was dismissed by the Portuguese Competition Authority in 03 March 2016 by ruling that "*the facts referring to behaviours that are subject to this procedure, supported by the elements available in the case, do not constitute sufficient indictment for forbidden practices, namely by art. 11 of Law 19/2012 of 08 May. Hence, there is no legal ground and conditions for the opening of discovery stage have not been met*". So, the Portuguese Competition Authority decided not to act, according to art. 102 of the EU Functioning Treaty, under the terms of the last paragraph of art 5 of Regulation (CE) nr. 1/2003 of the Council of 16.12.2002. PTC, at the time named MEO- Serviços de Comunicação e Multimedia, S.A., filed an appeal with the Competition and Regulation Court, which decided to ask for preliminary ruling by the CJEU. This became the Case. nr. C-525/16.

In its Opinion, dated 20 December 2017, the Advocate General Nils Wahl mentioned that "(…) *although GDA is currently the only society in Portugal that manages the collective rights of performing artists, that fact does not mean that it is actually in a dominant position, since it does not enjoy such market power as would permit it to act independently of its trading partners.*

In another passage, the AG also stated that:

"It is well established that the aim of Article 102 TFEU is to provide a check on the market power that undertakings may have. It is not sufficient, in order for the position of an undertaking to be characterised as dominant, to refer to the market share it has on a clearly identified market. It is necessary to refer also to the economic power it has as a result of its position.

The AG did manifest strong doubts on whether GDA could be considered as holding a dominant position in the neighbouring rights market since: *"(…) it is apparent from the information submitted to the Court that the determination of the prices and of the other contractual terms associated with the related rights which GDA markets is subject to the law, which obliges the parties to have recourse to arbitration if they cannot reach agreement. In such a situation, GDA will, as it did with the prices it charged MEO, merely apply the price established by the arbitration decision*. "

In this particular concern "*GDA has argued in this connection that it is not in a position to exert any commercial pressure on its main trading partners MEO and NOS. First of all, those undertakings form a powerful 'duopoly'. Lastly, since it is not vertically integrated, GDA has no interest in the upstream or downstream markets. On the contrary, if MEO were to be foreclosed*

from the market or if it were rendered less competitive than NOS, that would be to GDA's disadvantage. That being so, there is no dominant position, still less any abuse of a dominant position."

Ant he agreed with GDA's position stating that "[*t*]*he Commission's approach, expressed in several of its reports and communications dating from 2003 onwards, and that taken in the case-law of the Court of Justice and of the General Court of the European Union is that it is necessary for account to be taken of the anticompetitive effects of the alleged abusive conduct on the market. In order for a pricing practice to be characterised as abusive, it is necessary for competition between the providers of the services in question actually to have been distorted and for certain service providers to suffer a competitive disadvantage as a result of that distortion of competition. Accordingly, a 'mere' practice of price discrimination is not sufficient in itself to constitute an abuse within the meaning of point (c) of the second paragraph of Article 102 TFEU*.

The AG also stated that "*In both the decision-making practices of the competition supervisory authorities and the most recent case-law of the Court, (17) the rule has progressively developed that, where the conduct of an undertaking is examined by reference to Article 102 TFEU, the existence of a restriction of competition cannot be presumed. In order to conclude that there is such a restriction, it is necessary in every case to examine the actual or potential effects of the measure complained of, having regard to all of the circumstances of the case".*

The AG finally concluded that "*Contrary to what a superficial analysis might suggest, point (c) of the second paragraph of Article 102 TFEU does not compel monopoly holders or dominant undertakings to apply uniform tariffs to their trading partners*." (…) *"It is clear from the very wording of that provision that price discrimination exercised by a dominant undertaking with regard to its trading partners may come within the scope of the prohibition of abuses of a dominant position if and only if competition between those trading partners is distorted by that discrimination."*

Meaning that, turning to the concrete evaluation of the case in hand: "*on the basis of the information provided by MEO on 23 June 2015, it had to be concluded that, between 1 January 2010 and 31 December 2013, the sums which MEO paid annually to GDA in respect of the wholesale service in question represented only a small percentage of the costs borne by MEO in making available its retail subscription television access service and a tiny proportion of MEO's profits from that retail service. Since the relative significance of the price of the related rights charged by GDA was, in the Competition Authority's opinion, negligible, it is difficult to see how, as a result of its magnitude, the price differentiation applied by GDA could have affected MEO's competitive position and thus created a competitive disadvantage."*

In its decision, dated 19 April 2018, the CJEU confirmed the understanding that "*the answer to the questions referred is that the concept of 'competitive disadvantage', for the purposes of subparagraph (c) of the second paragraph of Article 102 TFEU, must be interpreted to the effect that, where a dominant undertaking applies discriminatory prices to trade partners on the downstream market, it covers a situation in which that behaviour is capable of distorting competition between those trade partners. A finding of such a 'competitive disadvantage' does not require proof of actual quantifiable deterioration in the competitive situation but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation."*

This, of course, would lead to the conclusion, at national level, that price discrimination, despite in fact demonstrated by the evidence gathered, did not provoke any effect on the competitive position of MEO in relation to NOS (the main two customers of GDA). In fact, those differences represented a relatively small percentage of the whole costs supported by MEO in relation to the retail service of total costs of access to Pay-Tv. Therefore, the differentiation has had a very limited impact on MEO's profits in this context. The Court did not ignore the bargaining power that both entities have in relation to GDA, as well as the latter's lack of interest in causing damage to either of them. So, if it happened, it was certainly not in purpose. Although proof of an effective and quantifiable deterioration is not required for determining an abuse of dominant position, the verification of such a competition disadvantage must be based on a complete analysis of the circumstances in the concrete case that allows the conclusion that such behaviour is able to affect that position. In the concrete case the analysis would determine the irrelevance of price discrimination as inducing a competitive disadvantage, thus confirming the decision to dismiss the complaint that the Portuguese Competition Authority had issued on 03 March 2016.

There is also some relevant Case Law addressing the issue of Unfair Competition. However, not especially in the field of Copyright, with the notorious exception of a Decision by the Supreme Court of Justice, issued on 25 march of 2014, that may be summarised as follows:

- Unfair Competition provisions are located in the Trademark and Patents Code (articles 317-318) but they also belong to the Code of Copyright and Neighbouring Code, since article 228, after the Law nr. 16/2008 of the 1st April, states that it is complementary. Nevertheless, there was a specific provision for that safeguard, which was revoked by said Law.
- Legal persons may enjoy the right to compensation for moral damages, even though they do not own personal rights, namely as a projection of their own "personality". Therefore, such damages may not be presumed as a mere consequence of a breach of copyright.
- This case is about the organisation of public performances and shows, in which a Company (the Claimant) employed a certain person (the Defendant. The latter used all the contacts and data obtained while he was servicing the former, to organise the shows himself, through another legal entity, a new company that he created while he was at the service of the Claimant.
- The Court of First Instance decided that the Defendant's behaviour qualified both as an Unfair Competition act, as well as a breach of Copyright, namely in relation to a Music Festival, that was considered an original intellectual creation, protected by Copyright.
- However, as there was no evidence of damage to the image/name of the Claimant, the Court decided that moral damages could not be presumed. Hence the Appeal Court of Lisbon revoked the First Instance Court that awarded the Claimant damages (25.000€).

In another Case, not about Copyright but Trademarks, the Supreme Court of Justice stated, on the 15th February of 2015, that there is full autonomy between Intellectual Property Rights and Unfair Competition. So, there may be cases where IP rights are breached, without occurring unfair competition, as well as cases where there is unfair competition with no breach of IP rights.

4. ONLINE MARKETS: "VALUE GAPS" (ONLINE PLATFORMS)

Notice that complete and valuable information resulting from the stakeholders' dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591

https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder

Please include only information that is specific to your country.

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

N.A.

If you are an EU country, have you addressed the transposition of Art.17 CDSM Directive?

The draft of the transposition law is being prepared by the Portuguese Ministry of Culture.

4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?

Yes: In a very important and unique Decision, issued on 2019, 25 March, VISAPRESS- GESTÃO DE CONTEÚDOS DOS MEDIA, CRL which is the CMO representing News Publishers, obtained an historical victory, whereby three Companies devoted to clipping activity were sentenced to pay 4,5% of their income for the permission to use the full text of articles previously published in newspapers and magazines, whose rights belong to their represented parties.

The Court referred to TJUE Decision of 16.07.2009 (INFOPAQ-Case C-5/08), to define protected work and applied the Portuguese Copyright and Neighbouring Rights Code, stating that newspapers and other published media were qualified as collective works[23], whose rights are owned by the Publishers, without prejudice to the individual rights of journalists and reporters.

The Court decided that an activity consisting of a copy-paste of specific texts and images, selected according to a relevance criterion for paying customers could neither be qualified as an exception of quotation nor press analysis, considering the reproduction of full texts and images.

A press analysis should be limited to an information purpose, encompassing the subject, matters, the number of articles published, quoting the titles, the interviewed people's statements, a summary, more or less short, of all that the press (national and international, regional, sports, economic, etc.) is reporting about the issue within a specific time frame and according to a target audience. This activity is free but does not involve full transcription of texts.

The Decision made it very clear that such activity may very well act as a deterrent for the sale of newspapers and other publications, and involve a substantive part of these, prompting the replacement of paid samples. This ultimately affects a normal exploitation of the collective work.

The protection of Copyright in the works doesn't affect freedom of information which is constitutionally granted[24] and it is not an absolute right: news become freely accessible after

[23] Articles 16 and 19, namely nr. 3 which corresponds to a deviation to the main principle that awards Copyright to the intellectual creator. Instead, exploitation rights are to be used by publishing companies.
[24] See art 37(1) of the Portuguese Constitution.

being published, and, anyway, the daily news and the reporting of facts for mere information purposes are excluded from Copyright protection[25] by the Portuguese Copyright Code.

However, there is a distinction to be made between "information" and "media", where the latter has an economic value and is subject of Copyright protection awarded to those who organised and directed its publishing. "Clipping" activity is not oriented towards people's information as a goal, but, instead, it is a commercial activity, based on granting the clients the published content they are interested on. It doesn't involve any own elaboration of summaries, only reproductions.

The licenses eventually obtained by the clipping agencies for their own personal use, so called "internal use", encompassing use by the management and employees, do not cover the use made by their clients of the copies which are distributed to them for a price, which is called "external use". There is a "primary use" done by the clipping agencies, and a "secondary use", made by their clients, sometimes including another set of reproductions for third-parties, which is not legitimate, since there is no license issued by the rights-owners for the customers of clipping agencies.

In this Decision, the Court of Intellectual Property of Lisbon made some important statements on tariff setting and possible competition issues:

- The Law doesn't set the amounts to be charged as Copyright tariffs by rightsholders;
- The eventual case of abuse of right, or breach of competition law, is to be excluded;
- The definition of Terms & Conditions for the use of works is a rightsholders' matter, notwithstanding the negotiation and agreements to be reached between the parties;
- In the present case, there is no abuse of rights nor price discrimination – the cost is the same for all the clipping companies, including those that were previously licensed;
- There is also no abuse of dominant position by VISAPRESS, that acts on behalf of its represented publishing companies. This is collective management of copyright not a collusion.

If you are an EU country, have you addressed the transposition of Art.15 CDSM Directive?

The draft of the transposition law is being prepared by the Portuguese Ministry of Culture.

4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

For instance, regarding cloud storage and compensation for private copying

The remuneration for private copy (which is an exception to the exclusive right of reproduction according to art. 75 (2) a)) of the Portuguese Copyright and Neighbouring Rights Code) is duly regulated, by the Law 49/2015 of 05 June 2015, that modifies and updates Law 62/98 of 1 September 1998 on private use. This new law on private use was enacted on 05 July 2015, except for the limitation to 20% of the maximum cost of management of the entity appointed to manage the private copy remuneration (AGECOP), that only applies from the 1st of January 2016 onwards. The original Law 62/98 of 1 September 1998, created this CMO, called AGECOP, which was legally determined to be formed by CMOs representing Authors, Artists, Publishers as well as Phonographic and Video Producers. The law disciplined what subjects should be included in the Statutes and stated in considerable detail the main governance and functioning principles of such entity.

[25] Article 7.

The principle of compensation for private use is foreseen in art 76 (1) b) of the Code, which states that the user who makes a reproduction must pay an equitable remuneration to be paid to the author and the publisher, in case of analogue reproduction.

So, as far as compensation for private copy is concerned, the model instituted by the legislator was compulsory collective management, where all the income corresponding to both analogue and digital media, as well as reproduction equipment is collected by this all-encompassing structure, in fact an aggregatory CMO. Then, AGECOP distributes such income, after deducting its own management fee (not higher than 20% of collections), as well as 20% for its cultural fund, by the associate CMOs according to a distribution key provided by the legislator himself:

a) In case of income provided by levies on reprographic copies: 50% for authors/50% for publishers;

b) In case of income provided by audiovisual media and equipment: 40% for authors/30% for artists; 30% to be split among phonographic and video producers.

So, the compensation for private copy is always of compulsory collective management, imposed by the law.

The law of 2015 significantly broadened the effectiveness of the levy charged on blank tapes, reproduction equipment and storage media, by encompassing digital storage equipment, which were not considered, until that moment, for the purposes of levy collection, due to aggressive lobbying by the digital equipment's' manufacturers and the policy to foster access to Knowledge in the Age of Information Society. The rate to apply to each different type of media or equipment is also determined by the law, as legal tariff, appending to the Law on private use.

The original Law nr.62/98 was the subject of a Statement of Unconstitutionality by the Constitutional Affairs Court (Decision nr. 616/2003, of 16 December, on account of awarding the Government the power to determinate the amount of the equitable amount. The CAC decided that this aspect likened the levy to a tax, as an imperatively imposed duty to pay. As such its determination should be awarded to the Parliament, instead of the Government. It was not considered a compensation for damages, but a form of avoiding the exemption by the user.

The nature of such income is akin to a tax, based on the State's *ius imperium* in view of the public- not private – purposes. Hence the conclusion that it was an unconstitutional provision. As a consequence of that, exemptions should be regarded as tax benefits, previously determined by the law, without room for any regulatory discretion in defining exemption's essential criteria.

This prompted the Parliament to amend the law, assuming the competence to determine the rate, and the Administrative and Tax Courts were granted competence as the fore for litigation.

There was, however, one dissenting vote, by a Judge that considered that the private nature of the associations to whom the compensation was destined, prevented the qualification of the income as a tax, or similar tribute, criticizing the lack of decision on the subject of qualifying the entity (AGECOP), a matter that was left undecided. The dissenting judge also criticized the qualification of the compensation as a tax, stating his opinion that it was not unilaterally imposed. Therefore, the Government was constitutionally competent to determine its rate. However, the last legislative act setting up the rate to be applied to some blank media, either digital or analogue, was Decree-Law 100/2017 of 23 August (following two Parliamentary Acts).

There was a provision in the law of Private Use, stating that, from 2015 onwards, in each civil year, in case the amount of equitable compensation exceeded €15 million, the outstanding amount should be awarded to the Cultural Development Fund, which is destined to fund several cultural and creative activities, mostly the discovery of new artistic talents (art 5-A). However, that provision was revoked by the State Budget for 2020, included in Law nr. 2/2020 of 31 March.

Since the law entered into force, the CMOs had been lobbying in the sense of this provision being unconstitutional, since it affected the right to a compensation held by the rightsholders, which they represent, and a legal opinion was produced by a Professor of Constitutional Law, which was ultimately considered by the Government, leading to the ban of any quantitative threshold for such compensation.