The Private Competition Enforcement Review

Ninth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia has been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent

(e.g., Nigeria) and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes to its private enforcement law. The most significant developments, though, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period, and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculation. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have also taken steps to facilitate collective action or class-action legislation. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages

awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the

Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct. And in Israel a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that

discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney-client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
February 2016

Chapter 21

PORTUGAL

Gonçalo Anastácio[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In Portugal there are limited public records of civil court cases dealing with competition law matters, which makes it difficult to either determine the number of pending or closed private enforcement cases, or assess information on the evolution of the importance of private enforcement within the overall system of competition enforcement. Nevertheless, there is some data and some empirical awareness indicating that private enforcement in Portugal is already a reality, comprising a sound number of precedents and gaining in significance. For example, two major follow-on cases are currently pending before the Portuguese courts, both based on recent decisions by the Portuguese Competition Authority (PCA) confirming abuses of dominant position.

The first case involves the members of the Portugal Telecom (PT) group, who were found by the PCA to have abused their dominant position in the wholesale and retail broadband access markets by means of a margin squeeze and a discriminatory rebate policy, and following which PT's clients launched two damages actions against the group in 2011.

The second case involves Sport TV, a Portuguese sports-oriented premium cable and satellite television network operating in the market for premium pay-TV sports channels, which were found by the PCA to have abused their dominant positon for several years by having imposed discriminatory conditions on operators, and concurrently

1 Gonçalo Anastácio is a partner at SRS Advogados. The author would like to thank Mariana França Gouveia – Professor of Civil Procedure at Universidade Nova and of counsel at SRS Advogados – for her comments on this chapter; and Leslie Rodrigues Carvalho – lawyer at the competition law department of SRS Advogados – for her research support.

having limited development and investment in the market. Following the decision, two separate damages actions were filed with the court, one of which is a class action, and representing the first of its kind in competition matters to be adjudicated in Portugal.

While the above cases remain pending, there have been no clear-cut[2] awards of damages on the grounds of competition law infringements to date.[3] There are, nevertheless, already many private enforcement precedents (even if competition law is typically only one of the legal angles in question) and the number is consistently increasing. In most cases, the competition rules were brought into litigation as a means of defence; most of the precedents have a vertical restraints' nature;[4] and often the validity of agreements or of particular clauses thereof is the leitmotif to call in competition law.

In addition, the work that the European Commission has carried out in this matter over recent years – culminating with Directive 104/2014 – has undoubtedly given greater visibility to the issue of private enforcement.

On a final note, the impact of the recent dramatic rise in state courts' fees in Portugal on potential claims for damages for competition infringements remains to be duly assessed.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

There is no specific Portuguese legislation (or rules) with regard to actions for damages arising from a breach of competition rules. The legislative framework for private antitrust enforcement in Portugal includes, besides the substantive rules on competition (laid down in the Portuguese Competition Law (PCL, approved by Law No. 19/2010, of 8 May)), the general rules on civil liability provided for in the Civil Code (CC)[5] and the procedural rules of the Code of Civil Procedure (CCP).[6]

Private actions may be brought on the basis of an infringement either of the PCL, or of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). Examples of such infringements may include: cartels (Article 9 of PCL and/or Article 101 TFEU); abuse of a dominant position (Article 11 of PCL and/or Article 102 TFEU); or abuse of economic dependence (Article 12 of the PCL).

An infringement of competition rules may lead to a civil action based either on the request for compensation for damages or on the request for the declaration of nullity

2 Leonor Rossi and Miguel Ferro refer to the existence of one precedent, with the caveat that it can be argued as essentially an unjustified enrichment case (*Revista de Concorrência e Regulação/Competition and Regulation*, No. 10, April–June 2012, p. 113).

3 There is already one very recent first instance precedent, specifically for damages, as regards the unfair competition regime, the so-called PIRC, under Decree-Law No. 370/93, of 29 October.

4 On these and other conclusions, see the above-mentioned paper.

5 The Portuguese Civil Code enacted by Decree No. 47344, of 25 November 1966, as amended.

6 The new Portuguese Code of Civil Procedure was enacted by Law No. 41/2013, of 26 June.

of an agreement or contractual clause deemed anti-competitive. Preliminary or definitive judicial declarations that a particular conduct or agreement is anti-competitive may also be requested. In any event, civil courts will have jurisdiction.[7]

The substantive law regarding actions for damages is set out in the CC, namely Article 483 et seq. (regarding the rules on liability for illicit acts) and 562 (on the calculation of awards of damages). In a claim for damages, the plaintiff will have to prove:[8] (1) the defendant's unlawful conduct including his or her fault or negligence; (2) the extent of the damage suffered; and (3) the causal link between the conduct and the damage. The burden of proof lies with the claimant/plaintiff and the burden of disproving the plaintiff's allegation lies with the defendant.[9] The judge bases his or her decision on the evidence produced and, when in doubt, decides against the party who bears the burden of proof.[10]

As regards limitation periods, there is a three-year time limit to bring an action for damages.[11] The time limit begins when the plaintiff becomes aware of his or her alleged right to a claim, regardless of his or her knowledge of the identity of the person liable or of the exact amount of harm suffered. Irrespective of the acknowledgment of the right to a claim, there is a 20-year absolute time limit to bring the action for contractual damages, starting from the date upon which the damage took place.[12]

The declaration of nullity of an agreement for breach of competition law is admissible according to Articles 280 and 294 of the CC and Article 9(2) of the PCL. The declaration of nullity will result in the return of what each party has provided to the other in the context of the invalid agreement, or the corresponding amount if such return is not possible.[13]

The applicable procedural rules for actions for damages as well as a declaration of nullity of an agreement or contractual clause are laid out in the CCP.

There is no specialised court for damages claims arising from competition infringements. A specialised Competition, Regulation and Supervision Court has recently been created in Portugal,[14] hearing appeals of PCA decisions at first instance.[15] It does not, however, decide on civil matters.

In the absence of a specialised court for private competition litigation, the competence to decide such matters lies with the judicial (general) courts. For actions relating to contractual issues, the court that has jurisdiction will be that which is located at the place where the defendant is domiciled, and in cases relating to actions for damages, the court that has jurisdiction will be located where the infringement of competition

7 Articles 61 and 62 of the CCP.

8 Articles 483, 487 and 563 of the CC.

9 Article 342 of the CC.

10 Articles 414 of the CCP and 346 of the CC.

11 Article 498 of the CC.

12 Article 309 of the CC.

13 Article 289 of the CC.

14 Decree Law No. 67/2012, of 20 March.

15 Article 84(3) of the PCL.

rules occurred.[16] Decisions of the judicial courts are reviewed by the relevant court of appeals, and decisions of the court of appeals can be reviewed by the Supreme Court of Justice, but on matters of law only.[17]

III EXTRATERRITORIALITY

The PCL applies to all anti-competitive practices that take place on Portuguese territory or that have, or may have, an anti-competitive effect in Portugal.[18]

The applicability of Portuguese law in cases of private enforcement concerning non-contractual obligations is regulated by Regulation (EC) No. 864/2007 (the Rome II Regulation) and concerning contractual obligations by Regulation (EC) No. 593/2008 (the Rome I Regulation).

As concerns damages actions, the law applicable to extracontractual civil liability, pursuant to the Portuguese CC,[19] is the law of the state where the main cause of the damage occurred. If the law of the state where the harm occurred considers the defendant liable while the law of the state in which the activity took place does not, the former will apply, on the condition that the defendant could have foreseen that his or her act or omission could result in damage in that state.

Contractual liability cases are, according to the Portuguese CC,[20] ruled by the law agreed to by the parties, provided that such law corresponds to a real interest of the parties or is connected with some elements of the contract. Where the parties have not agreed upon a specific law, the applicable law will be the one of the state of their common residence or, if they do not reside in the same state, the law of the state where the contract was signed.

Regarding the territorial jurisdiction of national courts, Regulation (EC) No. 44/2001 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention[21] are applicable in Portugal.

If such regulations do not apply, Articles 59 to 62 of the CCP give authority to the Portuguese courts in international matters. The general grounds for the attribution of international jurisdiction to Portuguese courts are: (1) the possibility of bringing the action in Portugal, according to the Portuguese rules on territorial jurisdiction;[22] (2) the fact that the main ground of the action, or any of the facts substantiating it, occurred in Portugal; and (3) the fact that the right claimed cannot be effectively enforced in courts other than the Portuguese courts, provided there is a relevant link, of objective or

16 Article 71 of the CCP.

17 Articles 68, 69 and 671(1) of the CCP.

18 Article 2(2) of the PCL.

19 Article 45 of the CC.

20 Articles 41 and 42 of the CC.

21 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007).

22 Territorial jurisdiction is regulated in Articles 70 through 84 of the CCP.

subjective nature, with the Portuguese legal order. The parties are able to agree on the competence of the courts of a given state, provided the question to be decided is linked to more than one jurisdiction.[23]

IV STANDING

There are no special rules in relation to the standing requirement in order to bring competition law actions. According to the general rules on liability,[24] any legal entity or natural person who suffered harm within the Portuguese territory as a result of an unlawful act has the right to be compensated for the harm suffered. Therefore, to have standing to bring an action for damages in relation to breach of competition law, a plaintiff must allege to have suffered harm as a consequence of an anti-competitive conduct within the Portuguese territory.[25]

Whether the plaintiff has a direct contractual relationship with the infringing party is not relevant for standing purposes. Thus, even an indirect purchaser may have standing, provided he or she claims having suffered harm as a result of an infringement of competition law.

V THE PROCESS OF DISCOVERY

Under Portuguese law, there is no discovery procedure as it is understood in common-law systems.

The courts have a discretionary power to request from any of the parties or third persons the disclosure of information which the court may consider important to the final decision of a given case.

On a request by any party to the proceedings, the court may order the opposing party or any third person to present any kind of document necessary to prove the alleged facts.[26] The requesting party has to identify, as accurately as possible, the document required and the facts he or she intends to prove with such document. The court may refuse the request if it considers that the document is not relevant to the decision.

The court may also, *ex officio*, order other documents to be submitted, if it considers them necessary to uncover the truth or to prove facts relevant to the case.[27] Documents may be requested from the parties, or from third parties such as the PCA.

Unless it is considered justifiable on the grounds provided for in the law (including so as to avoid a violation of privacy or professional secrecy),[28] a refusal to comply with

23 Articles 59 and 94 of the CCP.

24 Article 483 of the CC.

25 Articles 11 and 30 of the CCP.

26 Articles 429 and 432 of the CCP.

27 Article 436 of the CCP.

28 Article 417(3) of the CCP.

the court's order will result in the sanction of a fine.[29] If one of the parties refuses to cooperate, the court will freely assess the meaning of such refusal and may reverse the burden of proof.[30]

In case of follow-up litigation, access to the PCA's files may be deemed necessary or useful by the parties to prepare either their action for damages or their defence. Such access is regulated in Articles 32 and 33 of the PCL. According to those rules, private parties may claim access to the PCA's file so long as the file is not protected by judicial secrecy.

If the proceedings are not covered by judicial secrecy (which is the general rule according to the principle of publicity), any person with a legitimate interest may request access to the file. The accessibility of a file involves the right to peruse, and obtain copies, extracts and certified copies of any part of the file, excluding documents or extracts that have been declared confidential by the PCA.

If the proceedings are covered by judicial secrecy, the parties involved may only have access to the file after the notification of the statement of objections by the PCA. Third parties shall only have access to the file after the final decision has been issued.

VI USE OF EXPERTS

Under Portuguese law, parties may, unless otherwise provided, use any means to prove their allegations. The judge must take into account all the evidence presented by the parties and may freely make or order the production of any kind of evidence deemed necessary for the truth to be reached.[31] A defence hearing with the party to whom it is opposed is required.[32]

Expert evidence is admissible[33] and can be very useful when dealing with specific matters. It can either be requested by the parties or ordered *ex officio* by the court. Most commonly, a panel of experts is appointed, with the court appointing one expert and each of the parties appointing another expert. The court may request, for example, the expertise of an institution, laboratory or appropriate official service or, if this is not possible, the expertise of a sole expert appointed on the grounds of competence and recognition of the matter on which the expertise has been requested. The probative value of the expert evidence is left to the appreciation of the judge.[34]

Despite the lack of experience in Portugal concerning the use of experts in the context of an action for damages arising from a competition infringement, it is expected that, in the future, such expertise will mostly be requested on economic issues (as an action for damages frequently requires a complex economic analysis), namely for the quantification of damages.

29 Articles 417(2), 430, 433 and 437 of the CCP.

30 Articles 417(2) of the CCP and 344(2) of the CC.

31 Article 411 of the CCP.

32 Article 415 of the CCP.

33 Article 467 et seq. of the CCP and Article 388 of the CC.

34 Article 389 of the CC.

VII CLASS ACTIONS

The form of class action available for damages claims is the 'popular action' (*ação popular*) established in Article 52 of the Constitution of the Portuguese Republic (CPR) and regulated by Law No. 83/95, of 31 August. According to that law, any citizens (companies and professionals being excluded) or any associations or foundations promoting certain general interests have the right to file a popular action in order to protect those interests. The claiming party will have the right to obtain redress for harm suffered in violation of the general interest concerned. The promotion and the respect of competition can be considered to be a general interest and therefore can constitute grounds for a popular action and the claim for a compensation for harm suffered as a consequence of the infringement of competition rules.

The system provided for in the above-mentioned law may be considered to be an opt-out. The holders of the interests covered by the popular action that do not intervene in the action are notified through a press announcement and shall decide whether or not they accept representation in that action.

This type of action continues to be very rare, but, in March 2015, a landmark follow-on class action for damages was filed in civil court, based on a June 2013 decision by the PCA. In this decision, the PCA imposed a fine of €3.7 million on Sport TV, having found that the Portuguese television network had abused its dominant position in the market for premium pay-TV sports channels for a period of at least six years, by imposing discriminatory conditions on operators and limiting development and investment in the market.

The class action was the first to be brought by the *Observatório da Concorrência*, an association that represents consumers in class actions related to competition infringements, and was initiated under the 'popular action' law, utilising the applicable procedural rules provided for in the Code of Civil Procedure. The damages being claimed equate to the extra price that was paid by consumers for acquiring the services of the retail pay-TV market, as well as for injuries suffered by all subscribers of pay-TV in Portugal, due to Sport TV's practices limiting competition, innovation and development in the market, to the detriment of consumers.

This much-anticipated case represents an important step forward in private enforcement in Portugal, as it is one of the first private competition cases, and the first class action in which damages for an infringement of competition law are being claimed.

VIII CALCULATING DAMAGES

According to Portuguese law,[35] natural restoration or monetary compensation can be awarded following a successful claim for breach of competition law. Monetary compensation is available whenever the natural reconstitution of the claimant's situation as it was before the illicit act occurred is impossible, insufficient or too expensive.

35 Article 562 et seq. of the CC.

Damages awarded are thus purely compensatory, as punitive damages are not commonly available, although doctrine and jurisprudence have accepted punitive damages that have been contractually provided for. The amount of the compensation to be awarded shall correspond to the difference between the current patrimonial situation of the injured party and the patrimonial situation of such party if the damage had not occurred. Monetary compensation includes the amount of the damage caused by the illicit conduct plus interest.

Compensation covers the harm actually suffered by the injured party (actual loss, *damnum emergens*) and the loss of profit or the advantages that, as a result of the illicit act, will not enter the patrimony of the injured party (loss of profits, *lucrum cessans*).

The loss of a chance can also be indemnified, in particular if expenses were undertaken in light thereof. The indemnity also allows for the compensation of moral harm suffered by an individual only, and future harm suffered which the judge may foresee.

Despite the rules regarding the calculation of damages provided for in the CC, the judge has a significant amount of discretion, which provides a relevant degree of uncertainty as to the calculation of damages. Considering the complexity of quantifying antitrust harm, assessing the exact amount of the damages may be impossible or extremely difficult in a given case. In such an event, the judge may decide in accordance with equity, within the limits of the evidence produced.

If the injured party has contributed to the occurrence of the injury, the court may decide, considering the seriousness of both parties' conduct and the consequences thereof, that the amount of the compensation shall be reduced or even totally excluded.

Interest is calculated from the moment the harm occurred until the moment the indemnity is paid[36] and the interest rate is fixed by law.

Contingency fees are not allowed, as the by-laws of the Bar Association[37] do not consent to fees exclusively dependent on the result (*palmarium*) or to fees consisting of a percentage of the result (*quota litis*). Fees should be calculated based on several factors related to the service provided, such as: importance and complexity of the cause, urgency of the matter, time spent and, to a certain extent, results obtained.[38]

IX PASS-ON DEFENCES

Under Portuguese law, there is no express provision allowing for or prohibiting the defendant from arguing that the harm allegedly suffered by the plaintiff has been passed on to a third party.

However, the passing-on defence may be deemed admissible as a defence before national courts in a competition law dispute under the rules on the calculation of damages and unjustified enrichment.

36 Articles 805(2) and 806(1) of the CC.

37 Law No. 15/2005, of 26 January.

38 Article 101 of the by-laws of the Bar Association.

The objective underlying damages awards, under Portuguese law, is to compensate the injured party only for harm suffered. When calculating an award for damages to the plaintiff, the judge shall take into account the exact extent of harm suffered. Provided that the defendant is able to prove that the plaintiff transferred the damage, or part thereof, to a third person, (the pass-on defence), the judge shall not award the plaintiff 'passed-on' damages. Furthermore, if the plaintiff is awarded a sum of damages which goes beyond the harm actually suffered, there will be a situation of unjust enrichment, which is prohibited under Portuguese law.[39]

X FOLLOW-ON LITIGATION

Judicial proceedings and administrative proceedings before the PCA are completely independent from each other, according to the constitutional principle of the separation of powers.

The existence of a decision from the PCA establishing an infringement of competition law is not required for a private enforcement action to be initiated. The judicial court decides upon an action for damages arising from an infringement of competition rules irrespective of any previous decision already issued by the PCA on the same matter and relating to any other pending proceedings.

Also, there are no rules regulating the way in which proceedings before the PCA and judicial actions for damages related to the same infringement of competition rules should be coordinated.

When a decision by the PCA has already been issued, it is not binding on the civil courts deciding on the same matter. Even if the finding of an infringement by the PCA may be regarded as *prima facie* proof, and even if it can be said that the courts tend to follow the technical rationale of that finding, the plaintiff (with whom the burden of proof lies) must still prove the existence of an anti-competitive practice before the court.

If a defendant has, within a previous administrative proceeding, applied for immunity or a reduction of fines in the scope of the PCA's leniency programme,[40] he or she is not exempt from paying compensation for the harm caused within the scope of a private follow-on action for damages. The leniency applicant is also not exempt from the applicable rules on joint and several liability.

The judicial limitation period is different from the administrative limitation period (i.e., for the PCA to initiate proceedings), which can make it more difficult in practice for the plaintiff to usefully conciliate both proceedings. The limitation period for non-contractual liability is three years after the injured party becomes aware of his or her right to claim damages, while the limitation period for the PCA to initiate proceedings for antitrust infringements is five years.[41] There are no special rules on the beginning, duration, suspension or interruption of limitation periods to allow for conciliation

39 Article 473 of the CC.

40 Article 75 et seq. of the PCL.

41 Article 74 of the PCL.

between judicial and administrative proceedings, however, there may be a judicial notice served. It is therefore possible that the limitation period for claims for damages will have already started or even run out before the PCA decides on the same matter.

The possibility for a Portuguese civil court to delay its proceedings until a decision is issued by the competition authority on the same matter is not provided for in Portuguese law. Courts may decide to delay the proceedings for a certain period of time, but the limitation period remains an important obstacle to long stay periods.

XI PRIVILEGES

Attorney legal privilege is protected before judicial courts and administrative authorities (including the PCA) by the Portuguese Bar Association by-laws and both external and in-house counsel are protected as long as they are validly registered with the Portuguese Bar Association.

The Lisbon Court of Commerce (which was competent to judge the appeals from the PCA's decisions before the recent creation of the Court of Competition, Regulation and Supervision) declared, when deciding on an appeal from a PCA's decision, that external lawyers and in-house counsel should be treated equally for legal privilege purposes.

Some questions will arise when plaintiffs to an action for damages intend to access the PCA's files to obtain documents deemed necessary to sustain their action. Despite the principle of publicity, access may be denied by the PCA, either in relation to certain categories of documents or to the entire file.

The PCA may have declared some documents as confidential on the grounds of its obligation to protect business secrets[42] or otherwise confidential information, including professional secrets[43] (attorneys, medical doctors, bank secrecy, etc.).

Also, documents submitted within the scope of a leniency application are protected during the administrative proceedings.[44] The PCA shall declare the request for immunity or for a reduction of the fine, as well as all the documents and information presented by the leniency applicant as confidential. The access to those documents and information is granted to the co-infringers for right of defence purposes, but they will not be allowed to obtain copies thereof, unless duly authorised by the leniency applicant. Access by third parties to these documents will only be granted when authorised by the leniency applicant.

In general terms, the protection of leniency documents provided for in Directive 104/2014 is already contemplated in the Portuguese legal system and does not need transposition measures. As regards joint and several liability, the rule is set out in the

42 Article 195 of the Criminal Code.

43 Article 195 of the Criminal Code and Article 87 of the Bar Association by-laws.

44 Article 81 of the PCL. Here it will surely be very relevant the *Pfleiderer* doctrine. For a Portuguese language review and comment on the 2011 *Pfleiderer* ruling by the ECJ see Catarina Anastácio in C&R – Revista de Concorrência e Regulação, No. 10, April–June 2012, pp. 291–314.

Civil Code for infringements in which multiple companies take part and therefore the rule provided in Article 11/1 of the Directive already exists. The same is, however, not true for the two exceptions provided for in Article 11/2 and 11/4 of the Directive: at this point in time there is no limitation to the joint and several liability of the immunity recipient; and this will be a rather challenging and interesting point to follow as the Directive is applied in Portugal (notably as the exceptions create conflicts with classic rules and principles of extracontractual liability).

No protection exists in relation to documents issued in a proceeding before the PCA which has ended in a settlement decision.[45]

Note that the entire file may have been declared to be under judicial secrecy by the PCA.[46] In that case, third parties (namely plaintiffs in an action for damages) may only be allowed to access the file after the final decision has been issued.[47]

XII SETTLEMENT PROCEDURES

Unlike public enforcement by the PCA,[48] there is no specific judicial settlement procedure available within the scope of a damages action.

According to the Portuguese CCP, parties can reach a settlement both before and during a court proceeding,[49] provided that no non-disposable rights are involved.[50] The settlement may be reached by agreement of the parties or through conciliation (which can take place at any stage of the proceedings further to the parties' joint requirement or when the court finds it appropriate).[51]

Any settlement between the parties during a court proceeding shall be subject to confirmation (*homologação*) by the court in order to have the value of a judicial ruling.

XIII ARBITRATION

Competition law issues can be resolved through private arbitration[52] and, despite the fact that arbitration is in principle not public, there seems to be a number of precedents[53] and

45 Outside the leniency regime, protection for documents follows the general rule, as established in Article 30, 32 and 33 of the PCL.

46 Article 32(1) of the PCL.

47 Article 32(2) of the PCL.

48 See Articles 22 and 27 of the PCL and respective commentaries by Gonçalo Anastácio/Marta Flores and Gonçalo Anastácio/Diana Alfafar respectively, in Lei da Concorrência Anotada, Comentário Conimbricense, Almedina, 2013.

49 Article 283 of the CCP.

50 Article 289 of the CCP.

51 Article 594 of the CCP.

52 See Law No. 63/2011, of 14 December – the Arbitration Law.

53 See Leonor Rossi and Miguel Ferro (Revista de Concorrência e Regulação/Competition and Regulation, No. 10, April–June 2012, p. 93 and note 4).

at least one significant arbitral decision – appealed to the Lisbon Court of Appeals and confirmed by such upper court in 2014 (declaring an abuse of dominance in the health sector).

Any dispute with an economic value and not mandatorily submitted to judicial courts or to necessary arbitration by a special law can be submitted to an arbitral tribunal by way of an arbitration agreement. The agreement can relate to current disputes even if such are being dealt with in a judicial court (submission agreement) or to events that may occur in the future whether arising from a contractual or non-contractual relationship (arbitration clause).[54]

Arbitrators shall decide in accordance with the law, unless the parties have authorised them to decide according to equity (*ex aequo et bono*).[55] The award given by arbitrators has the same legal force as a first instance court decision and cannot be submitted to an appeal unless otherwise agreed by the parties.[56]

Arbitration procedures are confidential unless otherwise decided by the parties;[57] appealed to the state courts;[58] or subject to enforcement actions[59] by a state court (as state proceedings are public by nature).[60]

XIV INDEMNIFICATION AND CONTRIBUTION

Under Portuguese law, there is joint and several liability in relation to actions for damages.[61] Therefore, if the damage was caused by several persons, the plaintiff may recover the full amount of damages from any one of them. One defendant shall pay the full award and then retains a right of redress against the other defendants, claiming the corresponding parts from them. The contribution of each infringer is determined by the court on the basis of its individual guilt (which is presumed equal for all the defendants) and the effects arising from it.

54 Article 1(3) of the Arbitration Law.

55 Article 39 of the Arbitration Law.

56 Article 39(4) of the Arbitration Law.

57 Article 30(5) of the Arbitration Law.

58 Article 46 of the Arbitration Law.

59 Article 47 and 48 of the Arbitration Law.

60 As regards arbitration and competition law, see the following articles: Luís Silva Morais, 'Aplicação do Direito da Concorrência, nacional e comunitário, por Tribunais Arbitrais: o possível papel da Comissão Europeia e das Autoridades Nacionais de Concorrência nesses processos', Presentation at the Portuguese Competition Authority, 15 October 2007; Cláudia Trabuco & Mariana França Gouveia, 'A Arbitrabilidade das questões de concorrência no direito português: the meeting of two black arts', in Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida, Vol. I, Almedina, Coimbra, 2011 and José Robin de Andrade, 'Apresentação sobre a nova Lei de Arbitragem voluntária e a aplicação do Direito da Concorrência pelos tribunais arbitrais', in Revista de Concorrência e Regulação/Competition and Regulation, No. 11/12, July–December 2012, pp. 196–213.

61 Article 497 of the CC.

XV FUTURE DEVELOPMENTS AND OUTLOOK

To date, no legal rules have been adopted in order to facilitate private antitrust enforcement in Portugal.

Instead, the general legal framework applicable to civil liability and invalidity of contracts in principle provides sufficient tools for private antitrust enforcement in Portugal. However, some relevant cultural and technical obstacles remain, although they are by no means exclusive to Portugal.

As the European Commission concluded after years of assessment, specific legislation would be the most appropriate instrument to foster private antitrust enforcement, in particular in relation to actions for damages arising from competition law infringements.

The approval of Directive 104/2014 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, and its implementation by the Member States, will therefore surely represent a major step towards a more robust system of antitrust private enforcement.

However, several challenges connected to the transposition of the Directive 104/2014 still exist in Portugal. The major remaining structural issues concern whether (1) the scope of Directive 104/2014 should include infringements that do not have an effect on trade between Member States and, therefore, do not fall within the scope of Articles 101 and 102 of the Treaty; and (2) competence to judge damages actions related to competition infringements should be left with the civil courts, or given to the specialised Competition, Regulation and Supervision Court created in 2012.

In addition, several innovative provisions in the legal system are particularly challenging for Portugal due to the specific procedures contained in Articles 12/1 and 15/1. These include the provision on the binding effect of the competition authority's decisions; the provision on joint and several liability in derogations; the provision on limitation periods; and additional provisions on the burden of proof.

There are also leniency concerns related to Article 6/6 of Directive 104/2014. Although the protection of leniency documents provided for in Directive 104/2014 is already contemplated in the Portuguese legal system, the Portuguese Competition Act leniency programme covers all types of cartels, while the protection afforded to leniency statements by the Directive is confined to an application by a participant in a secret cartel. Also, Portuguese competition law extends protection to all documentation and information submitted in the scope of a leniency application, which is broader than the protection provided for in the Directive (which only covers the leniency statement itself). And finally, Directive 104/2014 does not allow for the disclosure of leniency documents, which is permitted under Portuguese competition law if authorised by the leniency applicant.

Additionally, the dramatic increase of court fees in Portugal – as a consequence of the financial crises of the country and respective international bail-out – poses a serious constraint to actions for damages as it very much increases the financial risk in bringing such actions. Such increased risk (the extent of which is yet to be determined), together

with the uncertainty of outcome due to factors such as the lack of precedents and the passing-on defence, may indeed act as a powerful deterrent to the development of actions for damages in the country.

Considering the above and that there is only so much public enforcement any competition authority can do and the importance of private enforcement for the overall level of compliance with competition law in a developed economy, the PCA is likely to play an increased and friendlier role in the advocacy and promotion of private enforcement. As its public enforcement profile is consistently increasing and its leniency programme is starting to bear fruit (and thus alleviating the fear that private enforcement could jeopardise the appetite for leniency), the PCA is now expected to follow in the footsteps of the European Commission, supporting private enforcement[62] as a key complementary dimension of its mission.

62 This could, *inter alia*, include information on private enforcement; development and publicity on the website of a list of precedents on private enforcement; public availability for a role of *amicus curiae*; quantification of damages within the public enforcement cases (already done in limited cases); and development of the training for judges and other magistrates that has been done in the last decade.

Appendix 1

ABOUT THE AUTHORS

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Gonçalo Anastácio is the partner in charge of the EU, competition and regulatory department of SRS and was previously a partner at Simmons & Simmons. His practice includes antitrust, merger control, state aid, compliance programmes and EU litigation. He joined the firm in 1998 after having worked in Genoa and Lisbon, and studied in Coimbra and Paris (Sorbonne).

In 2001, he was seconded to the EU and competition department of Simmons & Simmons in London and, in 2004 he was part of the first group of lawyers to be awarded the title of specialist in European and competition law by the Portuguese law society.

Gonçalo is ranked in the top band for competition law in Portugal of the leading international legal directories and is author and editor of a number of reference works on competition law.

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