

Private Antitrust Litigation

Consulting editor
Samantha Mobley



2018

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DEAL THROUGH

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Private Antitrust Litigation 2018

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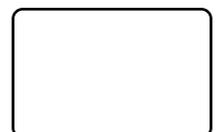


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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Even before the adoption of Directive 2014/104/EU, of 26 November 2014, on actions for damages under national law for infringements of competition law provisions of the member states (Antitrust Damages Directive), it was already indisputable that private parties may file actions for damages before the Portuguese courts where the illicit behaviour at issue consisted of a violation of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). This understating followed from the ECJ decision in *Courage v Crehan*, Case C-453/99, of 20 September 2001 (subsequently confirmed in other decisions, notably in *Manfredi*, Cases C-295/04 to C-298/04, of 13 July 2006), where the court ruled that effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss arising from an infringement of the competition rules have the right to claim damages.

As regards national courts, at least two decisions of the Supreme Court of Justice, those of 21 March 1996 and of 20 May 1997, already had recognised the possibility of claiming damages under the tort liability rules set forth in the Portuguese Civil Code, where the illicit behaviour corresponds to violation of the competition rules.

In addition, in at least two other cases (the Supreme Court of Justice in a decision of 24 April 2002 and the Appellate Court of Oporto in a decision of 9 March 2004), the courts had assessed requests for the declaration of nullity of agreements for infringement of competition rules regarding abuse of a dominant position (in the former case) and restrictive agreements and practices (in the latter decision).

While the above case law indicates some evolution in the area, it is evident that Portuguese undertakings resorting to private antitrust litigation for the settlement of competition law issues is still a developing area, a scenario that is expected to change with the transposition of the Antitrust Damages Directive.

The answers below are still based on the current Portuguese rules set out in the Portuguese Civil Code and in the Civil Procedure Code. In fact, legislation enacting the Antitrust Damages Directive should have been enacted until 27 December 2016 but this did not occur, although a draft legislation has been subject to public discussion. Such legislation is expected to be enacted before the end of 2017.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Currently, Portuguese law does not provide for any specific legal regime to be applied to private antitrust litigation, and the general civil law and civil procedure rules apply.

Any action shall, of course, have to be based on infringements of either the Portuguese Competition Act (hereinafter 'the Act', enacted by Law No. 19/2012, of 8 May 2012, which superseded the former Competition Act, enacted by Law No. 18/2003, of 12 June 2003, as amended) or of articles 101 or 102 TFEU.

The substantive Portuguese legal regime applicable to third-party claims for damages is defined in articles 483 et seq and 562 et seq of the Portuguese Civil Code, which set out the general rules on liability

for illicit acts. According to the general Civil Code rules, the standard liability requirements are: the finding of blameful or negligent illicit behaviour, proof of injury to the claimant and the demonstration of a causal link between the illicit conduct and the damage.

Furthermore, actions may be initiated to obtain a declaration of nullity of an agreement for breach of the competition rules, pursuant to articles 280 or 294 of the Portuguese Civil Code.

The procedural framework within which private parties may bring claims before Portuguese courts of law is set forth in the Portuguese Code of Civil Procedure.

As regards standing, under the Portuguese civil procedure rules, the plaintiff is required to have a direct interest in filing the lawsuit. Such interest is expressed by the usefulness for the plaintiff of a decision upholding the claim. Unless otherwise provided for in the law, the parties to the relationship underlying the dispute, as described by the plaintiff, are considered to have a direct relevant interest. Accordingly, and depending on how it describes the said relationship, a plaintiff such as an indirect purchaser may have standing. In any event, in the cases where the standing of an indirect purchaser may be established, the existence of the causal link shall likely be more difficult to demonstrate.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

In the absence of a specific legal regime, private antitrust actions are handled and decided by judicial courts of first instance with generic competence.

Appeals to the upper courts (the appellate courts and the Supreme Court of Justice) are generically admitted, provided the legal requirements, as set out in civil procedure law, are met.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions may be brought on the basis of any conduct which constitutes an infringement of either the Act or articles 101 or 102 TFEU. These include cartels, abuse of dominant position or abuse of economic dependence. Private actions are also available to obtain a declaration of nullity of an agreement for breach of the competition rules. A finding of infringement by a competition authority is not a requirement for a private antitrust action but it renders in principle easier for the claimant to demonstrate the existence of such infringement.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

In general, and unless the parties have agreed otherwise, the domicile of the defendant determines the territorial competence of the courts.

In the case of tort liability, such as that arising from the infringement of antitrust rules, an action may be brought before the court of the place where the infringement took place.

Under certain conditions, the parties may agree to attribute, in writing, to a certain jurisdiction the competence to hear the claim.

Nonetheless, when the Portuguese courts are competent, the court of the place where the infringement took place is mandatorily competent.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Individuals and undertakings may file actions for damages before the Portuguese courts if they have suffered damage within the Portuguese territory.

Where matters involve individuals or legal entities established outside the Portuguese territory, the territorial jurisdiction of the Portuguese courts will be governed by the Lugano Convention of 30 October 2007 or Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). In the cases where the Lugano Convention and Council Regulation No. 1215/2012 are not applicable, the matter will be governed by articles 59, 62 and 63 of the Portuguese Civil Procedure Code. Article 62 of the Portuguese Civil Procedure Code prescribes that the Portuguese courts have international competence, among other situations, where:

- the action may be brought before a Portuguese Court according to the rules of international competence established in Portuguese law;
- the fact that constitutes the cause of action, or any of the facts that are part of such cause, has been performed in Portugal; or
- the right invoked can only be enforced with an action brought in the Portuguese territory or it is appreciably difficult for the plaintiff to bring an action before foreign courts, provided that there is a relevant element of connection between the object of the action and the Portuguese legal system.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

In principle, nothing prevents the funding of litigation by third parties.

As regards fees, the Portuguese Bar Association Statute, enacted by Law No. 145/2015 of 9 September, prohibits agreements entered into by an attorney and the client before the conclusion of the case whereby the attorney's fees would be exclusively dependent on the result attained and by virtue of which the client would only have to pay to the attorney a part of the result (quota litis arrangements). However, an arrangement consisting of the prior fixing of the amount of the attorney's fees, even as a percentage of the amount of the claim entrusted to the attorney, is permitted. Arrangements whereby a success fee is payable alongside fees determined on the basis of the other criteria are also permitted.

As a rule, fees must be determined taking into account the time spent, the complexity and the urgency of the matter handled, the degree of the attorney's intellectual innovation required and the results attained.

8 Are jury trials available?

No.

9 What pretrial discovery procedures are available?

Discovery as known in common law systems is not available under Portuguese law.

However, courts can order, on their own initiative or on request from the parties, that information, objects, technical opinions or other documents be submitted to the court if they are considered necessary to prove the relevant facts.

Failure to comply with a court order relating to the disclosure of information, documents or objects by a party in the proceedings or by a third party represents an infringement of the general duty of co-operation with the court, and can give rise to fines. In addition, the court can freely assess the significance of a refusal to comply with its disclosure order for evidence purposes. However, refusal to collaborate with the court is considered legitimate if, for example, complying with the court order would imply a violation of privacy rights or professional secrecy obligations. Access to company books and other corporate documentation is also subject to legal restrictions.

Prior production of evidence, including witnesses' depositions or inspections, is admitted on request from any of the parties, provided there is a reasonable concern that the production of such evidence may become impossible or very difficult.

10 What evidence is admissible?

All types of evidence are admitted, except if otherwise provided for in the law (for example, regarding some facts the law may require a specific type of document, such as a public registration certificate).

Types of evidence more commonly used include testimony, documents, expert opinions, confessions and inspections.

The court freely assesses the evidence submitted and decides in accordance with its beliefs, with the exception that, as stated above, to prove certain facts the law may require the fulfilment of special formalities.

11 What evidence is protected by legal privilege?

As a general rule, under Portuguese law every person has a duty of cooperation with the courts in discovering the truth.

However, in cases where the fulfilment of the duty of cooperation implies the violation of professional secrecy (including banking secrecy), public officers' secrecy, religious secrecy or state secrecy, the law allows for the legitimate refusal to fulfil such duty. With the exception of state secrecy (which, if confirmed by the Ministry of Justice, cannot be breached) or religious secrecy (which can only be breached if the refusal to cooperate is found illegitimate), the law permits that a court, after hearing the entity that represents the profession related to the secrecy, can order cooperation if it finds the refusal illegitimate or if it considers that a relevant interest must prevail.

As to in-house counsel advice, the above secrecy rules and the corresponding protection by legal privilege shall only apply where the in-house counsel is registered with the Portuguese Bar Association.

With regard to trade secrets, they are privileged and the judge shall take into account the need to protect them, especially when their safeguard does not put the interest of the investigation at stake. It must also be noticed that, under the Labour Code, employees must not disclose trade secrets of their employer. On the other hand, if the discovery of the trade secrets was made through illicit means, their disclosure shall entail civil and criminal liability.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Under the Act, competition law infringements are not considered crimes, but rather quasi-criminal minor offences, without prejudice, however, to any criminal liability that may arise from any behaviour qualified as criminal associated with a competition law infringement.

It may occur, therefore, that a competition law infringement which in itself does not constitute a crime may also involve behaviour that may entail criminal proceedings. However, any criminal conviction that may arise from such criminal proceedings shall not, in principle, prevent the filing of a private antitrust lawsuit based on the infringement of the competition law rules and not on the conduct that originated the criminal proceedings.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence or findings in criminal proceedings against an undertaking may, with limitations, be relied upon by plaintiffs in parallel private actions. In fact, the parties' or witnesses' statements, or evidence produced by a panel of experts, may be considered for these latter actions, but only if such evidence has been obtained in a procedure in which the concerned undertaking has been heard.

Under the Portuguese leniency regime, the Competition Authority can grant immunity or a reduction in fines in procedures for quasi-criminal minor offences which concern agreements and concerted practices prohibited by article 9 of the Act and (where applicable) article 101 TFEU. However, leniency applicants, although benefiting from the protection that, to a certain extent, is granted by

Update and trends

Directive 2014/104/EU of 26 November 2014 on actions for damages under national law for infringements of competition law provisions of the member states should have been transposed into the Portuguese legal system by 27 December 2016.

For the above purposes, on 26 April 2016, the Portuguese Competition Authority opened a public consultation process submitting a draft legislation to public discussion. On 29 May 2016, the Competition Authority announced that it had received contributions from various organisations (including Gómez-Acebo & Pombo).

On 24 June 2016, the Competition Authority announced that, taking into account the contributions received, it has sent the proposed draft legislation to the government. So far, and for reasons that have not been made public, the said legislation is still to be enacted but this is expected before the end of the year.

the rules regarding the access to information are not protected from the possibility of being subject to follow-on litigation.

Under the Act, the Authority must publish in its website the final decisions adopted in restrictive practices proceedings, ensuring the protection of business secrets and other information considered confidential. In addition, the access to the file may be granted to any individual or legal entity that demonstrates a legitimate interest and applies for such access. However, information classified as confidential for business secrets' reasons, which is used as evidence by the Authority, may only be accessed by an attorney or outside economic adviser within the framework of the exercise of rights of defence or of appeals of the Authority's decisions in which such documents were used as evidence.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

A defendant may request that the court stay the proceedings, and the court may on its own motion order such stay, in cases where the matter is being assessed in a procedure opened by the European Commission, in accordance with article 16 of Council Regulation (EC) No. 1/2003 of 16 December 2002.

Furthermore, under article 272(1) of the Portuguese Civil Procedure Code, the court may order a stay of the proceedings whenever (i) the decision is dependent on a judgment in proceedings already pending in another court, or (ii) a justified reason occurs. It is therefore sustainable that the fact that a given possible infringement of competition law is being investigated by the Competition Authority may constitute a justified reason for the court to order, on its own motion or upon request from a party, the stay of the proceedings in which such infringement is to be assessed by the court.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

As a rule, the burden of proof relative to each fact submitted to the court rests with the party that invoked the fact in question to substantiate its rights. Accordingly, in competition law-related claims for damages, it is the plaintiff who must prove the existence of an infringement of competition legislation, the damage and the causal link between the infringement and the damage. Conversely, the defendant must prove the facts, such as a passing on defence, that hinder, modify or extinguish the effects of the facts alleged by the plaintiff. There are not, in respect of such claims, deviations from this regime, particularly rebuttable presumptions.

There are no special rules or established case law defining a specific standard of proof in competition law private actions for damages. Under the general rules, in case of doubt, the judge shall decide against the party that has invoked the facts at stake to demonstrate its right.

The existence of a prior decision of the Competition Authority concerning the infringement of competition rules invoked by a private claimant in the context of court proceedings for an award of damages may greatly facilitate the production of evidence in favour of the claimant, especially if such a decision has not been appealed or has been upheld by the courts.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

It is not possible to anticipate precisely what the length of proceedings may be, as it may vary greatly from case to case. However, in view of the complexity inherent to most actions for damages based on the infringement of the competition rules, and considering the usual duration of proceedings relating to damages claims, one may estimate that the adoption of a decision by the first instance court may occur several years after the lawsuit is filed (easily over two years after the initiation of the proceedings). Moreover, after the first instance court adopts a decision, in some cases, two degrees of appeal to higher courts will be available. These appeals will normally take another one to two years to be decided. It is not possible to accelerate the proceedings.

17 What are the relevant limitation periods?

Under article 498 of the Portuguese Civil Code, actions for damages must be initiated within three years from the injured party acquiring knowledge of its right, even if without knowing who the responsible person is and the full extent of the damage and, in any event, no later than 20 years (absolute limitation period) from the date of the act causing the damage.

As regards requests for a declaration of nullity of an agreement, under Portuguese law, such nullity may be invoked at any time by any interested party and may be declared ex officio by a court (article 286 of the Portuguese Civil Code).

18 What appeals are available? Is appeal available on the facts or on the law?

Decisions of first instance courts may, in principle, be the object of appeals in one or two degrees of jurisdiction, depending on the value of the case (in principle, the economic value associated with the claim), the grounds for the appeal, or both. The first degree of appeal is before the appellate courts, which may decide on matters of either fact or law. The second degree of appeal is before the Supreme Court of Justice, which only decides on matters of law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

There is no specific regime governing class actions regarding infringements of competition law. However, since 1995, a form of class action for damages has been admitted under Portuguese law. Law No. 83/95 of 31 August 1995, which defines the regime applicable to 'people actions', confers upon any citizens (legal entities or professionals are excluded) or associations and foundations that promote certain general interests the right to claim compensation arising from an injury caused by the violation of such general interests. Arguably, the promotion and protection of competition are among the general interests that may justify the initiation of a 'people action'. However, up to now, 'people actions' have rarely been filed and, to our knowledge, only one with respect to the violation of competition laws is pending. 'People actions' follow, with some deviations, the regime set out in the Civil Procedure Code for ordinary civil actions.

20 Are collective proceedings mandated by legislation?

See question 19.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Can plaintiffs opt out or opt in?

In 'people actions', the plaintiff represents, in principle, all owners of the concerned rights or interests without need for any mandate or express authorisation.

Under the law, the above owners of the concerned rights or interests who do not intervene in the proceedings are granted the possibility

of, within a period fixed by the court, intervening in such proceedings as parties thereto, accepting them in the phase in which they are, and declaring whether they agree to be represented by the plaintiff or, on the contrary, whether they wish to be excluded from such representation. The silence of the owners of the concerned rights or interests shall be deemed as acceptance of representation by the plaintiff, without detriment to the right of such owners to refuse the representation by means of an express statement in the proceedings until the end of the evidence-taking or equivalent phase.

24 Do collective settlements require judicial authorisation?

There are no deviations in this respect from the general civil procedure rules. As in ordinary cases, any judicial settlement is subject to confirmation by the court.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

26 Has a plaintiffs' collective-proceeding bar developed?

No.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Article 562 of the Portuguese Civil Code determines that the entity that is under an obligation to repair an injury must put the plaintiff back into the position that would have existed had the event that determines the need for reparation not occurred.

Pursuant to article 566 of the Portuguese Civil Code, reparation shall only take the form of monetary compensation if 'restitution' is not possible, does not fully repair the damage suffered or is excessively costly for the debtor. Forms of reparation which are alternative or complementary to monetary compensation may arguably include, for instance, orders determining that a defendant must adopt measures to re-establish competition or cease any anticompetitive practices.

If applicable, monetary compensation shall be measured by the difference between the actual financial situation (ie, all tangible and intangible assets, money, etc) of the damaged party and what the financial situation of such party would have been if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct, but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action. Predictable future damage shall be taken into account for this purpose. Indeterminable future damage, however, shall be the object of a later decision.

Portuguese law does not fix any maximum limits for the level of damages to be awarded in accordance with the above-described rules.

With regard to actions aimed at obtaining a declaration of nullity of an agreement, such declaration shall determine the return of all that each party has provided to the other pursuant to the null agreement, or the corresponding amount should such return not be possible (article 289(1) of the Portuguese Civil Code).

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

If there is a justified fear of serious damage to a right that would be difficult to rectify, interim remedies that may be adequate to preserve or protect the threatened right may be requested to the court. Such interim remedies have an urgent nature and are aimed at preventing risks arising out of any delays to which the main proceedings (ie, the private antitrust action) may be subject. Moreover, interim remedies depend on such main proceedings. In the interim remedies proceedings, the claimant must prove the likelihood of the existence of its right (*fumus bonni iuris*) and of the irreparable damage it would suffer in the absence of the interim measures (*periculum mora*).

29 Are punitive or exemplary damages available?

No.

30 Is there provision for interest on damages awards and from when does it accrue?

Under article 805(3) of the Portuguese Civil Code, in tort liability actions in which compensation is actually awarded by the court, late payment interest is due as of the date the defendant was summoned for the proceedings. Such interest is calculated at the legal rate established by the government, which is currently 4 per cent.

The same rules apply, in principle, when an agreement is declared null and the return of any amounts from one party to the other is determined pursuant to such declaration.

31 Are the fines imposed by competition authorities taken into account when setting damages?

As mentioned in question 27, reparation of an injury primarily aims to restore the situation that would have existed had the event that determined the need for the reparation not occurred. Accordingly, possible fines imposed by the Portuguese Competition Authority, the quantification of which is subject to specific criteria set out in article 44 of the Act, are not to be taken into account by a court in fixing the amount of the compensation for damages.

However, as mentioned in question 15, the existence of a prior decision of the Competition Authority concerning the infringement of competition rules invoked by a private claimant in the context of court proceedings for an award of damages may greatly facilitate the production of evidence in favour of the claimant, especially if it has not been appealed or has been upheld by the courts.

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32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Two types of legal costs should be considered: on the one hand, the 'court fee', and on the other, expenses relating to services requested by the court and other costs incurred by the court in connection with the proceedings (for example, costs resulting from the intervention of experts appointed by the court).

The amount of both court fees and expenses applicable in each case is defined in accordance with the Regulation on Judicial Costs, and thus may be estimated by plaintiffs prior to filing the action. The amount of the court fees largely depends on the initial amount of the claim or claims made before the court.

Legal costs are initially borne by all the parties. However, at the end of the proceedings, the court shall determine the proportion of the costs to be borne by each party. The basic rule is that the 'losing party' shall bear the full amount of the costs. In case of partial loss, the costs shall be divided proportionally among the concerned parties. As regards attorneys' fees, under the Regulation on Judicial Costs, the winning party may request the losing party to pay the former's attorneys' fees. However, a losing party is not liable for attorneys' fees exceeding 50 per cent of the applicable court fees.

33 Is liability imposed on a joint and several basis?

Under the tort liability regime, if the infringement is carried out by more than one person or entity, all the involved persons or entities shall be jointly and severally liable for the damages caused (articles 490 and 497(1) of the Portuguese Civil Code).

If a defendant pays more than its share of the damages awarded to the plaintiff, such a defendant may claim from the remaining liable persons or entities the corresponding contribution, which shall be proportional to their culpability and to the consequences of the latter. Such culpability is presumed equal for all the involved persons or entities (article 497(2) of the Portuguese Civil Code).

34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

See question 33.

35 Is the 'passing on' defence allowed?

Under tort liability rules, the injured party is only entitled to recover damages actually suffered as a result of the infringing behaviour. If it is proved that some of the damages claimed by the plaintiff were actually suffered by a third party to whom the plaintiff has been able to 'pass on' such damages, then the court shall not award the plaintiff those 'passed-on' damages.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are no specific defences against private antitrust claims. Defendants may use any defence allowed against tort liability claims.

37 Is alternative dispute resolution available?

Unless a dispute is, under special law, exclusively subject to the jurisdiction of a judicial court and the dispute concerns rights that cannot be waived, the parties may agree to submit any dispute, including tort liability disputes, to an arbitration court to be constituted and to operate under Law No. 63/2011, of 14 December 2011.

Parties may also seek to resolve a dispute through mediation.

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