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The International Comparative Legal Guide to:

Competition Litigation 2014

6th Edition

A practical cross-border insight into competition litigation work

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The International Comparative Legal Guide to: Competition Litigation 2014

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Portugal

Albuquerque & Associados

António Mendonça Raimundo

1 General

1.1 Please identify the scope of claims that may be brought in Portugal for breach of competition law.

As this chapter focuses mainly on the private enforcement of competition law, we will only address the specific private enforcement of competition law in Portugal.

In Portugal, injunctions or claims can be brought before courts by any person who has suffered due to anticompetitive practices. Such claims can be brought to obtain a declaration of nullity of any agreement or specific clause or practice considered to be anticompetitive and/or can be used to obtain a compensation for the damages suffered.

1.2 What is the legal basis for bringing an action for breach of competition law?

The legal basis for competition law claims in Portugal can derive either from national law or directly from EU law.

The recently adopted PCA – Law nr. 19/2012, of 8 May (hereinafter "PCA") – establishes the new general competition legal act concerning mergers, anticompetitive practices and abuses of dominant position.

Restrictive Agreements and Similar Practices:

The PCA prohibits, in its article 9, agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their purpose or effect the prevention, restriction or distortion of competition. Said agreements between undertakings may be legally binding agreements, informal agreements or simple arrangements between undertakings.

As regards concerted practices, they generally involve fixing of market conditions and business actions taken in parallel, for instance through a sudden and simultaneous rise in prices for a given product.

Similarly to article 101 of the TFEU, the PCA also provides examples of restrictive practices:

a) Direct or indirect fixing of purchase or selling prices or of any other business conditions.

b) Limitation or control over production, the distribution, technical development or investments.

c) Sharing of markets or sources of supply.

d) Application to trade partners of dissimilar conditions to equivalent transactions, therefore placing them in disadvantage in the competition.

e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Abuse of a Dominant Position:

The PCA prohibits, in its article 11, the abuse of a dominant position which is deemed to occur where an undertaking i) holds a dominant position in the relevant market, and ii) exploits it in an abusive manner.

According to the European Court of Justice's jurisprudence, a dominant position relates to a position of economic strength that enables an undertaking to prevent effective competition from being maintained in the relevant market by granting it the power to behave in a considerable extent regardless of its competitors, customers and consumers.

There shall be an individual or collective dominant position with regard to a given product or service if i) a company acts in a market in which it is not subject to significant competition, or ii) two or more companies behave in a concerted manner on a market in which they do not have significant competition or in which they prevail over others (joint dominance).

Similarly to article 102 of the TFEU, the PCA also provides examples of restrictive practices:

a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

b) Limiting production, markets or technical development to the prejudice of consumers.

c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

e) Refusing access for another undertaking to a network or other essential facilities that it controls, against the appropriate payment, provided that such undertaking without it cannot act, for *de facto* or legal reasons, as a competitor of such undertaking in a dominant position in the upstream or downstream markets, except if the dominant undertaking evidences that such access is not reasonably possible for operational or other reasons.

The last example is innovative when comparing the wording of the national law with EU law provisions. However, in practice, the same understanding and practice is followed within the EU scheme.

Abuse of Economic Dependence:

In addition to the abuse of dominant position, the PCA also prohibits, in its article 12, the abuse of economic dependence,

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which intends to prevent the abuse by one or more undertakings of the economic dependence over a supplier or client that has no equivalent alternative.

Other Types of Prohibited Conduct:

Portuguese legislation also prohibits individual commercial practices regarding activities which do not *per se* have effects on competition. Despite not being considered a competition law matter, the authority in such proceedings is also the Portuguese Competition Authority and therefore we consider it important to mention such practices briefly.

Accordingly, Decree-Law nr. 370/93 establishes the obligation for undertakings to hold price listings and details on the corresponding sale conditions regarding their products or services and prohibits the i) offer of discriminatory prices or conditions of sale, ii) sales below costs, iii) refusal to sell goods or provide services, and iv) abusive business practices.

When the above-referred anti-competitive practices occur, the infringement of articles 9, 11 or 12 of the PCA, and also if the infringement of articles 101 or 102 of the TFEU occurs, any affected person is entitled to bring appropriate action before the competent courts.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Depending on the specific case, the legal basis for competition law claims in Portugal is provided in the general rules of Portuguese civil law in connection with the specific provisions infringed, either the infringement of the national competition law provisions described above – articles 9, 11 and 12 of the PCA – or the infringement of articles 101 and 102 of the TFEU which are directly applicable and enforceable in Portugal before both the Competition Authority and the courts.

In accordance with the Portuguese general rules of civil law, if someone suffers a loss as a result of an anticompetitive practice, i.e., as a consequence of the infringement of the above-referred national or EU law provisions, such person is entitled to ask for damages before the competent courts.

1.4 Are there specialist courts in Portugal to which competition law cases are assigned?

Depending on the procedure at stake, different entities are considered competent, which can be summarised as follows:

Complaints Regarding Competition Law:

As a preliminary note, we would like to refer that pursuant to Portuguese law, offences to competition law are administrative offences. The complaints regarding competition law issues are presented before the Portuguese Competition Authority. If the Competition Authority becomes aware of facts which may indicate the existence of an infringement of the national and EU competition law provisions, it starts the procedure aiming to identify the prohibited practices as well as their agents. The Competition Authority may obtain such information under its own initiative and by its own means or through complaints presented to it by public bodies or natural or legal persons.

Appeals from the Portuguese Competition Authority's Decisions:

The dispute of decisions or measures (when appealing is possible) taken by the Portuguese Competition Authority are brought before the Competition, Regulation and Supervision Court (*Tribunal da Concorrência, Regulação e Supervisão*) (recently created by Law nr. 46/2011, of 24 June).

Court decisions issued by the Court of Competition, Regulation and Supervision may be appealed before the competent Court of Appeal.

Private Enforcement of Competition Law:

With regard to private enforcement of competition law, in Portugal there are no specialised courts so the local judicial courts are competent (specifically determined in accordance with specific procedural rules).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

When any anticompetitive practice occurs – the infringement of articles 9, 11 or 12 of the PCA, and also the infringement of articles 101 or 102 of the TFEU – any affected person, natural or legal, is entitled to bring appropriate actions for damages before the competent courts under the terms of article 483 of the Portuguese Civil Code.

Collective claims are possible under the terms of articles 30 and 31 of the Portuguese Civil Procedural Code provided that the cause of action is the same or connected/dependent on each other and also when the analysis of the case depends mainly on the same facts or the interpretation and application of the same norms or of analogous contractual clauses.

Also, under Portuguese law, it is theoretically possible to bring a claim called "popular action" (*acção popular*) which is somehow similar to class actions. Such judicial actions are ruled by Law nr. 83/95 of 31 August, and may be brought by any citizen, association and/or foundation that promotes the protection of the general interests described in the Portuguese Constitution (article 52/3) (such as public health, environment, consumer products or safety, cultural heritage and public domain) in order to ask for compensation for the infringement of the respective provisions. However such judicial instrument was never used in Portugal with regard to the infringement of competition provisions.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The general procedural rules on action for damages, established in the Portuguese Civil Procedural Code, are also applicable to competition law actions for damages.

The International Competence of the Portuguese Courts:

Portuguese courts will be considered competent whenever an EU or International Instrument determines so and besides that – and in summary under article 61 (international competence of the Portuguese courts), article 65 (requirements for considering the international competence of the Portuguese courts), and article 65-A (exclusive competence of the Portuguese courts) of the Portuguese Civil Procedural Code – Portuguese courts will also be considered competent in the following cases:

a) The defendant, or one of the defendants, is domiciled in Portuguese territory, unless it concerns legal proceedings on real property or personal rights on real property located in a foreign country. A corporation is considered domiciled in Portuguese territory if it has its registered or effective office in Portugal or has a branch, agency, subsidiary or delegation in Portugal.

b) The legal proceedings should be initiated in Portugal, according to the Portuguese rules on territorial jurisdiction.

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c) The cause of action or some of the facts related thereto were carried out in Portuguese territory.

d) The claimed right may only become effective through legal proceedings initiated in Portugal, or if it is too burdensome for the plaintiff to initiate the legal proceedings abroad, provided that there is an important person or real link between the subject of litigation and Portuguese legal system.

The Internal Competence of the Portuguese Courts:

The local competence of Portuguese courts is, in these cases, ruled by article 74 of the Portuguese Civil Procedural Code. In summary, for contractual liability actions, the court of the defendant's place of residence is the competent court; it is possible for the claimant to choose the court of the place where the obligation should have taken place when the defendant is a legal person or if both the claimant and the defendant have domicile in the metropolitan area of Lisbon or in the metropolitan area of Oporto. For extra-contractual liability actions (which include civil liability based on illicit facts) the court where the facts took place is considered the competent court.

1.7 Does Portugal have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

We consider that in terms of private enforcement, as well as in terms of public enforcement, Portugal does not have any of such reputation. Moreover, given the Portuguese legal and judicial system, we do not identify a tendency for such to occur.

1.8 Is the judicial process adversarial or inquisitorial?

Appeals from the Portuguese Competition Authority's Decisions:

The judicial process of appealing from a decision issued by the Portuguese Competition Authority is inquisitorial.

Private Competition Litigation:

The judicial process under the private enforcement of competition law, which occurs before the local judicial courts, is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Under the terms of article 34 of the PCA, in case the Competition Authority finds a specific practice to be responsible for damaging competition or a third parties' legitimate interests, it may take interim remedies in order to restore competition or to ensure the effectiveness of its final decision.

As to private enforcement of competition law, in accordance with Portuguese procedural law, interim measures may also be ordered by the judicial courts when specific conditions are met.

2.2 What interim remedies are available and under what conditions will a court grant them?

Said measures may involve the immediate suspension of the restrictive practice or any other temporary measures needed to restore competition or to ensure the effectiveness of the final decision and may be applied by the Portuguese Competition Authority under its own initiative or further to a request presented by an interested party.

If a market subject to sectoral regulation is at stake, the Portuguese Competition Authority previously requests the opinion of the respective regulator.

In general, interim measures are ordered only after the parties concerned were heard, except in urgent cases, where it is possible to immediately order an interim measure.

The Portuguese Competition Authority may only order interim measures in special cases, as said measures are restricted to circumstances where the damage at stake is imminent, serious and irreparable or very difficult to rectify. However the application by the Portuguese Competition Authority of such interim remedies is, so far, very scarce.

In what regards private enforcement and the application of such measures by the judicial courts, such application is also possible when the requirements are met. It is established in article 381/1 of the Portuguese Civil Procedural Code that whenever someone demonstrates a justified fear that a third party may cause serious and difficult-to-repair damages to his right, he may request the provisional or anticipated measures specifically appropriate to ensure the effectiveness of the threatened right.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Fines by the Portuguese Competition Authority:

As a preliminary note we would like to refer that pursuant to Portuguese law, offences to competition law are administrative offences. Accordingly, such offences are not prosecuted criminally *per se*.

The restrictive practices, better described in question 1.2 above, are administrative offences punishable by the Portuguese Competition Authority with a fine of up to 10 per cent of the undertakings' involved turnover in the previous year. In case the infringement is attributable to an association of undertakings, the fine shall have regard to the aggregate annual turnover of its associated undertakings.

The fines are determined considering the following circumstances:

a) Seriousness of the infringement to the maintenance of effective competition in the Portuguese market.

b) The nature and size of the market affected.

c) The duration of the infringement.

d) The degree of involvement in the infringement by the party concerned in the case.

e) The advantages gained by the concerned party in the prohibited practices stemming from the infringement, when such advantages can be identified.

f) The behaviour of the concerned party in the process of eliminating the prohibited practices and repairing the damage caused to competition.

g) The economic situation of the concerned party.

h) Previous administrative offences by the concerned party involving an infringement of competition rules.

i) Cooperation with the Competition Authority throughout the proceedings.

Article 73/6 of the PCA provides that the members of the board of directors of the legal person or equivalent entity, as well as those responsible for the management or supervision of the areas of activity where there has been an administrative offence, are also

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punishable with the same fine when acting in their name and in their collective interests or when, despite knowing or having the duty to know about an infringement committed, they did not adopt the appropriate measures to terminate it forthwith, unless they are liable to a more serious sanction through another legal provision.

In case the Competition Authority considers that the undertakings concerned engaged in a serious infringement, it shall order the publication of the decision in the official gazette ("*Diário da República*") or in a Portuguese newspaper having national, regional or local circulation, depending on the relevant geographical market in which the prohibited practice produced its effects.

Also, the Portuguese Competition Authority can impose a ban on the undertakings involved on the right to take part in the procedures for contracts where the purpose is to offer typical services of public works contracts, public service concessions, leasing or acquisition of movable assets or the acquisition of services or procedures involving the award of licences or authorisations, in those cases where the practice that has led to an administrative offence punishable with a fine has occurred during or because of such procedures.

In addition, undertakings which fail to comply with a decision of the Authority imposing a penalty or ordering the application of certain measures also incur a compulsory periodic penalty payment which may amount to 5 per cent of the undertaking's average daily turnover in the previous year for each day of delay in the fulfilment of such decision.

The individual commercial practices referred in question 1.2 above are also administrative offences punishable within the following terms: i) the infringement of the obligation to hold price listings and details on the corresponding sale conditions of the products or services is punishable with a fine from Euro 249.40 to Euro 1,246.99, when committed by individuals, or from Euro 498.80 to Euro 2,493.99, when committed by undertakings; or ii) the offer discriminatory prices or conditions of sale, sale below costs, refusal to sell goods or provide services and the performance of abusive business practices are all punishable with a fine from Euro 748.20 to Euro 3,740.98, when committed by individuals, or from Euro 2,493.99 to Euro 14,963.94, when committed by corporate entities.

Private Enforcement of Competition Law – Final Remedies by Judicial Court:

If the requirements established in article 483 of the Portuguese Civil Code are met and when it is possible to provide evidence before a court and under the Portuguese Civil Procedural Law of: i) the occurrence of an infringement of a legal provision, i.e., the existence of an anti-competitive practice; ii) the occurrence of damages; and finally iii) the "causal link" between such infringement and the occurrence of such damages, then there is legal ground for an action for damage.

The forms of compensation possible are "natural reconstitution" and monetary compensation (only in cases where the natural reconstitution is not feasible or effective or when it is excessively costly for the debtor).

Also, in accordance with Portuguese law, a declaration of nullity of any agreement or specific clause or practice considered to be anticompetitive – under either national laws or the TFEU – can be brought before a court. Under article 289 of the Portuguese Civil Code, such declaration of nullity has a retroactive effect and will imply the order to return everything that each party has provided under the terms of the annulled agreement, clause or practice, or the corresponding amount when such return is not feasible.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

As referred to above, actions for damages can be filed before a Portuguese court if the claimant is able to provide evidence that it has suffered damages as a result of the anti-competitive practices (therefore they are easier to file after the final decision on a case) and the above-mentioned "causal link" between such infringement and the damages.

Under articles 562 and 566 of the Portuguese Civil Code, the forms of compensation possible are "natural reconstitution" and monetary compensation. Monetary compensation will only be ordered when the natural reconstitution is not possible or effective or when it is excessively costly for the debtor.

Also under article 563 of the Portuguese Civil Code, the compensation that a court may grant will be strictly limited to the damages that the claimant would probably not have suffered, in case the infringement had not occurred (the so-called "causal link").

The general principle underlying the compensation is the recovery of the situation that would exist should the infringement not have occurred. As such, it is determined by article 564 of the Portuguese Civil Code that the duty to indemnify includes not only the damage, but also the benefits which the plaintiff failed to obtain as a result of the damage. Also, it is established by the same article that, in setting the respective compensation, the court may consider future damages, provided they are predictable; if these damages are not determinable, the determination of the relevant compensation will be delayed for a later decision.

This notwithstanding, there is no significant case law in Portugal regarding actions for damages in competition cases.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

There are no legal provisions that impose the court to take into account the fines imposed by the competition authorities or by the European Commission.

4 Evidence

4.1 What is the standard of proof?

Litigation on the Competition Authority Decisions/Actions:

Within the Portuguese Competition Authority proceedings, all the facts legally relevant for demonstrating the existence or non-existence of an infringement, identifying whether the actions are punishable or not, determining the punishment that can be applied and setting the amount of the fine that can be imposed are possible to serve as evidence except the ones prohibited by law.

However, it is important to stress that competition litigation strictly follows the criminal procedural rules and therefore the standard of proof lies essentially with the firm conviction of the judge based on the evidence presented always having in mind the so-called "principle of the material truth". Also in this kind of proceeding, there are some important principles that must be followed such as the "*in dubiu pro reu*" principle and the defendant's right to remain silent. As such, and also related to the same principles, the judge must only condemn when there is no reasonable doubt and if there is a reasonable doubt that the defendant shall be discharged of all the accusations.

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Private Competition Litigation:

With regard to the Portuguese private enforcement of competition law cases, the standard of proof of the relevant facts is also based in the freedom of the judge to decide according to his prudent conviction and experience, unless a legal assumption is foreseen or a certain formality is required in order for the fact to be considered proved (article 655 of the Portuguese Civil Procedural Code). This rule is particularly relevant regarding the testimonial evidence, which is the most usual form of evidence admitted.

Concerning this issue, the Coimbra Court of Appeal ("*Tribunal da Relação de Coimbra*") in a decision issued on 12 October 2010 (Case 155/2002.C1), decided that: "*The assessment of evidence shall be resolved with the creation of judgments, in the creation of logical reasoning, judgments and reasoning that emerge in the spirit of the Judge, according to the experience obtained and accumulated in his mind according to the psychological procedures that govern the exercise of his intellectual activity and, therefore, according to the rules of experience and logic*".

In general terms, all the forms of evidence are admitted regardless of the party that brings the evidence to the proceedings (article 515 of the Portuguese Civil Procedural Code) and therefore one party can benefit from evidence brought by the counterparty to the proceedings. Both parties are called to cooperate with the court in order to find the material truth in accordance with article 519 of the Portuguese Civil Procedural Code. If any doubt regarding the facts or the burden of proof subsists, the court should decide against the party that benefits from the evidence of the fact as provided by article 516 of the Portuguese Civil Procedural Code.

4.2 Who bears the evidential burden of proof?

In all Portuguese private law, in principle, the burden of proof lies with the claimant.

In accordance with article 342 of the Portuguese Civil Code, which establishes the general principle on this matter, one who claims a right must adduce proof about the facts that ground the alleged right. Therefore, in the private competition litigation, the burden of proof lies with the claimant.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In competition law as in general civil litigation, all the forms of evidence are, in principle, admitted unless the evidence is obtained by infringing the law.

Documentary evidence can be presented until the end of the trial. However, if it is done after the delivery of the initial petition, the court may condemn the party to the payment of a penalty in case the document could be delivered with the petition that initiates the proceedings (article 523 of the Portuguese Civil Procedural Code). In cases where the law establishes that a fact must be proved through documentary evidence, it cannot be proved through any other form of evidence, namely through testimonial evidence.

Testimonial evidence is one of the most important and usual forms of evidence foreseen. Generally, the party can present up to twenty witnesses as set out by article 632 of the Portuguese Civil Procedural Code. For each fact the party can present up to five witnesses in accordance with article 633 of the Portuguese Civil Procedural Code.

Expert evidence is also accepted by the court. The court can indicate a single expert, if both parties agree on the expert to be indicated (article 568 of the Portuguese Civil Procedural Code). The parties are able to request, or the court is able to itself determine, based on the complexity of the case and under the terms established by article 569 of the Portuguese Civil Procedural Code, an expert opinion to be issued by a group of three experts. If an agreement is not possible, two experts are to be indicated by the parties (one for each) and a third one designated by the court. If the issue is particularly complex, the court might officially indicate the realisation of the proof by a group of three experts.

Also, the law entitles each party to present before the court any expert evidence considered relevant, the probative value of the evidence always being subject to the free establishment of the judge under the terms of article 389 of the Portuguese Civil Code.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

In Portugal, the access to administrative documents is generally governed by Law nr. 46/2007, of 24 August; said law also implements EU Directive 2003/98/EC concerning the re-use of public sector documents.

The above-referenced law establishes, as a general rule, the principle of free access to the administrative documents, which includes the right to consult, reproduce and obtain information concerning the existence and content of said documents (article 5). The access to administrative documents can be denied by the Portuguese authorities if the documents are preparatory to an administrative decision or included in a procedure which is not yet finished, until the issuing of the decision, the archiving of the procedure or until one year after it is elaborated (article 6).

In order for a third person to have access to nominative documents, the presentation of a written authorisation issued by the person to whom the information concerns is mandatory, unless the third person claims direct, personal and legitimate interest sufficiently relevant according to the proportionality principle. The same rule is applied if the administrative documents contain commercial or industrial secrets, or information concerning the internal life of a company (article 6). The nominative documents can only be used for the purpose evoked when the request was presented, otherwise, the user may be liable for any damages caused.

Moreover, under article 535 of the Portuguese Civil Procedural Code, the court or any party is entitled to request to the counterparty (or to any public or private entity) the delivery of documents, information or even technical opinions if such delivery is important to the clarification of the material truth. If the entity or the party fails to deliver the requested documents, the court will be able to charge a fine.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

If the witness is enrolled and fails to appear before the court without providing adequate justification, the judge can, under the terms established by article 629 of the Portuguese Civil Code, order the attendance of the witness in court, under custody, without prejudice of application of a fine for missing the court session.

Under the terms of article 645 of the Portuguese Civil Procedural Code, it is also possible for the judge to call a person to the proceeding as a witness, without the person being presented as a witness by the parties, if during the proceedings there are reasons to consider that such person knows important facts for the accurate decision of the case.

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Article 638 of the Portuguese Civil Procedural Code sets out the regime of the cross-examination of witnesses. In summary, the witness is questioned about the facts that were presented by the party that presented the witness. The other party's lawyer may also question the witness and the judge is also entitled to request any clarification needed from the witness.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Under article 88/1 of the PCA, the interested party is entitled to appeal at the Competition, Regulation and Supervision Court against the decisions issued by the Portuguese Competition Authority on administrative proceedings. Once the decision is issued by the Competition, Regulation and Supervision Court, the interested party is entitled to appeal to the competent Portuguese Appeal Court.

When a decision is final (an appeal is no longer possible or the time for appeal has elapsed), the facts considered proven by the decision cannot be challenged in the judicial procedure for damages, which means that the decision issued has positive value in what concerns the facts related to the infringement.

Therefore, in the action for damages brought before the judicial court, the interested party will only have to prove that the infringement leads to the damages, the existence of a "causal link" between the infringement and the damages and also the amount of the damages.

Under the terms of article 16 of EU Regulation (CE) 1/2003 of 16 December, national courts cannot issue a decision contradicting facts already analysed and proved within a decision by the European Commission.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general rule, both parties benefit from full access to the documents and to the petitions delivered to the court, unless the procedure is covered by the law of judicial secrecy. Several court decisions were issued stating that the information protected by the commercial confidentiality rules or by IP rights should be confidential and the evidence produced in the court should be restricted to the facts directly regarding the issue at stake, excluding any additional information (decision issued by the North of Portugal's Appeal Court ("*Tribunal Central Administrativo Norte*") of 23 October 2008 – case 03487 – A/92).

Therefore, even though the courts are bound to protect the information concerning commercial confidentiality, within the judicial proceeding the confidential information will be available to both parties, if it is considered essential to the disclosure of the truth and any third party can have full access to it once the decision is published.

According to the PCA, during prosecution proceedings, the Competition Authority shall have due care for the legitimate interests of the undertakings or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets (article 30). Nevertheless, in order to demonstrate that there has been an infringement of the competition provisions set out in the PCA or EU law, the Portuguese Competition Authority is entitled to use as evidence information classified as confidential, for reasons of business secrecy (article 31).

The disclosure of a company's commercial documents can only be performed when the person to whom the documents belong has a legitimate interest or liability in the issue that causes the disclosure request. The documents shall be analysed in the premises of the owner of the documents and the information obtained must be restricted to specific issues related to the issue at stake (article 534 of the Portuguese Civil Procedural Code and articles 42 and 43 of the Portuguese Commercial Code).

4.8 Is there provision for the national competition authority in Portugal (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

In Portugal, there are no such specific provisions relating to private competition litigation so the general civil procedural rules are applicable in those cases.

Therefore, the Portuguese Competition Authority can only express its views or analysis in relation to a judicial case if it is called to the proceeding under the usual forms admitted under the Portuguese Civil Procedural Law, better described above in question 4.3, especially if it is designated as an expert.

Since there are no specific rules in the PCA or in the Portuguese Procedural Civil Code, and there is no significant case law in Portugal regarding actions for damages in competition cases, this possibility was only analysed theoretically.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Similarly to what is provided by article 101/3, in accordance with article 10 of the PCA, any restrictive practice under the terms of article 9 (agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their purpose or effect the prevention, restriction or distortion of competition) may be deemed justified when it contributes to improve the production or distribution of goods or services or to promote technical or economic development, provided that, cumulatively, they:

a) Offer the users of such goods or services a fair part of the benefit arising therefrom.

b) Do not impose to the undertakings concerned any restrictions that are not indispensable to the attainment of such objectives.

c) Do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market at stake.

As to the public interest defence/importance, it is established by article 4 of the PCA that the undertakings that have been legally entrusted with the management of services of general economic interest, or are by their nature legal monopolies, are subject to the provisions of the PCA, to the extent that enforcement of these provisions does not create an obstacle to the fulfilment of their specific mission.

Article 7 of the PCA sets the priorities of the Portuguese Competition Authority's mission and states that in carrying out its responsibilities, the Competition Authority shall be guided by the criterion of public interest in competition enforcement and support, and to this end it may define priorities in the handling of issues that it is called on to analyse.

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Also, it is established by the PCA that the Competition Authority shall exercise its sanctioning powers on a case-by-case basis, whenever the public interest of pursuing and punishing infringements of competition rules entails the initiation of administrative offence proceedings, taking into account in particular the priorities in competition policy and the elements of fact and law brought by the parties to the file, as well as the seriousness of the alleged infringement, the likelihood of being able to prove its existence and the extent of investigation required to fulfil as well as possible its mission to ensure compliance with articles 9, 11 and 12 of the PCA and articles 101 and 102 of the TFEU.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Since, as referred to above and in accordance with civil procedure rules on civil liability claims, the claimant can only be compensated for the damages suffered as a result of the anti-competitive practice and in accordance with the "causal link" between the anti-competitive practice and the damages in the amounts that is able to provide evidence before court; if the claimant is not able to provide evidence that it has suffered the damages, or if the damages were suffered by another entity, then it will not be entitled to the compensation of such damages.

On the contrary, anyone that suffers damages as a result of an anti-competitive practice, which includes indirect purchasers, provided that the requirements established by article 483 of the Portuguese Civil Code are met and it is possible to provide evidence before the court and under the Portuguese civil procedural law of: i) the occurrence of an infringement of a legal provision, i.e., existence of anti-competitive practice; ii) the occurrence of damages; and finally iii) the "causal link" between such infringement and the occurrence of such damages, such indirect purchaser can claim damages before the court.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

In accordance with article 286 of the Portuguese Civil Code, proceedings with the purpose of declaration of nullity of an agreement or clause can be brought at any time (there is no time limit). Such declaration of nullity can also be ordered by the court without the need of any request.

As to the actions for damages, in accordance with article 498 of the Portuguese Civil Code, the right to compensation shall be extinguished within three years from the date on which the claimant became aware of its right, despite not knowing the responsible person and the full extent of the damage.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

With regards to decisions from the Competition, Regulation and Supervision Court, it is not possible to accurately predict the duration of a judicial proceeding of this nature, mainly because this Court was just recently established. However, the Lisbon Commercial Court that formerly decided on the Competition Authority's appeals usually took no less than two years to decide.

As to private litigation in judicial courts, a civil liability procedure is expected to last approximately three years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Under the recently adopted PCA, it is now possible to terminate a procedure on restrictive practices further to a settlement concluded between the undertakings in question and the Portuguese Competition Authority; this aspect being one of the most innovative aspects of the new Act.

As to the private competition litigation before the judicial courts, general rules on civil procedure shall apply and, as such, and in accordance with article 293 of the Portuguese Civil Procedural Code, at any time it is possible for the claimant to withdraw the judicial request (totally or in part) and the defendant is also entitled to the right to confess the infringement and/or the occurrence of damages derived from it (totally or in part). Both parties can also settle on the proceedings at any time. However, the settlement must follow specific rules and is usually subject to the final confirmation of the court under the terms established by article 300 of the Portuguese Civil Procedural Code.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes. In accordance with article 446 of the Portuguese Civil Procedural Code, the party that loses a judicial dispute must bear its costs. In case of a partial conviction, the costs are proportionally divided between the parties.

Therefore, the winning party can recover the legal costs incurred in connection with the proceedings from the losing party.

8.2 Are lawyers permitted to act on a contingency fee basis?

The Portuguese Bar Association Act, i.e. Law nr. 15/2005, of 26 January, with the last amendment introduced by Law nr. 12/2010, of 25 June, establishes the most important rules on fee determination that must be complied with by lawyers.

Article 100 of the above-mentioned Portuguese Bar Association Act sets out that lawyer fees shall correspond to an adequate compensation for the services effectively rendered and, for the establishment of the fees, the lawyer shall consider the importance of the services rendered, the complexity and urgency of the matter and the intellectual effort involved and also the final result and the time spent, the responsibility of the case and other professional practices.

It is possible, in accordance with the above-referred provision, to previously agree to a fixed fee. However, article 101 of the Portuguese Bar Association Statute expressly prohibits the establishment of "*quota litis*"; "*quota litis*" being understood as the agreement between the client and its lawyer, before the conclusion of the proceedings, that the lawyers' fees are exclusively dependent upon the final result of the issue, whether they consist of a specific amount or any other kind of goods.

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Therefore, the previous establishment of fees, even if through a percentage, in connection with the value of the case is allowed; the establishment of an increase of fees depending on the result attained by the lawyer is also allowed.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There is no specific provision on this issue. However, we do not envisage any obstacle to that under Portuguese law.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the Portuguese Competition Authority:

In accordance with article 88/1 of the PCA, the decisions by the Competition Authority imposing a fine or a periodic penalty payment are appealed to the Competition, Regulation and Supervision Court. Fines or periodic penalty payment ordered by the Competition Authority can be reduced or increased by this court.

Court decisions issued by the Court of Competition, Regulation and Supervision may be appealed before the competent Court of Appeal.

Private Litigation:

Within the private competition litigation, the possibility to appeal from the so-called first instance judicial courts to Courts of Appeal ("*Tribunais da Relação*") and from these courts to the Portuguese Supreme Court of Justice ("*Supremo Tribunal de Justiça*") in civil proceedings will depend on the value of the action. If it exceeds the value of the respective *alçada*, then it is possible to appeal.

In accordance with article 31 of Decree-Law nr. 52/2008, of 28 August, as amended, the current *alçadas* for civil proceedings are the following: €5,000.00 for first instance judicial courts; and €30,000.00 for the courts of appeal.

10 Leniency

10.1 Is leniency offered by a national competition authority in Portugal? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Articles 75 to 82 of the PCA set the Portuguese leniency legal framework. Under the Portuguese leniency programme, it is possible to grant immunity from fines or a reduction of fines.

In accordance with article 75 of the PCA, immunity from fines or a reduction of fines shall be granted in administrative offence proceedings concerning agreements or concerted practices between two or more undertakings, prohibited pursuant to article 9 of the PCA and, if applicable, pursuant to article 101 of the TFEU, where such agreements or practices are aimed at coordinating their competitive behaviour on the market or influencing relevant parameters of competition, specifically through the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets, including collusion in auctions and bid-rigging in public procurement, restrictions on imports or exports or anti-competitive actions against other competitors.

Under the terms of article 76 of the PCA, both the responsible undertaking and the members of the board of directors or the supervisory board of legal persons and equivalent entities, as well as those responsible for the executive management or supervision of areas of activity where an administrative offence has occurred, being considered responsible for the infringement of competition law can benefit from immunity from a fine or reduction of a fine under the leniency programme.

The PCA sets out, in its articles 77, 78 and 79, the conditions that must be satisfied in order to qualify for leniency when disclosing to the Portuguese Competition Authority the participation in an alleged agreement or concerted practice. Full immunity from fines can be granted for the first undertaking that discloses information and reductions not exceeding 50 per cent of the total amount of the fine can also be granted by the Portuguese Competition Authority.

Given the scarce application of the Portuguese leniency programme and the fact that there is no significant case law in Portugal regarding actions for damages in competition cases, it is not possible yet to ascertain if courts will grant immunity from civil claims against a leniency applicant.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

There are no specific provisions on the issue. However, we do not envisage any obstacle that could prevent the applicant for leniency to present to the court the same evidence that he presented to the Portuguese Competition Authority.

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