THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. 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 terms of 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 had 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: it 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 past 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. In addition, 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 has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas 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 continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the 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 the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also 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 has 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 countries such as 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 taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. 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 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. Of course, in the UK – an EU jurisdiction that has been one of the most active and private-enforcement friendly forums – it will take time to determine what impact, if any, Brexit will have.

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, e.g., Sweden). Some jurisdictions 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 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 spillover 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, 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 a case (e.g., in Brazil, as well as 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 were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 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, 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 toward 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; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; 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 by 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 and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
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Chapter 18

PORTUGAL

Gonçalo Anastácio and Catarina Anastácio[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Private enforcement has been a reality in Portugal for some time, with a sound number of precedents, and is gaining in significance. The two major initial proceedings of note involve follow-on cases.[2]

The first case relates to a Portuguese Competition Authority (PCA) 2009 decision establishing that Portugal Telecom (PT) had abused its dominant position in the wholesale and retail broadband access markets through a margin squeeze and a discriminatory rebate policy. Following that decision, NOS (PT's major competitor) launched a damages action with the Lisbon Judicial Court in 2011.[3] In November 2016, the Court handed down its ruling, dismissing the case on the grounds that NOS had not sufficiently established the infringement. Nevertheless, this is a novel case in the Portuguese private enforcement landscape due to the infringement involved – margin squeeze – and also due to the Court's extensive reasoning and proximity to the jurisprudence of the Court of Justice of the European Union (CJEU).

The second case is still pending before the Portuguese courts. It involves Sport TV, a Portuguese sports-oriented premium cable and satellite television network operating in the market for premium pay-TV sports channels, which was found by the PCA to have abused its dominant position for several years by imposing discriminatory conditions on operators, and concurrently having limited development and investment in the market. Following the decision, three separate damages actions were filed with the court, one of which is a class action, representing the first of its kind in competition matters in Portugal.[4] After some setbacks, the Court finally decided on the admissibility of the action and gave the consumers 30 days to opt out.

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1 Gonçalo Anastácio is a partner and Catarina Anastácio is a consultant at SRS Advogados. The authors would like to thank Rita Lynce de Faria, professor of civil procedure at Universidade Católica and of counsel at SRS Advogados, for her comments on this chapter, and Luís Seifert Guincho and Maria Stock da Cunha, from the competition law department of SRS Advogados, for their research support.

2 Both PCA decisions were also appealed. The first was annulled by the Court because the administrative sanction had become time-barred; the second was upheld by the Court, although the fine was reduced.

3 Around the same time NOS filed its action, Onitelecom also sued PT for damages. However, the case was first dismissed by the Lisbon Judicial Court on the grounds that the statute of limitations had expired. The Court applied the three-year statute of limitations foreseen in Portuguese tort law, and considered that the deadline started running from the day the plaintiff filed its complaint before the PCA. The Lisbon Appeal Court confirmed the initial ruling.

4 This is, in fact, the second class action in Portugal where competition law issues have been raised. However, in the first case, *DECO v. Portugal Telecom*, competition law issues were not discussed because the case was decided based on specific telecom rules.

The Portuguese court deciding on one of those damages actions has submitted a referral for a preliminary ruling to the CJEU relating to the time frame for the enforceability of the Antitrust Damages Directive and the compatibility of a number of national rules applying to antitrust damages cases in the pre-harmonisation era (C-637/17). It was the first CJEU referral concerning the EU Damages Directive.

In particular, the Portuguese court asked for guidance on the application of limitation rules for the Damages Directive relating to facts arising before the deadline for implementation and before the country transposed the law. The CJEU ruled that when a Member State decides that the Directive's provisions are not applicable to actions for damages brought before the transposition, these actions remain governed exclusively by the national procedural rules in force. Since the Cogeco action was lodged before the transposition deadline and effective implementation in Portugal, the Damages Directive was inapplicable to the case.

However, the European Court also said that national legislation laying down limitation periods and rules for suspension or interruption must not undermine the full effectiveness of Article 102 TFEU, which might happen if the national legislation specifies that the limitation period in respect of actions for damages is three years and starts to run before the injured party has all the necessary information. Also, the judgment concluded that the principle bans national legislation that does not include any possibility of suspending or interrupting the limitation period during the competition authority proceedings. In conclusion, Article 102 TFEU and the principle of effectiveness preclude the Portuguese limitation rules for abuse of dominance cases. This was a very important ruling that helped to clarify terms not only for this case but in general, resulting in several actions being time barred.

With Sport TV's actions pending, there have been no clear-cut[5] awards of damages on the grounds of competition law infringements to date.[6]

Nevertheless, there are already many general private enforcement precedents (even if competition law is typically only one of the legal angles in question), and the number of these is constantly increasing.[7] In most cases, the competition rules were brought into the litigation sphere not by the plaintiffs but rather by the defendants as a means of defence, most of the precedents having a vertical restraints nature,[8] and often the validity of agreements or of particular clauses thereof being the leitmotif for the redress.

Furthermore, since the transposition of the Damages Directive, 70 damages actions have been launched with the specialised competition court: 68 following the European Commission decision on the *Trucks* cartel case (AT.39824), one following a decision of the Portuguese Competition Authority on a cartel in the sector of pre-fabricated modules and one allegedly partially following a European Commission decision on abuse of dominance. In addition, there are others lodged with several civil courts.

5 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, No. 10, April–June 2012, p. 113).

6 There is already one recent res judicata precedent, specifically for damages, as regards the PIRC (the unfair competition regime), under Decree-Law No. 370/93, of 29 October.

7 According to Miguel Sousa Ferro in *Jurisprudência Portuguesa de Direito da Concorrência*, Capítulo 7: Jurisprudência de Private Enforcement, there were 106 judicial rulings between 2011 and 2015, and there was an increment of 212 per cent more judicial rulings in 2015 than in 2011.

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

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Directive 104/2014 (Directive) was transposed into the Portuguese legal system by Law No. 23/2018 of 5 June, which came into force two months later. In addition to Law No. 23/2018, the legislative framework for private antitrust enforcement in Portugal includes, besides the substantive rules on competition (laid down in the Portuguese Competition Law (PCL)),[9] the general rules on civil liability provided for in the Civil Code (CC)[10] (regarding substantial issues not covered by Law No. 23/2018) and the procedural rules of the Code of Civil Procedure (CCP).[11]

Despite following the Directive very closely, Law No. 23/2018 goes beyond it in certain aspects and contains some innovative solutions.

First, Law No. 23/2018's scope is broader than the Directive's in two aspects:

a it applies not only to damages actions, but also to other requests based on infringements of the competition law[12] (thus including, inter alia, declarations of nullity of agreements or contractual clauses, actions aimed at obtaining a judicial declaration or an injunction, and actions on unjust enrichment); and

b it applies not only to damages actions for infringements of EU competition law (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)), with or without parallel application of equivalent national rules (in Portugal, Articles 9 and 11 PCL), but also to damages actions exclusively based on infringements of the Portuguese competition law or of equivalent provisions of other Member States. In Portugal, this includes damages actions for abuse of economic dependence (Article 12 PCA).

An important substantive aspect that Law No. 23/2018 has innovated regards the scope of liability for damages. It states that in addition to the undertaking that committed the infringement, whoever has exercised a dominant influence over the infringer during the infringement shall also be liable.[13] In addition, there is a presumption of dominant influence by the parent company if it holds 90 per cent or more of the subsidiary's share capital.[14]

Another aspect in which Law No. 23/2018 goes beyond what is prescribed by the Directive concerns the effect of national decisions.[15] In addition to giving the effect of an irrefutable presumption of the existence of an infringement to the final decisions of the PCA and of Portuguese courts, Law No. 23/2018 also gives the effect of a refutable presumption to the final decisions of competition authorities and courts of other Member States.[16]

Regarding jurisdiction, Law No. 23/2018 introduced a major novelty within the Portuguese legal system. Before its entry into force, the competence to decide on private competition actions lay with the judicial courts, as there was no specialised court for such matters.

9 The Portuguese Competition Law, approved by Law No. 19/2010, of 8 May.

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

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

12 Article 1(1) and 2(l) of Law No. 23/2018.

13 Article 3(1)(2) of Law No. 23/2018.

14 Article 3(3) of Law No. 23/2018.

15 Article 9 of the Directive.

16 Article 7 of Law No. 23/2018.

This has changed, as Law No. 23/2018 attributes the competence for hearing claims arising from competition infringements to the specialised Competition, Regulation and Supervision Court (CRSC), whose jurisdiction in competition law matters had been limited to public enforcement (as a first instance court of appeal from PCA decisions[17]). It is important to note that this competency only exists regarding actions arising purely from competition law infringements.[18] It is also established that appeals from decisions of the CRSC in private enforcement cases shall be centralised in the same civil section of the Lisbon Appeal Court and of the Supreme Court.[19]

III EXTRATERRITORIALITY

The PCL applies to all anticompetitive practices that take place on Portuguese territory or that have, or may have, an anticompetitive effect in Portugal.[20]

The applicability of Portuguese law in cases of private enforcement concerning non-contractual obligations is regulated by the Rome II Regulation,[21] and concerning contractual obligations by the Rome I Regulation.[22]

Regarding damages actions, pursuant to the CC,[23] the law applicable to extracontractual civil liability 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 the act or omission could result in damage in that state.

Contractual liability cases are, according to the CC,[24] ruled by the law agreed on 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 the law of the state where the contract was signed.

Regarding the territorial jurisdiction of national courts, Brussels I[25] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention[26] 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 on the following grounds: the possibility of bringing the action in Portugal according to the Portuguese rules on territorial jurisdiction;[27] the fact that the main ground of the action, or any of the facts substantiating it, occurred in Portugal; and the fact that the right claimed cannot be effectively enforced in courts other

17 Article 84(3) of the PCL.

18 Article 22 of Law 23/2018, which amends Article 112 of the Law on the Organization of the Judicial System (LOJS).

19 Article 22 of Law 23/2018, which amends Articles 54 and 67 LOJS.

20 Article 2(2) of the PCL.

21 Regulation (EC) No. 864/2007.

22 Regulation (EC) No. 593/2008.

23 Article 45 of the CC.

24 Articles 41 and 42 of the CC.

25 Regulation (EC) No. 44/2001.

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

27 Territorial jurisdiction is regulated in Articles 70 to 84 of the CCP.

than the Portuguese courts, provided there is a relevant link, of an objective or 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.[28]

IV STANDING

There are no special rules in relation to the standing requirement to bring competition law actions. According to the general rules on liability,[29] any legal entity or natural person who suffered harm within the Portuguese territory as a result of an unlawful act (an infringement of competition law, for the purposes of this chapter) has the right to be compensated for the harm suffered.[30]

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 to have suffered harm as a result of an infringement of competition law. In this regard, no changes have been introduced by Law No. 23/2018.

That is not true, however, as regards collective redress, as Law No. 23/2018[31] grants standing to associations of undertakings whose members have been harmed by a competition infringement when filing popular actions (which is not foreseen in the popular action legislation).

V THE PROCESS OF DISCOVERY

Under the general civil procedure in Portugal, there is no discovery procedure as it is understood in common law systems. The courts have discretionary power to request the disclosure of information that they may consider important to the final decision of a given case from any of the parties or third persons.

In competition cases, access to the PCA's files is regulated by Articles 32 and 33 of the PCL, according to which private parties may claim access to the PCA's file so long as the file is not protected by judicial secrecy.

As regards private enforcement, Law No. 23/2018 is in line with the Directive[32] meaning that the parties may ask the court to order the other parties, third parties to the proceedings or public entities to disclose documents or other means of evidence in their possession. However, it has gone beyond it in two aspects: the right of access is extended to pretrial situations in order to assess the existence of a cause of action or to prepare actions[33] (which is an exceptional solution in the Portuguese legal system); and it has been clarified that urgent conservatory measures may be ordered by the court when deemed necessary to prevent the destruction of evidence.[34]

28 Articles 59 and 94 of the CCP.
29 Article 483 of the CC.
30 Articles 11 and 30 of the CCP.
31 Article 19(2-a) of Law No. 23/2018.
32 Articles 12 and 14 of Law No. 23/2018.
33 Article 13 of Law No. 23/2018.
34 Article 17 of Law No. 23/2018.

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.[35] A defence hearing with the party to whom it is opposed is required.[36]

Expert evidence is admissible.[37] 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 each. The probative value of the expert evidence is left to the appreciation of the judge.[38]

Despite the lack of experience in Portugal concerning the use of experts in the context of an action for damage 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 or to demonstrate the effects of the infrigement.

VII CLASS ACTIONS

The form of class action available for damages claims is the 'popular action' established in Article 52 of the Constitution of the Portuguese Republic and regulated by Law No. 83/95 of 31 August, amended by Decree Law 214-G/2015 of 2 October. According to that Law, citizens (companies and professionals being excluded) or associations or foundations promoting certain general interests (including the promotion and respect of competition) have the right to file a popular action 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 system provided for in the above-mentioned Law may be considered to be an opt-out system. 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 they accept representation in that action.

Law No. 23/2018 expressly refers to the popular action and provides for several new specific rules not contemplated in the popular action law, namely in respect of standing (it grants standing to associations of undertakings), identification of the harmed parties, quantification of damages, and management and payment of compensation.[39]

This type of action continues to be very rare, but in March 2015, a landmark follow-on class action for damages was filed by the Observatório da Concorrência, an association that represents consumers in class actions related to competition infringements, in civil court, based on a June 2013 PCA decision. In this decision, the PCA imposed a fine of €3.7 million

35 Article 411 of the CCP.

36 Article 415 of the CCP.

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

38 Article 389 of the CC.

39 Article 19 of Law No. 23/2018.

on Sport TV, having found that it 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.

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. After some setbacks, including a decision (which has been challenged) that Observatório da Concorrência had no standing to file the action, the Court finally decided on the admissibility of the action; the consumers were given 30 days to opt out. Further developments in the case are expected soon.

VIII CALCULATING DAMAGES

Law No. 23/2018 does not make any significant changes as regards the calculation of damages, as Portuguese law already complies with the main features of the Directive in this matter.

Damages awarded are 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 that 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. 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 that event, the judge may decide in accordance with equity, within the limits of the evidence produced.

However, Law No. 23/2018 changed the legal landscape in respect of these cases by providing that the court may resort to the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU,[40] and, as per the Directive, that the PCA may assist the court in calculating the damages.[41]

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.

Contingency fees are not allowed, as the by-laws of the Bar Association[42] do not consent to fees exclusively dependent on the result (*palmarium*) or to fees consisting of a percentage of

40 Article 9(2) of Law No. 23/2018.

41 Article 9(3) of Law No. 23/2018.

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

the result (*quota litis*). Fees should be calculated based on several factors related to the service provided, such as the importance and complexity of the cause, the urgency of the matter, the time spent and, to a certain extent, the results obtained.[43]

IX PASS-ON DEFENCES

In line with the Directive, Law No. 23/2018 expressly states that the defendant may argue that the harm allegedly suffered by the plaintiff has been passed on to the claimant.[44] Law No. 23/2018 also provides that the court deciding on a private enforcement claim shall take into account proceedings initiated by parties at different levels of the production or distribution chain.[45] Additionally, it includes three examples of factors to be considered by the court: (1) damages claims referring to the same infringement filed by the plaintiffs at different levels of the production chain; (2) public information regarding the enforcement of competition law by public entities; and (3) judicial decisions rendered in respect of the damages actions foreseen in (1) and (2).

X FOLLOW-ON LITIGATION

Judicial and administrative proceedings before the PCA are completely independent from each other, according to the constitutional principle of the separation of powers. In this regard, it is relevant to note that a large majority of the Portuguese private enforcement precedents (not typically claims for damages) are either stand-alone actions or hybrid actions partially related to the subject matter of a PCA decision but wider in scope.

Therefore, 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 the competition rules irrespective of any previous decision already issued by the PCA on the same matter and relating to any other pending proceedings.

Before the entry into force of Law No. 23/2018, there were 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. This has now changed: Law No. 23/2018, in line with the Directive, foresees that a final condemnatory decision issued by it or by a Portuguese appeal court shall be deemed an irrefutable presumption of the existence of the infringement. In addition, Law No. 23/2018, going beyond the Directive, states that a final condemnatory decision issued by a foreign competition authority or appeal court shall be deemed as a refutable presumption of the existence of the infringement, thus giving it a qualified evidentiary value (whereas the Directive merely requires that such decisions be considered as *prima facie* evidence).[46]

The judicial limitation period is different from the administrative limitation period, i.e., for the PCA to initiate 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

43 Article 101 of the by-laws of the Portuguese Bar Association.

44 Article 8(1) of Law No. 23/2018.

45 Article 12 of Directive 104/2014 and Article 10(1) of Law No. 23/2018.

46 Articles 7(1) and (2) of Law No. 23/2018(Article 9 of Directive 104/2014).

is five years),[47] which could make it more difficult in practice for the plaintiff to usefully conciliate both proceedings. That problem has now been solved with the transposition of the Directive: Law No. 23/2018 provides for rules on the beginning, duration (five years, as per the Directive, and not three, as in general cases), suspension or interruption of limitation periods to allow for conciliation between judicial and administrative proceedings.[48]

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.

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 declare that the entire file remain under legal secrecy in order to protect the investigation or the defendant's interests.

The PCA may also declare some documents confidential on the grounds of its obligation to protect business secrets[49] or otherwise confidential information, including professional secrets[50] (attorneys, medical doctors, bank secrecy, etc.).

Documents submitted within the scope of a leniency application are also protected during the administrative proceedings.[51] The PCA shall declare a 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. 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.

Before the transposition of the Directive, Portuguese law protected not only leniency documents (as is binding under the Directive) but also pre-existing documents. In this context, Law No. 23/2018 foresees that, for damages action purposes, only leniency documents are protected; for all purposes other than damages actions, pre-existing documents continue to be protected under Portuguese competition law. Therefore, a practical consequence of the Directive in Portugal is that, for the purpose of damages actions, pre-existing documents are not to be protected anymore.

As regards joint and several liability, the rule is set out in the CC for infringements in which multiple companies take part, and therefore the rule provided in Article 11(1) of the Directive already exists. The same, however, is not true for the two exceptions provided for in

47 Article 74 of the PCL.

48 Article 6 of Law No. 23/2018.

49 Article 195 of the Criminal Code.

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

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

Article 11(2) and 11(4) of the Directive. In this respect, Law No. 23/208 2018 has followed the text of the Directive, which is rather challenging for the Portuguese legal system as these exceptions may create conflicts with classic rules and principles of extracontractual liability.

No protection exists in relation to documents issued in a proceeding before the PCA that has ended in a settlement decision.[52]

Note that the entire file may have been declared to be under judicial secrecy by the PCA.[53] In that case, third parties (namely plaintiffs in an action for damages) may only be allowed to access the file after a final decision has been issued.[54]

XII SETTLEMENT PROCEDURES

Unlike public enforcement by the PCA,[55] there is no specific judicial settlement procedure available within the scope of a damages action.

According to the CCP, parties can reach a settlement both before and during a court proceeding[56] provided that no non-disposable rights are involved.[57] 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).[58]

Any settlement between the parties during a court proceeding must be subject to confirmation by the court to have the value of a judicial ruling.

XIII ARBITRATION

Competition law issues can be resolved through private arbitration[59] and, despite the fact that arbitration is in principle not public, there seem to be a number of precedents[60] and at least one significant arbitral decision that was appealed before 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

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

53 Article 32(1) of the PCL.

54 Article 32(2) of the PCL.

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

56 Article 283 of the CCP.

57 Article 289 of the CCP.

58 Article 594 of the CCP.

59 See Law No. 63/2011, of 14 December: the Arbitration Law.

60 See Leonor Rossi and Miguel Ferro, *Revista de Concorrência e Regulação*, No. 10, April–June 2012, p. 93 and footnote 4).

being dealt with in a judicial court (submission agreement[61]) or to events that may occur in the future, whether arising from a contractual or non-contractual relationship (arbitration clause).[62]

Arbitrators shall decide in accordance with the law, unless the parties have authorised them to decide according to equity (*ex aequo et bono*).[63] 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.[64]

Arbitration procedures are confidential unless otherwise decided by the parties,[65] appealed to the state courts[66] or subject to enforcement actions[67] by a state court (as state proceedings are public by nature).[68]

XIV INDEMNIFICATION AND CONTRIBUTION

Under Portuguese law, there is joint and several liability in relation to actions for damages.[69] Therefore, if the damage was caused by several persons, the plaintiff may recover the full amount of damages from any one of them. If one defendant pays the full award, he or she 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 and the effects arising from it. As regards private enforcement, Law No. 23/2018 (under Article 5(5)) changes the general presumption under the CC (Article 497) that all infringers share equal guilt, replacing it, for the purposes of competition damages actions, with a market share-based allocation.

The contribution by a defendant to whom immunity from fines has been granted shall not exceed the amount of harm it has caused.

61 Pursuant to Article 277(b) of the CCP, the court will stay its proceedings in the event the parties reach an arbitration agreement.

62 Article 1(3) of the Arbitration Law.

63 Article 39 of the Arbitration Law.

64 Article 39(4) of the Arbitration Law.

65 Article 30(5) of the Arbitration Law.

66 Article 46 of the Arbitration Law.

67 Article 47 and 48 of the Arbitration Law.

68 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 and 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*, No. 11/12, July–December 2012, pp. 196–213.

69 Article 497 of the CC. The government's legislative proposal is in line with previous legislation and jurisprudence.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The transposition of the Directive into the Portuguese legal system constituted an important legal development. Despite the fact that the general legal framework applicable to civil liability and invalidity of contracts already provided sufficient tools for private antitrust enforcement in Portugal, it is undeniable that some of the provisions introduced by Law No. 23/2018, both those necessary to implement the Directive and the most innovative ones, represent an important step forward.

We would point out the following:

a the regime is also applicable to purely national competition law infringements, including those consisting of abuses of economic dependence;

b jurisdiction to decide on private enforcement actions that are exclusively based on competition law infringements and on all other civil claims also exclusively based on competition law infringements was attributed to the specialised tribunal, the CRSC;

c the civil responsibility of economic groups and the right of recourse are now regulated;

d measures are foreseen to preserve the means of evidence where a serious infringement capable of harming the plaintiff is suspected; a request for such measures will also interrupt the statute of limitation;

e the general presumption under the CC that all infringing parties share the same guilt has been replaced, for the purposes of damages actions, with a market share-based allocation;

f the scope of application of competition private enforcement to collective redress has been clarified through the introduction of several specific rules not provided for in the general legislation; and

g specific information systems to facilitate the intervention of the PCA in relation to observations on the proportionality of requests for access to documents included in its files as provided for in the Directive, and in relation to amicus curiae interventions pursuant to Article 15(3) of Regulation 1/2003, were introduced. This possibility already existed under general law, but the introduction of specific information systems is expected to make a major difference in the level of actual intervention of the PCA.

A further information exchange mechanism set out in Law No. 23/2018[70] and relevant to private enforcement (although unrelated to the Directive) aims at facilitating the obligation set out under Article 15(2) of Regulation 1/2003, pursuant to which Member States must inform the European Commission of all written decisions where Articles 101 or 102 of the TFEU were applied. To date, this rule has rarely been enforced, and the new rule (introduced by means of an amendment to the PCL) states that the courts must inform the PCA, which will inform the European Commission.

Despite these important steps forward, the dramatic increase in and uncertainty about court fees in Portugal as a consequence of the country's financial crisis, and the respective international bail-out at the beginning of the decade, pose a serious constraint to actions for damages, as they very much raise the financial risk in bringing such actions. Such increased risk (the extent of which is yet to be determined), together with the uncertainty of the

70 Article 21 of Law No. 23/2018, adding an article (94o A) to the PCL.

outcome due to factors such as a lack of precedents, the passing-on defence and the Bar Association limits on contingency fees, may indeed act as deterrents to the development of actions for damages in the country.

Considering the above and the fact that there is only so much public enforcement any competition authority can conduct, together with the importance of private enforcement for the overall level of compliance with the 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 constantly increasing[71] and its leniency programme is bearing fruit (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 by supporting private enforcement[72] as a key complementary dimension of its mission.

71 The PCA has become increasingly active in the fight against cartels. In general terms, there has been a dramatic increase in the number of dawn raids conducted in recent years. Since 2017, 22 investigations involving 56 facilities have been conducted involving several sectors. This increase in activity has already seen results: in 2019, the PCA adopted two important final decisions in the financial sector. In the first, the PCA fined six insurance companies a total of €54 million for cartel activity. In September 2019, after a long-running investigation, the PCA fined 12 banks €225 million over sensitive information exchanges about commercial offers in the mortgages and personal and commercial loans sectors. The PCA also issued three statements of objections against several companies active in the retail and drinks industries.

72 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 public enforcement cases (already done under very limited precedents); and the development of training for judges and other magistrates that has occurred over the past decade.

Appendix 1

ABOUT THE AUTHORS

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Gonçalo Anastácio is the partner in charge of the competition department at 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 he studied at the Coimbra, Lisbon and Sorbonne (Paris I) universities.

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 (as well as SRS) is ranked in the top band for competition law in Portugal by the leading international legal directories, and is the author and editor of a number of reference works on competition law.

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She has lectured in civil procedural law, contract and tort law and property law at the University of Lisbon law school.

Catarina was directly involved in the Damages Actions Directive negotiations, as well as in drafting the legislative proposal for its transposition in Portugal. She has lectured on private enforcement issues to different audiences, including postgraduate students, lawyers and magistrates.

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