COUNTRY COMPARATIVE GUIDES 2020

# The Legal 500
# Country Comparative Guides

## Portugal
# COMPETITION LITIGATION


**Contributing firm**

Albuquerque & Almeida Advogados

**Sónia Gemas Donário**

Managing Associate | sgd@aalegal.pt


This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Portugal.

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# PORTUGAL
# COMPETITION LITIGATION

## 1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

In Portugal, Law 23/2018, of 5 June, establishes the rules regarding claims for compensation for infringements of competition law, transposing into the Portuguese legal framework the EU Directive 2014/104, of 26 November, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, as well as rules on other claims based on infringements of competition law. This law is applicable regardless of whether the breach of competition law (which is the legal basis for the damages compensation´s claim), was declared by some competition authority or court (national or of any Member State), the European Commission or the Court of Justice of the European Union.

The mentioned Law 23/2018 (with a larger scope than Directive 2014/104) is applicable to claims with the following legal basis:

- Infringement of national law: damages actions as a consequence of breaches related with the anti-competitive practices foreseen in articles 9 (collusive practices), 11 (abuse of dominant position) and 12 (abuse of economic dependence). In this cases there are no cross-border effects;
- Infringement of EU law: damages actions as a consequence of breaches related with articles 101 (multilateral conducts: collusive practices based on agreements, concerted practices and decisions of associations of undertakings) and 102 (unilateral conducts – abuse of dominant position) of the Treaty on the Functioning of the European Union (TFEU);
- Other requests based on infringements of the competition law, including:
- Claims concerning the declaration of nullity of agreements or contractual clauses that breach national or EU competition law
- actions aimed at obtaining a judicial declaration or an injunction;
- Claims for interim measures intended to avoid irreparable anti-competitive harm, while proceedings are pending (Portuguese Civil Procedure Code).

## 2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

For the purpose of commencing a competition damages claim it must have taken place a breach of competition law that caused harm to the claimant.

In terms of procedural formalities, it is required that the claimant submit a written statement of claim before the Competition Court, including the following elements:

- Identifie the parties;
- Identifie the applicable law and rules infringed;
- Identifie the relief sought;
- Determine the participation of the defendant;
- Bring forward the essential facts that substantiate the grounds of the damages claim;
- The causal nexus between the infringement and the damages invoked;
- Quantifie the value of the claim;
- Present the evidence deemed necessary for the truth to be reached (including documents, witnesses and experts);
- Submit the power of attorney and the receipt of payment of the initial court fees.

## 3. What remedies are available to claimants in competition damages claims?

The right to compensation for harm resulting from infringements of competition law implies that a company or group of companies that breaches competition rules

 

will be held liable before the injured party for all harms arising from the infringement. This encompasses the tort law remedy of liability claim for damages under the extra-contractual liability regime – article 483 et seq. and 562 et seq. of the Portuguese Civil Code. The existence of a previous condemnatory decision issued by the PCA or by an appeal court that confirms that competition law has been infringed means an irrebuttable presumption. The decisions issued by competition authorities or courts of other Member States are rebuttable presumptions of existence of that infringement.

This liability regime implies that all the requirements for liability must be met:

- Existence of a breach of competition rules;
- Proof of injury to the claimant;
- Fault of the defendant; and
- Demonstration of a causal nexus between the infringement of competition rules and the damages occurred.

## 4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

*a) Measure of damages*

As said before, Law 23/2018 establishes that the right to compensation for harm as a consequence of infringements to competition law implies that undertakings that breach competition rules will be held liable before the injured party for all harms suffered

As set out in general rules lay down on article 564 of the Portuguese Civil Code, article 5 of Law 23/2018 also stipulates that damages are merely compensatory and courts award a compensation amount corresponding to the difference between the actual situation of the injured party and the situation that would exist had the infringement not take place. This compensation comprises not only the actual loss caused by the infringement but also the loss of profits – the foreseeable damage resulting from the amount of any benefits that the injured party could not obtain due to the breach of competition law. If future damages are indeterminable, a further court decision will be required. Interests also accrues to the damages, and are calculated from the date of the decision setting the amount until the full payment.

*b) Joint and several liability*

The above mentioned article 5 also establishes that if the breach of competition law results from the conduct of two or more entities, all those entities will be jointly liable, as a rule. However, whenever any of such undertakings is a small and medium-sized enterprise (SME) its liability will be limited:

- Towards its own direct or indirect customers or suppliers, if:
    - the infringement occurs in a market where the SME holds less than 5% of market share throughout the duration of the infringement, and
    - if joint liability jeopardises the financial solvency of the SME.
- Towards any other injured parties, if they do not obtain from the other infringing undertakings the repair of the damage suffered.

This exception is not applicable if the SME was primly responsible for the infringement, or constrained other undertakings to take part in it, nor if it has already been convicted for other competition law infringements.

When joint and several liability takes place, there is a right of redress between the undertakings to the exact extent of their relative responsibility on the damage, corresponding to the average of their shares in the affected markets. This is applicable to the amounts paid by way of compensation to injured parties that are not direct or indirect customers or suppliers of any of the offending undertakings. The liability share for each undertaking can be ascertained by the role that they played in the infringement.

*c) Leniency applicants*

If the damages were caused by leniency applicants, these undertakings are only liable towards:

- Its direct or indirect customers or suppliers;
- Claimants whose damages cannot be fully compensated by any other undertakings.

The amount to be paid as a right of redress by leniency applicants cannot exceed the amount of damages caused to their own, direct or indirect, customers or suppliers.

## 5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

*a) Limitation period*

 

According with Law 23/2018 the right to compensation shall expire within five years from the date the injured party became aware, or the date on which it can be reasonably assumed knowledge of:

- The behaviour in question, and that it constitutes an infringement of competition law;
- The offender's identity; and
- The existence of damages caused by the violation of competition law, irrespective of the knowledge of the full extent of the damage.

This limitation period only starts to run after the infringement of competition law ceases.

*b) Suspension of the limitation period*

The limitation period is suspended in the flowing cases:

- If the Portuguese Competition Authority (PCA) initiates an investigation of an infringement that is related to the action for damages, and this suspension does not end before one year the infringement has been declared by a final decision of the PCA or the court;
- In relation to the parties who participate, participated, are or were represented in an out-of-court settlement procedure, during the period of time in which such a procedure takes place, without prejudice of the interruption of the limitation period because of an arbitral commitment.

*c) Interruption of the limitation period*

The limitation period can be interrupted in the following cases:

- By the citation or judicial notification to the alleged infringer of any acts that express the intention to exercise the right, namely those resulting from the access to evidence before bring an action for damages or apply to the court for interim measures.

## 6. Which local courts and/or tribunals deal with competition damages claims?

In Portugal, the dispute of decisions or measures (when appealing is possible) taken by the PCA are brought before a specialised court, the Competition, Regulation and Supervision Court (CRSC – Tribunal da Concorrência, Regulação e Supervisão, created by Law 46/2011, of 24 June).

This Court has exclusive jurisdiction in damages actions resulting exclusively from the breach of competition rules (follow-on and standalone claims) and all cases related to regulatory decisions under competition law, inter alia, review the decisions of the PCA's, being the first instance court for PCA decisions; damages' actions exclusively grounded on competition law infringements; decide actions where a declaration of an agreement's nullity is requested exclusively on the grounds of competition law infringements.

This appeal does not suspend the effects of the PCA decisions, unless it is provided for, solely or cumulatively with other interim measures, explicitly in the interim measures duly handed down. The CRSC has full jurisdiction in cases of appeals submitted against the PCA decisions imposing a fine or a periodic penalty payment, and can reduce or increase the amount of the fine or of the periodic penalty payment. The competent appellate court (Tribunal da Relação) hears the appeals lodged against the rulings and dispatches of the CRSC. If the appeal previously referred to focus on an issue of law, the appeal will be brought directly to the Supreme Court. The decisions of the Tribunal da Relação can be brought to the Supreme Court but are strictly limited to issues of law, with no suspensive effect.

It should be also underlined that civil courts are still competent to decide any other claims when the breach of competition rules is only one among other grounds invoked by the claimant.

## 7. How does the court determine whether it has jurisdiction over a competition damages 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 an International Instrument so determines, and besides that – and, in summary, under article 59 (international competence of the Portuguese courts), article 62 (requirements for considering the international competence of the Portuguese courts), and article 63 (exclusive competence of the Portuguese courts) of the Portuguese Civil Procedural Code – Portuguese courts will also be considered competent in the following cases:

- The defendant, or one of the defendants, is domiciled in the Portuguese territory, unless it concerns legal proceedings on real property

 

or personal rights on real property located in a foreign country. An undertaking is considered domiciled in the Portuguese territory if it has its registered or effective office in Portugal or has a branch, agency, subsidiary or delegation in Portugal;
- The legal proceedings should be initiated in Portugal, according to the Portuguese rules on territorial jurisdiction;
- The cause of action or some of the facts related thereto were carried out in the Portuguese territory;
- 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 the Portuguese legal system.

It may also result from a forum selection clause agreed by the parties (with the exception of certain disputes such as, enforcement of decisions over real estate located in Portugal or insolvency of undertakings with a head office in Portugal).

## 8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

*a) Determination of the Applicable law*

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

As regards damages actions, the law applicable to extracontractual civil liability, according to the Portuguese Civil Code, is the law of the country where the main cause of the damage occurred. If the law of the state where the harm effect took place considers the defendant liable, but the law of the state in which the activity took place does not, the former will apply, provided that the defendant could have predicted the production of a damage in that country as a result of its act or omission. Though, if the claimant and defendant have the same nationality or, in the absence of it, the same habitual residence, and are occasionally in a foreign country, the applicable law will be that of common nationality or residence, notwithstanding local state provisions that should be applied without distinction to all persons.

Concerning contractual liability, also according to the Portuguese Civil Code, the obligations arising from agreements are ruled by the law agreed by the parties, although it only can fall under a law whose applicability corresponds to a serious interest of the parties or it is in connection with any of the elements of the applicable agreement in private international law terms. In the absence of this determination of the competent law, the law of the common habitual residence of the parties, or the law of the place of conclusion of the contract is applicable.

Relating to the territorial jurisdiction of national courts, when cases involve persons established outside the Portuguese territory, without prejudice to what is established in European regulations and other international instruments, Portuguese courts are internationally competent when the parties have given them jurisdiction or there is any of the connection elements stated at Portuguese Civil Procedure Code (article 62.º): i) when the action can be brought in a Portuguese court according to the rules of territorial jurisdiction established in Portuguese law; ii) the fact/s on which the claim is based has/ve been practiced in Portuguese territory; iii) when the claim invoked cannot become effective unless an action is brought before Portuguese courts or if there is an appreciable difficulty for the claimant in filing the action abroad, provided the existence of an element of relevant connection.

*b) Standard of proof*

Regarding the applicable standard of proof required, the court freely assesses the evidence and makes his decision on the basis of his prudent belief regarding each fact. The exception are those facts for which law requires special formalities to prove them, or those that can only be proven by certain documents or other means of proof (agreement or confession of the parties). Parties may use any means to prove their allegations and the judge must take into account all the evidence presented by them, and may freely order the production of any kind of evidence deemed required for the truth to be reached.

## 9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

A final condemnatory decision by the PCA, or by a court of appeal, through a final and unappealable decision, of the existence of a breach of competition law constitutes an irrebuttable presumption of existence of that

 

infringement, for an action for damages for the resulting damages of that breach. The final decisions of PCA are binding for the Competition Court or any other court regarding the existence and the characteristics of the infringement of competition rules and the legal grounds for damages claims.

The declaration by a competition authority of any Member State of the EU, through final decision, of the existence of an infringement of competition constitutes a rebuttable presumption of the existence of the infringement, unless disproved by the defendants. The same rebuttable presumption applies to the declaration by a court of appeal of others Member States of the EU, by a final and unappealable decision.

If the subject matter of an action pending before the civil court is being investigated by the PCA, or by a competition authority of any Member State of the EU, or by a court of appeal national or from a Member State, the Portuguese courts may decide to suspend the proceedings until the competition authority or the appeal court reaches a final decision.

### 10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

Portuguese courts may suspend proceedings and wait for the conclusion of an investigation or decision by the PCA. The parties may also apply to obtain the stay of the proceedings on the basis that the PCA is in a better position to gather evidence of the breach of competition law.

### 11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

The Constitution of the Portuguese Republic establishes the popular action (ação popular) as a form of class action available for damages claims, a way of supra-individual access to justice, which is somewhat similar to the mechanisms of “class actions”, “substituted actions” or “citizen suits” in other jurisdictions like the U.S. and the Anglo-Saxon system.

Such judicial actions are ruled by Law 83/95 of 31 August, which is an opt-out collective redress model also expressly referred at article 19.º of Law 23/2018 with specific rules related with the damages claims for infringement of competition law. The entities who are entitled to bring this actions for damages are: i) citizens; ii) associations and foundations whose purpose is the consumer protection; and iii) associations of undertakings whose members are injured by the competition law infringement in question.

Any holder of the interests covered by the actio popularis who does not want to be entailed by the judgment may opt out. The claimant in these actions automatically represents by default all the holders of the similar interests at stake and the would-be group members do not need to be identified precisely in the initial petition. There is no need to name all the members of the popular action nor provide an exact formal proof of monetary claims for all possible group members. The judge is required to notify identified parties individually and unidentified parties through newspapers or public notices as expressly forecast in article 15.º of Law 83/95. As this constitutes a less formal version of the general regime laid down in the Civil Code, it is not required to have the exact formal proof of monetary claims for all potential claimants, and it is not essential to name them all. The holders of the interests involved in the action will be publicly notified through a press announcement with the purpose of, within the term prescribed by the judge, deciding whether or not they accept representation in that action, or whether they decide to be excluded from the effects of the judicial decision. The silence equals acceptance of being part of the group.

The final decision has erga omnes effects and the court will identify the terms of payment of compensation to be paid by the losing party. All members of the group will be bound and affected by this court verdict, with the exclusion of those who voluntarily self-excluded.

The condemnatory sentence defines the criteria for identification of those injured by the violation of competition law and quantify the damage suffered by each injured person who is individually identified. In case the injured persons are not individually identified, the judge sets a global amount of compensation. If this global amount of compensation is not sufficient to compensate the damage suffered by the injured persons individually identified, it is proportionally distributed by them concerning the respective damage.

 

Regarding claims subject to the general provisions of the Portuguese Civil Procedural Code, third parties can join the proceedings as co-parties on an opt-in basis.

In Portugal, the first actio popularis to compensate consumers for infringements of competition law took place at March 2015, before the Lisbon Judicial Court (case n. 7074/15.8T8LSB). The Portuguese Competition Observatory, a non-profit association of academics, filed a mass damages claim against Sport TV (which held the monopoly in the provision of paid premium sports channels in Portugal), asking to be compensated for all consumers harmed by the anticompetitive behaviour of Sport TV between January 2005 and June 2013. This action aims to compensate over 600,000 clients for damages resulting from anticompetitive practices, and also to compensate those who were excluded from the benefit of these channels due to the inflation of prices and all Portuguese payTV subscribers (over three million persons) who suffered from a decrease of competition in this market as a consequence of improved transparency and reduced incentive to competition arising from the practices of the company jointly controlled by the pay-TV market leader. This action to some extent follows an abuse of dominance decision by the PCA. Sport TV was condemned by PCA to a fine of €3.7 million on the grounds of abuse of dominant position, later confirmed by the CCRS.

## 12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

Law 23/2018 contains a general presumption that cartels are the cause of damages caused by the infringements practiced by them, unless otherwise proven.

Under that Law, the pass on mechanism for competition damages claims is available and allows the defendant to invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed falls upon to the defendant. Thus, the defendant is permitted to invoke that the claimant has passed on any additional costs that resulted from the competition law breach downstream (or upstream) in the production or distribution chain, in which case the defendant has to prove the pass-on.

Indirect purchasers may also file damages actions based on the repercussion of additional costs resulting from competition law infringements. In this case, the referred law provides that there is a presumption that additional costs were passed on to the indirect customer, provided he demonstrates that:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

## 13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Portuguese law allows expert evidence, as a means of proof, requested either by the Court or by one of the parties, in competition litigation for assessing quantitative damages and enlighten important economic issues, such as the quantification of damages or to demonstrate the effects of the infringement. At the mentioned Sport TV case, expert evidence was produced for assessing quantitative damages and for clarifying essential economic issues before the CCRS. As expressly referred by article 12º of Law 23/2018, the Court may order the presentation of evidence that contains confidential information when considering it relevant to the action for damages, through the adoption of effective measures to protect them. This includes subjecting experts to the obligation of confidentiality or requesting the preparation by experts of abstracts on non-confidential or aggregate information.

Under article 467 et seq. of the Code of Civil Procedure, the expert evidence is requested by the court to an appropriate establishment, laboratory or official service or, when this is not possible or convenient, performed by a single expert, appointed by the judge from among persons of recognized reputation and competence in the matter in question. The parties are heard on the appointment of the expert, and may suggest who should carry out this diligence. If the parties agree on the expert to be appointed, the judge must appoint him, unless he has reasons to question his competence and probity. The expertise can be carried out by more than one expert, up to the number of three, upon request of the Court or by one of the parties or decision of the Court. In this last case, if the parties agree on the nomination of experts, the judge must appoint them.

 

Otherwise, each party chooses one of the experts and the judge appoints the third. Upon request by one of the parties or decision of the court itself, the judge might require the presence of the expert at the court hearing. The expert may be dismissed by the judge, which means that the probative value of this evidence is decided by the court. Finally, it is important to underline that parties or the court may file a complaint against the report of the expert or ask for clarifications and can also ask for a second expert evidence, whose probative value is assessed again by the court.

## 14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

The process commences with the initial written submissions presented to the court. During private enforcement hearings, the court uses a variety of means of evidence, supported by documents, witnesses and experts, among others. Once the submission has been received, the Public Prosecutor presents it to the Judge.

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 508 of the Portuguese Civil Procedural Code, order the attendance of the witness in court, under custody, without prejudice of application of a fine for missing the court session. 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. Article 523 of the Portuguese Civil Procedural Code sets out the regime for 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.

During the trial hearing, witnesses who have direct knowledge of the relevant facts will be firstly examined by the legal representative of the party who appointed them, and afterwards subjected to the examination of the counterpart legal representative. In any case, it is possible to cross-examine witnesses, either by request of the parties or by order of the court.

## 15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

Concerning the duration of the process, and conditional to the complexity of the case, the average duration of the civil liability proceedings in first instance court (CRSC) is about two a three years, in accordance with the Justice Report 2015-2019. The complexity of the cases might result in a longer duration.

As said before, the administrative decisions of the PCA may be appealed to the CRSC, the specialized court, corresponding to the court of first instance. The rulings of the CRSC may be appealed before the Lisbon Court of Appeal (judicial review of facts and Law). And the rulings of the Lisbon Court of Appeal can be appealed before the Portuguese Supreme Court of Justice (the higher body in the hierarchy of judicial courts, without prejudice of the Constitutional Court, only hears and determines on matter of Law).

## 16. Do leniency recipients receive any benefit in the damages litigation context?

The Portuguese leniency programme establishes the legal framework for granting immunity from fines and for reduction of fines to undertakings in administrative proceedings concerning the infringement of national and European competition rules (articles 75 to 82 of Law 19/2012, of 8 of May). This leniency programme defines the conditions that undertakings have to accomplish in order to qualify for leniency when reporting to the PCA any agreements and concerted practices in which they are or have been involved, subject to assessment in order to grant full immunity or a reduction not exceeding 50% of the total amount of the fine.

Regarding the damages litigation context there is no leniency program in the sense of a full immunity or a reduction of damages caused by the breach of competition rules to leniency applicants.

Nevertheless, as mentioned above, article 5 of Law 23/2018 provides that if the damage was caused by an undertaking beneficiary of a leniency program it only is liable before its own, direct or indirect, customers or suppliers, and towards any other injured parties, if they cannot obtain from other infringing undertakings the repair of the harm suffered.

Also, the amount to be paid as a right of redress by a

 

company beneficiary of a leniency program cannot exceed the amount of damage caused to its own, direct or indirect, customers or suppliers.

It may also be mentioned that the PCA classifies as confidential the request for leniency, as well as all documents and information presented for this purpose. Third party access to documents and information submitted by the applicant for the leniency program requires its authorization, without prejudice to the right of access under Law 23/2018, of 5 June.

## 17. How does the court approach the assessment of loss in competition damages cases? Are “umbrella effects” recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

Following article 4 of Law 23/2018, the right to compensation encompasses actual loss and profit loss. Interest are added to damages and calculated separately from the date of the decision setting the amount payable until the date of actual and full payment.

Legal interest rates vary over time and therefore, the interest calculation must take into account the different rates in force for each delay period. This legal interest are fixed by a joint ordinance of the Ministers of Justice and Finance, under the terms of article 559 of the Portuguese Civil Code. In December 2015, the date of the writing of this information, civil interest is fixed by Ordinance (Portaria).

Therefore, there is an umbrella effect recognition in Law 23/2018. For example, the article 9.º states that cartels are responsible for the damages caused and article 3.º requires all undertakings to fully compensate the injured parties for damages resulting from the infringement of competition rules. This obligation includes the costs of the general increase of prices or the quantity reduction across the relevant market concerned. Moreover, the referred Law outlines the standing for private damages actions in a very broad manner, as a right recognised to all injured parties (including presumptions for price effects caused by anticompetitive behaviour in favour of injured parties participating in the vertical value chain) irrespective of the existence of a direct contractual relationship with the infringing undertaking. Nonetheless, this broadly formulation can be limited by the Portuguese restrictive requirement for demonstrating causal nexus between the infringement and the loss.

Considering that in some cases the complexity of quantifying antitrust harm and assessing the exact amount of the damages or the amount of the pass-on, may be impossible or extremely difficult, the court may take into account:

- The available evidence in order to calculate a close estimation;
- The Commission Communication (2013 / C 167/07) of 13 June 2013 on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union;
- The assistance of the PCA, at its request, for the quantification of damages.

## 18. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

If the infringement of competition law results from the joint behaviour of two or more undertakings, the liability is joint and several the claimant may be compensated by the full amount of damages from any of those companies.

However, as sated at article 5.º of Law 23/2018, there is a right of redress between those liable undertakings in the extent of their relative liability for the damage caused, equivalent to the average of their shares in the relevant markets, unless is proven otherwise, namely, regarding the role played for each defendant in the infraction. This share-based allocation is determined by the court.

The mentioned right to redress is applicable concerning the compensation amounts paid to injured parties that are not, direct or indirect, customers or suppliers of any of the defendants.

## 19. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

**General rules are applicable.** Accordingly to article 283.º et seq. of CCP, parties may reach a settlement, at any stage of the proceedings (provided that no non-disposable rights are involved) and the court may stay the proceedings.

The settlement agreed between the parties is subject to confirmation (homologation or declared by court decision) of the court.

 

## 20. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Law 23/2018 do not expressly contemplate the possibility of the competition damages claim be disposed without a full trial, differently of what is set at the Portuguese Competition Law (Law 19/2012).

Thereby, the general rules from the Code of Civil Procedure Code (CCP) are applicable for the settlement procedure, if parties agree not to have a full trial.

## 21. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

During the court process the court may order the disclosure of confidential information when considering it relevant to the damages claim, but takes effective measures to protect them. Among this measures, stated at article 13.º of Law 23/2018, are:

- Hide sensitive parts of the documents;
- Conduct oral hearings behind closed doors;
- Restrict the number of persons authorized to have access to the means of evidence, namely limiting the access to legal representatives of the parties or experts subject to the obligation of confidentiality;
- Request the preparation by experts of reports with aggregate information or reports with non-confidential information.

The court does not order the disclosure of information covered by lawyer's legal privilege and, also, does not order the presentation of means of evidence without the possibility of the owner of that information has the opportunity to authorize.

Regarding documents from the PCA, the documents contained in the files not covered by restrict categories of access can be ordered by the court at any time. In general, the court can only order the disclosure of confidential information if no party or third party can reasonably provide them, and will assess the proportionality of the request considering the legitimate interests in question. For this assessment the court also takes into account i) if the request was submitted specifically regarding the nature, object and content of the evidence contained in the PCA; ii) whether the party requires disclosure in the context of a damages claim already brought to the court; and iii) whether it is necessary to safeguard the effectiveness of public enforcement of competition law, namely to protect an investigation in progress.

Some means of evidence can only be ordered by the court after the conclusion of the PCA proceedings, namely: documents specifically prepared by a natural or legal person for a process at PCA; documents prepared by the PCA and sent to the parties in the course of a proceeding; and revoked proposals for a transactions.

When assessing the disclosure of leniency application's or transaction proposals, the court may request the PCA assistance and listen to the authors of the documents in question and cannot allow access to other parties or third parties to these documents. In the case of access to leniency applications or transaction proposals, if the information was obtained exclusively through a PCA proceeding, this evidence is not admissible in damages actions.

Regarding the category of confidential information that can only be disclosed after the conclusion of proceeding by the PCA and was known exclusively through access to a PCA proceeding, is not admissible as evidence in damages claims while the said process is not completed by the PCA. All the other cases of confidential information, can only be used as evidence by the person who obtained them or by a person who is the successor in his rights, as well as by the person who acquired the right to damages compensation.

PCA can, by its own initiative, submit written observations to the court about the proportionality of requests for the disclosure of confidential information included in its files. For this purpose, the competent court notifies the PCA sending a copy of the request.

## 22. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

The party that loses a judicial dispute must bear its costs. In the 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. In its decision the court will rule on the allocation of costs incurred in the proceedings.

The losing party reimburse the winning party in the proportion of its loss, that include the court fees paid in advance by the parties, the costs beared by the parties with the presentation of evidence (experts' fees, for example) and a compensation of the winning party for costs incurred with legal fees, limited to half of the amount of court fees to be paid by both parties. However, the court may also award costs incurred with lawyer's fees without limitation if it rules that a party acted in the proceedings with bad faith.

Under actio popularis regime, article 20 of law 83/95 states that the plaintiff is exempt from the payment of costs in case of partial granting of the claim. In the case of total dismissal, the plaintiff will be subject to a penalty fixed by the judge of between a tenth and half of the costs that would normally be appropriate, having regard to its economic situation and the formal or substantive reason for the dismissal. Furthermore, there is a joint responsibility for the expense of the claimants involved, in general terms. The actio popularis regime exempts claimants from the payment of judicial costs in the event of partial granting of the claim.

### 23. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Law 23/2018 has no specific rules, and there is no regulation on third parties fund in competition litigation.

### 24. What, in your opinion, are the main obstacles to litigating competition damages claims?

Private enforcement is a fundamental pillar of the global competition law enforcement system, along with the public enforcement, due to the reinforcement it introduces to the competition rules, namely through its potential deterrent effect of infractions and the dissemination of a culture of competition.

Although the Portuguese legal system already comprises all the necessary elements to include compensatory protection for situations of breach of competition rules, there is still little tradition and relatively few cases, when compared to other European countries, and the Portuguese law on private enforcement is still very recent.

There are some recent examples in Portugal, such as the truck cartel concerning the manufacturers convicted in 2016 and 2017 by the European Commission. At issue is the claim for millions of euros in damages, following the fine for price concertation practiced in the sale of new trucks between 1997 and 2011. In August 2019, dozens of actions were proposed at CRSC (although most of the injured undertakings joined the ongoing processes in Germany and the Netherlands), currently under analysis.

Also the condemnatory decision of the PCA, of August 2019, concerning the insurance cartel (the first cartel sanctioned by the PCA in the Portuguese financial sector with a fine of more than 54 million euros, on the basis that the undertakings involved in the cartel coordinated the prices for large corporate clients regarding workplace accident, health and auto insurance) may lead to several claims for compensation in the future after the final decisions of the judicial appeals.

Undoubtedly, the success of private enforcement depends on an effective and solid public enforcement for the success of civil follow-on actions, but there are obstacles related, for example, to the complexity of quantifying damages and proceedings, including undertakings located in different levels of the supply chain; also the length of the processes related to the judicial appeals against the decisions of the PCA until there is a final and final decision might be a problem.

In Portugal, although actions for damages based on violations of competition law can also be brought collectively (the actio popularis,), this action continues to be used very little, partly due to its opt-out nature, but also due to specifics of competition law violations that make it difficult to identify the injured parties, calculate the damages and the payment of damages.

### 25. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

Taking into account that Law 23/2018 still has a very

 

short application in time, it is reasonable to expect that the reinforcement that it introduced on the actions for damages might encourage some developments in terms of a greater regularity for harmed undertakings exercise the right to compensation stemming from breach of competition law, which is also expected to be stimulated by the action of the PCA.

The extension of the limitation period for five years, the circumstance that condemnatory decisions of PCA creates an irrebuttable presumption of existence of an infringement and the additional powers of court to request documentation, are examples of the enhancement of this institute in Portugal.

The competition litigation will probably also be positively affected by the persistence of the PCA in its priority on the detection, investigation and sanctioning of practices which distort the functioning of markets, with a particular focus on cartels. Also PCA wants to reinforce the capacity to detect anti-competitive practices namely making redress to market information, based on complaints of undertakings, consumers or other market players or by applications for leniency.

Despite the mentioned important contribution of the Leniency Program, there is a possibility that this key mechanism in the detection of cartels may be affected by the increasing number of competition litigation, once after the leniency applicants have profited from the immunity or reduction of fines, the same is not applicable to civil claims.

## Contributors

**Sónia Gemas Donário** **Managing Associate**

**sgd@aalegal.pt**