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Editor

Ilene Knable Gotts

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INTRODUCTION

Ilene Knable Gotts *

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States and reflects the societal views generally towards the objectives and roles of litigation. The United States 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. As a result, the process imposes high litigation costs (in time and money) on all participants and 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 has created 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 from the competition authorities. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near term, particularly involving intellectual property rights and cartels.

The other jurisdictions discussed in this book have each sought to increase private antitrust litigation more recently (in the past two years, for instance, in Brazil and Israel) to complement increased public antitrust enforcement. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions [...] The model is based on compensation

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through single damages for the harm suffered.' EC Competition Commissioner Neelie Kroes said: 'The suggestions in this White Paper are about justice for consumers and businesses. [...] These people have the right to compensation through an effective system that complements public enforcement, whilst avoiding the potential excesses of the US system.' The key recommendations include collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages.

Even absent the issuance of final EC guidelines, however, states throughout the European Community (and indeed in most of the world) have recently increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors. In Brazil, however, it is unclear whether a tolling period for the commencement of damages applies. Some limitation periods are quite short (e.g., Canada's with respect to Competition Act claims is two years and, in the UK, Competition Act claims must be brought within two years of the date on which the infringement decision may no longer be appealed). Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Many of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Israel, Japan, the Netherlands, the UK), with liability arising for actors who negligently or knowingly engage in conduct that injures another party. Some jurisdictions also treat antitrust concerns as a defence for breaching a contract (e.g., the Netherlands). Some jurisdictions (e.g., Australia) expressly value the deterrent aspect of private actions to augment public enforcement, while 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. Some jurisdictions permit the enforcement officials to participate in the case (e.g., in Germany the President of the Federal Cartel Office may act as *amicus curiae*). A few jurisdictions even believed that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until recent legislation repealed this requirement). In the UK, a damages claim brought by individual claimants or by consumer groups acting on behalf of two or more individual consumers before the Competition Appeal Tribunal under the Competition Act must be based on a prior decision by a public competition authority that there has been an infringement of EC or UK competition law. Interestingly, no other jurisdiction has chosen to replicate the United States system of treble damages for competition claims, taking the position that damages awards should be compensatory rather than punitive. (That said, both Canada and the UK in principle recognise the potential for punitive damages.) Nor does any other jurisdiction permit the broad-ranging and court-sanctioned scope of discovery permitted in the United States. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including, via a plaintiff-

friendly class-action regime, representatives and indirect purchasers – and to potential increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Jurisdictions such as Germany generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In Japan, class actions are not available except to organisations formed to represent consumer members. Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Spain, the UK), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., 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 permits the use of statements in lieu of documents). Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery; Israel, which believes 'laying your cards on the table' and broad discovery are important; and the UK, which provides for disclosure of documents that would be reasonable and proportionate in the circumstances on which a party would rely). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work-product, or joint work-product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK), 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. Some jurisdictions view settlement as a private matter (e.g., France, Japan, and the Netherlands, except if the settlement agreement is intended as a settlement for a group); others view it as subject to judicial intervention (e.g., Israel, Switzerland). The culture in some places, such as Germany, so strongly favours settlement that judges will often require parties to attend hearings, and even propose settlement terms; however, whether they do will depend on the circumstances. In Canada and the UK, the law provides for potential consequences for failure to accept a reasonable offer to settle (e.g., reversal or limitations on costs awards), and, in some jurisdictions, a pre-trial settlement conference is mandatory.

Private antitrust litigation is largely a work-in-progress in most parts of the world, with the paint still drying even in the United States several decades after private enforcement began. Many of the issues raised in this book, such as pass-on defence and the standing of indirect purchasers, are 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 proposed legislative changes. The one constant cutting across all jurisdictions is the increase of cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Chapter 11

PORTUGAL

*Joaquim Vieira Peres and Eduardo Maia Cadete**

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

According to available public data, no clear-cut private antitrust litigation case has occurred in our jurisdiction. The lack of private antitrust enforcement is partly due to the absence of an antitrust damage action culture in Portugal, mainly derived from consumers' and economic agents' unawareness that they can suffer losses as a result of competition law infringements. This scenario may change in the near future following the ongoing work of the new Portuguese Competition Authority (created by Decree-Law No. 10/2003 of 18 January 2003) which is instilling a competition law culture in consumers and economic agents, notably by publicising in the media its public enforcement decisions.

Private antitrust enforcement, which is still in its infancy in Portugal can substantially improve the functioning of the competition regime. The decentralisation of the EC competition rules, under EC Regulation No. 1/2003, the publication of the European Commission Green Paper on damages,[1] the 2008 White Paper on damages actions in competition cases[2] and the respective Working Paper,[3] gave ground to an extensive European debate on private antitrust enforcement which will have a material spillover effect in the Portuguese jurisdiction.

In our view the interaction of the ongoing EU debate with the continual promotion of a competition culture by the Competition Authority, added with condemnatory

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1 COM (2005) 672 final, 19 December 2005.

2 COM (2008) 165 final.

3 SEC (2008) 404.

decisions in public enforcement antitrust cases, will, sooner or later, give birth to private antitrust damage claims in our jurisdiction.

The current Portuguese legal system, as described below, has all the substantive and procedural tools to accept and rule on an antitrust damage claim and no legislation is expected in the near future in this field.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The relevant legal framework on private competition enforcement is enshrined in Law No. 18/2003 of 11 June 2003, as amended ('the Competition Act'), regarding anti-competitive practices (Article 4), abuse of dominance (Article 6) and abuse of economic dependence (Article 7), as well as on Articles 81 and 82 of the EC Treaty through Article 8 of the Portuguese Constitution.

The Portuguese Civil Code ('the CC') also plays a relevant role in the substantive legal structure, by recognising tort liability based on the infringement of legal provisions (Article 483), joint and several liability (Articles 490 and 497), indemnity limitation in cases of negligence (Article 494) and a general limitation period of three years (Article 498). In brief, the existence of private antitrust liability can be viewed as dependent on the fulfilment of five cumulative requirements: (1) the existence of conduct (act or omission) controllable by human resolution; (2) the conduct's unlawfulness; (3) the imputation of the conduct to a wrongdoer; (4) the existence of a damage; and (5) a causal link between the conduct and the damage.

The Portuguese Civil Procedure Code ('the CPC') is also an important instrument within the adjective part of antitrust proceedings before Portuguese courts by providing, *inter alia*, the rules applicable to access to evidence in Articles 266, 528, 535 and 612(2), *ex officio* seizure of documents in Articles 421 and 520, protection of business secrets and legal privilege in Articles 519(3) and 534, documentary evidence in Article 421 and use of evidence from other proceedings in Articles 522 and 674-A.

III EXTRATERRITORIALITY

Article 45(1) of the CC establishes, as a general rule, that the substantive law applicable to tort liability is determined by the law of the country in which the main activity that caused the damage occurred. If the law of the country where the damage occurred considers the defendant liable, but the law of the country in which the activity took place does not, the former is applicable, as long as the defendant should have envisaged that his act or omission would result in damage.[4]

The procedural competence of national courts is determined in accordance with EC Regulation No. 44/2001 of 22 December 2000, the Lugano Convention of 16 September 1998, and, subsidiarily, by the rules of the CPC.

4 Article 45(2) of the CC.

In accordance with Recital I of the Regulation, at the plaintiff's own choice, defendants can either be sued in the courts of the state where they are domiciled or in the courts of the state where the illegal conduct occurred. And the place where the illegal conduct occurred can be either the place where the event giving rise to the damage occurred or the place where the damage itself occurred. Pursuant to Article 6(1) of the Regulation, where a person domiciled in a member state is one of a number of co-defendants, that person may be sued where any one of them is domiciled provided that the claims are closely connected.

If the Regulation is not applicable, Articles 61 and 65 of the CPC, which grant international competence to Portuguese courts in certain cases, must be taken into account. The international jurisdiction of Portuguese courts is met if any of the subsequent conditions is fulfilled: the defendant or any of the defendants has domicile in the Portuguese territory; the conduct which is the *causa petendi* of the proceeding occurred in Portugal; and the right claimed cannot be effectively enforced unless the proceeding is triggered before a Portuguese court and as long as there is a relevant causal link with the national legal order.

IV STANDING

There are no relevant limitations on standing,[5] as any natural or legal persons can bring an antitrust private action before Portuguese courts. Minors shall be represented by their parents or by a guardian. Branches, delegations and representations of companies also have standing. Equally, a company with its headquarters outside Portugal and a representation in Portugal may sue or be sued before national courts. In a nutshell, any economic agents including consumers, suppliers and competitors that have suffered losses or other damages arising out of an antitrust breach may stand before Portuguese courts in a private antitrust claim.[6]

V THE PROCESS OF DISCOVERY

The discovery process, as enshrined in common law systems, which is conducted by the parties with only minimal supervision by the courts is not a reality in Portugal, which has a civil law tradition, where the judge plays a more significant role in fact-finding.

Nonetheless, the claimant within a Portuguese judicial proceeding can request the court to grant it access to documents that rest with the defendant or with a third party. For this purpose, the claimant shall when possible identify the relevant documents and the facts to be proven with such documents. If the court considers the request relevant, it shall order the documents' disclosure. The non-disclosure of a document by the opposing party can be punished with a judicial fine and with a court order for seizure of such document. The addressee of the disclosure request can lawfully refuse to disclose a document if it would result in an infringement of physical or moral integrity; an intrusion

5 Article 5 et seq. of the CPC.

6 Article 26(1) of the CPC.

into private or family life, residence, postal correspondence or telecommunications; or a breach of legal privilege.[7]

Within a follow-on action, the claimant can also make a request to the Portuguese Competition Authority, pursuant to Law No. 46/2007 of 24 August, regarding access to administrative documents, copies of filed documents (namely in merger cases), which shall be disclosed within 10 business days, except for the defendant's duly justified confidential information and business secrets.[8] These documents can be used as evidence within a private antitrust action. In case of public antitrust misdemeanour proceedings (there are no antitrust criminal offences in Portugal), access to the Competition Authority's file should be based in the Portuguese Penal Procedural Code ('PPC'), which is applicable to the public enforcement cases dealt by the Authority.[9]

In proceedings before a court of law, witnesses are examined in a hearing by the party that has summoned them and are afterwards subjected to cross-examination by the counterparty. Witnesses are supposed to provide their evidence in a precise and clear manner.[10] They can also testify by video-conference, written statement (namely by agreement of the parties), letter rogatory and telephone.[11] The witness produced by one party can be used as evidence by the opposing party, but the value of witness testimony is, as is all evidence, subject to the court's appraisal.

VI USE OF EXPERTS

Expert witnesses, including economists, are admitted before Portuguese courts. They can be requested by any of the parties to the proceedings or be *ex officio* nominated by the court.[12] Pursuant to Articles 342(1) and 563 of the CC, the indemnity right can only be claimed in relation to damages that would not have occurred in the absence of the infringement, placing the burden of proof on the claimant. Thus, an expert witness can be a valuable resource for the court to determine the amount of damages suffered by a claimant in cases involving complex calculations, as quantification of damages in competition litigation can be particularly difficult given the economic nature of the illegality and the difficulty in determining the counterfactual. However, economist witnesses should be used sparingly, as the excessive use of mathematical equations or formulas in their findings might make the task of understanding and evaluating them extremely difficult for the judge. Simplicity, clarity and sound reasoning should be the pillars of any expert witness. Portuguese courts, as any judicial court, are highly likely to reject or to discard expert witness damage studies that lack proper and sound reasoning.

7 See Articles 528, 529 and 519 of the CPC.

8 See Articles 6 and 14) Law No. 46/2007 of 24 August.

9 See Articles 86 and 90 of the PPC, by virtue of Article 41 of the Portuguese Misdemeanour Code.

10 Article 638 CPC.

11 Article 621 et seq. of the CPC.

12 Article 568 et seq. of the CPC.

VII CLASS ACTIONS

Law No. 53/95 of 31 August 1995 establishes the legal framework applicable to a representative action ('*acção popular*'), which can be used in the context of a private antitrust class action. The aim of these actions is to defend collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Under this framework, any natural person, association or foundation (the latter two in cases which are directly connected with their scope) should be capable of bringing a private antitrust class action before a Portuguese court based on the breach of competition law rules.[13] Companies, however, may not use the representative action procedure.

Our national procedure can be qualified as an opt-out system, as the claimant automatically represents by default all the holders of similar rights or interests at stake who did not opt out, following, *inter alia*, the public notice regarding the submission of the representative action before the court.[14] The Portuguese opt-out system, although never used in a competition case, can have a real deterrent effect on the liable party, since the latter must compensate all the persons who have been victims of a given practice and may have to refund the unlawful profit derived from the conduct in question. This system entails advantages even for the defendant, as rather than having to manage simultaneously a vast number of similar cases being tried by a whole range of different courts, the defendant is able to prepare the defence before a single court.

A plaintiff in a representative action may benefit from an exemption of court fees in accordance with Article 2(d) of the Portuguese Court Fees Act. In the representative action the court is not bound by the evidence gathered or requested by the parties and, as a general rule, has the initiative to collect the evidence that it deems appropriate and necessary.[15] No jury trials are available in the Portuguese jurisdiction for a representative action.

The claimant may claim for the damage incurred; furthermore, the indemnity for the right holders that cannot be individually identified shall de determined globally.[16]

The Portuguese representative action, which has never been triggered on the grounds of a competition law breach, if used effectively, could serve a dual purpose: to provide compensation to affected consumers and simultaneously to deter future wrongdoers, enhancing the effectiveness of the national antitrust regime.

VIII CALCULATING DAMAGES

Treble damages, punitive damages and contingency fees, cornerstones of the US antitrust litigation system, are not available in Portugal.

13 See Articles 1 and 2 of Law No. 53/95 in articulation with Article 52(3) of the Portuguese Constitution and Article 26-A of the CPC.

14 Articles 14 and 16 of Law No. 83/95.

15 Article 17 of Law No. 83/95.

16 Article 22 of Law No. 83/95.

In accordance with Article 566 of the CC, reparation of damages shall only take the form of pecuniary compensation either if: natural reconstitution is impossible; or does not fully repair the damage suffered; or is excessively costly for the debtor. Article 562 et seq. of the CC provides that that the injured party has the right to claim for loss suffered (*damnum emergens*) and lost profis *(lucrum cessans*) resulting from the illegal conduct. The indemnity shall be the difference between the pecuniary situation of the claimant in the most recent date that can be taken into account by the court and the pecuniary situation in which he or she would be in the absence of those damages.[17] Thus, the measure of loss which shall be compensated in an antitrust damage case is taken to be the difference between the claimant's actual position and the situation he or she would have been in but for the illegal conduct. In terms of legal interests, under Article 805 of the CC, in actions in which compensation is actually awarded by the court, the late payment interest is usually due as of the date the defendant was summoned for the judicial proceeding. Such interest is calculated at the annual legal rate provided in Order No. 291/2003 of 8 April 2003, which is currently 4 per cent.

In terms of attorneys' fees, Article 101 of Law No. 15/2005 of 26 January 2005, as amended, prohibits a lawyer from making a *pactum de quota litis* with the client. This is defined as an agreement between the lawyer and the client, before the final settlement of the issue at stake, through which the right to attorneys' fees is exclusively dependent upon the outcome of the case and by virtue of which the client must pay the lawyer part of any award, be that a pecuniary amount or other good or value. Lawyers, pursuant to the adequacy principle, should define their fees accordingly, namely, with the time spent with the case, its respective complexity, the financial standing of the client and the final outcome.

IX PASS-ON DEFENCES

From our perspective, at least in theory, a pass-on defence could be used by a defendant in a national private antitrust proceeding sustaining that the claimant has suffered no damages because, for instance, overcharges were passed on to the plaintiff's customers. However, it may be difficult for defendants to provide evidence that the passing-on, such as a surcharge or any additional cost, has actually occurred, as they might not have in-depth knowledge of the claimant's revenues or cost structure. Therefore, the use of the passing-on defence strategy can entail non-negligible difficulties in order to be successful and effective on a private antitrust proceeding.

X FOLLOW-UP LITIGATION

Public antitrust enforcement or criminal enforcement does not preclude the right of private parties to claim antitrust damages from defendants.

17 Article 566(2) of the CC.

Specifically the Portuguese Competition Authority's final decisions can serve as *prima facie* evidence of illegal competition law conduct by one or more companies before a court and the competition's authority decision shall be freely evaluated by the judge.[18]

Leniency applicants before the Portuguese Competition Authority do not benefit from any type of immunity in terms of follow-up litigation pursuant to Law No. 39/2006 of 25 August 2006, which establishes the national leniency regime, and Regulation No. 216/2006 of 22 November 2006, which sets forth the procedure for gaining immunity or a reduction in the applicable sanctions.

XI PRIVILEGES

Attorney legal privilege is strongly protected by the Portuguese Bar Association, not only for external lawyers, but also for in-house counsel. Legal Opinion No. E-07/07 of the General Council of Portuguese Lawyers, adopted on 27 June 2007, expressly recognises legal privilege for in-house lawyers in the context of inquiries by Competition Authorities. The breach of in-house lawyer legal privilege constitutes a crime under Article 195 of the Portuguese Penal Code, subject to imprisonment up to one year. The Portuguese Bar Association Statute clearly provides that lawyers (external or internal) are protected by legal privilege before national courts and administrative authorities (including the Portuguese Competition Authority).[19] The correspondence of lawyers registered before the Portuguese Bar Association that relates to his or her legal practice also cannot be seized, including attorney-client and joint work product defences.[20]

Documents provided to a governmental authority by the lawyer on behalf of the client do not benefit from legal privilege, as they have been disclosed to a third party.

Thus, the claimant may request access to documents provided to governmental authorities by the defendant, pursuant to Law No. 46/2007 of 24 August, regarding access to administrative documents. In addition, the claimant can also request to the Portuguese Competition Authority, copies of the public enforcement file, expurgated from defendant's duly justified confidential information and business secrets.[21] These documents can be used as *prima facie* evidence before a court within private antitrust litigation.

XII SETTLEMENT PROCEDURES

Settlement can be reached not only prior to lodging a judicial claim, but also within the court proceedings by agreement of the parties and by the court, of its own motion, as

18 Article 522 of the CPC.

19 See Article 87 of the Statute.

20 Article 71 of the Statute.

21 See Articles 86 and 90 of the PPC, through Article 41 of the Portuguese Misdemeanour Code.

an outcome of a conciliation round ('*tentativa de conciliação*') between the parties, which can occur at any stage of the proceeding.[22]

The parties can always settle the case without seeking the courts approval. However, if the settlement occurs before the judge hearing the case it shall have the value of a judicial ruling.[23]

XIII ARBITRATION

Article 1 of Law No. 31/86 of 29 August, as amended, establishes the national arbitration regime. Arbitration is available for private antitrust claims, as long as the claimant and defendant enter into an arbitration agreement. Arbitration procedures are not public and the final decision is not disclosed to third parties, as long as this is foreseen in the arbitration agreement.

An alternative dispute mechanism, for low-value antitrust private actions, could be the recourse to Justices of the Peace, created by Law No. 78/2001 of 13 July, but these courts of law only have jurisdiction to assess and decide tort liability actions concerning damages that do not exceed €5,000. The alternative dispute mechanism can still be interesting for individual consumers that have suffered damages under this amount, since a mediation process may occur between the parties prior to the judicial phase.

XIV INDEMNIFICATION AND CONTRIBUTION

If the antitrust damage is caused by more than one natural or legal person, all the involved shall be jointly and severally liable for the losses incurred by the plaintiff.[24] However, if one of the defendants pays more than its share of the damages awarded to the plaintiff, such defendant may claim from the remaining legal or natural persons held liable the corresponding part, which shall be pro-rata to their guilt and respective effects. The guilt is presumed equal for all the involved defendants (*iuris tantum*). The right of recovery from co-defendants has a limitation period of three years, from the date the obligation towards the defendant was accomplished.[25]

XV FUTURE DEVELOPMENTS AND OUTLOOK

Antitrust private damage claims are still in a very 'embryonic' stage in Portugal. Despite the substantial increase in public enforcement of competition law, since 2003, owing to the advent of a new Competition Law and of a new antitrust Authority – illustrated by the numerous findings of infringements on a wide range of industries – no private antitrust actions have been submitted before national courts. One explanation may be

22 Articles 508-A and 509 of the CPC.

23 Article 300(4) of the CPC.

24 Articles 490 and 497(1) of the CC.

25 Article 498(2) of the CC.

that economic agents and consumers who suffered losses as a result of competition law infringements may be simply unaware of their right to redress.

This lack of awareness and the absence of private enforcement confirms that the victims of cartel activity remain uncompensated for known and publicised antitrust injuries, despite the national substantive and procedural framework providing all the necessary tools for recovery of caused damages.

Nevertheless, sooner or later, antitrust actions for damages by consumers or competitors will become a reality in Portugal and they could make a decisive contribution in sustaining the integrity of the marketplace and deterring anti-competitive conduct.

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