The Private Competition Enforcement Review

third Edition

Editor

Ilene Knable Gotts

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The Private Competition Review

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EDITOR'S PREFACE

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.

Most of the other jurisdictions discussed in this book have each sought to initiate or increase the role of private antitrust litigation recently (in the past few years, for instance, in Brazil and Israel) as a complement to 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 through single damages for the harm suffered'. 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. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia plans to enter into a new round of consultations and is likely to combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress.

Even in the absence of the issuance of final EU guidelines, however, states throughout the European Union (and indeed in most of the world) have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these states have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in 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 are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awards in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages (e.g., Lithuania or Romania).

Almost all jurisdictions 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.. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis. Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands or the UK), with liability arising for actors who negligently or knowingly engage in conduct that injures another party. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway or the Netherlands), others (e.g., Australia) 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 or 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 believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until legislation loosened this requirement somewhat). 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 (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims), neither 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 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. 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 or 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 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, Hungary, Korea, the Netherlands or Spain), 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 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 'laying your cards on the table' and broad discovery are important). 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, 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 to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan or the Netherlands); others view it as subject to judicial intervention (e.g., Israel or Switzerland). The culture in some places, 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 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 upwards trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell Lipton Rosen & Katz
New York
September 2010

Chapter 15

PORTUGAL

*Joaquim Vieira Peres and Eduardo Maia Cadete**

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

According to available public data, the use of private enforcement has witnessed some recent developments in Portugal, mainly in disputes regarding the validity of contractual clauses and other private instruments, albeit not in the context of private antitrust damage actions.

For instance, the Oporto Court of Appeal ruled, by judgment on 14 April 2010,[1] that an exclusive coffee supply agreement, in force for a period of six years and subject to automatic renewals, does not *per se* infringe Article 101 of the Treaty on the Functioning of the European Union ('TFEU').

The same appellate court, in a prior ruling of 11 March 2009,[2] had declared null, pursuant to Law No. 18/2003 of 11 June 2003, as amended ('the Competition Act'), a clause in a loan agreement creating as a security an obligation for a milk producer to sell its entire production to a single economic agent (who was also the lender) until the maturity of the loan.

Also, in the last quarter of 2009 (specifically on 11 October 2009), the Lisbon Court of Appeal,[3] in a judicial proceeding initiated in 1997, declared the invalidity and lack of effectiveness of UEFA's television broadcasting regulation in force at the time, concluding that third parties – notably undertakings active in television broadcasting – were not bound by such rules. The court's appraisal was based on a European Commission

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1 Case 8615/08.2TBMTS.

2 Case 572/07.9TBVLC.

3 Case 4292/1999.L1-7.

decision of 16 July 1998, declaring such UEFA television broadcasting rules incompatible with Article 101 of the TFEU (then Article 85(1) of the EC Treaty).

In terms of private antitrust damages actions, their absence in Portugal is partly due to the lack of an antitrust damage action culture, mainly derived from consumers' and economic agents' unawareness that they are entitled to seek redress for losses suffered as a result of competition law infringements. This scenario may change in the near future following the ongoing work of the Portuguese Competition Authority,[4] which is instilling a competition law culture in consumers and economic agents, in particular by publicising its enforcement decisions to the media.

Private antitrust enforcement, which is still in its infancy in Portugal, can substantially improve the functioning of the competition regime. The decentralisation of the EU competition rules under Regulation No. 1/2003, the publication of the European Commission Green Paper on damages,[5] the 2008 White Paper on damages actions in competition cases[6] and the respective Working Paper,[7] gave weight to an extensive European debate on private antitrust enforcement, which should have a material spillover effect in Portugal.

In our view, the interaction of the ongoing EU debate with the continual promotion of a competition culture by the Competition Authority, combined with a not negligible number of punitive decisions in public enforcement antitrust cases, should – sooner or later – give rise to private antitrust damages claims.

The current legal framework, as reviewed *infra*, already contains the main substantive and procedural mechanisms to accept and rule on antitrust damages claims, and no additional legislation is expected in this field in the short term.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The relevant legal framework on private competition enforcement is enshrined in 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 101 and 102 of the TFEU, 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). According to the CC rules, private antitrust liability depends on the fulfilment of five cumulative requirements: (1) conduct (act or omission) controllable by human resolution; (2) the conduct's unlawfulness; (3) the imputation of the conduct to a

4 Created by Decree-Law No. 10/2003 of 18 January 2003.

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

6 COM (2008) 165 final.

7 SEC (2008) 404.

wrongdoer; (4) the existence of damages; and (5) a causal link between the conduct and the damage.

Furthermore, one should not preclude the possibility of a damages claim being brought under contractual liability in cases where a contract exists between the wrongdoer and the entity suffering the damage, and there is a breach of a contractual obligation or any ancillary duty.

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, use of expert evidence in Article 568(1), protection of business secrets and legal privilege in Articles 519(3) and 534, documentary evidence in Article 523 *et seq.* 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.[8]

In situations involving a conflict of substantive laws, EU Regulation No. 864/2007 of 11 July 2007, on the law applicable to non-contractual obligations ('Rome II'), sets out, as a general rule (Article 4(1-2)), that the law applicable to a non-contractual obligation arising out of a tort will be the law of the country in which the damage occurs; this is the case irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. However, where the party alleged to be liable and the party sustaining damage both have their usual residence in the same country at the time when the damage occurs, the law of that country will apply. In addition, specifically in relation to non-contractual obligations arising out of restrictions of competition, Article 6(3) of Rome II provides that (1) the law applicable to a non-contractual obligation arising out of a restriction of competition will be the law of the country where the market is, or is likely to be, affected; or (b) when the market is, or is likely to be, affected in more than one country, the party seeking compensation, who sues in the court of the domicile of the defendant, may instead choose to base its claim on the law of the competent court, provided that the market in that Member State is among those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises. Where the claimant sues more than one defendant in that court in accordance with the applicable jurisdictional rules, it can only base its claim on the law of that court if the restriction

8 Article 45(2) of the CC.

of competition on which the claim against each of these defendants relies directly and substantially also affects the market in that court's EU Member State.

On the other hand, the procedural competence of national courts is determined in accordance with the 2007 Lugano Convention ('Lugano II'),[9] which entered into force on 1 January 2010, by Regulation No. 44/2001[10] and by the rules of the CPC.

In accordance with Articles 2(1)1, 3(1) and 5(3) of the aforementioned Regulation, at the plaintiff's request, 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. The place that 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 party domiciled in a Member State is one of a number of co-defendants, that party may be sued in the jurisdiction in which 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: (1) the defendant or any of the defendants have their domicile in Portugal; (2) according to the applicable Portuguese rules on territorial jurisdiction, the proceeding must be filed before a Portuguese court; (3) the conduct that is the *causa petendi* of the proceeding occurred in Portugal; or (4) 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,[11] 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.[12]

9 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

10 Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended.

11 Article 5 *et seq.* of the CPC.

12 Article 26(1) of the CPC.

V THE PROCESS OF DISCOVERY

The discovery process in Portugal is one of a civil law tradition, where the judge plays a more significant role in fact-finding, thus differing substantially from the discovery process enshrined in common law systems, which is conducted by the parties with only minimal supervision by the courts.

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 sanctioned with a judicial fine and with a court order for seizure of such document. However, 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 into private or family life, residence, postal correspondence or telecommunications; or a breach of legal privilege.[13]

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, to have access to administrative documents, copies of filed documents (in merger cases), which must be disclosed within 10 business days, except for the defendant's duly justified confidential information and business secrets.[14] These documents can be used as evidence within a private antitrust action. In the case of public antitrust misdemeanour proceedings (there are no criminal antitrust offences in Portugal), access to the Competition Authority's file should be based on the Portuguese Penal Procedural Code ('PPC'), which is applicable to the public enforcement cases dealt with by the Authority.[15]

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.[16] They can also testify by videoconference, written statement (by agreement of the parties), letter rogatory and telephone.[17] 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 nominated *ex officio* by the

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

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

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

16 Article 638 of the CPC.

17 Article 621 *et seq.* of the CPC.

court.[18] Pursuant to Articles 342(1) and 563 of the CC, the indemnity 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, with an adequate trade-off between accuracy and practicality. Portuguese courts, like any judicial court, are highly likely to reject or to discard expert witness damage studies that lack proper and sound reasoning.

VII CLASS ACTIONS

Law No. 83/95 of 31 August 1995 establishes the legal framework applicable to a representative action, 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.[19] Companies, however, may not use the representative action procedure.

The Portuguese 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.[20] 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 4(1b) of the recently revised 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 power to collect the evidence

18 Article 568 *et seq.* of the CPC.

19 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.

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

that it deems appropriate and necessary.[21] No jury trials are available in the Portuguese jurisdiction for a representative action.

The claimant may seek redress for damages suffered; but, the indemnity for the rights holders that cannot be individually identified shall be determined globally.[22]

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. In accordance with Article 566 of the CC, reparation of damages shall only take the form of pecuniary compensation 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 the injured party has the right to claim for loss suffered (*damnum emergens*) and lost profits (*lucrum cessans*) resulting from the illegal conduct.

The indemnity shall be the difference between the pecuniary situation of the claimant on 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.[23] Thus, the measure of loss that 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 interest on late payment is usually due as of the date the defendant was summoned for the judicial proceedings. 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, consdering the time spent with the case, its respective complexity, the financial standing of the client and the final outcome.

21 Article 17 of Law No. 83/95.

22 Article 22 of Law No. 83/95.

23 Article 566(2) of the CC.

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 pass-on defence strategy can entail non-negligible difficulties in order to be successful and effective in 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.

Specifically, the Portuguese Competition Authority's final decisions can serve as *prima facie* evidence of an infringement of competition law by one or more companies before a court and the competition's authority decision shall be freely evaluated by the judge.[24]

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 PRIVILEGE

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 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).[25] The correspondence of lawyers registered before the Portuguese Bar Association that relates to his or her legal practice cannot be seized, including attorney–client and joint work product defences.[26]

This appraisal is also recognised by the judiciary: the Lisbon Commerce Court confirmed[27] that no distinction should be made between in-house and external lawyers in terms of legal professional privilege protection.

24 Article 522 of the CPC.

25 See Article 87 of the Statute.

26 Article 71 of the Statute.

27 Case 572/07.9TYLSB.

A breach of in-house or external lawyer's legal privilege constitutes a crime under Article 195 of the Portuguese Penal Code, subject to imprisonment of up to one year.

However, documents provided to a public authority by the lawyer on behalf of the client do not benefit, as a general rule, from legal privilege, as they have been disclosed to a third party.

Thus, the claimant may request access to documents provided to public 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 copies of the public enforcement file from the Portuguese Competition Authority, with the defendant's duly justified confidential information and business secrets expurgated.[28] These documents can be used as *prima facie* evidence before a court within private antitrust litigation.

Finally, pursuant to the national leniency regime,[29] documents provided by the applicant to the Competition Authority do not benefit from legal privilege.

XII SETTLEMENT PROCEDURES

A settlement can be reached not only prior to lodging a judicial claim, but also during court proceedings by agreement of the parties or as the outcome of a conciliation round, which can take place at any stage of the proceedings if both parties require it or if the court finds it suitable or appropriate.[30]

The parties can always settle the case without seeking the court's approval. However, if the settlement occurs before the judge hearing the case it shall have the value of a judicial ruling.[31]

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 only have jurisdiction to assess and decide tort liability actions concerning damages that do not exceed €5,000. This alternative dispute mechanism can also be of interest to for individual consumers that have suffered damages under this amount, since a mediation process may occur between the parties prior to the judicial phase.

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

29 Law No. 39/2006 of 25 August 2006.

30 Articles 508-A and 509 of the CPC.

31 Article 300(4) of the CPC.

XIV INDEMNIFICATION AND CONTRIBUTION

If the antitrust damage is caused by more than one natural or legal person, all the involved entities shall be jointly and severally liable for the losses incurred by the plaintiff.[32] 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. The right of recovery from co-defendants has, as a general rule, a limitation period of three years, from the date the obligation towards the defendant was accomplished.[33]

XV FUTURE DEVELOPMENTS AND OUTLOOK

The number of private antitrust disputes is growing in Portugal, notably grounded on the validity of contractual clauses. In terms of private damage actions, 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 actions have been submitted before national courts. One explanation may be that economic agents and consumers who have 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 damage actions would seem to confirm that cartel victims remain uncompensated for known and publicised antitrust injuries, despite the national substantive and procedural framework providing adequate tools for recovery of caused damages.

Nevertheless, in the medium term, antitrust actions for damages by consumers or affected companies should become more common in the Portuguese antitrust landscape, making a decisive contribution in sustaining the integrity of the marketplace and deterring anti-competitive conduct.

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

33 Article 498(2) of the CC.

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