GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

© Law Business Research

PRIVATE LITIGATION GUIDE

Editors

Nicholas Heaton and Benjamin Holt

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2019
For further information please contact Natalie.Clarke@lbresearch.com

© Law Business Research

Publisher
Clare Bolton

Business development manager
Natalie Hacker

Editorial coordinator
Hannah Higgins

Production editor
Katrina McKenzie

Subeditor
Rakesh Rajani

Editor-in-chief
David Samuels

Published in the United Kingdom by Global Competition Review

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK
© 2019 Law Business Research Ltd
www.globalcompetitionreview.com

First edition

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information in this is accurate as of October 2019, be advised this is a developing area.

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-83862-216-9

Printed in Great Britain by Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© Law Business Research

Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE

ALLEN & OVERY LLP

BAKER MCKENZIE

CDC CARTEL DAMAGE CLAIMS CONSULTING SCRL

CHARLES RIVER ASSOCIATES

CROWELL & MORING LLP

CUATRECASAS

DENTONS LLP

DEUTSCHE BAHN AG

FASKEN MARTINEAU DUMOULIN LLP

FRANKLIN

HAUSFELD & CO LLP

HERBERT SMITH FREEHILLS LLP

HERZOG FOX & NEEMAN

HOGAN LOVELLS

LUTHER RECHTSANWALTSGESELLSCHAFT MBH

SIR MARCUS SMITH

MARTÍNEZ LAGE, ALLENDESALAZAR & BROKELMANN

© Law Business Research

MORAIS LEITÃO GALVÃO TELES SOARES DA SILVA & ASSOCIADOS

MUȘAT & ASOCIAȚII

NISHIMURA & ASAHI

PEPPER HAMILTON LLP

PINHEIRO NETO ADVOGADOS

PROSKAUER ROSE LLP

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SLAUGHTER AND MAY

WINSTON & STRAWN LLP

WOLF THEISS

© Law Business Research

Contents

© Law Business Research

© Law Business Research

Part II: Comparison Across Jurisdictions

© Law Business Research

© Law Business Research

PART II
COMPARISON ACROSS JURISDICTIONS

© Law Business Research

31

Portugal Q&A

Gonçalo Machado Borges[1]

Effect of public proceedings

1 What is your country's primary competition authority?

The competition authority in Portugal (AdC) came into being in 2003 and its current statutes were approved by Decree-Law No. 125/2014. The AdC is an independent administrative entity, which is autonomous in respect of its financing, administration and management, and is entrusted with the enforcement of the national competition legal regime, approved by Law No. 19/2012, and of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Sector-specific regulators are not empowered to apply the competition rules.

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The AdC has quite extensive fact-finding powers. It can carry out inspections (dawn raids) at corporate premises, during which it may question corporate officers and employees from whom it may request documents or information; search, examine, copy and seize documents (whether hard copies or digital format), including emails and computer hard-drives; and seal off specific rooms, areas, computers or servers. The AdC may also carry out searches at the personal domicile of corporate directors, officers or employees, provided it obtains prior judicial authorisation. Furthermore, the AdC may submit written requests for information that the undertakings in question are bound to answer, providing thorough and complete information. Failure to answer in full or the provision of incorrect or misleading information is punishable as a misdemeanour, and subject to fines of up to 1 per cent of the undertaking's turnover. Otherwise, competition violations do not constitute crimes under Portuguese law.

1 Gonçalo Machado Borges is a partner at Morais Leitão, Galvão Teles, Soares da Silva & Associados.

© Law Business Research

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Private antitrust claims can proceed parallel to investigations by the AdC, although claimants, particularly in damages actions, may prefer follow-on claims as a more effective option. Stand-alone claims face evidentiary hurdles due to difficulties in obtaining access to relevant information or documents contained in the competition authority's file (namely if the AdC has determined that its investigation should remain under legal secrecy pending a final decision or if the claimant is unable to demonstrate that no other party is in a position to supply the relevant information or documents). Moreover, the factual basis for the claimant's cause of action in the stand-alone claim may be affected by, or depend on, a final decision by the competition authority.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

In stand-alone actions for damages, in accordance with Article 7(4) of Law No. 23/2018, which finally implemented the EU Private Enforcement Directive (Directive 2014/104/EU) in June 2018, the competent court may stay proceedings on its own initiative, pending conclusion of an ongoing investigation or final decision by the AdC or of a final judicial ruling on appeal.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

According to Article 7(1) of Law No. 23/2018, competition law infringements found by a final decision adopted by the AdC, or confirmed on appeal by a final ruling (*res judicata*) by the review court, have binding evidentiary value in the form of a non-rebuttable presumption regarding the existence, nature, duration and material, personal and territorial scope of the antitrust infringements in question. In addition, Articles 7(2) and (3) of Law No. 23/2018 confer a qualified evidentiary value on the basis of a rebuttable presumption to final decisions or rulings by competition authorities or courts of other Member States. Sector-specific regulators are not empowered to apply and enforce competition rules in Portugal and, therefore, any decisions they adopt have no particular evidentiary value to private claimants.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

In accordance with Articles 81(1) and (3) of Law No. 19/2012 (the Portuguese Competition Act) as recently amended by Law No. 23/2018, immunity or leniency applications and all supporting documents and information are classified as confidential by the AdC. Access by third parties to both the leniency applications, and all supporting documents and information is conditional on the immunity or leniency applicant's authorisation. However, in follow-on actions, courts may under no circumstances order the disclosure of immunity or leniency applications to be used as evidence (Article 81(5) of Law No. 19/2012 and Article 14(5) (a) of Law No. 23/2018).

© Law Business Research

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

Any individual or legal person with a legitimate interest in obtaining access to the file in an AdC investigation (e.g., potential plaintiffs in private antitrust actions) may request access, including the right to physically review the file, obtain hard or digital copies, extracts or certificates of documents contained in the file.[2] This is subject to several exceptions, notably: access to the file may be limited if, in the course of an investigation, the AdC determines that the file must remain under legal secrecy and granting access may be prejudicial to the investigation;[3] access to information or documents that have been classified as confidential is only available to the defendants' counsel or external economic advisers in an infringement investigation, and strictly for the purposes of exercising its right of defence.[4] In addition, access to documents prepared by the AdC during an investigation (e.g., requests for information), or documents prepared specifically by natural or legal person for an investigation (e.g., replies to requests for information), as well as settlement proposals that have been withdrawn, may only be ordered by the court after the investigation is concluded. In any case, access to evidence included in the AdC's file may only be ordered by the court if it cannot be reasonably obtained from another party or from a third party.[5]

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

See question 6.

9 Is information submitted in a cartel settlement protected from disclosure?

According to Article 22(16) of the Competition Act, third parties may only be given access to settlement proposals submitted to the AdC by undertakings in the course of an investigation if the undertaking that has submitted that proposal consents to this disclosure.

In addition, courts are not allowed to order disclosure of settlement proposals as evidence in an ongoing legal action,[6] with the exception of settlement proposals that were withdrawn, and these may only be disclosed, by court order, after the AdC investigation is concluded.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

According to Article 12(1) of Law No. 23/2018, parties to an antitrust action for damages may petition the court to order other parties, third parties, or public entities to disclose documents or other means of evidence in their possession. If that material contains confidential information,

2 Article 33(3) of the Competition Act.
3 Article 33(2) of the Competition Act.
4 Article 33(4) of the Competition Act.
5 Article 14(2) of Law No. 23/2018.
6 Article 14(5) (b) of Law No. 23/2018.

© Law Business Research

when they are considered to be relevant to the damages claim, the court ordering their disclosure may adopt measures to protect that confidentiality, including: redacting sensitive parts of documents; conducting closed hearings; limiting the number of persons authorised to access the evidence, notably restricting access to the parties' attorneys or legal counsel or to appointed experts subject to a non-disclosure obligation; and requesting that experts draw up non-confidential summaries of the confidential information.[7]

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

A private antitrust cause of action arises from an antitrust infringement, whether an anticompetitive agreement between two or more undertakings[8] or abusive unilateral conduct by one or more (in the case of collective dominance) dominant undertakings.[9] In the specific context of antitrust damages actions, the cause of action arises from an antitrust infringement that satisfies the requirements for either tort or contractual liability of the infringing undertaking.[10]

12 What forms of monetary relief may private claimants seek?

The general rule is that the party deemed liable to compensate for the damage caused, must restore the situation to what would have existed if the event that caused the damage (in this case, the antitrust infringement) had not occurred.[11] Whenever this is not possible, which is most frequently the case, a private claimant is entitled to the equivalent monetary compensation for all damages caused by an antitrust infringement, including actual loss, loss of profit and future damages, if their occurrence can be predicted.[12]

In addition, a private claimant is entitled to delay interest. When the applicant's claim is based on the defendant's tortious liability, delay interest accrues from the date of service of the writ of summons and will be calculated by reference to the actual amount of damages that is ultimately awarded by the court.[13]

These general principles of civil law are restated by Article 4 of Law No. 23/2018, according to which private claimants may seek compensation for damages caused by the antitrust infringement (actual loss) as well as for benefits lost as a consequence of the damage (loss of profit). In addition, private claimants are also entitled to delay interest, which applies from the adoption of an infringement decision until effective and full payment of the compensation.

13 What forms of non-monetary relief may private claimants seek?

Private claimants may seek injunctive, or interim, relief, for instance with the aim of putting an end to an antitrust infringement by the defendant or obtaining a court order requiring that the defendant enter into a sale or supply agreement, or resume supplies, with the claimant (e.g., in situations of abusive refusal to supply by a dominant company). Articles 362–376 of the Civil

7 Article 12(7) of Law No. 23/2018.
8 Article 9 of the Competition Act and Article 101 of the TFEU.
9 Article 11 of the Competition Act and Article 102 of the TFEU.
10 Articles 483 ff. and 798 ff. of the Civil Code, respectively.
11 Article 562 of the Civil Code.
12 Article 564 of the Civil Code.
13 Article 805(3) of the Civil Code.

© Law Business Research

Procedure Code govern the common injunctive procedure, which may be used to request the judicial imposition of any interim measures that prove adequate and proportionate to defend the applicants' rights against an antitrust infringement. An injunctive procedure is always a temporary and urgent measure that is dependent on a subsequent declaratory legal action for a definitive judicial decision on the facts.

14 Who has standing to bring claims?

Claims for compensation related to antitrust infringements may be brought by any person, whether an individual or a legal person, that has suffered losses as a result of the infringement. Both direct and indirect purchasers of the relevant goods and services have standing for these purposes, although the latter may face a greater evidentiary difficulty regarding the causal nexus between the infringement and the damages caused (passing-on by the direct purchaser who resold the goods or services may have to be demonstrated). The fact that the few competition damages actions initiated in the Portuguese courts have resulted from abuse of dominance infringement decisions by the AdC has meant that the plaintiffs are normally corporate entities that purchased the relevant goods or services from a dominant operator.

15 In what forums can private antitrust claims be brought in your country?

Pursuant to Article 112 of Law No. 62/2013, as recently amended by Law No. 23/2018, the Court of Competition, Regulation and Supervision (located in Santarém) has sole jurisdiction to decide the following types of private antitrust claims: compensation claims for damages based solely on competition law infringements; actions to enforce a right of recovery between joint and severally liable infringing undertakings; requests for access or disclosure of evidence in connection with any such actions; and other civil actions based solely on an infringement of Articles 9, 11 or 12 of the Competition Act or of Articles 101 and 102 of the TFEU.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

The Court of Competition, Regulation and Supervision, in Santarém, currently has sole jurisdiction to hear and decide private antitrust claims. See question 15.

17 Can claims be brought based on foreign law? If so, how does the court determine what law applies to the claim?

Yes. If, in a conflict of laws situation and as a result of the applicable rules of private international law, the claim (for instance, related to a cross-border antitrust infringement) is governed by a foreign law, the Portuguese courts will assess and decide the claim based on that law. In addition to the relevant provisions of the Civil Code (for instance, Articles 41(1) and 45(1)), Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations and Regulation (EC) No. 593/2008 on the law applicable to contractual obligations may be relevant to the determination of the applicable substantive law. According to Article 348(1) of the Civil Code, it is for the party seeking to rely on a foreign law to demonstrate the existence and content of the relevant provisions.

© Law Business Research

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

There are no prerequisites for starting a claim. During proceedings, the parties are required to make payments on account of costs, which calculated by reference to the amount in dispute (i.e., to the amount of damages claimed in an action for damages). They are also responsible for the payment of their own expenses and attorneys' fees. When the court renders its decision, it determines the total amount of costs (calculated by reference to the amount in dispute and considering, among other criteria, the parties' conduct during the course of litigation and the complexity of the matters involved) and the proportion of the costs to be borne by each party if they are both held partially liable (i.e., if a claim is not entirely successful). If the claim is either awarded in full or entirely unsuccessful, the losing party bears the full amount of the costs.[14]

Barring limited exceptions, such as when an urgent service of claim is requested, if the claimant does not submit a document proving it has paid the initial court costs due, the court registry may reject the initial application[15] with the result that the legal action will not be deemed initiated on that date and no service of claim will be effected by the court.

19 What is the limitation period for private antitrust claims?

The limitation period for bringing private antitrust claims is five years.[16] Prior to the implementation of Directive 2014/104/EU by Law No. 23/2018, the relevant limitation period for private antitrust claims based on tortious liability was three years.

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

The time limits above are part of the substantive law and set out in the Civil Code and their expiry extinguishes the relevant rights (e.g., the right to compensation for damages). Claims for damages based on the expired rights become time-barred, which may be invoked as a defence in any legal action initiated by a potential claimant.

21 When does the limitation period start to run?

The five-year limitation period starts to run only after the infringement has ceased and from the date the claimant knows or can reasonably be expected to know of: the relevant behaviour and that it constitutes a competition law infringement (i.e., that it is unlawful); the infringers' identity; and the fact that the infringement has caused the plaintiff harm, even if the complete extent of the damages is not yet determined.[17]

14 Article 533 of the Civil Procedure Code.

15 Article 558, f, of the Civil Procedure Code.

16 Article 6(1) Law No. 23/2018.

17 Article 6(1) and 6(2) Law No. 23/2018.

© Law Business Research

22 What, if anything, can suspend the running of the limitation period?

The running of the limitation period may be suspended if a competition authority takes action for the purposes of an investigation into an alleged infringement of competition law to which the action for damages relates, and also if there is a consensual dispute resolution process involving the parties involved or represented in the action of damages.[18] In addition, the limitation period is interrupted by a legal notice to the alleged infringer expressing the claimant's intention to exercise its right to seek compensation for damage.[19]

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

A claimant's initial application must set out the essential facts relating to the cause of action that supports the claim. As such, the facts pertaining to the requirements of tort liability or breach of contract (as applicable) must be set out, as well as those relating to the damages for which compensation is claimed. The claim must be substantiated on reasonable grounds, although the level of detail required may vary depending on the specific circumstances of each case.

If a claim, or a cause of action alleged in an application, is wholly omitted or not intelligible (e.g., because essential facts pertaining to the cause of action have been insufficiently or incorrectly stated by the applicant), the court may consider the claim to be inadmissible, which will result in the proceedings being null and void.[20] The judge may, in such cases, invite the plaintiff to perfect its initial application, notably by adducing additional, or more substantiated, facts.[21]

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

Interim relief may be available, depending on the specific circumstances of a case, provided there is an element of urgency, namely if it can be demonstrated that without immediate intervention by the court, the claimant's right may be irreparably damaged or rendered useless in practical terms.

In an interim relief, or injunction, case a plaintiff must show, on a prima facie basis,[22] two essential requirements: that the subjective right claimed by the plaintiff exists, with the extent given to it in the initial application; and that the defendant's conduct would cause serious and potentially irreparable harm to that right. The relevant degree of harm must, in general, extend beyond a mere monetary loss (if such loss is not serious enough to bring the plaintiff's solvency into question) unless the applicant can prove that the defendant will have serious difficulties in settling the compensation amount. For example, in 2004, a civil court awarded a pay-tv cable operator an injunction requiring the historical telecoms operator in Portugal to provide access to its underground ducts, for the purposes of rolling out the plaintiff's cable network, considering that, inter alia, failure to do so might result in a revocation of its licence owing to non-compliance with minimum network coverage requirements.

18 Article 6(4) and 6(6) of Law No. 23/2018.

19 Article 6(7) of Law No. 23/2018.

20 Article 186(2), a), of the Civil Procedure Code.

21 Article 590(2), b), and (4) of the Civil Procedure Code.

22 An in-depth analysis of the claimant's cause of action is reserved for the subsequent declaratory legal action.

© Law Business Research

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

Following service of a claim, the defendant must contest it by submitting its defence within a 30-day period.[23] In its defence, the defendant may raise procedural objections (including lack of jurisdiction of the seized court, nullity of the proceedings or lack of standing in respect of the claimants). It may also raise objections to the effect that the case should be dismissed, either on procedural grounds (e.g., no factual basis to the claim, resulting in the ineptitude of the initial application) or on substantive grounds (e.g., expiry of the rights invoked by the plaintiff, resulting in its claim being time-barred). The defendant may also bring a counterclaim against the claimant, identifying it separately within the scope of its defence.[24]

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

According to Article 12 of Law No. 23/2018, upon request by a claimant who has presented a reasoned justification containing reasonably available facts and evidence that are sufficient to support the plausibility of its claim for damages, the court may order the defendant or a third party, including public entities, to disclose relevant evidence that lies in their control.

There are several limitations to the disclosure of evidence: the evidence must be proportionate and relevant to the decision; if the evidence contains confidential information, the courts are able to disclose it but must adopt measures to protect that confidentiality; the court is not allowed to order disclosure of evidence covered by legal professional privilege in accordance with EU and Portuguese law. In addition, the disclosure of documents prepared by the AdC during an investigation (e.g., requests for information), or documents prepared specifically by natural or legal person for an investigation (e.g., replies to requests for information), as well as settlement proposals that have been withdrawn, may only be ordered by the court after the investigation is concluded. Leniency statements and settlement proposals may not be disclosed, at any stage, for use as evidence in private antitrust claims.

As a matter of practice, courts have been rather strict in requiring that documents in the possession of another party be identified by the claimant (name, authors, date, etc., which in many situations may prove impossible to ascertain) and that their evidentiary relevance to the case be summarily demonstrated. In addition, access to categories of documents (as opposed to individually identified documents) has been met with some reluctance by the courts.

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

The court may order the disclosure of evidence containing confidential information when it is considered to be relevant to the damages claim. However, effective measures to protect the confidentiality of such information must be adopted, namely: redacting sensitive portions

23 Article 569 ff. of the Civil Procedure Code.

24 Article 583(1) of the Civil Procedure Code.

© Law Business Research

of documents; conducting closed hearings; limiting the number of persons authorised to access the evidence, notably restricting access to the parties' attorneys or legal counsel, or to appointed experts subject to a non-disclosure obligation; and requesting that experts draw up non-confidential summaries of the confidential information.[25]

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Legal professional privilege is recognised and attorneys are bound by attorney–client privilege pursuant to Article 92 of the Portuguese Bar Association Rules. Attorney–client privilege covers all the facts, documents or information that directly or indirectly concerns professional matters disclosed by the client to its attorney. Legal professional privilege extends to any lawyers intervening in the matter and to their respective employees, and also extends to in-house counsel. According to Article 76 of the Portuguese Bar Association Rules, correspondence and documents exchanged between a client and its attorney cannot be seized by the courts, unless they are directly related to a criminal offence in proceedings where the attorney in question has been named as a defendant.

Trial

29 Describe the trial process.

The initial stage of the proceedings is concluded when all the written pleadings have been submitted: as a rule, the initial application by the plaintiff and the defendant's defence pleading. In certain circumstances, for instance if the defendant files a counterclaim, the claimant is allowed to enter an additional written reply. If any facts occur at a later stage that are relevant to the cause of action (i.e., that may support or deny the claims in the initial application), the parties may introduce them into the proceedings by means of a supervening written pleading. Following this stage, the court normally schedules a preliminary hearing with the purpose of deciding on any procedural or substantive objections that may determine an early dismissal of the case or, exceptionally, when it considers it is in possession of all the relevant facts and evidence, to adjudicate on the merits of the claim without scheduling a trial date. If the case should proceed to trial (as is normally the case), the court issues a decision specifying the object of the legal action and setting out the main issues of fact on which evidence is to be given. The trial hearing is then held on the scheduled dates and all relevant evidence is given before the court and assessed. At the end of the trial hearing, the parties' attorneys are given the opportunity for a summary closing argument (which is given orally before the court and not in writing) covering the main issues of fact and law. The first instance court then issues its decision, which may be subject to appeal (see questions 45 to 47).

25 Article 12(7) of Law No. 23/2018.

© Law Business Research

30 How is evidence given or admitted at trial?

As a general rule, each party has the burden of proof regarding the facts on which its claim or defence are based, in accordance with the cause of action defined by the written pleadings. The defendant must individually contest the facts alleged by the claimant, and it will be deemed to agree with the facts it does not object to. Only those facts that remain contested following the written pleadings by the parties are subject to the taking of evidence in trial.

Under the current Civil Procedure Code (in force since September 2013), the parties must submit and identify all the evidence they consider relevant with their written pleadings. This means that all relevant documents must be submitted at the beginning of the proceedings, as well as a complete list of the witnesses (as a rule subject to a maximum number of 10 witnesses for each party) they intend to question at trial. If a party wishes the intervention of experts this must also be requested at this stage.

Up to 20 days prior to the date on which the trial hearing is scheduled to begin the parties may amend or increase their witness list, up to the legally established limit, and also file additional documents not submitted with their written pleadings (subject to a procedural fine unless the party can demonstrate that it was unable to obtain access to the documents at an earlier date). After this, parties may only request the filing of documents that were demonstrably impossible to submit at a previous date and that have become necessary as a result of a subsequent event.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Yes, experts are used in civil legal actions in Portugal, including private antitrust litigation.[26] Usually, in this context, the parties will request the intervention of expert economists, frequently with the purpose of assisting the court in demonstrating the effects of an antitrust infringement and in quantifying damages. Pursuant to a request by any of the parties, or if the court so determines (given the complexity of the facts or the need for expert knowledge pertaining to different fields), a collegiate panel of up to three experts will be appointed. Unless the parties are in agreement on the appointment of all the experts, each party will appoint one expert and the third will be appointed by the court. The experts will set out their findings in a written report and, if ordered by the court or upon request by any of the parties, they may be notified to appear in court at the beginning of the trial hearing for oral clarification of their report.

32 What must private claimants prove to obtain a final judgment in their favour?

Private claimants must prove all legal requirements pertaining to the tortious or contractual liability of the defendants on which their claim to compensation is based, namely: the occurrence of an unlawful act or breach of contract; fault, whether intent or negligence; damages; and a causal nexus between the unlawful act or breach of contract and the damages caused.

26 Article 467 ff. of the Civil Procedure Code.

© Law Business Research

Regarding the amount of damages claimed, if a claimant is unable to prove an exact figure, the court may adjudicate on the basis of an estimate resorting to equitable criteria and within the limits of the facts it deems proven.[27]

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

The passing-on defence is expressly permitted by Article 8 of Law No. 23/2018: the defendant may invoke, against a claim for damages, the fact that the claimant passed on (fully or in part) the overcharge resulting from the competition law infringement. The burden of proving that the overcharge was passed on rests with the defendant.

34 How long do private antitrust cases usually last (not counting appeals)?

Precedent in this field in Portuguese courts is scarce as relatively few cases of private antitrust litigation are public, in particular regarding actions for damages. In general, it would seem reasonable to estimate three to four years at the trial stage, followed by 18 months to two years at the appellate stage. These estimated timings should be shortened significantly under Law No. 23/2018 as jurisdiction for the private antitrust damages cases has been centralised in the Court of Competition, Regulation and Supervision.

35 Who is the decision-maker at trial?

Legal actions are decided in first instance by a single (trial) judge. Appeals are decided by a collegiate panel of three judges.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

When it is impossible or excessively difficult for plaintiffs to quantify the total damages suffered or the amount of the overcharge, the court may estimate the amount of harm, assisted, if the court so decides and upon its request, by the AdC.[28] With regard to cartels, it is presumed that their infringements cause harm, unless the defendants rebut the presumption.[29]

37 How are damages calculated?

Article 566(2) of the Civil Code states that pecuniary compensation for damages should adequately compensate the difference between the claimant's financial situation 'at the most recent date that may be considered by the court' and the hypothetical situation it would be in were it not for the damages. This enables the court to update the amount of compensation, for instance, to adjust for inflation between the date the damage was caused and the date of the court's ruling.

27 Article 566(3) of the Civil Code.

28 Article 9(2) and 9(3) of Law No. 23/2018.

29 Article 9(1) of Law No. 23/2018.

© Law Business Research

38 Does your country recognise joint and several liabilities for private antitrust claims?

In accordance with Article 5 of Law No. 23/2018, when two or more undertakings have infringed competition law through joint behaviour (such as anticompetitive agreements and concerted practices), they are joint and severally liable for the ensuing damages. Where the infringer is a small or medium-sized enterprise, the infringer is liable only to its own direct and indirect purchasers where its market share in the relevant market was below 5 per cent during the infringement, and the application of the joint and several liability rules would irretrievably jeopardise its economic viability and cause its assets to lose all their value. It is only liable to other parties if full compensation is not possible through other infringers.

Regarding damages caused by leniency applicants, the infringer is only liable to its own direct and indirect clients and is only liable to other claimants if they cannot obtain full compensation from other infringers.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Article 5(5) of Law No. 23/2018 establishes that the right of recovery between co-defendants is determined by the extent to which they are responsible for the damages caused by the infringement. It is presumed that this is equal to their average market shares in the markets affected by the infringement for the duration of their participation in the infringement, although this is a rebuttable presumption.

Contribution by a defendant that has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.[30]

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

At the end of the proceedings, the prevailing party may request payment of its court costs from the losing party, in proportion to the amount of the claim that is awarded by the court. For this purpose, the prevailing party submits a statement of its costs – including the amounts paid in respect of court costs, legal fees, expenses, attorneys' and enforcement agent fees – and may request payment of the expenses and attorneys' fees it has incurred, in the latter case limited to 50 per cent of the amount of court costs paid by all the parties.[31]

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

A party's liability to pay costs may be limited in the event it is strictly unable to pay them, which is an unlikely scenario in the context of private antitrust enforcement outside the context of a collective popular action (see questions 48 to 55). A party's ability to recover costs is normally limited, in accordance with the limits set out in question 47.

30 Article 5(7) of Law No. 23/2018.

31 Article 533 of the Civil Procedure Code, and Articles 25 and 26 of the Judicial Costs Rules.

© Law Business Research

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

A contingent fee arrangement, or similar, whereby attorneys' fees are made exclusively dependent on the outcome of a dispute, is forbidden by the Portuguese Bar Association Code.[32] Attorneys' fees may be composed of a fixed part (according to criteria such as time spent, complexity of the issue or importance of the service provided), which may be complemented by a success fee in view of the results obtained.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Third-party funding has not been implemented in Portugal and, as far as we know, has not been used previously. Under the principle of contractual freedom, legal costs may be paid by a third party but such party's right to recover those costs is limited to the terms of the agreement reached with the party in the proceedings. In other words, the external funding party is not entitled to recover costs within the proceedings as it is not bound by the court's decision. As a rule, credit rights may be transferred to third parties. However, it is doubtful whether a claim to compensation for damages, namely if it is grounded on tort liability, may be considered a credit right for these purposes before it has been confirmed by a judicial decision.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Yes, defendants may insure themselves against the risk of private antitrust claims. The legal regime on insurance contracts, approved by Decree-Law No. 72/2008 and subsequently amended, prohibits insurance coverage of risks relating to criminal acts, misdemeanours (such as antitrust infringements) or disciplinary infringements but an exception is made for risks associated with civil liability and damages claims resulting therefrom.[33] After-the-event insurance is not available for antitrust claims if the party seeking insurance has knowledge on that date that the event, in this case an antitrust infringement, has already occurred.[34]

Appeal

45 Is there a right to appeal or is permission required?

The party against whom an unfavourable decision has been issued has a right to appeal against it, in whole or in part, provided the legal requirements for appeal are satisfied, both regarding the value of the legal action in question and other procedural requirements. No permission is required.

32 Article 106.

33 Article 14(1) a) and b) of Decree-Law No. 72/2008.

34 Article 44(2) of Decree-Law No. 72/2008.

© Law Business Research

46 Who hears appeals? Is further appeal possible?

The general rule is that a party may appeal to the court of second instance if the value of the legal action is higher than €5,000 and the decision is unfavourable to the appellant by an amount higher than €2,500.01.[35] The court of second instance can decide on both issues of fact and law. In addition, a further appeal may be brought to the Supreme Court if the value of the legal action is higher than €30,000 and the decision is unfavourable to the appellant by an amount higher than €15,000.01. The Supreme Court only decides on matters of law and, in most cases, cannot review the second instance judgment on the facts.

Appeal to the Supreme Court is excluded if the second instance court issues an identical decision to that of the trial court, based on similar grounds and without dissenting opinions.[36]

47 What are the grounds for appeal against a decision of a private enforcement action?

The general grounds for appeal apply, subject to the limitations set out above regarding the value of the claims. The facts of the case may only be reassessed by the courts of second instance whereas issues of law may be the object of further appeal to the Supreme Court (provided the legal grounds for the appellate decision have differed from the initial ruling by the trial court). Grounds for appeal from the trial court decision may include the lack of international, material or hierarchical jurisdiction; the disregard of a previous ruling no longer subject to appeal *(res judicata)*; or the fact that a ruling goes against the uniform jurisprudence of the Supreme Court regarding the same legal provisions and the same fundamental issues of law.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Under Law No. 83/95, as amended, the Portuguese legal system provides for a 'citizen's action' or 'popular action' by which individuals or representative associations may submit claims before a court based on the infringement of certain rights or legally protected interests. This mechanism may be used to seek compensation for damages resulting from competition law infringements, as clarified by Article 19(1) of Law No. 23/2018.

This type of collective or representative action has been seldom used in practice.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

These claims may be brought by any citizen (individual persons) and associations or foundations created for the defence of any of the relevant legally protected interests.[37] Under Article 19(2) of Law No. 23/2018, consumer associations and foundations whose object is consumer protection may advance compensation claims. Interestingly, this provision also gives standing to

35 Article 629 of the Civil Procedure Code.

36 Article 671(3) of the Civil Procedure Code.

37 Article 2 of Law No. 83/95.

© Law Business Research

business associations whose members have suffered damages as a result of a competition law infringement, irrespective of whether their articles or by-laws include the defence of competition among their goals.

50 What is the standard for establishing a class or group?

In the case of associations and foundations, Article 3 of Law No. 83/95 states that three requirements must be met as conditions for procedural standing: the association or foundation must have legal personality; its object or scope, as defined in its statutes or by-laws, must explicitly include the defence of the interests that are at stake in the action in question; and it must not carry out any professional activity in competition with a company or a liberal profession.

According to Article 17 of the Consumer Protection Law – Law No. 24/96, as amended, a consumer association is constituted by any association with legal personality, whose activity is not-for-profit and that has as its main statutory goal to represent the rights and interests of consumers in general or of those consumers who are members. Consumer associations may have a national, regional or local geographic scope, depending on their area of action and number of members. They may also have a generic or specific interest (in the latter case, they only represent consumers of specified goods or services). Article 18(1)(l) of the Consumer Protection Law recognises consumer associations' right to initiate popular actions.

According to Article 19(1) of Law No. 23/2018, the requirements stated in Law No. 83/95 continue to apply.

51 Are there any other threshold criteria that have to be met?

No other threshold criteria have to be met.

52 How are damages assessed in these types of actions?

In accordance with Article 19(3) of Law No. 23/2018, the criteria applied to quantify the damages suffered by each individually identified claimant should be set out in the judgment. If the amount fixed is not sufficient to provide full compensation for damages, the amount is proportionally distributed between the individually identified claimants. In the case of unidentified individual consumers, judges award a global amount for compensation calculated on the basis of an estimate, taking into account the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

Claims in popular actions may be settled by the claimants and the defendants, with the intervention of the public prosecutor. Apportionment and distribution of any amounts will depend on the terms of the settlement.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Portuguese law does not recognise alternative forms of collective settlement.

© Law Business Research

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The AdC's statutory powers do not include the imposition or authorisation of redress schemes in relation to undertakings convicted of antitrust infringements.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Yes, private antitrust disputes may be submitted to arbitration. According to Article 1(1) of Law No. 63/2011 (the Voluntary Arbitration Act), any dispute that is not subject to the exclusive jurisdiction of the state's courts or to mandatory arbitration, and involves interests of an economic nature, may be submitted to arbitration by the parties by means of an arbitration agreement.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

Yes, courts generally enforce arbitration agreements, irrespective of the object of the dispute. If a party to an arbitration agreement that applies to an antitrust dispute brings a claim in a court, unless the arbitration agreement is manifestly null and void or ineffective, the court must dismiss the case if the defendant raises as an objection the breach of the arbitration agreement.[38] If an arbitration agreement is disregarded by one of the parties, who chooses to bring the dispute before a judicial court, this determines the absolute lack of jurisdiction of the court seised.[39]

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

Following the approval of Law No. 29/2013 of 19 April, which sets out the general principles governing mediation in Portugal, the court may at any time refer the parties to mediation, staying the judicial proceedings for this purpose. If an agreement is reached during the mediation proceedings, this is submitted for the court's confirmation. If no agreement is reached, the judicial proceedings resume.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

The AdC has pursued several advocacy initiatives to increase the visibility and knowledge of private competition law among the legal community, notably in the context of its intervention in preparing the initial draft proposal for the implementation of the EU Private Enforcement Directive (Directive 2014/104/EU). This has included a wide public consultation on its draft proposal, with the intervention of government representatives, judicial magistrates, public

38 Article 5(1) of the Voluntary Arbitration Act and Articles 577 and 578 of the Civil Procedure Code.

39 Article 96, b), of the Civil Procedure Code.

© Law Business Research

prosecutors, attorneys and in-house counsel, among others. Following the approval of Law No. 23/2018, these efforts have continued. Several public universities have started to give courses on this subject. Also, the Portuguese association of competition lawyers has organised several conferences and seminars focusing on the expected impact of the new EU rules on private enforcement.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

The general expectation in Portugal is that the volume of private antitrust enforcement, in particular actions for damages, will increase noticeably following implementation of Directive 2014/104/EU by Law No. 23/2018.

© Law Business Research

Appendix 1

About the Authors

Gonçalo Machado Borges
Morais Leitão Galvão Teles Soares da Silva & Associados

Gonçalo Machado Borges is a partner at MLGTS and joined the firm as an associate in 2006. He currently heads the firm's telecoms, media and technology practice.

Gonçalo has extensive experience in EU and competition law, including matters related to restrictive practices, abuse of dominance and merger control regarding transactions in a wide range of sectors. He has been particularly active in the telecoms sector and has advised the NOS Group (the main integrated communications operator in Portugal) for several years in antitrust and regulatory matters, including the acquisition of football rights, complex merger cases before the Competition Authority and damages actions resulting from competition law infringements (including a pending suit involving margin squeeze in broadband access markets). He has also been increasingly active in the area of private enforcement and was invited by the Portuguese Competition Authority, in December 2015, to be part of a panel of experts assisting with the implementation process of the 2014 EU Directive on damages actions and with the preparation of a draft legislative proposal.

More recently, Gonçalo has focused mainly on advising telecommunications operators and media companies, both Portuguese and international, on regulatory and competition issues affecting players in the TMT sector.

Morais Leitão Galvão Teles Soares da Silva & Associados
165 Rua Castilho
Lisbon 1070-050
Portugal
Tel: +351 213 817 400
Fax : +351 213 817 499
gmb@mlgts.pt
www.mlgts.pt/en/

© Law Business Research

Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

Visit globalcompetitionreview.com
Follow @GCR_alerts on Twitter
Find us on LinkedIn

an LBR business

ISBN 978-1-83862-216-9

© Law Business Research