

Private Enforcement and Collective Redress in European Law

Portuguese Report

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I. General Questions on Private Enforcement of Antitrust Law

Q1.

According to the ECJ case law *Courage* (C-453/99) and *Manfredi* (c-295/04) any individual is entitled to a compensation for damages based on the breach of Articles 101 and 102 of TFEU and the corresponding national provisions. In Portugal, there is no specific legislation on this matter, so actions are legally possible under the general procedural and substantive rules established in the Portuguese Code of Civil Procedure and laid down in the Portuguese Civil Code, in articulation with the substantive rules on competition provided for in the Portuguese Competition Law (Law 19/2012, 8 May) and in the Treaty on the Functioning of the European Union. According to Portuguese law, actions for damages based on antitrust infringements are legally possible both under tort law (Article 483 of the Portuguese Civil Code) and contract law (Article 798 of the Portuguese Civil Code). Additionally, the unjust enrichment can also be regarded as a subsidiary legal basis for claims on competition law violations (Article 473 of the Portuguese Civil Code).

Q2.

In Portugal, claimants can complain to a civil court and ask for compensation of damages (covering actual loss and loss of profits – Articles 562 and 564 of the Civil Code), challenge the validity of an agreement (Article 9 (2) of the Competition Law and Articles 280 and 294 of the Civil Code) and/or ask for injunctive relief if the requirements are met (Articles 362 and subsequent of the Code of Civil Procedure) through common declaratory actions or through collective actions (Popular Action, which is an opt-out collective redress model). Like we said before, actions for damages based on antitrust infringements are legally possible both under tort law (Article 483 of the Portuguese Civil Code) and contract law (Article 798 of the Portuguese Civil Code).

Q3.

The private enforcement is still modest in Portugal, but cases are not as rare as commonly presumed. According to a recent survey on competition law cases in

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Portuguese Courts², conducted until 2012, it was possible to identify more than thirty decisions where competition law issues were discussed. In the majority of the cases identified, the competition issues were raised in court as a means of defence, regarding the validity of agreements or contractual clauses, and dealt with vertical relations between a manufacturer and its distributors or retailers. However, to our knowledge, there is only one standalone action concerning damages claims for antitrust infringements, already decided by the Portuguese Supreme Court, and one follow-on action still pending. In fact, the Portuguese Supreme Court recently decided the Toyota case³, concerning a stand-alone action related to a situation of an ‘ abuse of economic dependency ’. The other case is a follow-on action still pending. In this case the Portuguese Competition Authority found, in June 2013, that Sport TV abused its dominant position by having imposed discriminatory conditions on operators and limited the development and investment in the market of pay-tv; the Portuguese Competition Authority imposed a fine of € 3.7 million. This decision was upheld by Portuguese Courts⁴. As a consequence, on 12 March 2015, the Portuguese Competition Observatory⁵ filed a mass damages claim against Sport TV through a Popular Action.⁶

Q4.

In Portugal, there are no specific rules on actions for damages based on antitrust infringements. Since there is no specific legislation on this matter, stand-alone actions are legally possible under the general procedural and substantive rules established on the Portuguese Code of Civil Procedure and laid down in the Portuguese Civil Code, in articulation with the substantive rules on competition provided for in the Portuguese Competition Law and in the Treaty on the Functioning of the European Union⁷. As already mentioned, claimants can complain to a civil court and ask for compensation of damages (covering actual loss and loss of profits – Articles 562 and 564 of the Civil Code) and/or challenge the validity of an agreement (Article 9 (2) of the Competition Law and Articles 280 and 294 of the Civil Code) through common declaratory actions or more uncommonly through collective actions (mainly Popular Action, which is an opt-out collective redress model)⁸. In private litigation, in principle, the burden of proof

² Cf. ROSSI, Leonor and FERRO, Miguel, “Private Enforcement of Competition Law in Portugal (I): An Overview of Case Law”, *Revista de Concorrência e Regulação*, Ano III, No. 10, Abril/Junho 2012, pp. 91 and subsequent.

³ Supremo Tribunal de Justiça (Supreme Court of Justice), Toyota, 20 June 2013, case no. 178/07.2TVPRT.P1.S1.

⁴ Tribunal da Relação de Lisboa [Lisbon Court of Appeals], 11.03.2015, proc. No. 204/13.6YUSTR.L1.

⁵ The Portuguese Competition Observatory is a non-profit association of academics from several Portuguese universities.

⁶ Cf. FERRO, Miguel Sousa, “Collective Redress: Will Portugal Show the Way?”, *Journal of European Competition Law & Practice Advance Access*, published April 7, 2015, 1-2.

⁷ Cf. ROSSI, Leonor and FERRO, Miguel, “Private Enforcement of Competition Law in Portugal (II): Actio Popularis – Facts, Fictions and Dreams”, *Revista de Concorrência e Regulação*, Ano IV, No. 13, Janeiro/Março 2013, pp. 38 to 40; PAIS, Sofia Oliveira, “Private Antitrust Enforcement: A New Era for Collective Redress?”, *Yearbook of Antitrust and Regulatory Studies*, 2015, vol. 8 (12) p. 15.

⁸ Cf. PAIS, Sofia Oliveira and PISZCZ, Anna, “Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?”, *Yearbook of Antitrust and Regulatory Studies*, 2014, vol. 7 (10), p. 214.

is incumbent on the claimant (Article 342 (1) of the Civil Code and Article 414 of the Code of Civil Procedure) and includes the defendant's unlawful conduct, the extent of the damages and the casual link between the conduct and the damage (Articles 483, 487 and 563 of the Civil Code). When in doubt, the judge will decide against the party who bears the burden of proof (Article 342 (3) of the Civil Code and Article 414 of the Code of Civil Procedure). This is not the case in contractual liability litigation, for there is a rebuttable presumption of fault of the debtor (Article 799 of the Civil Code). The decision of a civil court can be reviewed by the respective Court of Appeal and, if legally possible, by the Supreme Court.

Although stand alone and follow-on actions are legally possible in Portuguese legal order, in practice there are few of them. To our knowledge, as mentioned before, there is only one stand alone action concerning damages claims for antitrust infringements, already decided by the Portuguese Supreme Court, and one follow-on action still pending. In fact, the Portuguese Supreme Court recently decided the Toyota case, concerning a stand-alone action related to a situation of an 'abuse of economic dependency'. In this case, Toyota SC Comércio (Toyota) was the only importer of Toyota's vehicles in Portugal and excluded a company with weak bargaining power, and this company was unable to find an equivalent alternative set up with other commercial partners in a reasonable period of time. The Court of First Instance and the Court of Appeal considered that this practice should be considered an abuse. The Supreme Court of Justice upheld the previous national court decisions, confirmed the existence of an abuse of economic dependency and awarded compensation to the company victim of the antitrust infringement⁹.

There are no specific rules for antitrust damages actions concerning follow-on actions. To the best of our knowledge, there has not been a follow-on action case decided yet, based on infringement of competition rules¹⁰. Notwithstanding, there is already one follow-on action case, still pending on Lisbon Judicial Court¹¹. The case is the following: In June 2013, following up on a complaint, the Portuguese Competition Authority found that Sport TV¹² abused its dominant position by, at least between 1 January 2005 and 30 March 2011, having imposed discriminatory conditions on operators and limited the development and investment in the market of pay-tv. As a result, the Portuguese Competition Authority imposed on Sport TV a fine of € 3.7

⁹ Case Toyota vs. Auto-AA (Supremo Tribunal de Justiça [Supreme Court of Justice], 20.06.2013, proc. No. 178/07.2TVPRT.P1.S1 .

¹⁰ Cf. ROSSI, Leonor and FERRO, Miguel, "Private Enforcement of Competition Law in Portugal (I): An Overview of Case Law", *Revista de Concorrência e Regulação*, Ano III, No. 10, Abril/Junho 2012, pp. 91 and subsequent.

¹¹ Cf. Press Package, "Portuguese Competition Observatory Initiates Collective Enforcement Action Against Sport TV to Compensate Consumers for Damages Caused by Infringements of Competition Law", Portuguese Competition Observatory, 12 March 2015; DAF/COMP/WP3/WD(2015)15, Working Party No. 3 on Co-operation and Enforcement, Relationship Between Public and Private Antitrust Enforcement – Portugal, Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, 10 Jun. 2015, p. 2.

¹² Sport TV had a dominant position in two relevant products/services markets: the wholesale domestic market of conditional access channels with premium sports content (upstream), and in the retail market of subscription television (downstream).

million. This decision was confirmed both by the Competition, Regulation and Supervision Court and by the Lisbon Court of Appeal, although with a reduction of the fine from € 3.7 million to € 2.7 million¹³. Thus, on 12 March 2015, the Portuguese Competition Observatory, a non-profit association of academics from several Portuguese universities, filed a mass damages claim against Sport TV through a Popular Action. The action seeks “to compensate over 600,000 clients for damages allegedly resulting from a number of anticompetitive practices, but also to compensate those who were excluded from the benefit of these channels due to the inflation of prices and all Portuguese pay-tv subscribers, between 2005 and June 2013 (over 3 million at the end of the period), who suffered from a reduction of competition on this market”¹⁴.

Q5.

In Portugal, legal costs are borne initially by the parties, although at the end of the proceedings the winning party is entitled to a reimbursement of the costs by the losing party (Articles 25 and 26 of the Decree-Law 34/2008, 26 February, according to the last amendment made by Law No. 72/2014, 2 September). The lawyers’ fee must compensate the services delivered, considering the relevance, the difficulty and the value of the case (Article 26 (3 c) of the Decree-Law 34/2008, 26 February, according to the last amendment made by Law No. 72/2014, 2 September). According to Article 101 of the Bar Association Law, contingency fees are not permitted in Portugal. Since the beginning of the current crisis, there has been an increase in court fees. This situation may have a negative impact in antitrust damages claims. If this is the case, other funding solutions must be considered, such as crowdfunding, State legal aid or third party funding solutions¹⁵. On the other hand, there are special rules concerning legal costs in the Popular Action Act: the right to exemption from payment of costs, prepayments and stamp duty, under Law 83/95.

Q6.

In Portugal, funding of private enforcement litigation is usually provided by the claimants themselves or by the State legal aid (Law No. 34/2004, 29 July, and Decree-Law No. 71/2005, 17 March). Contingency fees are not possible under the Portuguese law. Nevertheless, Portuguese law is “compatible with entrepreneurial litigation”¹⁶ and as already explained, the representative who offers to ensure the funds necessary for “the instigation of a popular action and for the period during which it remains pending

¹³ Tribunal da Relação de Lisboa [Lisbon Court of Appeals], 11.03.2015, proc. No. 204/13.6YUSTR.L1.

¹⁴ Cf. FERRO, Miguel Sousa, “Collective Redress: Will Portugal Show the Way?”, *Journal of European Competition Law & Practice* Advance Access, published April 7, 2015, 1-2.

¹⁵ Cf. PAIS, Sofia Oliveira, “Private Antitrust Enforcement: A New Era for Collective Redress?”, *ibid.* pp. 8-9.

¹⁶ H. Sousa Antunes, *Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)* p, 22, cf. http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf (last visited 10.12.2015).

“creates a market”, which makes him the most interested party in seeing the action proceed or in agreeing a settlement with the defendant, whatever the means by which his remuneration is calculated”¹⁷.

Q7.

Under Article 90 of the Portuguese Competition Law (Law 19/2012, 8 May), the Portuguese Competition Authority has the duty to publish on its Internet site the non-confidential version of its decisions, also indicating whether there is pending an appeal in court. Moreover, the non-confidential version of the rulings of the Portuguese civil and administrative Court of Appeals and Supreme Courts are published online in a specific database (www.dgsi.pt). Besides these instruments, there are no other ways through which victims can in practice obtain information about competition infringements in order to take legal action, including damages action.

Regarding leniency programs, we should stress that Article 81 (1) of the Portuguese Competition Law classifies the leniency applications, along with all supporting documents and information, as confidential. On the one hand, access by parties to leniency documents is allowed pursuant to the exercise of rights of defence in the proceedings, but no copies are allowed unless authorized by the applicant (Article 81 (2) of the Portuguese Competition Law). On the other hand, access by third parties is also only possible if authorized by the applicant (Article 81 (3) of the Portuguese Competition Law). Finally, according to Article 81 (4) of the Portuguese Competition Law, no authorization for access to copies of the relevant oral statements shall be granted to the party concerned in the case, nor shall authorization for access to such oral statements be granted to third parties.

Claimants, consumers or small and medium enterprises, can complain to a civil court and ask for compensation of damages (covering actual loss and loss of profits – Articles 562 and 564 of the Civil Code) and/or challenge the validity of an agreement (Article 9 (2) of the Competition Law and Articles 280 and 294 of the Civil Code) through common declaratory actions. In Popular Action, according to Articles 2, 3 and 16 PAA [Law 83/95, 31 August – Popular Action Act], standing to initiate a popular action is granted to any citizen, any legally constituted association or foundation (a legal entity whose powers include the interests covered by the PA [popular action] and is not engaged in any type of professional business competing with companies or liberal professionals), to local authorities in relation to the interests of holders who are resident in the area of their constituency and, finally, to the public prosecutor’s office, which may replace the claimants if the contested behaviour endangers the interests involved. Small and medium-sized companies cannot seek compensation directly, but through the claimants referred to in the PAA.

In common declaratory actions, in principle, the judge is bound by the initiatives of the parties concerning the production of evidence (Article 342 (1) of the Civil Code

¹⁷ Cf. Miguel Teixeira de Sousa, “A Legitimidade Popular na Tutela dos Interesses Difusos”, *Lex*, 2003, p. 247.

and Articles 411 and 414 of the Code of Civil Procedure). Nevertheless, the parties can ask the Court to order the disclosure of documents that are in possession of the other party or third persons (Articles 429 and 432 of the Code of Civil Procedure). On the contrary, in Popular Actions, it is up to the judge's own initiative to collect evidence and he/she is not bound by the initiatives of the parties (Article 17 of the Popular Action Act, Law 83/95, 31 August).

On the subject of information about competition infringements, some authors suggested that the Portuguese legislator should create a rule similar to Article 75 (1) of the Portuguese Code of Criminal Procedure for the antitrust procedures conducted by the Portuguese Competition Authority. In fact, Article 75 (1) of the Code of Criminal Procedure provides that, when the investigating authorities become aware of possible injured persons, they must inform them of the possibility to ask for compensation within the criminal procedure and of the formalities that should be observed: "While granting the PCA [Portuguese Competition Authority] the power to include in its administrative procedure the compensation of injured parties would likely meet serious constitutional obstacles, there is nothing to prevent, and much to gain from, the revision of the Portuguese Competition Act so as to oblige the PCA, whenever possible, to personally notify injured parties of their right to initiate autonomous private enforcement actions"¹⁸.

Finally, concerning the limitation period rules, according to Portuguese law, there is a three-year period to submit an action for damages, which begins when the plaintiff becomes aware of his right to claim damages (Article 498 of the Civil Code), and there is a twenty-year absolute limit, regardless of the awareness of the right to claim damages, from the date of occurrence of damages (Article 309 of the Civil Code). Nonetheless, the limitation period for the Portuguese Competition Authority to initiate proceedings for antitrust infringements, under Article 74 (1), paragraph a), of the Portuguese Competition Law, is five years and there are no special rules regarding suspension or interruption of that period in order to allow the national courts to delay the proceedings and wait for the decision of the Portuguese competition authority. Currently, according to Directive 2014/104/EU, the limitation period shall be at least five years (Article 10 (3) of the Directive 2014/104/EU) and shall not begin until the infringement of competition law has ceased and the injured party knows or can be expected to know "(a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer" (Article 10 (2) of the Directive 2014/104/EU). In addition, the limitation period is suspended during investigations or proceedings of competition authorities (Article 10 (4) of the Directive 2014/104/EU). The solutions established in the Directive will, therefore, affect the Portuguese law.

Q8.

¹⁸ Cf. ROSSI, Leonor and FERRO, Miguel, "Private Enforcement of Competition Law in Portugal (II): Actio Popularis – Facts, Fictions and Dreams", *Revista de Concorrência e Regulação*, Ano IV, No. 13, Janeiro/Março 2013, p. 80.

In Portugal, the courts empowered to hear private enforcement cases of antitrust law are the common and civil courts (Article 64 of the Code of Civil Procedure) and their decisions can be reviewed by the Court of Appeal and then the Supreme Court. However, Article 88 (1) Portuguese Competition Law provides that the Competition, Regulation and Supervision Court shall have full jurisdiction in cases of appeals lodged against decisions by the Competition Authority imposing a fine or a periodic penalty payment, and can reduce or increase the amount of the fine or the periodic penalty payment (and the decision can be reviewed by the Lisbon Court of Appeal).

In common declaratory actions, in principle, the judge is bound by the initiatives of the parties concerning the production of evidence (Article 342 (1) of the Civil Code and Articles 411 and 414 of the Code of Civil Procedure). Nevertheless, the parties can ask the Court to order the delivery of documents that are in possession of the other party or third persons (Articles 429 and 432 of the Code of Civil Procedure). On the contrary, in Popular Actions, it is up to the judge's own initiative to collect evidence and he/she is not bound by the initiatives of the parties (Article 17 of the Popular Action Act, Law 83/95, 31 August).

Q9.

Considering our answer to the previous question and although the situation is much better than before, we think that not all Portuguese judges are sufficiently equipped and trained to deal with private enforcement litigation. A logical and obvious solution for this problem is the promotion of training actions for judges, as well as the promotion of training actions for lawyers.

Q10.

Communication No. COM (2015) 116 from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, refers that the average duration of the first instance court proceedings in Portugal is three years, which constitutes the longest average duration among all Member States¹⁹. The main causes for delays in the Portuguese judicial system are diverse and affect not only the private enforcement antitrust cases but all civil, commercial and administrative cases. Hence, it will be impossible in the context of this report to explain all the existent problems and to suggest possible or alternative solutions.

The principle of expedient procedures for claims for injunctive orders (principle 19 of Recommendation 2013/396/EU on collective redress) does not affect particularly the current law and practice in Portugal, since the injunctive proceedings are already qualified as urgent proceedings by the Portuguese Code of Civil Procedure (Article 363 of the Code of Civil Procedure).

¹⁹ Communication No. COM (2015) 116 is available online (http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf); last visited 20.12.2015.

II. Questions on Liability for Damages: Parties, Quantification, Passing-on Defence, Causality, Culpability, Joint and Several Liability

Q11.

As stated before, in Portugal, there are no specific rules on damages based on antitrust infringements. Since there is no specific legislation on this matter, any individual or legal person having suffered harm as a consequence of an unlawful conduct has the right to be compensated for the harm suffered, according to the general substantive rules laid down in the Portuguese Civil Code (general rules on civil liability – Article 483 of the Civil Code), in articulation with the substantive rules on competition provided for in the Portuguese Competition Law (Law 19/2012, 8 May) and in the Treaty on the Functioning of the European Union (see Q7.). Therefore, damages caused by an infringement of competition rules shall be awarded if all the requirements for liability are met (existence of illicit behaviour, negligence or fault, proof of injury to the claimant, and the demonstration of a causal link between the unlawful conduct and the damage), even if the claimant only has an indirect relationship with the infringer. Furthermore, we should also stress that, according to Portuguese legal order, punitive damages are not available²⁰, as damages are purely compensatory, covering actual loss and loss of profits (Article 564 of the Civil Code). Therefore, we do not foresee that Articles 3 (1) and 12 (1) of the Directive 2014/104/EU will require basic changes to the Portuguese legal system.

Q12.

Considering, on the one hand, the general rules on civil liability established in the Portuguese Civil Code and, on the other hand, the substantive rules on competition provided for in the Portuguese Competition Law (Law 19/2012, 8 May) and in the Treaty on the Functioning of the European Union, the infringer of competition law, for the purpose of liability for the compensation of damages, is any undertaking that infringes competition rules and causes damages (Articles 483 and 563 of the Civil Code). The concept of undertaking in competition law is broad and functional, which actually complies with EU law. In fact, Article 3 (1) of the Portuguese Competition Law provides that “the term undertaking, for the purposes of this law, shall be deemed to be any entity that has an economic activity comprising the supply of goods or services in a specific market, irrespective of its legal status or means of financing”.

Concerning parental liability for the infringement of competition law committed by a subsidiary, Article 3 (2) of the Portuguese Competition Law follows the EU

²⁰ See the law governing intellectual property, namely Directive No. 2004/48/CE, 24th April. There are some doubts whether with its implementation in the Portuguese context punitive damages were introduced”, cf. ANTUNES, Henrique Sousa, “Da Inclusão do Lucro Ilícito e de Efeitos Punitivos entre as Consequências da Responsabilidade Civil Extracontratual: A sua Legitimidade pelo Dano”, Coimbra Editora, 2011, p. 432.

solution. This provision establishes that “a group of undertakings is deemed to be a single undertaking, even if the undertakings themselves are legally separate entities, where such undertakings make up an economic unit or maintain interdependence ties deriving specifically from the following: a) the undertaking so defined has a majority of the share capital; b) it has more than half of the voting rights conferred by the share capital; c) it has the power to appoint more than half of the members of the board of directors or the supervisory board; d) it has the necessary powers to manage the businesses of the group and of each of its undertakings”²¹.

Q13.

Like we said before, there are no specific provision regarding damages in antitrust law. Thus, damages in general private Portuguese law, which are assessed on the basis of injury suffered by the complainant, are purely compensatory, covering actual loss and loss of profits (Articles 562 and 564 of the Civil Code). In addition, punitive damages are not available. According to Article 564 of the Civil Code, Portuguese courts award a compensation corresponding to the difference between the actual situation of the injured party and the situation that would exist if the infringement did not take place. The Court will assess damages at the most recent date, taking into account the damages and profit losses suffered in consequence of the breach of competition law (Article 564 of the Civil Code). Then, interests will be added, as well as other possible future damages, always with reference to the economic situation of the injured party at the time of injury (Articles 559 and 804 of the Civil Code). The interests awarded are legal interests, the level of which is established by the Ministries of Justice and Finance (7.05% if the creditor is an undertaking – Article 102 (§3) of the Portuguese Commercial Code, Article 1, paragraphs a) and b), of the Ordinance No. 277/2013, 26 August, and Ministerial Order No. 7758/2015 2nd Semester, 14 July; 4% if the creditor is an individual – Ordinance No. 291/03, 8 April). Accordingly, Article 3 (2 and 3) of the Directive 2014/104/EU will not affect the current practice in Portugal.

Q14.

In private litigation (and there are no specific solutions to damage claims in antitrust law), the burden of proof lies with the claimant, who invokes the facts substantiating its rights (Article 342 (1), 483, 487 and 563 of the Civil Code and Article 414 of the Code of Civil Procedure). When in doubt, the judge will decide against the party who bears the burden of proof (Article 342 (3) of the Civil Code and Article 414 of the Code of Civil Procedure). This will not be the case in contractual liability litigation, because there is a rebuttable presumption of fault of the debtor (Article 799 of the Civil Code).

²¹ The relevant decisions of the Portuguese Competition Authority are the following: PRC/25/2005 Vatel, Salexpor, Salmex and Sociedade Aveirense de Higienezação de Sal, 7 July 2006; PRC/05/2003, PT and ZON, 2 September 2009; PRC/02/2007, Eures, Trivalor, Uniself, ICA / Nordigal, Sodexo and others, 30 December 2009.

Q15.

The compensation awarded is the difference between the actual situation of the injured party and the situation that would exist if the infringement did not take place (Article 562 of the Civil Code). As we have already mentioned, the Court has to assess the damages at the most recent date, taking into consideration the damages and profit losses suffered in consequence of the breach (Article 564 of the Civil Code). Additionally, since the Portuguese courts have a certain amount of discretion on these matters, they can reduce or even exclude the compensation if the injured party contributed to the damages (Article 570 of the Civil Code). In fact, because the claimant is only entitled to recover the damages actually suffered as a result of the infringement, if he/she receives more than what it is due, that situation constitutes an unjust enrichment of the claimant (Article 473 and subsequent of the Civil Code). The Practical Guide is not frequently used Portuguese Courts use, usually, equity to award compensation, when the quantification of damages is very difficult.

Q16.

As mentioned earlier, the Court must assess damages at the most recent date, taking into consideration the damages and profit losses suffered in consequence of the breach (Article 564 of the Civil Code). Nevertheless, if at the time of the judicial decision there are no sufficient elements for assessing the damages precisely, the Court does not immediately need to determine the compensation to be awarded (Article 609 (2) of the Code of Civil Procedure). As a consequence, the matter will be postponed to the execution of the judgement, the liquidation phase (Articles 358 and subsequent of the Code of Civil Procedure).

Moreover, the Portuguese courts have a certain amount of discretion when measuring the damages suffered by the complainant. Therefore, if assessing the exact amount of damages is impossible or very difficult (even with the liquidation phase), the Court can decide in accordance with equity (Article 566 (3) of the Civil Code).

Q17.

See the previous answers to Q15. and Q16.

Q18.

The Portuguese legal order does not have any explicit provision allowing or prohibiting the passing-on defence; however, it should be considered admissible under the general rules applicable to calculation of damages. See Q19.

Q19.

As already mentioned the Portuguese legal order does not have any explicit provision allowing or prohibiting the passing-on defence; however, it should be considered admissible under the general rules applicable to calculation of damages (Article 564 of the Civil Code) and unjust enrichment (Articles 473 and subsequent of the Civil Code). In fact, the claimant is only entitled to recover the damages actually suffered as a result of the infringement (a different solution could constitute an unjust enrichment of the claimant – Article 473 of the Civil Code). As a consequence, according to the general rules on civil liability, if some of the damages were suffered by a third person because they were passed on to him/her, the former will not receive the amount correspondent to those damages.

Expert evidence for assessing quantitative damages and clarifying relevant economic issues is possible and may be requested by the Court or by any of the parties (Article 467 of the Code of Civil Procedure). The expert evidence can be produced by a single expert, who is appointed by mutual consent of the parties or, if not possible, nominated directly by the Court (Article 467 (2) of the Code of Civil Procedure). Furthermore, upon request by one of the parties or decision by the Court itself, the expert evidence can also be produced by three experts, who should be appointed by mutual consent of the parties or, if not possible, each party nominates one expert and the Court appoints the third one (Article 468 of the Code of Civil Procedure). According to Article 389 of the Civil Code, the probative value of the expert evidence is decided by the judge. Recently, in the Portuguese Sport TV case²², expert evidence for assessing quantitative damages and for clarifying relevant economic issues was made and produced before the Portuguese Court of Competition, Regulation and Supervision (Court of first instance for this case).

The Portuguese legal order does not provide any specific provision establishing the “Daubert” standard or an equivalent. Nevertheless, as we have seen, Article 389 of the Civil Code states that the probative value of the expert evidence is decided by the judge. Therefore, when deciding the probative value of the expert evidence, the judge will probably consider the methodology used among other relevant factors. Moreover, the parties, or even the judge by its own motion, may file a complaint against the report of the expert or ask for clarifications (Article 485 of the Code of Civil Procedure). In addition, upon request by one of the parties or decision by the Court itself, the judge might require the presence of the expert at a court hearing, in order to question him/her concerning the content of the report (Article 486 of the Code of Civil Procedure). Finally, any of the parties, and also the judge by its own motion, can ask for a second expert evidence if grounded reasons are argued to disagree with the report’s content (Article 487 of the Code of Civil Procedure). The probative value of the second expert evidence is decided again by the judge (Article 489 of the Code of Civil Procedure). Although the Portuguese legal order does not provide any specific provision establishing the “Daubert” standard or an equivalent, we think that the referred standard is respected by the Portuguese law.

²² Tribunal da Relação de Lisboa [Lisbon Court of Appeals], 11.03.2015, proc. No. 204/13.6YUSTR.L1.

Q20.

See the previous answer to Q.11.

Q21.

As we have already mentioned the compensation awarded must correspond to the difference between the actual situation of the injured party and the situation that would exist if the infringement did not take place (Article 562 of the Civil Code) and there are no punitive damages. And as we have already mentioned, the Court has to assess the damages at the most recent date, taking into account the damages and profit losses suffered in consequence of the breach (Article 564 of the Civil Code). The claimant is only entitled to recover the damages actually suffered as a result of the infringement (a different solution could constitute an unjust enrichment of the claimant – Article 473 of the Civil Code). Additionally, since the Portuguese courts have a certain amount of discretion on these matters, they can reduce or even exclude the compensation if the injured party contributed to the damages (Article 570 of the Civil Code)..

Q22.

See Q21.

Q23.

In Portuguese private law, causality is defined according to the theory of adequate causality (Articles 483 and 563 of the Civil Code). According to that theory, usually, a simple indirect causation will not be considered sufficient. Consequently, to establish an adequate link between the illegal act or conduct and the damages produced, the illegal act or conduct must constitute in the case at issue a causation without which the damage would not have been produced (*conditio sine qua non*)²³. Nonetheless, the *conditio sine qua non* itself is not sufficient for establishing an adequate causality. Then, the judge must also consider in abstract if the illegal act or conduct is or is not an adequate causation of those damages, which should be a normal, typical and probable consequence of the act or conduct (adequacy). So, if the two requirements are met (*conditio sine qua non* and adequacy), an adequate causality is established between the illegal act or conduct and the damages produced.

As mentioned before, there are no specific rules on actions for damages based on antitrust infringements. Since there is no specific legislation on this matter, the definition of causality in damage claims in antitrust law is the same as the one used in tort liability cases.

²³ Cf. VARELA, João de Matos Antunes, “Das Obrigações em Geral”, Vol. I, 10.^a edição, July 2009, Almedina, p. 892.

Considering the complexity and difficulty of obtaining sufficient proof in competition cases, it is not easy to meet all the legal requirements for civil tort liability in antitrust infringements cases. Therefore, the “Kone” case and the provision of Article 17 (2) of Directive 2014/104/EU, which establishes a rebuttable presumption that cartel infringements cause harm, are extremely important in this context and will require the adaptation of Portuguese legal and administrative measures in order to comply with EU law.

Q24.

See answer to Q23.

Q25.

Portuguese legal order does not provide any specific rules on actions for damages based on antitrust infringements. As a consequence, according to the general rules on civil liability, the claimant should produce enough proof to meet all the legal requirements for civil tort liability in order to be entitled to a compensation for the damages suffered (to recap, the existence of illicit behaviour, negligence or fault, the proof of injury to the claimant, and the demonstration of a causal link between the unlawful conduct and the damage – Article 483 of the Civil Code). The existence of illicit behaviour is intimately linked with the assessment of fault or negligence of the infringer (Article 487 of the Civil Code). For assessing the degree of fault or negligence of the infringer, the judge must follow the “bonus pater familias” test, which is an objective and abstract criterion (in other words, the judge must consider the act or conduct of the infringer from the perspective of an ideal standard, which is the standard of a reasonable, wise, sagacious, prudent, informed and thoughtful person)²⁴. Exceptions to this rule are objective liability established in the law. Concerning contractual liability litigation, there is a rebuttable presumption of fault of the debtor (Article 799 of the Civil Code).

Q26.

See answer to Q27.

Q27.

According to the general law on civil liability laid down in the Portuguese Civil Code, the joint and several liability is the exception and not the rule in our law system. Hence, joint and several liability is only applicable where a legal or a contractual basis can be found (Article 513 of the Civil Code). In tort liability, Article 497 of the Civil Code establishes a joint and several liability when there are two or more co-infringers

²⁴ Cf. VARELA, João de Matos Antunes, “Das Obrigações em Geral”, Vol. I, 10.^a edição, July 2009, Almedina, pp. 574 to 577.

responsible for the damages produced. Articles 497 (2) and 524 of the Civil Code ensure that a co-infringer may recover a contribution from any other co-infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. On the contrary, in contractual liability, since there is no legal provision and if the parties did not agree on a contractual clause establishing specifically a joint and several liability, the judge is obliged to apply the regime of several liability (in other words, each one is responsible for his own obligations). Article 11 (5) and (6) and article 19 (2) to (4) will, therefore, affect the Portuguese legal order.

III. Questions on Collective Redress

Q28.

Portugal has already a collective redress mechanism. It is an opt-out system called Popular Action (*Ação Popular*). The Popular Action is mentioned in Article 52(2) of the Portuguese Constitution and was implemented by the Popular Action Act (Law 83/95, 31 August). The list of interests mentioned in Article 1 of the Popular Action Act is merely exemplary²⁵, so damages from antitrust infringements can be compensated through the Popular Action.

The Popular Action Act²⁶ establishes certain special procedural rules: “it is up to the judge’s own initiative to collect evidence and [the judge] is not bound by the initiatives of the parties” (Article 17 of the Popular Action Act); “if a particular appeal has no suspensive effect, in general terms, the judge may, in a class action, give that effect, to prevent damage irreparable or difficult to repair” (Article 18 of the Popular Action Act). Under Articles 2, 3 and 16 of the Popular Action Act, standing to initiate a Popular Action is granted to any citizen, any legal association or foundation (a legal entity whose powers must include the interests covered by the Popular Action, which is not involved in any kind of professional business competing with undertakings or liberal

²⁵ According to Article 1 (2) of Law 83/95, popular action includes, amongst other interests protected by the law, public health, the environment, quality of life, consumers’ rights, cultural heritage. On this topic, see PAIS, Sofia Oliveira and PISZCZ, Anna, “Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?”, *Yearbook of Antitrust and Regulatory Studies*, 2014, vol. 7 (10), p. 215; PAIS, Sofia Oliveira, “Private Antitrust Enforcement: A New Era for Collective Redress?”, *Yearbook of Antitrust and Regulatory Studies*, 2015, vol 8 (12), pp.11-31.

²⁶ Popular Action (PA) can be Civil PA or Administrative PA. Administrative PA, as explained by the Portuguese literature, includes action for declaring void or for annulment of administrative acts, action for practice of legally due act, action for declaring void or for annulment of administrative rules or regulations, declaration of the illegality of an administrative omission, actions for the Administration to adopt or refrain from behavior or to practice conduct necessary to reestablish violated rights or interests, and the civil liability of the State or of other public legal persons, as well as those who hold office in its organs, its staff or agents, including appeals, and provisional remedies. Civil PA action takes any of the forms provided for in the Code of Civil Procedure: declaratory, condemnatory or constitutive. On this topic, see H.Sousa Antunes, *op.cit.*, p. 25 and Miguel Teixeira de Sousa, *op.cit.*, p.135.

professionals; companies, even small and medium ones, do not have, therefore, direct legal standing and can only seek compensation through individuals, associations or foundations), to local authorities (in relation with the interests of all those who are located in the respective area) and to the public prosecutor's office, which may replace the claimants if the contested behaviour endangers the interests involved (Article 16 (3) of the Popular Action Act).

Regarding judicial expenses, the Popular Action Act provides that the claimant is exempt from the payment of costs if the application is partially granted (Article 20 (2) of the Popular Action Act). However, if the claim is totally unsuccessful, the claimant will be obliged to pay an amount fixed by the judge ranging between 10% and 50% of the costs that would be normally payable, taking into account the claimant's financial situation and the formal or substantive reason for the dismissal (Article 20 (3) of the Popular Action Act). Considering now compensation, the court is obliged to determine a compensation for the infringement of the interests of those not individually identified (Article 22 (2) of the Popular Action Act). The right to damages shall be extinguished within three years from the final judgement that has recognized the damage and the unclaimed funds shall be delivered to the Ministry of Justice (Article 22 (4 and 5) of the Popular Action Act). The Ministry will create a special account and allocate the payment to attorney fees and to support access to the courts (Article 22 (5) of the Popular Action Act). The Popular Action Act does not explicitly provide for specific entities to distribute the total compensation among the injured parties. Therefore, in antitrust cases, consumer associations (or similar entities) should, in our opinion, be considered the most appropriate entities to receive and manage the indemnities.

Finally, it should be mentioned that collective protection is also established in special legislation such as the Securities Code (Decree-Law 486/99, 13 November last amended by Law 148/2015, 9 September.)²⁷ and Consumer Law, 24/96, 31 July (last amended Law 47/2014, 28 July)²⁸.

Q29.

There is, to best of our knowledge, only one collective antitrust damages action, still pending, on the Lisbon Judicial Court²⁹. In June 2013, following up on a complaint,

²⁷ Article 31: Class action 1. The following natural persons or entities have the right to class action for the protection of the homogeneous natural person or collective interests of non-qualified investors: a) Non-qualified investors; b) Associations for the defence of investors that fulfil the requirements detailed in the subsequent Article; c) Foundations that have as their objective the protection of investors in securities.

²⁸ According to Article 13 (c) Public Prosecutor and Consumer Director-General have legal standing to protect collective interests.

²⁹ Cf. Press Package, "Portuguese Competition Observatory Initiates Collective Enforcement Action Against Sport TV to Compensate Consumers for Damages Caused by Infringements of Competition Law", Portuguese Competition Observatory, 12 March 2015; DAF/COMP/WP3/WD(2015)15, Working Party No. 3 on Co-operation and Enforcement, Relationship Between Public and Private Antitrust Enforcement – Portugal, Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs,

the Portuguese Competition Authority found that Sport TV³⁰ abused its dominant position by, at least between 1 January 2005 and 30 March 2011, having imposed discriminatory conditions on operators and limited the development and investment in the market of pay-tv. In that case the Portuguese Competition Authority imposed on Sport TV a fine of € 3.7 million. This decision was confirmed by the Portuguese Courts, although with a reduction of the fine from € 3.7 million to € 2.7 million³¹. As a consequence, on 12 March 2015, the Portuguese Competition Observatory filed a mass damage claim against Sport TV through a Popular Action. The action seeks “to compensate over 600,000 clients for damages allegedly resulting from a number of anticompetitive practices, but also to compensate those who were excluded from the benefit of these channels due to the inflation of prices and all Portuguese pay-tv subscribers, between 2005 and June 2013 (over 3 million at the end of the period), who suffered from a reduction of competition on this market”³².

The Popular Action was also used by the Portuguese Consumer Protection Association (DECO) in other cases concerning consumer law (those cases were not decided on grounds of competition law infringement). The most famous case is the DECO case³³. Although competition law was alleged in this case, the truth is that the case was decided on other grounds. In this case, Portugal Telecom forced an unlawful “activation charge” on all clients regarding all phone calls. Therefore, DECO brought an action against Portugal Telecom, on behalf of all these clients. The consumer association argued that the contested practice was an abuse of dominant position, but the Portuguese Courts decided otherwise and considered the application successful on other grounds. Following the judgement, DECO and Portugal Telecom settled a compensation in an amount around 120 million Euros. That amount was translated in free national calls for all Portugal Telecom’s clients on several consecutive Sundays

Q30.

See answer to Q28.

Q31.

See answer to Q28.

Competition Committee, 10 Jun. 2015, p. 2.; PAIS, Sofia Oliveira, “Private Antitrust Enforcement: A New Era for Collective Redress?”, cit.

³⁰ Sport TV had a dominant position in two relevant products/services markets: the wholesale domestic market of conditional access channels with premium sports content (upstream), and the retail market of subscription television (downstream).

³¹ Tribunal da Relação de Lisboa [Lisbon Court of Appeals], 11.03.2015, proc. No. 204/13.6YUSTR.L1.

³² M. Ferro, Editorial, “Collective Redress: Will Portugal show the way?”, *Journal of European Competition Law and Practice*, April 2015 (advanced publication), pp.1-2.

³³ Cf. DECO (Portuguese Consumer Protection Association) vs Portugal Telecom (Supremo Tribunal de Justiça [Supreme Court of Justice], 07.10.2003, proc. No. 03A1243).

Q32.

See answer to Q5 and Q28.

Q33.

After receiving the order, the judge addresses the holders of the interest in question and asks whether they intend to intervene in the case in their own name or whether they accept representation by the claimant, according to Article 15 (1) of Law 83/95, in which case the decisions pronounced are applicable to them. The representation may be refused (explicitly) up until the end of the production of evidence. The notification is advertised in any adequate form of the media or press, but the law doesn't require the identification of all the victims. The notification may refer to them as holders of the interests at stake, and it must mention the action in question (and the claim), the identity of the claimant and of the defendant.

Q34.

In Portugal, the collective mechanism redress is an opt-out system. See answer to Q28.

Q35.

According to the Bar Association Statute (Law 15/2005, 26 January), lawyers' fees according to the system of quota litis (share of amount awarded) are prohibited. Lawyers' fees are agreed between the attorney and the client and the fees can relate to the value of the case, as well as its complexity, and time expended.

Q36.

To avoid abusive litigation the Portuguese Law recognizes a relevant role to the Public Prosecutor; in fact, Article 16 (3) of the Law 83/95 provides that the Public Prosecutor may replace the claimant if the settlement does not protect the interests represented. In addition, punitive damages do not exist in the Portuguese system and the Article 13 of the Popular Action Act provides for a special regime for the dismissal of the case when there are no reasonable grounds. The Court will also check settlements between the parties in Popular Action before approving them.

Q37.

See answer to Q11.

Q38.

See answer to Q28.

IV. General Questions on the Relationship and Cooperation between Courts and Competition Authorities and Binding Effects

Q39.

Information regarding this question is not available.

Q40.

Information regarding this question is not available.

Q41.

Information regarding this question is not available

Q42.

The decisions of the Portuguese Competition Authority are considered administrative decisions and may be appealed to a specialized court (Competition, Regulation and Supervision Court). A final decision of the Portuguese Competition Authority does not have binding effects for other courts (namely civil courts). Under the Portuguese Code of Civil Procedure, a final infringement decision taken by the courts (nationals or foreigners) and/or by the competition authorities does not have any binding effect in the context of follow-on actions, neither does it have any influence on the running of limitation periods. Thus, a final infringement decision taken by one of the mentioned institutions or authorities is merely an element of proof that the judge may take into consideration (Article 607 (5) of the Code of Civil Procedure). Compliance with Article 9 of Directive 2014/104/EU will require changes in the Portuguese legal order.

Q43.

As already mentioned under the Portuguese Code of Civil Procedure, a final infringement decision taken by the courts (nationals or foreigners) and/or by the competition authorities is not binding to civil courts. It is merely an element of proof

that the judge may take into consideration (Article 607 (5) of the Code of Civil Procedure).

Q44.

No. A plaintiff can bring an antitrust damage action to a civil court and at the same time present a complaint to the Portuguese Competition Authority, which can initiate its investigation.

V. Questions on Disclosure and Confidentiality

Q45.

Portuguese competition law establishes the general principle that proceedings of the Portuguese Competition Authority are public (article 32 of the Competition Law) with the safeguard of business secrets (article 30 of the Competition Law) and, thus, any person presenting a legitimate interest may request access to non-confidential files (Article 33 (3) of the Portuguese Competition Law).

Q46.

In common declaratory actions, in principle, the judge is bound by the initiatives of the parties concerning the production of evidence (Article 342 (1) of the Civil Code and Articles 411 and 414 of the Code of Civil Procedure). Nevertheless, the parties can ask the Court access to documents that are in possession of the other party or third persons (Articles 429 and 432 of the Code of Civil Procedure). The access to those documents is a consequence of the cooperation principle (Articles 7 and 417 (1 and 2) of the Code of Civil Procedure).

However, in common declaratory actions, the parties in litigation or third persons can legitimately refuse to comply with the order of the Court to produce evidence if the compliance leads, namely, to the disclosure of information covered by professional secrecy, by public servants' secrecy or by State secrecy (Article 417 (3), paragraph c), of the Code of Civil Procedure). In addition to this, Article 30 (1) of the Portuguese Competition Law states that, during proceedings, the Portuguese Competition Authority shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-

disclosure of their business secrets³⁴. Notwithstanding, the same Article 30 (3) provides that whenever the Portuguese Competition Authority wants to attach documents to the case file which may contain information that may be confidential, it shall give the undertaking, or association of undertakings, or other entity duly identified the opportunity to express their opinion.

Finally, regarding leniency programs, as it was explained before, Article 81 (1) of the Portuguese Competition Law classifies the leniency applications, along with all supporting documents and information, as confidential. On the one hand, access by parties to leniency documents is allowed pursuant to the exercise of rights of defence in the proceedings, but no copies are allowed unless authorized by the applicant (Article 81 (2) of the Portuguese Competition Law). On the other hand, access by third parties is also only possible if authorized by the applicant (Article 81 (3) of the Portuguese Competition Law). And according to Article 81 (4) of the Portuguese Competition Law, no authorization for access to copies of the relevant oral statements shall be granted to the party concerned in the case, nor shall authorization for access to such oral statements be granted to third parties. Article 6 (6) of the Directive will affect, therefore, the Portuguese legal order.

Q47.

As previously explained, the parties can ask the Court to order the access to documents that are in possession of the other party or third persons, identifying the documents and explaining why the access is needed (Articles 429 and 432 of the Code of Civil Procedure). The Court will assess the request and decide on its relevance. Nonetheless, the parties in litigation or third persons can legitimately refuse to comply with the order of the Court to produce evidence if the compliance leads, namely, to the disclosure of information covered by professional secrecy, by public servants' secrecy or by State secrecy (Article 417 (3), paragraph c), of the Code of Civil Procedure). Whenever it is argued that the disclosure of information implies the violation of professional secrecy, public servants' secrecy or State secrecy and if the Court has reasonable doubts regarding the validity of such plea, the judge may conduct the necessary investigations to assert the validity of the excuse of non-compliance (Article 417 (4) of Code of Civil Procedure and Articles 135 (1 and 2, first part), 136 and 137 of the Code of Criminal Procedure). If the Court concludes that the excuse of non-compliance on grounds of violation of professional secrecy, public servants' secrecy or State secrecy is not admissible, it will order the other party or third persons to produce evidence (Article 135 (2, second part), of the Code of Criminal Procedure).

Q48.

³⁴ According to Article 15 (1), paragraph c), of the Portuguese Competition Law, when the Competition Authority requests, in writing, documents and other information from undertakings or other natural or legal persons, the undertakings may identify the information that is deemed to be confidential because it contains business secrets, providing in this case a copy of the documents with confidential information expunged.

Yes. As already mentioned, it is possible for a party to request a national court to order third persons the disclosure of evidence, which includes the possibility to order the disclosure of evidence in the file of a Competition Authority. See answer to Q47.

Q49.

See the answer to Q47.

Q50.

See answer to Q47.

Q51.

See answer to Q47. Portuguese competition law already provides for some of protection regarding access to documents in possession of competition authorities and their use in court proceedings; the confidentiality of leniency statements and of settlement submissions is partially previewed³⁵. Nevertheless, Article 81 of the Portuguese competition provides, as already mentioned, that the access by third parties is possible if authorized by the applicant. Portuguese competition law will, therefore, need to be adapted to comply with Article 6 of the Directive.

Q52.

See answer to Q47.

Q53.

There is no general legal definition of confidential information besides certain specific legal disposition that establishes that certain documentation shall be considered confidential (e.g. leniency statements). Article 30 of the Portuguese Competition Law also establishes that Portuguese Competition Authority shall protect in its proceedings the business secrets of the parties.

³⁵ The Report on “Co-operation and Enforcement, Relationship Between Public and Private Antitrust Enforcement – Portugal”, which was published by the Organisation for Economic Co-operation and Development, already stated that “the current Portuguese legislation [aimed] at striking a balance between access to documents and the protection of important tools for detection of infringements and efficient handling of investigations by the PCA [Portuguese Competition Authority]. Cf. DAF/COMP/WP3/WD(2015)15, Working Party No. 3 on Co-operation and Enforcement, Relationship Between Public and Private Antitrust Enforcement – Portugal, Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, 10 Jun. 2015, p. 6.

Q54.

See answer to Q47. In addition, the Portuguese Courts can also protect confidential information by limiting access to the proceedings on grounds of protection personal dignity, right to privacy and public moral (Article 164 (1) of the Code of Civil Procedure). On the other hand, as already mentioned, Article 15 (1), paragraph c), of the Portuguese Competition Law provides that the Competition Authority requests' will respect business secrets and Article 30 (1) of the Portuguese Competition Law provides that, during prosecution proceedings, the Portuguese Competition Authority shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, regarding the non-disclosure of their business secrets. Additionally, Article 32 (6) of the Portuguese Competition Law provides that the Competition Authority shall publish on its internet site the final decisions adopted in prohibited practices proceedings, without prejudice to the safeguard of business secrets and other information considered confidential.

In criminal proceedings, the Public Prosecutor can, according to Article 86 of the Code of Criminal Procedure, request that, in certain circumstances, the facts of the case be protected by the "secret of justice" and the breach of that secret constitutes a criminal offence (article 371 of the Portuguese Penal Code).

Q55.

The Portuguese legal measures for protecting confidential information were already explained in our answers to Q47, Q51 and Q54. As there are no specific rules concerning the treatment of confidential information in antitrust actions (other than those dispositions already mentioned, such as those concerning the confidentiality of leniency statements and the general principle regarding the protection of business secrets), it would be advisable to adopt specific legislation in that context.