Questionnaire for Topic 2:

"The Judicial application of European Competition Law"

Portuguese Report

By Gonçalo Anastácio[1]

Contents

[1] Gonçalo Anastácio is a Partner at the Lisbon office of SRS (Sociedade Rebelo de Sousa & Advogados Associados R.L.). The author thanks Marta Flores da Silva, lawyer of the EU, Competition and Regulatory Department of SRS, for her cooperation.

1 - Was competition law privately enforced in your country before Regulation 1/2003 entered into force?

Competition law was not privately enforced in terms of compensation for damages in Portugal before Regulation 1/2003 came into effect. To this date, competition law has never been privately enforced in terms of compensation for damages either.

However, there were some cases of private application of competition law in the Portuguese Courts, with little relevance, such as the case between a Portuguese football club and the company holding the broadcast television rights for the matches of the Portuguese football league, based on the nullity of the agreement between the two parties for breach of Article 81 of the Treaty establishing the European Community (the "EC Treaty") (today article 101 of the Treaty on the Functioning of the European Union - "Treaty") and of the equivalent Portuguese rule, and two cases related to beer distribution agreements.

The current Portuguese Competition Law[2] (hereinafter "PCL") and the Portuguese Competition Authority – *Autoridade da Concorrência* (hereinafter "PCA")[3] were created, *inter alia*, to adapt the competition framework to the so-called modernisation, including the expected content of Regulation 1/2003. The decree-law that created the PCA was approved in the Council of Ministers on 20 November 2002 and the Regulation 1/2003 was approved by the Council on 16 December 2002.

Prior to that, although Portugal has had a competition law since 1983, there was no relevant competition law awareness and enforcement in Portugal.

Recently, there was some press news that referred to the likelihood of actions for damages following competition law infringements, as regards two cases recently decided by the PCA: (i) the alleged abuse of dominant position by two major TMT

[2] The Portuguese Competition Law was enacted by Law No. 18/2003 of 11 June, as amended by Decree Law No. 219/2006 of 2 November, by Decree Law No. 18/2008 of 29 January and by Law No. 52/2008 of 28 August.
[3] The Portuguese Competition Authority was created by Decree-Law No. 10/2003, of 11 January.

companies, in the wholesale and retail markets for broadband access and (ii) the so-called "catering cartel", by five mass catering undertakings. Therefore, it might be the case that some developments will occur on this front in the course of 2010.

2 - If yes, was competition law applied as the main or principal issue of the dispute (*à titre principal*) or only as a subsidiary issue (*à titre d'incident*)?

Not applicable.

3 - Were stand-alone actions possible/frequent? Were follow-up actions possible/frequent?

See answer to question 1, above.

4 - Has the entry into force of Regulation 1/2003 substantially increased the possibility to bring actions in practice or the number of actions brought?

No.

The creation of the PCL and of the PCA allowed competition issues to have more visibility, which should increase the likelihood of damages claims for competition infringements. However, at this stage, there have not been any awarding of damages for competition law infringements, which can be, in part, explained by the fact that most of the appeals from the PCA's decisions are still pending – although not necessarily, it is possible that the undertakings and those who suffered damages from anticompetitive practices will file uncertain and expensive damages actions in the light of a final and *res judicata* decision by the courts.

5 - Was there a need to modify the national competition law and/or the procedural legislation to facilitate the application of Regulation 1/2003?

There was a need to modify national competition law to facilitate the application of Regulation 1/2003 and the current PCL was created *inter alia* to adapt to the expected content of Regulation 1/2003.

6 - Has your national legislation been modified to take into account the recommendations included in the Commission's White Paper and Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules? Are any of these recommendations already part of your national law? Are there concrete legislative proposals to implement any of these recommendations?

There is no specific Portuguese legislation (or rules) in respect to damages actions for breach of competition rules.

Portuguese competition legislation was not modified to take into account the recommendations included in the Commission's White Paper and in the Commission's Staff Working Paper on Damages Actions for Breach of the EC antitrust rules and there are no known legislative proposals to implement any of the recommendations included in those documents.

However, some of the recommendations included in the Commission's White Paper and in the Commission Staff Working Paper on Damages Actions were already reflected in the Portuguese legal regime, having been laid down in the general rules on damages actions. Some examples are:

(i) In Portugal, indirect purchasers can file damages actions if they suffered damage: the Commission recommended the possibility for any individual who had suffered harm caused by an antitrust infringement to have standing to bring an action;
(ii) the pre-existing possibility for the plaintiff to ask the Court to notify the defendant or third parties in order to obtain specific documents of the Court: in the White Paper the Commission pointed out that frequently important evidence is held by the defendant or by third parties;

(iii) damages awarded must cover the whole damage suffered by the claimant (although it cannot cover punitive damages) which is in line with the Commission's recommendation that the victims must, at a minimum, receive full compensation of the real value of the loss suffered which encompasses not only the actual loss, but also the loss of profit and interest; and

(iv) the rules on the calculation of awarded damages and on unjust enrichment ("*enriquecimento sem causa*") are, in principle, enough to answer the passing-on defence questions raised by the Commission. The Commission also recognises this problem as it allows the infringer to invoke the "passing-on of overcharges" defence.

7 - Is private litigation in competition cases dealt with by ordinary civil/commercial courts or by a specialized court? Is there a difference depending on whether competition law is applied *à titre principal* or *à titre d'incident*?

In Portugal, there are no specialized courts for bringing competition-based actions for damages hence the rules on competence for actions for breach of competition law do not differ in any way from the rules applicable to other damages actions.

Therefore, in the absence of a specialised court for damages actions for competition cases, the judicial courts ("*tribunais judiciais*") are competent to apply competition law.
The competent court will be the court of the place where the infringement of competition rules occurred (Article 74(2) of the Portuguese Code of Civil Procedure, hereinafter "CCP"[4]).

Also, there is no difference between competition law being applied *à titre principal* or *à titre d'incident.*

[4] The Portuguese Code of Civil Procedure is enacted Decree No. 44129 of 28 December 1981 ("*Código de Processo Civil*"), as amended.

The substantive law for damages actions is set out in Portuguese Civil Code (hereinafter "CC")[5], namely on articles 483 *et seq*. (regarding the rules on liability for illicit acts) and 562 (on the calculation of the damages), together with the PCL (that defines the infringement).

The applicable procedural rules for damages actions are laid out in the CCP.

Private actions may be brought on the basis of an infringement either of the PCL, or of articles 101 and/or 102 of the Treaty. These infringements may include cartels (article 4 of the PCL and article 101 of the Treaty), abuse of a dominant position (article 6 of the PCL and article 102 of the Treaty) or abuse of economic dependency (article 7 of the PCL).

Also, it is clear that private parties may file a damages action for infringements of articles 101 and 102 of the Treaty before the Portuguese courts following illicit behaviour violating those articles, as the Court of Justice of the European Union (formerly the European Court of Justice, "ECJ") ruled in *Courage v. Crehan*[6]. The ECJ held that effective protection of the rights granted by the EC Treaty (today the Treaty) requires that individuals who have suffered a loss arising from an infringement of articles 101 and 102 of the Treaty have the right to claim damages.

Pursuant to articles 280 or 294 of the CC, a declaration of nullity of an agreement for breach of competition law is also admissible through private enforcement.

8 - Is private litigation in practice essentially circumscribed to specific practices or industries (e.g. supply exclusivity of petrol stations; motor vehicles distribution, etc.)?

Not applicable.

[5] The Portuguese Civil Code is enacted by Decree No. 47344 of 25 November 1966 ("*Código Civil*"), as amended.
[6] *Courage v. Crehan* - Case C-453/99, decision of 20 September 2001.

9 - Has the national court to stay its proceedings once the National Competition Authority ("NCA") has initiated proceedings on the same matter, until a decision has been reached?

Once the PCA has initiated proceedings, the national court does not have to stay its proceedings on the same matter until a decision has been reached by the PCA, since the damages actions in the courts and the administrative proceedings before the PCA follow different objectives and are completely independent of each other.

10 - Has the NCA to stay its proceedings once a national court has initiated proceedings on the same matter, until a decision has been reached?

Once a national court has initiated proceedings on the same matter, the PCA does not have to stay its proceedings until a decision has been reached.
See answer to question 9, above.

11 - Are national courts bound by the final decisions adopted by a NCA declaring that a certain practice amounts to an infringement? Is the response the same where the NCA rules that the practice does not infringe competition law?

Formally, the national courts are totally independent in their decisions. This is what is provided by the principle of separation of powers (judicial power is independent from the legislative and executive powers).

Therefore, they are not bound by the PCA declaring that a certain practice amounts to an infringement nor by the PCA ruling that the practice does not infringe competition law.

12 - Is the NCA bound by the final decisions adopted by a national court declaring that a certain practice amounts to an infringement? Is the response the same where the national court rules that the practice does not infringe competition law?

The PCA's decisions are completely independent from any previous final decision adopted by a national court declaring that a certain practice amounts to an infringement or ruling that the practice does not infringe competition law.

13 - If not, what is the value for a national court of a final decision adopted by a NCA and vice versa?

To this date, there have not been any damages actions for competition infringements which explains why this question has never been brought up. However, one can admit that a court may tend to follow the PCA's decision although, on the contrary, it seems more unlikely that the PCA would tend to follow the court.

14 - Is the final review of all the disputes (civil and administrative) related to competition law under the jurisdiction of a single court of last instance? Are there mechanisms to avoid inconsistencies in the case law?

The final review of all the disputes (civil and administrative) related to competition law is not under the jurisdiction of a single court of last instance.

A distinction between private litigation damages actions for competition infringements, on one hand, and appeals of the PCA's decisions in administrative proceedings, on the other hand, must be drawn.

First of all, it must be noted that the PCL was recently modified by Law No. 52/2008, of 28 August ("*Lei da Organização e Funcionamento dos Tribunais Judiciais*"), which enabled a reform of the Portuguese judicial system: before this amendment, which also concerned the rules applicable to the appeals of the PCA's decisions, the competent court for legal challenges was only the Lisbon Commercial Court ("*Tribunal de Comércio de Lisboa"*). The judiciary reform will first create some local commerce panels, the "*Juízos de Comércio*", in some pilot local-courts.

Hence, as far as the appeals of the PCA's decisions are concerned, the PCL states that the commerce panels of the respective court of first instance, i.e. the local court ("*Tribunal de Comarca"*), shall hear the appeals against the PCA's decisions to apply fines or other penalties provided by the PCL with suspensive effect (or by the commerce panel of the district capital, or by the commerce panel of the Lisbon Court of First Instance) (in accordance with article 50(2) of the PCL). The same court shall hear appeals against the other decisions, orders and measures taken by the PCA without suspensive effect (pursuant to article 50 of the PCL).

In accordance with the PCL, appealable decisions of the commerce panels may be challenged in the Court of Appeals ("*Tribunal da Relação*"), the decision of which shall be final. There is no ordinary appeal against the judgement by the Court of Appeals (Article 52 of the PCL).
Appeal proceedings suspend the enforcement of fines or other penalties.

Regarding the judgments from the civil courts, i.e. private litigation damages actions for competition infringements, these are reviewed by the Court of Appeals, and the judgments from the Court of Appeals can be reviewed by the Supreme Court of Justice ("*Supremo Tribunal de Justiça*"), but only on matters of law.

The right to appeal from judicial courts of first instance to the Court of Appeals (that can decide on matters of fact and of law) and from the Court of Appeals then to the

Supreme Court of Justice (on matters of law only) depends on the financial value attributed to the proceeding: it has to exceed the value of the financial threshold (the "*alçada*") and, also, the importance of the damage under the court *ad quo*[7].

15 - Does your legal/constitutional system allow courts to be bound by administrative decisions — as provided for in Article 16 of Regulation 1/2003 in respect to the Commission's decisions — ? In the absence of a specific legal provision such as Article 16 of Regulation 1/2003, what is or could be the value for a national court of a final decision adopted by a NCA of other Member State? And of a judgment of the court of another Member State?

The Portuguese legal/constitutional system does not allow courts to be bound by administrative decisions – as provided for in Article 16 of Regulation 1/2003 in respect to the Commission's decisions. The principle of the separation of powers applies.

A final decision adopted by an NCA, with the same value than a judgment in the country where it was issued, must be considered by the Portuguese Courts as if it was a decision from a foreign court.

In accordance with Article 33 of Council Regulation 44/2001[8], a judgment of another Member State (i.e., any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court) shall be recognised in the other Member States without any special procedure being required.

[7] Law No. 52/2008 of 28 of August fixed the "*alçada*" for the civil matters: €5,000 for the courts of first instance, and €30,000 for the Courts of Appeals.

[8] Council Regulation (EC) No. 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, of 16.01.2001.

In practice, the courts may tend to follow the technical rationale of the decisions of the national competition authority of another Member State or of a judgement of the court of another Member State.

16 - Is there any form of discovery, either pre-trial or court-ordered based on fact-pleading? If not, what mechanisms are available under your national law to obtain evidence from the opposing party? Are they sufficient?

There is no form of discovery in Portugal.

However, whenever the Court considers it necessary for the establishment of the truth or to prove relevant facts, the Court can, *ex officio* or upon request from any of the parties, order that information, documents, technical opinions, etc, are submitted to the Court, either by a third party or by the defendant or applicant (under article 535(1) of the CCP). A refusal to cooperate with the Court will only be admissible when complying with the Court would imply a violation of privacy or of professional secrecy and, therefore, will not represent an infringement and the application of a fine. All types of evidence are in principle admitted, except if excluded by law. The types of evidence used are: oral testimony, documents, expert opinions, confessions, and inspections. The Court will assess the evidence submitted by the parties and will freely decide its credibility.
Witnesses Up to 20 witnesses can be called by each party, and each of the parties may only have up to 5 witnesses for each fact that they intend to prove (article 633 of the CCP).

Documents (articles 523 *et seq.* of the CCP) can be authentic or private documents. Authentic documents are those that are formally drawn up by public authorities, and have full probatory force of the facts to which they relate (article 371(1) of the CC), while private documents are those that are not authentic, thereby only considered authenticated when confirmed by the parties, before a notary public under the terms of notary law (article 363 of the CC), and have the same probatory force as the authentic ones, not being able, however, to substitute/challenge an authentic document when

this later is required by law. Documents with the purpose of proving the grounds of the claimant or the defendant must be filed together with the written pleadings (article 523(1) of the CCP), but can also be filed at a later stage, and normally up until the end of the trial, pursuant to article 524 of the CCP.

Expert evidence can be very helpful when dealing with specific matters. The Court can request the expertise of an establishment, laboratory and appropriate official service or, when this is not possible, the expertise of a sole expert appointed on the grounds of his competence and recognition of the matter on which he expertise is requested (article 568(1) of the CCP).

The parties can, also, request an expert.

The value of the expert evidence is left to the appreciation of the judge (article 389 of the CC).

A confession (articles 552 *et seq*. of the CCP, and 352 *et seq*. of the CC) is only valid if the confessor has the capacity to dispose the right to which the confessed fact relates (article 353(1) of the CC) and legal capacity (article 553(1) of the CCP). The statement of the confession can only cover personal facts or facts within the confessor's knowledge. The confession will not be admissible if it is considered insufficient by law or if it relates to a fact that the law refuses to recognise or to investigate, if it is related to inalienable rights, or if the fact is obviously impossible or nonexistent (article 354 of the CC).

As far as the judicial inspection is concerned, pursuant to article 612 of the CCP, the Court may, *ex officio* or upon request of the parties, order an inspection of a certain location or the reconstruction of an event relevant to the outcome of the proceeding.
The mechanisms available under Portuguese law to obtain evidence from the opposing party are not sufficient.

17 - In case of follow-up litigation, can private parties claim access to the administrative file to prepare their action before the national

court? If so, will they also have access to documents that have been declared confidential by the NCA and to internal documents of the NCA?

There are no specific rules in the Portuguese legislation for obtaining documents from the PCA and for accessing the PCA's files.

In case of follow-up litigation, private parties can claim access to the administrative file to prepare their action before the courts as long as the process is not covered by judicial secrecy ("*segredo de justiça*").

The rules on judicial secrecy are applicable to misdemeanour proceedings by an administrative entity, such as the PCA[9], through the subsidiary laws applicable to the PCL: the General Regime for Administrative Offences[10] (hereinafter "GRAO"), according to Article 49 of the PCL, and the Criminal Procedure Code[11] (hereinafter "CPC"), which is the subsidiary law applicable to the GRAO (in accordance with Article 41 of the GRAO).

The access to the misdemeanour proceedings at the PCA is, therefore, ruled by the CPC as duly adapted (in accordance with Article 41(1) of the GRAO), applicable *ex vi* in article 22 of the PCL.

Thus, the CPC states, in article 86, that, as a rule, the criminal process is public (the principle of publicity). The process is not public if it is subject to judicial secrecy.

There are two exceptions to this principle, in accordance with article 86(2) and (3) of the CPC).

[9] On this point, see the opinion of the Portuguese Office of the Attorney General ("*Procuradoria-Geral da República*"), No. 84/2007, of 7 April 2008.
[10] The General Regime for Administrative Offences was enacted by Decree Law No. 433/82 of 27 October, as amended by Law No. 109/2001 of 24 December ("*Regime Geral das Contra-Ordenações*").
[11] The Criminal Procedure Code Law was enacted by No. 48/2007, of 29 August ("*Código de Processo Penal*"), as amended.

If the process is covered by judicial secrecy, it will remain so until the end of the inquiry and only the parties involved ("*sujeitos processuais*") can have access to the file (pursuant to Article 89(1) of the CPC).

In accordance with Article 90 of the CPC, if the proceeding is not covered by judicial secrecy any person with a legitimate interest may request access to a file.

The accessibility of a file involves the right to consult the file and to obtain copies, extracts and certified copies of any part of the file (according to (c) of number 6 of Article 86 of the CPC). The right to access does not include, however, any information pertaining to a person's life that does not constitute evidence (Article 86(7) of the CPC).

However, the PCA tends to apply article 90 of the CPC very restrictively. For that Authority, the legitimate interest of the party requesting access to the file has to clearly and identified and justified and must not result from a mere curiosity in accessing a file, in which there was not yet a decision, even when it is requested for the assessment of the possibility of filing a private enforcement action.

After a decision by the Portuguese Competition Authority, the proceeding is public. Private parties cannot have, however, access to documents or extracts that have been declared confidential by the PCA. In gathering evidence, the PCA must safeguard the legitimate interests of the undertakings by not revealing their business secrets (according to 26(5) of the PCL). Private parties can only have access to the PCA's internal documents when it is necessary for the proceeding.

The provisions of the Portuguese Code of Administrative Procedure[12] and the Portuguese Law on Access of Administrative Documents[13] also apply.

As a rule, any private party can access proceedings in which they are directly interested or when a legitimate interest in accessing the proceedings is proven. It is,

[12] Portuguese Code of Administrative Procedure enacted by Decree Law No. 442/91 of 15 November, as amended ("*Código do Procedimento Administrativo*").
[13] Portuguese Law on Access of Administrative Documents enacted by Law No. 46/2007 of 24 August ("*Lei de Acesso aos Documentos Administrativos*").

therefore, possible for any private party with a direct interest to obtain information that (i) was not considered confidential by the PCA or by the parties, and that (ii) does not contain trade or industrial secrets, or secrets related to scientific, artistic or literary ownership rights.

However, the PCA is generaly very reluctant in granting the access of the file.

18 - Who bears the burden of proof of the existence of an infringement in private litigation cases?

As previously mentioned, there are no specific procedural rules for private litigation cases, therefore the general civil law is applicable.

Hence, according to Article 342 of the CC and to Article 513 of the CCP, the burden of proof generally lies with the party who invokes the facts substantiating his rights. This rule does not apply, however, when either a fact is not of general knowledge (article 514(1) of the CCP) or the Court has gained the knowledge of a particular fact under the performance of its functions (article 514(2) of the CCP).
In the context of responsibility for illicit acts, the burden of proof lies with the person that alleges the damages – the plaintiff/claimant (Article 487 of the CC).

The burden of proof will not lie with the claimant if there is a favourable presumption, either legal (article 350 of the CC) or judicial (article 351 of the CC), or if the burden of proof has been reversed by law (article 344 of the CC). Legal presumptions are *iuris tantum* (presumptions that are rebuttable) or *iuris et de iure* (presumptions that can never be refuted). Judicial presumptions are only accepted if oral evidence is admitted. In relation to a reversal of the burden of proof, the CC states that this happens when there is any kind of presumption, dismissal of the burden of proof, an agreement between the parties foreseeing it or, generally speaking, whenever the law states it.

<u>What does the plaintiff have to prove to claim damages?</u>

To claim damages, the plaintiff, as the author of the damages action, must prove all the constitutive elements of his right (according to the above mentioned Article 342 of the CC).

Therefore, to claim damages the plaintiff will have to prove (i) the defendant's unlawful conduct and his fault or negligence (breach of duties of care or diligence or omission to avoid the damage) in committing the violation of either national or European competition law (Article 483 of the CC). The plaintiff will also have to prove (ii) the extent of the damage suffered and (iii) the causal link between the two ("*nexo de causalidade*") (Articles 487 and 563 of the CC).

Each party shall prove enough elements in order to establish that the facts have occurred per their description. Any fact that contradicts the existence of a damage, a causal link between the defendant's actions and the resulting damages or that justifies the actions causing the damage may be an admissible defence.
In cases of uncertainty, the judge will decide against the party who bears the burden of proof.

Does the burden of proof shift during the proceedings?

The burden of proof only shifts during the proceedings in specific cases: legal presumptions; exemption or liberation from the burden of proof; valid agreements in that respect, wherever the law allows it; or in cases where the counterpart has deliberately made a fact impossible to prove (Please see above).

Are there legal presumptions affecting the burden of proof?

There are no legal presumptions affecting the burden of proof which are relevant to competition-based actions for damages.

However, there is some case law that states that the failure to comply with the law presumes fault in the damage resulting from that failure, in particular in the cases of damages actions based on the non-compliance with laws that protect collective interests ("*interesses alheios*"), such as competition.

19 - What form of orders or remedies are available (i) in private actions before the courts; and (ii) in administrative proceedings by the NCA (e.g. declaration of infringement; declarations as to compliance with Article 81(3); annulment of agreements or of particular clauses; injunctions to restrain repetition of infringements; positive injunctions; interim measures in advance of final judgment; damages, etc.)?

In private actions before the courts, the Court may order the payment of the damages awarded to the plaintiff (Article 566 of the CC).

The Court can also declare the nullity of an agreement violating the PCL and/or European antitrust rules (Article 4(2) of the PCL states that "*prohibited practices are null and void*") in an action for an annulment of, for example, a contract or a contractual clause. The declaration of nullity will determine the return of all that each party has provided to the other in the context of the invalid agreement, or the corresponding amount if such return is not possible (according to Article 289 of the CC).

If the PCA considers the breach to be proven in an administrative proceeding, the PCA will then declare the existence of the breach, and (i) can order the necessary measures to stop the infringement within the required time period.

The PCA can also (ii) apply a fine up to 10% of the previous year's turnover for each of the undertakings participating in the infringement (Article 43 of the PCL). Undertakings forming part of an association subject to an infringement decision and, consequently, to a fine or to a periodic payment are jointly and severally liable for paying the fine. The Portuguese courts can force the undertakings to pay the unpaid fines.

An (iii) additional penalty (ancillary sanction) is also available. When the gravity of the infringement so justifies, the PCA can, at the offender's expense, publish the

decision of the infringement in the official gazette ("*Diário da República"*), or in a Portuguese newspaper with national, regional or local circulation, depending on the relevant geographical market in which the prohibited practice had its effects (Article 45 of the PCL).

In accordance with Article 6 of Decree-Law No. 18/2008, of 29 January, enacting the Public Procurement Code, and amending Article 45 of the PCL, a specific sanction for competition law infringements in public procurements proceedings is available. In fact, companies can be prohibited, for a maximum of two years, from participating in tenders for the award of contracts for (i) public works, (ii) concessions of public works or public services; (iii) the lease or acquisition of goods or services by the State; and (iv) granting of public licences or authorisations.

For each day of delay to obey to the PCA's decision, the PCA can also apply a periodic penalty payment, of up to 5% of the average daily turnover in the last year (Article 46 of the PCL).
Interim remedies are also available as long as the following requirements are met: *fumus bonis iuris*, *periculum in mora*, serious risk of irreparable damages and proportionality criteria.

The PCA can order interim measures whenever the investigation indicates that the practice which was the subject of the proceedings may cause imminent, serious and irreparable damage or is difficult to rectify through competition or for third-party interests. In practice, the PCA seems extremely reluctant to adopt interim measures and has only done it once.

The PCA can also order the immediate suspension of the practice or take any other provisional measures that are necessary to immediately re-establish competition or are indispensable for the useful effect of the decision to be taken at the end of the proceedings (Article 27 of the PCL).

The PCA can also justify an anticompetitive practice when it contributes to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, they offer the users of such

goods a fair part of the benefit arising there from; do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives; and do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market in question (Article 5 of the PCL – the economic balance).

The PCA cannot, of course, award damages.

20 - Are the administrative limitation periods for the imposition of penalties different from the term within which it is possible to bring an action for breach of competition law before the national court?

The administrative limitation periods for the imposition of penalties are different from the term within which it is possible to bring an action for breach of competition law before the national Court.

What is the time limit to bring an action for damages?

There is a three year time limit to bring an action for damages (Article 498 of the CC). The time limit begins when the plaintiff becomes aware of his alleged right to a claim and does not necessarily start as from the date of damaging fact or from the damage.

The causes of suspension and/or interruption of the period for the statute of limitation must also be added at the three year limit period, if applicable. The existence of an administrative proceeding before the PCA is not among those causes.

Regardless of the acknowledgement of the right, there is a 20 year absolute time limit to bring the action (Article 309 of the CC).

The administrative proceedings before the PCA are subject to a five year period of limitation (Article 48 of the PCL). The time limit is interrupted whenever there is a communication of any order, decision or action taken against the defendant or notice

to exercise his defence rights or to make statements. In any event, there is a time limit of 7.5 years after the infringement (according with the Article 28 of the GRAO).

21 - Are there special rules for competition law issues in relation to standing? Can indirect purchasers claim redress?

There are no special rules for competition law issues in relation to standing.

Any legal entity or natural person who suffered damages within the Portuguese territory as a result of an unlawful act (or failure to act) has standing.

Indirect purchasers can claim redress if the requirements for liability for illicit acts are met, i.e., if there is an illicit behaviour, the proof of injury to the claim and the demonstration of a casual link between the illicit conduct and the damage.
To file a competition based damages action, a plaintiff must have suffered an injury as a consequence of an anticompetitive conduct within the Portuguese territory and therefore has standing.

22 - Are there collective redress mechanisms allowing for the aggregation of individual claims for competition law infringements? Do your national procedural rules allow for (i) representative actions being brought by a specified body?; (ii) class actions generally; (iii) the consolidations of claims?

There are no collective redress mechanisms allowing for the aggregation of individual claims for competition law infringements.

There are no specific class actions for infringements of competition law. However, under Portuguese law, there is a form of class action for damages: the so-called "popular action" ("*acção popular*"), set in article 52 of the Constitution of the Portuguese Republic and regulated by Law No. 83/95 of 31 of August. According to article 2 of Law No. 83/95, any citizen (Article 3 expressly excludes companies and

professionals), or any associations and foundations promoting certain general interests have the right to bring a popular action in order to protect those general interests such as the public health, environment, quality of life, protection of consumer products or services, cultural heritage and public domain (see also article 26-A of the CCP). The list of the general interests set out in Law No. 83/95 is not exhaustive and, therefore, the promotion and the respect of competition can be considered to be amongst those general interests and justify the initiation of the popular action. The claiming party will have the right to obtain compensation for the damage suffered in violation of the general interests (in accordance with article 22 of the above-mentioned law).

The general requirements for the "*acção popular*" are, with some deviations, the same as for ordinary civil actions, set in the CCP. This system is based on an "opt-out collective action", which means that whoever does not want to be involved has to declare it (article 14) and the indemnity is collectively calculated (article 22 (2)). This kind of action remains, however, very rare and was never brought up for competition matters.

23 - If such possibilities do exist, can claimants having suffered damages in another Member State bring an action in your country? Would they have to prove that they had a direct relation with the defendant or would it be sufficient if they had this direct relation with the defendant's mother/sister company?

[To be reviewed]

In order to establish whether a claimant having suffered damages in another Member State can bring an action in Portugal, it is necessary to analyse Council Regulation 44/2001, of 22 December 2000, on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

It may happen that, by the nature of the subject matter of the action or by its special link with one territory, only the courts of a certain Member State can resolve the dispute (article 22), having as such exclusive jurisdiction. In this case, the parties

cannot determine another jurisdiction. In the case of a Member State being seized of a claim of the exclusive jurisdiction of another Member State by virtue of article 22, it shall declare *ex officio* that it has no jurisdiction (article 25).

The parties also have the possibility of including a jurisdiction clause (Article 23).

In the absence of exclusive jurisdiction or a valid jurisdiction clause, any legal entity or natural person which is domiciled in one Member State must be sued in the courts of that Member State (article 2(1)).
Instead of suing the defendant is his country of domicile[14], the claimant can, in special cases, bring an action in the courts of another Member State. This is possible in matters relating *inter alia* to contracts, maintenance, tort, civil claim damages or restitution, disputes arising out of operations of a branch, agency or other establishment. Where proceedings involving the same cause of action and between the same parties are brought in the same courts of different Member States, any court other than the court first seized shall *ex officio* stay its proceedings.

In Portugal, international jurisdiction is provided by the CCP.

Portuguese courts shall have jurisdiction when some of the circumstances mentioned in article 65 are verified. The general grounds of attribution of international jurisdiction to Portuguese courts are: (i) at least one defendant is domiciled in Portugal[15], except when the subject matter of the action relates to real estate assets situated in a foreign country; (ii) existence of an obligation to bringing the action in Portugal, according to the Portuguese rules on territorial jurisdiction[16]; (iii) the fact that is the main ground of the action occurred in Portugal, and the exercised right cannot be enforced in courts other than the Portuguese courts, with an action brought to them or being very difficult for the claimant the bring an action abroad insofar as

[14] Pursuant to article 59(1), in order to determine whether a party is domiciled in a Member State whose courts are seized of a matter, the court shall apply its internal law. With regard to companies or other legal persons or association of natural persons or legal entities, article 60(1) stipulates that they are considered domiciled at the place where they have the statutory seat, the central administration or the principal place of business.
[15] Pursuant to article 65(2), a legal person it is considered to have domicile in Portugal when its headquarters are in Portuguese territory or there is a branch, agency, subsidiary or delegation in Portugal.
[16] Territorial jurisdiction is regulated in articles 73 to 89 of the CCP.

there is more of a connection between the subject matter of the dispute and the Portuguese legal order, either personal or property rights.

As to determine if the claimant would have to prove that he had a direct relation with the defendant or whether it would be sufficient if he had this direct relationship with the defendant's mother/sister company, the ECJ, in the *Manfredi*[17] case, held that article 101(1) of the Treaty (formerly article 81(1) of the EC Treaty) produces direct effects on the relations between individuals and creates rights for the individuals concerned which the national courts must safeguard[18]: "*any individual can bring an action with base on the infringement of article 81*" (as in case *Courage and Crehan*[19]). As for the compensation for loss caused by a contract or by conduct liable to restrict or distort competition, the Court held that the full effectiveness of article 101 of the Treaty would be undermined if it were not open to any individual to claim damages for loss suffered by him by a contract or by conduct liable to restrict or distort competition[20].

The Commission has adopted an identical approach in the *White Paper*, stating that "*any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts*".

According to both the ECJ and the Commission, a causal relationship is necessary. Only the damages that present a sufficient causal relationship with the alleged facts will be compensated.

Thus, it seems clear that the Treaty objectives would be undermined if the claimant had to prove that he had a direct relation with the defendant.

In accordance with article 26 of the CCP, the claimant only has to have a legitimate interest to bring an action, he does not have to have a direct connexion with the defendant. It means that there must be a causal connection that can be perfectly

[17] Joined cases C-295/04 to C-298/04 - *Vincenzo Manfredi against Lloyd Adriatico Assicurazioni SpA* (Judgement of 13.7.2006).
[18] Manfredi, paragraph 58.
[19] Case C-453/99 - *Courage Ltd against Bernard Crehan* (Judgement of 20.9.2001).
[20] Manfredi, paragraph 60 and Courage case, paragraph 26.

established if the claimant has a connexion with the group of which the defendant is part. The claimant has a direct interest in bringing an action if he can establish that the defendant's conduct has harmed him in any way and that he has a valid compensation claim.

24 - Can a party claim full damages from one of the members of a cartel based on joint and several liability?

Yes. Pursuant to Article 497 of the CC, the rule for damages actions is joint and several liability ("*solidariedade*").

25 - What is the level of the costs and/or fees of legal procedures as compared with the cost of filing a complaint before the NCA?

There are no costs for filing a complaint before the PCA.

To bring an action before the Portuguese Courts, the plaintiff will have to pay the "*taxa de justiça*" and the "*custas judiciais*", i.e., the court fees. The "*custas judiciais*" are defined in accordance with rules set out in the Portuguese Code of Judicial Costs[21] and depend mainly on the initial amount of the claim made before the Court. Court fees are initially borne by all the parties. However, at the end of the proceeding, the winning party has the right to recover from the losing party the court fees it supported during the proceedings, following the rule that the losing part must bear the costs of the proceedings. Following a recent amendment on this point, this includes part of the lawyers' fees.

26 - Do the legal costs and/or fees deter claimants from bringing stand-alone actions? Idem from follow-up actions. Are there procedural mechanisms to avoid this?

[21] The Portuguese Code of Judicial Costs enacted by Decree-Law nr. 34/2008, of 26 of February.

Given the fact that there were not, to this date, any action for damages for competition infringements, either stand-alone either follow-up actions, it is not possible to determine if the legal costs and/or fees deter claimants from bringing stand-alone or follow-up actions.

However, the uncertainty as regards success, inherent to the novelty of private enforcement of competition law, may cause court fees to be a possible deterrent.

27 - Are there any specific substantive or procedural rules applicable to undertakings that have filed a leniency application? If so, are they only applicable to undertakings qualifying for full immunity?

No.

28 - What is the average length of judicial proceedings before a final and binding judicial decision has been adopted and enforced? Compare with the proceedings followed before a NCA.

It is not possible to determine the average length of a judicial proceedings before a final and binding decision has been adopted and enforced. There is no information or way to accurately predict the duration of a judicial process in Portugal.

A claim to obtain compensation for infringement of competition laws can be very complex and time consuming. There are many reasons that can explain the (excessive) length of the damage claims: the lack of experience of the Portuguese judges on competition issues (there are no specialized courts for competition in Portugal), the large number of documents presented as evidence that need to be analysed by the Court, the complexity of those documents (in the majority of the cases, economic data), the amounts in the claim are bound to be very substantial when compared to common damages actions…

A conservative estimate would be between 2 to 5 years. The National Statistics Institute ("*Instituto Nacional de Estatística*") explains this conservative estimative by

the large increase of actions being brought to the courts[22]. In fact, the average length of the civil proceedings at the first instance courts has increased in 2006 (in comparison with 2005), reaching a period of 30 months (2 and a half years)[23].

Also, after the first instance court decision, the parties have two degrees of appeal to higher courts (the Court of Appeals and the Supreme Court of Justice), which, of course, will also be time-consuming.

29 - Is there any judicial settlement procedure? Can administrative proceedings conclude with a settlement? What would be, if any, the differences in the settlement procedure?

There is no specific judicial settlement procedure. Any judicial settlement is subject to confirmation ("*homologação*") by the Court.

Formally, the PCL does not provide for any kind of commitments, however, the PCA has already dismissed some complaints based on changes of the parties' behaviour, as it believed competition problems had been resolved.

30 - Some of the obstacles to effective redress for victims of breaches of competition law are common to non-contractual claims in other areas (product or environmental liability; etc.). Are such claims easier/more frequent in your country? If so, why?

Non-contractual claims in other areas (product or environmental liability; etc.) are not easier, but are more frequent in Portugal probably due to stronger awareness and tradition, including amongst lawyers.

[22] See *Processos Cíveis nos Tribunais Judiciais de 1ª Instância – 1996 – 2005*, p. 2, in www.ine.pt.
[23] *Statistic Yearbook of Portugal, 2007*, p. 600, in www.ine.pt.

31 - Do national courts have to inform the NCA and/or the European Commission of any claims where competition law would have to be applied? Is the obligation established in Article 15.2 of Regulation 1/2003 to transmit judgments regularly complied with?

There is no rule that states that the national courts have to inform the PCA of any claims where competition law would have to be applied. We are unaware of any case where EU Competition law was applied by Portuguese courts.

32 - Have your national courts asked for Preliminary Rulings *ex* Article 234 EC in cases concerning Articles 81 or 82 EC? If not, why?

Portuguese courts have already asked for preliminary rulings ex Article 267 of the Treaty (formerly Article 234 of the EC Treaty) in cases concerning current Articles 101 or 102 of the Treaty. We briefly present two cases concerning current article 101 of the Treaty.

The first case concerns a request of a preliminary ruling by the Lisbon Court of Appeals to ECJ[24]. The case was about a criminal proceeding brought by the public prosecutor against an instructor with a driving school established in Lisbon, charged with giving driving lessons on the motorway in a municipality adjoining the municipality of Lisbon. Portuguese legislation made it an offence to give driving lessons in a municipality other than that in which the driving school is established. The Lisbon Court of Appeals had doubts concerning the conformity of the Portuguese legislation with Community Law *(*eg. with the rules on the free movement of persons and services and with competition rules).

The second case refers to a preliminary ruling requested by the Lisbon First Instance Court, decided by the ECJ[25]. The question was raised in proceedings, following the unilateral termination by the fuels reseller of a contract made with a service station for

[24] Case C-60/91, decision of 19 of March of 1992.
[25] Case C-39/92 - *Petrogal / Correia, Simões & Companhia and Correia, Sousa & Crisóstomo* (Judgment of 10.11.1993).

a 15-year period. The Portuguese Court decided to stay the proceedings on the possibility of an indefinite duration or for a period of more than 10 years, rendering, by virtue of Article 85(2) of the EC Treaty (current Article 105(2) of the Treaty), the agreement void in its entirety or is it possible, on the grounds that the nullity affects only that point, to abridge the agreement by making it apply for a period of 10 years, the maximum permitted by the regulation.

In the DG-COMP website of national cases, there are only two preliminary rulings concerning Portuguese Courts: the first one was ruled on 14 March 2005, by the Lisbon First Instance Court, in Process n.º 8.942/03, and the second was judged on 21 October 2005 also by the Lisbon First Instance Court, in Process n.º 67/02, and both cases are related to beer distribution agreements.

33 - Have your national courts requested your NCA or the European Commission intervention in judicial proceedings between private parties involving the application of competition law? How? Was their intervention required by one of the parties or decided *ex officio*? Are there any national procedural rules providing for the intervention of NCAs or the Commission in judicial proceedings?

To our knowledge, national courts have never requested the PCA's intervention in judicial proceedings between private parties involving the application of competition law.

34 - Can any other bodies representing public interest (e.g. public prosecutor) and/or consumer associations bring judicial actions for breach of competition law? Can they intervene in judicial proceedings between private parties involving the application of competition law? How?

The associations can bring actions according to the law of the popular action, but there is no intervention set for pending proceedings (see answer to question 22, above).

35 - Can competition law issues be solved by private arbitration or other forms of alternative dispute resolution mechanisms?

Competition law issues can be solved either by private arbitration or mediation.

Competition issues can be solved by private arbitration, which is regulated by Law No. 31/86 of 29 of August, as amended by Decree-Law No. 38/2003 of 8 March.

Any dispute that is not related to non-disposable rights and is not mandatorily submitted to judicial courts or to necessary arbitration by a special law can be submitted to an arbitral tribunal by way of an arbitration agreement (Article 1 of Law 31/86). The agreement can be related to current disputes even if it is still undergoing in a judicial court (submission agreement) or to events that may happen only in the future whether from a contractual or non-contractual relationship (arbitration clause). Even the State or any other public entity can make arbitration agreements either if they are empowered by special law or if the dispute is regard to private law relations.

Arbitrators shall decide in accordance with the law, unless the parties have authorised the arbitrators to decide according to equity in the arbitration agreement or in a document signed before the acceptance by the first arbitrator (article 22 of Law 31/86). In accordance with article 26(2) of the above mentioned law, the award given by arbitrators has the same legal force of a first instance court decision. As such, the appeal of the award, if the parties have not waived it, is made to the Court of Appeals on the same terms of the decision by the first instance court. However, the enforcement of the arbitral award has to be filed at the court of first instance (article 30 of Law 31/86).

Arbitration is international whenever interest of international trade is at stake. In such cases, parties may choose the law to be applied by arbitrators unless they have

authorised them to decide according to equity (article 33 of Law 31/86). In international arbitration the rule is that there is no appeal procedure. However, under article 35, an appeal may be possible if the parties have foreseen that possibility and have taken the necessary measures to decide its terms.

The rules of mediation and conciliation[26] state, in its article 1, that all business disputes suitable for transaction may be submitted by the parties to mediation and conciliation, by a sole conciliator at the commercial arbitration centre. Mediation must strictly follow principles such as impartiality, equity, justice (article 7) and confidentiality, which are the best way to reach an agreement. Nevertheless, the conciliator may act as he thinks fit.

36 - What are the kinds of damages that can be awarded following a successful claim for breach of competition law (i.e. compensatory, punitive, disgorgement, etc.)?

Only the natural reconstitution or a monetary compensation can be awarded following a successful claim for breach of competition law. There are no punitive damages available.

Article 562 of the CC states that entity that has to repair an injury must "restore" the situation to as it would have existed had the event that determines the need for reparation not occurred. The two main forms of natural reconstitution are repair (i.e. reparation in specie of a damaged good, for example) and enforcement (of an agreement or of a legal obligation).

Monetary compensation is available whenever the "natural reconstitution" of the claimant's situation as it was before the illicit act occurred is impossible, insufficient or too expensive (Article 566 of the CC). It may be partial or applied together with a natural form of repair or with the enforcement of an obligation.

[26] The rules of mediation and conciliation were approved by the Lisbon Trade Association / Portuguese Chamber of Commerce and Industry, on 22 July 1994.

Monetary compensation shall be measured by the difference between the current patrimonial situation of the claimant (the damaged party) and what the patrimonial situation of the party would have been if the damage had not occurred. Monetary compensation includes the amount of the damage caused by the illicit conduct as well as the interests.

Damages can be patrimonial or moral.

Patrimonial damages are those which are susceptible to being repaired by money. Compensating these kinds of damages may cover patrimonial damages suffered by the injured party, namely "*dano emergente*" (the damage actually suffered by the injured) and the "*lucro cessante*" (the loss of profit or the advantages that, because of the illicit act, will not enter the patrimony of the injured). The loss of a chance can also be indemnified, in particular if expenses were undertaken in light of it. One may seek compensation for the profits that would arise from a lost chance.

The indemnity also allows for the compensation of moral damages (i.e. the suffering arising from damages to physical integrity, honour, reputation of the injured, etc) and future damages the judge may foresee (Article 564 of the CC).

Civil courts may also order anti-competitive conducts to cease and/or specific performance such as granting access to a network.

37 - What is the discretion of the courts on the calculation of damages? Is the existence of an administrative penalty, imposed either by the European Commission or by a NCA, taken into account when awarding damages?

In the CC, there are some rules regarding the calculation of the indemnity (Article 562 *et seq.*). However, the judge will always have some discretion in the calculation of the damages.

In theory, the indemnity for damages is completely independent from the administrative sanction, because the objectives are different (compensation of the damages, on one hand, and the punishment/prevention, on the other). However, the existence of a prior administrative penalty imposed by the PCA following an infringement of competition rules, invoked by a private claimant in the context of judicial proceedings, can be taken into account when awarding damages.

38 - Does the NCA take into account the compensation paid or to be paid by the company when determining the fine?

The PCA can take into account the compensation paid or to be paid by the company when determining the fine. Pursuant to Article 44(f) of the PCL, one of the circumstances that the PCA has to consider when determining the fine is "*the offender's behaviour in eliminating the prohibited practice and repairing the damage caused to the competition*".

This can, in principle, include the PCA's consideration of the repair of the damages caused to the concrete plaintiffs.

39 - Is the passing on defence admissible as a defence before national courts in a competition law dispute?

The passing on defence is admissible as a defence before national courts in a competition law dispute. It can be taken into account in the calculation and awarding of damages, as it aims at diminishing the scope and extent of the injury suffered by the plaintiff.

However, please note that the defendant must only pay for the damages he has caused, otherwise, there will be a situation of unjust enrichment by the plaintiff.

Also, when the plaintiff has contributed to the production or the worsening of the damage, the Court may reduce the amount of the indemnity to take into account the faults of both parties.

40 - Identify three main elements which, in your view, hinder the development of private enforcement of competition law in your country.

- There are not many PCA's decisions that are final and *res judicata*: it will be easier to file a claim based on competition damages when the infraction has already been confirmed by the courts;
- The national courts take too much time to decide;
- The absence of precedents of private enforcement of competition law; and
- Unawareness of the topic, including among lawyers.

41 - Indicate at least three measures which, in your view, would facilitate the development of private enforcement of competition law in your country.

- More decisions from the PCA and prompt publication of non-confidential versions thereof on the PCA's website;
- More disclosure/awareness of the competition rules and private enforcement;
- Inclusion of the possibility of private enforcement on the press releases by the PCA informing on convictions;
- Special rules for private enforcement of competition law; and
- Guidelines concerning the calculation of damages.

42 - The Commission and the European Parliament have been pushing for a "European" model of judicial application of competition law that would avoid the "potential excesses of the US system". Given the present underdevelopment of private enforcement in Europe, do you think it is possible to find right away a correct equilibrium or would it be necessary, to reverse the present atrophy

of private enforcement in Europe, to introduce some positive incentives that could be eventually removed if excesses also appear?

Private enforcement in the US antitrust system is very attractive. §4 of the Clayton Act, title 15, chapter 1, §15 indent a) states that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the United States, in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages sustained by him, as well as the cost of the law suit, including reasonable attorney's fees. The court may also award, if it considers reasonable under the circumstances, simple interest on the actual damages.

It has both a deterrence effect on the violation of antitrust laws and an incentive effect on private parties to sue for damage awards.

However, it seems a very broad and generous system. The European model should seek a more balanced regime, maybe awarding indemnities superior to the damage inflicted so that it creates an incentive effect but should not be so unbalanced.

It would be important that some specific rules relating to competition should be introduced, namely on popular actions, articulation with the leniency regime, introduction of guilt presumptions, guidelines on measurement of the damages, etc.

References

- Ashurst - *Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report*, 2004.

- Correia, Sérvulo – *Efectividade e limitações do sistema português de aplicação impositiva do direito da concorrência através de meios processuais administrativos e civis*, Estudos em Honra do Professor Doutor José de Oliveira Ascensão, Volume II, Almedina, 2008.

- European Commission – *Green Paper, Damages actions for breach of the EC antitrust*, COM (2005) 672 final, 2005.

- European Commission – *Commission Staff Working Paper, Annex to the Green Paper, Damages Actions for breach of the EC antitrust rules*, SEC (2005) 1732, 2005.

- European Commission – *White Paper on damages actions for breach of the EC antitrust rules*, COM (2008) 165 final, 2008.

- Gorjão-Henriques, Miguel, and Roux, Stéphanie, *Portugal, in Competition Litigation*, International Comparative Legal Guides (ICLG), 2009.

- Portugal National Report, in *Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report*, 2004.

- Ricardo, Fernando Pereira – *A Aplicação dos artigos 85.º e/ou 86.º do TCE, a título incidental, pelos tribunais portugueses – A acção de indemnização por perdas e danos resultantes de uma violação dos arts. 85.º e/ou 86.º do TCE*, A.A.F.D.L., Lisboa, 1999.

- Vilaça, José Luís da Cruz, and Pessoa Brandão, Teresa, *Getting the deal through – Private antitrust litigation 2005 in Global Competition Review, Special Report*, 2005.

List of Abbreviations

- CC - Civil Code
- CCP - Code of Civil Procedure
- CPC - Criminal Procedure Code
- EC Treaty - Treaty establishing the European Community
- ECJ - European Court of Justice
- GRAO – General Regime for Administrative Offences
- PCA – Portuguese Competition Authority
- PCL – Portuguese Competition Law
- Treaty - Treaty on the Functioning of the European Union