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The International Comparative Legal Guide to:
Competition Litigation 2011

A practical cross-border insight into competition litigation work

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1 General

1.1 Please identify the scope of claims that may be brought in Portugal for breach of competition law.

In Portugal, the law recognises the right of any person to seek preliminary injunctions, damages or any suitable claim against any behaviour in breach of the Law, including the Competition Law approved by Law Nr. 18/2003 of 11 June (hereinafter "CL").

While it had previously been held that an infringement of the CL formerly in force (DL 371/93) would not have conferred a subjective right and could not be the basis for a claim of civil liability, this understanding seems to have been since overturned. Courts should no longer be expected to uphold that view, instead resorting to the application of the general principles governing contractual or tort liability and the well-known ECJ case-law.

However, actions for damages caused by the infringement of competition rules are still very uncommon.

1.2 What is the legal basis for bringing an action for breach of competition law?

There is no specific competition statutory basis. The legal basis derives both from articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU") and implementing regulations and from the parallel CL provisions.

National courts will apply the rules on tort liability set out in articles 483 *et seq*. and 562 *et seq*. of the Portuguese Civil Code (hereinafter "CC"). The claimant must prove the existence of an injury, the defendant's fault, the damages suffered and the link between the injury and the damages.

Also, the illegal use of IP rights or the violation of unfair competition rules in the Portuguese IP Code may be the basis for a damages claim.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis will always be the respective national CL provision. When an effect on trade between Member States is also present, the respective EU Law provision (article 101 or 102 TFEU) should also be invoked as legal basis.

1.4 Are there specialist courts in Portugal to which competition law cases are assigned?

One must distinguish between private litigation and the judicial control of the Competition Authority's (*Autoridade da Concorrência*, herein after "NCA") decisions.

For private litigation there is no specialised court and any judicial court of any judicial local circumscription ("*comarca*") may be competent.

Law Nr. 52/2008 of 28 August on the Organisation and Functioning of the Judicial Courts *(Lei da Organização e Funcionamento dos Tribunais Judiciais*) approved the Judiciary Reform, which will gradually establish a judiciary decentralised system, enabling the Government to create, by decree-law, in the local courts ("*comarca*") "*Juízos de Comércio*" (Commerce Panels), which will be competent to decide appeals from decisions of the NCA in Competition Law cases. Three pilot judicial circuits already function according to this new legislation (Alentejo Litoral, Baixo-Vouga and Greater Lisbon Northeast). Until the implementation of the Judicial Reform, appeals of NCA decisions are still to be made (outside these pilot circuits) to the Commercial Court of Lisbon. Also, a negative decision of the NCA regarding a merger may be appealed to the Ministry of Economy. So far, this has occurred in just one case (*Brisa/AEO/ AEA*) with a favourable outcome for the appellant.

However, last April, the Government announced its intention to create a Court specialised in "competition, regulation and supervision", and presented to the Parliament a bill proposal last June 20, 2010 (Proposal 32/XI/1.ª). If this plan goes through, it would be expected that such a Court would centralise the appeals of NCA decisions, but its role in private enforcement – if any – is less clear.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Any legal or natural person who suffered damages in consequence of an unlawful act (or failure to act) has standing.

As for collective claims, they may be put forward by any parties sharing the same cause of action, or when the decision of the case implies the analysis of essentially the same facts, or the interpretation and enforcement of the same legal provisions or of analogous contractual provisions, and as long as there are no circumstances that act as obstacles to such collective claims (see articles 30 and 31 CPC).

The courts may decide to join several and different cases, even in

different moments of the legal process (see articles 275 and 275-A CPC).

Furthermore, Law Nr. 83/95 allows any citizens and associations/foundations protecting general interests to bring what might be considered, although with some differences, as "class actions" (*acção popular* or *acção para a tutela de interesses difusos*) and claim compensation when there is a violation of *diffuse* interests such as public health, environment, quality of life, protection of consumer products or services, cultural heritage and public domain (see also article 52 of the Portuguese Constitution and article 26-A of the Portuguese Civil Procedure Code ("CPC")). It would appear that no attempt has ever been made to use this Law in the context of the enforcement of competition law.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The rules on competence are defined in the CPC and are the same that are applicable to any other damages action, in articles 61, 65 and 65-A (international competence), 66 or 67 (generic and specialised internal competence). If the action involves a legal or natural person established outside the Portuguese territory and within the EU, EU Regulation Nr. 44/2001 or the new "Lugano convention", since January 1, 2010 – OJ, L 140, of 8.6.2010, p. 1).

Generally speaking, under articles 65 and 65-A CPC, Portuguese courts have international competence whenever it is imposed by EU or other international instruments and when, notwithstanding other EU/international rules: (a) the action may be lodged in a Portuguese court according to territorial competence rules valid in Portugal; or (b) the right claimed cannot be effectively enforced unless the action is brought in Portugal "*or the claimant has an appreciable difficulty in instituting the proceedings abroad*", provided that there is a significant, personal or *real*, connection between the subject matter of the dispute and the national legal order.

Please note that the wording of articles 65 and 65-A considered for the purposes of this report is given by Law Nr. 52/2008, which have entered into force in January 2nd 2009 for the circumscriptions included in map II annexed to the Law.

According to article 74 CPC, in cases of contractual liability, the action is brought before the court of the defendant's place of residence (in some circumstances, the claimant may chose to file the action before the court of the place where the obligation should be performed); and in cases of extra contractual liability, the claim is brought before the court of the place where the infringement took place.

1.7 Is the judicial process adversarial or inquisitorial?

In competition litigation in judicial courts between private parties the process is adversarial.

In appeals from NCA decisions, the judicial process is inquisitorial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes they are.

2.2 What interim remedies are available and under what conditions will a court grant them?

According to article 27 CL, the NCA may itself order *ex officio* (i.e. by its own motion) or under request of any interested party the immediate suspension of the conduct under appreciation or any other pre-emptive provisional measure considered necessary to ensure the maintenance of competition or the *effet utile* of the final decision in the procedure. These interim measures may be granted if the conduct may "*cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third party interests*". Thus, undertakings may seek interim measures in the framework of complaints presented to the NCA.

In private litigation in judicial courts, interim measures are allowed as in any other legal judicial procedure, if the general criteria, the *fumus bonis iuris* and the *periculum in mora*, are met.

On January 2009, the NCA applied for the first time interim measures under article 27 CL (Press release 1/2009). The decision was, allegedly, appealed to the Lisbon Commercial Court.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

According to articles 562 and 566 CC, the forms of compensation available are natural restoration and monetary compensation (if the first is not possible, does not entirely repair the damages suffered or is excessively costly for the debtor). However, compensation will only be awarded if the following requirements are fulfilled: the existence of an illicit behaviour; proof of injury to the claimant; and the demonstration of a causal link between the unlawful conduct and the damage (see article 483 CC).

Claims can also be brought to obtain a declaration of nullity of an agreement violating CL/EU Law. 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 (see article 289 CC). These provisions are applicable without prejudice to some *bona fide* (good faith) rules or the respect for some past *de facto* contractual relations.

Other remedies may be the publication of the decisions. This is allowed by the misdemeanour regime and by article 45 CL, regarding NCA decisions.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

Monetary compensation shall be aimed at re-establishing the patrimonial situation of the injured party as it would currently exist if the infringement had not taken place. It includes the damages caused by the unlawful conduct and the benefits that the damaged party could not obtain due to the illicit action.

When the plaintiff has contributed to the production or the worsening of the damages, the court may reduce the amount of indemnity, or even exclude it.

Exemplary damages are not available.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

Not necessarily. There is no case law on this subject but fines imposed by the NCA or the Commission may not be taken into account, given the different nature and purposes of the regimes. ECJ case law could be considered, though.

4 Evidence

4.1 What is the standard of proof?

There are no specific rules for private competition litigation, the general rules being applicable.

Both for private enforcement, and for litigation relating to NCA decisions, as is customary in continental European law, the standard of proof is essentially the firm conviction of the court, based on an overall assessment of the evidence presented to it (notwithstanding specific value that may be legally attributed to certain documents or other means of proof).

It should be noted that competition litigation relating to NCA decisions is governed by some criminal procedure principles, under article 32(10) of the Constitution, including the "*in dubio pro reo*" or the "right to silence" principles, the latter being interpreted in a more liberal way than in ECJ case-law. Thus, evidence supporting a claim in misdemeanour cases must not leave room for "*reasonable doubts*". This may raise some difficulties whenever the undertakings concerned claim the benefit of article 101(3) EU or of the correspondent article 5 CL. Indeed, the courts' experience and the doctrine indicates that this principle must be extended to the so-called "legal absolving excuses", like articles 101 (3) or 5 CL. As a result, and despite article 2 of EU Regulation 1/2003, Portuguese courts may make a narrow interpretation of this provision. If so, concerned undertakings may be acquitted should they succeed in persuading the judge that reasonable doubts subsist about the conditions laid down in article 101(3). So, in the misdemeanour cases, the NCA applies the criminal standard of proof since the general misdemeanour regime (*Regime Geral das Contra-Ordenações*) is of subsidiary application. The *Tribunal da Relação de Lisboa*, in 7.7.2007 (case 7251-2007-3), decided that, as long as the conduct fulfils the legal prohibition elements, that suffices to consider the behaviour as illegal, unless the defendant presents justifying cause. It should be highlighted that the Court expressly considered the EU doctrine on the subject.

4.2 Who bears the evidential burden of proof?

In private litigation, the burden of proof lies with the claimant (see article 342 CC) and, when in doubt, the judge will decide against the party who bears the burden of proof. This may not be the case in contractual liability litigation, since there is a presumption of fault of the debtor (see article 799 CC).

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no general limitations to the forms of evidence admissible in competition law cases, as the existing restrictions seem to be inapplicable to competition litigation.

Evidence must be submitted to a contradictory hearing of the party against whom it is presented (see article 517 CPC).

Witness testimony is generally admitted, except when the proof needs to be written or when a fact has a full conclusive force (see article 393 CC). The number of witnesses allowed is limited per case [20] and per fact discussed [5]. Parties in the action cannot be witnesses (see articles 617, 632 and 633 CPC).

Confession can only relate to personal facts or to facts that the party ought to know, and it cannot concern criminal facts or facts related to unavailable rights (see articles 354 CC and 554 CPC).

Expert evidence is accepted by the courts, but the expert is designated by the court (see articles 568 *et seq*. CPC). Other expert opinions may be presented by the Parties, and the probative value of the answers is freely established by the court (see article 389 CC).

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The access to administrative documents is ruled by Law Nr. 46/2007 of 24 August, also implementing EU Directive 2003/98 on the re-use of public sector documents.

The law acknowledges a general right of access, although limited, for instance in nominative documents (related to particulars of a considered natural person). Regarding undertakings, the law allows the access to any concluded administrative procedures (the access can be differed by the Administration during no more than one year), but also recognises a right to have access even to company documents including commercial or industrial secrets or other internal company documents if the person shows "*a sufficiently relevant and direct, personal and legitimate interest*". Nevertheless, a person may be held liable if the document is used for a different purpose than the one invoked to have access to this document.

Anticipated production of evidence (testimonials, inspections, etc.) is possible, upon request, provided that there is a reasonable concern that the production of such evidence may become impossible or very difficult (see articles 520/521 CPC).

Furthermore, a party can request the court to order the other party or any other person/entity to present a document (see articles 528 and 531 CPC) and the court may do so by its own motion (article 535 CPC).

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

When a witness is missing without justification, the judge will impose a fine and order his/her presentation before the court under custody [see article 629(4) CPC]. Witnesses may also be heard in the court of their place of residence, through video-conference (see article 623 CPC).

The party presenting the witness indicates the facts that are to be testified to by the witness and conduts the questioning (*interrogatório*). The judge is always allowed to ask questions (see article 638 CPC). The counter party's lawyer is also entitled to question the witness, if the questions are in connection with the previous testimonial statements. Direct confrontation between witnesses may be requested to the court.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

No: the judge will freely appreciate it, according to his prudent belief. However, the existence of a prior infringement decision may facilitate the production of evidence in favour of the claimant.

If there has been a previous Commission decision regarding the conduct, the court cannot adopt any conflicting decision (see article 16 of Regulation 1/2003), having to accept the *de facto* assumptions of

the decision and based on them it will decide on the damages. In a recent precedent relating to a UEFA regulation which had been declared contrary to Article 101 TFEU by the European Commission, the Lisbon Court of Appeals took note of that Decision and followed its conclusion, without entering into details on the substantive legal analysis of the decision of association of undertakings in question (see judgment of 10 November 2009, in case *VSC & FPF v. RTP*).

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Courts are bound to protect commercial confidentiality. If there are doubts on whether information is confidential, *e.g.* commercial secrets, internal documentation or IP rights, the court may decide on the matter.

Generally, the Parties in a court procedure must be granted full access to all the pieces and documents produced by the other party. Third parties may have limited access to the file but once the decision is delivered access to a copy of the court's judgment must be granted. In administrative procedures, however, both the Supreme Administrative Court and the Constitutional Court, in several decisions, have decided that the access to the file may be limited if it is necessary to protect IP rights, commercial secrets or internal information of undertakings.

That being said, any company should presume that the information produced before the court is fully available to the parties and may be used subsequently in other proceedings.

The Lisbon Commercial Court has recognised that the NCA may use information provided to it under its supervision and non-contentious powers in the framework of subsequent misdemeanour procedures. However, the NCA is bound to protect the business secrets both in administrative or misdemeanour procedures [*e.g.* articles 18, 19, 26(5), or 30 CL; see also article 62 of the Administrative Procedural Code].

Disclosure of commercial documentation to a court is also subject to articles 534 CPC and 42/43 of the Commercial Code of 1888, in the wording given by Decree-Law Nr. 76-A/2006 and Decree-Law 8/2009.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Two justifications present in the EU Treaty are reflected in the CL: for prohibited agreements or concerted practices [see articles 101(3) of the TFEU and 5 of the CL] and for undertakings entrusted with the operation of services of general economic interest [see articles 106(2) of the TFEU Treaty and 3(2) of the CL].

It is possible that other public interest arguments be considered as relevant, such as those of the ECJ case law in *Wouters* or the need to protect the employment, etc.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Yes. As the claimant can only recover the damages suffered as a result of the infringement, if it is proved that some of the damages were suffered by a third person, the court will not award the plaintiff the "passed on" damages.

On the other hand, if the requirements for civil tort liability are met (see question 3.1), indirect claims are possible.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Actions for damages must be brought within three years from the date the plaintiff acquired knowledge of the right to make a claim (article 498 CC). Requests for the declaration of nullity of an agreement can be brought at any time by any interested party and may be decided *ex officio* by the court (article 286 CC).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

There is no precise information and no way of accurately predicting the duration of a judicial process. Official statistics may be misleading for these purposes.

Depending on the complexity, we would say that the adoption of a final judgment by the Lisbon Commercial Court will probably take more than two years.

In private litigation in judicial courts, the expected duration of the procedure would be two/three years, in the first instance. However, Abel Mateus, the former NCA Council President, declared in 12.10.2007 that the average duration was of about four/five years.

Preliminary relief is urgent and may be decided in up to three/five weeks; otherwise it is not possible to accelerate proceedings.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Under the general rules of civil procedure, any judicial settlement "obtained by the judge" is subject to confirmation *(homologação)* by the court [article 300(4) CPC].

Generally, the author is free to withdraw (*desistência*), at any time, the action (*instância*) or the whole/part of the request (*pedido*), and the defendant is free to confess/admit the damages/violation of CL at any time. If the author decides to abandon the action after the defendant has already contested the author's allegations, that depends on the defendant's approval (article 296 CPC). In these cases, the discontinuation is declared by the court in the form of a decision (*sentença*).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Legal costs are initially borne by all the parties. However, at the end of the proceedings and if it has requested it from the court, the "winning party" has the right to recover them from the "losing party" (in case of partial loss, the costs are divided proportionally among the parties). The fees of the lawyers are borne by each party, in principle (see articles 446 CPC, 33 and 33-A of the Code of Judicial Costs).

From April 20th, 2009, under the new Regulation of the Procedural Costs (Decree-Law Nr. 34/2008, of 26 February – in the wording of

the Budgetary Law for 2009 – Law 64-A/2008, of 31 December, article 156), in the end of the proceedings, the winning party has to send to the court and to the losing party a document containing the explanation and the justification of the costs (*nota discriminativa e justificativa*), in order to be reimbursed by the latter. This amount may include lawyers' fees, within certain limits. This regimen is only applicable to new judicial procedures.

8.2 Are lawyers permitted to act on a contingency fee basis?

The lawyers' fees must correspond to an adequate financial compensation for the services provided, taking into account *e.g.* the importance of the services provided, the difficulty and the urgency of the issue, the intellectual creativity, the result, the time spent or the responsibility assumed.

The Bar Association Law does not allow for fees to be exclusively dependent on the result or to be determined in a percentage of the achieved result. It is the so-called *quota litis* prohibition (article 101 Law Nr. 15/2005). So, contingency fees are not allowed. However, the same Law recognises the right of the lawyer and the client to previously define a fixed fee amount due for the services that are to be provided, and to agree in an increase of the fees if the result so merits.

8.3 Is third party funding of competition law claims permitted?

There is no provision regarding such matter. From the perspective of legal services, it is only forbidden for lawyers to share their fees with third parties that did not cooperate in advising the Client.

9 Appeal

9.1 Can decisions of the court be appealed?

See questions 1.4 and 1.6.

Appeals from NCA decisions applying a fine or other sanctions are generally made to the Commerce Court of Lisbon and from there to the *Tribunal da Relação de Lisboa*, which is the last instance and may only consider matters of law (see article 52 CL).

Since the beginning of 2009, under the Judiciary Reform (Law Nr. 52/2008) two *Juízos de Comércio* in the pilot local-circumscriptions, based in Aveiro and Sintra, were already created (Decree-Law 25/2009, of January 26th), with competence to decide on the appeals from these NCA decisions. For now, we believe that the Commerce Court of Lisbon remains competent for other appeals in misdemeanour cases (see article 121, 4, of Law 52/2008).

That also applies to administrative procedures (mainly mergers) under articles 54/55 CL, but then appealing to the Supreme Court of Justice remains possible, although limited to questions of law (if the original appeal is limited to questions of law, appeal *per saltum* is allowed). In mergers, a negative decision of the NCA may also be appealed to the Ministry of Economy. That occurred in just one case (*Brisa/ AEO/ AEA*) with success to the appellant.

Except for some limited territorial judicial circumscriptions (not including Lisbon, itself), the Commerce Courts were to be converted into "*Juízos de Comércio*" (v. "Commerce Panel") by September 1st 2010, but Law 3-B/2010 said that the implementation of the Judiciary Reform could be concluded until September 1, 2014. By that time the new wording of articles 50, 52, 54 and 55 of the CL may be applicable to the entire national territory. The changes merely intend to adapt the appeal rules in the CL to the future "*Juízos de Comércio*". However, there are some doubts in this regard, since the Government announced and submitted to the Parliament a bill proposal for the creation of a specialised court for "competition, regulation and supervision" that will dramatically alter the solutions envisaged by the Judiciary Reform.

In private litigation, the right to appeal from lower judicial courts to the Courts of Appeals (*Relação*), which can decide on matters of fact and of law, and from there to the Supreme Court of Justice (*Supremo Tribunal de Justiça*) depends directly on the value of the action (if it exceeds the value of the respective *alçada*) and on the importance of the loss under the *ad quo* court. The Supreme Court only decides on matters of law (see articles 676, 678, 691 *et seq*., and 721 *et seq*., CPC).

In civil matters, the "*alçada*" is fixed in €5,000 (1st instance courts) and €30,000 (*Relação*), according to Law Nr. 3/99, as amended by Decree-Law Nr. 303/2007; see article 31 of Law Nr. 52/2008).

Should any claim arise against the State or involve the rights and legally protected interests of individuals based on administrative law or concern extra contractual liability of public bodies, administrative agents or individuals subject to the new State liability regime (Law Nr. 67/2007), the Administrative Courts will be competent to decide the claim.

10 Leniency

10.1 Is leniency offered by a national competition authority in Portugal? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes. Under the CL, the measure of the fine applied could vary according, *inter alia*, to the "collaboration given to the" NCA (art. 44, e)). Meanwhile, Law Nr. 39/2006 of 25 August established a formal leniency regime. There is no way to be certain of whether the Portuguese Courts will grant immunity from civil claims to a leniency applicant.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

There are no rules in the leniency regime in this regard. Generally, evidence already disclosed to the NCA may be used for other purposes.

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