

Editorial

Collective Redress: Will Portugal Show the way?

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Portugal is a small country by European standards and, with the financial and economic crisis, it has not always been in the limelight, for positive reasons, in the last years. Here is one area in which, however, this small country, with unlimited access to the gigantic ocean resources, could show the path, or at least, a possible path, to the rest of Europe.

That path concerns collective redresses in damages competition proceedings. When the decision was made not to include provisions on collective redress in the EU Antitrust Damages Actions Directive, it became clear that each Member State would have to find its own way of interpreting the principle of effectiveness and its implications for actions relating to mass damages arising from antitrust infringements.

And it is good that things turned out the way they did, because the approach which would have been possible at the EU level, as the Commission's broader 2013 Recommendation shows, would have imposed conditions which might have seriously stifled the possibility of achieving full reparation of damages to consumers through collective enforcement. The choice for the opt-in system, in particular, would inevitably mean that a great number of consumers would not be represented, favouring the non-reparation of damages to those who are least informed, more prone to inertia and more in need of protection.

While research seems to growingly point to the economic and sociopolitical justification of opt-out mechanisms, as long as certain safeguards are in place, very few Member States have as yet made this option. Examples that stand out, in varying degrees, are the Netherlands, Portugal and, more recently, the UK, and Belgium. On the whole, however, it seems fair to say that the laws of the Member States have not yet made it possible for companies to be ordered to fully compensate consumers for the damages caused by anticompetitive practices.

Despite the many decisions taken by the European Commission and the NCAs which could have led to follow-on consumer redress, there are very few cases in the EU as a whole which can be pointed to as examples thereof. Two successful cases related to a very limited

number of injured parties—the Austrian driving schools cartel case (District Court of Graz, file no. 4 C 463/06 h) and the UK's *JJB Sport* case (CAT, case no. 1078/7/9/07), the latter concluded with a settlement. More often, attempts at such actions are wholly unsuccessful, usually not passing the stage of admissibility—such as the French mobile telephony case (Paris Commercial Court, 6 December 2007, *UFC Que Choisir v Bouygues Telecom*), the Spanish *Telefónica* case (Madrid Commercial Court No. 4, 7 November 2012, *Ausbanc v Telefónica*) or the Italian *Microsoft* case (Milan Tribunal, 20 December 2010, upheld by Milan Court of Appeals, 3 May 2011).

This may change. On 12 March 2015, the Portuguese Competition Observatory, a non-profit association of academics from a number of Universities, filed a mass damages claim against Sport TV, which until recently held the monopoly in the provision of paid premium sports channels in Portugal (Lisbon Judicial Court, case no. 7074/15.8T8LSB).

The action seeks to compensate over 600,000 clients for damages allegedly resulting from a number of anticompetitive practices, but also to compensate those who were excluded from the benefit of these channels due to the inflation of prices and all Portuguese pay-tv subscribers, between 2005 and June 2013 (over 3 million at the end of the period), who suffered from a reduction of competition on this market as a result of increased transparency and reduced incentive to competition arising from the practices of the company jointly controlled by the pay-tv market leader. Partly following an abuse of dominance decision by the Portuguese Competition Authority, confirmed by the courts, the action can lead to reparations in the tens of millions.

In that case, the claim was made possible by the Portuguese (1995) *actio popularis* law, in which standing is given to any injured consumer or consumer association, with little in the way of certification and no financial resources requirements, very limited court fees and safeguards set up primarily through the vigilance of the Court and the Public Prosecutor.

Beyond attracting claimants to Portugal, that claim may turn into a case-study for the EU as a whole. For

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firms found guilty of competition infringement, it may show that a rather flexible system is possible, and legitimate, where civil society and the courts are trusted to defend the rights of consumers in reasonable contexts and in a just and altruistic manner, thereby allaying the surprisingly pervasive concerns of abuse. How could it

be otherwise, if we are truly committed to effectiveness, full reparation and the rule of law . . .

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