Antitrust Private Enforcement in Portugal and the EU: The Tortuous Topic of Tort

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Introduction

Directive 2014/104/EU was written on the assumption that the private enforcement of competition law is a matter of tort in all Member States. While doubts about this issue may have been brought up by some during the legislative process, they are not reflected in the final text. This assumption also underlies rules of EU law, notably in the field of private international law.

This paper shows that this assumption may well prove to be wrong in several Member States, and highlights the consequences thereof. It will do so by focusing specifically on Portugal,[1] but it is likely that the same legal issues will arise in other jurisdictions where civil law has a strong Germanic influence.

The Directive and tort

It seems fair to say that the vast majority of EU law doctrine believes that antitrust private enforcement, at least when arts 101 or 102 TFEU are at stake, is a matter of tort, even when noting that this may be a controversial issue in some jurisdictions.

But Directive 2014/104/EU itself seems to be silent on the issue. Member States retain their sovereignty over civil law and procedural law, except to the extent that harmonisation of such rules is required in the pursuit of competences transferred to the EU. This Directive does precisely that. But if it is truly silent on qualification of disputes as tort or contractual liability, then this remains to be decided entirely under national law. As will be argued below, a broader view of the EU legal order disproves this point (see jurisdictional clauses).

The Directive regulates the right to compensation both in cases where there was and where there was not a contractual relationship between the infringing undertaking and the injured party. But, in Portugal (and perhaps in other Member States), the rules applicable to those situations may be different.

Tort or contractual liability

In Portuguese law, tort (*responsabilidade extracontratual*) and contractual liability differ, namely, in what concerns burden of proof, limitation periods, scope of protection and jurisdictional clauses. The differentiation between the two has been the subject of much criticism in doctrine, but courts' predominantly positivist approach to the law makes reform by non-legislative means unlikely.

Portuguese legal doctrine is virtually unanimous in stating or assuming that all private enforcement actions fall under tort rule. But this is partly due to the fact that the issue has tended to be discussed only by competition law experts, who are strongly influenced by EU law. Civil law experts called to issue an opinion (which has occurred in the framework of paid legal opinions), are more likely to hold a different view.

No one questions that antitrust private enforcement cases where there was no contractual relation between the infringing undertaking and the injured party are to be decided under tort rules. But these cases have so far been rare. On the other hand, Portuguese case law is split on how to qualify the nature of liability when there was a contractual relation between the parties. Contradictory decisions have been adopted by the same courts faced with similar situations. We have identified seven pro-tort cases (with only one discussing the issue in-depth),[2] and three pro-contractual liability cases.[3]

The school of thought in the latter group of cases may arguably be summarised as follows: any dispute arising in the context of a contractual relation between the parties falls under contractual liability rules, or it falls under both those and tort rules, in which case contractual liability rules prevail.

This conclusion was arrived at:

1) by the Oporto Appeal Court, about an unlawful termination of a dealership contract by a car manufacturer, under national abuse of economic dependence provisions[4];

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[1] The analysis that follows is based on an extensive collection of antitrust private enforcement precedents in Portugal, with a total of 88 restrictive practices cases, between 1988 and the present. For a detailed description and analysis of all antitrust private enforcement cases in Portugal, see: M. Sousa Ferro, *Jurisprudência de Private Enforcement*, CIDEEFF Working Paper, 2016 (available in Portuguese only).

[2] *Júlio Canela Herdeiros v Refrige* (87823) 21 March 1996 Supreme Court; *B and C v D* (653357) 10 July 2006 Oporto Appeal Court; *A v B* (3130/08) 21 October 2010 Supreme Court; *Goodyear v Eurovidal* (107/2001.L1) 4 October 2011 Lisbon Appeal Court; *Auto A v B* (5484/09.9TVLSB.L1-2) 10 February 2011 Lisbon Appeal Court; *NOS v Portugal Telecom* (1774/11.9TVLSB) 7 December 2012 Lisbon Judicial Court; *Onitelecom v Portugal Telecom* (2271/11.8TVLSB.L1-8) 31 October 2013 Lisbon Appeal Court.

[3] *Auto AA, Representações, Acessórios e Reparações Automóveis v Salvador Caetano* (178/07.2TVPRT.P1) 11 September 2012 Oporto Appeal Court; *Associação Nacional das Farmácias and Farminveste v IMS Health* (672/11.0YRLSB) 3 April 2014 Lisbon Appeal Court; *Interlog and Taboada & Barros v Apple* (135/12.7TCFUN.L1.S1) 16 February 2016 Supreme Court.

[4] The issue was not revisited on appeal: *Auto AA* (178/07.2TVPRT.P1.S1) 20 June 2013 Supreme Court.

2) by an arbitral tribunal, confirmed by the Lisbon Appeal Court, about an excessive pricing abuse of dominance in the pharma intelligence market[5]; and
3) by all instances in an art.102 stand-alone case against Apple by its former exclusive distributor in Portugal.[6]

A ruling in a case concerning a margin squeeze by Portugal Telecom highlighted that, when the court believes that such disputes fall under tort rules, it may treat part of the claim (surcharge) as an unjustified enrichment, which follows somewhat different rules.[7]

As a non-civil law expert, I have struggled to understand the logic of a legal interpretation that leads to discussions of infringements of agreed upon obligations where no provision of the contract was infringed, and where the anticompetitive behaviour was based on and allowed by a clause in the contract. More importantly, I fail to understand the justification for submitting identical situations to fundamentally different rules, depending on whether or not the infringement of competition law occurred in the context of a contractual relation, leading to unjust results.

Contractual liability is generally more protective of the injured parties, because of the longer limitation period and because fault is presumed, whereas it must be proven by the injured party under tort rules. Why should a distributor or large undertaking in the retail market have access to a more favourable regime in antitrust private enforcement than the consumers or indirect customers to whom damages were passed-on?

We will see that, in the context of the enforcement of EU law, national courts are not entirely free in qualifying a dispute as falling under tort or contractual liability. This will be so, namely, to the extent that such qualification may impact the effectiveness of the right to compensation or the *effet utile* of arts 101 and 102 TFEU. But it is also the case whenever the situation has a link to two or more Member State legal orders, and the EU Private International Law Regulations are applicable, or the Regulations would be applied differently from one Member State to the other.

Scope of protection

Within the case law that treats antitrust private enforcement as an issue of tort, there is a school of thought in Portugal which effectively denies the right to compensation on the basis of infringements of competition law.

In simplistic terms, in our legal system, there is only a right to compensation in tort if the rule that was infringed was aimed at protecting the rights of the injured party, if those rights fall within the rule's scope of protection.

While there seems to be unanimity that competition law is aimed at protecting consumers, and thus damages caused to them fall within the scope of protection, some have argued that the law is not aimed at protecting competitors or even other types of clients.

So far, there has never been a Portuguese case where an injured party has succeeded in obtaining some financial advantage strictly under tort rules. The only cases that have led to compensation of damages have always been decided under contractual liability rules or, at least, had to do with the annulment of contractual clauses.

Unfortunately, in 1996, the Portuguese Supreme Court ruled that competition law did not grant undertakings a subjective right to compensation.[8] In 2010, it reaffirmed that competition rules are meant to protect market competition and to safeguard the interests of consumers, and that they were not meant to grant rights to intermediaries (a film distributor)—the behaviour in question could lead to a fine in public enforcement, but not to damages in private enforcement.[9]

That being said, legal practitioners have essentially ignored these rulings and this can certainly not be considered settled case law. In 2011, the Lisbon Appeal Court held that, if competition law were infringed, a car dealer would have a right to compensation for the damages arising therefrom, under tort rules.[10]

There are several pending cases which assume the existence of a right to compensation and the majority of civil law experts (including a doctrinal thesis on the subject) disagree with the Supreme Court. So there is hope for change. It is clear that the Supreme Court's position contradicts the case law of the ECJ, whenever the TFEU is applicable (which was not the case in either of those two situations). And the transposition of the Directive[11] should definitively put the issue to rest (at least for cases filed under the new law), regardless of whether EU law or only national law is applicable.

Limitation periods

The ECJ's ruling in *Manfredi* confirmed that limitation periods are an issue of national law, to the extent that there are no EU rules governing the matter.[12]

In Portugal, tort cases are subject to a limitation period of three years, but contractual liability is time-barred only after 20 years. The latter is also true for claims of unjustified enrichment. As a result, in Portugal, the claims

[5] *Associação Nacional* (672/11.0YRLSB) 3 April 2014 Lisbon Appeal Court.
[6] *Interlog* (135/12.7TCFUN.L1.S1) 16 February 2016 Supreme Court.
[7] *NOS* (1774/11.9TVLSB) 7 December 2012 Lisbon Judicial Court.
[8] *Canela Herdeiros* (87823) 21 March 1996 Supreme Court.
[9] *A v B* (3130/08) 21 October 2010 Supreme Court.
[10] *Auto A v B* (5484/09.9TVLSB.L1-2) 10 February 2011 Lisbon Appeal Court. See also *NOS* (1774/11.9TVLSB) 7 December 2012 Lisbon Judicial Court.
[11] Draft transposition proposal available at: *http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Paginas/Consulta_Publica_PrivateEnforcement.aspx?lst=1&Cat=2016* [Accessed 9 November 2016].
[12] *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) [2006] E.C.R. I-6619; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [77].

of indirect clients, including final consumers, will often be time-barred long before the same occurs to the claims of direct clients, depending on the position of the court as to the nature of the liability.

After the transposition of the Directive, in principle, any claim to compensation for an antitrust infringement will be subject to this special regime, meaning that, even if the liability is deemed to be contractual, the special rules on the limitation period will apply, including the five-year deadline.

There are controversies regarding when the deadline begins to run. For tort, the limitation period starts the moment the right may be exercised, specifically, when the injured party became aware of its right to compensation, even if not knowing the person responsible or the full extent of the damages.[13] But when is that, exactly?

The practical consequences of this issue were exemplified in two follow-on cases against an abuse of dominance by Portugal Telecom. Both undertakings had submitted complaints to the Portuguese NCA (more than three years before the filing of the action), leading to the adoption of the decision which identified the infringement.

The *NOS* case is still pending. Although the issue is still subject to confirmation in the final judgment, it seems the first instance court "saved" a part of the action, by allowing the applicant to revise its request in terms of unjust enrichment, rather than tort.[14] This only applies to the surcharge part of the damage (not, e.g., to lost profits).

The *Onitelecom* case, decided wholly under tort law, was found to be time-barred. The courts considered that, in this case, the injured party was, at the time of the complaint, already aware of the facts on which its right to compensation rested, and that only a factual, not a legal awareness was required.[15]

This is a troubling perspective (unjustified by the court), which could have very negative consequences for future private enforcement cases. That view may make sense for classic tort scenarios. If bricks fall on a car from a construction site, it is fair that the limitation period begins to run when the injured party is aware of those facts, without requiring a legal knowledge of a right to compensation, because it is based on a straightforward and basic legal principle. But the existence of a right to compensation for antitrust infringements is based on extremely complex rules and is almost never straightforward.

The establishment of an art.101 or 102 infringement usually requires access to data that private parties do not have. It also often requires extremely complex legal and economic assessments, which make the existence of a right to compensation very uncertain. In this Portuguese case, the companies may have known enough to submit a complaint to the NCA, and they would naturally try to make their complaint sound as persuasive as possible, but that did not mean that they had in their possession sufficient facts to know that they had a right to compensation (or they would probably have initiated the private enforcement action at the same time). Arguably, that determination for this type of abuse (margin squeeze) required information on the cost structure of Portugal Telecom, which only the NCA could obtain during the investigation. The court's ruling opened the dangerous precedent of considering that, whenever an injured party complains to the NCA or to the European Commission about a suspected antitrust infringement, the limitation period begins to run immediately, and it may see its action time-barred well before there is a res judicata public enforcement decision.

This is clearly against the rules of the Directive, under which this case would not have been time-barred. But even prior to the transposition of the Directive, the principle of effectiveness already prevents national rules on limitation periods from making it practically impossible or excessively difficult for injured parties to seek compensation for the harm caused by an infringement of art.101 or 102 TFEU, which may occur, for example, if the limitation period is too short or if it begins to run on the day the practice was adopted, rather than when it came to an end.[16]

So the question is whether or not the principle of effectiveness already required the court in *Onitelecom* to decide differently. I believe so. The drastic legal uncertainty on the existence of a right to compensation, together with the impossibility of meeting the burden of allegation of facts (you cannot allege facts you are not yet aware of) and the dissuasive high costs associated with such actions (especially, court fees, which in Portugal are calculated as a percentage of the value of the claim and can easily far surpass lawyer and economist fees, at least until the Constitutional Court rules on this), mean that initiating the limitation period at the moment of a complaint to the NCA makes it impossible or excessively difficult to exercise the right to compensation. Astonishingly, the claimant argued that this finding would violate the principle of effectiveness, but the court refused to submit a referral and skipped over this argument.

After the transposition of the Directive, this specific discussion should be settled, in part. But since the Directive requires the determination of the moment when the injured party became aware of the facts, and that they constituted an infringement of competition law, and since the rules on the limitation period were thought of primarily for follow-on actions, it is fair to expect the debate to continue in a slightly revised form, especially in stand-alone actions.

[13] See arts 306, 309 and 498 of the Portuguese Civil Code.
[14] *NOS* (No 1774/11.9TVLSB) 7 December 2012 Lisbon Judicial Court.
[15] *Onitelecom* (No 1/11.8TVLSB) 14 January 2013 Lisbon Judicial Court; *Onitelecom* (No 1/11.8TVLSB.L1-8) 31 October 2013 Lisbon Appeal Court.
[16] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [78]–[82].

Jurisdictional clauses

Perhaps the strangest of all Portuguese cases discussed in this paper was the recent *Apple* dispute.[17] The multinational was sued by its former distributor, who alleged a range of unlawful behaviours under art.102 TFEU and its national equivalent (as well as abuse of economic dependence).

Faced with a multi-million euro case, with thousands of pages, the first instance court, who had never heard a competition law dispute before, found a way to declare itself incompetent, by applying a clause in the distribution contract that awarded jurisdiction to Irish courts for "all disputes arising from this contract". In order to do so, it qualified the dispute as relating to contractual liability.[18]

Although the applicant only raised infringements of competition law (imposition of unwanted contractual amendments, minimum purchase requirements, RPM, refusal of sales, absolute territorial protection, discriminatory sales conditions, etc.), and several of the behaviours in question were actually based on and allowed by the contract, the court found that the applicant was purposely disguising a contractual dispute as a tort dispute. In the view of this court, any dispute concerning an antitrust infringement between a manufacturer and a distributor necessarily falls under the rules for contractual liability. It reformulated all of the alleged anticompetitive behaviours as violations of the civil law principles of loyalty and good faith in the fulfilment of contracts, stating that, even if they could be perceived to (also) be infringements of competition law, this would be secondary.

This finding was upheld by the Lisbon Appeal Court (with an unusually succinct judgment) and by the Portuguese Supreme Court, which also seemed to believe that any dispute arising in the context of a contract (even if after its termination) falls under the rules for contractual liability. It should be noted that the judicial favouring of contractual liability (particularly when the two types of liability are at stake) rests largely on the fact that this regime is generally more favourable to plaintiffs. But, in this case, that regime actually left the weaker party unprotected, which does not seem to have been taken into account.

The requests of referral to the ECJ were denied, on the grounds that the decisive issue (tort or contractual liability) was one of national law, for which EU law was irrelevant. And yet, I believe it is relatively clear that these judgments infringed EU law, both in what concerns the effectiveness of art.102 TFEU and in what concerns Reg.(EC) 44/2001 (Brussels I), replaced by Reg.(EU) 1215/2012, and Reg. (EC) 864/2007 (Rome II).

In the EU legal order, at least when it comes to applying the Brussels I and the Rome I and II Regulations, damages arising from antitrust infringements give rise to a tort. The concepts of tort and contractual liability to be used in this context are necessarily EU concepts, not national ones, as clarified by the ECJ.[19] And these concepts are common to the Brussels I and the Rome I and II Regulations.[20] The Brussels I and Rome I rules for contractual liability are only applicable in relation to "a legal obligation freely consented to by one person towards another and on which the claimant's action is based".[21] That is not the case of an obligation arising from an infringement of a competition rule imposed by the State (even if the contract mentions the need to respect competition law).

In *CDC Hydrogen Peroxide*, the ECJ confirmed that a private enforcement action relating to an infringement of art.101 in the context of contractual relations (extendable, by analogy, to art.102) must be decided under art.5(3) of Reg.(EC) 44/2001 (now art.7(3) of Reg.(EU) 1215/2012).[22] These rules are aimed at ensuring that the dispute is decided by the court which is best placed to do so, which is usually the one of the area where the damages occurred.[23]

Any interpretation by national courts that leads to the application of rules relating to contractual liability excludes the application of the set of EU law provisions meant for tort, depriving them of all effectiveness and violating the primacy of EU law. And that is precisely what happened in the *Apple* case.

There is a "big picture" behind this dispute that seemed to go unnoticed by the national courts. If this approach were to consolidate, multinationals operating in Portugal would effectively be immune from antitrust private enforcement action from their distributors and clients (but not from indirect customers and consumers), by simply stipulating in contracts that any disputes relating thereto should be resolved in a jurisdiction of difficult access to Portuguese plaintiffs.

As was clearly demonstrated by *Apple*, the reality is that the vast majority of Portuguese companies who suffer damages as a result of anticompetitive practices will not be in a position to litigate in Ireland, the UK, Germany, etc., for linguistic, information, cultural and, above all, economic reasons. Obviously, the bankrupt plaintiff was not in a position to litigate in Ireland after this decision. Furthermore, even if it tried to do so (and if the case in Portugal could be taken into account to prevent the right from being time barred), the Irish court would most likely deem itself incompetent (negative conflict), because it would consider the case to be tort and the jurisdictional clause to be inapplicable.

[17] *Interlog* (135/12.7TCFUN) 27 April 2014 Funchal Judicial Court; *Interlog* (135/12.7TCFUN.L1) 25 June 2015 Lisbon Appeal Court; *Interlog* (135/12.7TCFUN.L1.S1) 16 February 2016 Supreme Court.
[18] The court applied arts 5(1)(a) and 22 of Reg. (EC) 44/2001 and arts 63 and 94 of the Portuguese Code of Civil Procedure.
[19] *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* (C-352/13) EU:C:2015:335; [2015] Q.B. 906; [2015] 3 W.L.R. 909 at [37]; *ERGO Insurance SE v If P&C Insurance AS* (C-359/14 and C-475/14) EU:C:2016:40; [2016] R.T.R. 14; [2016] I.L.Pr. 20 at [43]–[46].
[20] *ERGO Insurance* (C-359/14 and C-475/14) [2016] R.T.R. 14; [2016] I.L.Pr. 20 at [44].
[21] *ERGO Insurance* (C-359/14 and C-475/14) [2016] R.T.R. 14; [2016] I.L.Pr. 20 at [44].
[22] *CDC Hydrogen Peroxide* (C-352/13) [2015] Q.B. 906; [2015] 3 W.L.R. 909, e.g. at [43] and [52].
[23] *CDC Hydrogen Peroxide* (C-352/13) [2015] Q.B. 906; [2015] 3 W.L.R. 909 at [39]–[41].

In light of all this, an interpretation that allows parties to a contract to agree, beforehand, that any disputes, including those relating to competition law, will be settled in a jurisdiction other than that of the injured party, may seriously jeopardise the *effet utile* of arts.101 and 102.

This raises an important lesson for the EU as a whole. Under current EU law, consumer contracts cannot include such (*a priori*) jurisdictional clauses.[24] Contracts such as the one in the *Apple* case can.[25] The ECJ has already curtailed the risks created by this bow to contractual freedom, by stipulating that such clauses will only be valid in the context of antitrust private enforcement cases if they specifically mention antitrust infringements and, apparently, if the specific infringement was reasonably foreseeable at the time when the jurisdictional clause was agreed upon.[26]

But this may not be enough. Yes, it solves the problem in many cases, and namely required a different outcome for the Portuguese *Apple* case. However, it is far too easy for multinationals to include a standard specific reference to antitrust infringements in jurisdictional clauses, in all their contracts. If that is enough for them to be able to avoid private enforcement actions, we're back to the same problem. The solution will probably have to be sought in a careful and fair interpretation of the requirement that the specific infringement be foreseeable at the time of the agreement.

What is a (reasonably) foreseeable antitrust infringement? I would argue that foreseeability, for this purpose, must be interpreted strictly, requiring proof that the present or future existence of the infringement was of public knowledge or of private knowledge to the injured party. This may occur, for example:

1) if the party agrees to a jurisdictional clause in a contract identical to another by the same undertaking which had already been declared null and void by a competition authority in a public decision;
2) if the party participated in or was somehow aware of the existence of the cartel in question; or
3) if the injured party alleges an abuse of dominance or a vertical restriction that derives directly and necessarily from a contractual provision it agreed to.

Finally, the court should consider the interplay between this case law and the fundamental right of access to justice, together with the principle of effectiveness. While the interpretation of art.25 of Reg.(EU) 1215/2012 set out in *CDC Hydrogen Peroxide* may generally be valid, I would argue that parties cannot be free to agree, beforehand, to resolve antitrust disputes in another jurisdiction, even if they could foresee them, if such agreement makes the exercise of their right to compensation impossible or excessively difficult. This restriction of contractual freedom is, I would argue, not only justified, but required by the public order nature and the goals of EU competition law.

[24] Reg.(EU) 1215/2012 art.19.
[25] Reg.(EU) 1215/2012 art.25.
[26] *CDC Hydrogen Peroxide* (C-352/13) [2015] Q.B. 906; [2015] 3 W.L.R. 909, e.g. at [68]–[71].