Private Litigation

Portugal

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GCR Know-how

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Effect of public proceedings

1 What is your country's primary competition authority?

The competition authority in Portugal is the Autoridade da Concorrência (AdC) which came into being in 2003 and whose current statutes were approved by Decree-Law No. 125/2014. The AdC is an independent administrative entity, which is autonomous in respect of its financing, administration and management and is entrusted with the enforcement of the national competition legal regime, approved by Law No. 19/2012, and of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Sector-specific regulators are not empowered to apply the competition rules.

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The AdC has quite extensive fact-finding powers. It can carry out inspections (dawn raids) at corporate premises, during which it may (i) question corporate officers and employees from whom it may request documents or information; (ii) search, examine, copy and seize documents (whether hard copies or digital format), including emails and computer hard-drives; (iii) seal off specific rooms, areas, computers or servers. The AdC may also carry out searches at the personal domicile of corporate directors, officers or employees, provided it obtains prior judicial authorisation. Furthermore, the AdC may submit written requests for information that the undertakings in question are bound to answer, providing thorough and complete information (failure to answer in full or the provision of incorrect or misleading information is punishable as a misdemeanour, and subject to fines of up to 1 per cent of the undertaking's turnover).

Competition violations do not constitute crimes under Portuguese law.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Private antitrust claims can proceed parallel to investigations by the AdC, although claimants, particularly in damages actions, may tend to prefer follow-on claims as a more effective option given that: (i) stand-alone claims may face evidentiary hurdles due to difficulties in obtaining access to relevant information or documents contained in the competition authority's file (namely if the AdC has determined that its investigation should remain under legal secrecy pending a final decision); (ii) the factual basis for the claimant's cause of action may be affected by, or depend on, a final decision by the competition authority.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

Currently, according to the Code of Civil Procedure, the court may only stay proceedings in a limited number of circumstances, notably if its ruling is dependent on the outcome of an already pending legal action (a prejudicial lawsuit) or if the parties agree on a stay of proceedings. In future, and in the context of the AdC's draft proposal for the implementation of the EU *Private Enforcement Directive* (Directive 2014/104/EU), this will change regarding actions for damages as the proposal establishes that the competent court may stay proceedings on its own initiative, pending conclusion of an ongoing investigation or final decision by the AdC or of a final judicial ruling on appeal.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

In what concerns infringements to articles 101 or 102 of the TFEU which have been investigated and declared by the Commission, Portuguese courts are prevented from taking decisions that run counter to the Commission's decision once it becomes final or has been confirmed on appeal by the General Court or by the Court of Justice (article 16 of Regulation 1/2003).

As a matter of Portuguese civil procedure rules, the general principle is that the courts freely assess and evaluate the evidence given before them based on their reasonable conviction of the facts (article 607(5) of the Civil Procedure Code). As an exception to this principle, final conviction decisions in criminal procedures create a rebuttable presumption, in related civil procedures, as to the existence of the facts that are relevant to the requirements of the relevant type of crime (article 623 of the Civil Procedure Code). This, however, does not extend to misdemeanours such as antitrust infringements and, therefore, currently, findings of an antitrust infringement, whether by the AdC or resulting from a court decision, have a merely persuasive evidentiary value in follow-on actions.

In future, and in the context of the AdC's draft proposal for the implementation of the EU *Private Enforcement Directive* (Directive 2014/104/EU), this will change as the proposal confers a binding evidentiary value (in the form of a non-rebuttable presumption) on final decisions adopted by the AdC, or on final judicial rulings on appeal, regarding the existence, nature, duration and material, personal and territorial scope of an antitrust infringement. In addition, and as regards final decisions or rulings by competition authorities or courts of other member states, the proposal seeks to award them a qualified evidentiary value on the basis of a rebuttable presumption.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

In accordance with articles 81(1) and (1(3) of Law No. 19/2012 (the Portuguese Competition Act), immunity or leniency applications and all supporting documentation and information are qualified as confidential by the AdC and access by third parties to both the applications and the supporting documents and information is conditional on the immunity or leniency applicant's authorisation.

In future, and in the context of the AdC's draft proposal for the implementation of the EU *Private Enforcement Directive* (Directive 2014/104/EU), immunity and leniency applicants will be further protected as the proposal states that courts may not determine the submission of evidence which includes immunity or leniency applications (as well as settlement proposals). The current wording of the relevant provision in the proposal may create a gap in respect of supporting documents and information provided together with the immunity or leniency application as access to these elements is not expressly excluded.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

Any individual or legal person with a legitimate interest in obtaining access to the file in an AdC investigation (eg, potential plaintiffs in private antitrust actions) may, as a rule, request access, including the right to physically review the file, obtain hard or digital copies, extracts or certificates of documents contained in the file (article 33(3) of the Competition Act). This is subject to several exceptions, namely: (i) access to the file may be limited if, in the course of an investigation, the AdC determines that the file must remain under legal secrecy and granting access may be prejudicial to the investigation; (ii) access to information or documents that have been qualified as confidential for containing business secrets is only available to the defendants in an infringement investigation; (iii) access to immunity or leniency applications and supporting documentation can only be given if the applicant consents to it; (iv) access to settlement proposals presented to the AdC is also dependent on the relevant undertakings' authorisation.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

Please refer to question 6.

9 Is information submitted in a cartel settlement protected from disclosure?

According to article 22(16) of the Competition Act, third parties may only be given access to settlement proposals submitted to the AdC by undertakings in the course of an investigation if the undertaking that has submitted that proposal consents to this disclosure. In future, and in the context of the AdC's draft proposal for the implementation of Directive 2014/104/EU, courts will, in addition, not be allowed to determine the submission of settlement proposals as evidence in an ongoing legal action.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

In the course of an investigation by the AdC, access to any information which has been qualified as confidential for containing business secrets (ie, commercially sensitive information), whether it has been submitted by any undertaking undergoing investigation or by third parties (eg, complainants) is only available to the former for the purposes of preparing their defence against a statement of objections or bringing an appeal from a final decision and fine by the AdC (articles 33(4) and 31(3) of the Competition Act).

According to the AdC's draft proposal for the implementation of Directive 2014/104/EU, in future parties to an antitrust action for damages may petition the court to order other parties, third parties, or public entities to submit into evidence documents or other means of evidence in their possession. If any such documents or means of evidence contain confidential information, the court will be enabled to adopt measures to protect that confidentiality, such as: (i) redacting sensitive excerpts of documents; (ii) conducting closed hearings; (iii) limiting the number of persons authorised to access the evidence, notably restricting access to the parties' attorneys or legal counsel or to appointed experts subject to a non-disclosure obligation; (iv) request that experts draw up non-confidential summaries of the sensitive information.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

A private antitrust cause of action arises from an antitrust infringement, whether an anticompetitive agreement between two or more undertakings (article 9 of the Competition Act and/or article 101 of the TFEU) or abusive unilateral conduct by one or more (in the case of collective dominance) dominant undertakings (article 11 of the Competition Act and/or article 102 of the TFEU). In the specific context of antitrust damages actions, cause of action arises from an antitrust infringement which satisfies the requirements for either tort or contractual liability (breach of contract) of the infringing undertaking(s) (articles 483 ff. and 798 ff. of the Civil Code, respectively).

12 What forms of monetary relief may private claimants seek?

The general rule is that the party deemed liable to compensate for damages caused must restore the situation to that which would have existed if the event that caused the damage (in this case, the antitrust infringement) had not occurred (article 562 of the Civil Code). Whenever this not possible, which is most frequently the case, a private claimant is entitled to claim the equivalent monetary compensation for all damages caused by an antitrust infringement, including actual loss, loss of profit (*lucrum cessans*) and future damages, if their occurrence can be predicted (article 564 of the Civil Code).

In addition, a private claimant is entitled to delay interest (*juros de mora*). When the applicant's claim is based on the defendant's tortious liability, delay interest accrues from the date of service of the writ of summons and will be calculated by reference to the actual amount of damages that is ultimately awarded by the court (article 805(3) of the Civil Code).

13 What forms of non-monetary relief may private claimants seek?

Private claimants may seek injunctive, or interim, relief, for instance with the aim of putting an end to an antitrust infringement by the defendant or obtaining a court order requiring that the defendant enter into a sale or supply agreement, or resume supplies, with the claimant (eg, in situations of abusive refusal to supply by a dominant company). Articles 362-376 of the Civil Code govern the common injunctive procedure, which may be used to request the judicial imposition of any interim measures that prove adequate and proportionate to defend the applicants' rights against an antitrust infringement. An injunctive procedure is always a temporary and urgent measure that is dependent on a subsequent declaratory legal action for a definitive judicial decision on the facts.

14 Who has standing to bring claims?

Claims for compensation related to antitrust infringements may be brought by any person, whether an individual or a legal person, that has suffered losses as a result of the infringement. Both direct and indirect purchasers of the relevant goods and services have standing for these purposes, although the latter

may face a greater evidentiary difficulty regarding the causal nexus between the infringement and the damages caused (to the extent passing-on by the direct purchaser(s) who resold the goods or services may have to be demonstrated). The fact that the few competition damages actions initiated in the Portuguese courts have resulted from abuse of dominance infringement decisions by the AdC has meant that the plaintiffs are normally corporate entities who purchased the relevant goods or services from a dominant operator.

15 In what fora can private antitrust claims be brought in your country?

Antitrust claims for damages can be brought in any first instance judicial court with general jurisdiction over civil matters, provided it also has territorial jurisdiction. When a claim is related to the performance or breach of contractual obligations, jurisdiction lies, either with the court of the location where said obligations should have been performed, or with the court of the defendants' registered office or place of residence. In the case of tort liability, the courts where the relevant facts (antitrust infringement) took place are territorially competent (article 71(1) and (2) of the Civil Procedure Code).

Private antitrust claims may also be submitted to an arbitration court (see question 56).

In future, pursuant to the AdC's draft proposal for the implementation of the EU Private Enforcement Directive (Directive 2014/104/EU), the Court of Competition, Regulation and Supervision (located in Santarém) will have sole jurisdiction to decide the following types of legal actions: (i) compensation claims based exclusively on the infringement of competition rules; (ii) actions to enforce a right of recovery between joint and severally liable infringing undertakings; (iii) requests for access to evidence in connection with any such actions; and (iv) actions seeking to declare contractual provisions null and void exclusively on the basis of an antitrust infringement to articles 9–12 of the Competition Act or to articles 101 and 102 TFEU.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

The Civil Procedure Code establishes the legal criteria for the jurisdiction of judicial (civil) courts.

According to article 62 of the Code, the international jurisdiction of Portuguese courts is determined by the following criteria: (i) the courts are competent to decide a legal action when, according to the applicable rules on territorial jurisdiction, the claim may be filed in a Portuguese court; (ii) when the facts constituting the cause of action have taken place in Portugal; (iii) when the plaintiff's rights may only be made effective by an action filed in Portuguese courts, or when initiating the lawsuit in a foreign country may present significant difficulties for the plaintiff, provided there is a strong element of connection between the claim and the Portuguese legal system.

In addition, the territorial jurisdiction of Portuguese courts is determined, notably, by the following criteria: (i) if a claim is related to the performance or breach of contractual obligations, jurisdiction lies, either with the court of the location where said obligations should have been performed, or with the court of the defendants' registered office or place of residence; (ii) in the case of tort liability, the courts where the relevant facts (antitrust infringement) took place are territorially competent (article 71(1) and (2) of the Civil Procedure Code).

Furthermore, Regulation (EC) 44/2001 (Brussels Regulation) and Regulation (EU) 1215/2012 (Recast Brussels Regulation) apply, depending on whether proceedings were initiated before or after 10 January 2015, to the issue of jurisdiction in claims brought against defendants who are domiciled in other EU member states.

If more than one forum has jurisdiction (a positive jurisdictional conflict), the issue may be submitted to the Supreme Court of Justice or to the Court of Conflicts, who will determine the competent court (articles 109 ff. of the Civil Procedure Code).

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Yes. If, in a conflict of laws situation and as a result of the applicable rules of private international law, the claim (for instance, related to a cross-border antitrust infringement) is governed by a foreign law, the Portuguese courts will assess and decide the claim based on that law. In addition to the relevant provisions of the Civil Code (for instance, articles 41(1) and 45(1)), Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations and Regulation (EC) No. 593/2008 on the law applicable to contractual obligations may be relevant to the determination of the applicable substantive law. According to article 348(1) of the Civil Code, it is for the party seeking to rely on a foreign law to demonstrate the existence and content of the relevant provisions.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

There are no prerequisites for starting a claim. During proceedings, the parties are required to make payments on account of costs (calculated by reference to the amount in dispute, ie to the amount of damages claimed in an action for damages) are also responsible for payment of their own expenses and attorneys' fees. When the court renders its decision it determines the total amount of costs (calculated by reference to the amount in dispute and considering, among other criteria, the parties' conduct during the course of litigation and the complexity of the matters involved) and the proportion of the costs to be borne by each party if they are both held partially liable (ie, if a claim is not entirely successful). If the claim is either awarded in full or entirely unsuccessful, the losing party shall bear the full amount of the costs (article 533 of the Civil Procedure Code).

Barring limited exceptions, such as when an urgent service of claim is requested, if the claimant does not submit a document proving it has paid the initial court costs due (*taxa de justiça*), the court registry may reject the initial application (article 558, f), of the Civil Procedure Code) with the result that the legal action will not be deemed initiated on that date and no service of claim will be effected by the court.

19 What is the limitation period for private antitrust claims?

The Portuguese Civil Code (Civil Code) sets out different limitation periods depending on the nature or type of civil liability involved. If a private antitrust claim is based on tort liability, and according to article 498(1) of the Civil Code, the right to compensation expires after three years. In the case of liability for breach of contract the general limitation period applies, meaning that any claim to compensation becomes time-barred once 20 years have elapsed from the occurrence of the unlawful act / contract violation (article 309 of the Civil Code).

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

The time limits above are part of the substantive law and set out in the Civil Code and their expiry extinguishes the relevant rights (eg, the right to compensation for damages). Claims for damages based on the expired rights become time-barred, which may be invoked as a defence in any legal action initiated by a potential claimant.

21 When does the limitation period start to run?

The limitation period starts to run on the date on which the claimant becomes aware of its right to compensation, irrespective of whether it has knowledge of the person(s) liable or the full extent of the damages incurred. The three-year limitation period for tortious liability is based on a subjective criterion: the injured party acquiring knowledge of its right to compensation. This moment is normally equated with the date on which a claimant

becomes aware that all the relevant requirements for civil liability have been satisfied (ie, mere knowledge that damages have been caused will not suffice). According to article 483(1) of the Civil Code, liability in tort depends on four cumulative requirements: the occurrence of an unlawful act; fault (intent or negligence); damages; and a causal nexus between the unlawful act and the damages caused. These requirements also apply to liability for breach of contract (in this case the law provides for a rebuttable presumption of the debtor's fault).

22 What, if anything, can suspend the running of the limitation period?

The running of the limitation period may be suspended or interrupted.

The Civil Code provides for several suspension causes, of which two may potentially apply in the context of claims for antitrust infringements: the limitation period is suspended (i) for as long as the claimant is prevented from enforcing its right/claim, due to force majeure, during the final three months of that period, and (ii) if the claimant does not enforce its right/claim due to the fault of the liable party (article 321 of the Civil Code).

In accordance with article 323(1) the Civil Code, the limitation period is interrupted by the judicial notification of a writ of summons, or of any other act which, directly or indirectly, expresses the claimant's intention to enforce its right to compensation. Interruption of the limitation period renders useless the time lapsed so far and restarts the applicable limitation period (article 326(1)). Nevertheless, the new limitation period does not begin to run until a final decision is issued on the claims submitted to the court (res judicata), putting an end to the legal action (article 327(1)).

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

A claimant's initial application must set out the essential facts relating to the cause of action that supports the claim. As such, the facts pertaining to the requirements of tort liability or breach of contract (as applicable) must be set out, as well as those relating to the damages for which compensation is claimed. The claim must be substantiated on reasonable grounds, although the level of detail required may vary depending on the specific circumstances of each case.

If a claim, or a cause of action alleged in an application, is wholly omitted or not intelligible (eg, because essential facts pertaining to the cause of action have been insufficiently or incorrectly stated by the applicant), the court may consider the claim to be inept, which will result in the proceedings being null and void (article 186(2), a), of the Civil Procedure Code). The judge may, in such cases, invite the plaintiff to perfect its initial application, notably by adducing additional, or more circumstantiated, facts (article 590(2), b), and (4) of the Civil Procedure Code).

24 What must plaintiffs show for the court to grant interim relief?

In an interim relief, or injunction, case a plaintiff must show, on a prima facie basis (an in-depth analysis of the claimant's cause of action is reserved for the subsequent declaratory legal action), two essential requirements: (i) that the subjective right claimed by the plaintiff exists, with the extent given to it in the initial application; and (ii) that the defendant's conduct would cause serious and potentially irreparable harm to that right. The relevant degree of harm must, in general, extend beyond a mere monetary loss (if such loss is not serious enough to bring the plaintiff's solvency into question) unless the applicant can prove that the defendant will have serious difficulties in settling the compensation amount. As an example, in 2004 a civil court awarded a pay-tv cable operator an injunction requiring the historical telecoms operator in Portugal to provide access to its underground ducts, for the purposes of rolling out the plaintiff's cable network, considering that, inter alia, failure to do so might result in a revocation of its licence owing to non-compliance with minimum network coverage requirements.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case (eg, answer, counterclaim, motion to dismiss, summary judgment)?

Following service of a claim, the defendant must contest it by submitting its defence within a 30-day period (article 569 ff. of the Civil Procedure Code). In its defence, the defendant may raise procedural objections (including lack of jurisdiction of the seized court, nullity of the proceedings or lack of standing in respect of the claimants). It may also raise objections to the effect that the case should be dismissed, either on procedural grounds (eg, no factual basis to the claim, resulting in the ineptitude of the initial application) or on substantive grounds (eg, expiry of the rights invoked by the plaintiff, resulting in its claim being time-barred). The defendant may also bring a counterclaim against the claimant, identifying it separately within the scope of its defence (article 583(1) of the Civil Procedure Code).

Disclosure/discovery

26 What types of disclosure/discovery are available (*eg, documentary, depositions, interrogatories, admissions*)? Describe any limitations.

Disclosure, as a formal procedural mechanism enabling a party to require another party to produce information, documents or testimony, notably at the pretrial stage, is not available under Portuguese law. The provisions contained in articles 573 to 576 of the Civil Code set out a duty to provide information (extending to physical objects and documents, in the latter case provided the requesting party has a relevant legal interest in examining them) in limited circumstances: only when (i) a party seeking to invoke a right/claim has serious doubts as to the existence or extent of said right/claim, and (ii) another party is in a position to provide the necessary information. This generic information duty may, in case of a refusal by the party in possession of the information or documents, be enforced by the courts in accordance with articles 1045 to 1047 of the Civil Procedure Code.

In addition, and in accordance with the general rules of civil procedure (articles 429 and 432 of the Civil Procedure Code), in the context of an ongoing legal action, a party may petition the court to order the other party, or third parties (including regulatory authorities such as the AdC) to submit into evidence documents in their possession, provided it is able to identify the relevant document(s) to the extent possible and specifies the facts it seeks to prove with such documents.

Furthermore, all persons, whether parties to a legal action or not, are under a general duty to cooperate with the court which may include disclosing documents or other evidence that is requested by the court in order to clarify the facts in dispute (article 417 of the Civil Procedure Code). Any refusal to submit requested documents is freely evaluated by the court for evidentiary purposes and, in addition to fines, may result in a reversal of the burden of proof (article 344 of the Civil Code).

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

In accordance with article 417(3) of the Civil Procedure Code, a party required to produce information or documents in the context of an ongoing legal action may legitimately refuse its cooperation on reasonable grounds related to confidentiality, notably if compliance with the order implies (i) an intrusion to its private or family affairs, or to its domicile, correspondence and telecommunications, or (ii) a breach of professional secrecy, civil servant secrecy or state secrets. The court may, in some cases, still determine that sensitive data be provided if it is deemed essential to its assessment and final decision, in which case the relevant information must be used strictly for the relevant purposes and restricted. In addition, the judicial exhibition of certain corporate records (eg, minutes books pertaining to the meetings of a company's corporate bodies) is subject to certain restrictions in accordance with articles 42 and 43 of the Commercial Code.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Legal professional privilege is recognised and attorneys are bound by attorney-client privilege pursuant to article 87 of the Portuguese Bar Association Rules. Attorney-client privilege covers all the facts, documents or information which directly or indirectly concerns professional matters disclosed by the client to its attorney. Legal professional privilege extends to any lawyers intervening in the matter and to their respective employees and also extends to in-house counsel. According to article 71 of the Portuguese Bar Association Rules, correspondence and documents exchanged between a client and its attorney cannot be seized by the courts, unless they are directly related to a criminal offence in proceedings where the attorney in question has been named as a defendant.

Trial

29 Describe the trial process.

The initial stage of the proceedings is concluded when all the written pleadings have been submitted: as a rule, the initial application by the plaintiff and the defendant's defence pleading. In certain circumstances, for instance if the defendant files a counterclaim, the claimant is allowed to enter an additional written reply. If any facts occur at a later stage that are relevant to the cause of action (ie, which may support or deny the claims in the initial application), the parties may introduce them into the proceedings by means of a supervening written pleading. Following this stage, the court normally schedules a preliminary hearing with the purpose of deciding on any, procedural or substantive, objections which may determine an early dismissal of the case or, exceptionally, when it considers it is in possession of all the relevant facts and evidence, to adjudicate on the merits of the claim without scheduling a trial date. If the case should proceed to trial (as is normally the case), the court issues a decision specifying the object of the legal action and setting out the main issues of fact on which evidence is to be given. The trial hearing is then held on previously scheduled dates and all relevant evidence is given before the court and assessed. At the end of the trial hearing, the parties' attorneys are given the opportunity for a summary closing argument (which is given orally before the court, and not in writing) covering the main issues of fact and law. The first instance court then issues its decision, which may be subject to appeal (see questions 45 ff).

30 How is evidence given or admitted at trial?

As a general rule, each party has the burden of proof regarding the facts on which its claim or defence are based, in accordance with the cause of action defined by the written pleadings. The defendant must individually contest the facts alleged by the claimant, or it will be deemed to agree with the facts it does not object to. Only those facts that remain contested following the written pleadings by the parties are subject to the taking of evidence in trial.

Under the current Civil Procedure Code (in force since September 2013), the parties must submit and identify all the evidence they consider relevant with their written pleadings. This means that all relevant documents must be submitted at the beginning of the proceedings, as well as a complete list of the witnesses (as a rule subject to a maximum number of 10 witnesses for each party) they intend to question at trial. If a party wishes the intervention of experts this must also be requested at this stage.

Up to 20 days prior to the date on which the trial hearing is scheduled to begin the parties may amend or increase their witness list, up to the legally established limit, and also file additional documents not submitted with their written pleadings (subject to a procedural fine unless the party can demonstrate it was unable to obtain access to the documents at an earlier date). After this, parties may only request the filing of documents which it was demonstrably impossible to submit at a previous date of which have become necessary as a result of a subsequent event.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Yes, experts are used in civil legal actions in Portugal, including private antitrust litigation (article 467 ff. of the Civil Procedure Code). Usually, in this context, the parties will request the intervention of expert economists, frequently with the purpose of assisting the court in demonstrating the effects of an antitrust infringement and in quantifying damages. Pursuant to a request by any of the parties, or if the court so determines (in light of the complexity of the facts or the need for expert knowledge pertaining to different fields), a collegiate panel of up to three experts will be appointed. Unless the parties are in agreement on the appointment of all the experts, each party will appoint one expert and the third will be appointed by the court. The experts will set out their findings in a written report and, if ordered by the court or upon request by any of the parties, they may be notified to appear in court at the beginning of the trial hearing for oral clarification of their report.

32 What must private claimants prove to obtain a final judgment in their favour?

Private claimants must prove all legal requirements pertaining to the tortious or contractual liability of the defendants (the occurrence of an unlawful act; fault, whether intent or negligence; damages; and a causal nexus between the unlawful act, or breach of contract, and the damages caused) on which their claim to compensation is based. Regarding the amount of damages claimed, if a claimant is unable to prove an exact figure, the court may adjudicate on the basis of an estimate resorting to equitable criteria and within the limits of the facts it deems proven (article 566(3) of the Civil Code).

33 Are there any defences unique to private antitrust litigation (eg, *Noerr-Pennington defence, passing-on defence*)? If so, which party bears the burden of proving these defences?

As a matter of practice, there may be some defences that are especially suited to private antitrust litigation. These may include passing-on, if a defendant is sued by an indirect purchaser, or, in the event that a plaintiff chooses to bring a claim not only against an infringing undertaking but also its parent company, an objection by the latter based on the inexistence of decisive influence over, or direct instructions to, its subsidiary.

34 How long do private antitrust cases usually last (not counting appeals)?

Precedent in this field in Portuguese courts is scarce as relatively few cases of private antitrust litigation are public, in particular regarding actions for damages. In general, it would seem reasonable to estimate three to four years at the trial stage, followed by 18 months to two years at the appellate stage. These estimated timings should be shortened significantly following the AdC's draft proposal for implementation of Directive 2014/104/EU and once jurisdiction for the vast majority of private antitrust damages cases is centralised in the Court of Competition, Regulation and Supervision.

35 Who is the decision-maker at trial?

Legal actions are decided in first instance by a single (trial) judge. Appeals are decided by a collegiate panel of three judges.

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

A plaintiff seeking compensation for damages is not required to specify the exact amount of the damages it is claiming in its initial application and may, if necessary, formulate a relatively generic claim in this respect (article 569 of the Civil Code and article 556(1), b), of the Civil Procedure Code). If, in the course of the proceedings, a higher amount of damages than initially estimated is proven, the plaintiff may review the claim accordingly.

37 How are damages calculated?

Article 566(2) of the Civil Code states that a pecuniary compensation for damages should adequately compensate the difference between the claimant's financial situation "at the most recent date that may be considered by the court" and the hypothetical situation it would be in were it not for the damages. This enables the court to update the amount of compensation in order to, for instance, adjust for inflation between the date the damage was caused and the date of the court's ruling.

38 Does your country recognise joint and several liabilities for private antitrust claims?

As a general matter under Portuguese law, joint and several liability is exceptional and only recognised when a legal provision explicitly provides for this regime or when it is stipulated by the parties (article 513 of the Civil Code). That is the case in the event of tort liability (which presumably will encompass the majority of antitrust infringements), wherein article 497(1) of the Civil Code establishes that, when several parties are responsible for the damages caused, their liability shall be joint and several.

Under joint and several liability each debtor is liable for the alleged damages in their entirety and, correspondingly, the claimant (or creditor) may, if it is more convenient for its procedural interests, require payment of the entire amount of the damages claimed from any of the debtors (in this case, any of the infringing undertakings) – articles 512(1) and 519(1) of the Civil Code. If a defendant satisfies the claim in full, paying out the entire amount of the alleged damages, it then has a right of recovery against the remaining joint and severally liable parties whereby it can recover, from each of them, their respective share in the overall amount paid (article 524).

Normally, joint and severally liable debtors are presumed to participate in equal shares in the overall amount due (article 516 of the Civil Code). In the context of tort liability, article 497(2) states that the right of recovery between the liable parties is commensurate to the extent of their fault (and the consequences thereof), which is presumed to be equal for all of them.

This presumption is rebuttable and it is possible for the various joint and severally liable parties to have differing shares in the overall amount of damages if the extent of their fault (eg, their contribution to a cartel) is not identical in each case. This might be the case, for instance, if one of the undertakings had an instrumental role in bringing about the antitrust infringement (eg, leadership of a cartel) or if some undertakings participated in the infringement for a longer period than others.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Yes. In the context of joint and several liability of several defendants, each debtor is liable for the alleged damages in their entirety and, as such, the claimant may require payment of the entire amount of the damages claimed from any of the defendants (articles 512(1) and 519(1) of the Civil Code). If any defendant satisfies the claim in full, paying out the entire amount of damages awarded, it then has a right of recovery against the remaining joint and severally liable parties whereby it can seek contribution from each of them in the amount of their respective share in the overall damages paid (article 524 of the Civil Code).

Normally, joint and severally liable debtors are presumed to participate in equal shares in the overall amount due (article 516 of the Civil Code). In the context of tort liability, article 497(2) states that the right of recovery between the liable parties is commensurate to the extent of their fault, which is presumed to be equal for all of them. This presumption is rebuttable and it is possible for the various joint and severally liable parties to have differing shares in the overall amount of damages if the extent of their fault (eg, their degree of participation in a cartel) is not identical in each case.

Currently, a leniency applicant is not protected against a claim for contribution by a co-defendant although this will change with the implementation of Directive 2014/104/EU.

40 Can prevailing parties recover attorneys' fees and court costs? How are costs calculated?

At the end of the proceedings, the prevailing party may request from the losing party payment of the court costs incurred by the former, in proportion to the amount of the claim which is awarded by the court. For this purpose, the prevailing party submits a statement of its costs – including the amounts paid in respect of court costs/legal fees, expenses, attorneys' and enforcement agent fees – and may request payment of the expenses and attorneys' fees it has incurred, in the latter case limited to 50 per cent of the amount of court costs paid by all the parties (article 533 of the Civil Procedure Code and articles 25 and 26 of the Judicial Costs Rules).

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

A party's liability to pay costs may be limited in the event it is strictly unable to pay them, which is an unlikely scenario in the context of private antitrust enforcement outside the context of a collective popular action (see questions 48 ff). A party's ability to recover costs is normally limited, in accordance with the limits set out in question 47.

42 May attorneys act for claimants on a conditional fee basis? How are contingency fees calculated?

A contingent fee arrangement, or similar, whereby attorneys' fees are made exclusively dependent on the outcome of a dispute is forbidden by the Portuguese Bar Association Code (article 101). Attorneys' fees may be composed of a fixed part (according to criteria such as time spent, complexity of the issue or importance of the service provided), which may be complemented by a success fee in view of the results obtained.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Third-party funding has not been implemented in Portugal and, as far as we know, has not been used previously. Under the principle of contractual freedom, legal costs may be paid by a third party but such party's right to recover those costs is limited to the terms of the agreement reached with the party in the proceedings. In other words, the external funding party is not entitled to recover costs within the proceedings as it is not bound by the court's decision. As a rule, credit rights may be transferred to third parties. However, it is doubtful whether a claim to compensation for damages, namely if it is grounded on tort liability, may be considered a credit right for these purposes before it has been confirmed by a judicial decision.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Yes, defendants may insure themselves against the risk of private antitrust claims. The legal regime on insurance contracts, approved by Decree-Law No. 72/2008 and subsequently amended, prohibits insurance coverage of risks relating to criminal acts, misdemeanours (such as antitrust infringements) or disciplinary infringements but an exception is made for risks associated to civil liability and damages claims resulting therefrom (article 14(1) a) and b) of the statute). After-the-event insurance is not available for antitrust claims if the party seeking insurance has knowledge on that date that the event, in this case an antitrust infringement, has already occurred (article 44(2) of Decree-Law no. 72/2008).

Appeal

45 Is there a right to appeal or is permission required?

The party against whom an unfavourable decision has been issued has a right to appeal against it, in whole or in part, provided the legal requirements for appeal are satisfied, both regarding the value of the legal action in question and other procedural requirements. No permission is required.

46 Who hears appeals? Is further appeal possible?

The general rule is that a party may appeal to the court of second instance if the value of the legal action is higher than €5,000 and the decision is unfavourable to the appellant by an amount higher than €2,500.01 (article 629 of the Civil Procedure Code). The court of second instance can decide on both issues of fact and of law. In addition, a further appeal may be brought to the Supreme Court if the value of the legal action is higher than €30,000 and the decision is unfavourable to the appellant by an amount higher than €15,000.01. The Supreme Court only decides on matters of law and, in most cases, cannot review the second instance judgment on the facts.

Appeal to the Supreme Court is excluded if the second instance court issues an identical decision to that of the trial court, based on similar grounds and without dissenting opinions (article 671(3) of the Civil Procedure Code).

47 What are the grounds for appeal against a decision of a private enforcement action?

The general grounds for appeal apply, subject to the limitations set out above regarding the value of the claims. The facts of the case may only be reassessed by the courts of second instance whereas issues of law may be the object of further appeal to the Supreme Court (provided the legal grounds for the appellate decision have differed from the initial ruling by the trial court). Grounds for appeal from the trial court decision may include the lack of international, material or hierarchical jurisdiction; the disregard of a previous ruling no longer subject to appeal (res judicata); or the fact that a ruling goes against uniform jurisprudence of the Supreme Court regarding the same legal provisions and the same fundamental issues of law.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases?

The Portuguese legal system does not provide for a class action process as such but it does provide for a "citizen's action" (or "popular action") by which individuals or representative associations may submit claims before a court based on the infringement of certain rights or legally protected interests (notably regarding public health, the environment, quality of life, consumption of goods and services, cultural assets and the public domain). The basis for the popular action regime is found in article 52(3) a) of the Portuguese Constitution and it is regulated by Law No. 83/95, as amended.

Although the non-exhaustive list of legally protected interests that may be addressed by way of a popular action does not explicitly include competition, it is understood that this means of collective redress may be used to seek compensation for damages resulting from competition law infringements, where consumer protection is involved.

The popular action rules allow for both administrative and civil actions and are based on an opt-out model according to which a claimant represents all other persons who hold identical rights or legally protected interests and who have not chosen to opt out following publication of the initial application (articles 14 and 15 of Law No. 83/95).

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Standing to bring claims under the popular action is recognised to any citizen (individual persons) as well as to associations or foundations created for the defence of any of the relevant legally protected interests. Consumer associations can bring claims on behalf of groups of consumers. Corporate entities (eg, companies or legal persons that carry out economic activities) do not have standing to initiate popular actions, even if they may be the final or intermediate clients of an undertaking involved in a competition infringement.

50 What is the standard for establishing a class or group?

In the case of associations and foundations, article 3 of Law No. 83/95 states that three requirements must be met as conditions for procedural standing: (i) the association/foundation must have legal personality; (ii) its object or scope, as defined in its statutes or by-laws, must explicitly include the defence of the interests which are at stake in the action in question, and; (iii) it must not carry out any professional activity in competition with a company or a liberal profession.

According to article 17 of the Consumer Protection Law – Law No. 24/96, as amended – a consumer association is constituted by any association with legal personality, whose activity is not-for-profit and that has as its main statutory goal to represent the rights and interests of consumers in general or of those consumers who are members. Consumer associations may have a national, regional or local geographic scope, depending on their area of action and number of members. They may also have a generic or specific interest (in the latter case, they only represent consumers of specified goods or services. Article 18(1) l) of the Consumer Protection Law recognises consumer associations' right to initi9ate popular actions.

51 Are there any other threshold criteria that have to be met?

No other threshold criteria have to be met.

52 How are damages or settlements distributed?

The popular action legal regime (Law no. 83/95) is relatively inadequate regarding the award and distribution of damages. According to article 22(2) and (3) of this statute, both global compensation and individual compensation may be awarded: (i) compensation for holders of legally protected rights who are not individually identified is awarded as a global amount; and (ii) individually identified claimants are entitled to compensation in accordance with the general rules of civil liability. It is unclear if global compensation may be awarded in situations where unidentified individual consumers hold similar individual interests (as in a mass damages action, for instance), which may imply practical difficulties for consumers in successfully claiming compensation. This may be one of the main reasons why very little use has been made of the popular action mechanism as a procedural means of obtaining compensation for damages caused to multiple consumers by antitrust infringements.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned.

Claims in popular actions may be settled by the claimant and the defendants, with the intervention of the public prosecutor. It is unclear however under what criteria settlement amounts would be apportioned, namely regarding an eventual global compensation amount in respect of non-individualised consumers.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Portuguese law does not recognise alternative forms of collective settlement.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The AdC's statutory powers do not include the imposition or authorisation of redress schemes in relation to undertakings convicted of antitrust infringements.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

Yes, private antitrust disputes may be submitted to arbitration. According to article 1(1) of Law No. 63/2011 (the Voluntary Arbitration Act), any dispute which (i) is not subject to the exclusive jurisdiction of the state's courts or to mandatory arbitration, and (ii) involves interest of an economic (patrimonial) nature, may be submitted to arbitration by the parties by means of an arbitration agreement.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

Yes, courts generally enforce arbitration agreements, irrespective of the object of the dispute. If a party to an arbitration agreement regarding an antitrust dispute brings a claim in a judicial court, and unless the arbitration agreement is manifestly null and void or ineffective, the court must dismiss the case at the defendant's request, ie, provided the defendant(s) raise(s) as an objection the breach of the arbitration agreement (article 5(1) of the Voluntary Arbitration Act and articles 577 and 578 of the Civil Procedure Code). If an arbitration agreement is disregarded by one of the parties who chooses to seize a judicial court this determines the absolute lack of jurisdiction of the court seized (article 96, b), of the Civil Procedure Code).

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

Following the approval of Law No. 29/2013, of 19 April, which sets out the general principles governing mediation in Portugal, the court may at any time refer the parties to mediation, staying the judicial proceedings for this purpose. If an agreement is reached during the mediation proceedings, this is submitted for the court's confirmation. If no agreement is reached, the judicial proceedings resume.

Advocacy

59 Describe any notable attempts by policymakers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

The AdC has pursued several advocacy initiatives to increase visibility and knowledge of private competition law among the legal community, notably in the context of its intervention in preparing the initial draft proposal for the implementation of the EU Private Enforcement Directive (Directive 2014/104/EU). This has included a wide public consultation on its draft proposal, with the intervention of government representatives, judicial magistrates, public prosecutors, attorneys and in-house counsel, among others. Also, the Portuguese association of competition lawyers (CAPDC) has organised several conferences and seminars focusing on the expected impact of the new EU rules on private enforcement.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

The general expectation in Portugal is that the volume of private antitrust enforcement, in particular actions for damages, will increase noticeably following implementation of Directive 2014/104/EU. There has been a significant effort by the AdC in its draft implementation proposal to remove procedural barriers that might dissuade plaintiffs from bringing legitimate claims based on antitrust infringements. We expect to see a greater volume of litigation in this field as awareness of the new procedural rules becomes more widespread.

KNOW-HOW ▸ FIRM

Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS) is one of the leading firms in Portugal, with more than 200 lawyers and offices in Lisbon, Porto and Funchal (Madeira). The firm has a significant international practice in all major areas of law and represents multinational and domestic corporations and financial institutions, as well as sovereign governments and their agencies. In view of the global assistance MLGTS provides to its clients, the firm has developed a consistent network of associations with local firms in Angola, Mozambique and Macao (China), which forms the MLGTS Legal Circle.

The firm's EU and competition law team, based in Lisbon and Porto, is one of the leading practices in Portugal. The team advises and represents clients in most of the high-value national and cross-border transactions, disputes and competition agencies' investigations in or concerning Portugal. The team has extensive experience representing clients in a wide range of industries, such as energy, financial services, communications, pharmaceuticals, broadcasting, advertising, land, sea and air transportation, retail distribution, logistics, mining, food and beverages, tourism and agriculture.

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Gonçalo Machado Borges is a senior lawyer at MLGTS and joined the firm as an associate in 2006. He has extensive experience in EU and competition law, including matters related to restrictive practices, abuse of dominance and merger control regarding transactions in a wide range of sectors. He has been particularly active in the telecoms sector and has advised the NOS Group (the main integrated communications operator in Portugal) for several years in antitrust and regulatory matters, including the acquisition of football rights, complex merger cases before the Competition Authority and damages actions resulting from competition law infringements (including a pending suit involving margin squeeze in broadband access markets).

More recently, Gonçalo has been involved in negotiating the first settlement procedure under the 2012 Competition Act, in a bid rigging case. He has also been increasingly active in the area of private enforcement and was invited by the Portuguese Competition Authority, in December 2015, to be part of a panel of experts assisting with the implementation process of the 2014 EU Directive on damages actions and with the preparation of a draft legislative proposal.