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**Working Party No. 3 on Co-operation and Enforcement**

**RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT**

-- Portugal --

**15 June 2015**

*This document reproduces a written contribution from Portugal submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement on 15 June 2015.*

*More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>*

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-- Portugal --

**1. Overview of private enforcement in Portugal**

1. The current *status quo* of private enforcement in Portugal is not easily described, as there are no public data available specifically on civil cases dealing with competition matters.
2. However, a recent research<sup>1</sup> allows for some conclusions:
  1. The status of private enforcement in general is still modest in Portugal, but cases are not as rare as generally assumed;
  2. There has not been a follow-on damages case decided yet;
  3. There has not been a collective redress case decided yet;
  4. In most of the cases identified, the competition issues were raised in Court as a means of defense, concerned the validity of agreements or contractual clauses, and dealt with vertical relations between a manufacturer and its distributors or retailers.
3. A certain deficit of competition culture in Portugal that still remains, besides the common obstacles to damages actions identified by the European Commission throughout the European Union<sup>2</sup>, may help explain the scarcity of private enforcement.
4. There are, however, some signs of an increasing number of private enforcement initiatives. This may be due to the advocacy and enforcement efforts of the Portuguese Competition Authority (“PCA”) over the past years and also to the work that the European Commission has been carrying out on private enforcement, which led to the recently approved EU Directive on Antitrust Damages Actions<sup>3</sup>.
5. Recently, damages actions, including a class action, were brought before Portuguese civil courts in relation to a case of abuse of dominant position decided by the PCA in the market of premium pay-TV sports channels. These are the first follow-on actions and also the first class action on competition matters publicly announced in Portugal and are a clear sign of positive developments in this area.
6. This contribution will focus on the main features of the Portuguese legal regime applicable to private enforcement (section 2), followed by a brief discussion on the interplay between public and private enforcement (section 3).

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<sup>1</sup> See Leonor Rossi/Miguel Sousa Ferro, “Private Enforcement of Competition Law in Portugal (i): An Overview of Case-Law”, *Competition and Regulation*, Year III, No. 10, April/June 2012, pp. 91-141 and “Private Enforcement of Competition Law in Portugal (ii): *Actio Popularis* – Facts, Fictions and Dreams”, *Competition and Regulation*, Year IV, No. 13, January/March 2013, pp. 35-87. For a recent and quite thorough overview, see Gonçalo Anastácio, “Portugal”, in *The Private Competition Enforcement Review* (ed. Ilene Knable Gotts), 7<sup>th</sup> Edition, Law Business Research, London, 2014, pp. 291-302.

<sup>2</sup> See Green Paper “Damages Actions for breach of the EC antitrust rules”, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN> and Commission Staff Working Paper, at [http://ec.europa.eu/competition/antitrust/actionsdamages/sp\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf).

<sup>3</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

## **2. Main features of the legal regime applicable to private enforcement**

7. Civil actions for infringements to competition rules may be grounded mainly on the request for compensation for damages and on the request for the declaration of nullity of an agreement or contractual clause.

8. There is no specific legislation in Portugal on actions for damages based on competition infringements. Those actions are possible under the general rules on civil liability, laid down in the Civil Code ("CC"), in articulation with the substantive rules on competition provided for in the Portuguese Competition Act<sup>4</sup> and in the Treaty on the Functioning of the European Union.

9. According to the general rules on civil liability<sup>5</sup>, any person having suffered harm as a consequence of an unlawful conduct has the right to be compensated for the harm suffered. Thus, damages caused by an infringement of competition rules shall be awarded if all the requirements for liability are met, even if the claimant only has an indirect relationship with the infringer.

10. In Portugal, punitive damages are not available, as damages are purely compensatory, namely covering actual loss and loss of profits<sup>6</sup>.

11. The burden of proof lies with the claimant<sup>7</sup> and includes the defendant's unlawful conduct, the extent of the damages and the causal link between the conduct and the damage<sup>8</sup>. In case of doubt, the judge will decide against the party who bears the burden of proof.

12. There is no explicit provision allowing or prohibiting the passing-on defense, but it may be deemed admissible under the general rules applicable to calculation of damages and to unjustified enrichment. The claimant is only entitled to recover damages which were actually suffered. Therefore, if some of the damages were suffered by a third person because they were passed-on to him/her, the former will not receive those damages. A different solution would constitute an unjustified enrichment of the claimant, under the Portuguese law.

13. There is a three-year limitation period to bring an action for damages, which begins when the plaintiff becomes aware of his right to claim damages, and there is a 20-year absolute time limit, regardless of the awareness of the right to claim damages, starting on the date of the occurrence of the damage<sup>9</sup>.

14. As regards the declaration of nullity of an agreement for breach of competition law, it is admissible under article 9(2) of the Portuguese Competition Act and the general rules on invalidity of contracts<sup>10</sup>. Article 9(2) of the Portuguese Competition Act is currently the only provision in the Portuguese legal system dealing specifically with private enforcement of competition rules.

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<sup>4</sup> Approved by Law No. 19/2012, of 8 May.

<sup>5</sup> Article 483 CC.

<sup>6</sup> Article 564 of the CC.

<sup>7</sup> Article 342 of the CC.

<sup>8</sup> Articles 483, 487 and 563 of the CC.

<sup>9</sup> Articles 498 and 309 of the CC.

<sup>10</sup> Articles 280 and 294 of the CC.

15. The request for the declaration of nullity of an agreement or contractual clause may be presented either as a defense in an action brought against the requesting party or as an autonomous claim. The request may be filed at any time by any interested party and nullity may be declared *ex officio* by the court<sup>11</sup>.

16. The declaration of nullity by the court results in the total lack of effects of the contract or clause(s) concerned and implies the restitution of all that each party has provided within the context of that contract, or the corresponding amount if the restitution is not possible<sup>12</sup>.

17. The applicable procedural rules for both actions for damages and requests for the declaration of nullity of contracts are laid down in the Code of Civil Procedure (“CCP”).

18. In Portugal, there is no discovery process similar to common law systems, but the courts have the power to order the disclosure of evidence, either in possession of the other part in the proceedings or of third parties, whenever deemed important to the decision of a given case<sup>13</sup>. The refusal to comply with the court’s order is sanctioned with a fine<sup>14</sup>. Furthermore, the court may freely assess the meaning of any refusal of any one of the parties to cooperate, and it may also reverse the burden of proof<sup>15</sup>.

19. Even if no specific collective redress mechanism for competition law infringements is available, there is a general form of class action called “ação popular”<sup>16</sup> (“*actio popularis*”), which can be used to protect general interests, in which competition can be included.

20. According to the law, any citizen or association promoting certain general interests may file a class action in order to protect those interests. This regime therefore allows for an action to, *inter alia*, claim damages for infringement of competition rules.

21. The law on “ação popular” provides for an “opt-out” system, with the holders of the interests covered by the “ação popular” being publicly notified, namely through a press announcement, and having to decide whether or not they accept to be represented in the action. In case of not expressing any option, it will be deemed that the holders of the interests accept to be represented in the action.

22. There is no specialized court to deal with civil actions arising from infringements to competition rules. The recently created specialized court, the Competition, Regulation and Supervision Court, judges appeals of PCA’s decisions as a first instance court, but does not rule on civil matters. The competence to decide such matters belongs to the civil courts.

### **3. Interplay between public and private enforcement**

23. Although having different immediate objectives, public and private enforcement should not be perceived as conflicting, or even as completely separated. On the contrary, they play a complementary role within the overall system of competition enforcement and may be mutually beneficial.

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<sup>11</sup> Article 286 of the CC.

<sup>12</sup> Article 289 of the CC.

<sup>13</sup> Articles 429 and 432 of the CCP.

<sup>14</sup> Articles 417(2), 430, 433 and 437 of the CCP.

<sup>15</sup> Articles 417(2) of the CCP and 344/2 of the CC.

<sup>16</sup> Regulated by Law No. 83/95, of 31 August.

24. The main objectives of public enforcement are the promotion and defense of an effective competition in the markets<sup>17</sup>. In order to achieve those objectives, competition authorities aim namely at deterring, putting an end to, and punishing infringements to competition law. The main objective of private enforcement is the reparation of the damages caused by the infringement, mainly by the way of monetary compensation, even if its role in terms of overall deterrence can also be pointed out.

25. It is of the utmost importance to optimize the interrelation between both types of enforcement, in order to enhance their potential for mutual reinforcement, on the one hand, and to ensure that they do not negatively interfere with each other, on the other.

26. While private enforcement is a crucial tool for the protection of competition, there is the need of ensuring that it does not jeopardize the investigations of Competition Authorities, in particular that it does not diminish the attractiveness of leniency programs and settlement procedures.

27. There is a number of aspects in which the interrelation between public and private enforcement must be subject to a special focus. The recent EU Directive on Antitrust Damages Actions deals with some of those aspects namely the effect of competition authorities' decisions in civil actions, the limitation periods, the intervention of competition authorities in private enforcement actions and the access to competition authorities' files by parties in private enforcement actions, in particular to leniency documents.

28. The EU Directive is a very important instrument to improve the conditions in which the parties injured by an infringement to competition law may be compensated by the damages suffered. It contains a number of provisions aiming at facilitating the access to damages actions (access to file, binding effect of NCA's decision, limitation periods, etc.), but it also aims at ensuring that public enforcement is not jeopardized by the application of private enforcement (access to NCA's files, for instance).

29. The implementation of the Directive by the Member States, which is due to be completed in December 2016, will surely contribute to an increasing number of private enforcement actions in national courts and also to a more balanced interrelation between public and private enforcement.

30. Currently, there are already specific rules on the protection of leniency documents in the Portuguese Competition Act, which are relevant for damages actions.

31. Under Article 81 of the Portuguese Competition Act, leniency applications, along with all the supporting documents and information, are confidential. Access by parties to leniency documents is allowed pursuant to the exercise of rights of defense in the proceedings. However, no copies are allowed unless authorized by the applicant. Access by third parties is also only possible if authorized by the applicant.

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<sup>17</sup> Competition is a legal value protected by the Portuguese Constitution. See Article 81, f) of the Constitution of the Portuguese Republic, which states:

"In the economic and social field the State is under a priority duty:

(...)

f) To ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest".

32. The law foresees additional protection of oral statements<sup>18</sup>. Parties cannot obtain copies of oral leniency applications, and no access to oral statements is allowed for third parties.

33. After the final decision becomes *res judicata*, restrictions to access to file also apply due to the confidential nature of leniency documents.

34. Similar rules are in place for the protection of settlement documents, according to which no access to settlement submissions by third parties is allowed, except if authorized by the undertaking concerned.

35. Therefore, the current Portuguese legislation aims at striking a balance between access to file and the protection of important tools for detection of infringements and efficient handling of investigations by the PCA.

#### **4. Concluding remarks**

36. The PCA considers private enforcement a very important pillar of the overall system of competition enforcement, namely by promoting a competition culture and by playing a role in overall deterrence.

37. Therefore, the PCA intends to support the development and success of private enforcement, within the limits of its legal powers, in the fulfilment of its mission of promoting and defending competition in Portugal.

38. The PCA, as other competition authorities, has at its disposal investigative powers and resources that private parties usually cannot replicate. For that reason, those who suffered a damage as a result of a competition infringement are likely to rely on the PCA's work to ground their civil claims, namely in follow-on actions.

39. Thus, the success of the private enforcement depends in a high degree on a vigorous public enforcement. Robust investigations by competition authorities are the first step towards solid civil actions.

40. Moreover, enhanced transparency and advocacy efforts by competition authorities are essential. Besides vigorous enforcement, the PCA is committed to increase the transparency of its action, namely by timely publishing its decisions, guidelines and opinions, as well as to enhance its advocacy efforts, towards building a solid culture of competition, in which a successful private enforcement is an important element.

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<sup>18</sup> The possibility of submitting a leniency application orally was introduced in Portugal in 2012.