

PRIVATE ENFORCEMENT OF COMPETITION LAW IN PORTUGAL (II): *ACTIO POPULARIS* – FACTS, FICTIONS AND DREAMS

*Leonora Rossi*¹/*Miguel Sousa Ferro*²

ABSTRACT: *This paper builds on the results of research carried out into the private enforcement of competition law in Portugal, published in a previous issue of this journal. Its goal is to clarify the legal framework that governs the options offered to private parties that suffered damages as a result of antitrust infringements, and to complete it with an assessment of the viability of those options from an economic perspective, depending on the characteristics of each case.*

SUMMARY: 1. Introduction. Private enforcement of competition law in Portugal: legal and historical introduction. 2.1. Common declaratory actions. 2.1.1. Legal framework. 2.1.2. Overview of precedents. 2.2. Popular actions. 2.2.1. Legal framework. 2.2.2. Overview of precedents. 3. Economic assessment. 4. Daring to dream.

1. INTRODUCTION

This paper builds on research into precedents of private enforcement of competition law in Portugal, published in a previous issue of this journal³.

Much has already been written concerning Portuguese collective redress mechanisms and the *Actio Popularis* Act (APA), in general⁴, covering a much

1 Professor at Nova School of Business and Economics. E-mail: lrrossi@novasbe.pt.

2 Doctoral candidate at the University of Lisbon Law School. Counsel at Eduardo Paz Ferreira & Associados. E-mail: miguel.ferro@eduardopazferreira.pt.

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3 Rossi & Sousa Ferro, 2012.

4 For a summarised overview, in English, of the Portuguese legal system, in this regard, see, e.g.: Gouveia & Garoupa, 2012; and Sousa Antunes, 2007.

broader scope than that of the present paper. Several papers have also focused specifically on the popular action in specific contexts, such as within the scope of administrative law⁵ or of securities law⁶. However, not much attention has been paid in Portuguese doctrine, as of yet, to popular action in the context of competition law⁷.

The discussion that follows shall focus exclusively on civil popular action, more specifically on actions aimed at obtaining compensation for damages arising from infringements of (EU and/or national) competition law. The objective is to fill what we perceive to be a gap in doctrine concerning this topic, by applying a Law and Economics approach to the assessment of the existing frameworks for the private enforcement of competition law in Portugal. Hopefully, this will provide a sounder basis for the assessment of the viability and usefulness of existing mechanisms, helping to chart a way forward.

The issue has far-reaching economic consequences. The reality is that, even though there have been a great number of decisions adopted by the Portuguese Competition Authority (PCA) and the European Commission concerning infringements of competition law in, or with effects on, Portuguese territory, none has led to follow-on actions. Thus, even when the authorities had already identified an antitrust infringement, and it was clear that such an infringement led to damages to consumers and clients, Portuguese courts have almost never been asked to compensate such damages⁸, by any of the procedural means available, and never through *actio popularis*.

There is, thus, a rather substantial gap between the theoretical possibilities presented by the Portuguese popular action mechanism, often singled out as an exceptionally pragmatic system within the EU⁹, and its use in practice.

5 See, e.g.: Fábrika, 2000; and Fábrika, 2003.

6 See, e.g.: Oliveira Ascensão, 2011.

7 As an exception, see: Sérvulo Correia, 2010.

8 As noted by one author: “Undoubtedly, the AdC has sanctioned various infringements of the competition rules that, without great effort, would provide the basis for damages actions” (see Coutinho de Abreu, 2011:112).

9 As one author noted: “The relatively broad role that Portuguese law reserves to the procedural principle of popular action (*actio popularis*) removes, in turn, a difficulty encountered in other national legal orders of the European Union. Thanks to popular action, it is possible to solve otherwise unsolvable problems regarding standing to sue in a common declaratory action when the interests prejudiced by the anti-competitive practices are not perfectly related to a specific case” (Sérvulo Correia, 2010: 111).

It has been estimated that, throughout the European Union (EU), over 20 billion euro per year in damages arising from competition law infringements go unrecovered¹⁰. Based on this figure, and on Portugal's proportion of the EU's GDP in 2011 (1,35%), a proportional and rough estimate suggests over 270 million euro of unrecovered antitrust damages in Portugal, per year. Some of these antitrust damages have even been quantified in PCA decisions (although these decisions, until very recently, were not made public)¹¹.

There is an ongoing debate, at the EU level, that aims at arriving at common collective redress mechanisms for damages caused to consumers (not only from infringements of competition law). The European Commission has recently published a Proposal for a Directive on Private Enforcement of Competition Law. While obviously set in the framework of such debates, and taking contributions thereto into account, this paper is not concerned with the troublesome issues of harmonization raised by it, but instead focuses specifically on the reality of the Portuguese legal system.

Indeed, the situation in Portugal is, in some senses, quite distinct from that of other Member States. The main difference arises from the fact that Portugal has, in theory, an opt-out collective redress mechanism, even though it is scarcely used. Unlike other Member States, where consumer associations have been unable to initiate law-suits in representation of categories of consumers¹², the Portuguese *actio popularis* mechanism has been successfully used (once) to represent all the clients of an undertaking accused of infringing, *inter alia*, competition rules.

That being said, the theoretical potential of the Portuguese *actio popularis* mechanism is clearly overshadowed by its outstanding failure in practice, at

¹⁰ Kroes, 2008.

¹¹ An analysis by one author of cartels identified by the PCA (Coutinho de Abreu, 2011: 112) highlighted that, in some of the PCA's decisions, estimated damages to consumers, clients and the economy were quantified. Thus, as a result of a pharmaceutical cartel, "the [PCA] calculated damages in the sum of EUR 3,2 million in 2002 and 2003 in the hospital sector and up to EUR 10,4 million per year starting from when the rule fixing the price of the 'reactive strips' went into effect for sale to the public". An eight year long salt cartel allegedly caused damages to consumers and competitors amounting to 5,6 million. No damages actions were filed to follow-up on these decisions.

¹² Almunia, 2010: "In 2005, French mobile operators were found to have created a cartel that for two years overcharged as many as 20 million subscribers for their services. A French consumer association tried to represent a large group of these consumers in court but, owing to current French rules, they did not succeed. Two years later, Dutch brewers were found to operate a cartel which raised the price of beer for a great number of bars and cafés in the Netherlands. The establishments tried to bring the brewers to court through their association but, again, could not initiate a representative action under Dutch law".

least in so far as the enforcement of competition law is concerned. The purpose of this paper is to apply a Law and Economics approach to the identification of possible reasons for this failure, contrasting it to the characteristics and the actual use of other procedural means available to pursue the same goals, and, ultimately, to suggest improvements to the current legal framework so as to allow it to go beyond the mere letter of the law.

2. PRIVATE ENFORCEMENT OF COMPETITION LAW IN PORTUGAL: LEGAL AND HISTORICAL INTRODUCTION

2.1. Common declaratory actions

2.1.1. Legal framework

(i) *Common declaratory actions*

Designed to “remove clouds” from legal relations¹³, the common declaratory action is the most frequent route followed by claimants in order to secure judicial rulings that put an end to conflict, acknowledge invoked rights and ultimately serve as the basis of executive proceedings.

As we write (June 2013) a global amendment to the Code of Civil Procedure has just been approved. It is laid out in Act 41/2013 and will enter into force on 1 September 2013. This Act will implement a substantive revision of principles. We have opted, nonetheless, to write under the current framework, and where possible, to indicate proposed changes in the footnotes.

In Portugal, under the current framework¹⁴, there is no specialized court for private litigation and any judicial court of any local judicial circumscription (*comarca*) may be competent. National courts will apply the rules on tort liability set out in articles 483 *et seq* and 562 *et seq.* of the Portuguese Civil Code (hereinafter “CC”).

Active legitimacy is acknowledged to any individual or collective entity with legal personality and that holds an interest in the outcome of the case (respectively, articles 5 and 26 of the Portuguese Code of Civil Procedure hereinafter “CPC”¹⁵).

13 Borchard, 1943.

14 Data regarding this Section of the paper has principally mirrored the answers to the questionnaire submitted in Gorjão-Henriques & Sousa Ferro, 2012.

15 See articles 11 *et ss.* and 30 of the new CPC, adopted by Act 41/2013.

Declaratory proceedings are mainly governed by the Code of Civil Procedure, but also by the Civil Code and other disperse statutes. Their scope may be (i) of simple clarification (when the judicial decision simply holds that an invoked fact or a right exists or not); (ii) condemnatory (when the court issues a behavioral order *vis-à-vis* a party – *de facere* –, on the assumption that a certain right has been breached) or, finally, (iii) itself constitutive of rights or liabilities (when the court's decision alters the preexistent legal *status quo* – Article 4 CPC¹⁶).

In private litigation, in principle, the burden of proof is incumbent on the claimant (see article 342 CC) and, when in doubt, the judge will decide against the party who bears the burden of proof¹⁷. This may not be the case in contractual liability litigation, since there is a *juris tantum* presumption of fault of the debtor (see article 799 CC).

Thresholds of the value at stake (*alçada do Tribunal*) are extremely important since they determine what is known as the 'form' of proceedings¹⁸. The alternative is between the common form (*ordinário*) that governs claims in excess of 30.000 €, the summary form (*sumário*) that governs claims under 30.000€ but in excess of 5.000€ and, finally, the accelerated form (*sumaríssimo*) that governs claims up to 5.000€. Court jurisdiction as well as procedural rules and respective deadlines will all be affected by the value attributed to the claim by the claimant. For example the obligation of being represented by a lawyer may be foregone only in proceedings in which the value at stake is estimated to be under 5.000€.

The Code of Civil Procedure attempts judicial conciliation of the parties once all written pleading, replies and rejoinder have been submitted to the court. If that attempt fails, discussion will continue¹⁹ to the appreciation of evidence that is mainly documentary, although statements of the parties may be considered (as confession), experts and witnesses may be heard and judicial inspections may be undertaken.

16 See article 10 of the new CPC, adopted by Act 41/2013.

17 There are, however, cases where a reversal of the burden of proof occurs, as, for example, in article 344 CC.

18 See article 24 of LOFTJ and article 462 CPC. These rules have been altered in the new CPC, adopted by Act 41/2013.

19 França Gouveia, 2007: 308.

Once a decision on fact is produced, a non-binding deadline of 30 days is in place for the decision on the merits. It should be noted that, in principle, the decision cannot address issues not raised by the claimant²⁰ or condemn the defendant in excess of what has been requested.

Within the common declaratory proceedings, the judge may also proceed to immediate “liquidation” of damages²¹ (i.e. quantification) if that is considered possible and/or is requested by one of the parties. In other cases a separate, subsequent, phase of liquidation of damages may be necessary.

The relationship of common declaratory actions with executive proceedings has been a source of surprise and anguish to many claimants that, having seen their rights acknowledged by a court, fail to understand why it is also necessary to file executive proceedings in order to see that very judicial decision carried out. This is certainly not the place to spend more time on this issue but it is important to note that both the national and the EU legislator²² are engaging in concrete efforts in order to, at the very least, qualify the ruling issued in the common declaratory action as *executive title* for the executive proceedings (article 46 CPC)²³, in order to waive further re-discussion of fact and/or evidence in the subsequent action²⁴.

(ii) *Discovery and interim relief*

On the issue of discovery, under the current framework, as a general principle, any party may request that the court orders the opposing party or any other person/entity to produce a document (see articles 528 and 531 CPC).

Interim or urgent relief is available *ex ante* in case of probable causation of serious harm by one party to another and/or *ex post* in case of improbable

20 On this point *infra* and regarding *Actio Popularis* proceedings, see SC, 7 October 2003, *in fine*, in which the SC states that, in particular, liquidation of damages/lump sum payment is not considered as it was not requested by the claimant.

21 See article 661(2) CPC in a harmonious reading with articles 378, 378-A, 379, 380 CPC and still 301-304 CPC.

22 Frias Costa & Cantista, 2011.

23 On this point see, *infra*, the contrast with *Actio Popularis* Proceedings, Supreme Court 7 October 2003, *in fine*, where it is hinted that it is uncertain, whether the claimant in the *actio popularis* is the (correct) entity that should require liquidation of a previous declaratory ruling. These rules in particular will undergo extensive change under the new framework expected to enter into force in September 2013 and will be re-numbered as article 703 *et seq* CPC.

24 On this point, for decisions issued by foreign courts see Regulation (EC) 805/2004; Regulation EC 1896/2006 and Regulation (EC) 44/2001.

capability of reparation of harm already caused by the perpetrator to the claimant (article 381 CPC). The freezing of assets (*arresto*, article 406 CPC), for example, is considered a specific form of interim relief appropriate for cases in which there is probable cause to fear that the debtor will squander assets. For those incidents the CPC departs from the principle *audi alteram partem*. It is probably the protective order most sought after by creditors.

Interim relief is necessarily based on a main action filed with the court, and while the particular measures sought take priority over non-urgent cases and are usually decided within two months of being lodged with the court, they will ultimately share the fate of the principal action²⁵.

(iii) Alternative dispute resolution

For over a decade (Act 78/2001) Portuguese claimants have had at their disposal distinctive entities known as *Julgados de Paz* with competence in Civil Law proceedings. With the noteworthy exclusion of issues pertaining to Family, Inheritance, Labour law and actions of Eviction, proceedings valued under 5,000€ may be decided simultaneously at an increased pace and at a reduced cost. Although considered special ‘courts’, the justices are, in principle, not professional judges. Within this framework if attempts of mediation fail, the decisions rendered by the *Julgado de Paz* are subject to appeal at the Courts of First Instance, as long as the value of the claim is greater than 2,500€.

(iv) Non-representative group litigation

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

25 Sérvulo Correia, 2010: 107-108: “A declaratory action may be supported by interim protection proceedings and a follow-up action for the coercive enforcement of the declaratory judicial decision. In the interim protection proceedings, application may be made for anticipatory or maintenance measures specifically appropriate to assuring the effectiveness of the right under threat (...). A condemnatory decision in the declaratory action will serve, in turn, as a basis for the process of execution (coercive enforcement). In these cases, the purpose of the enforcement will be the payment of an exact amount or the provision of a positive or negative fact”. P. 111: “The way in which the Code of Civil Procedure formulates the common declaratory action seems to create no significant impediments to the private enforcement of competition law. All the remedies envisaged here fit into that action as a claim and as content of the judgment”. Again these rules are expected to be affected by the new framework of September 2013.

The courts may decide to join several and different cases, even in different moments of the proceedings (see articles 275 and 275-A CPC). Therefore, Portuguese Civil Law is familiar with forms of joinder (article 275 CPC) and aggregation (Decree-Law 108/2006 of 8 of May) as traditional forms of group litigation.

Joinder (*apensação*) means that certain actions that have been filed with the same court by different parties are decided together where instances of “*litisconsortium*, coalition, opposition or counterclaim are confirmed”²⁶.

Aggregation (*agregação de ações*), is a different option offered to the judiciary and is resorted to when ‘total’ joinder of the fate of separate and multiple actions is not considered opportune or even appropriate by the judge. In fact, it allows a judge to perform a specific task only once while extending the effects of that incident to multiple actions. This has been described as the practice of “mass acts”²⁷ and, as mentioned above, is possible if, in spite of an existing connection between separate actions, the judge feels that joinder is of no ulterior usefulness.

(v) *Legal costs and funding*

Regarding the recovery of legal costs from an unsuccessful party, and more specifically court costs (excluding lawyer’s fees), they are initially borne by each party. However, at the end of proceedings and upon request, the “victor” has the right to recover at least a part of these from his “opponent”. In case the claimant is successful only in part, the costs are divided proportionately among the parties.

The fees of lawyers are, in principle, and to this date certainly in practice, borne by each party (see article 446 CPC and articles 25 and 26(3) of the Regulation of Procedural Costs introduced by Act 7/2012). However, a mitigation of this tradition seems to have been identified in the fact that, within certain limits, the “victor” may, within 5 days of the end of proceedings include – within stringent limitations – part of the lawyers’ fees in a document (*nota discriminativa e justificativa*) that must be remitted to the court and to his

26 Sousa Antunes, 2007: 4: “the procedural instrument is regulated in Article 6 of the statute. The intervention of the legislator was the result of an increase in the phenomena of mass non-compliance, with the intervention of the courts applying to a limited number of users, concentrated geographically according to their respective headquarters («small debts of communications companies, consumer credit, car leasing and, in general, all the natural litigation of a consumer society»)”.

27 Sousa Antunes, 2007.

“opponent”, according to which the “victor” will be reimbursed for a certain amount of all costs incurred with the litigation.

In Portugal there is no precedent, or for that matter any legal basis for third party funding of claims.

However it does not follow that such funding is forbidden. From the perspective of legal services, it is only forbidden for lawyers to share their fees with third parties that did not cooperate in advising the client.

(vi) Provision regarding passing-on or indirect purchasers

As the claimant can only recover the damages suffered as a result of the infringement, if the fact that some of the damages were suffered by a third person is proven, the court will not award the claimant “passed-on” damages.

On the other hand, if the requirements for civil tort liability are met (existence of illicit behaviour; proof of injury to the claimant; and the demonstration of a causal link between the unlawful conduct and the damage (article 483 CC) indirect claims are possible.

(vii) Provision for follow-on actions

To date, no specific provision regarding litigation between economic agents concerning competition damages arising from practices identified by a competition authority has been introduced into the Portuguese system²⁸.

(viii) Declaration of nullity and statute of limitations

Requests for the declaration of nullity of an agreement can be brought at any time by an interested party and may be decided *ex officio* by the court (article 286 CC).

As regards statute of limitations (*prescrição*), there are several periods established in article 300 *et seq* of the CC. Article 309 lays down a general 20 year period for contractual liability with specifications in article 310 of a 5 year period and further cases of 6 months in article 316 CC and 2 years in article 317 CC.

²⁸ Concerning follow-on actions and the value of previous PCA or Commission decisions on the same practices - Gorjão-Henriques & Vaz, 2004: 640: “There is a real possibility of contradiction between decisions taken by our NCA and court judgments concerning the same competition issues”.

Regarding Tort – or extracontractual liability, as it is also called – actions for damages must be brought within three years from the date the claimant acquired knowledge of the right to make a claim (article 498 CC).

(ix) Concluding

It is into the framework described above that the *actio popularis* is grafted. If it is true that the system is familiar with certain forms of collective actions and among others, joinder, it is undeniable that *litisconsortium* was not designed to manage thousands or even millions of connected claims. Moreover if it is true that the system is familiar with the concept of tort liability, unjust enrichment looms up as an uncomfortable obstacle to the development of a clear definition of an autonomous framework to govern the lump sum award. In a certain sense, the CPC could be described as a straightjacket within which the *actio popularis* is still struggling. It is the hope of both authors of this article that discussing these issues will contribute to the finding of adequate solutions.

2.1.2. Overview of precedents

The precedents of private enforcement of competition law in Portugal, through common declaratory actions, have already been described in a paper published in a previous issue of this journal²⁹. At this stage, we will highlight only those elements that may prove relevant to the assessment of the economic viability and justifiability of common declaratory actions in this area.

Between December 1983 and May 2012 (i.e. 28,5 years), we were only able to identify 37 cases where issues of competition law were raised in common declaratory actions. Even allowing for an imperfect sample, as a result of the difficulty in collecting relevant first instance judgments, this suggests an average of less than 2 private enforcement cases per year (1,3). We find no clear pattern of increase in the number of such cases in recent years.

Of those 37 cases, only 7 – i.e. 19% – were originated by a party seeking (*inter alia*, at least) damages as a result of competition law infringements. This is significant, as it shows how extremely rare (0,25 cases per year) it is for undertakings to decide to use common declaratory actions to obtain compensation for damages arising out of competition law infringements in Portugal.

29 Rossi & Sousa Ferro, 2012.

What's more, none of the plaintiffs successful in their claims. Indeed, we were only able to identify one case in which a successful competition law argument led to a direct economic benefit for the respective party, in the context of a counterclaim. In *Carrefour v. Orex Dois*³⁰, Carrefour was ordered to return 49.000 EUR in unlawfully imposed "referencing" and "opening rappel" charges (relating to the opening of new stores).

This being said, it is useful to analyse the circumstances behind the above mentioned 7 cases of actions for damages under the private enforcement of competition law.

In both *JSS et al v Tabaqueira*³¹ and *JCG et al v. Tabaqueira*³², a group of tobacco retailers sued the national quasi-monopolist for refusing to continue to grant them preferential discounts, on the grounds that they had been rendered unlawful by competition law. The limited available details of these cases don't allow for a precise quantification of amounts at stake, but it would seem that the discounts in question amounted, depending on the product, to a profit margin of 0,75% or 0,5%. In the second case, six retailers were grouped together as applicants, apparently of their own initiative.

In *Júlio Canela Herdeiros v. Refrige*³³, a wholesale distributor sued the national representative of Coca-Cola for damages arising from a refusal to supply. The damages were not specified.

In "*B*" & "*C*" v. "*D*"³⁴, two importers of entertainment machines joined together to sue an Austrian manufacturer for alleged exclusionary practices, asking for compensation in the total amount of 155.000 EUR.

In "*G*" v. "*N*"³⁵, a textile retailer sued a manufacturer for damages resulting from the cancellation of an order, seeking compensation in the value of 19.000 EUR.

30 Lisbon AC, 24 November 2005.

31 SC, 31 October 1991. Appeal from Lisbon AC, 6 March 1990.

32 SC, 8 July 1993. Appeal from Lisbon AC, 18 April 1991.

33 SC, 21 March 1996. Appeal from Évora AC, 23 February 1995. Appeal from the Santarém Judicial Court.

34 Oporto AC, 10 July 2006.

35 Lisbon AC, 12 September 2006.

The *Cleaning services association II*³⁶ case does not easily lend itself to this type of analysis, as the applicants' objective was to get their jobs back. In any case, it is worth noting that the suit was brought by a labour Union.

Finally, in *Automobile insurance*³⁷, an automobile repair shop sued an insurance company for damages and sought an injunction against what it deemed to be an unlawful boycott of its services. It asked for compensation amounting to 40.000 EUR.

On average, from the first to the last instance, these cases lasted 5,5 years, the shortest lasting 4,5 years, and the longest 7 years.

There are 3 cases, apparently still pending before the courts, that are examples of a rather different type of antitrust suit. All three are suits for damages by medium-sized or large companies against large companies, involving very high amounts³⁸:

- (i) TV TEL Grande Porto sued Portugal Telecom for damages of 15 million EUR resulting from an alleged abuse of dominant position (the same practices were subsequently the subject of a PCA decision, but which was overturned by the courts);
- (ii) Optimus initiated a follow-on action against Portugal Telecom for damages arising from an abuse of a dominant position identified by the PCA, asking for compensation in the amount of 11 million EUR. Oni subsequently joined the suit asking for 1,5 million EUR in damages; and
- (iii) Interlog, the former sole distributor of Apple products in Portugal, filed a 40 million EUR suit against the Ireland-based company, for alleged abuses of dominant position and of economic dependence.

2.2. Popular actions

2.2.1. Legal framework

The Portuguese legal framework for popular actions has drawn a great deal of international attention, in particular within the framework of the debate on the collective enforcement of competition law. It has been singled out as “the most extensive form of collective action based on the «opt-out» model

36 SC, 6 June 2007. Appeal from the Labour Court of Ponta Delgada.

37 Guimarães AC, 4 January 2011.

38 For further details on each case, see: Rossi & Sousa Ferro, 2012.

available in the EU³⁹, and as being viewed, “in theory, as the most liberal [regime] in Europe”⁴⁰.

The basis for civil popular actions in Portugal is found in article 52(3)(a) of the Constitution⁴¹, according to which:

“Everyone shall be granted the right of *actio popularis*, to include the right to apply for the appropriate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question. The said right shall particularly be exercised in order to:

a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage; (...).”

This constitutional right was implemented through Law 83/95, of 31 August (*Popular Action Act*, or PAA⁴²). It should be noted that the PAA has a broad scope, encompassing both administrative and civil actions and, in the latter, being applicable to the protection of public, diffuse, collective and homogenous individual interests⁴³. For the purposes of the present paper, our analysis shall focus on the regime relating to the protection of homogenous individual (also called “fragmented”) interests, since it is the compensation of these (mass damages) which is at stake in the reaction to damages arising from antitrust infringements⁴⁴.

39 Leskinen, 2011: 91.

40 Delatre, 2011: 39.

41 For a description of the evolution of this constitutional provision, see, e.g.: Fábrika, 2000: 16-17.

42 As rectified by Rectification no. 4/95, of 12 October.

43 As summarised by Sousa Antunes: “it is common to distinguish the public interest, which is an interest of the State and other territorial beings, diffuse interest, meaning the sharing by each subject of interests that belong to the community, collective interest, identified by the joint purpose of persons joined together by a legal bond in the same group or class, and homogeneous individual interests, where the individual entitlement to a good shares questions of fact or law with other interests of that nature” (Sousa Antunes, 2007: 7). For a more in-depth discussion of the types of interests in question, see Teixeira de Sousa, 2003: 13-58. See also Monteiro & Júdice, 2012: 192.

44 The use of *actio popularis* to protect homogenous individual interests is also the one which is closest to, and clearly inspired by, common law class action suits (see, e.g., Fábrika, 2000: 17). As stated by one author, in the framework of securities law: “a popular action for the defense of investors need not always be based on the defense of investors’ collective interests. It may simply be based on the defense of individual

In two cases relating to damages suffered by clients of Portugal Telecom for breach of contract and for a breach of legal obligations, the Supreme Court has confirmed that this type of action, generally, aimed at the compensation of mass damages falls within the scope of the PAA, under the category of homogenous individual interests⁴⁵⁻⁴⁶ (i.e. cases in which the members of the class hold diverse rights, but are dependent on a single factual or legal issue, all of them requiring a judicial solution of identical content⁴⁷).

While certain branches of the law include special provisions concerning *actio popularis*⁴⁸, the use of this mechanism for the enforcement of competition law is governed exclusively by the general provisions.

There was, at a time, a dispute in the Portuguese legal community concerning the nature of the *actio popularis*. In essence, this figure was perceived, by some, as a subjective right, an extension of the active legitimacy to resort to existing procedural means, and it was perceived, by others, as an autonomous procedure, in itself. For the purposes of the present paper, however, we believe this discussion is outdated and superfluous, given that, at least in what concerns civil proceedings, article 12(2) APA clearly

interests, as long as they are homogenous”, with the explicit objective of facilitating the enforcement of liability – Oliveira Ascensão, 2011 (our translation). On the boundaries of homogenous individual interests, see also: Lisbon AC, 5 June 2008.

45 See: SC, 23 September 1997 (“Within the homogenous individual interests encompassed by article 1 of [the PAA], a specific consumer right may be singled out, that of the right to compensation for damages”, our translation); SC, 7 October 2003. These cases were fundamental in setting aside a position that had been defended by some authors and which had already been upheld by the Lisbon Court of Appeal (and was overruled by the SC in the first case), according to which *actio popularis* would only be possible when a diffuse or collective interest was at stake. See also: SC, 17 February 1998; and SC, 1 July 2010 (in this last case, the courts refused the argument of one of the defendants that the individual nature of the rights in question excluded the use of *actio popularis*).

46 One issue that has not yet been clarified by the courts is where to draw the line in terms of a minimum number of injured parties. Clearly the protection of homogeneous individual interests through *actio popularis* was only meant for mass damages cases, and not, e.g., for compensating a very small number of customers. We believe the line should be drawn, in accordance with the *ratio legis*, at the point where it would not be economically viable for all parties injured by the behaviours in question to obtain compensation through common procedural mechanisms. This need not be as “massive” a number as one may, at first glance, assume, and will be dependent on the value of the individual claims. Thus, for example, if only 100 consumers suffered damages as result of an anticompetitive practice, but those damages were all under 200 euros, use of *actio popularis* would still be justified.

47 Grinover, quoted in SC, 23 September 1997.

48 The most important of such special regimes is the one foreseen in article 31 of the Securities Code. See also articles 13(b), 14 and 18(1)(l) of the Consumer Protection Act; and articles 2(1) and 40 of the Environment Framework Law.

states that “*civil popular actions may take on any form foreseen in the Civil Procedural Code*”⁴⁹.

Although not unanimously accepted in doctrine, it now seems fairly settled that *actio popularis* may also be used to seek provisional measures and injunctions⁵⁰. Less clear is the possibility of its use to seek judicial enforcement of a previous declaratory court ruling (“processo executivo”)⁵¹.

We would argue that access to these procedures is absolutely essential to guarantee the *effet utile* of the *actio popularis*. Thus, for example, if it is possible to use *actio popularis* to obtain a declaration that a company should pay compensation to a large group of consumers, but then it is necessary to resort to common proceedings to force the company to pay the amount owed, it will be easy enough for companies to avoid payment, as the enforcement proceedings will not be feasible in practice, for the same reasons that the common declaratory action was not feasible and was replaced by the *actio popularis*. If one accepts, in principle, that an executive *actio popularis* should exist, it should be kept in mind that the law itself generally provides the courts with the necessary leeway to adapt the applicable provisions, in so far as this may be required by the specific context⁵².

Article 1(2) presents a non-exhaustive enumeration of the interests which may be protected through popular action⁵³. Competition is not included in this enumeration, which does mention consumer protection. However, the Supreme Court has already implicitly confirmed that *actio popularis* may also

49 In this sense, see, e.g.: Fábrika, 2003: 50 *et ss*; Otero, 1999:881. The Portuguese Supreme Court has already stated that *actio popularis* may be used, not only for declaratory, but also for condemnatory purposes, e.g. to order the termination of the infringement in question – see: SC, 7 October 2003.

50 Article 26-A of the CPC clarifies this by stipulating that the *actio popularis* encompasses procedures for provisional measures. See also: Monteiro & Júdice, 2012: 193; Sousa Antunes, 2007: 25; Mata de Almeida, 2002: 17. Confirming the possible use of *actio popularis* to obtain provisional measures: Lisbon AC, 26 November 2000; see also: SC, 24 January 2002.

51 Two leading authors on this subject express reluctance in accepting this possibility – see: Teixeira de Sousa, 2003: 134; and Payan Martins, 1999:122. The Supreme Court has hinted at being uncertain of standing for this purpose: SC, 7 October 2003.

52 Thus, for example, under article 265-A of the CPC, “[w]hen the procedure for consideration provided for in the law is not appropriate to the specific characteristics of the case, the judge, having heard the parties, should, officiously, order the practice of those acts that best suit the purpose of the case, and also the necessary adaptations”. In other words, if a specific aspect of a procedure, as foreseen in the general rules of the CPC, is not perfectly suited to a popular action, the judge may adapt the procedure in so far as necessary so that it becomes appropriate thereto.

53 See, e.g., Oliveira Ascensão, 2011; Teixeira de Sousa, 2003: 29; Marques Dias, 2009: 6.

be used to seek compensation for damages arising from infringements of competition law, at least when consumer protection is at stake⁵⁴. Furthermore, since the list of interests to be protected, provided in the Constitution and in the PAA, is not exhaustive, it can be argued that promoting effective competition on the market is one of the interests which legitimises the use of *actio popularis*⁵⁵, even when the specific law suit is meant at compensating, e.g., SMEs, especially when one considers that the ultimate beneficiaries of competition policy and of undistorted competition on the market are the consumers. In short, the protection of competition on the market is one of the public interests which may be pursued through *actio popularis*⁵⁶.

Standing to initiate a popular action is granted to any citizen⁵⁷ and to any legally constituted association or foundation created for the defense of the relevant interests, regardless of whether or not they have a direct interest in the claim (article 2(1))⁵⁸. Thus, as an example, any individual consumer or group of consumers may initiate a popular action to seek termination of and reparations for the infringement, but a company (e.g. a client of the

54 In SC, 7 October 2003, the Supreme Court referred specifically to competition law arguments raised by the applicant, and the admissibility of this claim was not challenged, nor was it raised of the court's own initiative.

55 Indeed, article 81(f) of the Constitution lists, as one of the priority tasks of the State, "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".

56 And will be legitimately pursued in this manner, even if the claimants do not explicitly refer to the protection of this public interest, but merely to the homogenous subjective rights encompassed therein – see: SC, 20 October 2005.

57 It has not yet been clarified whether "citizen" includes citizens of other States (including, with specific legal issues, citizens of other EU Member States) and stateless persons. While this broad interpretation may appear to run counter a common-sense approach to the letter of the law, one author has persuasively argued in favour of it, on the basis that the constitutional right of access to the courts exists independently of Portuguese nationality (see Teixeira de Sousa, 2003: 178; see also Marques Dias, 2009: 17-18). Another important issue is that, while it may seem a disproportionately permissive reading of the law, considering the limitation of standing imposed on legal persons, the fact is that neither Art. 52(3)(a) of the Constitution, nor Art. 2(1) of the PAA, impose any requirement of material connection between the citizen that initiates the action and the infringement in question (meaning, e.g., that a citizen need not have personally suffered damages as a result of the antitrust infringement in order to have standing to initiate an *actio popularis*).

58 In the context of the protection of a public interest, the Supreme Court has rejected, as a matter of principle, that such standing may be set aside on the basis on an abuse of legal rights – see: SC, 28 May 2009.

company responsible for the infringement) may not do so⁵⁹, even if it is an SME⁶⁰.

Given that many antitrust infringements whose effects are felt in Portugal involve undertakings with headquarters in other States, it should be stressed that the PAA merely regulates active legitimacy. In what concerns the courts' international competence and issues of passive legitimacy, general rules must be applied, which means that the PAA may have extraterritorial consequences⁶¹.

The application is subject to a preliminary assessment and should be dismissed by the judge if it is concluded that its success is “manifestly unlikely”⁶².

If the action proceeds beyond this preliminary assessment, the claimants shall be deemed to represent⁶³, “with no need for mandate or express

59 In what concerns legal persons, standing is granted only to the associations and foundations that meet the above mentioned requirements, with the additional condition that they must not carry out any professional activities in competition with undertakings or liberal professions (article 3), which makes it clear that the legislator intended to exclude the use of *actio popularis* by any legal person that carries out an economic activity. This is not to say that their activities must have no economic relevance (e.g. they can and should be seeking economic compensation), but they must not have a profit motive (see: Teixeira de Sousa, 2003: 189; Marques Dias, 2009:20).

Also, companies are not, in practice, absolutely prevented from giving rise (albeit indirectly) to popular actions – quite simply, they must do so through individuals or through associations (e.g. an association created to protect the interests of the respective economic sector, as long as its object can be deemed to include the protection of interests encompassed by the PAA). It should be noted that the PAA does not stipulate any additional requirements concerning, e.g., the number of persons represented by the association or foundation in question, the holding of the status of public utility, or any minimum period of existence of the legal person prior to the initiation of the popular action (see: Teixeira de Sousa, 2003: 184; Sousa Antunes, 2007: 16).

60 The extension of collective litigation rights to Small and Medium Enterprises has often been suggested. In Portugal, ANACOM has expressed its belief that there is no significant difference between the obstacles faced by natural persons and SMEs, so that no difference need be established between the mechanisms available to them and to consumers (ANACOM, 2011: 1, 6 and 10). The Portuguese Government has expressed a more cautious position (MNE, 2011:5 and 9).

61 In this regard, see: Sérvulo Correia, 2010: 114. There have, indeed, been several civil popular actions that involved foreign defendants, as described in Tortell, 2008: 10.

62 Article 13 of the PAA. It should also be kept in mind that the court should, of its own initiative, qualify an action as a popular action or a common action, even if the parties were not clear in that regard – see: SC, 20 October 2005.

63 Some authors argue that this is not, technically speaking, a true case of “representation”, but rather a situation of “exceptional legitimacy” – see, e.g.: Oliveira Ascensão, 2011: 6. Others stress that, at least in what concerns representation, the “prerequisites for a class action in Portugal are therefore very mild” (Gouveia & Garoupa, 2012). For further analysis, see: Lebre de Freitas, 1998: 800 *et ss.*; Ferreira Enriquez, 2002: 11-13; Duarte, 2002: 53 *et ss.*; SC, 27 October 2009. We would clarify that the Portuguese popular action falls both within the category of “representative actions” and in that of “collective actions”, as they tend to be used in international doctrine.

authorization”, all the holders of the rights or interests in question who do not opt-out⁶⁴. In other words, the association, consumer or client who initiates an *actio popularis* against a company, seeking compensation for a specific antitrust infringement, shall represent, before the court, all the consumers/clients who suffered damages as a result of that infringement. Only those who opt out shall not be deemed to be represented⁶⁵.

One of the legally disputed aspects of the representation inherent in the *actio popularis* is the extent of the effect of *res judicata*⁶⁶. As a rule, any person who does not opt-out is bound by the effects of the rendered judgment (*erga omnes* effects). Only two exceptions are foreseen – there shall be no *erga omnes res judicata* effect: (i) when the action was unsuccessful due to insufficient evidence; and (ii) when the court should decide differently, considering specific characteristics of the case in question⁶⁷.

These are two very important restrictions. The first guarantees, e.g., that, even if a claimant is incapable of producing sufficient evidence to persuade the court, in an *actio popularis*, of the existence of an infringement, of damages or of the causal link between the two, other claimants may subsequently still attempt to do so. The second is a sort of catch-all provision, which allows the courts enough leeway to exclude *res judicata* when faced with specific circumstances that justify it (which the legislator could not hope to foresee exhaustively).

Additionally, it should be kept in mind that the *res judicata* effect does not prevent courts from being confronted with several suits initiated, more or less simultaneously, by natural and legal persons under the common declaratory

64 Article 14 of the PAA.

65 Article 15 of the PAA requires the court to notify (by edicts or through the media) all the holders of the interests at stake in the popular action who have not already gone before the court, so that they may intervene or opt-out within a determined deadline. This notification need not personally identify the persons concerned. Similarly, under article 19(2) of the PAA, and in light of the *erga omnes* effects of judgments in an *actio popularis*, judgments must also be publicised. However, as was stressed in Gouveia & Garoupa, 2012, it should be noted that “poster or press may not be the best way to notify potentially interested parties when those interests might be diffused (specifically for well-defined homogeneous groups of individuals)”. All those who may be represented in a popular action have, thus, 3 options: to do nothing and be represented; to intervene in the proceedings; or to opt-out. For a deeper view into the legal discussions around this issue, see, e.g.: Duarte, 2002.

66 For a more in-depth analysis, see, e.g.: Ferreira Enriquez, 2002. See also: Figueiredo Dias, 1999.

67 Articles 15 and 19 of the PAA. Some doctrine has argued that some interpretations of these provisions may be unconstitutional and that only favourable results should have *res judicata erga omnes* – see Lebre de Freitas, 1998: 809.

procedure⁶⁸. Nor is there any special provision in the PAA concerning what to do in case of initiation two or more simultaneous popular actions concerning the same subject matter. Thus, when faced with such issues, courts will have to resort to the general rules of the CPC⁶⁹.

Aside from its usual competencies, the Public Prosecutor's Office may, in the context of an *actio popularis*, decide to take over the action, replacing the claimant(s), if the latter withdraws from the lawsuit or proposes a settlement or adopts other behaviours which would be damaging to the interests at stake⁷⁰.

A popular action is further subject to special procedural rules concerning the collection of evidence (the judge acts on his own initiative, instead of being bound by the initiatives taken by the parties)⁷¹ and the suspensory effect of appeals (generally absent, this effect may be granted by the court when necessary to avoid harm which would be impossible or difficult to repair)⁷².

Another, extremely significant, difference between popular actions and common declaratory actions concerns court costs. The claimants in an *actio popularis* are exempt from payment of initial court costs⁷³. As for final court costs, the claimants will also be exempt from their payment if they are at least partly successful, and, if their claim is wholly unsuccessful, they shall be ordered to pay an amount to be determined by the court, in between 10% and 50% of the normally applicable costs⁷⁴.

As for payment of attorney fees⁷⁵, the rule stipulated in the PAA is that the court decides on these fees, in accordance with the complexity of and the amounts at stake in the case⁷⁶. It should be noted that this article

68 On this issue, see, e.g.: Amado Gomes, 2005: §4.

69 One author has suggested that a mechanism could be introduced analogous to that of the "mass actions" foreseen in article 48 of the CPAC – see Sérvulo Correia, 2010: 117.

70 Article 16(3) of the PAA. For more on this, see, e.g.: Teixeira de Sousa, 2003: 124-125.

71 Article 17 of the PAA. As stressed in Sérvulo Correia, 2010: 112, by introducing this provision, "the lawmakers sought to offset, at least in part, the usual difficulties of producing evidence in this type of action".

72 Article 18 of the PAA.

73 Monteiro & Júdice, 2012: 198.

74 Article 20 of the PAA. In determining the percentage of costs to be paid in a claim that is entirely unsuccessful, the court should take into account the financial situation of the claimants and the reasons (substantial or procedural) which led to the dismissal of the action.

75 Since the PAA is silent on the issue of access to legal aid, general rules must be applied.

76 Article 21 of the PAA.

was introduced at a time when it was a more favourable solution than that which was in force for common declaratory actions. Following the revision of the CPC by Decree-Law 34/2008, of 26 February, and specifically the introduction of article 447-D⁷⁷, we believe the spirit of the law and the succession of laws (as well as the fact that the PAA must be complemented with the general rules of civil procedure) requires that, to the extent that the rules in force for common declaratory actions⁷⁸, in this regard, are more favourable than those stipulated in the PAA, they should be applied. However, if the claimants in an *actio popularis* are unsuccessful, the court may, under article 21 of the PAA, decide not to order the payment of the winner's lawyer fees (in part or in full), based on a reasoning analogous to that found in article 19 of the PAA.

If the claimants in a popular action are successful, the next – rather complex – step is how to handle the issue of compensation. There are two options: (i) the claimant and the company found liable for the antitrust infringement reach an agreement; or (ii) the court issues a ruling on compensation.

In the first case, the fact that the claimants represent all injured persons (who did not opt-out) may raise significant problems. These are, however, mitigated by two factors. First, as mentioned before, the Public Prosecutor's Office may step in and take over the case if it believes the proposed settlement is not equitable. Second, the court also has a role to play in assessing the fairness of a proposed settlement⁷⁹.

In the second case, there are, at present, more doubts than certainties about how compensation is to be decided and paid out. Indeed, if up to this point the legal framework is extremely favourable to the pursuit of popular actions, the doubts that subsist concerning the interpretation of the PAA's provisions on compensation are such as to potentially jeopardise any and all practical use of this instrument as a means of obtaining compensation for mass damages.

It would seem that the options open by the PAA have not yet been fully accepted by Portuguese legal doctrine. Some authors seem to straight out exclude the use of *actio popularis* to obtain compensation for damages that

77 See article 533 of the new CPC, adopted by Act 41/2013.

78 See article 447-D of the CPC and articles 25-26 of the CCR.

79 As a result of a joint reading of the PAA and article 300(3) of the CPC (corresponding to article 290(3) of the new CPC, adopted by Act 41/2013). According to Sousa Antunes, 2007: 24: "the court may refuse to approve the settlement if the representation has not been exercised with the aim of satisfying the interests in question".

can be individualized⁸⁰, even though, given the letter of the law, this seems to be more of a criticism than a proposed interpretation. Others seem to arrive at more or less the same result indirectly. One thing is certain: as one author put it, “there is a shocking absence of criteria relating to the awarding and effective distribution of compensation to the holders of interests who were not individually identified”⁸¹.

In order to better understand the possibilities presented by the law, and the consequences of the different interpretations thereof, one should keep in mind the three different scenarios which may arise in the context of a popular action to obtain compensation for mass damages caused by an infringement of competition law: (i) all injured parties are individually identified during the proceedings; (ii) only some of the injured parties are individually identified; or (iii) no injured parties are individually identified.

It should also be kept in mind that the popular action need not immediately determine the compensation to be awarded (be it globally or individually). This is a matter that may be left for an ulterior moment, during the execution of the judgment – the so-called liquidation phase⁸². Indeed this has been the option (validated by the Supreme Court) in previous civil popular actions⁸³. However, this merely postpones the moment when the court will be confronted with the issue.

Let us begin by assessing the scenario in which all or some of the injured parties have been identified.

It seems to be settled, in the courts and in the vast majority of doctrine, that a popular action may and should lead to the ordering of compensation for the damages of injured parties who are individually identified during the proceedings and that, in these cases, general liability rules apply. This means that, aside from proving the unlawful behaviour in itself, the specific damage must be identified and quantified and the causal link must be established.

As a rule, the claimant in an *actio popularis* will, *ab initio*, not be in possession of sufficient information to individually identify all the injured

80 Pereira da Silva, 2000:50. See also Figueiredo Dias, 1999: 58, according to whom: “even if the holders of substantive legal positions are not denied the right to resort to popular action in order to have access to the courts, we see this situation as atypical, certainly not being the type of case which the legislator had in mind” (our translation).

81 Oliveira Ascensão, 2011: 6.

82 See articles 378 to 380-A of the CPC (or article 358 *et ss.* of the new CPC, adopted by Act 41/2013).

83 See, e.g.: SC, 7 October 2003; and SC, 7 January 2010.

parties. However, procedural law allows the court, upon request⁸⁴ or on its own initiative (given its extended powers under article 17 of the PAA), to require the defendant to produce the documents and information necessary to individually identify the injured parties, as long as this is necessary to prove a fact which has been alleged (e.g. that certain damages were caused to a group of identifiable persons)⁸⁵. But how helpful would this be, in reality?

In some cases (and, once again, considering the possibility of requiring the production of documents and information by the defendant), this may be a rather simple matter. For example, if the anticompetitive behaviour was an agreement to raise prices from A to B, and the product/service in question was provided at a homogenous price to all clients, who, by the very nature of things and circumstances, purchased only one unit⁸⁶, then the causal link will be clear and the damage will correspond to the difference between the prices before and after the increase agreed upon.

But one should expect the reality of the vast majority of mass damages antitrust cases to be far more complex and heterogeneous. The bottom-line is that, very often, it would be virtually impossible for the court to control that liability requirements have been met for each individualized injured party and to assign each of them their respective compensation. In other words, in a great number of cases, it will simply not be rational to even attempt to take the option of individual identification of injured parties.

The main issue, then, becomes: what to do about cases when injured parties have not been individually identified?

Here, there would seem to be, essentially, two schools of thought in Portuguese legal doctrine.

84 See articles 519(1) and 528 of the CPC (or articles 417(1) and 429 of the new CPC, adopted by Act 41/2013).

85 Under articles 533 and 519(3) of the CPC (or articles 434 and 417(3) of the new CPC, adopted by Act 41/2013), the defendant will only be able to refuse the production of such documents and information if it can base its refusal on one of the motives foreseen in the law. An issue that should be expected to be debated is whether the production, before a court of law, of information which allows for the individualization of customers, without their prior consent, would be in breach of personal data protection law. However, it may be argued (namely by analogy with the provisions of article 519-A of the CPC, or of article 418 of the new CPC, adopted by Act 41/2013) that no such infringement would occur as long as guarantees are put in place to ensure that this information is requested and used only for the purposes of the action in question, and is necessary thereto.

86 This is not a purely academic example. Such a situation (or at least rather close to it) was identified by the PCA in June 2011. Seven driving schools in Madeira were found to have agreed on prices for a period of four months.

Article 22 foresees two types of compensation, which may be awarded upon request or on the court's own initiative⁸⁷:

- (i) Individual compensation: “the holders of interests who are identified are entitled to the corresponding compensation in accordance with the general rules of civil liability” (Art. 22(3)); and
- (ii) Global compensation: “compensation for a violation of the interests of parties who are not individually identified is set globally” (Art. 22(2)).

One school of thought argues that both Art. 22(2) and (3) may be applied to homogenous individual interests, meaning that a mass damages popular action may lead to the payment of both individual compensation, for those injured parties who have been individually identified, and of global compensation, for the remainder⁸⁸.

Another school of thought argues, in essence, that the choice between individual and global compensation depends solely and necessarily on the type of interests at stake. Global compensation would be reserved for diffuse or collective interests, “which are not to be individualized”, and individual compensation would be reserved for homogenous individual interests (those for which “individualization is indispensable”)⁸⁹. However, it would seem that the thesis of the author who is deemed to be the initial proponent of this approach has been misinterpreted, since he himself argues that homogenous individual interests may, under certain conditions, lead to the granting of global compensation, and that the holders of such interests must be given access to a part of that global compensation⁹⁰.

It so happens that the Supreme Court seems to have taken up the second school of thought. In its 2003 judgment on the mass damages claim of *DECO v. Portugal Telecom*, even though it admitted that the interpretation of these

87 In this sense, see, e.g.: Marques Dias, 2009: 33

88 See Payan Martins, 1999: 117 *et ss.* – this author warned that the drafting resulted from the merging of opposing views during the legislative process and that courts might come to interpret this provision in such a way as to, effectively, restrict *actio popularis* to the status of an instrument useful only to protect diffuse interests, but stated that such an interpretation would not be consistent. Other authors also do not seem to exclude global compensation for homogenous individual interests – see: Oliveira Ascensão, 2011: 6; and Sérvulo Correia, 2010: 112-113.

89 Doctrine that refers to this school of thought generally quotes Teixeira de Sousa, 2003: 171-174.

90 In accordance with the clarifications provided by Prof. Teixeira de Sousa in a meeting in February 2013.

legal provisions “raises many doubts”, the Supreme Court said it “seemed certain” that this type of case (homogenous individual interests) calls for the payment of individual compensation, global compensation being excluded⁹¹. The Court was well aware that there “may be difficulties in implementing its judgment” (i.e., in injured parties actually being compensated), but ascribed this to the “manifest technical imperfections” of the PAA. Another mass damages popular action also led (at least potentially) to individual compensation⁹², and we are unaware of any example of global compensation being provided in a popular action relating to homogenous individual interests.

A possible explanation for the judiciary’s favouring of this position is that it is more harmonious with the general theory of civil liability, the application of which the courts are more familiar with. Ironically, the right of popular action was created precisely as an exception to the general rules of civil liability, and in trying to interpret it within the framework of these general rules, courts will effectively deny a large part of its usefulness for mass damages actions.

However, since no value is ascribed to judicial precedent in the Portuguese legal order, courts remain free to interpret the provisions of the PAA, in future cases, in accordance with the first school of thought. And this, we believe, they should do, namely because it is the most appropriate interpretation, based on the literal, systemic and teleological elements, and the only one which prevents a violation of the constitutional right of access to justice and of the constitutional right of *actio popularis* in itself⁹³.

From a *literal* approach to interpretation, it must be recognised that Art. 22(2) and (3) make no distinction between the types of interests at stake, assigning individual or global compensation exclusively on the basis of whether the holders of the interests “are identified” or “are not individually identified”⁹⁴.

91 SC, 7 October 2003.

92 SC, 1 July 2010.

93 As highlighted in Otero, 1999: 878 (referring, also, to the opinion of Gomes Canotilho and Vital Moreira), the right of *actio popularis* “is not foreseen in the Constitution as an exceptional institute, but rather it expresses an actual fundamental right” (our translation). As it does not have an exceptional nature, restrictive interpretations become all the more sensitive.

94 It should be recalled that, under the general principles of interpretation of the Portuguese legal system, the interpreter may not arrive at a result which “has not even a minimum of verbal correspondence in the letter of the law, even if imperfectly expressed”, which is arguably the case with the interpretation proposed by the second school of thought.

Furthermore, Art. 22(4) stipulates that the right to compensation becomes time-barred 3 years after the judgment becomes *res judicata*, and Art. 22(5) stipulates that the “amounts corresponding to time-barred rights shall be surrendered to the Public Prosecutor’s Office” (to pay attorney fees and fund access to the courts and other popular actions). Under the second school of thought, Art. 22(5) becomes entirely senseless. Indeed, if only those interests “which are not to be individualized” can lead to a global compensation, there would never be any determined compensation amount that could become time-barred and thus be surrendered to the Public Prosecutor’s Office⁹⁵.

From a *systemic* approach to interpretation⁹⁶, it should be recognized that, while the PAA is admittedly flawed, many of those flaws (in this context) derive precisely from the fact that it establishes a single legal regime for the compensation of different types of interests. That being said, the Portuguese legal order contains one example of special rules for civil popular action aimed at the compensation of homogenous individual interests in a specific field, that of securities⁹⁷. And these special rules confirm that the legislator allows for the possibility of global compensation in the case of homogenous individual interests, at least in that case, setting aside the argument that there is some overriding general principle of liability in our legal order that requires the courts to follow the second school of thought.

Under Art. 31(1) of the Securities Code, a popular action may be initiated to protect the collective or homogenous individual interests of (certain) investors. If the application is successful, the “conviction obtained should indicate the entity in charge of the receipt and management of the indemnity due to those shareholders not individually identified [i.e. their part of the global compensation], designating, according to the circumstances, sinking funds, associations for the defense of investors or one or various shareholders

95 A global compensation could never be broken down into individual compensations that could be claimed by individuals, so there would be no individual rights that could become time-barred. And individual compensations would only be quantified following a specific action by the holders of the respective individual rights, so that: (a) either they would initiate these actions before the 3 years deadline, and then the right would not be time-barred; or (b) they would not initiate these actions before the deadline, and the right would become time-barred without the court ever having quantified how much compensation was owed.

96 Under article 9(1) of the Civil Code, interpretation of the law should, among other factors, “mostly keep in mind the unity of the legal system”.

97 Art. 31 of the Securities Code. This provision has been described as a “significant deepening of the regime relating to the reparation of damages” resulting from article 22 PAA (our translation) – Mata de Almeida, 2002: 39.

identified in the action”⁹⁸. And any “indemnities that are not paid, due to being time-barred or the impossibility of identifying the respective shareholders, should revert to” the respective sinking fund or to the investors’ compensation system⁹⁹. The parallel with what happens to compensations not claimed within the deadline, under Art. 22(5) of the PAA, is obvious.

From a *teleological* approach to interpretation¹⁰⁰, it should be highlighted that the PAA implements the constitutional right of popular action, foreseen in article 52(3)(a) of the Constitution. This constitutional right includes “the right to apply for the appropriate compensation for an aggrieved party or parties”, and while the provision allows for the terms in which this is to occur to be determined by law, the law cannot breach the limits imposed by the constitutional provision. It is clear that the right of popular action, as foreseen in the Constitution, includes the right to obtain “appropriate compensation”. This is an expression of the fact that this right ultimately seeks to overcome, in so far as possible, a shortcoming of the legal system, that leads to situations of mass damages (involving small claims) being deprived of any viable means of judicial enforcement, in breach of the constitutional right of access to justice. Furthermore, *actio popularis* allows for the pursuit of the public policy objective of dissuading illegal behaviours¹⁰¹ and of finding economically efficient and rational ways of enforcing the law.

Thus, if two interpretations of the PAA’s provisions on compensation are possible, one leading to an effective (even if imperfect) mechanism of compensation that also has the desired dissuasive effect, and another leading to the absence of any feasible mechanism of compensation of injured parties (and the absence of dissuasive effect), the first interpretation must be chosen as the only one which does not contradict the constitutional provision in question and pursues the *ratio legis* of the PAA.

Indeed, the end result of the second school of thought is that popular actions will never (or almost never) be capable of leading to any form of actual

98 Art. 31(2) of the Securities Code. Confirming that this global compensation is available for actions in defense of individual homogenous interests: Oliveira Ascensão, 2011.

99 Art. 31(3) of the Securities Code.

100 Under article 9(1) of the Civil Code, interpretation of the law should, among other factors, “reconstitute the legislative mindset”.

101 Sérvulo Correia, 2010: 113, noted that the “possibility of fixing the compensation on an overall basis means that the perpetrators can be prevented from gaining advantage from the damage even when it is not possible to establish the exact extent of the individual damage suffered”.

compensation of mass damages, as only individual compensation can be used, which requires the use of general liability rules. But the extension of the right of popular action to the protection of homogenous individual interests was meant, precisely, to create a mechanism for the compensation of damages that cannot be compensated through the common procedures and general liability rules.

It seems hard to imagine any scenario where it might prove economically rational for claimants who suffered damages in the amount of 5 euros to go through the steps required to individualize their specific damages and causal link¹⁰². And from the macroeconomic perspective, the cost of assessing each of such claims individually would be absurdly disproportional. The potential total utility deriving from the popular action would be completely outweighed by the costs to the injured parties and courts.

Finally, the interpretation proposed by the second school of thought violates the principle expressed in article 9(3) of the Civil Code¹⁰³, as it rests on the assumption that the legislator meant to say something other than he really said.

Granted, the first school of thought raises some problems (as does the second), given the PAA's lack of detail about how global compensation is to function, in practice. But that is a legal lacuna which must be filled in accordance with the methods foreseen for that purpose in our legal order¹⁰⁴.

How would one go about quantifying a global compensation for homogenous individual interests?

Generally, a global compensation can be determined:

- (i) By the court: when quantifying the global compensation, the Court would resort to equity criteria, in accordance with article 566(3) of the Civil Code¹⁰⁵, and would consider the global damage caused

102 It should also be noted that the Supreme Court has expressed doubts about who would have standing, following a declaratory popular action, to seek compensation for individualized damages (SC, 7 October 2003), which might constitute a further obstacle to obtaining compensation as a result of a popular action.

103 Under this provision, in "determining the meaning and scope of the law, the interpreter shall presume that the legislator foresaw the best solutions and was able to express his thoughts adequately".

104 This, of course, until the legislator sees fit to clarify the legal framework.

105 This is one point on which doctrine seems to be unanimous – see, e.g.: Sérvulo Correia, 2010: 113; Teixeira de Sousa, 2003:166. This author also notes that "the applicant need not quantify this compensation in a precise amount, since article 569 of the Civil Code dispenses the person requesting compensation from defining the exact value it ascribes to the damages and article 471(1)(a) of the CPC (or article 556(1)(a) of the new CPC, adopted by Act 41/2013) allows for the formulation of a generic request when it not yet possible to determine, definitively, the consequences of the unlawful fact" (idem, our translation). For guidance on the manner of quantification of antitrust damages, specifically, see: European Commission, 2011.

- by the practice in question, subtracting the value of individualized compensations already (or simultaneously) awarded and the damages caused to parties who exercised the right to opt-out¹⁰⁶;
- (ii) By the applicant and defendants, through a settlement: such a settlement would be subject to control by the court and the Public Prosecutor's Office (as explained above);
 - (iii) By an arbitral tribunal: in 1999, Payan Martins had already suggested, *de jure condendo*, that a solution for these situations would be to organize payments exclusively through a simplified arbitration procedure¹⁰⁷. Subsequently, the CPC was revised so that it now allows for liquidation through (voluntary) arbitration¹⁰⁸.

How would one manage the distribution of the general compensation among the injured parties who might come forward following its awarding¹⁰⁹? Unlike Art. 31 of the Securities Code, Art. 22 of the PAA does not seem to allow for the transfer of the management of this distribution to another entity, so that this management would remain with the court.

The procedure to have access to a part of the global compensation cannot imply demonstrating individualized damages and specific causal link, or we'll be right back to the situation of denial of justice and compensation because of the economic irrationality of processing each request individually. While there is very little to go on to build a reply to this question, we would suggest that an equitable solution might be for the judgment that sets the global compensation to determine, at the same time, a simplified procedure and criteria for injured parties to have access to a pre-determined part of the compensation¹¹⁰.

106 In this sense, see Payan Martins, 1999: 119. The approach herein suggested also avoids turning a global compensation into a punitive measure, dissociating it from the reality of compensating actual damages caused to fragmented interests – the ultimate goal is not to punish, but to compensate injured parties, in so far as possible.

107 Payan Martins, 1999: 122.

108 See article 380-A of the CPC (or article 361 of the new CPC, adopted by Act 41/2013).

109 And what if the amount of damages of the injured parties who come forward exceeds the total amount of the global compensation? Some authors argue that, because of the *res judicata* effect associated to popular action, the right to effective and full compensation requires that, if the global compensation awarded proves to be insufficient to cover all damages, those who were not fully compensated may still initiate separate court proceedings to rectify this situation (for a description of this position, see: Marques Dias, 2009: 33).

110 A similar - but not entirely identical – approach to that which is here described was suggested by Prof. Teixeira de Sousa in a meeting in February 2013.

Staying close to the letter of Art. 22(4) APA, the court could, e.g., determine that a certain part of the compensation would be awarded to all injured parties that come forward within the 3 year deadline and simply demonstrate that they meet the subjective qualifying requirements (such as having bought the products in question from the defendants during the relevant period). This may be made simpler by requiring the defendant to identify all its clients who meet those requirements (i.e., who are “injured parties”, for the purposes of that popular action), the court needing merely to verify if the person is included in the list provided and to control cases of inconsistencies¹¹¹. The part of the compensation to which each injured party would be entitled would be based on the court’s estimate of the amount of injured parties and damages, which could also be formed on the basis of documents and information that the defendants would be compelled to provide¹¹².

And what happens to the part of the global compensation that is not claimed? The answer to that question is explicitly provided for in Art. 22(5) of the PAA: it is turned over to the Public Prosecutor’s Office which will deposit it in a special account and will use it to pay attorney fees, when applicable, to support access to the courts and to provide financial aid to the promoters of popular actions that require it with due justification.

111 The non-indication by the defendant of some of the clients who met the subjective qualifying requirements (and who subsequently come forward and prove that they meet those requirements) could constitute a breach of a court order and the provision of false information to the court, with the normal legal consequences associated thereto.

112 To provide a hypothetical example of this approach, let us imagine that a monopolist that provides certain services abuses its dominant position by imposing, during the year 2012, an access fee that is not justified by costs associated to granting such access, expressed as a percentage of business volume (i.e. a variable fee per client). A court that finds that competition law was thus infringed could ask the company to provide it with the total number and identify of its new clients during the year 2012, to whom such a fee would have been imposed, as well as the total amount of access fees charged. It would then calculate the fixed amount of the global compensation as the total amount of access fees charged in 2012, and stipulate that each injured party would be entitled to a pre-determined part of that global compensation (corresponding to the total amount divided by the total number of new clients). Subsequently, it would order that any injured party (already identified by the defendant or mistakenly omitted from the list provided to the court) could come before the court and ask that their portion of the global compensation be paid to them, by merely identifying themselves as one of the injured parties and expressing that intention. After 3 years, whatever amount of the global compensation would be left over would be surrendered to the Public Prosecutor’s Office, in accordance with article 22(5) of the PAA.

An alternative, already mentioned above, the viability of which would namely be dependent on the number of injured parties, would be for the court to order the defendant to provide it with enough information to determine individual compensations. In this situation, that would require the defendant listing each new client in 2012 and the precise amount of the access fee charged to each.

An important aspect to keep in mind is that the PAA establishes the liability of the infringing person for damages caused to “the injured party or injured parties”¹¹³. Crucially, therefore, while companies may not initiate an *actio popularis* themselves, they are seemingly entitled to compensation if they can be identified as having suffered damages as a result of the unlawful behaviours identified by the court¹¹⁴. This is an issue that must still be tested before the courts.

In certain cases, however, care must be had to avoid imposing double compensation, specifically when compensation is to be paid both to final consumers and to intermediary undertakings, when the latter have fully passed on to consumers the costs associated to the unlawful behaviours. This same issue must be pondered when establishing the causal link between the unlawful behaviour and the damages argued by the claimants. It is unclear how the courts would react, for example, to a popular action aimed at compensating (exclusively) consumers for antitrust infringements carried out by a company on an upstream market, whose consequences were passed on to them by intermediary undertakings. The spirit of the law would seem to be favourable to such a proposition, as consumers would be protected and the intermediary undertakings would, in such a case, already have passed on the damages to their clients. And yet, the establishment, in such a situation, of a causal link with the original anticompetitive behaviour may depend on the nature and characteristics of that behaviour.

Finally, under article 26 of PAA, the PCA is obliged to cooperate with the courts and the intervening parties in a popular action relating to a competition infringement. These may, namely, require information and copies of documents in the possession of the PCA to be produced before the court. Only the due protection of legally mandated confidentiality can justify a refusal to provide such information or documentation.

113 Article 22(1) of the PAA.

114 It would be a rather inequitable restrictive interpretation of the law if only consumers were allowed to be compensated for infringements, e.g., by an electronic communications service provider, while other legal persons, such as SMEs, which had suffered similar damages, at the same level (i.e., as final users of that service) would not have access to compensation. Furthermore, it would significantly diminish the deterrence effect of popular actions.

2.2.2. Overview of precedents

Despite the extensive debate around collective private enforcement, there is a striking lack of thorough empirical studies available¹¹⁵.

In Portugal, the *actio popularis* mechanism is often used, by single individuals, in cases relating to public roads or accesses¹¹⁶. There is, to our knowledge, no collected statistical information on civil popular actions¹¹⁷. In so far as we could determine, although theoretically available, no civil popular action has claimed non-material damages¹¹⁸.

After researching the case-law of the Supreme Court, SOUSA ANTUNES has noted that: “it seems fair to conclude that the law of popular action has been applied very scarcely, whether due to the fact that the intervention of civil society is still in its early stages, or due to the prohibition on *quota litis* agreements or to the doubts that the application of Law 83/95 has raised”¹¹⁹. If this is already true of civil popular actions, in general, the outlook for civil popular actions specifically concerning competition law is, by far, bleaker.

There has been only one civil popular action aimed at enforcing, *inter alia*, competition law. Following the introduction of an allegedly unlawful “activation charge” by Portugal Telecom in 1998 and 1999, the Portuguese Consumer Protection Association (DECO) sued the telecom incumbent, on behalf of all of its clients¹²⁰. A total of approximately two million Portugal Telecom customers were represented in the case concerning the 1999 charge, and only five persons opted out. A separate popular action ran concerning the same charge in 1998, but did not raise antitrust issues.

In the case relating to 1999, the application was successful, but on grounds that had nothing to do with competition law, these arguments never having

115 See, as a notorious exception (relating to Japan): Vande Walle, 2011.

116 See, e.g.: SC, 14 February 2012; SC, 9 February 2012; SC, 13 July 2010; SC, 23 December 2008; SC, 13 January 2004.

117 The same is stated in Sousa Antunes, 2007:20. This author further provides the following information concerning administrative popular actions, between 1991 and 2003, based on data provided by the Ministry of Justice’s Office of Planning and Legislative Policy: “The number of cases brought by a popular action claimant was at its highest in 1991 (73) and lowest in 2002 (9). These represent a particularly small percentage of the total number of administrative cases considered (between 0.2 % and 4%)”.

118 Tortell, 2008: 3.

119 Sousa Antunes, 2007: 20.

120 SC, 7 October 2003. Appeal from Lisbon AC, 12 November 2002. See, further: Rossi & Sousa Ferro, 2012.

been discussed by the courts. However, since the Supreme Court referred specifically to competition law as one of the arguments raised by the applicant, and the admissibility of this claim was not challenged, it can be argued that, implicitly, this judgment confirmed that the PAA may be used in antitrust private enforcement cases.

The case took approximately 4 years, from the first to the last instance. The claimant did not ask the court to rule on compensation, nor did it attempt to demonstrate that the requirements for liability were met. Following this judgment, DECO and Portugal Telecom arrived at a settlement, for the estimated value of 120 million EUR (i.e. 60€ per client)¹²¹. This amount was paid out, not in direct payments, but in free national calls for all Portugal Telecom customers on 14 consecutive Sundays. It has also been noted that “PT also agreed to reimburse any customer who makes a claim for his portion of the 1998 call set-up charges”¹²², but no further information is available in this regard.

Although not an antitrust private enforcement case, it seems appropriate to briefly mention a more recent civil popular action case, for the value of the clarifications it brings. In a case concerning credit contracts associated to language schools, concluded by a Supreme Court judgment in 2010. In this case, in which an estimated 1.200 to 1.500 people were represented (with no opt-outs), DECO was not only successful in obtaining a declaration of the nullity of those contracts, but the court further ordered the defendants to return to the represented consumers the amounts paid under those contracts, to be liquidated following the judgment (which was to be publicized in accordance with Art. 19(2) of the PAA)¹²³. Although no precise follow-up information is available, information provided by DECO suggests that the injured parties in this case were notified of the possibility of obtaining compensation, and that all those who, by their own initiative and means, asked the defendant to return the respective amount were duly compensated.

121 However, it must be noted that this is merely an estimate of potential value to customers of the possibility of free calls on certain days open to clients. It is unlikely that this actually corresponded to an accrued number of calls on the designated days based on this possibility, and it should also be kept in mind that, in any case, the cost of such calls for Portugal Telecom is quite different from their price for consumers. In other words, the figure in question is likely to be highly inflated in terms of the real economic cost of the settlement for Portugal Telecom.

122 See Mulheron, 2008: 77-78.

123 SC, 1 July 2010.

3. ECONOMIC ASSESSMENT

It is, seemingly, uncontroversial to state that large undertakings are far more likely to seek compensation of antitrust damages through private enforcement than SMEs and consumers¹²⁴. While legal, cultural and contextual issues certainly play an important role in explaining this reality, the premise that market agents make essentially rational options – even if limited by the information available to them – would suggest that an economic explanation for this reality may be found.

Could it indeed be true, as suggested by SÉrvulo Correia, that “the Portuguese civil procedure provides the conditions of practicability (...) for the private enforcement of the competition rules”¹²⁵, and that it is only reasons beyond the legal framework that explain the scarce resource to antitrust private enforcement in Portugal? We have already seen that this does not seem to entirely hold true. Even if a solution may be found within the possible interpretations of the law, the interpretation that was expressed by the Supreme Court raises serious obstacles for the last, crucial, step of a popular action – the actual compensation of the damages suffered by the injured parties –, that jeopardise the usefulness of this mechanism as a whole, within this context.

In any case, understanding the extent to which the reduced (virtually inexistent) use of *actio popularis* for antitrust private enforcement is explained by economic factors (and, specifically, by microeconomic factors), or, in other words, understanding the causes and precise limits of “rational disinterest”, is

124 According to one author: “When the victims of illegal practices – say, a cartel – are large companies, they would always bring a lawsuit to obtain compensation. (...) But when the victims are consumers and small businesses, they would not go to court if their losses do not justify the costs of litigation and the uncertainty of the outcome. They often receive no compensation for the harm they suffer” – Almunia, 2010.

125 SÉrvulo Correia, 2010: 113. The same author, however, also indicates that the explanations for the limited extent of private enforcement include: “the unsuitability of the legal system as a whole for the solution of this kind of dispute” (p. 114). Other authors have pointed out that: “We should not jump to the conclusion that just because we do not observe too many class actions, the legal framework and the procedural rules are improper. The reasons for the apparent lack of interest by the citizens for class actions in Portugal could lay elsewhere” (Gouveia & Garoupa, 2012). The PCA itself has expressed that it believes that: “the Portuguese legal order is, generally, well equipped to answer the issues that arise in the framework of [private enforcement], even if it should be admitted that the introduction of a few special rules could facilitate the success of such actions. Within the issues identified by the European Commission, the PCA considered particularly relevant those relating to access to evidence (...), and the indispensable coordination between so-called public and private enforcement, including the safeguard of the leniency regime” (PCA, 2007:25, our translation). The PCA had previously adopted an internal document wherein it expressed an opinion on the required reforms of collective private enforcement of competition law in Portugal (PCA, 2005:54), but the document is not publicly available (Botelho Moniz & Rosado da Fonseca, 2008: 765 noted that the proposal included in this document “was never adopted by the Government and it is not envisaged to be adopted in the future”).

a crucial step to allow for a pondered reconsideration of the legal framework, so as to increase incentives – or decrease disincentives – for the private enforcement of competition law.

It may generally be assumed that the choice to proceed with litigation aimed at obtaining compensation for damages arising from infringements of competition law is grounded in an economical assessment of certain and uncertain (potential) costs and benefits.

That being said, it must be kept in mind that an abstract assessment by consumers and SMEs of the level of damages that would justify litigation is not likely to correspond to the level that the same persons would find motivating enough, when faced with the detailed costs and benefits assessment of a concrete litigation scenario. For this reason, the usefulness of previously carried out studies that rest on such abstract assessments is limited¹²⁶.

The diversity of possibly relevant factors and their inherently subjective assessment by different economic agents makes it extremely difficult to arrive at a uniform description of the conditions that need to be met in order for it to be economically advantageous to initiate such legal proceedings.

In what concerns costs, for example, the decision to initiate a suit taken by a consumer association that has on-staff lawyers is grounded in a significantly different assessment than that of a group of consumers or small companies who would have to take into account the legal fees of external counsel¹²⁷. Private enforcement between undertakings in a vertical relationship may also raise the prospect of costs connected to the breach of business relations with the counterparty, as well as to negative effects on business relations with other companies.

In what concerns benefits, some companies may find sufficient motivation in the impact that a competition suit would have to its competitor's public image, or in causing financial difficulties for a competitor by forcing it to shoulder the burden of legal fees and to provision the amount of the claim in its budget.

126 See, e.g., Civic Consulting, 2008. While half of the respondents to a study “expressed the view that it was not worth going to court for less than 200 euros” (ANACOM, 2011: 1), it can safely be assumed that only a significantly higher amount would actually justify the expense and time involved in proceeding with litigation in a specific situation.

127 However, this factor should not be overestimated, as the “on-staff” lawyers will hardly ever be specialized in competition law, and often specialist knowledge is deemed to be essential for the successful private enforcement of competition law.

Furthermore, the factors that go into the decision of initiating a law suit are not the same that are pondered in the context of counterclaims, wherein the larger part of the associated costs already derive from the required defense in the main suit.

All this being said, it is possible to generally identify the main factors of costs and benefits in any law suit aimed at the private enforcement of competition law, abstracting from variables that may alter motivations and conclusions in marginal cases.

The weighing of these costs and benefits is based on risk assessment criteria, which will vary most significantly in function of whether the suit is “stand-alone” or “follow-on”. In the latter case, the burden of proof is eased in practice, and will tend to focus on the quantification of damages and the establishment of a causal link¹²⁸.

Costs

The main costs to be considered are: court costs, lawyer fees, time and organizational costs, and possible retaliations.

At the outset, in principle, the decision to initiate a private suit for the enforcement of competition law carries the certainty of costs (lawyer fees, court costs – at least transitionally – and time), while presenting no guarantee of benefits.

Court costs vary significantly between common declaratory actions and popular actions.

In popular actions, there are no initial costs and, if the case is successful, the applicants will not have to pay for any costs whatsoever. If they are not successful, they will have to pay a much smaller percentage (between 10% and 50%) of normally applicable costs. That being said, these may not be negligible.

As for common actions, the amounts vary drastically depending, namely, on the number of plaintiffs and value of the action. Crucially, such costs are substantially higher than in popular actions and grow in direct proportion to the number of applicants.

Lawyer fees (including expenses) may be assumed to be identical for the two types of actions, especially considering that the average duration and number of documents to be produced in the context of litigation is very similar for both types of cases and that the knowledge of substantive law required is the

128 See: Sêrvulo Correia, 2010: 115-116.

same. Although legal aid is theoretically available, it is highly unlikely that, in its current format, it could ever play a role in popular actions¹²⁹, or even in common declaratory actions.

Lawyer fees vary significantly depending on whether one resorts to specialists or to non-specialist lawyers. As would be expected, the available precedents suggest that the majority of private enforcement cases are handled by non-specialist lawyers, intervention by specialists tending to be limited to cases with very high claims. There is insufficient data to conclude whether resorting to specialist lawyers increases, in practice, the chances of success (even though that seems to be the generalized perception).

To arrive at an approximate estimate of lawyer fees per case, for the purposes of the present paper, based on our knowledge of the market, we estimated an average hourly fee of 60€ for non-specialist lawyers, and of 150€ for specialist lawyers. Given an average duration of 5,5 years per case¹³⁰, and assuming the need for an application, a reply and a trial, in the first instance, as well as the corresponding steps in the second instance, we arrived at a working estimate of an average number of billable hours per case of *circa* 250 hours. Further considering the usual practice of capping fees at a predetermined maximum level, it would seem that a reasonable (possibly low-balled) working estimate of average lawyer fees per such case may be of 15.000€ for non-specialist lawyers, and 37.500€ for specialist lawyers.

However, it must be kept in mind that, under both common declaratory actions and popular actions, a successful applicant may expect to see at least part of its lawyer fees borne by the losing party. This means that a degree of risk assessment is required in the inclusion of these costs in the initial decision to litigate.

129 As noted in Tortell, 2008: 6-7: "Although a *pro bono* system exists in Portugal, such specific cases are unlikely to take advantage of that system, which officially involves the random allocation of a lawyer for particular cases".

130 It has been suggested that popular actions may be faster, but it is not possible to arrive at such a conclusion, for Portugal, based on a single precedent of a popular action relating to competition enforcement in which, all the more, competition law was not discussed. That being said, one author's empirically analysis led to the conclusion that the average length of civil popular actions is 5 to 7 years (Tortell, 2008: 7), i.e. the same average we identified for common declaratory actions. For these reasons, we believe it justified to use the same estimated average duration for popular actions as the one identified for common declaratory actions. We would note that this implies a significant difference in relation to American class action suits, which tend to take considerably longer (see Keske, 2009: 106). Also, the Portuguese Government has expressed a willingness to consider adopting shorter procedural time limits at various stages of collective redress actions (MNE, 2011: 6).

Furthermore, it should be borne in mind that, even in a hypothetical scenario of assured victory, there is a quantifiable economic cost associated to paying portions of the lawyer fees throughout the period of litigation, which will not be reimbursed. Thus, for example, in a case lasting 5,5 years, assuming that the above mentioned amounts are paid in 6 equal parts (one per year), and assuming a remuneration rate of 5% if the amounts in question were otherwise invested throughout the same period, funding an action with non-specialist lawyers (even in case of success) costs 2.795€, and funding an action with specialist lawyers costs 6.980€.

While the Portuguese legal system does not allow lawyers to propose “no win, no fee” scenarios, or to collect a percentage of the damages awarded to the claimants (*quota litis*)¹³¹, it does allow for an initial low fee to be topped off by a “success fee”, which would reduce the amount of lawyer fees that must be born (even if just temporarily, in case of success) by the applicants, and, therefore, also the above mentioned “funding” cost.

The costs associated with time and organization of the file relate, in essence, to organizational expenses such as mailings and processing plaintiff documents, and to the value attributed to all the time expended with the organization of the case that is not already covered by lawyer fees (“opportunity cost”). In common actions, a great deal of “organizational” effort is required during an initial phase (e.g. identifying plaintiffs and gathering powers of attorney), but every step of the procedure will continue to imply important costs, as all clients must be consulted whenever any important decision needs to be taken. Such costs must be multiplied by the number of plaintiffs, and thus will tend to become prohibitive, in themselves, after a certain number (considering the law of increasing marginal costs). Organizational costs in popular actions are much lighter, and may, indeed, be almost negligible from the perspective of the applicant. Additionally, it should be kept in mind that those wishing to initiate any such law suit will often have to dedicate a significant amount of time to collecting information, in particular given the information asymmetries infamously identified in antitrust enforcement.

131 Monteiro & Júdice, 2012: 198, single out prohibition of contingency fees as possible main reason for the failure of popular action in practice. Leskinen, 2011, makes a strong case for the need for some form of contingency fees, as a requirement to make collective antitrust private enforcement viable.

Finally, a rather significant factor that tends to be left out of the equation is the fear of retaliation. For companies pondering a common action, this may frequently prove to be a decisive obstacle, based on the possible severing of commercial relations with the company in question, or the perception that the action will be assessed as a negative factor by other companies when deciding to become (or continue as) clients or suppliers. On the other hand, for consumers, retaliation will not often be a relevant concern, which suggests that it is not a factor, at all, in popular actions.

Benefits

The main benefits to be considered are: compensation for damages and dissuasion of future infringements.

Given the absence of punitive damages in the Portuguese legal system, potential economic benefits are limited to the quantification of damages arising from the infringement in question (even though these are not restricted to patrimonial damages). As is demonstrated by the available national precedents, damages to be claimed, per person, can run from under 100 euros to several million euros.

The benefits arising from the dissuasive effect may weigh heavily at the level of public policy, but will not be relevant for the vast majority of potential plaintiffs' decision to initiate a specific antitrust suit. Even consumer associations seemingly tend to base their decision to litigate a specific case based on a costs and benefits assessment mostly limited to the universe of that case, and not to potentially generalized effects (even if its preliminary decision to attempt to identify antitrust private enforcement cases for it to pursue might have the general dissuasive effect in mind).

Excluding (to some degree) the perspective of the motivation of not-for-profit organizations such as consumer associations, it is crucial to stress that if a popular action is to be prosecuted by a lead plaintiff, in the decision to initiate the suit, the leader's costs are weighed only against his potential benefits, and not the potential benefits of all those represented¹³².

It has often been pointed out that lawyers themselves may take a lead role in the promotion of the private enforcement of competition law. With this in

¹³² Keske, 2009: 106, who also points out that spreading the costs among those represented does not seem possible outside mandatory schemes.

mind, market forces may be sufficient to push forward private enforcement, even when the compensation for damages, in itself, would not justify the law suit (or, at least, would not justify the decision to proceed, given the associated risk assessment), if lawyers are willing to finance the litigation, postponing a large part of their remuneration, with the expectation that the counterparty will, in the end, be sentenced to pay their attorney fees. In this perspective, it is the benefits to lawyers which are weighed against the costs. However, a specific manifestation of the “fear of retaliation” should be considered here, and may explain the failure of popular actions (and, specifically, of lawyer-led entrepreneurial litigation) in the private enforcement of competition law in Portugal: specialized lawyers may fear that their active promotion of popular actions may be damaging to their careers and, specifically, generate animosity among potential large clients¹³³.

Doctrine has tended to divide consumer claims into two groups, depending on whether it would be economically justified to proceed with individual or aggregated litigation (“group A” consumer claims or “Positive Expected Value” claims), or not (“group B” consumer claims or “Negative Expected Value” claims). It has been suggested that EUR 2.000 could function as an upper limit for the dividing line between the two groups, but that, particularly for antitrust private enforcement, a lower figure may be appropriate¹³⁴. Crucially, however, the vast majority of imaginable consumer antitrust private enforcement cases would involve damages far below that figure, not exceeding a few hundred Euros¹³⁵. The same may not always be true for antitrust private enforcement by SMEs.

There seems to be a general conviction that the *actio popularis* mechanism is a viable and more efficient manner of seeking compensation for a plurality of injured parties than that of common declaratory actions, even though there

133 This concern has already been expressed in Sérvulo Correia, 2010: 114. It should not be underestimated in the Portuguese context, where the market for specialized competition litigators is quite small. That being said, Sousa Antunes, 2007: 22, believes that “Portuguese law is compatible with entrepreneurial litigation, notwithstanding the prohibition on *quota litis*”.

134 See, e.g.: Ioannidou, 2011: 69 *et ss*. This author has noted that, in antitrust private enforcement, “it seems unlikely for consumers to bring claims exceeding several hundred Euros and in any case damage flowing from a competition”.

135 Ioannidou, 2011: 71.

is little empirical evidence to support this conviction¹³⁶. While the previous analysis certainly confirms that this procedure is economically more efficient, it is not clear whether it may truly be called “viable”.

Considering the estimates made above, it would seem to be economically irrational for even the most optimist of claimants to proceed with a popular action to seek damages for antitrust infringements in Portugal unless the expected benefits exceeded, at the very least, EUR 3.000 (or, in the case of a group of claimants, that each person’s share of those costs exceeded his/her share of the expected benefits). In many cases, that figure may be substantially higher, especially when complex substantive issues arise that require the intervention of a specialist. Common actions also do not seem viable below that threshold (except, possibly, if they are pursued through alternative dispute resolution mechanisms).

But more in-depth study and simulations are required to determine precisely what level of damages justifies such actions, especially considering that it is incorrect to simply divide the total costs by the total number of claimants, as the actual economic costs of a law suit in common proceedings grow in proportion to the number of claimants.

The viability of popular actions as an effective means of arriving at compensation for damages arising from anticompetitive practices is put in question, or perhaps even effectively prevented (considering the absence of precedents), by the following factors:

- (i) Imperfections and lacunae of the existing legal framework, together with restrictive judicial interpretations, which may make it impossible, in practice, to arrive at individual compensation in mass damages cases and to enforce declaratory judgments;
- (ii) Need for a person or persons wishing to shoulder the burden of costs arising, in the most optimist of scenarios, to at least EUR 3.000, with no expected return beyond any damages it may, itself, be entitled to;
- (iii) Limited financial resources of consumer associations;

136 In this sense, see Sousa Antunes, 2007: 31-32: “In the absence of statistical data, it can be pointed out that, from a pragmatic point of view, there is ample and significant legal theory which accepts that the use of the collective action motivated by the impulse of one representative for all the interested parties is a more advantageous solution than opting for the more traditional means of combining the interests of various parties in a single action”.

- (iv) Limitation of entrepreneurial litigation by lawyers, derived from the prohibition of *quota litis* agreements and the fear of “retaliation”;
- (v) Length of judicial proceedings (which becomes more and more dissuasive the smaller the claim);
- (vi) Lack of knowledge and experience of lawyers and judges with popular actions; and
- (vii) Cultural barriers (lack of litigation culture in Portugal)¹³⁷.

4. DARING TO DREAM

As we have seen, the existing legal framework already provides for a theoretically adequate instrument for the private enforcement of competition law, even in cases with a very large number of plaintiffs, each with very little damages. To go from theory to practice, only a few steps are required. Some may achieve the desired result by themselves, but most will only do so when combined with others. Some are simple, almost expectable, others bold and rather unlikely.

Changing mindsets

We would argue that there are two groups of stakeholders whose attitudes must change before (successful) mass damages actions become a reality in the Portuguese legal order. Ironically (or not), it is not the victims who can play a lead role here, given that, in the case of small claims, their apathy will continue to be rational in the absence of punitive or exemplary damages.

First, judges must accept that *actio popularis* was (also) meant, and can indeed be used, for the compensation of antitrust mass damages, and that it is up to them to fill the lacunae left by the legislator, particularly in what concerns the means of calculating and distributing global compensation. This would seem to be more a matter of shedding ways of thinking framed in the general theory of liability and in a pre-PAA mentality, as the courts have tended to be generally amicable to popular actions.

Also, subject to the appropriate arguing of facts by the applicant, courts may play a crucial role by using their powers of directing the production of evidence to require the defendants to provide the information required to

137 On this issue, one author noted: “Although the corporate-fascist regime of the «industrial conditioning», etc., has been extinguished, the (anti-) judicial-economic culture has been around for almost four decades and the general culture of competition law and civil liability has still not been properly established in a country that many say has «weak customs»” (Coutinho de Abreu, 2011: 113).

identify the persons who suffered damages (or, at least, their number) and to quantify those damages. In so doing, the courts would effectively force a partial internalization of the costs that had been illegally externalized to the injured parties, as well as creating an economic incentive for the defendants to reach a settlement or to agree to arbitration.

Second, specialized antitrust lawyers must become more familiar with the brave new world of possibilities opened up by the PAA¹³⁸, and a few, at least, must develop the entrepreneurial spirit (and, perhaps, the willingness to risk alienating possible clients) required to actively promote popular actions¹³⁹. A good sign that this shift may soon be upon us is that, for the first time, the Portuguese market is showing signs of a possible excess supply of lawyers specialized in competition law.

Changing administrative practice

The European Commission has taken it upon itself to include a call for private enforcement in all its press releases announcing decisions finding infringements of articles 101 and 102 TFEU. Similarly, the PCA, in furtherance of its role of promoting competition culture in Portugal, could include in its press releases concerning relevant decisions a message aimed at consumers, clients and competitors, clarifying their right to seek compensation for damages arising from the practices in question, and the manner in which such compensation may be sought¹⁴⁰. Other measures could also be taken by the PCA to actively promote private enforcement, namely adopting a clarified and simple procedure for accessing case-file information for the purpose of follow-on actions, and a predisposition to act as *amicus curiae* in such cases¹⁴¹.

138 Sérvulo Correia, 2010: 117, suggested lawyer training initiatives in partnerships between the PCA, the Bar Association and law schools.

139 As stressed in Delatre, 2011: 41: “the use of the popular action mechanism rests on the dedicated time and effort of experienced lawyers”.

140 Suggesting, in general terms, such an approach: CACCL, 2011: 4. See also MNE, 2011: 6 and 8; and ANACOM, 2011: 7.

141 Sérvulo Correia, 2010: 117: “If the cooperation provided for in Article 15 of Regulation No. 1/2003 is not to remain almost always a dead letter, it would be fitting for the lawmakers to establish a simple and practical procedure mechanism that delineates the contact between the various institutions in order for the Commission or the Competition Authority to provide information and opinions to the courts and produce written or oral observations”.

*Changing the law*¹⁴²

The following improvements to the existing legal framework would significantly increase the odds of *actio popularis* becoming an effective instrument for the private enforcement of competition law¹⁴³: (i) clarifying access to compensation; (ii) increasing economic incentive for entrepreneurial litigation; (iii) ending the *quota litis* prohibition; (iv) centralizing jurisdiction; and (v) introducing PCA notification obligation.

First, the current level of legal uncertainty concerning the possibility of actually obtaining compensation through a popular action does not bode well for the future of this constitutional right. Even though the courts can use general techniques of legal interpretation to fill the law's lacunae, it would be useful if the PAA were revised (or, alternatively, if special rules were added to the Competition Act itself) so as to clarify:

- (i) that *actio popularis* may be used to obtain individual and global compensation in mass damages cases (and, specifically, damages arising from antitrust infringements);
- (ii) that individual compensation should be decided and awarded, on the basis of general liability rules, to all injured parties who have been individually identified;
- (iii) that global compensation is to be calculated based on equity and on information (which the court may order the defendant to provide) concerning the number of injured parties and the average amount of damages caused by the infringement;
- (iv) that global compensation is to be distributed in equal parts to all persons who so request, within 3 years, and can prove that they meet the class (or injured party) criteria defined by the court; and

142 As this paper was being finalized, the European Commission published its Proposal for a Directive on Private Enforcement of Competition Law. While it would be premature to analyze the contents of this proposal at length, it should be stressed that it has focused on several issues that are discussed herein as useful improvements to the legal framework, including: (i) providing greater ease of access to evidence; (ii) making NCA and Commission decisions constitute full proof of infringements before civil courts (to facilitate follow-on actions); (iii) clarification that victims are entitled both to actual loss suffered and to lost profits; (iv) allowing for the awarding of damages in "passing on" scenarios; (v) establishing a presumption that cartels cause harm; and (vi) clarifying the repartition of liability towards the victims between a group of infringers.

143 A carefully presented and justified call for a review of the PAA, globally, can be found in Payan Martins, 1999: 128.

- (v) that the right of *actio popularis* extends to the enforcement of a declaratory judgment (*processo executivo*), and that this right can be exercised by the initial applicants or by anyone with a direct interest in the judgment's enforcement.

It should be noted that the frailties of the PAA in what concerns calculation and distribution of compensation and enforcement may, in practice, be partly compensated by companies' approach to business and public relations. Thus, for example, the mere fact that a judgment declaring an infringement can be obtained through popular action, together with its expectable publicity in the media (namely, but not only, thanks to Art. 19(2) of the PAA), may be enough to pressure a company to reach a settlement on compensation¹⁴⁴, or to agree to arbitration in the liquidation phase. And, in cases where each injured party's damages are quantified by, or clearly quantifiable as a result of, the terms of the judgment itself, defendants may comply with the court's decision and compensate all those clients that fall within the class and contact them for that purpose, without it being necessary to resort to judicial or to arbitral liquidation¹⁴⁵.

Second, it seems to be the case that the existing framework does not provide sufficient economic incentive for lawyers and consumer associations to actively promote the private enforcement of competition law through popular actions. Presently, at best they can expect to be refunded for legal fees and to be compensated for damages if they themselves were injured parties. For organizations with very limited resources, the potential benefits of promoting a popular action will, thus, rarely outweigh the costs associated thereto. The Portuguese legal order has already found a way of creating the needed added economic incentive in the field of securities law.

Indeed, under article 31(2) and (3) of the Securities Code¹⁴⁶:

"2. The conviction obtained [in a popular action] should indicate the entity in charge of the receipt and management of the indemnity due to those shareholders not individually identified, designating, according to the circumstances, sinking

144 As the 2003 *DECO v. Portugal Telecom* case more or less demonstrates.

145 As apparently happened following SC, 1 July 2010.

146 These provisions were described as a "significant deepening of the regime relating to the reparation of damages" resulting from article 22 PAA (our translation) – Mata de Almeida, 2002: 39. On the lacunae of these provisions, see Oliveira Ascensão, 2011: 12.

funds, associations for the defense of investors or one or various shareholders identified in the action.

3. Indemnities that are not paid, due to prescription or the impossibility of identifying the respective shareholders, should revert to:

- a) The sinking fund relating to the activity giving rise to the indemnity;
- b) In the absence of the sinking fund described in the previous sub-article, the investors' compensation system".

In other words, adapting this system to the private enforcement of competition law, the full amount of the global compensation determined by the court would be paid to the applicant(s) (e.g. the consumer association), who would be responsible for distributing the compensation among injured parties, as determined by the court, and would be entitled to keep the amount not claimed within 3 years¹⁴⁷.

This solution has two added advantages. On the one hand, it eliminates the essentially crippling doubts as to how the Public Prosecutor's Office is to manage funds left over from global compensations, under the existing rules of the PAA. On the other hand, it provides a more realistic approach to compensation. It has been pointed out that it is, in practice, impossible to achieve full compensation for damages caused to individual consumers within the context of antitrust private enforcement in group B claims¹⁴⁸. Indeed, even if a popular action is successful, and even if collective compensation is paid out, e.g., to a fund that is then responsible for distributing it among the injured parties, there is likely to be a number of them who are too passive to do whatever it may take to obtain their part of the compensation. Thus, it has been argued, as a matter of public policy, we should focus on protecting the "collective consumer interest", with popular actions being perceived as a means not only to achieve (partial) compensation of victims, but also as an instrument of deterrence and of competition policy itself¹⁴⁹.

147 Care would have to be taken to ensure adequate publicity and simplicity of access, so as to combat the incentive of the applicant for apathy in actively promoting the distribution of the global compensation.

148 Ioannidou, 2011: 73 and 83.

149 Ioannidou, 2011: 74. This solution is, therefore, recommended by Ioannidou, as the most likely to make popular actions a viable instrument: "As long as priority is given to individual consumers to claim their respective damages, no violation of the compensatory principle can be established, where consumers did not claim individually, thereby allowing the damages to be retained by the consumer organisation" – Ioannidou, 2011: 83.

Third, ending the *quota litis* prohibition would eliminate the inevitable financial burden of funding legal fees and facilitate the entrepreneurship of specialized lawyers. This is a reform, however, which would have to encompass all legal practice, framing it in a much broader discussion and making it a very unlikely (and not an essential) development.

Fourth, it would be very helpful, allowing for the avoidance of typical mistakes of generalist courts, if the private enforcement of competition law – regardless of the procedure adopted – were to be centralized in a specialized court, just as appeals relating to PCA decisions have been centralized in the Competition, Regulation and Supervision Court (and, before its creation, in the Lisbon Commercial Court)¹⁵⁰.

Finally, under article 75(1) of the Criminal Procedural Code, when the investigating authorities become aware of possible injured parties, they are obliged to “inform them of the possibility to submit a request for civil compensation within the criminal procedure and of the formalities to be observed”. While granting the PCA the power to include in its administrative procedure the compensation of injured parties would likely meet serious constitutional obstacles, there is nothing to prevent, and much to gain from, the revision of the Portuguese Competition Act so as to oblige the PCA, whenever possible, to personally notify injured parties of their right to initiate autonomous private enforcement actions, whenever (some or all of) these parties have been identified in the course of the adoption of the PCA’s decision.

It certainly seems to be the case, as has been argued, that the current situation “*will take time to change*”¹⁵¹. And yet, we will surely be forgiven for daring to dream that the change is coming sooner, rather than later, and that the required conditions for taking several steps forward are already present.

150 See: Sérvulo Correia, 2010: 110, 114 (“the application of competition law is highly complex: it involves possessing extensive legal knowledge and permanently monitoring developments in the case-law of the European Courts and practice of the Commission and Competition Authority”) and 117. This author has also highlighted that the dispersion of jurisdiction for these actions throughout all civil courts also leads to a dispersal of financing of antitrust training, which must be made available to all civil court judges. Indeed, it seems to be a common opinion among Portuguese competition practitioners that the enforcement of competition law by Portuguese courts “*falls short of expectations since Portuguese judges seldom have the skills to deal with economic issues*” (Gorjão-Henriques & Vaz, 2004: 638; quoted and reaffirmed in: Botelho Moniz & Rosado da Fonseca, 2008: 763-764).

151 Gorjão-Henriques & Vaz, 2004: 638.

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