# THE ART OF CONSISTENCY BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT: PRACTICAL CHALLENGES IN IMPLEMENTING THE DAMAGES DIRECTIVE IN PORTUGAL

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Abstract: *The AdC was entrusted with the mission of submitting a draft legislation to the Portuguese Government for the purposes of implementing the Damages Directive. This article shares the AdC's experience in this regard, by reflecting, with minor adjustments, the speech made at the occasion of the XII Treviso Antitrust Conference, which was held in May 18, 2016. On the one hand, it describes the strategy adopted by the AdC throughout the transposition process, its underlying goals and the steps undertaken to achieve it. On the other hand, it discusses some of the public policy challenges faced in this context, by highlighting the main substantive solutions established in the draft legislation, in particular those aspects where options were exercised and innovations were envisaged in comparison with the regime laid down in the Directive.*



## 1. INTRODUCTION

This article reproduces the speech made at the occasion of the XII Treviso Antitrust Conference that took place in May 18, 2016. Rather than focusing

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on the many procedural and substantive law hurdles potentially raised by private enforcement *per se,* this article reflects on the experience in implementing the Damages Directive[1] in Portugal from the standpoint of a public enforcer, including on some of the public policy challenges faced therein.

One of the original features of the implementation process in Portugal was the fact that it was the competition enforcer – i.e. the '*Autoridade da Concorrência*' (hereinafter, the "AdC") – that was entrusted with the mission of submitting a draft legislation to the Portuguese Government for the purposes of implementing the Damages Directive.

This article is structured as follows: on the one hand, it describes the strategy adopted by the AdC throughout the transposition process, its underlying goals and the steps undertaken to achieve it. On the other hand, it highlights some of the solutions that have been proposed in the draft legislation meant to transpose the Damages Directive into Portuguese law, in particular those where innovations were envisaged in comparison with the regime laid down in the Directive.

Despite the national approach of the article, other jurisdictions may also be able to easily relate to some of the challenges faced in Portugal, which may help to stir the ongoing international debate on the matter. In any event, the usual cross-border nature of antitrust damages litigation accentuates the interplay (not to say competition) between jurisdictions and, therefore, the inevitable international dimension of the discussion.

### 1.1. Why the AdC?

One might question whether the decision to 'outsource' to the public enforcer the project of transposing the Damages Directive or, in other words, the mission of helping to boost private enforcement in Portugal, was a sound policy decision, since this might be said to encompass a potential conflict of interest (which might hypothetically encourage the public enforcer to undermine the damages actions regime in order to shield its public enforcement tools). In theory, the task could have been accomplished, alternatively, within the government, by a working group of experts or through the academia, as it usually occurred in other jurisdictions. There was indeed a previous political

1 Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L349/1 (the "Damages Directive").

choice in this regard. Moreover, this option was kept between two legislatures, despite the political changes in the government administration that occurred in the meantime.

In effect, the public enforcer is well placed to fine tune the appropriate solutions in order to safeguard one of the key goals of the Damages Directive, notably, achieving a proper balance between public and private enforcement, with a view to ensure the maximum effectiveness of antitrust rules. In addition, the AdC had actively participated in the preparatory works that led to the approval of the Directive, in particular in the negotiations at the level of the European Council on behalf of the Portuguese government, thus gathering extensive know-how on the matter, which the government thus seek to build upon.

## 2. STRATEGIC GOALS OF THE TRANSPOSITION PROCESS

### 2.1. Project planning

Once the AdC accepted this project from the government, it chose to launch a public debate on the topic, in order to engage stakeholders. The AdC thus strategically decided that the transposition process should be open, transparent and inclusive. In light of this goal, the AdC essentially carried out three initiatives:

First, it invited a solid working group of external experts to join it in the discussion, which functioned as a 'sounding board' on the ongoing legislative work. This group was comprised of representatives from the judiciary (a justice of the Portuguese Supreme Court of Justice), academia (a professor form the University of Lisbon School of Law) and law practice (including one representative of the Portuguese Circle of Antitrust Lawyers and one experienced cross-border litigator/arbitrator and former President of the Portuguese Bar Association, in order to help broaden the range of the discussion to outside the scope of the usual competition experts).

Second, the AdC organized a consultative workshop on the draft legislation, with the aim of 'market testing' some of the proposed solutions that had already been assessed within the working group, before actually launching a wider public consultation. To this effect, the AdC circulated beforehand between workshop participants a very preliminary draft while it was still 'work in progress'. The workshop was participated by a broad variety of stakeholders,

representing around thirty organizations, including, *inter alia,* the courts, the public prosecutor, government departments, consumer and business associations, together with law firms.

Third, by taking on board many of the comments and suggestions voiced therein, the AdC concluded a version of the draft legislation, which was submitted to public consultation. This also proved to be a fruitful exercise. Building on the many helpful contributions received during public consultation, the AdC finished the draft legislation that was presented to the government for further parliamentary approval.

All main work products of this transposition project were posted on the AdC's website. Together with the transposition work, the AdC held several rounds of meetings and contacts with the European Commission and different government departments, notably from the areas of Justice, Economy Affairs, Consumers and the Presidency, in order to ensure the appropriate following buy-in of the project.

### 2.2. Engaging stakeholders

With these initiatives, the AdC certainly strived to take advantage of the operational know-how of expert stakeholders, in view of the fact that the Directive deals largely with civil litigation law and procedure, that is to say, with matters that the AdC is not so familiar with.

But most importantly, the AdC's key goal was to reach-out to the community and get a variety of interested parties engaged in the discussion, so that they might feel the new private enforcement regime as their own and, thus, be actually encouraged to field-test it once implemented. The underlying thinking of course was that an open, transparent and participated implementation process would more likely bring about a higher quality draft, even if with the tradeoff that the AdC might thus be less likely to enforce its own preferred solutions, but instead those resulting from broader compromise. In truth, the AdC's ultimate objective here was not only to produce a more robust legislative piece, but, above all, for the regime to gain traction once implemented.

## 3. SUBSTANTIVE SOLUTIONS OF THE DRAFT LEGISLATION: GOING BEYOND THE DAMAGES DIRECTIVE

The Damages Directive, like any other, is a relatively flexible legal instrument that requires Member States to achieve certain results or fulfill certain minimum requirements but frequently leaving them free, to a certain extent, to choose

how to do so. In many instances, Member States may decide to go beyond the minimum necessary to duly implement it, for instance by extending its scope or by adopting further measures deemed to be useful to the fulfillment of its overall objectives.

There is indeed some "room for creativity", which is mostly addressed below. The article's next section illustrates some of the aspects whereby options were exercised in the implementing draft legislation and where improvements were contemplated in relation to the regime laid down in the Damages Directive.[2]

### 3.1. Extension of the scope

The scope of the regime was extended to cover infringements that are purely domestic in nature, in other words, that do not affect trade between Member States, even though the Directive only applies to infringements of Articles 101 or 102 TFUE or to the equivalent provisions of national law when applied in parallel with those articles, i.e. when the requirement regarding interstate trade is met.

This solution was based on the following reasoning: (i) the Damages Directive's main objectives are equally valid for damages actions resulting from purely domestic infringements, maybe with the exception of the reasons related to market integration –i.e., to ensure the victims' right to compensation and, as a result, to reinforce the level of deterrence in Portugal; (ii) this solution also better ensures the overall coherence of the legal system; (iii) it guarantees equal treatment between infringers and between victims, regardless of the infringement's potential to cause effects on trade; (iv) it provides legal certainty, since the "inter-state trade" requirement is a very wide notion, which can be significantly contentious, namely, it can give rise to litigation as to whether or not that requirement is met in a particular case. This could ultimately make it harder for victims to obtain compensation even with regard to infringements of Articles 101 and 102; finally (iv) this solution also allows for the automatic compliance with the principle of equivalence.

2 This article reflects the status of the draft legislation meant to transpose the Damages Directive as it stood at the time of the XII Treviso Antitrust Conference, in May 18, 2016, that is, when it was submitted to public consultation. Further adjustments were made afterwards building on the results of the public consultation, which are identified below where appropriate. Moreover, the final normative solutions, as approved by the legislator, might naturally somewhat differ from the draft legislation that was proposed to the Portuguese government.

### 3.2. Who's liable? Notion of undertaking and imputability

It is a well-known fact that competition law typically refers to the activities of undertakings, not legal entities or individuals. The notion of undertaking has an autonomous meaning under EU competition law: it is an economic concept rather than a legal one. An undertaking, within the meaning of competition rules, may be comprised of several legal entities, notably, in the quite common case of a group of companies. "Undertakings" or "associations of undertakings" can thus be held to have committed an infringement and, pursuant to the Damages Directive, they are equally liable to pay damages.

However, "undertakings" do not exist in the legal world.

In order to solve this mismatch between the subject of competition rules and civil liability, in the context of a group of companies, the draft legislation identifies which legal entities within an undertaking may be held liable to pay damages, in line with the case law of the ECJ on parental liability[3] and in accordance with the very notion of undertaking as an economic unit, thus ensuring consistency between public and private enforcement.

Pursuant to the draft legislation, both the legal entity that has directly committed the infringement and any of its parent companies that have exercised decisive influence over that entity's business may be held liable to pay damages. The exercise of decisive influence may be inferred, *inter alia*, from any of the powers listed in the Portuguese competition act with respect to the notion of *control*.[4] Furthermore, the draft legislation sets forth a rebuttable presumption that a parent company holding 90% or more[5] of the share capital of a subsidiary exercises decisive influence over this entity's business.

### 3.3. Joint and several liability

Article 11 (5) of the Damages Directive provides that Member States shall ensure that an infringer may recover a contribution from any other infringers,

3 V., for example, Case C-97/08 *Akzo Nobel NV and Others v Commission*.

4 Article 36 (3) (a) to (c) of the Portuguese Competition Act, that is, *inter alia*: the acquisition of the whole or part of the share capital; the acquisition of ownership rights, or rights to use the whole or part of the assets of an undertaking; and the acquisition of rights or the signing of contracts which confer a decisive influence on the composition, voting or decisions of an undertaking's corporate bodies.

5 Though the initial threshold of this presumption was set at 100%, it was lowered to 90% as a result of the suggestions submitted during public consultation, in line with the rationale of the Portuguese Corporate Code with regard to scenarios deemed to lead to total dominance.

the amount of which being determined in light of their *relative responsibility* for the harm caused by the infringement.

Relative responsibility of the infringers is to be determined in light of national rules. In this respect, the Portuguese Civil Code establishes a rebuttable presumption according to which relative responsibility is based on the co-infringers respective fault, which is presumed equal.

Instead of applying this presumption, which would lead, as a default rule, to equal relative shares between co-infringers, the draft legislation lays down a rebuttable presumption to measure contribution on the basis of the co--infringers average market share throughout the duration of the infringement. This alternative proxy[6] was found to be more proportionate to the ability of each of the co-infringers to harm the competitive process and also to gain from the infringement (which, in turn, is a proxy of their market power). This provision is also in line with public enforcement, since the setting of the basic amount of antitrust fines is usually grounded on the each of the infringers' sales in the affected market. Notwithstanding, one should bear in mind that this presumption is rebuttable, that is to say, it should apply in a scenario of "all things being equal", i.e. when co-infringers are found to have been similarly involved in the temporal and geographical scope of the infringement.

### 3.4. Binding effect of decisions of competition authorities and courts of other Member States

Pursuant to the Damages Directive, infringement decisions by competition authorities and review courts of other Member States are taken at least as *prima facie* evidence that an infringement occurred, for the purposes of bringing a follow-on damages action.

The draft legislation submitted to public consultation proposed to go beyond the minimum required by the Directive, by treating exactly the same way said decisions and those taken by the AdC and Portuguese review courts, that is, as irrefutable proof of the existence of the infringement, with regard to the nature of the infringement, together with its material, personal, temporal and territorial scopes.

The underlying thinking in this respect was that the reasons for granting binding effect to decisions of competition authorities and review courts of the "State of origin" are also perfectly valid where those competition authorities

6 Which was also recommended by the US *Antitrust Modernization Commission* in its 2007 Report and Recommendations (v. p 254).

and courts happen to be based on a different Member State, notably: (i) the need to avoid duplicating administrative costs that would burden the judicial system and the community as a whole (by allowing to litigate again the same set of facts that might have already taken many years of continuous litigation to establish); (ii) the interest in preventing contradictory decisions between the public and private enforcement forefronts; and (iii) to facilitate the victims' right of compensation.

Moreover, Member States share common legal traditions and are all bound by the Human Rights Convention, notably by the principles of due process and the right to a fair trial included therein. Infringement decisions by national competition authorities are always subject to judicial scrutiny in any Member State, even if the respective antitrust models of judicial review might somewhat differ in nature (some are more administrative-based, while others include quasi-criminal features, with principles and rules of criminal procedure having a more prevalent presence). Therefore, no sufficiently persuading reason was found to doubt that those systems comply with basic principles of due process, which might justify raising obstacles to the evidentiary value of decisions taken by competition authorities and courts of other Member States.[7]

### 3.5. Enabling access to evidence: "pre-trial discovery" and interim measures to preserve evidence

The AdC's draft legislation includes several provisions intended to assist the plaintiffs' access to evidence, notably, provisions on: (i) pre-trial discovery; (ii) interim measures; and (iii) sanctions.

Although the stipulation on pre-trial discovery does not lead, in material terms, to a wider disclosure of evidence than that which is provided for in the Damages Directive, it does extend – by anticipating– its temporal scope, with the aim of enabling a potential plaintiff to ascertain whether or not to bring an action for damages.

7 Notwithstanding, the public consultation revealed this point to be contentious. For example, suggestions were made that the constitutionality of this provision could be put into question. The litigation that might thus ensue with regard to this ancillary aspect could ultimately make it harder for victims to actually obtain compensation. Therefore, in order to mitigate the potential for ancillary litigation regarding the damages actions' regime itself, the AdC found it more sensible to adjust the evidentiary value of decisions by competition authorities and review courts of other Member States as follows: these decisions are to be taken as rebuttable presumption that an infringement occurred, including as regards the nature of the infringement, and its material, personal, temporal and territorial scopes.

Accordingly, anyone who wishes to obtain information or documents to which the holder does not want to give access, may request the court to order disclosure, provided that certain requirements are observed, including those laid down in the Directive on disclosure of evidence.

Similarly, an alleged injured party may request the court to order immediate and effective provisional measures to preserve evidence of the infringement, when there are strong indications that it has taken place.

Penalty payments for delays in delivering evidence and fines of up to 500.000 euros to deter behavior, such as destruction of relevant evidence and failure or refusal to comply with a court disclosure order, are also laid down in the draft legislation.

### 3.6. Setting up an information system to monitor private enforcement

The draft legislation sets up an information system meant to enable the AdC to monitor the level of private enforcement in the country and to intervene in private enforcement proceedings, either as *amicus curiae* or in relation to requests for disclosure of evidence included in its investigation files.

Civil courts are thus required to notify the AdC both of the filling of any civil action or defense which mainly relies on the breach of competition rules and with respect to any ruling or judgment where an infringement of Articles 101 and 102 or the corresponding national provisions is considered. Furthermore, the competent court is also required to notify the AdC of any request for disclosure of evidence included in its files, in order to enable it to submit observations for the purpose of assessing the proportionality of such a request, pursuant to Article 6 (11) of the Damages Directive.

Once again, this information system is meant to ensure consistency between public and private enforcement and compliance with Article 15 (2) of Regulation 1/2003 relating to the obligation of Member States to forward to the European Commission a copy of any written national ruling where Articles 101 and 102 are applied. Indeed, since it appeared that national courts were not complying with this requirement, the AdC is thus seeking to centralize this information in order to ensure compliance with said provision, by informing the European Commission, besides releasing it in its website.

### 3.7. Collective redress: fostering the Portuguese opt-out system

The Portuguese legal system encompasses a very ancient and rare collective redress regime, when compared to other European jurisdictions, because it

is based on an "opt-out class action" system. This regime is said to be rooted in Roman law, which included the "actio popularis", an action brought by a member of the public in the interest of public order. In effect, the Portuguese regime is named "ação popular", which roughly translates as "the peoples' action". This regime has even been labelled a "hippie law", because it is full of good intentions, though perhaps lacking some pragmatism. Furthermore, the right to initiate such an action was enshrined in the Portuguese Constitution of the 70's.

Indeed, this collective action may be initiated by any citizen, even if not personally affected, to protect public interests, the protection of competition obviously being considered a public interest within the meaning of this law. In particular, compensation for harm suffered as a result of an antitrust infringement may be claimed under this law.

The AdC's draft legislation contains a number of provisions designed to overcome some of the practical difficulties raised by the collective redress regime and, therefore, to encourage its use both by businesses and individuals.

These provisions basically concern: (i) the identification of the possible victims or injured parties; (ii) quantification of the overall damages; and (iii) management and payment of compensation.[8]

The goal in this regard is naturally to enhance consumer protection in the field of competition law, by encouraging "class actions" for damages. Because of the overall costs of "normal" damages actions, individuals and small and medium sized enterprises, in particular, may more likely resort to this instrument of collective redress and obtain compensation more effectively.

### 3.8. Specialised Court

The draft legislation proposes to grant jurisdiction to the already existing specialized Competition and Regulation Court to hear damages actions or any other civil action, whose claim is solely based on antitrust infringements, instead of leaving the respective competence with common civil courts, as it would be the default rule.

8 Further to the public consultation, a couple of additional rules were introduced in this respect, namely: (i) a provision making clear than both consumer and business associations enjoy standing to initiate such an action; (ii) a provision, inspired by the UK 2015 Consumer Rights Act, allowing the competent court to order that all or part of the damages not claimed by the victims within a specified period may revert to the plaintiff to cover for all or part of the costs or expenses incurred by the plaintiff in connection with the proceedings.

In the public enforcement forefront, this specialized court ("Tribunal da Concorrência, Regulação e Supervisão") already reviews the AdC's decisions both in relation to antitrust and merger control. In fact, as regards antitrust, the Court holds powers of full jurisdiction in all respects: it does not merely annul or uphold the AdC's decisions; it also holds powers to acquit or convict the defendants. The evidence gathered in the investigation stage is reheard before the Court: witnesses are examined and cross examined before a judge, with a view to adversarial argument, such as in a criminal trial. Moreover, rules and principles of criminal procedure are applied as subsidiary law. Hence, in this respect, the Court is more than an appeals court, since it acts to a large extent as a true trial court.

The draft legislation proposes that whenever competition law is at issue regardless of the enforcement tool that is being used – namely, antitrust, merger control or private enforcement (with regard to both follow-on and stand-alone actions, including collective redress) – all corresponding cases are ruled by the same court.

This solution seeks to take advantage of the usual benefits of specialisation, including to prevent contradictory judicial decisions and to avoid that antitrust damages actions be decided by civil judges spread throughout the country, most of which would have dealt with competition law, at best, once or twice beforehand in their entire legal careers.

While being conscious that this proposal entails an increased empowerment and importance to be granted precisely to the Court that scrutinises its own activity, the AdC considered this solution to be sound and in the best interest of the consolidation of a legal culture of competition in Portugal.

### 3.9. Leniency statements: excluding pre-existing information

The implementation of the Directive forced the AdC to propose amendments to the Competition Act concerning its leniency program.

In effect, the Portuguese leniency regime so far protects both leniency statements and evidence submitted by leniency applicants together with their application. As a result, disclosure of those materials is only allowed to other co-defendants for the purposes of exercising their rights of defense.

Under Article 6(6) of the Damages Directive, leniency statements are included in the so-called "black list", which means that their disclosure can never be ordered by the competent court. However, so-called preexisting information, that is, any documents attached to a leniency statement that exist irrespective of

the proceedings of the competition authority are not to be protected according to the Directive and may thus be disclosed to those seeking compensation for harm suffered as a result of antitrust infringements.

This means that the Portuguese Competition Act currently grants a broader protection to leniency documents than that provided for in the Damages Directive.

Since this is an aspect that is totally binding for Member States, in the sense that neither a wider or stricter protection of leniency documents is allowed, the AdC was thus required to propose an amendment to the Competition Act in order to harmonize it with the Directive, by excluding the protection of pre-existing documents, only in so far as access is requested pursuant to the regime laid down in the Damages Directive and for the purposes of a damages action.

This is a clear example of a situation whereby the AdC was required to fully assume a role of an objective and unbiased legislator, and resist the temptation of maximizing the protection of its leniency program.

### 3.10. Ensuring absolute protection of settlement talks that fail

In turn, the draft legislation introduces amendments to the Competition Act in order to make clear that the submissions filed during settlement talks that for some reason fail and thus become ineffective are absolutely protected from disclosure to third parties, including to those seeking redress. These submissions are not "withdrawn", within the meaning of the Damages Directive. In effect, the Competition Act does not allow for a settlement submission to be withdrawn by its applicant. Those submissions may, nonetheless, become ineffective in case of unsuccessful settlement talks and, therefore, remain in the file, while possibly entailing an admission of wrongdoing.

Because the Competition Act might be said to be ambiguous in this regard, since doubts could be raised as to the distinction between "ineffective" and "withdrawn" settlement submissions and as to the corresponding scope of protection, these amendments were deemed necessary to avoid discouraging businesses to resort to this strategic procedural tool.

## 4. CONCLUSION

This article provides an overview of the transposition process of the Damages Directive in Portugal, whose preliminary draft legislation was entrusted to the AdC.

By engaging stakeholders through an open, transparent and inclusive implementation process, the AdC has seek to bring about a more robust legislative piece that stakeholders may actually use to enhance private enforcement in the country.

The draft legislation has been designed to achieve a proper balance between public and private enforcement, under the belief that these tools are mutually reinforcing. At the end of the day, the AdC is interested first and foremost in maximizing the effectiveness of competition policy: the prospect of compensation helps to engage the community at large in fighting anticompetitive behavior. Therefore, it contributes to disseminate a culture of competition, even in relation to the common citizen. And of course it creates additional deterrence; it produces stronger incentives for companies to compete on the merits, thus maximising consumer welfare, through prices, innovation and choice, which is the ultimate goal of modern competition policy.