International
Comparative
Legal Guides

Practical cross-border insights into competition litigation

Competition Litigation 2022

14th Edition

Contributing Editor:
Euan Burrows
Ashurst LLP

CDR Commercial Dispute Resolution

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Portugal


Margarida Rosado da Fonseca


Ana Sofia Rendeiro

Campos Ferreira, Sá Carneiro – CS Associados

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

Portuguese courts are competent to assess claims for breach of:

- European Union ("EU") competition rules – Articles 101, 102 and 108 [by reference to 107(1)] of the Treaty on the Functioning of the European Union ("TFEU"); and/or
- Law No. 19/2012, of 8 May as amended (Competition Act or CA) – mostly of Article 9 (agreements, concerted practices and decisions by associations of undertakings), Article 11 (abuse of dominant position) and Article 12 (abuse of economic dependence), although some may also argue that the legal provisions on the mandatory filing of concentrations which trigger any of the legal thresholds are also within the scope of the claims.

Claims for breach of competition law may be brought alone or together with claims for breach of legal provisions concerning other areas of law, such as Commercial (Contract) Law or Public Procurement Law. Claimants may request the declaration of nullity (or voidness) and unenforceability of agreements (or specific clauses) or of decisions of associations of undertakings. More precisely, they will allege that the same agreements and decisions amount to unjustified restrictions to competition falling within the scope of the prohibitions contained in EU rules or the CA. As regards state aid, courts may notably declare the unlawfulness of aid and suspend the implementation of the measure(s) in question ordering the recovery of any payment already made. Claimants may also request interim measures.

Under Article 267 TFEU, courts are given the possibility to ask the Court of Justice of the European Union ("CJEU") for a preliminary ruling concerning the interpretation of the TFEU rules and/or the validity and interpretation of acts of the institutions of the EU necessary for the decision on the claim.

In case claimants consider they have suffered damages arising from the breach of competition rules, they may request compensation (i) in the context of the abovementioned judicial actions, or (ii) specifically through the lodging of an action for damages. The latter may be a standalone action, or lodged after a final decision of a competition agency within the EU becomes *res judicata* ("follow-on actions").

An alternative avenue of redress is consensual dispute resolution.

In addition, claims can also be brought in the context of proceedings with the Portuguese Competition Authority ("PCA") involving administrative offences, in order to challenge interlocutory decisions or the final decision of that same authority. These claims may be brought either by the entities or natural persons being investigated (and sanctioned for administrative offences, as the case may be) or by third parties which, for example, lodged a complaint and the PCA decided to close the informal stage of investigation without opening the formal proceeding. Without prejudice to their relevance in practice, to the extent these claims constitute judicial appeals from the PCA's decisions, the same are not included in the scope of the present analysis. These claims are ruled by the CA and the General Regime of Administrative Offences.

1.2 What is the legal basis for bringing an action for breach of competition law?

Concerning the substantive provisions, please see question 1.1 above.

As regards the procedural provisions applicable to competition matters in particular, please note the following:

- The CJEU has long declared the direct effect of Articles 101, 102 and 108 TFEU on relations between individuals and consequently the creation of rights and obligations for the same, which must be enforced by national courts. Moreover, please see mainly Articles 6, 16 and 17 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in those same legal provisions ("Regulation No. 1/2003"), and mainly Article 16(3) of Council Regulation (EU) No. 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU ("Regulation No. 2015/1589").
- Law No. 23/2018, of 5 June implements Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("Private Damages' Directive") and amends the CA and the rules on the Organization of the Portuguese Judiciary System (Law No. 62/2013). Law No. 23/2018 ("Law on Private Enforcement") provides that the Competition, Regulation and Supervision Court ("TCRS") holds exclusive competence to judge on actions for damages to the extent they rely exclusively on breaches of competition rules. Appeals from TCRS' judgments follow the rules provided in Law No. 62/2013. The Law on Private Enforcement addresses specifically damages actions for breach of Articles 101 and 102 TFEU and the equivalent CA provisions (Articles 9 and 11), as well as Article 12 of the CA.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Competition law claims are based on breach of EU and/or Portuguese competition rules.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

TCRS is the specialised court of first instance sitting in Santarém and having the assignment of ruling on:

- actions for damages of which cause of action (*causa de pedir*) is exclusively based on breaches of competition rules, claims for redress between co-offenders, as well as requests for access to file concerning the means of proof, under the Law on Private Enforcement; and
- remaining civil actions of which the cause of action (*causa de pedir*) is exclusively based on breaches of Articles 9, 11 and 12 CA, the corresponding legal provisions in other Member States and/or Articles 101 and 102 TFEU, as well as requests for access to file concerning the means of proof relating to the same actions under the Law on Private Enforcement.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Under general civil procedural law, actions can be brought by the harmed party alone or together with other individuals or entities where claims are (i) identical, (ii) related to each other, or (iii) depend on the consideration of the same facts or law, and (iv) there are no procedural obstacles to rule those claims together.

Moreover, Law No. 83/95 (establishing the rights for participation in proceedings and the *ação popular*) and the Law on Private Enforcement establish a specific procedure for handling a series or group of related claims – the *ação popular*, a class/collective action on an opt-out basis.

The *ação popular* may be brought in order to promote the prevention, cessation or the judicial persecution of breaches of competition rules, as well as other rights, by:

- individuals, regardless of whether or not they have a direct interest in the case, provided that their claim is not purely individual, i.e. that collective interests are at stake;
- associations and foundations that defend consumers' rights;
- associations of undertakings harmed by the breach of competition law;
- local authorities, regarding the interest of their residents within their respective area;
- the Public Prosecutor, where consumer rights are in question; or
- the Directorate-General for Consumers, where consumer rights are in question.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Jurisdiction of Portuguese courts over competition law claims is determined according to rules on international or local, subject-matter jurisdiction, of which we highlight the following:

- International jurisdiction is determined according to Regulation (EU) No. 1215/2012 of 12 December 2012, essentially based on (i) the domicile of the defendant, or (ii) the place where the harmful event occurred.
  Where no EU Regulation or international agreement applies, the Civil Procedure Code shall apply. Generally, courts will have jurisdiction: (i) if the defendant is domiciled in Portugal; (ii) for tort, if the harmful event occurred in Portugal; or (iii) if the claimant's rights can only be effectively enforced if the action is brought before Portuguese courts or the claimant has serious difficulties in bringing the action before foreign courts, when the matter has a connection to Portugal.
- Local jurisdiction is determined pursuant to the Portuguese procedural rules.
- Subject matter jurisdiction is described in the answer to question 1.4 above.

As mentioned above, Regulation No. 1/2003 (first and foremost Articles 15 and 16) and Regulation No. 2015/1589 provide detail on the co-operation between the Commission and national courts as regards the TFEU legal provisions referred to in the answer to question 1.1 above.

See also the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 TFEU, of 27 April 2004 and the new Commission Notice on the enforcement of State aid rules by national courts, of 30 July 2021.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

As a preliminary remark, it is important to mention that there is still no up-to-date centralised database as regards rulings in first instance courts. This also applies to the available information concerning conveyance by the Portuguese authorities to the Commission as concerns judgments of the courts deciding on the application of Articles 101 and 102 TFEU.

Secondly, according to the information available, there were few private enforcement actions prior to the implementation of the Directive on Private Damages; these were mostly standalone actions on breach of competition rules and consisted of one of the several grounds for the lodging of actions. Arguably, the first *ação popular* filed in Portugal on the basis of a breach of competition rules (and decided on that same basis) dates from 2015.

Implementation of the Directive on Private Damages was undertaken by the Law on Private Enforcement, of 5 June as mentioned in the answer to question 1.2 above.

There is still no relevant trend concerning the attractiveness of the judicial system to either claimants or defendants and litigation funding is extremely rare. However, the number of follow-on *ações populares* filed in Portugal by breach of EU and national competition law is increasing.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process in Portugal is adversarial, meaning that the judge can only rule on (i) the facts brought to the proceedings by the parties in their pleadings, (ii) any ancillary or instrumental facts that result from the evidence produced, or (iii) any facts that are public and known or that the judge has become aware of acting in its judicial capacity.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

As regards evidence, although the judge is allowed to perform or request inspections, documents or other evidence to seek the truth, in general the evidence is produced by the parties, in accordance with the rules set forth in the Civil Procedure Code.

However, the Law on Private Enforcement establishes several specificities concerning actions for damages exclusively based on breaches of given competition rules, including as regards to (i) presumptions on the existence of the infringement, (ii) the court's intervention to order the disclosure of documents and confidential information before the beginning of the proceedings or during the same proceedings, as well as (iii) the intervention of the PCA.

As regards proceedings for the application of Articles 101 and 102 TFEU, Regulation No. 1/2003 provides for co-operation between the Commission, competition authorities and national courts; this is without prejudice to Article 267 TFEU.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Pending the outcome of investigations, interim measures are generally available to claimants as detailed in question 2.2 below. The legal standard is the finding of a risk of causing serious or irreparable harm to competition as a result of an infringement of competition rules or if such an infringement is imminent.

2.2 What interim remedies are available and under what conditions will a court grant them?

The Civil Procedure Code provides for two types of interim relief, as follows:

- specified interim relief, designed to protect specific rights identified by law, including but not limited to seizures and suspension of corporate resolutions; and
- non-specified interim measures, that grant parties the opportunity to request the adoption of any protective or pre-emptive interim measure not specifically provided for in the Code, so long as it is adequate to ensure enforcement of the award.

In order to obtain interim relief, claimants shall show that: (i) the claimed right is likely to exist; (ii) there is a risk of imminent and irreparable damage if urgent measures are not taken; and (iii) the damage caused to the other party with the interim measure does not outweigh the damage that could occur had the interim measure not been issued.

In strict circumstances, interim relief can be obtained without hearing the counterparty which will have the opportunity to oppose the decision after it has been rendered. In that case, it is possible to obtain interim relief in a few weeks. Otherwise, this may take a few months.

Interim measures are provided in the Law on Private Enforcement specifically as regards the maintenance of the means of evidence, and specific provisions of the Civil Procedure Code are relied upon.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

As regards actions for breach of competition rules, please note the following:

- Concerning specifically Articles 9 and 11 of the CA or the same provision(s) in conjunction with Articles 101 and 102 TFEU, and depending on the remedies which are requested by claimants, the courts may:
  - declare the nullity of agreements, concerted practices or decisions of undertakings and consequently their unenforceability and voidness; and/or
  - award damages to be paid by the offender and/or co-offenders (participating in the breach).

The test the court applies in case of the provisions of the CA, is the same as the one to be applied by the PCA under Article 10 CA; and in the case of the TFEU provisions, the test is the same as the one the Commission or the PCA applies in accordance with Article 101(3) TFEU and secondary legislation, in line with the CJEU (and General Court of the European Union) jurisprudence.

Notwithstanding, please see the answer to question 4.3 below as regards specifically actions for damages arising from breaches of competition rules.

- Concerning Articles 107(1) and 108(3) TFEU, national courts have the responsibility to offer effective legal protection to third parties. Their contribution to the State aid control system is especially necessary in cases where unlawful aid is granted:
  - in the absence of a final Commission decision on the same measure or until the adoption of such decision; as well as
  - in cases where a possibly compatible aid has been granted in violation of the standstill obligation.

For more details, please see the Commission Notice on the enforcement of State aid rules by national courts from 30 July 2021, and also the detailed rules on national courts as established in Regulation No. 2015/1589.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Yes. For the determination of the amount to be awarded, national courts are bound to consider the following factors:

- the quantum of loss effectively suffered by the claimant;
- any loss of profits arising from the said breach, assessed from the moment the breach started; and
- any interest accruing to the payment from the date of the judgment until full payment of damages.

Thus, under Portuguese law, the purpose of civil liability is to repair damages that were caused to individuals or companies. Where damages actions are lodged as *ações populares*, there are specific provisions establishing the possibility to grant global compensation, and in some cases part of the compensation may arguably be seen as including punitive damages.

In cases where it is practically impossible or excessively difficult to quantify in an accurate manner the harm suffered or the passing on – on the basis of the evidence available – the courts undertake a rough estimation and may consider the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The award by the court is undertaken following the calculation

© Published and reproduced with kind permission by Global Legal Group Ltd, London

of the compensation (see the answer to question 3.2 above). Moreover, the Law on Private Enforcement provides that:

- As regards the liability of the offender(s), in case the breach of competition rules has been undertaken by more than one offender, there is joint and severable liability, without prejudice to given specificities notable in case of small and medium-sized enterprises and lenient applicants having obtained immunity from fines.
- A previous consensual settlement has implications concerning the claim(s) of the settling damaged party both towards the settling co-offender and the non-settling co-offender(s), as well as in the exercise of the right of redress amongst offenders.

4 Evidence

4.1 What is the standard of proof?

In Portugal, the standard of proof is reasonable certainty.

Rules on the value of documentary evidence and confession, provided by the Civil Code, shall be observed by the court. Other important means of evidence, such as testimonial evidence, will be assessed at the judge's discretion.

For damages actions concerning breaches of competition rules, please see the answer to question 4.3 below.

4.2 Who bears the evidential burden of proof?

As a rule, the party filing for a liability claim bears the burden of proof. Thus, the relevant facts are usually alleged by the undertaking requesting the exemption. However, the defendant bears the burden of proof for alleging any ground of defence that obstructs, modifies or extinguishes the right of the claimants.

As regards specifically actions for damages based on breaches of competition rules, there are evidential presumptions which must be considered in this context – see the answer to question 4.3 below.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Given the relevance of several evidential presumptions in the context of damages claims, as provided in the Law on Private Enforcement, we highlight the following:

- The existence of an infringement of competition law:
  - if declared in a final decision of the PCA or judgment of an appellate court that has become *res judicata* (irrebuttable presumption); or
  - if declared by the Commission or a national competition agency within the EU or by a court of appeal of another EU Member State (rebuttable presumption).
- A person exercises decisive influence over another when the former holds 90% or more of its share capital and is thus jointly liable with the offender (rebuttable presumption).
- Harm results from cartel activity (rebuttable presumption).
- Surcharges have been passed on to the indirect customer in specific circumstances provided in the Law (rebuttable presumption).

It should be noted that presumptions are without prejudice to the need by the claimants to prove causality and the sum concerning the damage.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

As a rule, there are no limitations on the forms of evidence provided – documentary evidence, testimonial evidence and expert evidence are all admitted at trial.

Expert evidence is produced by one expert appointed by the parties or a panel of three experts appointed by the parties and the court. Experts, who shall be impartial, produce a written report on the matters identified by the parties and the court. The report is made available to both parties and the court before the trial commences. Experts may be summoned to clarify their statements in court. The judge is not bound to the conclusions put forward by the experts in their written report. However, the general practice is that judges usually follow the report.

In disputes related to demanding technical or financial issues, it is also common that the parties appoint witnesses with particular expertise who have evaluated those issues. However, their statements will be evaluated as testimonial evidence and not as expert evidence.

The Commission is bound to assist national courts in the context of the duty of sincere co-operation provided for by Article 4(3) TFEU and its contribution to the uniform application of EU competition rules. Particular mention should be made to the following forms of co-operation by the Commission concerning claims of breach of Articles 101 and 102 TFEU: (i) transmitting information in its possession or of procedural information; (ii) giving its opinion on questions regarding the application of EU competition rules; and (iii) submitting observations to national courts as *amicus curiae*.

In the same way and concerning the same type of claims, the PCA may submit observations to the courts as *amicus curiae*.

As referred above, Regulation No. 1/2003 and Regulation No. 2015/1589 provide detail on the co-operation between the Commission and national courts as regards the TFEU provisions referred to in the answer to question 1.1 above. See also the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 TFEU, of 27 April 2004 and the new Commission Notice on the enforcement of State aid rules by national courts, of 30 July 2021.

As regards claims specifically based on breaches of the CA, Portuguese courts may require the PCA to intervene.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Under Portuguese law, there is no obligation to disclose documentary evidence before court proceedings begin or as part of the pre-trial procedure.

Nonetheless, in civil proceedings, parties who have the burden of proof are required to present documents and information that support their claims or defence. Parties have the right to ask the court for the submission of documents in possession of the counterparty or of a third entity in order to prove facts alleged in the proceedings. The court then orders the party or the third party, including the PCA, to submit those documents if it deems them relevant to the decision of the dispute. Should the parties fail to provide non-confidential documents or information without due cause, the court may apply a fine and seize the document in question. Also, the court will take such refusal

© Published and reproduced with kind permission by Global Legal Group Ltd, London

into consideration when examining the remaining evidence, and reversal of the burden of proof may be applicable.

As regards actions for damages arising from breach of competition rules, the Law on Private Enforcement provides for several specificities both regarding disclosure of documents by the other party, a third party or the PCA, at the moment before lodging the action and/or during the proceedings.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

A witness who fails to appear without a reasonable excuse may be fined and ordered to appear under custody.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Yes. As explained in the answer to question 4.3 above, a decision by the PCA or a judgment of an appeal court in Portugal declaring the existence of a breach of competition rules, and being already *res judicata* in any of the cases, constitutes an irrebuttable presumption of the existence, nature, subjective and material scope, and temporal and territorial scope of such infringement, for the purposes of an action for damages resulting therefrom.

However, equivalent decisions by competition authorities from EU Member States or judgments of appeal courts of those same Member States constitute rebuttable presumptions.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Where a party wishes or is requested to submit any documents with commercially sensitive information (thus confidential), it usually submits them after having redacted the same to the extent possible. The assessment by the court of the adequateness of the redaction of confidential information and the evidential value of such document is dealt with on a case-by-case basis, taking into consideration notably the level of confidentiality of the information and the need to ensure the rights of defence of other parties, as well as the public nature of the proceedings.

The Law on Private Enforcement provides that the court shall order the production of evidence including confidential information where it deems it to be relevant to the action for damages. However, in order to protect the confidential nature of such information, courts usually accompany such disclosure with protective measures of various sorts, as established further in the same Law.

In any event, the court shall not order the disclosure of information covered by attorney-client privilege, under the terms of either national or European rules.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Both the Commission and the PCA are competent to express their views or analysis concerning actions on the breach of competition rules. In this context, a distinction must be made between the claims regarding the breach of EU competition rules and the claims also or solely on the breach of the CA. For more details, please see:

- Regulation No. 1/2003, as regards both the PCA and the Commission's interaction with Portuguese courts; and the Commission Notice on the co-operation between the courts of the EU Member States in the application of Articles 101 and 102 TFEU (consolidated text as amended in 2015).
- Regulation No. 2015/1589 and the Commission Notice on the enforcement of State aid rules by national courts of 30 July 2021, as regards the Commission interaction with Portuguese courts.

Pursuant to the Law on Private Enforcement, concerning damages actions for breach of competition rules, a competition authority may be requested to present observations on the assessment of the proportionality of requests of access to documents which concern evidence of the infringement and are included in the file of the same competition authority.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

As regards the infringement of Articles 9 and 11 of the CA and/or Articles 101 and 102 TFEU, Article 10(1) of the CA provides for a defence strongly inspired by Article 101(3) TFEU, and Article 10(3) of the CA provides for the application of regulations stemming from Article 101(3) TFEU to purely domestic infringements.

Article 4 provides for a public interest exception equivalent to Article 106 TFEU. More precisely, State-owned undertakings, State-owned business undertakings and undertakings to which the State has granted special or exclusive rights are covered by this law. From this group, those undertakings that have been legally entrusted with the management of services of general economic interest, or which by their nature are legal monopolies, are subject to the enforcement of competition provisions only to the extent that it does not create an obstacle to the fulfilment of their specific mission, either in law or in fact.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Yes. The passing on defence is codified in the Law on Private Enforcement. More precisely, defendants may argue that price increases suffered by the claimant were passed on to its customers and include overcharges that take effect directly on the supply chain. In this case, the defendant still bears the burden of proof.

Under the same Law, indirect purchasers (and suppliers) have legal standing to sue to the extent that they bear the burden of proof of both the existence and the scope of such passing on. Notwithstanding, the same legal provision establishes a presumption of the existence of such passing on if the conditions provided are fulfilled.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes, cartel participants may join as co-defendants, either voluntarily as co-party or by preparing a separate defence. Under the general rules provided by the Civil Procedure Code, defendants

© Published and reproduced with kind permission by Global Legal Group Ltd, London

may ask the court that a third party be ordered to join the proceedings as co-defendants in several cases – for instance, whether they: (i) are joint and severally liable with that party in relation to the matter in dispute and wish to claim compensation against that party once the case is ruled against them; or (ii) show another relevant interest in the joining.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The Law on Private Enforcement specifically establishes a statute of limitation period of five years for bringing a liability claim for breach of competition rules before the competent court. As regards the limitation period, the following should be noted:

- The limitation period starts running from the moment when the claimant becomes aware of, or can reasonably be assumed to have become aware of: (i) the infringement of competition rules; (ii) the identity of the offender; and (iii) the existence of damages to the claimant (even if the exact extent of such damages is unknown to the claimant). In any case, the limitation period only begins to run after the infringement ceases.
- It is suspended if a competition agency initiates an investigation in relation to the breach of competition rules that is related to the action for damages and during out-of-court settlement negotiations.
- It is interrupted with the notification to the offender of the intention to file the claim before the court.

As regards other claims, such as the declaration of voidness and unenforceability notably of clauses of an agreement or other kinds of claims, general rules shall be applicable.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

A typical claim concerning a breach of competition rules usually takes one year to be brought to trial and up to two years to have a decision on first instance. If the proceedings are suspended to obtain further evidence before the PCA or the Commission or the case is referred to the CJEU under Article 267 TFEU, it is expected to take longer.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

Permission of the court to discontinue claims for breach of competition rules is generally not required. As a rule, claimants may withdraw their claim for breach of competition rules and defendants may confess to the damages caused to the claimants or the infringement to competition law at any time.

As concerns specifically damages actions, the Law on Private Enforcement rules on the implications of the out-of-court settlements for the former actions and parties involved.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Yes. Collective settlement or a settlement by the representative body on behalf of the claimants is permitted. Nonetheless, in the *ação popular*, claimants may be replaced by the Public Prosecutor where the case is settled and, in any case, the settlement needs to be confirmed by the court.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In Portugal, the successful party may recover the court fees from the unsuccessful party. However, legal fees that shall be paid by the losing party are generally limited by law to an insignificant amount,.

In an *ação popular*, claimants are exempted from paying court fees unless the case is dismissed for being manifestly unfounded.

8.2 Are lawyers permitted to act on a contingency fee basis?

The Statute of the Portuguese Bar Association bars payment of lawyers on the basis of a contingency or success fee.

8.3 Is third-party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Portuguese law neither prohibits nor specifically regulates third-party funding of competition law claims. Despite not being prohibited, third-party funding is not a common practice in Portugal.

9 Appeal

9.1 Can decisions of the court be appealed?

This mostly depends on the subject and value of the matter in dispute: (i) judgments and orders of TCRS or other judicial court may be appealed to a Court of Appeal and/or to the Supreme Court of Justice; and (ii) judgments and orders rendered by the administrative courts may be appealed to a Court of Appeal and/or the Administrative Supreme Court.

Where constitutional principles are at stake, the case may also be referred to the Constitutional Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, the CA provides for the possibility of the PCA to grant leniency either consisting of immunity or of reduction of the fine concerning the infringement of Article 101 TFEU and/or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Article 9 of the CA, strictly within the scope of the investigation proceedings undertaken by the same entity.

No applicant is given immunity from civil claims. Notwithstanding this, successful applicants for leniency that have been granted immunity from fines by the PCA have a more beneficial procedural position in the context of civil claims than the remaining co-offenders (as the case may be), as detailed in the Law on Private Enforcement.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

During an investigation for breach of competition rules, the PCA defines as "confidential" the application for immunity or reduction of fines, as well as all documents and information conveyed with the same aim. This is without prejudice to the fact that the CA provides that during an investigation for an alleged breach of competition rules, the PCA allows offenders to have access to the file concerning application(s) for immunity or reduction of fines, including the documentation and information presented in the context of the same leniency application(s). Such access does not include copying the documents or information unless authorised by the leniency applicant.

Subsequently, during court proceedings, the same cannot order the disclosure of any evidence which includes the application for immunity or reduction of fines (or proposals for settlement).

Notwithstanding, there are given specificities concerning damages actions which should be taken into account, as provided in the Law on Private Enforcement.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable. The EU Directive on Antitrust Damages Actions has been implemented by the Law on Private Enforcement, and there has been an increase in claims for damages arising from breaches of competition rules (both EU and national rules).

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

The implementation of the EU Directive on Antitrust Damages Actions was undertaken by the Law on Private Enforcement, which also applies to claims for damages arising from breach of Articles 9, 11 and 12 of the CA and the equivalent rules in other jurisdictions within the EU. The same Law also amended the CA, notably to adapt the rules on leniency and arguably avoiding a disincentive to future leniency applications, and to amend TCRS' jurisdiction.

It is still too early to draw conclusions on the application of this Law by Portuguese courts.

11.3 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

This is not applicable. The Law on Private Enforcement implemented the EU Directive on Antitrust Damages Actions.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

On 21 May 2021, Portugal's XXII Government submitted to Parliament a proposal of a law implementing Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers, and to ensure the proper functioning of the internal market ("ECN+ Directive"). This proposal aims to amend notably the CA and the bylaws of the PCA beyond what is provided in the same Directive. The legislative procedure is ongoing.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Margarida Rosado da Fonseca heads the EU and Competition practice. With more than two decades of experience, her professional career has included acting both as an EU and Competition (and regulatory) lawyer and as Merger Director at the Portuguese Competition Authority. Her thorough experience and insight, as well as her pragmatic and committed provision of specialised legal advice, are recognised notably in her election as Secretary-General of the Portuguese Association for European Law and of the Association of Portuguese Competition Lawyers. She is a regular contributor to Portuguese and international highly regarded publications in the abovementioned areas of law, and in 2009 co-authored *The Portuguese merger control regime – The Competition Authority's decisional practice under Law nr. 18/2003*.

Campos Ferreira, Sá Carneiro – CS Associados
Avenida da Liberdade, 249, 8º
1250-143 Lisboa
Portugal

Tel: +351 211 926 835
Email: margarida.fonseca@csassociados.pt
URL: www.csassociados.pt

Ana Sofia Rendeiro is a Senior Associate in the Litigation and Arbitration and Restructuring and Insolvency practices. Her practice focuses on court disputes and domestic and international arbitration, primarily in financial, commercial and corporate matters. She also has experience in insolvency, liquidation and restructuring of companies and financial institutions, representing both creditors and debtors in court and advising creditors and funds. She has been a guest lecturer in Civil Procedure Law at the University of Lisbon School of Law.

Campos Ferreira, Sá Carneiro – CS Associados
Avenida da Liberdade, 249, 8º
1250-143 Lisboa
Portugal

Tel: +351 211 926 836
Email: sofia.rendeiro@csassociados.pt
URL: www.csassociados.pt

Campos Ferreira, Sá Carneiro – CS Associados was incorporated at the end of 2009, and its priority is to establish a professional relationship of proximity with its clients, based on the quality of the legal services provided and the direct and permanent involvement of its Partners (and Heads of Practice Areas) through the whole legal counselling process.

In order to achieve its purpose, CS Associados assists its clients only in the legal areas where it possesses specialised competence and in which its distinctive quality is widely recognised in the market.

The team's experience encompasses all areas of law (such as civil and commercial litigation, enforcement proceedings and criminal law) and includes cases before civil and criminal courts. The firm's litigation and arbitration team has also acted in multijurisdictional proceedings and actions before the highest arbitration bodies.

Besides providing standalone specialised legal advice, the EU and Competition practice area liaises notably with the litigation and arbitration team whenever appropriate, so as to provide a seamless legal service to clients in complex and interdisciplinary situations already at the early pre-litigation phase, and subsequently.

www.csassociados.pt

Campos Ferreira
Sá Carneiro
CS ASSOCIADOS

© Published and reproduced with kind permission by Global Legal Group Ltd, London

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group