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Contributing Editor:
Euan Burrows
Ashurst LLP

glg Global Legal Group

Expert Analysis Chapters

Q&A Chapters

Portugal


Miguel Gorjão-Henriques


Mafalda Ferreira Santos


Alberto Saavedra


Nuno Temudo Vieira

Sérvulo & Associados

1 General

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

Victims of a competition law infringement have the following avenues available in Portuguese courts:

- A follow-on action for damages if there is already a previous administrative decision of a competition authority (European Commission, Portuguese Competition Authority ("*Autoridade da Concorrência*" – "**PCA**" or "**AdC**")), or another competition authority currently of an EU Member State; the European Commission and any other EU Member State competition authority shall be jointly referred to as EU/National Competition Authorities ("**NCAs**") that has become *res judicata*.
- A stand-alone action for damages if there is no *res judicata* decision of a competition authority.
- Declarations of nullity of agreements or contractual clauses, actions on unjust enrichment and/or actions aimed at obtaining an injunction.

There are other areas that may be within the scope of such claims, but will not be further developed in our analysis below:

- Private arbitration – violations of competition law and the attribution of damages can be dealt with between infringers and victims through private voluntary arbitration (for example, in the context of contracts that foresee an arbitration clause).
- State aid – parties affected by unlawful State aid can bring direct action before Portuguese courts for damages, recovery and/or injunctive measures.
- Mergers – claimants may seek damages and/or declarations of voidness of concentrations that were implemented in disregard of the mandatory legal provisions on merger control.

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

There are both EU rules and national laws to assess claims for breach of competition law.

EU legislation

Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition (see Articles 6, 16 and 17).

- EU competition rules as provided for in the Treaty on the Functioning of the European Union ("TFEU") that have a direct effect (see Article 101 on restrictive practices; Article 102 on abuse of a dominant position; and Articles 107/108 on State aid).
- Council Regulation (EU) No. 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (see Article 16(3)).
- Directive (EU) No. 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under the national law for infringements of the competition law provisions of the Member States and of the European Union ("Private Damages Directive").

National laws

- Portuguese Competition Law ("**PCL**"), Law No. 19/2012, of 8 May, last amended by Law No. 17/2022 of 17 August – the main provisions are Article 9 (agreements, concerted practices and decisions by association of undertakings), Article 11 (abuse of a dominant position) and/or Article 12 (abuse of economic dependence)).
- Law on Private Enforcement ("**LPE**"), Law No. 23/2018, of 5 June, implementing the "**Private Damages Directive**" – in a nutshell, the LPE deals with damages awards regarding the violation of Articles 101 and 102 TFEU and the equivalent Portuguese rules (Articles 9 and 11) as well as Article 12 PCL.
- Law of Popular Action ("**LPA**"), Law No. 83/1995, of 31 August – regulates the right to procedural participation and the so-called popular action ("*ação popular*").
- General rules on civil liability provided for in the Civil Code regarding substantial issues not addressed by the Law on Private Enforcement and the procedural rules of the Civil Procedure Code ("**CPC**").

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

Competition law liability claims originally derived from the Civil Code extracontractual liability provisions and are, of course, reaffirmed by the case-law of the Court of Justice, at least since *Courage Ltd v. Creehan* (case C-453/99). They were, therefore, available prior to the Private Damages Directive and the implementing legislation. See question 1.2 above for further developments.

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

Yes, although its competence is limited.

The specialised Competition, Regulation and Supervision Court ("**Competition Court**") has jurisdiction to deal with actions for damages that rely exclusively on "pure" competition law infringements (see Article 112(3) Law on the Organization of the Judicial System). Such actions for damages shall be based in a violation of Articles 101 and/or 102 TFEU and/or Articles 9, 11 and/or 12 PCL.

Also, the Competition Court hears cases of redress between co-offenders and requests for access to files regarding means of proof. In private enforcement cases, the appeals from decisions of the Competition Court are centralised in the same chamber of the Lisbon Appeal Court specialised in intellectual property, competition and regulation ("*Tribunal da Relação de Lisboa*").

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?

The general civil procedural rules apply to competition law actions in terms of legal standing. Any legal entity or natural person who has suffered harm as a result of an unlawful act (*in casu*, an infringement of competition law) may be entitled to compensation thereof. Provided that the referred criteria are met, even an indirect purchaser has standing to bring an action.

Article 52 Portuguese Constitution enshrines a right to recourse to class actions, the so-called popular actions/*ações populares*, to obtain collective redress, which are regulated by the LPA.

The LPE has specific provisions to encourage collective redress mechanisms, including popular actions, in case of competition law breaches. It attributes legal standing to associations of companies whose members have suffered from a violation of competition law when filing a so-called popular action/*ação popular*. The system may be qualified as an opt-out system. See the answer to question 11.1 below as regards the impact in practice of said law on antitrust mass damages actions.

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

International jurisdiction is regulated by Regulation (EU) No. 1215/2012 of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In brief, the jurisdiction is determined based on (i) the defendant's domicile, or (ii) the place where the harmful event occurred or may occur.

Under Regulation (EU) No. 1215/2012, the expression "place where the harmful event occurred" refers both to the place where the damage occurred and to the place of the causal event giving rise to that damage, so that the action may be brought, at the choice of the plaintiff, before the courts of either of those two places (judgment of 15 July 2021, *Volvo and Others*, C-30/20, (EU:C:2021:604)). However, the Court of Justice has decided that such concept does not cover the registered office of a parent company bringing an action for damages for harm suffered solely by its subsidiaries on account of anticompetitive conduct of a third party, which constitutes a breach of Article 101 TFEU, even if it is claimed that that parent company and those subsidiaries form part of the same economic unit (judgment of 4 July 2024, *MOL v. Mercedes*, case C-425/22, EU:C:2024:578).

If no EU Regulation or international agreement governs the case, the Portuguese CPC would apply. Pursuant to the Portuguese CPC, and as mentioned above, the Competition Court has jurisdiction to deal with actions for damages that rely exclusively on "pure" competition law infringements. If the claim does not rely exclusively on "pure" competition law infringements, the Court with jurisdiction to rule over the case is, in principle, the one corresponding to the place where the harmful event occurred.

As a rule, Portuguese courts have jurisdiction: (i) if the proceedings may be brought before the Portuguese courts according to local territorial jurisdiction rules (e.g., for tort cases, proceedings may be brought in Portugal if the harmful event occurred in Portugal); (ii) if the facts or part of the facts that constitute the cause of action occurred in Portugal; or (iii) if the claimant's rights can only be effectively enforced in the Portuguese courts or the claimant has significant obstacles in bringing such matter before foreign courts, and there is a relevant link with the Portuguese legal order.

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

Portugal is an attractive jurisdiction for claimants within the private enforcement of infringements of competition law. The LPE implemented the Private Damages Directive and entered into force on 5 August 2018. It enacted a favourable legal regime for claimants. That, paired with the fact that these claims now fall under the exclusive jurisdiction of the specialised Competition Court (except for proceedings initiated prior to 5 August 2018 and mixed claims), as well as the fairly low court costs practised in Portugal, showcase promising growth in the field, which may lead the jurisdiction to the forefront of private enforcement within the EU. In this regard, the Portuguese regime on popular actions, which is applicable to antitrust infringements, should also be considered, given that it is one of the few opt-out regimes in Europe. Finally, the duration of judicial procedures before the Competition Court is not excessive and may even be considered swift, when compared to other branches of the judiciary.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial, i.e., parties determine the scope and object of the proceedings and the court is not entitled to appreciate facts that were not brought by the parties to the proceedings. Contrary to jurisdictions that envisage a stand-alone class certification process, in Portugal, the defendant must present all procedural and substantive defences in its reply to a claim. However, the adversarial nature of the process is mitigated by an inquisitorial principle in regard to evidence, given that courts have the duty to perform or order *ex officio* the production of all evidence necessary to rule on the case.

1.9 Please describe the approach of the courts in your jurisdictions to hearing stand-alone infringement cases, including in respect of secret cartels, competition restrictions contained in contractual arrangements or allegations of abuse of market power.

Portuguese courts hear stand-alone actions for damages, including in respect of secret cartels, competition restrictions contained in contracts or allegations of an abuse of a dominant position. The courts are bound to respect the commercial and trade secrets and other relevant protected secrets, like leniency statements. Nevertheless, in some cases Competition Court judges granted third parties full access to the judicial proceedings, irrespective of the documentation containing commercial or trade secrets.

In stand-alone cases it is for the claimant to demonstrate the existence of a competition law infringement.

See also the answer to question 1.1 above for further developments on the several avenues available in the Portuguese courts for victims of competition law infringement.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, if there is a risk of serious and irreparable harm to competition caused by an infringement or an imminent infringement of such rules. See the answer to question 2.2 below for further developments.

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

The Portuguese CPC establishes the interim remedies in two circumstances. First, the specified interim relief is aimed at protecting specific rights enshrined in law. Second, non-specified interim measures enable the party to request pre-emptive interim measures that are not specifically listed in the Portuguese CPC.

The court will only grant interim remedies if the following conditions are cumulatively met:

- *Periculum in mora*, i.e., the well-founded fear that, pending issue of a ruling on the merits, the right that the interim measure seeks to safeguard may be irreparably harmed.
- *Fumus boni juris*, i.e., the likelihood of the existence of the right.
- Proportionality test: the damages caused if such interim relief is not issued must outweigh the damages caused if the interim remedy is granted.

Additionally, the LPE sets out interim relief measures related to the preservation of the means of evidence, whenever there are serious indicia of an infringement of competition law that is likely to cause harm. The Portuguese CPC applies (in particular, Article 420).

In the case *IO v. Bimbo*, the Competition Court decided that the applicant failed to prove urgency through the existence of a well-founded or justifiable fear that the defendant would destroy the documents in question. No *periculum in mora* was found (Judgment of the Competition Court of 14 March 2024, case 17/23.7YQSTR).

3 Final Remedies

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

The remedies available to claimants for the violation of competition rules (Articles 101 and 102 TFEU and/or 9, 11 or 12 PCL) are the following:

- Infringers (or co-infringers) may be required to pay damages (including interests) to compensate for the harm caused.
- Nullity and the respective unenforceability of agreements, concerted practices or decisions of undertakings.

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 that are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

The general rules apply to the type and quantification of the amount of the compensation. The award of damages is of a compensatory (and not punitive) nature.

Compensation includes the amount of the damage caused by the illegal conduct. This means that the compensation covers: (i) the actual loss ("*damnum emergens*"); (ii) the loss of profits ("*lucrum cessans*"); and (iii) interests until the payment of the damages in full.

Below is a summary of certain cases in which the courts awarded damages:

- In some trucks' cartel cases, the Competition Court acknowledged that it was not able to quantify the damages and to decide on the accuracy of the parties' diverging expert reports. Based on equitable considerations, the amount of the overcharge was set at 5% of the purchase price of each truck actually paid by the defendant. This assessment was confirmed by the Lisbon Court of Appeal (judgment of 6 November 2023, *Transportes Guilherme Fernandes, Lda. v Renault Trucks*, case 54/19.6YQSTR.L1-PICRS).
- The trucks producer MAN was condemned by the Competition Court to pay 208,176 EUR (including interests) to several claimants (see Competition Court judgment of 30 June 2023, *MAN* case).
- In the calculation of the amount of the compensation, the Competition Court was persuaded by the 15.4% surcharge identified in the claimant's expert report and granted an interest of 4% since the acquisition of the trucks, i.e., since the occurrence of the damage (see Competition Court judgment of 6 November 2022, *DAF Trucks NV*, (case 71/19.6YQSTR)).
- The Competition Court approved a settlement following a consumer redress opt-out action: the defendant accepted to pay damages of 5% of the amount paid by consumers for land surveying services (see Competition Court judgment of 20 September 2021, *Ius Omnibus ("IO") v Associação Nacional de Topógrafos*, case 15/21.5YQSTR).
- Compensation of around 16.5 million EUR for 23 claimants, although a final decision is still pending (see Lisbon District Court judgment of 13 February 2019; Lisbon Appeal Court judgments of 8 October 2020 and

of 4 February 2021; Supreme Court decision of 17 January 2022, *Recensere et al v Tabaqueira*, case 49/11.8TVLSB).

- An arbitral tribunal awarded IMS Health 887,000 EUR for abuse of dominance by the Portuguese pharmacy association. This arbitral decision was confirmed by the Lisbon Appeal Court (see Lisbon Appeal Court judgment of 3 April 2014, *ANF v IMS Health* (case 672/11.0YRLSB)).

In the *DAF Trucks NV* case, the Competition Court shed some light on the *quantum* of the compensation. The Court stated that it cannot merely apply a presumed percentage of surcharge, based on studies on the average impact of cartels. On the one hand, claimants must provide convincing economic studies and/or use the methods that are provided in the "*Practical Guide on quantifying antitrust harm in damages actions*" and in the European Commission's *Passing-on Guidelines*. On the other hand, defendants cannot simply deny or rely on economic theories or studies limited to its own data. In this case, the defendants tried to persuade the court of the absence of damage, but the court dismissed the "no damage" claims and ordered the full damages sought.

See question 11.1 below for further developments on other notable examples of private enforcement cases that are pending before the Portuguese courts.

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 calculation of the award is made in accordance with the rules explained above in question 3.2 above.

Where several undertakings jointly infringe competition rules, e.g., through a cartel, those co-infringers are held jointly and severally liable for the entire harm caused by the infringement. However, there are some specificities regarding leniency applicants that have received immunity from fines or small and medium-sized enterprises ("**SMEs**").

Following a consensual settlement, there are consequences regarding the claims of the settling injured parties towards both the settling co-infringers and the non-settling co-infringers.

Moreover, in case of a prior settlement, there are specific rules on the exercise of the right of redress between co-infringers. Non-settling co-infringers shall not be permitted to recover contribution (paid to a settling injured party) for the remaining claim from the settling co-infringer. When settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, the court should give due consideration to the damages already paid under the consensual settlement.

When the PCA sets the amount of the fine, it can consider the behaviour of the accused undertaking in eliminating the prohibited practices and repairing the damage caused to competition, in particular through a consensual agreement to pay damages to victims of a competition law infringement.

4 Evidence

4.1 What is the standard of proof?

The standard of proof within civil proceedings is generally one of preponderance of evidence, i.e., a fact shall be considered proved if its truthfulness is more likely than not.

4.2 Who bears the evidential burden of proof?

In general terms, under Article 342 Civil Code, the burden of proof lies on the party that has invoked (and thus will benefit from) the alleged fact. However, there are exceptions to this rule, among other grounds, with regard to legal presumptions that reverse the burden of proof, as set out in Article 344(1) Civil Code, and specifically prescribed in the LPE (see questions 1.9, 4.3, 4.5 and 4.11).

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?

The LPE has enacted different legal "presumptions" regarding the existence of decisive influence, infringements, passing-on and damages that reverse the burden of proof. Regarding infringement presumptions, it prescribes that a final – material – decision issued by the PCA or by a Portuguese appeal court constitutes an irrebuttable presumption of the existence of the infringement, and that a final condemnatory decision issued by the EU/NCA's or appeal court shall be deemed a rebuttable presumption of the existence of the infringement (see Article 7 LPE). Said "presumption" shall not apply in the face of a formal ruling from competition authorities (e.g., a decision solely grounded on the statute of limitations of competition authorities' proceedings), but only of substantial decisions regarding the existence of an infringement. Notwithstanding, in the *IO v Abanca* case, the claimant is seeking damages on the basis that such presumption is applicable to a case where the defendant has not appealed against the PCA's condemnatory decision because its participation in the infringement was time-barred by the statute of limitations (case 3/24.0YQSTR, pending). This latter interpretation has no valid grounds, in our view.

Specifically, regarding cartel cases, Article 9(1) LPE further enshrines a presumption of damages (and causation) with regard to cartel practices, in accordance with Article 17(2) of the Private Damages Directive.

In any case, it is likely that the presumptions will play a very important role in damages claims.

Following the European Court of Justice case-law, in the *DAF Trucks NV* case the Competition Court decided that the legal presumption that cartels cause damage is a substantive rule, which was not applicable to the case *ratione temporis*. However, according to the Court, the same result would be attained under the EU principle of effectiveness. Also, in the *Transportes Guilherme Fernandes v Renault Trucks* case, the Competition Court made use of a judicial presumption to conclude that the prices were higher than those that the claimant would have paid in the absence of the cartel (judgment of 6 November 2023, case 54/19.6YQSTR.L1-PICRS).

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

Under Portuguese law, parties may generally resort to any means to prove their allegations, unless expressly provided otherwise. Expert evidence may be requested by the parties or ordered *ex officio* by the court (see Articles 388 Civil Code and 467 CPC). Typically, parties present economic expert evidence regarding the existence of damages, causation and pass-on.

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)?

During proceedings, pursuant to Article 12(1) LPE, the court may, at the request of one of the parties, following an assessment of proportionality and relevance to the claim, order disclosure from the counterparty or third parties (including public entities, although with specificities). Regarding means of proof that are part of (ongoing or completed) proceedings undertaken by competition authorities, a higher threshold applies, as follows from the special rules provided in Article 14; among these is the prohibition of disclosure of means of evidence like leniency statements or settlement submissions.

Moreover, Article 13 enshrines special proceedings for disclosure to take place before damages claims have been filed, if necessary, ensuring the right to pre-filing discovery, albeit limited to the same rules described *supra*. Under Article 18, the lack of compliance with a disclosure order and the destruction or concealment of a requested means of evidence, as well as the disrespect for the prescribed limits to disclosure regarding competition authorities, may give rise to adverse inferences, lead to the inversion of the burden of proof and be sanctioned with a fine (unless a refusal to co-operate is deemed legitimate pursuant to Article 18(6)) LPE).

Said legal rules, aimed at relieving claimant's burden of proof in private enforcement proceedings, have been applied and reinforced by the Competition Court, most notably, in *IO v COMCAST NBC Universal* (case 7/21.4YQSTR), pertaining to a special proceeding for disclosure within which the court ruled, in June 2023, that access to documents (including confidential documents) was to be granted to the parties, their lawyers and to the experts appointed by the parties, subject to a confidentiality obligation and for the sole purpose of the initiation of an action for damages for infringement of competition law. Moreover, the Lisbon Appeal Court, in the *IO v Super Bock* (case 20/20.9YQSTR) ruling of March 2023, has come to clarify the due legal procedure enshrined in the LPE facing disclosure requests (see also question 4.8 below).

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

Pursuant to Article 417(1) CPC, witnesses are obliged to give testimony. A witness duly notified that fails to give testimony may be compelled by the court, pursuant to Article 508(4) PC, to appear in court under custody and pay a fine, unless there is a reasonable motive for the absence or a legitimate reason to refuse testifying (the grounds for refusal are set out in Article 497 CPC and include the invocation of professional secrecy).

Under Article 516(2) CPC, cross-examination of a witness indicated by one party is granted to the counterparty. Cross-examination is limited to the facts encompassed by the witness's testimony.

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. An infringement of competition law declared by a PCA final decision or by a review court (*res judicata*) is deemed irrefutably established for the purposes of an action for damages brought before the Portuguese courts under Articles 101 or 102 TFEU and/or Articles 9, 11 or 12 PCL.

The effect of such *res judicata* finding covers the existence and nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or the review court.

Similar decisions of other EU/NCAs or EU courts constitute rebuttable presumptions, whereas the Directive merely requires that such decisions be considered *prima facie* evidence.

See also question 4.3 above.

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

As prescribed in Article 12(4) and 12(5)(c) LPE, disclosure and access to evidence are made dependent on a proportionality and relevance test carried out by the Court, taking into account the existence of confidential information.

Furthermore, in case the court determines that evidence containing confidential information shall be attached to the proceedings, special measures shall be enacted to protect commercial confidentiality, as set out in Article 12(7): concealing of confidential information from documents; conducting proceedings *in camera*; restricting the number of people authorised to access such evidence; or instructing experts to summarise the information in an aggregated or otherwise non-confidential form.

Witnesses and parties may also invoke commercial confidentiality to refuse to testify in civil proceedings, including competition proceedings. However, even if the court finds such refusal to be legitimate, the court may determine the disclosure of the confidentiality invoked, as long as, following the carrying out of an assessment pursuant to a prevalence of the preponderant interest principle, which will take into account the indispensability of the evidence and the balance of the legal interests at stake, the court decides that the confidentiality shall be disclosed.

In *IO v Meliá* (case 6/21.6YQSTR), the Competition Court ruled, in March 2023, within a special proceeding for disclosure – similarly to the *IO v COMCAST NBC Universal* case mentioned in question 4.5. above – that access to documents necessary to assess and prove the existence of a right to compensation for anticompetitive practices (including confidential documents) was to be granted to the legal representatives and experts of the claimants, subject to a confidentiality obligation, and for the sole purpose of the initiation of an action for damages for infringement of competition law.

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 European Commission and the PCA may express its views or analysis in relation to private enforcement cases pending before Portuguese courts.

The participation of the European Commission in national cases is thoroughly foreseen in the *Commission's Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 of the TFEU* (as amended by 2015/C 256/04). Article 15 Council Regulation

(EC) No. 1/2003 empowers the European Commission/NCAs to submit written and, with the permission of the national court, oral submissions in court proceedings for the application of Articles 101 and 102 TFEU (so-called *amicus curiae* interventions).

See also the *Commission Notice on cooperation within the Network of Competition Authorities* (2004/C 101/03).

The LPE provides for the possibility of a competition authority to present an opinion on the proportionality of requests to disclose the evidence in the file of such competition authority.

4.10 Please describe whether the courts in your jurisdiction have a track record of taking findings produced by EU or domestic *ex-ante* sectoral regulators into account when determining competition law allegations and whether evidential weight (non-binding or otherwise) is likely to be given to such findings.

We are not aware of any case before the Portuguese courts in which the taking of findings produced by EU or domestic *ex-ante* sectoral regulators into account or its evidential weight has been an issue.

As to the evidential weight that is likely to be given to such findings, the Portuguese courts may, pursuant to the general rules on the assessment of evidence, freely appraise the evidence produced, which includes the findings produced by EU or domestic *ex-ante* sectoral regulators, as long as the respective decisions are filed into the judicial private enforcement proceedings. However, Portuguese courts shall not solely ground a decision on such findings, as that would equate such findings to the final decisions issued by the NCA or by a Portuguese appeal court or to final condemnatory decisions issued by an EU competition authority or appeal court. Therefore, the demonstration of the facts encompassed by such findings, if not accepted by the parties, must rely on additional means of evidence.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Prohibited practices may be exempted under Article 10 PCL or Article 101(3) TFEU, or both. Since there are no industry-specific defences, these general rules apply. Under the decentralised regime, the onus is on companies wishing to benefit from the exemption to self-assess their conduct and to come forward with evidence that demonstrates the fulfilment of all cumulative requirements.

Article 4 PCL mirrors Article 106 TFEU. It contains a public interest exception granted to State-owned undertakings, State-owned business undertakings and undertakings to which the State has granted special or exclusive rights that perform services of general economic interest ("**SGEI**"). Those undertakings that have been legally entrusted with the management of SGEI, or are by their nature legal monopolies, are subject to the provisions of the PCL, to the extent that enforcement of these provisions 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?

A passing-on defence is admissible under Article 8 LPE.

As it results, notably, from Articles 5(2) and (4) and 8(2) LPE, indirect purchasers have legal standing to sue.

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?

Article 5(1) LPE clarifies that antitrust practices that result from the joint behaviour of more than one company entail joint and several liability, i.e., each company may be held liable for the full extent of damages caused, holding a right to recourse against the other(s) (exceptions are provided, however, for small and medium-sized undertakings and for undertakings with immunity from fines).

Under Articles 316(3) and 321(1) CPC, defendants are procedurally able to request the joinder of other cartel participants to the claim as co-defendants, provided that, with regard to the matter of the proceedings, the cartel participants shall also be held liable for the damages in case the court upholds the claim, or if the defendants intend to obtain a contribution from the other cartel participants should they be sentenced to pay compensation to the claimants.

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 general rule (special rules apply to SMEs and undertakings with immunity from fines) is, pursuant to Article 6(1) and (2) LPE, that once an infringement ceases, injured parties will benefit from a period of five years to bring a claim, counting from when they acquire the knowledge (or it can be presumed they have acquired the knowledge) of such infringement, as well as of the infringer's identity and of the existence of damages. In any case, the limitation period may not exceed 20 years counting from when the right to compensation for damages could be exercised.

Furthermore, Article 6(4) LPE sets out that the limitation period is suspended during the conduction of investigations of the infringement at stake by a competition authority. Pursuant to Article 6(5) LPE, the ending of the suspension may only take place one year (i) after the infringement has been declared by a final decision of a competition authority or an appeal court, or (ii) after the proceedings are otherwise concluded. The limitation period is also suspended, pursuant to Article 6(6), regarding parties that participate in consensual dispute resolution mechanisms for the duration of such mechanisms.

Likewise, pursuant to Regulation No. 1/2003 (Article 16(1)), a Portuguese court is prevented from taking decisions that would conflict with a decision rendered by the European Commission. This means that a Portuguese court should assess whether it is necessary to stay proceedings pending the outcome of the European Commission's decision or any appeals to the EU courts. The Lisbon Appeal Court decided that a popular action for antitrust damages claims could be suspended until a final judicial decision was issued in the parallel public enforcement proceedings (ruling of the Lisbon Appeal Court of 23 March 2023, *IO v EDP* (case 18/21.0YQSTR.L1)).

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?

According to the Annual Statistic Report (2015–2021), for competition law claims brought before the Competition Court, it may generally take between two and three years until a judgment is given by the court of first instance, depending on the complexity of the evidence and, notably, on the existence of expert evidence. The duration is further dependent on other factors, which are often seen in these proceedings, such as their eventual suspension due to pending public enforcement proceedings.

Additionally, according to the Justice Report (2015–2019), possible appeals to the Lisbon Appeal Court and to the Supreme Court may entail an additional period of two to three years until a final judgment is given.

Nevertheless, the EU Justice Scoreboard 2023 and the most recent national statistics of the Directorate General of Justice Policy (2023) indicate a positive tendency in Portugal towards more expediency.

In certain situations of significant delay, in order to expedite proceedings, parties may submit a priority request to the national Superior Council of the Magistracy ("*Conselho Superior da Magistratura*").

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)?

Under the Portuguese CPC, settlements, confessions and withdrawals ought to be confirmed by the competent court (see Article 290), with the court's assessment limited to a legality control, i.e., the court is not empowered to assess its compatibility with the parties' interests or the fairness or balance of a settlement agreement. As to popular actions, see question 7.2 below.

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?

Collective claims for damages may take place through the national mechanism of popular action, under the provisions of the LPE. Article 19 of said Law expressly confirms the right to resort to popular action for antitrust damages claims.

The representative body may agree upon settlements, solely binding consumers who do not choose to opt out (see Articles 14 and 15 LPA).

In popular actions, settlements and withdrawals will also be dependent on the stance of the Public Prosecution Office, which may block the settlement or withdrawal if it finds that they would be harmful to the claimants' interests (see Article 16 LPA).

See question 3.2 above for an example of a successful settlement that was reached between a consumer organisation and the defendant.

8 Costs

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

Under Articles 533 CPC and 3 of Decree-Law 31/2008 ("*Regulamento das Custas Processuais*"), in civil proceedings, the successful party may recover from the unsuccessful party the court fees paid and the share of court expenses supported (e.g., experts' fees). With regard to counsel's legal fees, the successful party is entitled to obtain compensation from the unsuccessful party that may not exceed half of the total court fees paid by all parties in the proceedings. Considering that counsel's legal fees will often be higher than half of the court fees paid by all parties in the proceedings, there will be, in a significant number of cases, a part of the legal costs that the successful party will not be able to recover.

However, if the unsuccessful party is condemned as a bad faith litigator, which will occur if the court finds that a party, for example, omitted facts relevant for the proceedings or alleged facts knowing them to be false, the bad faith litigator may be sentenced to pay compensation for the damages caused by its wrongful behaviour, which may include all the (reasonable) counterparty's legal costs, not subject to the above-mentioned limit.

Furthermore, there is a special regime on the recovery of legal costs applicable to popular actions. In these proceedings, pursuant to Article 20 LPA, no procedural fees will be demanded from claimants in case of partial loss, and in case of absolute loss, claimants will only be obliged to pay between one-tenth and a half of the costs ordinarily required. Moreover, pursuant to Article 19(7) LPE and to Article 21 LPA, and although it is not entirely clear how these rules should be interpreted, it may be argued that claimants could see their legal costs entirely refunded, including, e.g., counsels' legal fees and the remuneration owed to a third-party funder.

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

In Portugal, contingent fee arrangements, through which a lawyer agrees to accept a fee exclusively dependent on the success of the claim, are deontologically prohibited, pursuant to Article 106(1)(2) of Law No. 145/2015 of 9 September 2015 (Statute of the Portuguese Bar Association). However, it may be agreed that, under Article 106(3) of said Law, the lawyer will receive a surcharge fee depending on the result of the proceedings (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?

The Portuguese legal order (in particular, the LPE) has no specific rules that regulate third-party funding of competition litigation. Nevertheless, there is an ongoing doctrinal and judicial discussion on whether third-party funding is compatible with the Portuguese Constitution.

In the last few years, third-party funding has been used in some cases, such as: *IO v Mastercard* (case 19/20.5YQSTR); *IO v Super Bock* (case 20/20.9YQSTR); *IO v Mercedes-Benz AG et al.* (case 6970/21.8T8LSB); and *IO v Stellantis NV et al.* (case 11400/21.2T8LSB), and in the banking cases: *IO v. BBVA et. al*

(cases 2/24.1YQSTR and 6/24.4YQSTR); *IO v Barclays Bank* (case 4/24.8YQSTR); *IO v Deutsche Bank* (case 5/24.6YQSTR); and *IO v Abanca* (case 3/24.0YQSTR).

9 Appeal

9.1 Can decisions of the court be appealed?

Judgments and orders of the Competition Court or any other first instance court may be appealed to the Lisbon Appeal Court and/or the Supreme Court. Whether the decision of the court of first instance may be appealed will depend on the value and the matter at stake. Also, if the applicable laws contravene the legal provisions of the Portuguese Constitution or the principles enshrined therein, the case may be appealed 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 PCA may grant immunity from a fine or reduction of a fine pursuant to certain forms of infringement of Article 101(1) TFEU and/or its equivalent, Article 9 PCL (see Articles 75 *et seqs* PCL and the procedure for obtaining immunity or reduction of fines, approved by the PCA Regulation No. 747/2024 of 11 July).

Even a successful immunity applicant is not entirely shielded from private enforcement claims (case 4/24.8YQSTR, *IO v. Barclays Bank*, pending). Nevertheless, the LPE grants some degree of protection to such immunity applicants from undue exposure to damages claims. For example: (i) the immunity recipient is relieved (in principle) from joint and several liability for the entire harm; (ii) special rules for redress between co-offenders (e.g., any contribution the immunity applicant must make *vis-à-vis* co-infringers shall not exceed the amount of harm caused to its own direct or indirect purchasers); and (iii) protection of leniency documents from requests to access for the purpose of actions for damages, etc.

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?

For the purposes of actions for damages, settlement proposals and leniency statements are protected (Articles 14(5) and 16(1) LPE). However, third parties may submit a reasoned request for the court to ensure that the requested documents are within the scope of the settlement proposals and leniency statements, and that no access can be granted (Article 14(7) LPE).

Access by third parties to requests, documentation and information submitted when applying for leniency is granted if the leniency applicant gives authorisation, without prejudice to the provisions contained in the LPE (Article 81 PCL).

Outside the leniency regime, the disclosure and protection of other types of documents follow the general rules (see Articles 30, 32 and 33 PCL).

The access of other co-infringers to leniency documents is strictly for the purposes of its defence and/or the judicial review of a PCA decision where the information at stake has been used as evidence, as well as for the determination of the relative responsibility of a given infringer where there is joint and several liability (Article 81(2) PCL).

In accordance with Articles 81(3) PCL and 14(4) LPE, the following categories of information obtained within the scope of a leniency application cannot be used before the courts until the PCA concludes its analysis of such leniency applications:

a) information drafted by other natural or legal persons specifically within the scope of the leniency applications; and
b) information drafted and sent by the PCA to the leniency applicants.

11 Anticipated Reforms

11.1 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 Private Damages Directive has only been implemented in the Portuguese jurisdiction by the LPE, in 2018.

The LPE goes beyond the Private Damages Directive on Antitrust Damages Actions in several aspects, such as:

- The law applies not only to EU competition law violations (Articles 101 and 102 TFEU), but also to actions for damages exclusively based on infringements of the PCL or of equivalent provisions of other Member States. In Portugal, this also comprises actions for damages for abuse of economic dependence (Article 12 PCL).
- The law is applicable both to claims for damages and to any "other requests" based on a violation of EU or Member State competition law (e.g., actions for access to evidence or declarations of nullity/voidness of contractual clauses, interim measures, etc.).
- The parent company is liable for their subsidiaries' infringements and there is a presumption of exercise of control above a 90% shareholding.
- The law provides the right to pre-filing discovery, in order to assess the existence of a cause of action or to prepare a damages claim.
- The law provides the right of opt-out from representative actions/*ação popular* may be used in actions for damages regarding the violation of competition laws.

Portugal's opt-out collective redress regime is making it a leading jurisdiction in the EU as regards mass actions for damages (alongside the UK and the Netherlands). Also, the LPE contains significant rules to incentivise such damages claims (e.g., the presumption that cartels cause damage, or the binding effect of the PCA's final decisions or the courts' decisions, etc.).

With the increase in PCA public enforcement decisions, a surge of follow-on damages actions is expected. In the past years, the PCA has: imposed fines on companies for infringements of competition law totalling more than EUR 1 billion in *circa* 30 sanctioning decisions; issued 17 statements of objections; conducted dawn raids in at least 10 investigations; and received *at least* eight leniency requests. In its priorities for 2024, the PCA assumed its commitment to the detection and sanctioning of anticompetitive behaviour, combating cartels and bid rigging in public procurement, as well as abusive practices and collusion in the digital market.

Following the enactment of the LPE, there has been an increase in litigation. For example, there are recent follow-on actions (including opt-out representative actions) of both the European Commission's decisions (*trucks cartel*, *Mastercard*,

Google Play Store, *Apple App Store*, *Sony*, dieselgate litigation, etc.) and PCA decisions (*Sport TV*, *EDP*, *Super Bock*, banking cases, etc.).

It is too early to take stock in these new cases of how the Directive has been applied, since they have not been decided by the Portuguese courts of last instance.

The Competition Court is the specialist court dealing with actions arising purely from competition law infringements (see question 1.4 above). Court specialisation is commonly considered an important reform initiative to advance the development of a successful judicial system.

Lastly, it should be noted that the Portuguese courts are no longer afraid of making references for preliminary rulings of the Court of Justice of the EU ("**ECJ**") in competition cases (e.g., the recent cases of: C-637/17 *Cogeco*; C-525/16 *Meo*; C-331/21 *EDP*; C-211/22 *Super Bock Bebidas*; C-298/22 *Banco BPN/BIC et al*; or C-260/23 *SIBS*).

11.2 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 to new cases. The EU Directive on Antitrust Damages Actions has been implemented by the LPE, which came into force in August 2018.

The Portuguese Supreme Court has decided that time-barring rules are substantive in nature and that a limitation period (Article 6 LPE) is applicable only to infringements that occurred after the entry into force of this law (see Supreme Court judgment of 8 March 2022, *RNM v. Daimler*, case 6/19.6YQSTR-C.L1.S1, pp. 18–20).

Moreover, the ECJ decided in the same vein for limitation periods (C-637/17 *Cogeco* EU:C:2019:263) and as regards the application of the presumption that cartel infringements cause harm (case C-267/20, *Volvo AB/DAF Trucks NV v. RM*, EU:C:2022:494). In these cases, an action for damages that, although brought after the entry into force of the provisions belatedly transposing the Directive into national law, pertains to an infringement of competition law that ceased before the date of expiry of the time limit for its transposition, does not fall within the temporal scope of that Directive.

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

Law No. 17/2022 of 17 August implements Directive (EU) No. 2019/1 ("**ECN+ Directive**"). Accordingly, the PCL and the PCA bylaws were amended, and extensive amendments were introduced in several matters: (i) the PCA investigative powers (to inspect business premises, request information, etc.); (ii) determination of the ceilings for fines; (iii) rules on limitation periods; (iv) access to files; and (v) leniency applications, *inter alia*.

In general, the legislative reform conferred more investigative powers to the PCA, while weakening the fundamental rights of the accused companies. This may eventually lead to more robust public enforcement and additional condemnatory decisions. Consequently, it is expected that more follow-on actions for damages will be brought against infringers of competition rules.

Besides competition law, we anticipate an increase of class actions, in particular in ESG, privacy, consumer, crypto and "big tech" class action litigation.

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Miguel Gorjão-Henriques is a partner in the EU and Competition Department and co-coordinates the Life Sciences Department since the end of 2007. He has a *Doutoramento* (Ph.D.) in Law from the University of Coimbra, where he has been a professor of EU Law and other areas since 1992 (excluding the period 2014–8/2018). As a lawyer, he has been registered under the Portuguese Bar Association since 1999 and, in his early years, collaborated with Coelho Ribeiro & Associados, PLMJ and VdA. He is president of the General Assembly and Consultative Council of the Circle of Portuguese Competition Lawyer's and vice-president of the Portuguese Association of European Law ("**APDE**"), a member of the International Federation of European Law ("**FIDE**"). He has an extensive number of publications in his areas of interest.

Sérvulo & Associados
Rua Garrett, 64
1200-204, Lisbon
Portugal

Tel: +351 210 933 000
Email: mgh@servulo.com
LinkedIn: www.linkedin.com/in/miguel-gorjão-henriques-5b649617

Mafalda Ferreira Santos has been a partner in the firm's Litigation & Arbitration and Restructuring & Insolvency Departments since 2018. She holds a Master's degree in Legal Sciences from the Faculty of Law of the University of Lisbon. Mafalda started her career in 1997 at F. Castelo Branco, P. Rebelo de Sousa & Associados – Sociedade de Advogados and P. Rebelo de Sousa & Associados, Simmons & Simmons. From 2003 to 2013, Mafalda was an associate at Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL, where she became a partner in 2013. Mafalda has also lectured on "Interdisciplinary Juridical Practice" (2004–2017) at the Faculty of Law of Universidade Nova de Lisboa and on a graduate course at the Faculty of Law of the University of Lisbon.

Sérvulo & Associados
Rua Garrett, 64
1200-204, Lisbon
Portugal

Tel: +351 210 933 000
Email: mfs@servulo.com
LinkedIn: www.linkedin.com/in/mafaldasantos

Alberto Saavedra is a partner in the European and Competition Department. He holds an LL.M. – Master of Laws in European and Competition Law from University College London (2009), is a postgraduate in Competition Law from King's College London (2006), and graduated in Law from the Oporto Faculty of Law of Universidade Católica Portuguesa (2004). He was previously an aide to the Secretary of State for the Treasury of the XIX Constitutional Government (2013–2015), an associate at SRS – Advogados & Associados (2011–2013), and at Nobre Guedes, Mota Soares & Associados in 2010. Alberto began his career at Morais Leitão, Galvão Teles & Associados (2004–2010). He is Treasurer of the Portuguese Association of European Law ("**APDE**"), a member of the International Federation of European Law ("**FIDE**"). He is the author of several articles and publications on his areas of specialisation.

Sérvulo & Associados
Rua Garrett, 64
1200-204, Lisbon
Portugal

Tel: +351 210 933 000
Email: as@servulo.com
LinkedIn: www.linkedin.com/in/alberto-saavedra1

Nuno Temudo Vieira is a senior associate in the Litigation and Arbitration department. He holds a postgraduate degree in Arbitration from the Faculty of Law of Universidade Nova de Lisboa (2018). He holds a Master's degree in Corporate and Business Law from the Oporto Faculty of Law of Universidade Católica Portuguesa (2014), and a degree in Law from the Faculty of Law of Universidade do Porto (2011). Nuno started his career at SRS Advogados (2015–2019) and was a trainee at Caiado Guerreiro & Associados (2014–2015).

Sérvulo & Associados
Rua Garrett, 64
1200-204, Lisbon
Portugal

Tel: +351 210 933 000
Email: ntv@servulo.com
LinkedIn: www.linkedin.com/in/nuno-temudo-vieira-98704499

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