



Competition Litigation Comparative Guide



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1. Legal framework

1. 1. Which laws regulate competition in your jurisdiction?

Portugal
PLMJ

The Competition Act (19/2012) sets out the Portuguese legal framework on competition. The Competition Act mirrors EU Regulation 1/2003 to a great extent, and the provisions that prohibit anti-competitive agreements/concerted practices and the abuse of dominant position are identical to Articles 101 and 102 of the Treaty on the Functioning of the European Union.

The Private Damages Act (23/2018) sets out the legal framework applicable to private antitrust claims. The Private Damages Act implemented the EU Damages Directive (2014/104/EU) and applies both to EU competition law and Portuguese competition law. General substantive rules provided for in the Civil Code and the procedural rules of the Civil Procedure Code will apply when issues are not addressed in, or fall outside the scope of, the Private Damages Act.

1. 2. Which authorities are responsible for enforcing the competition legislation? What is their general approach to enforcement?

Portugal
PLMJ

The Portuguese Competition Authority (PCA) is responsible for the enforcement of competition law in Portugal.

The PCA is going through the most activist phase of its existence. Since 2016, it has imposed fines for infringements of competition law totalling over €1.4 billion. Most of these fines have related to alleged infringements of the rules prohibiting anti-competitive agreements/concerted practices. The key areas of enforcement to note in the recent past include:

- over €650 million in total fines imposed for alleged hub-and-spoke infringements in the food and beverage distribution sector;
- infringement decisions relating to the exchange of competitively sensitive information between competitors;
- infringement decisions relating to the alleged bid rigging of public tenders; and
- infringement decisions alleging the existence of non-poaching agreements between competitors.

2. Private claims

2. 1. What types of private claim may be brought for breach of competition law in your jurisdiction?

Portugal
PLMJ

An individual or company wishing to bring a claim for breach of competition law can bring either a standalone action or a follow-on action.

A standalone action is a claim brought where the alleged breach of competition law is not already the subject of an infringement decision by the European Commission or the Portuguese Competition Authority (PCA). In this case, the claimant must prove to the court that the infringement took place and that it suffered loss as a result of the alleged infringement.

Where a breach of competition law has been established by a European Commission or PCA infringement decision and has become final and unappealable, a claimant can bring a follow-on action. This means that the claimant can rely on the European Commission's or PCA's findings regarding the existence of the infringement and will usually need only to prove that the loss was suffered as a result of that infringement.

There are three main types of relief available to a claimant (please refer to question 11.1 for further details):

- damages;
- an injunction; and
- a declaration that a certain agreement, clause or conduct is anti-competitive and therefore void and/or unenforceable

A claimant may seek – and be awarded – more than one type of relief in the same case.

2. 2. What is the legal basis for bringing a claim for breach of competition law?

Portugal
PLMJ

A claim for a breach of competition law in Portugal can be brought under:

- Articles 101, 102, 107 and 108 of the Treaty on the Functioning of the European Union; and
- EU Regulations 1/2003 and 2015/1589.

Claims can also be brought under the domestic Competition Act and the Private Damages Act. General substantive rules provided for in the Civil Code and the procedural rules of the Civil Procedure Code will apply when they are not addressed or fall outside the scope of the Private Damages Act. See question 1.1 for further details.

3. Parties

3. 1. Who has standing to bring a claim for breach of competition law?

Portugal
PLMJ

The general provisions on standing for civil claims apply to claims for breach of competition law. Accordingly, any legal or natural person that believes it has suffered harm as a result of a competition infringement producing effects in Portugal has standing to bring a claim and seek payment of damages.

The following should be noted in particular:

- Individual/collective claims: Claims for breach of competition law may be brought individually or collectively by means of joint proceedings or class actions – for further details, please refer to questions 10.4 and 4.1.
- Direct/indirect consumer claims: Both direct and indirect consumers and/or end consumers can have standing to bring a claim.
- Class action standing. The following people or entities have standing to bring a class action:
 - citizens, individually or jointly with others;
 - associations that exist to defend the interests in question;
 - local authorities, in respect of interests of residents in their area; and
 - the public prosecutor.
- Class action standing rules for consumer associations: The following requirements must be met for an association or foundation to be entitled to bring a class action on behalf of a group of citizens:
 - It must be a legal person with full legal capacity;
 - The interests involved in the class action must be specifically covered by its purpose in the articles of association; and
 - It cannot engage in any kind of activity that competes with companies or self-employed professionals.
- Class action standing rules for associations of undertakings: Associations of undertakings whose members have been harmed by an infringement of competition law may also bring proceedings, even if their statutory purpose does not include the defence of competition.
- Third-party funders: Funding arrangements and third-party funding do not in themselves grant standing to the funder to intervene in the proceedings.

3. 2. Can a claim for breach of competition law be brought against parties outside the jurisdiction?

Portugal
PLMJ

Yes, under:

- the EU rules on jurisdiction rules for civil and commercial matters (which includes competition damages actions) as set out in the Recast Brussels Regulation;
- any other international treaties that may be applicable; or
- the internal rules that attribute international jurisdiction to Portuguese courts as set out in the Civil Procedure Code.

The core jurisdictional provision under the Recast Brussels Regulation provides that a claim should be brought in the courts of the EU member state where the defendant is domiciled. There are two special jurisdictional provisions that apply to competition damages claims:

- In a tort claim, a claimant may bring an action in the courts of a member state where the harmful event occurred or may occur.
- Where there are multiple defendants domiciled in different member states, a claimant can opt to bring a

claim in the courts of a state where one of those defendants is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

In cases where the Recast Brussels Regulation's jurisdictional rules or the rules contained in any other international treaty are not applicable, the domestic rules on jurisdiction set out in the Civil Procedure Code will apply.

3. 3. Can a claim for breach of competition law be brought against individuals, or only companies?

Portugal
PLMJ

Under Portuguese law, a claim for breach of competition law may be brought against both individuals and companies.

The Portuguese Competition Authority (PCA) has sanctioned individuals in the past. However, in practice and from experience, the enforcement activity of the PCA has been focused primarily on companies and the same is true in relation to private claims.

4. Collective actions

4. 1. Is it possible to bring a collective action for breach of competition law in your jurisdiction? If so, what is the applicable regime?

Portugal
PLMJ

Yes, it is possible to bring a collective action for breach of competition law in Portugal.

Competition class action claims in Portugal are brought under the general class action rules, as well as under the specific rules for class actions set out in the Private Damages Act, where applicable.

The right to bring class actions is provided for by the Portuguese Constitution. Article 52 states that every citizen – either individually or through associations that exist to defend the interests in question – has the right to bring class actions under the terms of the law.

The general legal framework for class actions is set out in the Class Action Act (83/95).

The Private Damages Act is also applicable to all to class actions where damages are claimed.

4. 2. Do collective actions proceed on an 'opt-in' or an 'opt-out' basis?

Portugal
PLMJ

The rule under Portuguese law is that all class actions proceed on an opt-out representative basis.

The rule under Portuguese law is that all class actions proceed on an opt-out representative basis.

If the class action is accepted by the court, class members will be served:

- to join and participate in the proceedings proactively if they wish; or
- to state that they do not agree to be represented by the claimant.

The court sets a deadline by which the class members must inform the court of their decision.

The right to opt out may be exercised by class members until the end of the evidential stage of proceedings. Not opting out of an action by the deadlines set will result in automatic opt-in.

4. 3. Do collective actions require certification? If so, what requirements must be met to obtain certification?

Portugal
PLMJ

Portuguese law does not provide for a standalone class certification process.

However, for a class action to proceed in Portugal, the court must carry out a preliminary analysis of the claim. In that assessment, the court can summarily reject the claim if it considers that it is manifestly unlikely to proceed. One of the grounds for such a decision can be the absence of a proper class. It is very rare, however, for class actions to fail at this stage of proceedings.

Notwithstanding the above, the parties to class action proceedings can make submissions regarding class membership in the claim (claimant) and in the defence (defendant). There are additional stages where this issue can be litigated prior to judgment. These include:

- during the preliminary hearing (which is akin to a case management conference);
- during the final hearing; and
- in response to any request for submissions on this point made by the court in the run-up to the final hearing.

As a rule, the court will rule on all substantive issues – including class membership – in the final judgment.

5. Forum

5. 1. In what forum(s) are claims for breach of competition law heard in your jurisdiction?

Portugal
PLMJ

The main forum where claims for a breach of competition law are heard in Portugal is the Competition Court. The Competition Court is a specialist court that was established in 2012.

The Competition Court is the first instance court of appeal of infringement decisions taken by the Portuguese Competition Authority. It has also been the forum of choice for follow-on competition actions and for all of the competition class actions brought in Portugal to date.

Appeals against judgments rendered by the Competition Court in competition claims are heard by the Lisbon Court of Appeal (LCA). The LCA has a specialist chamber that hears these (and other competition) cases.

Claims for breaches of competition law can also be heard in arbitration tribunals. We are aware of at least one high-value arbitration claim that involved an alleged breach of the competition rules.

6. Bringing a claim

6. 1. What is the limitation period for claims for breach of competition law in your jurisdiction?

Portugal PLMJ

The general rule under the Private Damages Act is that once the infringement has ceased, injured parties have a period of five years to bring a claim. This period begins to run from the moment the claimant becomes aware (or it can be assumed that it has become aware) of:

- the infringement;
- the identity of the person responsible for the infringement; and
- the existence of the damage.

Prior to the entry into force of the Damages Directive and the Private Damages Act, the limitation period for bringing claims for breach of competition law based on tort liability was three years.

The above is without prejudice to the 20-year limitation period provided for under Portuguese law, as from the harmful event. The limitation period for claims for breach of competition law based on contractual liability is also 20 years.

The limitation period is suspended:

- if a competition authority brings an investigation concerning the infringement to which the claim for damages relates. This suspension will not end until one year after:
 - the infringement has been established by a final decision of a competition authority or by a court decision that has become final; and/or
 - the proceedings are otherwise concluded;
- for parties that participate or are represented in alternative dispute resolution proceedings, for as long as such proceedings continue; and
- in case of service on the defendant of any action intended to exercise the right to damages. In this case, the relevant time limit will be 'reset' and will begin to run again from the start.

6. 2. What are the formal requirements for bringing a claim for breach of competition law?

Portugal
PLMJ

Under Portuguese law, there are no specific formal requirements for bringing a claim for breach of competition law.

6. 3. What are the procedural and substantive requirements for bringing a claim for breach of competition law?

Portugal
PLMJ

The procedure for bringing a claim for a breach of competition law follows the general rules for civil and commercial proceedings.

Claims are started by filing a claim via the Portuguese e-court platform (called Citius). The claim must:

- identify the parties;
- list the relevant facts;
- state the claimant's position and, in its view, the law applicable to the case;
- make a petition to the court; and
- request any evidence (eg, documentary or witness evidence), which may be amended later in the proceedings.

A court fee is due at the time of filing.

A claim for breach of competition law must be derived from an infringement, whether it is an anti-competitive agreement between two or more undertakings or abuse of dominance by a dominant undertaking.

The cause of action should be an infringement of competition law which, subject to evidence presented during the proceedings, satisfies the requirements for either contractual or tort liability of the defendant(s).

The claimant will also need to show a nexus/territorial connection of the alleged infringement to Portugal – that is, that the conduct at issue:

- took place in Portugal; and/or
- had an effect on a relevant market or markets in Portugal.

The claim must be substantiated on reasonable grounds, subject to the specific circumstances of each case. Failure to comply with this may give rise to an invitation by the court to perfect the claim or ultimately lead to the claim being dismissed.

6. 4. What are the implications if a public enforcement action in relation to the same behaviour is pending? Can a claim still be brought?

Portugal
PLMJ

Yes, private enforcement proceedings can be brought in parallel to public enforcement action.

In such circumstances, there are mechanisms for staying the claim parallel to public enforcement proceedings:

- Pursuant to EU Regulation 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 from decisions following investigations.
- Likewise, under the Private Damages Act, a Portuguese court may stay proceedings pending the conclusion of an ongoing investigation or final decision by the Portuguese Competition Authority (PCA) or a final judgment on appeal.

In the *Super Bock* class action proceedings (a follow-on class action from the PCA's decision to fine domestic brewer Super Bock for resale price maintenance), the Competition Court stayed the proceedings until all appeals against the PCA's infringement decision had been exhausted.

6. 5. How is jurisdiction over the claim determined?

Portugal
PLMJ

Territorial jurisdiction of the Portuguese courts must be established under:

- the Recast Brussels Regulation;
- other applicable international treaties; or
- the applicable national rules – please refer to question 3.2.

Portuguese law governing the organisation of the court system sets out the cases over which the Competition Court has jurisdiction. The Competition Court has jurisdiction to hear any questions concerning the appeal, review and enforcement of decisions taken by the PCA.

It is also incumbent on the Competition Court to hear:

- actions for damages based on breaches of competition law;
- actions aimed at exercising the right of recourse between co-infringers; and
- requests for access to evidence relating to such actions.

The Competition Court will also hear all other civil actions with claims based exclusively on infringements of competition law, as well as requests for access to evidence relating to such actions.

6. 6. How is the applicable law determined?

Portugal
PLMJ

The law applicable to tort obligations is established under the Rome II Regulation. The applicable law for contractual obligations is established under the Rome I Regulation.

Where neither the Rome II or Rome I Regulations nor any other international agreement applies, national rules on conflicts of law or on the determination of the applicable law will apply.

It is for the party seeking to rely on foreign law to demonstrate the existence and content of the provisions on which it relies.

The above is without prejudice to the parties' choice of applicable law, to the extent permissible.

6. 7. Under what circumstances must security for costs be provided?

Portugal
PLMJ

As a general rule, a party is not required to pay security for litigation costs of the opposing party.

Such a payment may be required by the court, however, when a party appeals the judgment and wishes to stay the appealed proceedings while the appeal is pending. The decision on whether to grant a stay and the adequacy of the security is subject to the discretion of the court.

6. 8. Are interim remedies available in competition litigation? If so, how are they obtained?

Portugal
PLMJ

Interim remedies are available provided that there is a risk of:

- serious and irreparable harm to the claimant or competition in general caused by the alleged infringement; or
- an imminent breach of competition rules.

An interim remedy will be awarded if all of the following conditions are met:

- the existence of a substantive claim against the defendant;
- urgency (ie, a need to take urgent steps to bring certain actions or omissions to an end); and
- the proportionality of the benefit of the injunction to the detriment caused to the defendant (proportionality test).

In damages claims, where there is a risk of losing asset security, the claimant will need to show the court that it legitimately fears that payment of damages will be jeopardised by the defendant (eg, because the defendant is preparing to dispose of property or conceal its assets outside the country to hinder payment or avoid the enforcement of the damages award).

Interim proceedings are urgent in nature and confidential, at least until the case is served on the defendant. They can be granted on an *ex parte* basis (ie, without prior hearing of the defendant) to ensure their effectiveness, but this is subject to the court's discretion.

7. Disclosure and privilege

7. 1. What rules apply to disclosure in your jurisdiction? Do any exceptions apply?

Portugal PLMJ

Unlike in common law jurisdictions, there is no discovery process in Portugal. Portuguese law also does not allow other types of pre-trial investigations, fishing expeditions or indiscriminate requests for the production of evidence. A party to litigation is therefore under no obligation to make available evidence which either supports or undermines its case to the other side.

Notwithstanding the above, both claimants and defendants must indicate the evidence on which they base their factual assertions. In addition, the court may order the production of specific documents at the request of each party.

Production requests are usually made between the pleadings stage and the preliminary hearing, and are subject to the court's decision. All documents disclosed must be formally submitted in the proceedings and are subject to the adversarial rules. This means that no production orders can be ordered by the court without the opposing party making submissions to the court regarding the production request (eg, with respect to its proportionality or temporal scope).

The timing of the production of documents is set by the court and may vary according to the type and the number of documents to be produced. Judges are usually receptive to reasonable constraints invoked regarding the production of documents.

The court may also order the production of documents or information of its own motion at any stage of the proceedings.

In claims for breach of competition law, claimants can also request the production of specific documents if these can be identified to reasonable degree.

Any such request must pass the applicable legal tests – namely relevance, specification, and proportionality. Pre-litigation disclosure requests must also pass the 'plausibility of the underlying right' test. Stringent safeguards to protect privacy sensitive and commercially sensitive information can be put in place where applicable.

The court cannot, however, order the disclosure of documents containing leniency statements or settlement submissions (under the prohibition contained in the Private Damages Act).

7. 2. What rules on third-party disclosure apply in your jurisdiction?

Portugal
PLMJ

See question 7.1.

7. 3. What rules on privilege apply in your jurisdiction?

Portugal
PLMJ

Any facts, documents or information obtained in breach of attorney-client privilege will not be admitted as evidence in court proceedings. Correspondence and documents exchanged between lawyers and their clients cannot be seized by the court unless they relate to a criminal offence in proceedings where the counsel is a defendant.

8. Evidence

8. 1. What types of evidence are permissible in your jurisdiction? Is expert evidence accepted?

Portugal
PLMJ

All evidence which is relevant to the claim being litigated is admissible. In competition litigation in Portugal to date, evidence that is typically presented to the court includes:

- in cases of follow-on actions, the European Commission/Portuguese Competition Authority decision on which the action is based;
- evidence relevant to the effects of the alleged infringement on the market in question;
- evidence relevant to the damage caused by the alleged infringement to the applicant; and
- evidence relevant to the defences put forward by the defendant – for example, the quantum of any alleged damage and the existence of pass-on.

Evidence relating to causation of the alleged infringement and the effects on the applicant can take various forms. In its claim, the applicant can:

- include evidence regarding all or some of the aspects of the claim; and
- request the court to order discovery of documents to which it does not have access, which are in the control of the defendant and which are relevant to all/parts of its claim.

Expert evidence is accepted and is presented as a matter of course in competition litigation in Portugal. The most common type of expert evidence presented is economic expert evidence regarding each of the items identified above – in particular, as to the existence of any damages, causation and pass-on. Experts can be both presented by the parties and appointed by the court.

Expert evidence and legal opinions from legal scholars are also typically submitted in competition litigation proceedings. Such evidence will typically relate to the correct legal interpretation of procedural and substantive law issues, such as:

- limitation;
- standing;
- the applicable rules of evidence or causation;
- constitutional law issues; and
- points of EU law.

8. 2. What is the applicable standard of proof?

Portugal
PLMJ

The standard of proof in competition litigation is the balance of probabilities.

8. 3. On whom does the burden of proof rest?

Portugal
PLMJ

In general terms, the burden of proving a fact lies with the party that alleges it. This is without prejudice to any presumptions provided for by law.

8. 4. What defences are typically available in competition litigation?

Portugal
PLMJ

Procedural and substantive defences are available in competition litigation proceedings in Portugal.

The key procedural defences brought in competition litigation to date in Portugal are as follows:

- limitation – that is, the claim was brought after the limitation period for the claim expired;
- pass-on – that is, the claimants are said not to have suffered any damage because they passed on the overcharge to their customers or mitigated damage by other means; and
- in class actions where the claim is brought by consumer associations, a defence as to whether the association in question meets the requirements as a class representative and therefore has standing to bring the claim.

The key substantive defences brought in competition litigation to date in Portugal are as follows:

- in standalone infringement litigation, the absence of any infringement of EU and/or domestic competition law;
- in follow-on and standalone litigation, the absence of causation of any damage arising from the conduct

at issue; and

- in follow-on and standalone litigation, the absence of any alleged damage to the claimant(s) because they would have passed on the overcharge to their customers, fully or in part, and mitigated damage by other means (passing on).

There are a number of additional defences that are currently being run in competition class action litigation. These include the argument that third-party funding agreements in finance class actions may in some cases be unconstitutional.

The extent to which these defences will remain available in the future will depend on the outcome of current litigation.

9. Settlement

9. 1. Can the proceedings be discontinued without a full trial? If so, how; and what are the implications?

Portugal
PLMJ

Yes, proceedings can be discontinued without a full trial.

A settlement can be taken to court for approval (if the settlement is reached in court); or the parties can just inform the court that they have reached a settlement (if the settlement is reached out of court). If the court approves the settlement and/or considers the procedural conditions for a settlement are met, the case will be closed.

The court is not allowed to assess the reasonableness of the settlement with the interests of the parties or by any means rule on the balance of the settlement.

In the case of a settlement, costs are split 50:50, unless otherwise agreed. Where the settlement is made between a party exempted from payment of costs and another party which is not exempted, the court, after hearing the public prosecutor, will set the proportion in which costs are to be paid.

9. 2. In the case of collective actions, is collective settlement possible? If so, how; and what are the implications?

Portugal
PLMJ

In Portugal, there is no specific procedure for settlements in the context of collective actions. The general rules for settlements in civil claims will apply.

In the case of a settlement of a class action, the settlement must be submitted to the court for approval. The public prosecutor is notified of the proposed settlement in order to indicate whether it wishes to exercise its right to substitute the claimant and/or to raise any issues regarding the agreement on the payment of court costs that the parties have reached.

The settlement will be binding on, and enforceable between, those that sign it. Class members that refuse to enter into the settlement or that have opted out of the proceedings will not be bound by the settlement.

10. Court proceedings

10. 1. Are court proceedings in your jurisdiction public or private? If the former, are any options available to the parties to keep the proceedings or related information confidential?

Portugal
PLMJ

As a rule, court proceedings are public. Any party, counsel or anyone else that has a reasonable interest can access the court file.

Proceedings and related information may be kept confidential where disclosure is:

- likely to harm the dignity and/or privacy of private or family life of the persons involved and/or public morality; and/or
- necessary to ensure the full effectiveness of the judgment to be given (as in the case of *ex parte* decisions).

Court hearings – including the trial – are public, except when the judge decides otherwise in order:

- to safeguard the dignity of the persons involved or public morality; or
- to ensure the orderly conduct of the proceedings.

Safeguards to protect confidential and commercially sensitive documents or information can be requested from the court – for example, in the form of orders that:

- proceedings be conducted *in camera*;
- sensitive information and/or business secrets from documents/parts of documents be redacted;
- documents be made only available only to the court and the parties to the proceedings and their counsel;
- access be granted to opposing counsel provided a commitment is made to use those documents exclusively for certain purposes;
- a data room be set up for consultation of documents with no permission to download or copy them;
- only excerpts or non-confidential versions be made available;
- consultation by third parties be prevented without court permission; or
- personal data be redacted or encrypted.

Please refer to question 7.3 for further information on this point.

10. 2. How do the court proceedings unfold in your jurisdiction?

Portugal
PLMJ

The initial stage of the proceedings consists of the parties' written pleadings – namely the statement of claim and the statement of defence.

If the defendant makes a counterclaim, the claimant will be allowed to submit a defence.

In some cases, it is also possible for the parties to submit additional pleadings at a later stage if:

- new facts relevant to the case arise; or
- the parties become aware of such facts after the initial pleadings.

As a rule, the pleadings stage is followed by the preliminary hearing, which is similar to a case management hearing. However, a preliminary hearing is not mandatory and is at the court's discretion.

If the case proceeds to trial after the preliminary hearing (which is usually the case), the court will list the facts on which evidence must be produced by the parties.

The trial takes place on a date or dates scheduled by the court, usually for the production of witness evidence (including expert evidence) and statements by the parties or their legal representatives. Cases at first instance are presided over by a single judge, including at trial.

At the end of the trial, the parties' counsel may present closing arguments, which are usually oral but may be made in writing.

Judgment will follow and can be appealed. Appeals are heard by the Court of Appeal, which decides on matters of fact and law; and then by the Supreme Court of Justice, which hears appeals on matters of law only. Appeals are heard by a panel of three judges.

10. 3. What is the typical timeframe for proceedings?

Portugal
PLMJ

Our experience to date of competition litigation in Portugal is that such proceedings can take between approximately four and 5.5 years, with the following estimated periods for each stage of proceedings:

- First instance proceedings: 2.5 years to three years.
- Court of Appeal proceedings: An additional one to 1.5 years.
- Supreme Court of Justice proceedings: Up to an additional year.

10. 4. What rules apply to the joinder of third parties?

Portugal
PLMJ

Third parties may join the proceedings as claimants or defendants of their own motion or at the request of parties. This will be the case when a third party has a similar interest to that of claimant or defendant in the outcome of the proceedings.

If the third party does not have the same interest in the case as the claimant or the defendant (eg, if it only has an indirect interest), it may still participate in the proceedings. In this case, participation in the proceedings will be more limited, as will be the effect of the judgment on the third party.

Parties that join the proceedings as claimants or defendants will be liable for costs in the same way as the original parties. Parties that join the proceedings because they have an indirect interest in the case may also be liable for costs.

Portuguese law also allows for multi-party/joint proceedings – that is, separate proceedings that are managed and heard together in any of the following situations:

- Multiple claimants join their individual claims into one action (joinder of parties);
- Two or more existing proceedings have a significant connection between them and are joined with a view to avoiding inconsistent decisions (joinder of actions); or
- There is an assignment of claims to special purpose vehicles, where several individual claims are assigned to a special purpose vehicle that acts as a claimant.

There are no formal limitations on the number of claims or claimants that may be joined in the same proceedings.

10. 5. To what extent do the decisions of national or foreign competition authorities influence the court's decision?

Portugal
PLMJ

The Private Enforcement Act includes several presumptions regarding the existence of an infringement, passing on and damages, as follows:

- A final decision issued by the Portuguese Competition Authority (PCA) or by a Portuguese appeal court constitutes an irrebuttable presumption of the underlying infringement. This presumption covers the nature of the infringement and its material, temporal and territorial scope, as ultimately determined by the PCA or appeal court.
- A final decision issued by an EU competition authority or appeal court constitutes a rebuttable presumption of the underlying infringement.

A presumption of loss and causation exists in cartel infringements. There is also a presumption regarding the existence of passing on of the overcharge resulting from a cartel that benefits indirect purchasers of the cartelised products or services.

11. Remedies

11. 1. What remedies are available in competition litigation in your jurisdiction?

Portugal
PLMJ

The remedies available for competition litigation in Portugal are the same as those that are available for claims under tort law – namely:

- injunctive relief;
- requests for compensation for losses incurred and damages suffered;
- requests for specific performance; and
- requests for penalties for non-performance of the conduct at issue.

A claimant may be awarded more than one type of relief in the same case.

The most common types of remedies sought to date by claimants are requests for compensation for losses incurred and damage suffered as a result of the alleged anti-competitive conduct.

11. 2. Are punitive damages awarded in your jurisdiction?

Portugal
PLMJ

The general rule under Portuguese law is that damages for competition infringements are compensatory in nature – that is, punitive damages are not awarded.

Punitive damages have been the subject of intense debate among scholars and practitioners, and before the courts.

While there seems to be a consensus that punitive damages are not traditionally awarded in Portugal, some provisions regarding tort liability and compensation for loss and damage appear to have a punitive role. Furthermore, there is case law that appears to recognise a certain form of punitive liability in the application of these provisions.

The provisions in question relate to legal criteria placing importance on the degree of fault/intent or negligence and the financial situation of the offender or of the injured party; and they may influence the quantum of damages.

11. 3. Will the courts consider any fines imposed by the competition authorities in deciding on the quantum of damages? What other factors will it consider in this regard?

Portugal
PLMJ

Courts will not have regard to the fines imposed by the competition authorities in deciding on the quantum of damages.

In determining the quantum of damages, the general rules on the type and quantum of damages caused by the infringement apply.

Damages for competition law infringements in Portugal are compensatory in nature and the quantum can be determined based on the following factors:

- the actual loss;
- loss of profit; and
- interest until the damages are paid.

The process of quantifying damages in actions for breach of competition law can prove complex and it may be extremely difficult or even impossible to assess the exact amount of damage in a given case. If this is the case, the court may determine the amount of damages based on the rules of equity and the evidence produced in the case.

Where several undertakings infringe competition rules jointly (eg, in the case of a cartel), they are jointly and severally liable for paying compensation for the damage caused by the infringement.

12. Appeals

12. 1. Can the decision of the court or tribunal be appealed? If so, on what grounds and what is the process?

Portugal
PLMJ

Yes, first instance decisions can be appealed. The process for private enforcement claims is as follows:

- **Deadline to appeal:** The deadline to appeal a decision at first instance is either 30 or 40 days from the date of the decision. The latter deadline applies if the appeal challenges the findings of fact at first instance and the appellant requests that the evidence recorded during the trial be reviewed.
- **Admissibility:** The court of first instance (in competition proceedings, this will be the Competition Court) will make an initial determination as regards the admissibility of the appeal. Subsequently, the Court of Appeal will reach its own conclusions on admissibility of the appeal.
- **Submission of evidence and expert opinions:** The extent to which new evidence is admitted at the appeal stage is very limited. Only evidence that could not be adduced at first instance or which has become relevant as a result of the judgment at first instance will be admitted. Expert opinions may be submitted up to the point at which the judges start to draft the collective decision.
- **Court of Appeal judgment:** Final judgment by the Court of Appeal.
- **Appeal of Court of Appeal judgment:** The Court of Appeal's decision can be challenged before the Supreme Court of Justice. Such an appeal can only relate to matters of law and must usually be lodged within 30 days. There is a similar process by which both the Court of Appeal and the Supreme Court of Justice rule on the admissibility of the appeal.

13. Costs, fees and funding

13. 1. What costs and fees are incurred when litigating in your jurisdiction? Can the winning party recover its costs?

Portugal
PLMJ

The general rule is that the losing party bears all costs associated with the proceedings. These comprise court

fees and adverse costs, including the fees paid by the winner to its counsel.

In civil proceedings, including competition damages actions, costs awards regarding opposing counsel fees are limited to half of the aggregate court fees paid by the parties. However, in the case of class actions, this amount may be fixed by the judge according to the complexity and value of the case.

As a rule, the proportion of costs due to the court and the winning party depends on the 'share' of the claim won by that party.

Under the specific class action rules, if the court finds even just partially in favour of the claimant, the claimant will be exempted from court costs.

If the claim is universally unsuccessful, claimants will be ordered to pay an amount to be fixed by the court as costs. This amount will range from 10% to 50% of the amounts due in ordinary civil claims.

In determining the specific amount to be paid by an unsuccessful claimant, the court will consider the economic situation of the claimants and the reasons why the claim did not succeed.

In cases where there is more than one claimant and a cost order is rendered by the court, claimants will be jointly and severally liable for payment.

Defendants in class actions must pay court costs, as is the case in any other civil proceedings.

13. 2. Are contingency fees and similar arrangements permitted in your jurisdiction?

Portugal

PLMJ

Contingency fees are not permitted under Portuguese law.

However, lawyers and their clients may agree on fees by reference to the value of the case or other similar criteria. These include:

- the importance and complexity of the case;
- its urgency; and
- the time spent on the case.

Success fees are also permitted under Portuguese law.

13. 3. Is third-party funding permitted in your jurisdiction?

Portugal

PLMJ

Third-party funding is not yet specifically regulated in Portugal.

To date, there is no identifiable established case law on whether and to what extent third-party funding arrangements are lawful in Portugal. Until very recently, third-party funding was very rare. However, since December 2020, several class actions backed by litigation funding arrangements have been brought before the Portuguese courts. Third-party funding is currently a hot topic of discussion among legal practitioners

Certain aspects of third-party funding in Portugal are currently being litigated in several ongoing competition class action claims. The extent to which litigation funding arrangements common in jurisdictions such as the United States, the United Kingdom and Australia are permitted by Portuguese law is not yet clear. One of the issues that will need to be resolved by the court in this respect is whether third parties are allowed to receive a portion of any compensation for damage suffered by others (among other issues).

14. Trends and predictions

14. 1. How would you describe the current competition litigation landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Portugal
PLMJ

The competition litigation landscape in Portugal is rapidly evolving across two main fronts:

- Follow-on litigation: As in other EU member states, follow-on litigation based on infringement decisions of the European Commission has been brought in Portugal. The most significant examples of such litigation are follow-on actions resulting from the European Commission's *Trucks* infringement decision. Since approximately May 2019, more than 100 follow-on actions have been lodged with the Competition Court. A settlement has also been reached in a follow-on class action filed against the National Association of Land Surveyors.
- Class actions: The first competition law class actions were lodged with the Competition Court in December 2020. These actions were brought by a self-proclaimed consumer association, Ius Omnibus. In these cases, Ius Omnibus is seeking:
 - €400 million from Mastercard in a hybrid claim which follows on from the European Commission's 2015 infringement decision relating to Mastercard's central acquiring rule. This claim also contains standalone elements – namely allegations that extend the timeframe of an alleged infringement regarding the conduct at issue in the commission's infringement decision and which include allegations not included in that claim. Ius Omnibus also alleges that losses were caused to Portuguese consumers resulting from Mastercard's interregional interchange rates; and
 - €400 million from national brewer Super Bock. This case is a follow-on class action that results from a Portuguese Competition Authority infringement decision that fined Super Bock €24 million for resale price maintenance.

Since December 2020, Ius Omnibus has brought numerous additional class actions against both multinational and domestic firms. Many of these actions are copycat cases of class actions or other types of private enforcement cases brought in other jurisdictions – for example:

- the class actions against Mastercard described above;
- the cases against the Google Play Store and the Apple App Store; and
- the *Dieselgate* litigation.

Other cases are more specific to the Portuguese market, such as:

- the class action against Super Bock;
- the class action against EDP (the electricity incumbent); and
- a number of cases against platforms for their alleged failure to make electronic complaints books available on their Portuguese websites.

15. Tips and traps

15. 1. What would be your recommendations to parties facing competition litigation in your jurisdiction and what potential pitfalls would you highlight?

Portugal
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We expect the volume of competition litigation to continue to increase in the short to medium term, with respect to both traditional follow-on enforcement and class actions. With respect to the latter, parties would be advised to keep the following key points in mind when facing a claim in Portugal:

- Anyone can bring a class action and the general rule is that class actions are opt out.
- There is no separate class certification stage. A decision on the class of potentially harmed consumers is only made on final judgment. This means that a claimant is not burdened by a procedural hurdle which in other jurisdictions can result in delays to a final hearing on the merits and final judgment.
- The costs associated with bringing class actions are relatively low. Judicial costs are only due on final judgment and the claimant is exempt from any court costs if the claim is totally or partially upheld. If the claim fails entirely, judges have the discretion to cap cost orders against claimants. Based on past judicial practice, it is unlikely that a claimant will be burdened with an order to pay a large amount of the defendant's costs in the event that the claim is dismissed in its entirety.
- Portugal is a one-shot jurisdiction. This means that a defendant must present all of its procedural and substantive defences in its defence to a claim. This can often place a defendant on the back foot, as the deadlines for submitting a defence are very tight – a domestic defendant will need to respond to a claim within 30 calendar days of service on the last defendant, while a foreign defendant has 60 days to respond from service on the last defendant.

The combination of these reasons makes Portugal an attractive jurisdiction for class action claimants and can put Portuguese proceedings at or near the front of a defence strategy for a defendant facing similar/identical claims across jurisdictions. This is because, as noted, a defendant must submit all defences at a very early stage in the proceedings. As a result, while in other jurisdictions a defendant may be litigating class certification, in Portugal the same defendant will have to have developed all its arguments on the merits of the case in addition to presenting any procedural defences.

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