Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
In Portugal, private antitrust litigation, prior to the enactment of the Private Enforcement Directive, has been based on general rules of civil contractual and tort liability. On 5 June 2018 Law No. 23/2018 was approved, which entered into force on 4 August 2018, implementing EU directive 2014/104, of 26 November 2014, on Antitrust Damages Actions (“Law 23/2018”).

1. Jurisdiction

The primary authority in charge of enforcing competition law in Portugal is the Portuguese Competition Authority (“PCA”). The authority is only competent for public enforcement and not for private damages actions.

Victims of anti-competitive conducts can seek compensation before civil common courts if the cause of action is grounded non-exclusively on a competition law breach (for instance, abuse of dominance and cumulative breach of insurance sector rules) and before the specialised Competition Court, which has jurisdiction *ratione materiae* over the entire Portuguese territory, if the cause of action is exclusively based on a competition law breach. As such, the specialised Competition Court lacks competence to decide claims based on anti-competitive conducts combined with other grounds.1

1 See Article 112(3-4) of Law 62/2013.
In private antitrust enforcement proceedings, claimants can bring actions based on a decision from the PCA, the competition authority of another EU member state or the court of another EU member state finding an infringement of competition law against the defendant(s) (follow-on actions) or, independently of a public enforcement procedure, on the basis of a stand-alone action.

Collective actions for indemnity, under the opt-out model in force in Portugal, can also be started to seek compensation for anti-competitive conducts. The judicial claim is lodged before civil common courts and can also be reasoned on a prior public enforcement procedure or independent of such procedure.

2. Relevant legislation and legal grounds


Pursuant to the framework introduced by Law 23/2018, a competition law infringement found by a final decision adopted by the PCA or judicially confirmed (res judicata) has binding evidentiary value in the form of a non-rebuttable presumption regarding the existence, nature, duration and material, personal and territorial scope of the antitrust infringement. Further, the law confers a qualified evidentiary value on the basis of a rebuttable presumption to final decisions or rulings by competition authorities or courts of other EU member states.2

3. What types of anti-competitive conduct are damages actions available for?

Damages actions are available for anti-competitive agreements, abuses of dominant position and abuses of economic dependency.3 Among the classic illegal behaviours that can lead to a damage action, one can include price-fixing and/or allocation of customers among competitors or a refusal to supply or a non-justifiable discriminatory pricing policy set by an undertaking in a dominant position in a regulated or non-regulated sector of the economy. In parallel, the abuse of economic dependence consists of the abusive exploitation by one undertaking of the economic dependence of another undertaking due to the absence of the latter of an equivalent alternative for the supply of goods or the provision of services.

2 See Article 7 of Law 23/2018.
3 See Article 1 and 2(I) of Law 23/2018.
4. What forms of relief may a private claimant seek?

A private claimant under a private antitrust enforcement claim can seek compensation for the damage suffered (\textit{damnium emergens}), as well as for the benefits (\textit{lucrum cessans}) that it lost as a consequence of the unlawful conduct.\(^4\)

Causation between the fault and the damage must be direct, which means that the claimant must prove that the damage suffered and/or loss of profits results exclusively from the anti-competitive behaviour.

In addition, private claimants are also entitled to delay interest (\textit{juros de mora}), which is applied from the adoption date of the judicial decision that awards damages until effective and full payment of the compensation.\(^5\)

If the anti-competitive conduct results from a joint behaviour of two or more undertakings, they are jointly and severally liable for the incurred damage,\(^6\) but the subsequent exceptions can apply to SMEs and leniency applicants. If the damage is caused by an SME, such undertaking is only liable before the respective direct or indirect customers or suppliers if (i) its market share in the market(s) affected by the infringement is below 5\% during the infringement period and (ii) the application of joint and severally rules harms irreparably its economic viability and devalues fully its assets.\(^7\) The aforementioned exception for SMEs is not applicable if the SME is the ringleader or coerced other undertakings to participate in the infringement or has been condemned in another procedure for a competition law breach by a final decision. With regards to a leniency applicant,\(^8\) the company is only liable to (i) the respective direct or indirect customers or suppliers, and (ii) any other victims, if these cannot obtain full reparation on the suffered damages from the other infringers.

5. Burden of proof/Passing-on defence

The passing-on defence is expressly allowed under national rules: the defendant may invoke the fact that the claimant passed on (fully or in part) the overcharge resulting from the competition law infringement. The burden of proving that the overcharge was passed on rests with the defendant.\(^9\) Conversely, indirect purchasers may seek compensation arguing that the overcharge was passed on them.

6. Pre-trial discovery and disclosure, treatment of confidential information

There is no pre-trial discovery procedure in Portugal similar to the one in force in the US legal system.

---

4 See Article 3(1) and 4(1) of Law 23/2018.
5 See Article 4(2) of Law 23/2018.
7 See Article 5(2-3) of Law 23/2018.
8 See Article 5(4) of Law 23/2018.
9 See Article 8 of Law 23/2018.
Still, any party to the proceedings, including the claimant, is entitled to request to the court the disclosure of documents that are considered as necessary to prove the alleged facts that are in the possession of the defendant or of any third party, including public authorities.\textsuperscript{10}

In the case of documents from the file of the PCA, the European Commission or a national competition authority within the EU, the court may order the disclosure of the following categories of evidence only after the competition authority has closed its proceedings: (i) information that was prepared by a natural or legal person specifically for the proceedings of the competition authority, (ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings and (iii) settlement submissions that have been withdrawn.\textsuperscript{11} Still, the court, per applicable rules, cannot request the following sets of documents from a competition authority: (i) leniency statements; and (ii) settlement proposals.\textsuperscript{12}

There is also a specific procedure to protect business secrets from requested documents. Under this procedure the court can request the presentation by the parties of documents containing confidential information, albeit adopting adequate measures to protect the respective confidentiality, such as (i) deletion of excerpts from documents; (ii) hold hearings behind closed doors; (iii) restrict the number of persons authorised to have access to the evidence, namely, limit or access the legal representatives and defenders of the parties or individuals subject to the obligation of confidentiality; or (iv) request the preparation by a court-appointed expert of information in an aggregated or otherwise non-confidential manner.\textsuperscript{13}

In addition, before bringing an action for damages, the claimant, through a reasoned motion, can request the competent court to summon a party withholding information or means of proof and order it to present the said information or means of proof.\textsuperscript{14}

When there is serious evidence of a breach of competition law capable of causing damages, the injured party can ask the court for provisional measures to preserve the means of proof of that breach.\textsuperscript{15}

Additionally, when there is a well-founded fear that the deposition of a certain party or the checking of certain facts by means of inspection will become impossible or very difficult, that deposition or inspection can take place before the action is brought.\textsuperscript{16}

\textsuperscript{10} See Article 12, 13 and 14 of Law 23/2018.

\textsuperscript{11} See Article 14(4) of Law 23/2018.

\textsuperscript{12} See Article 14(5) of Law 23/2018.

\textsuperscript{13} See Article 12(7) of Law 23/2018.

\textsuperscript{14} See Article 13(1) of Law 23/2018. Articles 2 to 9 of Law 23/2018 are applicable, mutatis mutandis, to the request—see Article 13(2) of Law 23/2018. In accordance with the Civil Procedure Code, the summoned party can challenge this court order—see Article 1046(1) of the Civil Procedure Code.

\textsuperscript{15} See Article 17(1) of Law 23/2018.

\textsuperscript{16} See Article 17(2) of Law 23/2018.
7. **Limitation Periods**

Prior to the implementation of Directive 2014/104/EU by Law 23/2018 the relevant limitation period, for private antitrust claims based on tort liability, was three years from the date on which the injured party was aware of its right, even if unaware of the identity of the person liable and the full extent of the damage.\(^{17}\) Yet, the Court of Justice ruled in 2019 that this system of limitation period violated Article 102 TFEU and the principle of effectiveness: “a limitation period of three years, such as that at issue in the main proceedings, which, first, starts to run from the date on which the injured party was aware of its right to compensation, even if the infringer is not known and, secondly, may not be suspended or interrupted in the course of proceedings before the national competition authority, renders the exercise of the right to full compensation practically impossible or excessively difficult.”\(^{18}\)

Pursuant to Law 23/2018, the limitation period is now five years from the date the victim knows or can reasonably be expected to know of, cumulatively, the relevant conduct and the fact that it was anti-competitive, the identity of the wrongdoer; and the harm that it caused to the victim.\(^{19}\)

In any case, the five-year limitation period does not start to run until the infringement has ceased. Further, said period is suspended when the PCA, other competition authority of other EU member state or the European Commission, starts a formal investigation regarding the infringement to which the indemnity claim is connected. Aforesaid suspension only ceases one year after the case is concluded by the relevant competition authority.\(^{20}\)

8. **Appeal**

First instance civil court decisions and specialised Competition Court rulings can be subject to judicial review before the Court of Appeal and, if applicable procedural rules are met, by the Supreme Court of Justice.\(^{21}\)

9. **Class actions and collective representation**

In the Portuguese jurisdiction, class actions are available for private antitrust enforcement under the opt-out model.\(^{22}\)

The judicial claim must be introduced by (i) a natural person; (ii) a public prosecutor; (iii) an association or foundation whose aim is the protection of consumers; or (iv) an association of companies whose members were victims of anti-competitive conducts, even if the respective by-laws do not include in their scope the protection of competition.\(^{23}\)

---

17 See Article 498(1) of Law 23/2018.
18 CJEU, Case C-637/17, 28 March 2019, Cogeco, para. 53.
19 See Article 6 of Law 23/2018.
20 Please see preceding footnote.
21 See Article 627 et seq of the Civil Procedure Code.
22 See Article 19 of Law 23/2018 and Articles 14 and 15 of Law 83/95.
23 See Article 19(2) of Law 23/2018 and Articles 2(1) and 15 of Law 83/95
If the class action proceeds on the merits, the judicial decision determines the criteria to identify the victims of the anti-competitive conduct and the quantification of the damage suffered by each identifiable victim. If all victims are not individually identifiable, the court can award a global compensation amount. The judicial decision further identifies the entity responsible for the reception, management, and payment of the granted compensation to the victims which were not individually identifiable.24

10. Key issues

In a recent request for a preliminary ruling (case C 637/17, Cogeco), triggered by a company active in the Portuguese jurisdiction, the Court of Justice of the European Union, by a judgment of 28 March 2019, confirmed that Directive 2014/104 rules are not applicable racione temporis to actions for damages that were lodged before the expiry of the deadline for transposing Directive 2014/104 into the Portuguese jurisdiction.

ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC’s core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world’s leading companies, SMEs, business associations and local chambers of commerce.