

## Executive summary and overview of the national report for Portugal

<b>Section I – Summary of findings</b>	
<p>There have not been any cases awarding damages for breach of competition law in Portugal.</p> <p>In theory, it is however possible to file such actions to judicial courts on the basis of the general regime of civil responsibility (the Competition Authority has administrative powers to impose sanctions but does not have the judicial powers to award damages). The rules are laid down in the Code of Civil Procedure and the courts will apply the substantive rules set out in Articles 483 et seq. and 562 of the Civil Code together with Law No 18/2003 of 11 June 2003 regulating competition.</p> <p>The condition to sue for damages is to have suffered an injury as a consequence of an anti-competitive conduct. The claimant will have to prove the defendant's fault or negligence in performing the unlawful conduct, the extent of the injury and the link between the two. The action shall be filed within three years from the moment the plaintiff becomes aware of its alleged right to claim damages.</p> <p>In theory, any individual or any undertaking that has suffered injury as the consequence of an anti-competitive conduct may sue for damages. He may claim monetary compensation together with repair and enforcement. The burden of proof generally lies with the party who invokes the facts that substantiate its rights. Within the context of responsibility for illicit acts, the burden of proof lies with the person who suffers the damages. The burden of proof may only be reversed in specified cases (legal presumption, exemption or liberation from the burden of proof, valid agreement in that respect, whenever the law allows for it, or in case the counterpart has deliberately made the fact impossible to prove).</p> <p>Theoretically, each party shall prove enough elements in order to establish that the facts have occurred as per their description. Any fact that contradicts the existence of a damage, of a causal link between the defendant's actions and the resulting damages or, to a lesser extent, justifies the actions that caused the damage may be an admissible ground of justification.</p> <p>When the plaintiff has contributed to the production or the worsening of the damage, the court may reduce the amount of indemnity to take into account the faults of both parties.</p> <p>The parties bear the legal costs, but in the end the winning party is entitled to collect them from the losing party, except lawyers' fees.</p> <p>The new Portuguese Competition Authority is ambitious and willing to achieve excellence in the practice of competition law. It is empowered with large investigation capacities. Claimants would therefore be well advised to file complaints to the Authority with a view to rely on its decision in parallel proceedings for obtaining damages resulting from the infringement. This would facilitate the proof and reduce the cost of investigating the infringement. With the decentralisation system to be established further to Council Regulation No 1/2003 of 15 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 EC, national courts are expected to be much more active in applying competition law. They nevertheless lack experience and ability to deal with competition matters.</p>	
<b>Section II – status quo and forthcoming reforms – action for damages</b>	
<b>A. Legal Basis</b>	
(i) Is there an explicit statutory basis?	No. Civil liability regime is applicable
(ii) Is this statutory basis different from other actions for damages?	No
(iii) Is there a distinction between EC and national law in this regard?	N/a
<b>B. Competent court</b>	
(i) Which courts are competent?	Judicial courts (or Administrative Courts in certain circumstances)
(ii) Are there specialised courts for private enforcement of competition rules?	No
<b>C. Standing</b>	
(i) Limitations on standing of natural or legal	- In theory no limitation; - Company with main office abroad and representation

persons, including those from other jurisdictions?	<p>office in Portugal may sue or be sued in Portugal whenever the obligation in cause refers to a Portuguese person (legal or natural) or a foreign person (legal or natural) established in Portugal</p> <ul style="list-style-type: none"> <li>- Portuguese courts have jurisdiction for international matters when: (i) the defendant is domiciled in Portugal, unless the action relates to unmovable assets situated abroad; or (ii) the fact(s) on which the action is based occurred in the Portuguese territory; or (iii) the right claimed cannot be effectively enforced unless the action is brought before the Portuguese courts.</li> <li>- Contractual civil liability cases are submitted to the law chosen by the parties; if the parties did not chose a specific law, the applicable law will be the one of the State of their common residence; if they do not reside in the same State, the law of the States where the contract was celebrated will apply.</li> <li>- Extra contractual civil liability cases are in general submitted to the law of the State where the main cause of the damage occurred.</li> </ul>
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	Action must refer to an unlawful act or failure to act, whose effects occurred in the Portuguese territory and that has violated someone's rights.
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	A kind of class or collective action for damages (" <i>Acção popular</i> " or " <i>Acção para a tutela de interesses difusos</i> ") should be available; it may also be seen as a form of litigation in the public interest.
<b>D. Procedural and substantive conditions</b>	
(i) What forms of compensation are available?	Monetary compensation or "natural reconstitution" (i.e. repair <i>in specie</i> or enforcement of an agreement or a legal obligation).
(ii) What are the other forms of civil law liability (if any)?	Apart from contractual and objective liability, there are no other forms of civil law liability. Nevertheless, directors of companies may be subject to different non-civil penalties: (i) reduced fines for infringement of competition law (either material or procedural law, e.g. refusal to comply in full with a written request for information from the Competition Authority); (ii) dismissal by the shareholders when their behaviour is recognised as a "fair reason" (" <i>justa causa</i> ") for dismissal. Directors may also be sentenced to prison if they are recognised to have committed fraud.
(iii) Does the infringement have to imply fault?	Fault or negligence
(iv) If so, is fault based on objective criteria?	"Bonus pater familias" test
(v) Is bad faith (intent) required?	No, but consciousness of causing harm is implied, for the fault to be established.
(vi) Can negligence be taken into account?	Yes
<b>E. Rules of evidence</b>	
<b>a. General</b>	
(i) Burden of proof and identity of the party on which it rests?	Proof lies with the party alleging a fact
(ii) Standard of proof	Theoretically, each party must prove enough elements to establish that the facts have occurred as per their description
(iii) Limitations concerning form of evidence	- Evidence will only be admissible if it has been subject to a contradictory hearing with the party against whom it is opposed;

	<ul style="list-style-type: none"> <li>- Testimonial proof is in general admitted except when written document with full evidentiary strength (notary deeds, company certificates, etc.) is required (testimonial proof left to the appreciation of the judges);</li> <li>- Individuals that can be a party to the action cannot be witnesses (ex company's management);</li> <li>- Any spouses, partners or ex-spouses cannot be forced to stand as witness in a case that involves the other spouse or partner. Identically, ascendants cannot be forced to stand as witnesses in cases involving their descendants or adopted children and vice and versa;</li> <li>- Maximum number of witnesses for each party is 20 with up to 5 witnesses answering to the same facts;</li> <li>- Parties or equivalents (representatives) may give "testimony" that covers only personal facts ("confession") (ex for company representatives) and only if the deposition is requested by the counterparty or ordered by the Court</li> <li>- The party who invokes a foreign law shall prove its existence and content; foreign decisions may be elements of proof (left to appreciation of the judge).</li> </ul>
(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	<ul style="list-style-type: none"> <li>- Discovery, as it is understood in Common Law jurisdictions, is not available. A party may however request the Court to order the other party or any other person/entity to present a certain document (Professional privilege may be invoked);</li> <li>- A preliminary hearing may take place after all the written submissions are exchanged for the judge to issue an interim decision.</li> </ul>
(v) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	n/a
(vi) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	n/a
b. Proving the infringement	
(i) Is expert evidence admissible?	Yes
(ii) To what extent, if any, is cross examination permissible?	<ul style="list-style-type: none"> <li>- The party that presents the witness indicates the facts to which the witness will answer and makes the questioning (judge also allowed to ask questions);</li> <li>- Counter-party's lawyer then entitled to ask questions to the witness, in connection with the explanations given.</li> </ul>
(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	It is an element of proof left to the appreciation of the judge.
c. Proving damage	
(i) Are there any specific rules for evidence of damage?	No
d. Proving causation	

(i)	Which level of causation must be proven: direct or indirect?	The theory of adequate causality applies. Pursuant to that theory, in most situations, a simple indirect causation will not be considered sufficient.
F. Grounds of justification		
(i)	Are there grounds of justification?	Any fact denying the existence of damages or of the causal link between the illegal act and the damages, or, to a lesser extent, any fact justifying the actions that caused damages are admissible grounds of justification.
(ii)	Is the 'passing on' defence taken into account?	Yes
(iii)	Are 'indirect purchaser' issues taken into account?	Yes
(iv)	Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Yes
G. Damages		
a. Calculation of damages		
(i)	What economic or other models are used by courts to calculate damage?	The courts will award an indemnity corresponding to the difference between the actual situation of the injured party and the situation it would have been in had the infringement not occurred.
(ii)	Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	No specific provisions but in general, to the extent that the claimant proves it has suffered damages outside the Portuguese territory, civil courts will take these into account in the calculation of the indemnity.
(iii)	Are ex ante (time of injury) or ex post (time of trial) estimates used?	Damages are assessed at the time of trial. At that time, the court will assess damages at the most recent date, taking into consideration the damages and profit losses suffered in consequence of the breach of competition law; interests will be added, as well as other possible future damages, always with reference to the economic situation of the injured party at the time of injury.
(iv)	Are there maximum limits to damages?	No
(v)	Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	Injury suffered
(vi)	Are punitive or exemplary damages available?	No
(vii)	Are fines imposed by competition authorities taken into account when settling damages?	No
b. Interest		
(i)	Is interest awarded from the date the infringement occurred, the date of the judgment or the date of a decision by a competition authority?	From the date of the infringement until the indemnity is paid.
(ii)	What are the criteria to determine the levels	The interests awarded are legal interests (" <i>juros legais</i> "), the level of which is established by the Ministry of Justice

	of interest?	and Finances (currently 7% if the creditor is a company and 4% if an individual).
(iii)	Is compound interest included?	Automatic accrual of compound interest is not allowed and is considered illegal (except for banks and other financial institutions).
<b>H. Timing</b>		
(i)	What is the time limit in which to institute proceedings?	3 years from knowledge of the plaintiff's right to claim.
(ii)	On average, how long do proceedings take?	19 months, according to statistical data available, including very simple proceedings and proceedings terminated by amicable settlement.
(iii)	Is it possible to accelerate proceedings?	No, except if a scandalous fact occurs.
(iv)	How many judges sit in actions for damages cases?	One or three, upon request of the parties.
(v)	How transparent is the procedure?	In general, civil proceedings are public but only the parties, their representatives or person having an interest will be entitled to examine the files.
<b>I. Legal costs</b>		
(i)	Are Court fees paid up front?	Partly paid at the beginning of the proceedings and partly at the end, upon notification by the court.
(ii)	Who bears the legal costs?	The parties pay the costs but the winning party has the right to recover them, except, in principle, lawyers' fees.
(iii)	Are contingency fees permissible?	No, but success "bonus" admissible
(iv)	Are contingency fees generally available for private enforcement of EC competition law?	n/a
(v)	Can the plaintiff/defendant recover costs?	Yes if he wins
(vi)	What are the different types of litigation costs?	The costs comprise the «justice fee» and the expenses (established in tables approved by regulation).
(vii)	Are there any national rules for taxation of costs?	No specific rules exist
(viii)	Is any form of legal aid insurance available?	Yes
(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	In most cases, the costs will depend only on the initial value of the claim and therefore can be easily estimated by the parties in accordance to the legal table.
<b>J. General</b>		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	No
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	N/a
(iii)	EC competition rules are regarded as being of public policy. Does that influence any	No

answers given?	
(iv) Are there any differences according to whether defendant is public authority or natural or legal person?	Administrative courts will hear the claims against the State
(v) What are the key differences, if any, from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?	N/a
(vi) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	No
(vii) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	<ul style="list-style-type: none"> <li>- The Competition Authority is empowered with appropriate investigation means. Claimants should file complaints to the Authority with a view to rely on its decision in parallel proceedings for obtaining damages resulting from the infringement. This would facilitate the proof and reduce the cost of investigating the infringement;</li> <li>- National courts are expected to be more active in applying competition law but still lacking knowledge and experience in competition matters.</li> </ul>
(viii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	None
<b>Section III: Means to facilitate private enforcement of Articles 81 and 82 EC</b>	
(i) Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	Application of general rules on civil liability by ordinary courts should facilitate the introduction of claims for damages. On the contrary, lack of expertise of those courts on competition matters and EU law constitutes an obstacle to a successful private enforcement of Articles 81 and 82 EC.
(ii) How could that be achieved?	Training judges, allowing intervention of the Competition Authority and the European Commission as <i>amicus curiae</i> , providing for more financial resources to the courts and the Competition Authority.
(iii) Are alternative means of dispute resolution available?	Arbitration
(iv) If so, to what extent are they successful?	In most important cases, arbitration is largely preferred to judicial courts, since proceedings are in general faster and decisions can be made by specialised arbitrators.