PORTUGAL

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I. Introduction

Actions for damages for breach of competition law are still very uncommon in Portugal.

Law No. 18/2003 of 11 June lays down the new Portuguese legal regime of competition. The Competition Authority (*Autoridade da Concorrência*[1]) (hereinafter the "Authority") is responsible for enforcing that law together with the Community competition laws. It "*exercises all the competences that Community law confers upon national administrative authorities in the field of competition rules applicable to undertakings*" (Article 6(1)(g) of Decree-Law 10/2003). The Authority is entitled to order anti-competitive practices to cease, adopt preventive measures, and impose fines or sanctions. In exercising its disciplinary powers, the Authority shall "*identify and investigate practices capable of infringing national and Community competition law, take evidence and come to a decision, applying, if necessary, the sanctions provided for by the law*" (Article 7(1)(a) of Decree-Law No. 10/2003). Similarly, under article 17(1)(a) of the same Decree-Law, the Authority may "*open and decide cases relating to anticompetitive practices, imposing fines according to the law […]*".

The Lisbon Commercial Tribunal (*Tribunal de Comércio de Lisboa*) has jurisdiction to hear appeals against the Authority's decisions (Article 50 of Law No. 18/2003). The decisions of the Lisbon Commercial Tribunal that may be appealed[2], may further be challenged to the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*), that will decide in last instance for infringement proceedings. In the case of administrative proceedings only, a final appeal to the Supreme Court of Justice *(Supremo Tribunal de Justiça*) may be lodged, on points of law only (Article 55 of Law No. 18/2003).

Although the Authority may impose fines of an administrative nature, it does not have the judicial powers to award damages for breach of competition law.

It is therefore under the general regime of civil responsibility that actions for damages for breach of competition law may be brought.

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

There is no specific statutory basis for bringing an action for damages under Portuguese competition law. General principles governing liability for damages will apply, without any differences being made for competition-based damages actions. The basis for suing for damages follow the rules laid down in the Code of Civil

1 Created by Decree-law No. 10/2003 of 18 January. It is an independent and financially autonomous institution that succeeded to the Competition Council (*Conselho da Concorrência*) and to the Directorate General of Competition and Trade (*Direcção-Geral do Comércio e da Concorrência*).

2 I.e. when the decision exceeds €14,963.94, in the case of infringement proceedings.

Procedure (*Código de Processo Civil*). The courts will apply the substantive rules relating to responsibility for illicit acts set out in Articles 483 et seq. and 562 of the Civil Code (*Código Civil*) together with Law No. 18/2003.

The condition to sue for damages is to have suffered 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 (Articles 487 and 563 of the Civil Code).

The illegal use of intellectual property rights and/or unfair competition (*concorrência desleal*) (Article 317 of the Code on Intellectual Property Rights, "*Código da Propriedade Industrial*", approved by Decree-Law 36/2003 of 5 March) may also give rise to a right to damages, on the basis of the same articles of the Civil Code, if they cause harm to competitors. It has been judged, for example, that the production and marketing of thermic bags identical to those of another competitor will entitle the holder of author's rights on those bags to compensation for damages[3]. Further, the fact that 41 commercial agents of a company, acted simultaneously and in a concerted way to cancel their agency agreements with the said company in order to be transferred to another company constitutes an act of unfair competition that generates an obligation to indemnify[4].

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

The rules on competence for actions for breach of competition law do not differ in any way from the normal rules applicable to damages actions. On the basis of contract law or on the civil liability regime and pursuant to Articles 66 and 67 of the Code of Civil Procedure, judicial courts (*tribunais judiciais*) are competent to apply competition laws. Aside from actions for a declaration of nullity of a contract on grounds that it breaches Articles 81 or 82 EC, they will hear claims for compensatory damages resulting from infringement of competition rules.

In principle, there is a judicial court for each administrative county. Depending on the size of the county, the judicial courts – whose jurisdiction ranges from civil proceedings to criminal proceedings – are arranged in different categories, according to the specific matter, such as civil law, family law, commercial law, criminal law etc. Courts specialised in civil law (which, in principle, shall hear actions for damages arising from infringements of competition rules based either on contract law and/or tort) may further be divided into sub-categories, depending on the amount of the claim and the level of specialisation of the court. Please note that there are no specialised panels/chambers that deal with competition claims within each court. The claimant is not free to choose which Court will decide the case[5] or, within each Court, which judge shall hear the case.

The value of the claim will only have influence inasmuch as it is lower than 14.963,94 Euros. In this case a specific Court may be competent (depending on whether there is a «small claims court» in the relevant county) and there shall be only one grade of appeal to the *Tribunal da Relação*. If the claim is lower than 3,740.98 Euros, no appeal will be admissible (in principle). Simpler (and more limited) rules of procedure shall apply.

There are no provisions that we are aware of stating that any issues of the claim must be referred to another court/authority (e.g. the question on breach of competition law to the Competition Authority).

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3 Supremo Tribunal de Justiça, Processo 02A4599 of 11 February 2003 and Processo 087088 of 24 April 1996.

4 Supremo Tribunal de Justiça, Processo 99B017 of 06 May 1999. See also the recent claims filed by TVTEL against Tv Cabo with the Competition Authority and the Tribunal Civil of Porto, for unfair competition practices, consisting in the fact for TV Cabo to have granted its clients access to codified channels (such as Disney Channel or Telecine Premium) for free. The claimant requests damages for nearly € 1 million, considering that the allegedly prohibited practices lasted for more than a year (see http://tek.sapo.pt/print/4O0/422190.html)

5 Except in the cases where, according to territorial competence rules, the claimant could apply to more than one Court.

Administrative courts will decide claims against the State (Articles 1 and 4 of the Statutes of Administrative and Fiscal Courts (*Estatuto dos Tribunais Administrativos e Fiscais*)). Such courts have general jurisdiction to hear cases that involve the rights and legally protected interests of individuals based upon provisions of administrative law or related to legal acts of the Administration taken under the provisions of administrative law, or that concern the extra contractual responsibility of public bodies, of administrative agents or of individuals to whom the specific regime of State responsibility is applicable (Article 4 of the Statutes of Administrative and Fiscal Courts).

As far as territorial jurisdiction is concerned, the court of the place where the infringement of competition rules has occurred will be competent (Article 74(2) of the Code of Civil Procedure).

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There are no specialised courts for bringing competition-based actions for damages.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

(i) Standing of natural or legal persons

In theory, any individual (with full capacity and older than 18 years old) or any undertaking that has suffered injury as a consequence of anti-competitive conduct may sue for damages. A claimant who alleges the suffering of such an injury will have an interest for the action ("*Interesse processual*"). In other words, there must be a necessity for the claimant to file a judicial action, but that necessity does not have to be absolute (it is sufficient it is justified and reasonable).

Under the general principle of civil liability, a private 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.

(ii) Territorial jurisdiction

Regulation 44/2001 and the Lugano Convention are applicable in Portugal.

In case they do not apply, the applicable law is stated in the Code of Civil Procedure.

Articles 61 and 65 of the Code of Civil Procedure confer on the Portuguese courts jurisdiction for international matters when: (i) the defendant is domiciled in Portugal, unless the action relates to real estate assets situated abroad. If the defendant is a company, it is considered to have domicile in Portugal when its headquarters are in Portugal or when there is a subsidiary or representative in Portugal; 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. Article 65(1)(d) also states that, whenever it is not reasonable to request the complainant to bring the action to foreign courts, and when there are some personal or patrimonial elements of connection to Portugal, the action can be brought to the Portuguese courts.

According to Article 7(2) of the Code of Civil Procedure, if the management or the main office of a company is established abroad, its representation in Portugal (subsidiary, agency, delegation) may sue or be sued before the Portuguese courts, even if the fact generating the action has been performed by the management (i.e. established abroad), whenever the duty/obligation in question is towards a

Portuguese person (legal or natural) or a foreign person (legal or natural) domiciled in Portugal.

(iii) Applicable law

The provisions of Article 41(1) and (2) of the Civil Code comply with the main rule of the Rome of 1980 Convention, i.e. that, contractual civil liability cases are submitted to the law chosen by the parties. The Civil Code precises that it is the case, so far as such law corresponds to a real interest of the parties or is in connection with some elements of the contract. If the parties have not designated a specific law, the applicable law will be the one of the State of their commum residence; if they do not reside in the same State, the law of the State where the contract was celebrated will apply (Article 42 of the Civil Code).

Article 45 of the Civil Code submits extra contractual civil liability cases to the law of the State where the main cause of the damage occurred. If, under the law of the State where the damage produced its effects, the author may be held responsible for that damage, but may not, under the law of the State where the damage has occurred, then, the law of the State where the damage produced its effects will apply, but only if the author could have foreseen that his act or omission could have resulted in a damage in that country.

It is finally to be noted that pursuant to Article 32 of the Code of Civil Procedure, natural or legal persons are required to be represented by a lawyer before the Civil courts whenever the value of the action for damages exceeds 3,740.98 □ (Article 24 of Law No. 3/99 of 13 January, as amended by Decree-Law No. 323/2001 of 17 December) or, independently from the value of the claim, when an appeal can be brought against the decision (appeal is always available if the international competence of the Court is being discussed, or if the decision implies the repetition of a previous case – *res judicata*). Further, appeals and actions brought before the Supreme Court (*Supremo Tribunal de Justiça*) always require that the claimant is represented by a lawyer.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

A type of collective or representative actions for damages (as herein considered) is also available but not very common.

The *acção popular* - also called "*acção para a tutela de interesses difusos*" ("action for the protection of diffuse interests") by Article 26A of the Code of Civil Procedure - is based on Article 52 of the Portuguese Republic Constitution and on Law No. 83/95 of 31 August. It confers on any person or any associations/foundations (note that companies and professionals - "*profissionais liberais*" - are expressly excluded by Article 3 of said law) the right to claim the discontinuation or the prevention of infractions against inter alia public health, consumers rights, quality of life, environment or the public domain. Such right encompasses the right, for the claiming party(-ies), to obtain compensation for the damages they have suffered as a result of the violation of the above mentioned interests (Article 22 of Law No. 83/95). Although Law 83/95 does not mention Competition Law, the list provided for in Article 52 of the Portuguese Constitution is not exhaustive; therefore, it may be possible to refer to the protection of other interests such as the preservation of competition.

In spite of its name, the "acção popular" is usually considered to be somewhat different from the well renowned "class actions" in the anglo-american legal systems. Nevertheless, and due in particular to the fact that any members of the class who do not want to be bound by the judgment may opt out (a notification procedure is foreseen in Article 15 of Law No. 83/95, so that the holders of interest covered by the action can inform the judge whether they accept representation or not), the *acção popular* does contain some aspects of the definition of "class action" (as herein defined).

In any case, the "acção popular" may also be seen as a form of public interest litigation (a claim, issued by a representative association or a single person, not in defence of some individual or subjective interests, but in favour of the public interest). It is indeed referred as a procedure for the protection of diffuse interests (private interests which may not be split in individual terms, such as the environment).

Apart from the actions described above, citizens may present complaints concerning acts or omissions on the part of the administration to the Ombudsman ("Provedor de Justiça) who does not have any decisional power or power to bring actions on behalf of the citizens, but may make recommendations to the competent organs to prevent the injustice (Article 23(1) of the Constitution). The Ombudsman may also act on his own initiative (Article 24(1) of Law 9/91 of 9 April), whenever private rights are at stake but only when there is a special relation of dominance in the context of the protection of rights, freedoms and warranties of the citizens (Article 2(2) of Law 30/96 amending Law 9/91).

The Ombudsman may also call the Constitutional Court to assess the constitutionality of legislation or omission (Article 20(3) and (4) of Law 9/91, referring to Articles 281(1) and (2)(d) and 283(1) of the Constitution).

The public prosecutor can bring criminal proceedings once the interested parties have informed him of the facts or on his own initiative in the case of crimes that do not depend on a claim or accusation from the victim or other persons (usually crimes within the family but also some economical crimes) (Articles 48 and seq. of the Criminal Procedure Code).

According to Article 75 of the Criminal Procedure Code, whenever during a criminal procedure, the Public Prosecutor acknowledges the existence of damages, the person(s) affected shall be informed in order to present a compensation request.

Apart from the actions described above, there isn't any possibility for public agents to bring an action on behalf of affected groups.

Joint actions are possible under Portuguese law. Article 275 of the Civil Procedure Code allows the judge to join different cases namely when intervention of all the interested parties is necessary to preserve the useful effect of the decision or when different claims have the same grounds or are interrelated, even when the cases are pending before different jurisdictions, unless the stage of the proceedings or other special reasons recommend otherwise.

D. What are the procedural and substantive conditions to obtain damages?

As already stated under Question II (A) (i), in order to obtain compensation for damages, the plaintiff 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 (Articles 487 and 563 of the Civil Code).

(i) What forms of compensation are available?

Monetary compensation is available whenever the "natural reconstitution" (*restauração natural*) of the claimant's situation as it was before the illicit act occurred, is impossible, insufficient or too expensive (Article 566 of the Civil Code). The two main forms of "natural reconstitution" are repair (i.e. reparation *in specie* of a damaged good for example) and enforcement (of an agreement or of a legal obligation). Civil courts may also order anti-competitive conducts to cease and/or specific performance such as granting access to a network. In theory, monetary compensation is the exception (but the most common in practice), and is used whenever natural reconstitution cannot take place. It may be partial or applied together with a natural form of repair or the enforcement of an obligation.

Pecuniary compensation may cover patrimonial damages suffered by the injured party (i.e. those damages which are susceptible to be repaired by money). Such damages comprise the "*dano emergente*" (i.e. damage actually suffered by the

injured due to a reduction in assets) and the "*lucro cessante*" (i.e. loss of profit or the advantages that, because of the illicit act, will not enter the patrimony of the injured). The loss of a chance can be indemnified, in particular if expenses were undertaken in view of it. In theory one may seek compensation for the profits that would arise from a lost chance. However, the level of evidence required by the Court will be very difficult to match up. The indemnity also allows for the compensation of moral damages (i.e. suffering arising from damages to physical integrity, honour, reputation of the injured etc…) and future damages the judge may foresee (Article 564 of the Civil Code).

It is not common for entire court decisions to be published in the press in Portugal, summaries would, in any cases, be preferred. In the cases of criminal and misdemeanour proceedings, the publication of the decision may be ordered (Article 86(2)(b) of the Code of Criminal Procedure). This may happen upon request of the defendant, in case he has been acquitted and when the judge considers it is appropriate (Article 378 of the Criminal Procedure Code). This rule applies also to misdemeanour proceedings, as the Criminal Procedure Code applies subsidiarily. It is for example common within defamation proceedings concerning crimes and misdemeanours against public health. In the case of infringement proceedings initiated in pursuance with Law 18/2003, Article 45 of Law 18/2003, states that the Authority may, should the infringement so justify, publish its decision in the official gazette, the *Diário da República*, or in a Portuguese newspaper with local, regional or national circulation, depending on the relevant geographical market.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Apart from contractual liability and objective liability (see (iii) below), there are no other forms of civil law liability. Nevertheless, under Article 47(3) of Law No. 18/2003, the Competition Authority may impose 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) to directors of companies, if they knew or ought to have known of the infringement and yet failed to take the appropriate measures to terminate it immediately, unless a more serious penalty (e.g., criminal sanctions for fraud) is applicable further to specific legal provisions.

Such fines for infringing competition law are administrative penalties and may only be imposed by the Competition Authority (they cannot be imposed by the judge in the context of a civil action between private parties). However, there are no known examples of such non-civil sanctions being imposed to directors.

Directors can also be dismissed by the shareholders (deliberating by simple majority or further to a judicial action filed by any shareholder against the company), when their behaviour, consisting of a serious violation of their duties as regards compliance of competition law is recognised, under labour law, as a "fair reason" ("*justa causa*") for dismissal (Articles 257 and 403 of the Code of Commercial Companies (*Código das Sociedades Comerciais*)).

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

For both contractual and extra-contractual damages actions, the claimant will have to prove the defendant's unlawful conduct and its fault or negligence (i.e. breach of duties of care or diligence or lack of skills to avoid the damage) in committing the violation of competition law (Article 483 of the Civil Code). It is not possible to state whether the violation of EC competition rules will give rise to a presumption that the fault element is fulfilled.

Pursuant to Article 483(2) of the Civil Code, "objective liability" (liability without fault or negligence) may only occur when expressly stated in the law (e.g., producer liability).

The fault is usually assessed by recourse to the *bonus pater familias* test ("*Bom pai de família*") (Article 487 of the Civil Code). Bad faith, meaning intention to cause harm, is not required. Indeed, liability arises when someone commits the illegal act and is aware (or should be) of its unlawfulness with no intention to specifically cause harm to someone. All that is required, in such case, for the fault ("conscious negligence") to be established, is that the author of the infringement be conscious of the likely possibility of causing harm to a third party.

If the intention to commit the unlawful act is verified, reparation of the damages caused must be complete.

On the other hand, when responsibility is based on a mere negligence, the indemnity may be fixed at a level lower than the actual damages caused, when the degree of culpability of the defendant, their economic situation, the economic situation of the claimant and other circumstances justify it (Article 494 of the Civil Code).

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

The burden of proof generally lies with the party who invokes the facts substantiating its rights (Article 342 of the Civil Code). Within the context of responsibility for illicit acts, the burden of proof lies with the person who alleges the damages (Article 487 of the Civil Code).

The burden of proof may only be reversed in case of legal presumption, exemption or liberation from the burden of proof, of valid agreement in that respect, whenever the law allows for it[6], or in case the counterpart has deliberately made the fact impossible to prove (Article 344 of the Civil Code). In this last case, it is required that the party at fault rendered the production of evidence impossible. It is not considered sufficient that such production was made more difficult.

Under Portuguese law, the party benefiting from a legal presumption is dispensed from proving the facts deemed as being evidenced by such presumption. Legal presumptions can be refuted through contrary proof, except when the law prohibits this (Article 350 of the Civil Code). In general terms, judicial presumptions may only be invoked in the absence of a written document or when proof by written document is not expressly required (Articles 351 and 392-396 of the Civil Code).

There are no specific legal presumptions relevant to competition-based actions for damages. This being said, it is for example possible that, in the context of contractual liability, a presumption of fault ("*presunção de culpa*") arises, from the simple fact that a debtor does not execute his obligation (Article 799 of the Civil Code).

(ii) Standard of proof

In theory, each party must prove enough elements to establish that the facts have occurred as per their description (Articles 341 of the Civil Code). Most judges will expect that each fact mentioned by a party be proved. If such proof is considered established, but contested by another party, the latter shall then present evidence constituting a counter-proof.

6 In practical terms the field of application of these agreements is very narrow, as Article 345 of the Civil Code foresees that the agreement shall be null and void if it reverts the burden of proof regarding rights that cannot be waived or if it makes the evidence excessively difficult to the other party. The agreement shall also be deemed null and void if it allows means of evidence not foreseen in the law or if it forbids any mean of evidence that should be admissible under Portuguese law. If the provisions of the agreement go against the Public Order of the Portuguese State, the whole agreement shall be null.

The requisite standard of counter-proof shall be higher or equal to the standard of proof reached by the evidence provided in first place. Thus, if proof is given through an official document, issued by an official authority, the judge shall admit counter-proof only if it shows that the document is fake, false or vitiated.

There is no such standard of proof as *"beyond reasonable doubt",* but in case of doubt – i.e., if the evidence given is not of full evidentiary force (i.e. not a notary deed or a company certificate, for instance) or if the counter-proof offered is of equivalent strength - the judge shall decide against the party who bears the burden of proof (Articles 516 of the Code of Civil Procedure and 346 of the Civil Code).

Both civil and criminal law have their own rules on evidence and standard of proof. In principle, the two procedures are independent (Article 7 of the Code of Penal Procedure (*Código de Processo Penal*). However, the legislation establishes some bridges between the two areas of law, regarding proof, whenever the case has both criminal and civil law issues. Therefore, if a criminal case includes a civil damages request, the facts relevant to civil liability will also be taken into account during the criminal proceedings (Article 124(2) of the Code of Penal Procedure).

Civil procedure rules on evidence, such as the acceptance of all means of proof not forbidden by law (Article 125 of the Code of Penal Procedure), the principle of the rules of experience and free conviction of the judge, or the rules on standard of proof (Article 127 of the Code of Penal Procedure) are also expressly adopted for criminal procedures.

Finally, it should be added that injunctive relief requires a lower standard of proof than other proceedings. For such relief to be granted, the plaintiff will only have to show that he has arguments to sustain he has a right and that, if the court does not grant the relief, there is a risk that a damage may be caused (Articles 381 and seq. of the Code of Civil Procedure "Código de Processo Civil").

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

As a general principle, the judge shall take into account all the elements of proof presented by the parties. However, evidence will not be admissible if it has not been subject to a contradictory hearing with the party to whom it is opposed (Articles 515 and 517 of the Code of Civil Procedure).

(a) Documents (Articles 523 et seq. of the Code of Civil Procedure)

As mentioned above (point E(a)(i)), testimonial proof is in general admitted, with the exception of the cases where a written document considered to have full evidentiary force (such as notary deeds, company certificates, etc.) is required (Article 393 of the Civil Code).

Documents should be filed together with the written pleadings (Article 523 of the Code of Civil Procedure), but they can be filed at later stages and normally up until the end of the trial. In that case the Court may fine the party presenting such documents, unless it can show that it only had access to the document at a later stage (Articles 524 and 543 of the Code of Civil Procedure).

Legal and technical opinions can be freely filed at any stage of the proceedings (Article 525 of the Code of Civil Procedure).

Foreign decisions regarding private rights, may serve as elements of proof before a Portuguese court. The judge will have a discretionary power to decide on the value of such proof (Article 1094 of the Code of Civil Procedure). However the decision must fulfil the objective criteria set in article 1096 of the Code of Civil Procedure (in particular, there shall not be any doubts as to the authenticity of the document that contains the decision; it must have been decided in accordance with the law of

the country in which it has been pronounced; it must have been decided by a foreign court, whose competence is legally established in accordance with the law of that country and should not be of the exclusive competence of the Portuguese courts etc…). There are numerous decisions from the Portuguese courts that have reviewed the evidential value of foreign decisions[7].

(b) Witnesses (Articles 616 et seq. of the Code of Civil Procedure)

Despite the existence of documents (when considered not to have full evidentiary strength), testimonial evidence shall normally be given and tends to be considered the most relevant form of evidence.

The evidentiary value of a witness deposition is left to the appreciation of the judges (Article 396 of the Civil Code). Articles 616 et seq. of the Code of Civil Procedure regulate the testimonial proof. Witnesses shall have the mental and physical capacities to testify. Any spouses, partners or ex-spouses cannot be forced to stand as witnesses in a case that involves the other spouse or partner. In the same way, ascendants cannot be forced to stand as witnesses in cases involving their descendants or adopted children and vice and versa. Individuals that are obliged by professional secrecy or State secrecy may also dispense themselves.

There are limits to the number of witnesses that can be called by each party (generally 20 – Article 632 of the Code of Civil Procedure) and normally each party may only have up to 5 witnesses answering to the same fact (Article 633 of the Code of Civil Procedure).

With the exception of high representatives from the government and other high officials, written statements are not admitted (Article 624 of the Code of Civil Procedure). However, if both parties agree and there is a severe obstacle to the attendance of a certain witness, the Court may authorise a written statement (Article 639 of the Code of Civil Procedure), or that the deposition may be taken by the attorneys of both parties without the intervention of the court (Article 638(A) of the Code of Civil Procedure).

Witnesses are supposed to give deposition based on their own knowledge; thus hearsay evidence shall not, in principle, be admitted.

Outside the scope of an expertise (see below), experts can be called to depose as witnesses and the court shall evaluate their testimony.

(c) Confession (Articles 552 et seq. of the Code of Civil Procedure)

Article 617 of the Code of Civil Procedure prevents an individual who may be considered as a party to an action from witnessing in that action. The representatives of a company (the management) are considered as being parties in the case and therefore are prevented from standing as witnesses. However, the parties or those who are considered as being equivalent to parties (company representatives) may be called to give testimony ("party's deposition"). The particularity here is that only the defendant or the court may call such individuals and any admissions that the deponents may make will be considered as a confession (Articles 552 et seq. of the Code of Civil Procedure).

The statement should cover only "personal facts", i.e., facts that the party or the party's representative should be aware of. In this situation, ignorance may be considered as a confession.

For example, in a price fixing case, the defendant may, to mitigate its responsibility, call upon a representative of the claimant company with a view to show that he actively contributed to the infringement. In a case of margin squeeze or sale below cost, the defendant may also call upon a representative of the claimant company to prove the latter was aware for a long time of the defendant's activities and did not act.

7 See for example decisions of the *Tribunal da Relação de Lisboa* nº 55411 of 16 June 1992, nº 53911 of 16 June 1992 and decision of the *Tribunal da Relação de Coimbra* nº 3316/2001 of 29 January 2001.

(d) Nevertheless, judges only tend to accept as a confession a full statement confirming a fact and therefore the relevance of this type of evidence is minor. Expertise (Articles 568 et seq. of the Code of Civil Procedure)

The parties or the judge may order an expertise. When ordered by the court, normally there will be only one expert. Anyone may serve as an expert. However, if the choice is up to the Court, it will commonly request the professional representative organisations to indicate an expert. In other cases the Court maintains its own lists, either delivered by professional organisations or composed of previously nominated experts or containing names (this is very common when the expert to appoint is an appraiser). If there is a state organism specialized in the field of the expertise, normally the Court will ask it to appoint the expert.

Any party may separately request an expertise (Article 577 of the Code of Civil Procedure). Whenever a party requests an expertise with more than one expert (the maximum being three) and there is agreement between the parties as to the experts chosen, the judge will appoint those experts, unless he thinks they are not competent for the job.

If the parties do not agree on the experts' names, each party appoints one expert and the judge will appoint a third one (Article 569(2) of the Code of Civil Procedure).

The experts will prepare a joint report where they will answer the questions raised. Those questions are limited to matters of fact (Article 577 of the Code of Civil Procedure). Later they can be called to court in order to provide explanations on the report.

(e) Inspection (Articles 612 et seq. of the Code of Civil Procedure)

The court, on its own initiative or following a request from one of the parties may order an inspection of a certain place or the reconstruction of any event relevant to the proceedings.

(f) Foreign law

The party who invokes a foreign law shall prove its existence and content (Article 348(1) of the Civil Code). According to said provision, the judge shall, on his own, also search for the content and existence of that law. Regarding foreign official and/or private documents, Article 365 of the Civil Code states that if the document has been established in conformity with the law of the relevant country, then its value is equal to the value such a document would have in Portugal.

(g) Summoning witnesses

Witnesses are either presented by the party or summoned by the court. In the first case, if the witness does not appear in court, there is very little the party can do (Articles 628 and 629 of the Code of Civil Procedure). In consequence, when a party is not completely sure that the witness will be available or willing to stand in court, it will request the court to summon them.

In this last case, if the witness does not appear, the party will be able to ask the court to apply a penalty to the witness and to order whatever measures are needed to ensure that the witness will appear (including intervention of the police) (Article 629 of the Code of Civil Procedure).

The place and the manner in which the witnesses will be heard will depend on the place of their residence:

- For witnesses that live nearby the court, the judge will summon them to appear in person;

- For witnesses that live elsewhere (but within the Portuguese territory) the Court will send a letter of request to the court of the zone where the witness lives. The witness shall be summoned by that court to appear there and the testimony shall be given through video-conference (Article 623 of the Code of Civil Procedure);

- As for witnesses living abroad, the traditional system was to send a letter of request through the Foreign Affairs Ministry, which would transmit the request to the Foreign Affairs Ministry of the country where the witness lives, which thereafter would make the request to a local court. Theoretically the Portuguese court can contact directly the foreign authority or the foreign court, but in practice that does not happen (Article 182 of the Civil Procedure Code). Despite all treaties regulating the matter, this system takes normally more than one year. Therefore, an amendment was introduced in the law in order to allow that witnesses may give testimony in a Portuguese Consulate, the testimony being transmitted by video-conference (Article 621(b) of the Code of Civil Procedure). Notwithstanding, this possibility is not yet fully in force and, in principle, shall only apply to witnesses that are willing to appear, as any Portuguese Consulate will not have the legal power to oblige witnesses to appear.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis defendants, third parties and competition authorities (national, foreign, Commission)

(a) Discovery

As understood in Common Law systems, discovery is not available in Portugal. A party may request the court to order the other party or any other person/entity to present a certain document. The court may refuse the request if the documents requested are considered not to be relevant to prove the fact the party requesting them wants to prove (Article 528(2) of the Code of Civil Procedure). The party will have to identify the document to the extent possible and explain in which manner it may be relevant to the file (Articles 528 and 531 of the Code of Civil Procedure).

If the document is not presented and no acceptable justification is given, the court will apply a fine (Article 519 of the Code of Civil Procedure). The court may also order any measures it deems appropriate in order to obtain the document.

If the refusal comes from the defendant, the court shall be free to evaluate the meaning of such refusal and it may lead to the reversal of the burden of proof regarding the fact that was supposed to be evidenced through the document.

The court can also order, ex officio, disclosure of documents necessary to establish the truth (Article 535 of the Code of Civil Procedure).

If the document relates to commercial books or commercial information (business secrets), the court may only request it in specific cases (Article 534 of the Code of Civil Procedure and 42 of the Commercial Code). Those provisions may be used to prevent the disclosure of evidence.

In principle, everyone (who can be a party or not to a case) has the duty to cooperate with the Court, so that the truth is discovered (Article 519(1) of the Code of Civil Procedure). There is an exception to that rule in particular, when professional privilege or secrecy may be invoked (Article 519(3) and (4) of the Code of Civil Procedure – see also Articles 55, 60 and 61 of the Bar Association Rules). This provision is also relevant in criminal proceedings (Articles 135(1) and 182 of the Code of Penal Procedure). It applies in particular to lawyers, priests, journalists, doctors or members of credit institutions.

In principle, evidence obtained through discovery in other countries would be admissible in Portugal, although that way to obtain evidence is not accepted in Portugal. In exceptional cases, if the discovery proceedings have gone beyond some limits that are considered important by the Portuguese system, the issue

could be raised and it is possible that the evidence would be refused. In any case, the value of such evidence will be left to the appreciation of the judge.

Injunctive relief is also available in order to secure evidence (see question E(a)(ii) below). Likewise, if there is the risk that the evidence may be destroyed or lost, it is, for example, possible to request the Court to hear the witnesses (even before the case is filed), make an inspection, an expertise, etc…

(b) Preliminary hearing

Although with a specific scope, Portuguese law foresees that a "preliminary hearing" may take place after all the written submissions are exchanged.

In their written submissions the parties are obliged to present all their arguments and all written evidence. In principle (as to documents, subject to the exceptions mentioned above) they shall have no other opportunity to do so. Thus, upon the exchange of pleadings, the court shall be in possession of all relevant facts (except for evidence to be produced at later stages).

At that moment, the judge shall summon the attorneys to appear before him. This "preliminary hearing" has several purposes (Article 508(A) of the Code of Civil Procedure):

- To try to settle the dispute (normally the judge will only ask if the parties have discussed that possibility, but he will not attempt to act as «*amicable compositeur*»);
- To allow the parties to discuss the case, either when there is the possibility of a dismissal or when the judge believes that all relevant information is available and a final decision can be given;
- To discuss the position of each party and to correct any possible mistakes or unclear aspects of the written pleadings.

The main goal of this "preliminary hearing" is for the judge to issue an interim decision, where he shall analyse the case from a formal point of view and decide on any legal questions that can be decided at that stage (e.g. competence and *locus standi*) (Article 510 of the Code of Civil Procedure).

Together with this decision, two lists of facts shall be prepared (Article 511 of the Code of Civil Procedure):

- One containing the facts that are accepted by both parties or that were not challenged by the defendant;

- The other, containing the facts, in the form of questions that shall be discussed in trial.

This latter list is of the utmost importance, because the final decision on the issues of fact will be made in the form of answers to those questions, and no other issues of fact (except the ones from the first list) may be taken into account.

In cases that are considered to be simpler, the judge may dispense with the preliminary hearing, but the interim decision and the lists of facts shall always be issued (Article 508(B) of the Code of Civil Procedure).

(b) Proving the infringement

(i) Is expert evidence admissible?

Expert evidence is admissible (please see above point E(a)(iii)) and can be presented by either the parties or at the judge's request. Its value is left to the appreciation of the judge (Articles 388 and 389 of the Civil Code).

(ii) To what extent, if any, is cross-examination permissible?

Except for the cases mentioned above, all testimony is oral. The party that presents the witness shall indicate the facts to which the witness will answer and shall conduct the questioning. The judge is allowed to ask questions (Article 638 of the Code of Civil Procedure).

At the end of the testimony, the counter-party's attorney shall be entitled to put any questions to the witness, provided that they are in connection with the explanations given during the testimony (Article 638 of the Code of Civil Procedure).

Witnesses may be confronted with documents in the file and may use their own documents, provided that they do not read out answers.

Besides the cross-examination, the counter-party may also:

- Impeach the witness at the beginning of the deposition (e.g. by alleging that the witness is a representative of one of the parties) (Article 636 of the Code of Civil Procedure);

- Challenge the witness at the end of the testimony, alleging any facts or presenting documents in order to discredit it (Article 640 of the Code of Civil Procedure);

- Request a direct confrontation with any other witness (Article 642 of the Code of Civil Procedure).

(iii) Under which conditions do a statement and/or decision by a national Competition Authority, a national court, an authority from another EU Member State have evidential value?

Pursuant to Article 522(1) of the Code of Civil Procedure, statements and arbitration sentences produced at a judicial hearing or arbitration court may be used as elements of proof in a different proceeding, provided that the other party has been heard and the new procedure refers to the same party. There are some exceptions to that rule: firstly, it does not apply to a confession (which is only valid in the judicial lawsuit where it has been produced); secondly, if the regime of production of proof in the first proceedings offers less guarantees to the parties than the new process' regime, said statements and arbitrations will only be considered as beginnings of proof in the second proceedings.

Rulings of a national court have an evidential value – Article 671 of Civil Procedure Code. A decision from the Portuguese national Competition Authority, if final, has the same evidential value than a foreign decision. Decisions from foreign Courts have, in principle, to be subject to an exequatur procedure. However, if the decision is just presented as evidence (i.e., no enforcement is pursued) it shall be accepted regardless of any formalities but subject to the judge's free evaluation. If in the country where it was issued, the decision from Competition Authority has the same value than a court decision, it shall be accepted by Portuguese Courts as if it was a decision from a foreign Court.

Pursuant to Article 32 of Council Regulation Nº 44/2001[8], any judgement given by a court or tribunal of a Member State (including any decree, order, writ of execution, decision or determination of costs or expenses by an officer of the court) will be recognised in Portugal without any special procedure.

8 Council Regulation Nº 44/2001 of 22 December 2000 - OJ L012 of 16/01/2001, p. 1

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

There are no specific rules for evidence of damages applicable in actions for breach of competition laws. Any means of proof (testimonies, written documents, expert's reports, presumptions) are admissible to prove both the defendant's claims and the damages suffered. (Please see Question G below).

The Court may grant a decision on liability without fixing the compensation amount. Such amount shall have to be ascertained, at a later stage, in a new claim. Partial judgments whereby the existence of damage is determined and the assessment of quantum takes place later do not exist in Portugal (although, in practical terms, the previous solution may lead to an equivalent result).

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Pursuant to Article 563 of the Civil Code, the obligation to indemnify only arises in relation to damages that would probably not have occurred, had the illegal conduct not taken place.

According to the legal doctrine, the theory of adequate causality applies. Further to that theory, causation is established if the occurrence of the damage was objectively and reasonably predictable at the time of the act or fact and taking into account the circumstances known by the person committing it (This may also be seen as a form of "foreseeability test"). The indemnity will only cover the damages that can legitimately be verified and that would have not occurred should the act/fact did not happen. Thus, in most situations, a simple indirect causation will not be considered sufficient. If the facts are considered of general knowledge, no evidence is required.

The theories of equivalent conditions or of the sine qua non condition (whose application could lead to indirect causation being recognised) are not followed under Portuguese law.

F. Grounds of justification

(i) Are there grounds of justification?

Any fact that denies the existence of damage or of a causal link between the defendant's actions and the resulting damages, or, to a lesser extent, that justifies the actions that caused the damage may be an admissible ground of justification. Such fact may lead to a simple reduction of compensation to, in rare cases, a whole exculpation of the defendant.

It should be added that the amount of damages awarded will differ if the defendant had the intention of committing a wrongful act or if he has simply been negligent (see point D (iii) below).

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

A passing on defence or indirect purchaser issue may be taken into account in the calculation and awarding of damages, as both defences aim at diminishing the scope and extent of the injury suffered by the claimant.

For example, (A) acted in breach of Article 82 EC by selling at excessive prices to (B). If (B) passed (totally of partially) the excessive prices on to (C), (C) may claim damages from (A) (so far he is able to show that he suffered an injury caused by (A)'s illegal act and so far he proves that (B) has passed on the excessive prices to him). However, if (A) manages to prove that (C) has passed part of the overcharges resulting from the anti-competitive act on to (D), the amount of

damages (C) is entitled to receive will be lower than if he did not do so. In that case, the burden of proof will shift to (C).

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

Article 570 of the Civil Code states that when the plaintiff has contributed to the production or the worsening of the damage, the court may adjust the amount of indemnity to take into account the faults of both parties. Depending on the degree of responsibility of the plaintiff's fault, the indemnity may be reduced or even excluded. Further to such provision, it may be assumed that if it is proved that the plaintiff could have mitigated the loss and failed to do it, or that he has benefited, to a certain extent, from the infringement, the judge may reduce the damages granted. Article 570(2) expressly states that if liability is based on a presumption of fault, the plaintiff's fault excludes, in principle, any duty to indemnify.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

In Portugal, damages are awarded to compensate the actual loss suffered. The purpose is to ensure the injured party's return to the position he occupied before he was affected by a wrongful conduct - including therefore both the actual or real loss or injury and, if applicable, loss of profits (see point D(i)).

Even in the event that damages are difficult to calculate, the profits made by the defendant are, in general, not used as a yardstick to measure loss to the plaintiff.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

Law No. 18/2003 applies to practices restricting competition and concentrations between undertakings that take place or have or may have effects in the territory of Portugal (Article 1(2)). Portuguese courts may also directly apply EC law if trade between Member States is affected by the illicit act. There is no provision stating that courts may award damages for injury suffered outside the Portuguese territory. However, in general, to the extent that the claimant proves it has suffered damages outside the Portuguese territory, civil courts will take these into consideration in the calculation of the indemnity. Therefore, if the infringement took place in Portugal but its effects spread out to other countries, the judge may take into account those losses.

(iii) What economic or other models are used by courts to calculate damage?

Damages are calculated in general as per the criteria contained in Article 566 of the Civil Code i.e. as the difference between the economic situation of the injured party, at the most recent date that can be assessed by the court, and the economic situation the injured party would have been in, had there been no breach of competition law and had no damages occurred.

No other models are used in damages cases. Therefore, although there have not been any cases where compensation for damages was granted as a consequence of breach of competition law, it is fair to assume that the Portuguese courts will apply this kind of "but for" scenario.

The Court will require evidence that the loss effectively occurred. Any type of evidence is potentially admissible, but in practical terms proving damages is very difficult.

There are no presumptions that can be invoked. However, whenever the damage is established but cannot be quantified, an indemnification may be granted according to the equitable criterion of the judge, taking into account the evidence produced.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The majority of legal doctrine and the courts consider that damages should be assessed at the time of trial since a different solution may exclude certain types of damages such as profit losses that have occurred since the damage or other potential consequences or intervening events arising out of the damage. It should be noted that interests are also added to the estimates.

Therefore, at the time of trial, 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, to which interests will be added, as well as other damages that may arise in the future, always with reference to the economic situation of the injured party at the time of injury.

(v) Are there maximum limits to damages?

There are no established maximum limits to damages.

(vi) Are punitive or exemplary damages available?

Civil courts can never impose punitive damages. Damages are only allowed when there has been a real loss or injury.

(vii) Are fines imposed by competition authorities taken into account when settling damages?

Fines and damages do not serve the same purpose and there are no legitimate grounds upon which a court should refuse to grant damages to an injured person on the basis the defendant has already paid a fine, e.g. to the Competition Authority.

(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?

According to Articles 805(2) and 806(1) of the Civil Code, interest is awarded, in case the defendant has committed an offence, from the moment such offence has been committed until the indemnity is paid. In competition based damages cases it is assumed that the starting date will be the date of violation of the law. Nevertheless, it is common to see courts granting interest as from the moment notice of the proceedings was given to the defendant.

(iii) What are the criteria to determine the levels of interest?

The interests awarded are legal interests ("*juros legais*"), the level of which is established from time to time by the Ministry of Justice and Finances (Articles 559 and 806(2) of the Civil Code). Currently the interest rate is 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 equivalent companies).

Notwithstanding this, the claimant may notify the debtor (even during the proceedings) to pay the interests incurred in a certain period of time (generally one year), under the penalty of capitalisation (Article 560 of the Civil Code).

H. Timing

(i) What is the time limit in which to institute proceedings?

There is a three-year period of prescription that applies to actions for liability in tort (Article 498 of the Civil Code). The time limit begins when the plaintiff becomes aware of its alleged right to claim[9]. This means that the plaintiff must know that it has suffered (or will suffer) damage and that the damage is the result of the illicit conduct of another. The plaintiff does not have to know the identity of the wrongdoer or the extent of its damage. The defendant bears the burden of proof to establish the time when the prescription period or time limit began. The judge will however take into consideration negligence of the plaintiff in acknowledging the occurrence of damage; this will be decided according to the particulars of each case. Prescription is an absolute time bar on bringing actions.

(ii) On average, how long do proceedings take?

It is not possible to establish an average period for a decision to be obtained. According to official statistics, the average duration of a case in a Civil Court in Lisbon is 19 months. However, this figure comprises simple claims to collect small amounts and cases that were brought to end by an amicable settlement (taking into consideration the duration of court proceedings, the parties very often prefer to settle cases by agreement before trial).

In normal circumstances a claim to obtain compensation for infringement of competition laws would tend to be complex, involving expert reports, large number of documents, substantial claims, witnesses, etc., and would therefore be very time consuming.

A conservative estimate would be between 2 and 5 years, although there are complex cases that have been decided in shorter periods and others that take much longer.

After a judgement is given, there are two degrees of appeal to higher courts ("*Tribunal da Relação*" and "*Supremo Tribunal de Justiça*"). These can take 6 to 12 months to decide a case. In principle the complexity of the case will not affect those time limits, because the appeal court does not re-hear the case.

(iii) Is it possible to accelerate proceedings?

Unless a scandalous situation occurs (for example, if the judge refuses to advance with the case, or if the Court is completely stopped due to some problem with the judges) that can motivate a complaint to the Judiciary Supervisory Council («*Conselho Superior da Magistratura*»), there are no accelerating proceedings foreseen in the law.

Summary judgements (i.e. fast track proceedings) are not available in Portugal.

(iv) How many judges sit in actions for damages cases?

A single judge is the general rule. However the parties, by mutual agreement, may request that three judges hear their case (Article 646 of the Code of Civil Procedure). However, in such cases the parties must accept that oral evidence shall not be recorded (which can be a major limitation in case of an appeal). The single judge rule applies to first instance courts only, as appeal courts and supreme courts are collective courts (Article 37 and 57 of Law 3/99 of 13 January on the Organisation and Functioning of the Judicial courts "Lei de Organização e Funcionamento dos Tribunais Judiciais").

9 This means that the time limit is not necessarily counted as from the damaging fact or as from the damage. The relevant moment is considered the moment in which the damaged party becomes conscious of the legal possibility of being indemnified for the damage suffered.

(v) How transparent is the procedure?

Civil proceedings are public in Portugal, unless the court decides otherwise in order to protect the dignity of persons and public morality or in order to guarantee its normal functioning (Articles 167(1) and 656(1) of the Code of Procedure Civil). Such publicity implies the right for any person having an interest or empowered by a judicial mandate, to examine and consult the court' s files (Article 167(2)) (the public therefore will not have access to the entire file). Such access may be restricted in particular if it may affect the decision to be rendered (in case of interim injunctions for example when the defendant is not heard before the decision on the interim measure (Article 385(1)).

I. Costs

(i) Are Court fees paid up front?

Payments of court fees are effectuated at two distinct moments of the proceedings. At the beginning of the proceedings, when the case is attributed to a judge and to a specific section of the court, the party will have 10 days to pay the initial "justice fee" ("*imposto de justiça*"). The remaining court fees are paid at the end of the written proceedings, just before the hearing, and upon notification by the court. Court expenses (cost of documents or other elements of information, costs of transportation if necessary and other services requested by the court, e.g. experts' costs) are also to be paid by the parties. In principle, the court estimates the amount of these costs and charges the parties before they undergo such costs. However, in practice, those costs are very often accrued only at the end of the proceedings.

(ii) Who bears the legal costs?

The parties bear the legal costs, but in the end, the winning party is entitled to collect them from the losing party, with the exception of the lawyers' fees (save in exceptional circumstances and in very marginal amounts). If both parties had partial success, the costs are split according to the percentage of victory/defeat.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Contingency fees are not permitted. The Code of conduct of the Bar Association (*Estatuto da Ordem dos Advogados*[10]) establishes a principle of moderation in setting non-judicial fees, taking into account the amount of time involved, the complexity of the case, the importance of the advice provided and the financial means of the client. Lawyers' fees are usually based on an hourly rate (Article 65 of the Code of Conduct).

According to Article 66 of the above-mentioned Code of Conduct, lawyers may not (i) claim, as their fees, a percentage of the amount obtained as a result of a legal suit (*quota litis*) or (ii) make their fees depend on the success of the action (*palmarium*).

This being said, a portion of the lawyers' fees may be subject to the outcome of the proceedings ("success fees"). Such portion will be considered as a bonus and not as a substitute for the fees for lawyers' services.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Further to the rule that the losing party must bear the costs of the proceedings, the winning party will recoup the expenses that it supported during the proceedings. Nevertheless, each party shall support the costs of its respective lawyers. The re-imbursement of such expenses will only occur where litigation is in bad faith, in which case the judge can sanction the party for its conduct during the

10 Contained in Decree-Law No. 84/84 of 16 March, as amended by Law No. 6/86 of 23 March, Decree-Laws Nos. 119/86 of 28 May and 325/88 of 23 September and by Laws Nos. 33/94 of 6 September, 30-E/2000 of 20 December and 80/2001 of 20 July.

process. The law foresees a theoretical compensation that is extremely low: 0.25% to 0.50% of the claim.

There is large debate on whether full recovery, including lawyers' fees, should be admitted. Until now the tendency is to deny such possibility, but there are already some decisions (in Administrative courts), which recognise that right.

(v) What are the different types of litigation costs?

The costs comprise the "justice fee" and the expenses.

The justice fee serves to initiate and promote the proceedings both in first instance and appeal. The expenses serve to pay for costs such as services requested by the Court to other entities and retributions to those who incidentally participated in the proceeding.

The amount of the justice fee as well as expenses is established in tables annexed to the Code of Judicial Costs ("Código Das Custas Judiciais")

Finally, the winning party is entitled to receive from the other party the amount corresponding to the costs related to the proceeding, with the exception of lawyers' fees.

(vi) Are there national rules for taxation of costs?

As mentioned above, the possibility of claiming compensation for all litigation costs, including lawyers' fees, is not yet admitted in Portuguese courts (with some exceptions). Therefore no rules exist as regards taxation of costs. Nevertheless, it is not impossible that in the future the courts will admit a claim for reimbursement of such costs (mainly lawyers' fees) as part of a claim for damages.

(vii) Is any form of legal aid insurance available?

Legal aid is available in Portugal. This system allows for the total or partial dispensation of the parties from the payments that should normally be supported by them. It also provides for the official nomination of a lawyer, when the party in question shows, to the satisfaction of the Social Security Department , that he/she does not have the financial means to support his/her costs. The decision to grant legal aid is taken by the Social Security Department of the domicile of the requesting party in an autonomous administrative procedure filed for that exclusive purpose. However, the other party may always contest the facts presented by the person requesting the legal aid by presenting the contrary proof.

It is also possible to obtain insurance from private insurance companies to cover eventual legal costs.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

It is not possible to estimate an average. Nevertheless, 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 with the table annexed to the Code of Judicial Costs.

For example, if the value of the initial claim is between ▫ 15,000.01 and ▫ 25,000, the costs in a first instance Court will be around ▫ 356; if the value of the initial claim is between ▫ 100,000.01 and ▫ 135,000, the costs will be around ▫ 1,157; if the value of the initial claim is between ▫ 210,000.01 and ▫ 250,000, the costs will be around ▫ 2,136. However, if the value of the initial claim is over ▫ 250,000, there will be basic costs of ▫ 2,136 plus a further ▫ 445 for each ▫ 25,000 (or fraction of ▫ 25,000) claimed over that amount.

The costs of a first appeal will be half of the costs calculated in first instance. If a second appeal is filled, the costs will be identical to those in first appeal and will added to these ones and to those applied to the first appeal.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

There are no rules specific to the private enforcement of competition rules.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

The fact that EC competition rules are regarded as being public policy does not influence any of the answers given.

(iii) Are there any differences according to whether the defendant is public authority or natural or legal person?

Actions for damages against public authorities for breach of competition laws are usually based on the general civil regime as described above. Within the context of liberalised markets, such actions should become increasingly rare. Typical examples may include an action for damages against an incumbent telecommunications operator for failure to provide access to an "essential facility", or an action claiming for loss of profit in consequence of a State Aid to a public competitor.

Notwithstanding this, claims against the State will normally be decided by an administrative court. Although the same principles of law will apply, administrative courts tend to prefer documentary evidence rather than witness testimonies.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

There are no specific provisions dealing with immunity for parties that are more cooperative than others in disclosing infringements of competition rules. There is therefore no interaction between leniency programmes and actions for claims for damages under competition rules.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

Not applicable

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

As stated above, Law No. 18/2003 sets up a Competition Authority; it also gives the Lisbon Commercial Court jurisdiction to hear appeals against the decisions of said Authority. The Authority is empowered with the necessary competences to apply EC competition rules. It is now seeking to "*establish itself as an institution of excellence among its European counterparts*[11]". 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 decentralisation pursuant to Council Regulation No 1/2003[12], national courts are expected to be more active in applying competition law.

11 See the Competition Authority's Business Strategy (2003-2005) on www.autoridadedaconcorrencia.pt
12 OJ L1/1 of 4/01/2003

(vii) 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

There is no case in which damages have been awarded for breach of Articles 81 or 82 EC in Portugal.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Application of general rules on civil liability by ordinary courts should facilitate the introduction of claims for damages. However, courts' lack of expertise on competition matters and EU law constitutes an obstacle to a successful private enforcement of Articles 81 and 82 EC. Improving the ability of the judiciary to ensure private enforcement of Articles 81 and 82 EC may be achieved by training judges, allowing intervention of the Competition Authority and the European Commission as *amicus curiae* (which should entail a legislative amendment) and providing for more financial resources to the courts and the Competition Authority.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Arbitration courts may apply both EC and national competition laws. Arbitration in Portugal is governed by Law No. 31/86 of 29 August, as amended by Decree-Law No. 38/2003 of 8 March. The law deals with the setting up and composition of the tribunal, the nomination of arbitrators, the determination of the object of the case etc. The purpose of this law is mainly to regulate ad-hoc arbitrations, but it foresees the existence of private dispute resolution centres, which may have their own rules (although subject to same general principles laid down in Law 31/86).

In most important cases, arbitration is largely preferred to recourse to the judicial courts, since such proceedings can be faster and confidentiality can be preserved.

International rules such as ICC, UNCITRAL, etc. are widely referred to and often applied.

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V. National case law summaries

There have not been any cases awarding damages for breach of competition law in Portugal that we are aware of.