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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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# Antitrust Litigation

Portugal  
VdA

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# 2019

## Law and Practice

*Contributed by VdA*

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## 1. Overview

### 1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Portugal – including claims for the nullity of agreements, interim measures and damages actions – dates back to the 1980s and was the result of the enactment of Decree-Law No 422/1983 of 3 December 1983, which established the first national competition rules. Portugal's accession to the EU and subsequent developments in national antitrust legislation created additional incentives to seek remedies in private enforcement.

In line with the ECJ, Portuguese courts have recognised that Articles 101 and 102 of the TFEU have a direct effect on relations between individuals and create rights and obligations for them which national courts must enforce.

However, for years, a disputable aspect of competition law enforcement was whether violation of competition rules would allow undertakings or consumers to claim compensation for damages, since competition rules were not designed to protect their rights, but the competitive process. The *acquis communautaire* made an important contribution to this matter by recognising the right to compensation for harm caused by infringements of EU competition law, including compensation for actual loss and for gain of which that person has been deprived, plus interest.

Seeking relief in private enforcement before civil Portuguese courts remained, however, a difficult endeavour for claimants, and few cases resulted in the granting of damages and interim measures. Infringements and damages proved hard to demonstrate.

The long-awaited transposition of EU Directive No 2014/104, of the European Parliament and of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of member states and of the European Union, finally took place in Portugal, by means of Law No 23/2018 of 5 June 2018.

This fact alone may be viewed as the most important recent development in Portuguese legislation, opening new prospects for private enforcement.

### 1.2 Other Developments

In addition to transposing EU Directive 2014/104, Law No 23/2018 establishes co-operation and information mechanisms between the Portuguese Competition Authority (PCA) and national courts, and vests the *Tribunal da Concorrência, Regulação e Supervisão* (Competition Court) with sole jurisdiction for all cases where the violation of competition rules is the sole basis for the claim.

## 2. The Basis for a Claim

### 2.1 Legal Basis for a Claim

In essence, the content of Law No 23/2018 corresponds to the text of the EU Directive, although it does go beyond it in certain aspects, with some innovative solutions.

Firstly, the scope of the law. Articles 9 (agreements restricting competition), 11 (abuse of dominant position) and 12 (abuse of economic dependence) of Law No 19/2012 of 8 May – the Portuguese Competition Law (PCL) – and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are the legal basis for bringing an action for breach of competition rules.

As such, the law applies not only to claims for damages for infringements of EU competition law, as set out in the Directive, but also to claims for damages based on mere national infringements, with no cross-border effects or corresponding legal provisions in other member states.

Secondly, the law applies not only to claims for damages deriving from infringements of competition law, but also to claims relating to nullifying agreements that restrict competition, or to the violation of standstill obligations in merger control, or to interim measures designed to avoid irreparable anti-competitive harm.

In relation to damages actions, Article 3 of Law No 23/2018, much as the EU Directive 2014/104, provides that a company or group of companies that infringes competition law will be held liable before the injured party/parties for all damages arising from the relevant infringement, under the terms foreseen in Article 483 et sequitur of the Portuguese Civil Code (ie, under the extra-contractual liability regime).

Article 4 of Law No 23/2018 clarifies that the person/entity who has suffered harm caused by an infringement of competition law is entitled to full compensation, the latter covering both actual loss and loss of profit, accrued of interest.

The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether there has been a prior finding of an infringement by a competition authority.

As mentioned above, Portuguese courts may be requested to rule on whether an agreement between undertakings or whether any of its clauses are contrary to competition rules and award compensation for damages resulting therefrom, as long as the prerequisites to that effect, as provided for under the law, are met.

While proceedings are pending and as a means to ensure the effectiveness of a possible favourable ruling, the claimant may resort to the courts to request interim relief.

The Portuguese Civil Procedure Code sets forth two different types of interim relief: specified and non-specified. Specified interim relief (eg, seizure, provisional maintenance, suspension of corporate resolutions) is aimed at protecting a risk of injury specially foreseen and regulated by the law, while non-specified interim relief is ordered whenever someone establishes a founded fear that another may cause serious injury, that is difficult to repair, to the former's right. Non-specified interim relief seems the most appropriate way to obtain cease-and-desist orders against illegal conduct.

It will fall upon the applicant requesting such relief to demonstrate that the following requirements are met:

- *fumus boni iuris* – prima facie case, the applicant must show that they have a justifiable claim on the merits against the defendant;
- *periculum in mora* – circumstances giving rise to urgency; and
- the damage caused to the other party by the interim measure does not exceed the damage the applicant anticipates and wishes to avoid.

To date, most private enforcement cases have been related to the validity of contractual clauses and to damages deriving from abuse of a dominant position. The large majority were standalone actions. Very few could be considered as follow-on claims brought after the finding of an infringement by a public authority.

## 2.2 Specialist Courts

The decisions of the PCA may be challenged before the Competition Court. This is a specialist court located in Santarém, not far from Lisbon.

Apart from reviewing the PCA's decisions, the Competition Court holds exclusive jurisdiction to rule on all civil actions solely based on the violation of competition rules. This includes both follow-on and standalone claims.

It follows that all matters falling under the jurisdiction of the Competition Court must be handled and ruled on by this court, with cases being dismissed on account of lack of jurisdiction if they are wrongfully launched with other courts.

However, the civil courts remain competent to decide claims where the violation of competition rules is just one of the grounds invoked by the claimant. As a rule, the law does not allow cases to be transferred between different courts, although, if the jurisdiction is the subject matter of arbitration clauses, the territorial court may be chosen through court conventions.

Competition Court judges are not specialist judges per se, although time and experience have of course enabled some of them to develop the necessary skill sets to evaluate and rule on the more technical and economic-based facts and arguments that these sorts of cases usually entail.

The rulings of the Competition Court may be appealed before the Lisbon Court of Appeal. Judges of the Court of Appeal are also not specialist judges, which means that it can sometimes prove challenging for them to assess the merits of complex economic analyses.

## 2.3 Decisions of National Competition Authorities

PCA decisions may be challenged before the Competition Court, and rulings of the Competition Court may be appealed before the Lisbon Court of Appeal.

However, as set out in Article 7 of Law No 23/2018, once the PCA decision becomes final, it also becomes binding for the Competition Court and for any other court in what concerns the existence and the characteristics of the breach of competition rules and the legal grounds for damages claims (see Article 7 of Law No 23/2018).

Final decisions of the competition authorities of EU member states, as well as final rulings of EU member state jurisdictions, constitute presumptions of the existence of a competition law breach. These presumptions may, however, be rebutted and set aside by the defendants.

Whenever the subject matter of an action pending before the civil court is being investigated by a competition authority, the Portuguese courts may decide to suspend the proceedings until the competition authority reaches a final decision.

## 2.4 Burden and Standard of Proof

As a rule, under Portuguese law, the party filing a liability claim needs to prove the facts alleged to substantiate the claim.

As a result of Directive No 2014/104/EU and of Law No 23/2018, the claimant no longer needs to prove the breach of competition rules in follow-on actions. Also, the law contains a general presumption that cartels are the cause of harm. The claimant does need, however, to demonstrate causation and damage, in particular the quantum of damage.

In what concerns the proof of damage, Article 8 of Law No 23/2018 establishes that defendants may argue that price increases suffered by the claimant were passed on down the supply chain and that damages claimed by the direct purchaser are higher than they should be. If this occurs, it is up to the defendant to prove the pass-on.

Article 8 of Law No 23/2018 further determines that, in damages actions filed by indirect purchasers to whom actual

loss has allegedly been passed on, it is up to them to demonstrate the existence and scope of such a passing-on.

Unless a legal presumption is established by the law, the standard of proof in civil claims in the Portuguese jurisdiction does not require absolute certainty, just the court's conviction, based on convergent facts and on its prudent assessment.

As a rule, in case of doubt, the court shall decide that a certain contentious fact has or has not been proved against the party upon which falls the burden of proof. The law does not establish explicit and specific standards of proof, but it is understood that reasonable (not absolute) certainty is required. As to specific means of proof, the general rule is that the court is free to evaluate them. However, some means of proof enjoy special evidentiary value (eg, certain documentary evidence and confessions).

### 2.5 Direct and Indirect Purchasers

Claims can be brought by direct purchasers and by indirect purchasers. Direct purchasers need to quantify and prove damages. Indirect purchasers need to demonstrate that part of the damage was passed on to them.

### 2.6 Timetable

Proceedings in Portuguese courts may go on for several years until a final decision is reached. Standalone actions may take more time since additional proof of the breach is required. Five years should be expected.

As mentioned above in **2.3 Decisions of National Competition Authorities**, the courts may suspend proceedings and wait for an investigation by the PCA to be closed. Parties may apply to obtain a suspension on the basis that the PCA is in a better position to gather evidence of the breach.

## 3. Class/Collective Actions

### 3.1 Availability

The EU Directive does not require member states to introduce collective redress mechanisms.

However, class/collective actions or *actio popularis* are available under Portuguese law, as specifically provided for in Article 19 of Law No 23/2018, on an opt-out basis. *Actio popularis* claims follow the legal regime set out in Decree-Law No 83/95 of 31 August.

Actions can be brought on behalf of consumers and undertakings, indirect purchasers as well as direct purchasers. Although available, the system remains largely untested.

### 3.2 Procedure

Associations and foundations whose aim is consumer protection, as well as associations of undertakings whose associates suffered damages because of competition law infringements, have standing to bring *actio popularis* damages actions.

The petition of an *actio popularis* shall be rejected if the judge, after hearing the public prosecutor's office and the preliminary investigations that the judge considers to be justified or that the author or the public prosecutor's office have requested, considers that it is manifestly unlikely that the request will be granted.

In *actio popularis* and in the context of the fundamental questions defined by the parties, the judge shall take his or her own initiative in the gathering of evidence, without being bound by the initiative of the parties.

### 3.3 Settlement

There is insufficient experience of class action settlements in Portugal to evaluate judicial oversight/involvement in the settlement of collective actions. However, as a matter of principle, courts are called on to promote dialogue between parties aimed at settling disputes, but do not take an active role in mediating such dialogue, rather adopting a more passive role and sanctioning any positive outcome from such dialogue.

## 4. Challenging a Claim at an Early Stage

### 4.1 Strikeout/Summary Judgment

Strikeout/summary judgments per se are not available in Portugal.

The court may render a decision soon after receiving the statement of claim, namely, if the court finds the subject matter manifestly unfounded or if any insuperable dilatory objection occurs, in which case, the claim may be dismissed. Alternatively, the court may render a decision soon after the exchange of written briefs in which it is immediately able to assess the merits of the case. These situations are not, however, the general rule.

The court may (and will usually) render a decision only after extensive taking of evidence (ie, at the end of the proceedings). In all cases, the court, at its sole discretion, decides whether and when the merits of the case should be addressed, provided all legal requirements for the issuance of a binding decision are met.

Finally, a default judgment may be rendered. This commonly happens when the claimant presents a claim and the defendant, despite having been summoned, fails to present a defence. In this case, the facts alleged by the claimant are



deemed confessed (with certain exceptions) and the court applies the law to those facts, rendering a decision.

## 4.2 Jurisdiction/Applicable Law

As a general rule, the court of the defendant's residence holds jurisdiction to rule over damages actions. The same goes for the applicable law. The Competition Court, however, has exclusive jurisdiction in damages actions arising solely from the breach of competition rules.

## 4.3 Limitation Periods

A five-year statute of limitations period is applicable with respect to competition law liability claims.

The limitation period starts running from the moment the claimant has knowledge of, or can reasonably be assumed to have knowledge of: the infringement, the identity of the offender, and the existence of damages. The limitation period will not start counting before the infringement ceases.

The statute of limitations is suspended if the PCA starts an investigation of an infringement that is related to the action for damages (in which case, the time limit only begins to count again one year after the final decision) and during out-of-court settlement procedures.

Limitation periods do not represent an obstacle to bringing actions for damages in Portugal. As a matter of fact, they can be adjourned by requesting a court to notify the defendant of the intention to bring a claim.

## 5. Disclosure/Discovery

### 5.1 Disclosure/Discovery Procedure

There is no American-style document discovery procedure in place in Portugal. In general, a party is not obliged to provide all the available evidence, specifically evidence that is harmful to its position in the proceedings.

The Civil Procedure Code does, however, set out a specific document disclosure procedure whereby the court, at its own initiative or at the request of any of the parties, can order any party or third party to produce specific documents considered useful to evaluate the damages claim (eg, technical reports, plans, photography, drawings, objects or other documents necessary to ascertain the truth regarding the merits of the case).

Failure to produce specific documents ordered by the court entails the imposition of a fine and may lead to adverse inferences, such as the presumption that the allegations made by the requesting party regarding the other party are true.

The court can also order any document included in the PCA proceedings to be produced in a case where it cannot be

obtained from any party or a third party. Portuguese legislation extends the rights of access to pre-trial situations.

Claimants have the right to disclosure of evidence relevant to their claim. Defendants may request the disclosure of evidence by claimants and the Portuguese courts can also order that evidence be disclosed by third parties, including public authorities.

Portuguese legislation is rather vague regarding the protection of business secrets. Despite the absence of detailed guidelines, the courts may resort to several measures to protect confidential information from being disclosed during the proceedings, while respecting a requirement of proportionality.

### 5.2 Legal Professional Privilege

Documents can be withheld from disclosure on the grounds of legal privilege. In Portugal, legal privilege extends to external counsel and to in-house counsel. Until now, the Portuguese courts have recognised that internal communications with in-house lawyers – enrolled at the Bar and subject to the same ethical rules as external counsel – benefit from legal privilege in competition law investigations.

### 5.3 Leniency Materials/Settlement Agreements

Leniency and/or settlement applications and related documents are privileged, and access to third parties is only granted if authorised by the defendants.

## 6. Witness and Expert Evidence

### 6.1 Witnesses of Fact

In private enforcement hearings, the court can hear witnesses who have direct knowledge of the relevant facts. As a rule, witnesses are heard orally before the court or via video conference/Skype. Although written statements and affidavits can also be produced, these are the exception in Portuguese courts and will only be resorted to and allowed on specific grounds. Witnesses are subject to cross-examination and may be called to clarify any matters raised by the judge.

Witnesses who have been appointed in such a capacity by the parties to the proceedings are, as a rule, compelled to render testimony. They may, however, refuse to disclose information or provide evidence on the basis of marital or other family-linked privilege, client-attorney privilege, and bank secrecy privilege recognised by the law.

### 6.2 Expert Evidence

There is a distinction to be made between expert evidence and expert witnesses.

Experts are persons appointed by the court, after the parties have been heard, to perform an analysis and to draft a report

on specific and specialised matters pertaining to the claim. These experts may then be heard at the final hearing, at the request of the parties or on the court's initiative. However, these experts are not heard as witnesses, so the number of witnesses to be heard by each party is not affected. As a rule, a panel of three experts will be appointed by the court, except for when the issues at stake are considered simple enough for a sole expert to be appointed.

Expert witnesses, on the other hand, are appointed by the parties as regular witnesses, albeit with particular expertise. Expert witnesses are bound to tell the truth but are not bound to the impartiality obligations imposed on the above-referenced experts.

Parties and the court may make clarification requests concerning an expert report and may even request that a second expert report be prepared. It must, however, be noted that the second report does not replace the first one, but merely constitutes an additional source of evidence. The second expert report is carried out by a distinct panel of experts composed of two additional experts (meaning that, as a rule, the second panel will be composed of five experts). In cases where the first expert report has been carried out by a state entity, a second analysis will not be allowed.

Both expert reports and testimonies are valued equally by the court.

## 7. Damages

### 7.1 Assessment of Damages

According to Article 4 of Law No 23/2018, the obligation to pay damages includes actual loss and loss of profits calculated from the time when the harm occurred and subject to adjustment and payment of default interest. No exemplary or punitive damages are available under Portuguese law.

### 7.2 'Passing-on' Defences

As mentioned in 2.4 **Burden and Standard of Proof** above, the pass-on defence is available and is regulated in Articles 8, 9 and 10 of Law No 23/2018.

### 7.3 Interest

According to Article 4 of Law No 23/2018, interest accrues to the damages. Interest is calculated from the date of the decision setting the (adjusted) amount payable until the date of actual and full payment. The rate of 'statutory interest' is updated and published from time to time in the official gazette.

## 8. Liability and Contribution

### 8.1 Joint and Several Liability

Liability is on a joint and several basis (see Article 5 of Law No 23/2018). Limitations exist for small and medium-sized undertakings and for immunity applicants. In both cases, liability may be restricted to direct purchasers.

### 8.2 Contribution

Article 5 of Law No 23/2018 establishes that, for the purposes of the right of recourse, the liability of each undertaking is presumed to be equivalent to the average of their market shares in the markets affected by the infringement.

## 9. Other Remedies

### 9.1 Injunctions

Injunctive relief is available under Portuguese law.

In order to obtain a preliminary injunction, the claimant needs to demonstrate that there is the likelihood of the existence of a right (*fumus boni juris*) as well as an imminent threat that cannot be remedied if urgent measures are not taken to prevent the harm caused by the infringement (*periculum in mora*).

In very strict circumstances, injunctive relief may be obtained without notice to the other parties. Such a court decision may take only a few weeks to be issued. The defendant can oppose the injunction before and after it has been granted.

Only in exceptional circumstances can a party that obtained an injunction be liable for damages caused if the injunction is lifted following an adverse ruling after the trial of the substantive case.

The court can prevent said damages by granting interim relief in exchange for an appropriate guarantee.

### 9.2 Alternative Dispute Resolution

Methods of alternative dispute resolution are available under Portuguese law. Arbitration is often used, particularly when the subject matter of the dispute is the total or partial validity of agreements between undertakings.

That said, while for many years Portugal's dispute resolution lay almost exclusively with the country's judiciary, more recently and most significantly over the past decade, arbitration and other alternative dispute resolution mechanisms have become a true alternative to litigating parties, both at a national and international level.

Modern-day disputes arising out of complex financial structures and ultra-specialised sectors, such as pharmaceuticals, have also exposed parties to a pressing need to ensure that



their subject matter is dealt with and ruled on by real experts rather than historically generalist judges.

In addition, whereas judicial solutions used to present themselves as cheaper than alternative methods of dispute resolution, litigating through state courts has, to a certain extent and at a certain level, become increasingly unattractive.

In Portugal, arbitration is nowadays primarily governed by the Portuguese Voluntary Arbitration Law (VAL), Law No 63/2011 dated 14 December 2011. The VAL is based on the UNCITRAL Model Law, albeit with differences and specificities tailored to the Portuguese legal system and arbitral culture and practice. The VAL is applicable to all arbitrations seated in Portugal although it contains some specific rules applicable to international arbitrations, aimed at rendering Portugal an attractive seat.

Given that arbitration is well established and recognised in Portugal, parties to an arbitration agreement may rely on the negative effect of the competence-competence principle established in the VAL, that is, that judicial courts before which proceedings referred to arbitration are launched, will deny holding jurisdiction to rule the case when one of the parties invokes an arbitration agreement (save when it finds that the arbitration agreement is clearly null and void, is or has become inoperative, or is incapable of being performed).

Other than this, the courts will assist arbitral tribunals when asked, even prior to the commencement of arbitral proceedings, as a means to grant interim measures ordered by arbitral tribunals, appoint arbitrators where the parties or appointing authorities have failed to do so, decide on challenges following the prior decision of the tribunal refusing a challenge, and grant support with the submission of evidence upon refusal of one of the parties, or a third party, to co-operate.

The leading commercial arbitral institution is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, based at the *Associação Comercial de Lisboa*. Other prominent national arbitral institutions include:

- *Centro de Arbitragem de Conflitos de Consumo de Lisboa*;
- *Centro de Informação de Consumo e Arbitragem do Porto*;
- CAL – *Centro de Arbitragem de Litígios Cíveis, Comerciais e Administrativos da Ordem dos Advogados*;
- *Centro de Arbitragem da Universidade Católica Portuguesa*;
- *Centro de Arbitragem Administrativa*; and
- ARBITRARE – *Centro de Arbitragem para a Propriedade Industrial, Nomes de Domínio, Firmas e Denominações*.

## 10. Funding and Costs

### 10.1 Litigation Funding

No regulation on third-party funding of arbitration or litigation exists in Portugal. There are also no judicial precedents in Portuguese courts related to third-party funding.

Notwithstanding the fact that there is no specific regulation nor known cases involving third-party funders, the instrument of third-party funding has generated interest within the arbitral community, and academic discussion surrounding this topic is on the rise.

Considering that this financing model is aimed primarily at big claims, it presents itself as an interesting alternative for claims initiated by, or against, top companies operating in Portugal. Such companies would, in turn, resort to international funders, as there are no funders acting solely in Portugal.

Portugal has a long-standing and widespread practice of insurance for judicial protection, although this is mostly included in civil liability insurance for motor vehicles. Although less common, there is also insurance coverage for other kinds of claims, including commercial, real estate and other areas of law. Such insurance policies, however, typically adopt the ‘before-the-event’ insurance model for legal and judicial risks.

### 10.2 Costs

In Portugal, the rule is that the losing party shall bear the court costs incurred by the successful party during the course of the proceedings. In general, with regard to other expenses, such as lawyers’ fees, only a limited amount is recoverable.

However, if a party is deemed to have litigated in bad faith, it may be ordered to compensate the other party for its expenses, including lawyers’ fees.

In the case of class actions, claimants are exempt from the payment of judicial costs in the event of partial granting of the claim.

## 11. Appeals

### 11.1 Basis of Appeal

In the Portuguese jurisdiction, there are ordinary and extraordinary appeals, the difference being that the former are filed before the decision becomes *res judicata*, and the latter after that.

#### Ordinary Appeals

These are typically entry-level based. In general, claims brought before the court of first instance may only be

appealed to the Court of Appeal if their value is higher than EUR5,000 and if the decision is unfavourable to the appellant in more than half the said amount. As for the decisions of the Court of Appeal, an appeal to the Supreme Court of Justice is only admissible if the value of the claim exceeds EUR30,000 and if the decision is unfavourable in more than EUR15,000.

### **Extraordinary Appeals**

There are two types of extraordinary appeals, the revision appeal and the appeal for the standardisation of jurisprudence. The revision appeal may be filed in exceptional cases in which it can be shown that the first decision was, for instance, based on forged evidence. The appeal for the standardisation of jurisprudence is employed in order to attain a homogeneous interpretation and application of Portuguese law.

The Court of Appeal may review both issues of fact and law. The subject of the appeal is defined by the conclusions drawn by the appellant at the end of its appeal statement. The Supreme Court of Justice may only review matters of law.

More specifically, appeals are available against the rulings of the Competition Court as well as against the rulings of any civil court, in both cases to the Court of Appeal and in certain specific circumstances to the Supreme Court of Justice.

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