Lloyd's List Intelligence
Competition Law Insight
www.competitionlawinsight.com

A textbook example of a (so far) successful enforcement ecosystem

Understanding the upturn of private antitrust litigation in Portugal

by **Maria João Melícias**

Over the last decade Portugal has undergone a marked transformation in private competition litigation. What was once a jurisdiction with a small number of claims with limited success[1] now has one of the most dynamic and rapidly growing private litigation forums in Europe, including when it comes to cross-border litigation, increasingly falling under the radar of third-party funders.[2] Empirical indicators place Portugal high on comparative indices that measure the attractiveness of mass-litigation frameworks and judicial efficiency.[3] According to the European Class Action Report 2024 the aggregate quantum claimed in Portuguese class actions in 2024 exceeded, for the first time, the amount claimed in Dutch class actions at €48 billion and €35 billion respectively. These values represent a six-fold increase when compared to 2022,[4] making Portugal, by this metric, the second largest forum for class actions in the European continent, after the UK.

Implementation of the Damages Directive

Notwithstanding prior instances of private enforcement of competition law within the broader context of civil litigation, damages actions in Portugal, including class actions, experienced significant growth following the implementation of Directive 2014/104/EU[5] (the Damages Directive) through Law 23/2018 of 5 June 2018, which enacted the Private Enforcement Act (PEA).

A distinctive feature of the transposition process in Portugal was its implementation by the public enforcer, the Autoridade da Concorrência ("AdC"). The AdC launched a comprehensive public consultation[6] on the matter, with a view to ensuring proper interplay between public and private enforcement, thereby fostering the effectiveness of competition policy.

The AdC's approach was characterised by transparency and broad stakeholder engagement involving practitioners, the judiciary, academia, business and consumer associations, throughout the legislative drafting process.

All work products were made publicly accessible on the AdC's website.

This inclusive methodology served a dual purpose: first, to leverage specialised expertise in civil litigation law and procedure; and secondly, to foster stakeholder ownership of the new regime, thereby encouraging its practical application upon implementation.

The AdC established a working group comprising different stakeholder representatives that functioned as a "sounding board" on the ongoing legislative work. Additionally the AdC organised an enlarged consultative workshop with approximately 30 organisations including courts, the public prosecutor, government departments, and consumer and business associations. Finally, it launched a formal public consultation. This participatory process, while limiting the AdC's ability to impose preferred solutions unilaterally, was designed to produce higher-quality legislation and ensure meaningful uptake of the private enforcement regime.

In short, the goal was not only to produce a more robust legislative piece, but for the regime to gain traction once implemented. Reality proved that this objective has been fully achieved.

Innovation in private enforcement

Several innovative features in the PEA and the broader collective redress legal framework help to explain its current attractiveness for claimants, both businesses and consumers, together with third-party funders. Some of these features are highlighted hereunder.

Material scope

While the Damages Directive's material scope is circumscribed to infringements of the relevant provisions of the Treaty on the Functioning of the European Union (TFEU) – articles 101 and 102 – the PEA also covers violations of

the equivalent national provisions, including other forms of anticompetitive unilateral conduct (such as "abuses of economic dependency") together with the corresponding norms in other member states' legal acquis.

This broader scope thus avoids the need to litigate whether the interstate trade requirement is met, which may constitute an additional burden for claimants, especially in mixed or standalone actions.

Effect of other NCAs' infringement decisions

The PEA has further lessened the burden on the claimants by establishing that a final infringement decision by other national competition authorities constitutes a rebuttable presumption of the existence of said infringement, thereby reversing the burden of proof in their favour.

Parental liability

The PEA codified the parental liability doctrine in the context of private enforcement thereby anticipating the CJEU case law on the matter.[7]

In order to solve the mismatch between the subject of competition rules (undertakings) and civil liability (which is imputable to *persons*), in the context of a group of companies, the PEA identifies which legal entities within an undertaking may be held liable to pay damages, in accordance with the very notion of undertaking as an economic unit, thus ensuring consistency between public and private enforcement.

For example, pursuant to the PEA, both the legal entity that has directly committed the infringement and any of its parent companies that have exercised decisive influence over that entity's business may be held liable to pay damages. The exercise of decisive influence may be inferred, inter alia, from any of the powers listed in the Portuguese Competition Act with respect to the notion of control. Furthermore, article 3(3) sets forth a rebuttable presumption that a parent company holding 90 per cent or more of the share capital of a subsidiary exercises decisive influence over this entity's business.

Specialised court

The PEA also stands out for having assigned jurisdiction to hear damages actions that are exclusively based on competition law infringements to the Competition, Regulation and Supervision Court, the same court which reviews public enforcement decisions. Actions to seek contribution from other joint and severally liable co-infringers, and pre-trial discovery cases are also assigned to this court. Conversely, claims that are not solely based on antitrust infringements are, by default, of the competence of common civil courts. (according to article 112(3) and (4) of the Law on the Organisation of the Judicial System (Law 63/2013)).

This solution sought to take advantage of the usual benefits of specialisation, thereby reinforcing the credibility of the legal framework.

Collective redress – "opt-out" class actions

The PEA allows collective antitrust damages actions pursuant to an "opt-out" system, a rare model in the European landscape.

Portugal has been a pioneer in establishing a collective redress mechanism, with the fundamental right of citizens and associations to file class actions, aka "popular actions" being enshrined in the Constitution of the Portuguese Republic since 1976. The current wording of article 52(3) of the Portuguese Constitution, introduced by a 1997 Amendment, lays down the right to initiate popular actions to promote, prevent or prosecute infringements against public health, consumer rights, quality of life, the preservation of the environment and cultural heritage. The right to file class actions was codified into Law 83/95 (the Class Actions Act).

The Class Actions Act included several provisions aimed at increasing the class representatives' incentives and reducing legal and economic barriers. For instance, the plaintiff is exempt from court fees in case of at least partial success.[8]

The main distinctive feature of this regime was the adoption of an "opt-out" principle, enshrined in article 16. Under this principle, all individuals belonging to the represented class (ie holders of diffuse, collective or homogeneous individual rights and interests) are included in the action unless they actively choose to withdraw.

In principle, every consumer or represented party who has not opted out is bound by the effects of the rendered judgment, with two relevant exceptions: (a) when the action is unsuccessful due to lack of evidence; and (b) when the court, considering the characteristics of the case, decides not to extend detrimental res judicata to the injured parties that have not opted out, but have not actively participated in the action either. Additionally, harmed individuals can choose to opt out at any point in the case of a settlement, ensuring that they are not required to accept unfavourable agreements.

A further institutional safeguard protecting the interests of represented parties is the Public Prosecutor's standing to assume representation of the class when the designated class representative acts in a manner detrimental to the class's interests, including through withdrawal from the proceedings or acceptance of an unfavourable settlement.

In Portugal, the participation rate for class actions is reported at nearly 100 per cent.[9]

The first known example of a class action in the domain of antitrust private enforcement was the *DECO v PT* case (1999 to 2003), where a consumer association claimed damages to the telecommunications incumbent for breach of sector regulation and antitrust rules (abuse of dominance). Two million clients were represented, of which only five exercised opt-out, though competition rules were only argued incidentally. The claim was deemed admissible

by national courts and ultimately ended in a settlement agreement.[10]

There is currently an overwhelming consensus among academics and practitioners that an opt-out system is necessary to achieve a socially optimal level of enforcement and adequately redress the harm caused by competition infringements. This is due to the significant economic, social and psychological barriers, such as risk and cost aversion, rational apathy, information asymmetries and coordination problems that emerge in situations where individual damages are small and diffuse, but significant in aggregate.

In a system where each individual consumer or undertaking harmed has to exercise a procedural initiative on its own, more often than not it will not be economically rational to claim the damages, considering the litigation costs, the expected duration of the proceedings and the risk of rejection.

Information asymmetries can also hinder the effectiveness of opt-in systems, as many consumers may not be aware of their rights.

The PEA thus extended the pre-existing collective redress framework to encompass antitrust damages actions, as competition law was not expressly enumerated among the protected interests and rights in the Class Action Act.

This adaptation was undertaken with the objective of addressing certain practical impediments inherent in the general regime and thereby incentivising its use by both undertakings and natural persons. The PEA includes provisions concerning: (i) the identification of the possible victims or injured parties; (ii) quantification of the overall damages; and (iii) management and payment of compensation.

Facilitating the financing of collective actions – third-party funding

Moreover, the PEA includes a provision, inspired by the UK 2015 Consumer Rights Act, meant to facilitate the funding of collective actions. It allows the court to order that all or part of the damages not claimed by the victims within a specified period may revert to the plaintiff to cover for all or part of the costs or expenses incurred by the plaintiff in connection with the proceedings (article 19(7)).

This landscape encouraged third-party funders to invest in the jurisdiction and facilitated the emergence of a specialised plaintiffs' bar.

Moreover, in December 2024, Decree-Law 114-A/2023 transposed Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (Consumer Collective Redress Act, or CCRA) further adding to the credibility and trustworthiness of the system. The CCRA mirrored the abovementioned provisions of the PEA and further clarified that the costs and expenses incurred by the plaintiff may include fair and reasonable remuneration of a third-party funder (article 16(6) and (7)).

Though not specifically listed therein, antitrust damages actions fall within the scope of the CCRA, as such actions are primarily designed to protect consumer interests.

The CCRA also introduced rules regarding the regulation of third-party funding, including the obligation to disclose to the court a certified copy of the funding agreement listing the sources of funding and costs incurred by each party. It also sought to ensure the independence and absence of conflicts of interest between the funder and the parties, as well as the principle that the remuneration shall not exceed a fair and reasonable amount, evaluated in accordance with the action's characteristics, risk factors and the market price for litigation funding. Moreover, cross-border collective actions can only be filed by qualified entities recognised by the Directorate-General for Consumers.

The decision to retain an opt-out mechanism in Portugal was not straightforward, as it conflicted with the approach advocated by the European Commission in its Recommendation on common principles for collective redress mechanisms, which expressly endorses the "opt-in" principle.[11] Nevertheless, the Portuguese framework provides balanced solutions to protect class interests, as illustrated above, thereby offsetting much of the scepticism surrounding the opt-out mechanism.

Strategic benefits for companies – business collective actions

In addition to protecting consumers, the PEA was designed as a strategic tool for businesses that are also often victims of anticompetitive behaviour perpetrated by competitors, customers or suppliers. Companies' competitiveness, regardless of their size, is undermined when they face abuses of dominance that hinder their growth or route to market or cartels that fix purchase or sale prices, deteriorate or reduce the output companies need for their production.

When harmed by these anticompetitive practices, companies find in the PEA an easier way to recover losses that are not passed on downstream. Best practices in management and corporate governance determine that such type of credit right cannot be ignored or hidden from shareholders and should be claimed.

Indeed, in some jurisdictions, large incumbent companies often claim compensation for their losses in court when they too are victims of anticompetitive behaviour, thus turning risk into opportunity. This business maturity is emerging in Portugal, with the PEA serving as an instrument of competitive differentiation.

To this effect, the PEA makes clear that business associations also enjoy standing to bring collective damages actions on behalf of the respective sector, when their members may have been harmed, a mechanism that has not been fully tested to date.

The road ahead

Portugal's experience demonstrates how the strategic combination of robust legal frameworks, specialised

institutional mechanisms and inclusive stakeholder engagement can establish a jurisdiction as a leading forum for private competition enforcement. Such growth occurred mostly in the aftermath of the implementation of the Damages Directive, whose preparatory works were coordinated by the public enforcer, the AdC.

The legal framework was designed to achieve a proper balance between public and private enforcement, recognising that these tools are mutually reinforcing, thereby maximising the effectiveness of competition policy. By engaging stakeholders through an open, transparent and inclusive implementation process, the AdC sought to produce robust legislation that stakeholders would actively utilise to enhance private enforcement in the country.

This model offers valuable insights for other jurisdictions seeking to develop effective private enforcement ecosystems. The prospect of compensation engages the broader community in fighting anticompetitive behaviour, thereby fostering a more participatory competition culture among both businesses and consumers.

Notwithstanding the significant progress achieved, private enforcement in Portugal remains in an early stage of development. Portuguese case law on private enforcement remains limited, with the *Trucks* cartel case being one of the first and most significant precedents where damages were actually awarded for competition law infringements in Portugal.

Significant untapped potential remains in the current regime, particularly in business-to-business litigation, including via arbitration or collective actions. An underutilised mechanism is the possibility for collective actions to be filed by associations of undertakings whose members were harmed by competition infringements, even where such associations' statutory purposes do not expressly include the defence of competition.[12]

Practical questions pertaining to the quantification of damages, proof of causality and subsequent allocation and distribution of compensation between injured parties remain largely unanswered. For instance, article 19(6) of the PEA establishes that, in the final decision, the court must designate a responsible entity for the reception, management and payment of compensation, but this mechanism has not yet been tested in practice, as most concluded cases have ended in settlement.

The PEA has been a victim of its own success. The growth of damages actions together with the AdC's stronger public enforcement revealed the need to strengthen the capacity of the Competition, Regulation and Supervision Court, namely through judicial and economic advisers, as this specialised court decides cases with a structural impact on the country's economy and competitiveness.

In effect, one of the main risks currently facing the success of private enforcement in Portugal is the relatively high disposition times and low clearance rates, with most cases still pending or awaiting final decisions. This may produce a chilling effect on the litigation funding industry, as the funding cycle for class actions depends on a decision on the merits of the case and subsequent payment within a reasonable timeframe.

To ensure the continued effectiveness of the Portuguese enforcement architecture, including the sustainable growth of competition class actions, it is paramount that the specialised court be endowed with adequate human and material resources to respond effectively to the increasing volume and complexity of actions. The current government's programme already provides for these measures, and it is now crucial that they be implemented in practice for the benefit of society as a whole.

Maria João Melícias *is a professional partner and co-head of Competition, Regulation and EU law at Abreu Advogados. Maria was formerly an executive board member of the Autoriadade da Concerrência and référendaire of the European court of Justice.*

Endnotes

1. cf José Manuel Sérvulo Correia, "The effectiveness and limitations of the Portuguese system of competition law enforcement by administrative and civil procedure means", *Competition Law and Economics*, 2010, Edward Elgar Publishing. It is worth noting that the assertion that private-enforcement of national and EU competition law was near non-existent before 2018 has been challenged, for example, by Miguel Sousa Ferro and Leonor Rossi, In "Private Enforcement Of Competition Law In Portugal (I): An Overview Of Case-Law", 2012, *Revista de Concorrência e Regulação*, no 10, www.concorrencia.pt/sites/default/files/imported-magazines/CR10_-_Leonor_Rossi_-_Miguel_Sousa_Ferro.pdf.
2. See, for example, Fernando Aguilar de Carvalho and Constança Borges Sacoto, Lua Mota Soares "Litigation Funding Comparative Guide", 2024, available at www.mondaq.com/finance-and-banking/1285392/litigation-funding-comparative-guide.
3. The indices used were the following: Institutional Framework for Mass Litigation – that considers the legal framework (eg, opt-out systems, no requirement to disclose funding sources, no loser-pays principle, admission of ad hoc qualified entities) and the institutional factors external to the legal system (eg number of funders); and Judicial Efficiency for Litigation – that looks into variables such as the number of judges and prosecutors, clearance rates and dispositions times. For more information, cf Fredrik Erixon, "The Impact of Increased Mass Litigation in Europe", Occasional Paper – No 03/2025, ECIPE, ecipe.org/wp-content/uploads/2025/02/ECI_OccasionalPaper_03-2025_LY07.pdf.
4. See "European Class Action Report 2024", cvca.cz/wp-content/uploads/2024/08/CMS_European_Class_Action-Report_2024.pdf.
5. Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.
6. Disclaimer: in her capacity as executive board member of the AdC, the author coordinated these preparatory legislative works.

7. For example, *Sumal SL v Mercedes Benz Trucks España SL*, Case C-882/19, ECLI:EU:C:2021:800.
8. According to article 4(1)(b) and 4(5) of the Decree-Law 34/2008 (Regulation on Court Fees), the claimant may be responsible for the court fees in the general terms if the request is manifestly unfounded.
9. Hamuľáková, 2018: 96 apud Beppe Micallef Moreno, "Are small jurisdictions like Malta squeaking mice?: Opt-out collective redress as a necessary tool for effective enforcement of EU competition law in Malta", 2024, Revista de Regulação e Concorrência, available at: www.concorrencia.pt/sites/default/files/documentos/Beppe.pdf.
10. cf Miguel Sousa Ferro, "Jurisprudência Portuguesa de Private Enforcement: Capítulo VI", 2016, www.cideeff.pt/xms/files/Arquivo/2022/Projeto_4_grupo_III/Jurisprudencia_de_Private_Enforcement.pdf.
11. cf Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), //eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396.
12. See article 19(2) of the Private Enforcement Act.

Competition Law Insight is published by Lloyd's List Intelligence, 5th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom. *Competition Law Insight* alerts you to new opportunities and potential pitfalls in areas such as mergers, joint ventures, distribution agreements, international enforcement and technology licensing, whilst also covering overlapping policy areas that are helping to shape the framework of antitrust law and policy. For our full range of legal titles visit about.i-law.com.

Customer Success: Please contact our Customer Success team: EMEA office: +44 (0)20 7509 6499; APAC office: +65 6028 3988 or email customersuccess@lloydslistintelligence.com

Editorial queries: Please contact Kate Clifton on kate.clifton@lloydslistintelligence.com

Maritime Insights & Intelligence Limited is registered in England and Wales with company number 13831625 and address 5th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom.

Lloyd's List Intelligence is a trading name of Maritime Insights & Intelligence Limited. Lloyd's and the Lloyd's crest are the registered trade marks of the society incorporated by the Lloyd's Act 1871 by the name of Lloyd's.

Print managed by: Hobbs the Printers Ltd.