

Competition damages actions in Portugal: learning to live with public enforcement (and labour markets)

Rita Samoreno Gomes

PLMJ Advogados, Lisbon

Martim Valente

PLMJ Advogados, Lisbon

Petra Carreira

PLMJ Advogados, Lisbon

João Prata Rodrigues

PLMJ Advogados, Lisbon

Introduction

There has been a significant step change in competition law enforcement in Portugal over the last decade. This is due to several factors. From a public enforcement perspective, the Portuguese Competition Authority (PCA) entered the more activist phase of its existence. It did so by focusing its resources on key sectors of the economy and on adopting a more hardline approach to fining.

Higher fines had one of the desired policy outcomes: companies took note and began using the leniency programme in greater numbers.

The PCA also brought cases that stretched established legal concepts developed in other jurisdictions. For example, Portugal is the European Union jurisdiction with the highest number of hub-and-spoke infringement decisions, ten between 2021 and 2024.¹ These cases would arguably not be brought in other jurisdictions with a more established track record of (judicially reviewed) hub-and-spoke enforcement. The PCA approach relied more on a broad notion of concerted practice than on the case law precedent of United Kingdom courts, which seeks to establish the objective and subjective elements required to connect the different parts of the hub with each spoke.

The PCA has also been a leader in the application of competition law to labour markets. This began with a policy paper in 2019² and enforcement shortly thereafter during the Covid-19 pandemic in a case that is currently before the Court of Justice of the EU (CJEU; *Tondela and others*).³ Additional cases have followed, many of which relate to alleged no-poach arrangements between competitors. However, there are indications that the PCA will not limit itself to no-poach cases and is also investigating potential instances of buyer cartels.

In parallel, Portugal has become one of the EU's main class action hubs. This was not the result of a policy choice by government to complement public enforcement with a new class actions regime (eg, the reforms introduced in the UK in 2015). Instead, the domestic class action regime, which has been in place since the 1990s, was effectively repurposed to bring such cases. Over 20 competition class actions have been brought since 2020,⁴ and Portugal now features high on the list of jurisdictions that both potential claimants and defendants need to consider in outlining their litigation strategies.

The impact of private enforcement on the broader competition landscape, and on public enforcement in particular, has been a subject of broad debate. Portugal is a good candidate jurisdiction for additional study. There can be little doubt that the emergence of class actions that, in most instances, seek damages awards that dwarf any PCA fines, has had an impact on incentives for companies when assessing a leniency application. Whether the emergence of such claims will have a net benefit both to the economy and consumer welfare remains to be seen.

1 See, eg, PRC/2017/1, PRC/2017/3 and PRC/2017/4.

2 Organisation for Economic Co-operation and Development (OECD), Competition Issues in Labour Markets, Note by Portugal.

3 Case C-133/24, *Tondela and others v Autoridade da Concorrência*, EU:C:2025:364.

4 This figure includes all pure competition class actions and class actions that include some competition law elements in addition to other substantive law allegations (eg, alleged consumer law infringements).

However, evidence provided by leniency applicants is, by its very nature, of high probative and legal value. Its absence puts greater pressure on the PCA's public enforcement case pipeline, as *ex officio* investigations typically require greater resources and can decrease the prospect of well-evidenced decisions. This, as a result, places additional pressure on claimants to prove their damages claims given the symbiotic relationship between public and private enforcement.

One area in which there are signs that any such impact could be mitigated is in respect of labour market enforcement. No-poach arrangements of the type that the PCA has been investigating and sanctioning have, by definition, a more limited class of claimants, that is, employees affected by such conduct. These are not claims that directly relate to conduct involving large consumer-facing markets. The same can be said of buyer cartels, where the input in question is labour and the conduct is the suppression of wage increases. This may explain the fact that the PCA's recent leniency statistics indicate a relatively steady stream of applications: four in 2024 and a reported five in 2025.⁵ In other words, labour market enforcement could be one of the ways that competition agencies overcome the likelihood of negative impact on their leniency programmes resulting from private enforcement, and high-value class actions in particular.

More detail on each of the above points is provided in the sections that follow. First, an overview of the development of competition damages actions in Portugal is provided, with an emphasis on the emergence of class actions. This is followed by an explanation of the potential impact on public enforcement that results from such litigation. Then, some conclusions and recommendations are provided on how public and private enforcement could interact in greater harmony, particularly in a smaller EU economy such as Portugal.

Private enforcement of competition law in Portugal: an overview

Background: the emergence of competition law class actions

Prior to December 2020, competition law class actions were virtually non-existent in Portugal. However, since then, such cases have become ever more frequent, even surpassing traditional private enforcement such as follow-on claims based on infringement decisions by competition authorities.

A major catalyst for this trend has been the consumer association *Ius Omnibus*, established in March 2020. Since its first two class actions in December 2020, targeting Mastercard and Super Bock, each seeking around €400m in damages, *Ius Omnibus* has brought additional cases against both international and local companies.

⁵ See www.jornaldenegocios.pt/empresas/detalhe/adc-cinco-pedidos-de-clemencia-recebidos-em-2025 accessed 20 November 2025.

The aggregated value of these claims exceeds several billion euros. Many of these actions are modelled on similar cases in other jurisdictions (eg, those against Mastercard, the Google Play Store and the Apple App Store). Others are tailored to the Portuguese context, including cases against Super Bock, EDP (the electricity incumbent), domestic banks, and food and beverage retailers and distributors.

The growth of domestic class actions has prompted other consumer associations to bring parallel or similar claims, and such activity has attracted the interest of third-party litigation funders. In some instances, these actions are led by different class representatives, including academics. It remains to be seen how courts will handle competing, near-duplicate class actions and whether more claimants and funders will enter the field.

Factors behind the growth of class actions in Portugal: a unique regime

The class action regime is not new, nor was it introduced into domestic legislation (in the 1990s) for the stated purpose of mass claims of the type that have emerged in the past five years. Instead, certain aspects of the regime, that is, geared towards smaller, more manageable claims, explain why Portugal now plays a key role in multijurisdictional class action litigation in Europe.

- First, as a rule, anyone can bring a class action and Portugal generally operates under an opt-out regime.
- Second, Portugal is a one-shot jurisdiction. This means that all procedural, legal and factual defences must be presented in the initial defence in a very short timeframe (30 days for a domestic defendant and 60 days for a foreign-based defendant). This is different to many jurisdictions, where a substantive defence is presented at a later stage, once certain threshold points have been decided. The defence can be fleshed out at a later stage with expert reports (on topics such as damages and discrete legal points). The practical effect of this aspect of the regime is that defendants must marshal the key aspects of their defence at a very early stage, and this can put Portugal at the front of the queue in the context of multijurisdictional proceedings.
- Third, the challenges associated with the one-shot nature of the regime are further enhanced by the fact that domestic law does not provide for class certification or for other threshold points to be decided prior to final judgment. It is possible to make such arguments at the preliminary hearing stage,⁶ although judges have broad discretion to decide all matters only at final judgment. To date, judges have generally used such discretion and held that all matters will

6 In Portugal, the preliminary hearing (*audiência prévia*) serves a similar function to a case management hearing, allowing the court to organise the proceedings and address procedural or even substantive matters before subsequent stages and trial.

be decided at final judgment. Despite this, there are some very recent signs that the Competition Court is beginning to see merit in taking preliminary decisions on matters such as standing and the lawfulness of funding arrangements prior to trial.

- Fourth, courts can award aggregate damages and unclaimed damages do not revert back to defendants. Damages are calculated on the basis of the aggregate damages sustained by the entire class and undistributed amounts are allocated to certain public entities rather than being reimbursed to the defendant, which puts defendants under significant pressure.
- Fifth, the costs to bring such cases are extremely low and adverse costs orders are extremely rare and highly unlikely for a plaintiff bringing a class action of this type. Court fees are only payable at the end of the case. If the claim is successful, the claimant is exempt from court costs, and even if unsuccessful, judges can limit the costs imposed on claimants.

Each of these features creates a favourable regime to bring litigation, as demonstrated by the emergence of dedicated plaintiffs such as *Ius Omnibus* and its competitors (the most prominent of which is *Citizen's Voice*). In turn, this has resulted in the likelihood of litigation funders viewing Portugal as a low-risk, potentially high-return jurisdiction, despite the fact that no case has yet been brought to completion.

Current challenges in the class action system

The rapid rise of competition class actions has brought several legal and practical challenges. The first of these is the role of litigation funding. The use of third-party funding in large damages claims is a relatively new phenomenon in Portugal. Courts have yet to clarify the extent to which funders can be compensated for losses they have not personally suffered, raising both civil law and constitutional law questions. It is also not clear the extent to which litigation funding will be viewed by Portuguese courts as playing a central role in the access to justice in comparison to the view taken in other European jurisdictions, such as the UK.

The second major challenge to date has been the capacity for domestic courts to respond to the wave of litigation post-December 2020. The Competition Court has a wide remit. In addition to judicially reviewing PCA decisions, the Competition Court is the court of first instance for the decisions of other regulatory bodies such as the Bank of Portugal, the telecoms regulator (*Autoridade Nacional de Comunicações* or ANACOM) and the stock market regulator (*Comissão do Mercado de Valores Mobiliários* or CMVM).

The court is staffed by four full-time judges. This means that, in addition to an extremely heavy workload, these judges need to decide on all aspects of complex

class actions, from standing to litigation funding, statute of limitations issues and matters of interaction with EU law, as well as the heart of most competition litigation: extensive economic and factual evidence that often spans broad time periods. As a result, litigation is time-consuming and delays are the rule rather than the exception. Indeed, there have not yet been any first instance judgments on the merits to date (as noted, the first of these cases was brought in December 2020).

Other landmark private enforcement matters: the *Trucks* litigation

In parallel, the key follow-on private enforcement case has been the *Trucks* litigation. Similar to the approach in other EU jurisdictions, more than 100 claims have been brought against various original equipment manufacturers (OEMs). However, each of these claims is heard by a single court (the Competition Court), avoiding the piecemeal approach of other jurisdictions, such as Spain.

These cases are characterised by their complexity, with both claimants and defendants submitting extensive economic reports to support their positions on the quantification of damages. Despite the volume and sophistication of these expert submissions, a clear judicial trend has emerged: both the appeal courts and, notably, the Supreme Court have increasingly relied on judicial estimation to determine the level of harm. In particular, the courts have settled on a standard overcharge rate of five per cent, effectively disregarding the economic analyses presented by the parties.

As a practical matter, this could be interpreted as demonstrating some level of pragmatism by the judiciary. However, the approach could also be criticised for failure to engage with evidence that, despite often being complex, is at the heart of any damages case. One reform that could assist the Competition Court would be the creation of a panel of specialist economists that could assist the court on these and other economic matters that, given the nature of the court's jurisdiction, are a feature of nearly every case heard.

In summary, the current landscape for damages actions in Portugal can be described as uncertain. Uncertain because, despite a great deal of litigation, the ambitious and wide-ranging cases that have been brought remain undecided both in respect to the substantive issues raised, as well as other critical issues, such as the extent to which litigation funding will be permitted, the assessment of economic evidence and the scope of document production. A further point that is also unclear is the extent to which this wave of litigation will directly impact one of the key drivers for damages actions themselves: public enforcement.

Impact of the emergence of damages actions on public enforcement

The interaction between public and private enforcement of competition law is widely debated in many jurisdictions. While it is clear that damages actions have a ripple effect on certain aspects of public enforcement, in particular, leniency, it is also true that not all public enforcement is impacted in the same manner. The following section provides an overview of the domestic public enforcement landscape during the period characterised by the emergence of class actions in Portugal and identifies an area that could be less impacted by this phenomenon: labour markets.

Background: recent developments in public enforcement in Portugal – large fines and hub-and-spoke infringements

The major shift in public enforcement in Portugal began to yield results in 2019. This was when the PCA adopted its first wave of decisions that resulted in fines totalling hundreds of millions of euros, in particular, the so-called ‘banks cartel’ which, according to the PCA, involved the exchange of commercially sensitive information, with total fines of €225m.⁷ Additional high-profile infringement decisions were adopted from that point onwards, with a particular emphasis on the large number of hub-and-spoke infringements in the food and drinks retail sector.

It has been argued that the PCA’s hub-and-spoke enforcement stretched the concept too far, well beyond what had traditionally been considered to qualify as such conduct in other jurisdictions. The PCA used the notion of ‘concerted practice’ as the legal basis for its approach, as noted in its submissions to the Organisation for Economic Co-operation and Development (OECD).⁸ The legal test used by the PCA does not, therefore, reflect practice in the UK and US, which are the two jurisdictions where hub-and-spoke infringements have been prosecuted and debated most widely.

Higher fines and novel theories of harm resulted in greater public enforcement litigation. One of the consequences of such litigation is another feature of Portuguese litigation in recent years: the increase in the number of preliminary references to the CJEU. Such requests have covered a variety of topics, from the notion of potential competition, information exchanges, the lawfulness of the PCA’s dawn raid practice under the Charter of Fundamental Rights and the principle of effectiveness, to the application of competition law principles to labour market enforcement.

⁷ This case was ultimately reverted due to the application of the statute of limitations. However, the class actions that resulted from the PCA’s case remain ongoing.

⁸ OECD, Roundtable on Hub-and-Spoke Arrangements, Note by Portugal.

Leniency and damages actions: incentives, tensions and a potential way forward – an increase in more novel types of enforcement

As is the case in most jurisdictions, the majority of cartel investigations in Portugal have been initiated following the submission of a leniency application. Between 2014 and 2024, the PCA received 44 leniency applications. Thus far in 2025, the PCA has received five applications,⁹ slightly higher than the annual average over the past decade. This could suggest that Portugal might be immune to the traditional damages action effect on leniency programmes and that companies are applying for leniency irrespective of the increased risk of follow-on litigation. This may be true; we do not yet have data to demonstrate this empirically.

Another possible explanation for the stable number of leniency applications could be the PCA's focus on labour markets. Since 2020, the PCA has opened several investigations into practices involving alleged no-poach arrangements and potential agreements related to wages. The *Tondela and others* case, the first no-poach infringement decision in Portugal (and, to the best of the authors' knowledge, in the EU), is currently before the CJEU as a result of a preliminary reference from the Competition Court.¹⁰ The CJEU has yet to render judgment. However, Advocate General Nicholas Emiliou has provided some initial guidance on how the court may approach competition enforcement in labour markets.

In summary, Advocate General Emiliou's Opinion held that: (1) no-poach agreements could, in theory, result in a restriction of competition by its object under Article 101 of the Treaty on the Functioning of the EU; (2) the effect of no-poach arrangements was to lock in staff, and a restriction in competition for labour (a market for inputs) can negatively impact output markets (the products and services offered by undertakings); but (3) the Covid-19 pandemic could potentially mitigate the restrictive object and/or effect of such arrangements (the no-poach arrangement in question applied only to ensure that it would be possible to complete the remaining ten games of the 2019/2020 season that had been suspended by the first lockdown).¹¹

The key consequence of such an interpretation, should it be followed by the CJEU, is that the legal framework applicable to labour markets is no different to that of traditional markets for products and services. However, a distinction can be made from a damages action perspective. Labour market enforcement arguably

9 See n 5 above.

10 The PCA fined the Portuguese football league, and first and second division clubs a total of €11.3m for an agreement not to poach each other's players during Covid-19 in cases where players were entitled to terminate their employment agreements due to lack of payment.

11 See n 3 above, para 51 *et seq.*

has unique characteristics that mean that the risk of large-scale follow-on actions could be limited.

- First, the ‘value of commerce’ affected by these kinds of infringements is more difficult to quantify, posing greater challenges in the quantification of potential damages in downstream/output markets, to the extent that any such damage could even be invoked or quantified. The proportion that labour costs represent in the final price paid by a consumer is an area that has yet to be litigated in Portugal. The exercise would appear to be inherently more challenging than quantifying the cost of an input in a downstream product object of a ‘traditional’ infringement.
- Second, the pool of claimants is more limited, typically consisting of employees who have been locked in by no-poach arrangements. This may limit the incentives for large class actions that typically cover large parts of the population (thereby limiting the size of the claims and potential returns for funders).

These factors could diminish the perceived follow-on action liability risks for leniency applicants. As a result, the leniency pipeline of such cases has a greater prospect of remaining steady over time. In other words, the PCA’s strategic decision to dedicate greater resources to labour market enforcement in 2019, the year before the emergence of competition class actions in Portugal, could have had a major (and likely unintended) consequence: the preservation of at least part of the leniency regime despite the emergence of class actions often seeking damages of much higher multiples than PCA fines.

Conclusion

For many years, Portugal was not a headline competition enforcement jurisdiction. The PCA adopted a small number of infringement decisions a year (if at all), and damages actions were non-existent. From 2019 onwards, the landscape changed entirely. Portugal now has one of the most activist agencies in the EU and is a vibrant litigation hub. And surprisingly, the PCA has so far maintained an active leniency pipeline.

Labour market enforcement likely explains what, in many jurisdictions, is a paradox: continued self-reporting, and numerous and high-value damages claims. However, until significant adjustments are made to leniency programmes, for example, extending the benefits of immunity and reductions in fines to follow-on claims, public enforcement is likely to be dependent on ex officio investigations and forms of enforcement that limit exposure to follow-on claims. This is self-defeating for both agencies and litigants. Ex officio investigations are more time and resource-intensive, and represent a higher execution risk for an agency. And focusing enforcement on cases where the value of commerce affected is

lower or more difficult to quantify appears to be counterintuitive to the protection of consumer welfare.

The policy choice made by the PCA regarding labour market enforcement was, in hindsight, timed to perfection given the avalanche of class action litigation that was to come. However, lightning is unlikely to strike twice. Expanding the scope of the leniency programme to include follow-on litigation is, in our view, the simplest and most straightforward way to find a sensible and proportionate balance between public and private enforcement, in Portugal and elsewhere.

Rita Samoreno Gomes (Partner) and Petra Carreira (Managing Associate) are members of PLMJ's Litigation practice group (Rita Samoreno Gomes is Co-Head of the group); Martim Valente (Senior Counsel) and João Prata Rodrigues (Senior Associate) are members of PLMJ's EU & Competition Law department. The views of in this article are personal and the usual disclaimer applies regarding any errors or omissions.