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A First Look at the Portuguese Act 23/2018 Transposing the Private Enforcement Directive

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I. THE TRANSPOSITION PROCEDURE OF THE PRIVATE ENFORCEMENT DIRECTIVE

FOLLOWING THE ADOPTION of Directive 2014/104/EU 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 the Member States and of the European Union,¹ the Ministry of Economy requested that the Portuguese Competition Authority prepare a preliminary draft of a law transposing this Directive into the national legal order.

The Portuguese Competition Authority proceeded with the drafting of this proposal through an open and transparent process divided into several phases from 2015 to 2017. The first phase consisted of the drafting of a working paper and setting up a working group of external experts from the judiciary, academia and legal practice to participate in the discussions. In the second phase, the Portuguese Competition Authority sent the draft to a large number of different stakeholders, including public authorities, law firms, universities, sectoral associations, consumer associations and professional associations, inviting them to participate in a consultative workshop and, if they so wished, to present their comments on the preliminary draft.² After the workshop, a report was written

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¹ Directive 2014/104/EU 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 [2014] OJ L 349/1.

² See MJ Melícias, 'The Art of Consistency between Public and Private Enforcement: Practical Challenges in Implementing the Damages Directive in Portugal' (2016) 26 *Revista de Concorrência e Regulação* 37, 39.

with the aim of presenting, in a succinct way, the different perspectives that were suggested by the participants, ‘for future memory and as a potential working tool’.³ In the third phase, the Portuguese Competition Authority promoted a public consultation process on the first draft proposal for the transposition of the Directive, which ran from 26 April to 27 May 2016, and was published through the Portuguese Competition Authority’s website. The main strategic goal of this public debate, according to the Portuguese Competition Authority, was to engage stakeholders ‘so that they might regard the new private enforcement regime as their own, and thus be actually encouraged to field-test it once implemented’.⁴

Curiously, the Portuguese Competition Authority’s proposal was only submitted to the Parliament a year later. After being criticised by some of the left-wing parties, the Government presented a new proposal for transposition (Proposal 101/XIII), which, with some minor exceptions, included the main solutions of the Portuguese Competition Authority’s proposal. On 5 June 2018, the Act 23/2018 (Portuguese Act), establishing the new legal framework on action for damages for the infringements of competition law, was finally published.⁵

II. THE SCOPE OF THE PORTUGUESE ACT

The majority of the provisions adopted in the Portuguese Act followed the Directive. The scope of Act 23/2018 is wide. It applies to stand-alone and to follow-on actions and includes infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union, infringements of Articles 9.º, 11.º and 12.º of the Law 19/2012 as well as infringements of similar legal rules of other Member States. The aim of this solution, according to the Portuguese Competition Authority, is to ensure the creation of a unitary frame of reference as well as a non-discriminatory system for those causing damages by infringing EU or national competition laws and to promote, therefore, a higher level of legal certainty, fulfilling at the same time the principle of equivalence.⁶

Damages caused by infringements of state aid or mergers rules are not, however, addressed by the Portuguese Act,⁷ which might be explained by the fact

³ M Sousa Ferro, ‘Workshop consultivo sobre o anteprojeto de transposição da Diretiva 2014/104/UE – relatório síntese’ (2016) 26 *Revista de Concorrência e Regulação* 51, 51–52.

⁴ *ibid.*, 40. See also Autoridade da Concorrência, *Proposta de Anteprojeto de Transposição da Diretiva Private Enforcement* (Lisboa, 22 de junho de 2016), available at: www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Private%20Enforcement/Proposta%20de%20Anteprojeto.pdf.

⁵ Diário da República, 1ª série, N.º 107, 5 de junho de 2018, p. 2368.

⁶ Autoridade da Concorrência, ‘Exposição de motivos’ (2016) 26 *Revista de Concorrência e Regulação* 103.

⁷ Act 23/2018, Art 2, l).

that actions for damages are almost exclusively related to cartels.⁸ In fact, recent studies have reviewed the judgments issued by national courts on damages caused by the infringement of competition rules and concluded, on the one hand, that the situation has changed significantly in the last few years and that the level of uncertainty surrounding private enforcement issues has diminished as the national courts have provided many insights in their decisions. Moreover, the studies also confirm that the majority of claims are still related to cartels.⁹

On the other hand, concerns regarding the fact that the transposition procedure and the solutions adopted would inevitably undermine the internal systematic consistency of Portuguese legislation were also referred to in the workshops (organised by the Portuguese Competition Authority) and during public consultation.¹⁰ For instance, the presumption of cartel damages and the solution established in the Portuguese Proposal, concerning the sharing of responsibilities between co-infringers according to their market shares, might be difficult to reconcile with certain rules of the Portuguese legal order. Nevertheless, those solutions were adopted in Act 23/2018.

III. EXCLUSIVE COMPETENCE OF THE SPECIALISED PORTUGUESE COURT FOR COMPETITION REGULATION AND SUPERVISION

A novelty in the Portuguese Act that goes beyond the Directive is to grant exclusive jurisdiction for this kind of action to the already existing Portuguese Specialised Court of First Instance, the *Tribunal da Concorrência Regulação e Supervisão* (TCRS). In other words, it is for the Specialised Court – the Portuguese Court for Competition Regulation and Supervision (TCRS) – to decide not only cases of public enforcement (it already reviews the antitrust and merger decisions from the Portuguese Competition Authority) but also actions for damages based solely on the infringement of competition law. So the Portuguese Court will hear those actions as well as actions for the exercising of

⁸See the survey conducted by M Kuijpers, S Tuinenga, E Whiteford and TB Paul, 'Actions for Damages in the Netherlands, the United Kingdom, and Germany' (2017) 8 *Journal of European Competition Law & Practice* 65. For an analysis of the situation of private enforcement in Spain, see R Alonso Soto, 'La aplicación privada del derecho de la competencia' (2015) 22 *Revista de Concorrência e Regulação* 94, 96, and the excellent article by A Robles Martín-Laborda, 'La directiva 2014/104 sobre daños antitrust y la configuración del derecho español de daños' (2015) 22 *Revista de Concorrência e Regulação* 107.

⁹J-F Laborde, 'Cartel Damages Claims in Europe: How Courts have Assessed Overcharges (2017 ed.)' (2017) 4 *Concurrentes* 1, 1–2. In this survey, updated and extended in the summer 2017, 98 cartel damages claims were identified, and the cases come from 12 countries: 'Germany (38 cases), France (27 cases), Hungary (7 cases), Italy (6 cases), the Netherlands (4 cases), Austria, Denmark and Finland (3 cases each), Belgium, Poland and Spain (2 cases each), and Greece (1 case)'; and of the 98 cases only 4 were stand-alone actions.

¹⁰Published in *Diário da Assembleia da República*, Series II-A, No 18, 24/10/2017, 4–18. See also *Autoridade da Concorrência*, 'Exposição de motivos' (n 6) 103.

the right of contribution between co-infringers, and the requests for access to evidence relating to such actions.¹¹

This solution, according to the Portuguese Competition Authority, would take advantage of specialisation (avoiding civil judges who lack experience of these issues) and would avoid contradictory judicial decisions.¹² Furthermore, the exclusive competence of the TCRS will only apply after the entry into force of the law and the pending actions before the civil courts will not be transferred to that court (Article 24.º, n.º 2, Act 23/2018).

Finally, to monitor private enforcement the Portuguese Act sets up an information system according to which national courts must notify the Portuguese Competition Authority of their actions involving the application of antitrust rules as well as a request for the disclosure of evidence.¹³

It is important to mention that the solution adopted by the Portuguese Act, regarding the granting of jurisdiction to a specialised court, is not consensual.¹⁴ The main problem highlighted was that there would be few actions based *solely* on the infringement of competition law. In fact, as Maria José Costeira has already mentioned ‘notwithstanding the fact that there will be a single specialised court (...) there is still a large number of cases, perhaps the majority, which stay away from the specialisation’. In fact, ‘all the cases in which the cause of action is not uniquely the competition law infringement, as well as the ones in which the competition law is invoked in the defendant pleading, [that is to say] most of the pending cases in our courts, are excluded from the TCRS’ competence’; in addition, ‘there are still a considerable number of cases that will remain in the administrative courts where the private enforcement actions have been increasing’.¹⁵ These meaningful insights are also supported by a study published by the Centre for Research in European, Economic, Financial and Tax Law, which anticipates that the majority of the cases will be heard in other courts of first instance and the specialised court will only cover fewer than 8 per cent of the cases.¹⁶

In conclusion, although the reasons for granting exclusive jurisdiction to TCRS remain valid, the interest and effectiveness of that solution might be, for the reasons already mentioned, very limited in practice.

¹¹ Art 22 of Act 23/2018 modifies Art 112 of Law 62/2013, 26 August.

¹² Taking the opposite view, others have argued that this reform might promote the rethinking of the fairness of the solutions of the general regime. See Melícias, ‘The Art of Consistency between Public and Private Enforcement’ (n 2) 47.

¹³ Art 21 of the Act 23/2018 modifies the Law 19/2012 adding the new Art 94-A.

¹⁴ See the relevant arguments presented by MJ Costeira, ‘The Transposition of the Private Enforcement Directive: a Critical Perspective’ (2017) 3 *UNIO – EU Law Journal* 148, 155–56.

¹⁵ *ibid*, 155–56.

¹⁶ See the Study of the Centre for Research in European, Economic, Financial and Tax Law, available at: www.cideeff.pt/xms/files/Projeto_4_grupo_III/Jurisprudencia_de_Private_Enforcement.pdf.

IV. SUBSTANTIVE SOLUTIONS

The Portuguese Act has mainly adopted the solutions of the Directive but gone beyond it regarding certain specific issues.

A. The Concepts of Undertaking, Parent Company and Joint Liability

With the aim of providing legal certainty, the Portuguese Act defines an undertaking in accordance with the case-law of the Court of Justice and mentions that it will be liable for the infringement of competition law;¹⁷ in other words, it will have to fully compensate those injured by the damages resulting from such an infringement.

The ‘parent company’ will also be liable if it has exerted decisive influence over the undertaking’s business under Article 36, paragraph 3, of Law no 19/2012, of 8 May, and a decisive influence is presumed to exist (rebuttable presumption) when the parent company holds 90 per cent or more of the share capital of the subsidiary and exercises decisive influence over its business. With this solution, the Portuguese Competition Authority argued that the consistency between public and private enforcement would be improved.¹⁸

It should be highlighted, however, that these solutions are still not consensual in Portugal as well as in other legal orders. In Portugal, it has been argued that the Act should use legal language consistent with our traditions, namely the Commercial Company Code.

In other Member States,¹⁹ there is literature arguing that a parent company should only be held responsible for its own wrongdoing or if it has infringed the duty to supervise its subsidiaries, calling into the equation the constitutional principles of assessing legal responsibility according to individual guilt and *nulla poena sine lege*.²⁰ In addition, with the *Kone* judgment²¹ it has also been

¹⁷ Case C-41/90 *Höfner and Elser* EU:C:1991:161. This definition of undertaking was already inserted in Art 3 of the Portuguese Competition Act.

¹⁸ Melícias (n 2) 42.

¹⁹ See eg Maria José Costeira stressing that ‘neither the companies include a plurality of legal persons nor the infractions committed by a company are imputable to other. Companies are or might be in group relations or domain. On the other hand, it is not the imputation that is transmitted. What may be transmitted is the responsibility/liability resulting from the infringing action’; Costeira, ‘The Transposition of the Private Enforcement Directive’ (n 14) 151–52.

²⁰ F Janka, ‘National and International Developments Parent Company Liability in German and EU Competition Law: Two Worlds Apart?’ (2016) 7 *Journal of European Competition Law & Practice* 616. However, in June 2017, the German Competition Act was amended and parental liability was aligned with EU rules; in other words, the amendment extends liability to all companies constituting a ‘single economic entity. For a brief description of the German law, see B Burkhardt, *The New German Competition Law in a Nutshell*, available at: www.lexology.com/library/detail.aspx?g=535d2bda-4598-413d-86c6-05b592b1c7b5.

²¹ Case C-557/12 *Kone AG and others against ÖBB-Infrastruktur AG* EU:C:2014:1317.

argued that the application of the concept of ‘single entity’ to civil responsibility is a decision for the Member States.²² In fact, in this judgment, the Court of Justice held that in the absence of EU rules, and as long as the principles of equivalence and effectiveness are fulfilled, ‘it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU’.²³

Finally, if the infringement of competition law results from the joint conduct of two or more undertakings, they are jointly liable.²⁴ This means that each of those undertakings has to compensate for the harm in full, and the injured party has the right to require full compensation from any of them. Joint liability has been established in the Directive as a general rule and only the derogations provided for in its text are allowed, namely an immunity recipient,²⁵ small and medium-sized enterprises, provided that certain conditions are met,²⁶ and the situation where the injured party has reached a consensual settlement with one of the co-infringers.

Concerning the right of contribution between co-infringers, the Portuguese Act goes beyond the Directive. It establishes in Article 5, n.º 5, a rebuttable presumption that the extent of the liability of each undertaking is ‘presumed to be equivalent to the average of their market shares in the affected markets during their participation in the infringement, unless proven otherwise’. In other words, the capability of the undertakings to restrict competition, measured through their market shares, will be taken into account to apportion liability for the assessed damages. In addition, this solution would be ‘in line with public enforcement’.²⁷ The general rule of Portuguese civil law, establishing

²²S Thomas and S Legner, ‘Die wirtschaftliche Einheit im Kartellzivilrecht’ (2016) *Neue Zeitschrift für Kartellrecht* 155, 156; P Stauber and H Schaper, ‘Die Kartellschadensersatzrichtlinie – Handlungsbedarf für den deutschen Gesetzgeber?’ (2014) *Neue Zeitschrift für Kartellrecht* 346, 357 and Janka, ‘National and International Developments Parent Company Liability in German and EU Competition Law’ (n 20) 616.

²³*Kone* (n 21) para 24.

²⁴The Portuguese Act adopts the solution provided in Art 11 of the Directive.

²⁵That is to say a person that has been granted immunity from fines by a competition authority under a leniency programme. It will only be liable to its direct or indirect purchasers or providers, and to other injured parties where full compensation cannot be obtained from the other undertakings that were involved in the same infringement and the amount of its contribution shall also not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers. See Art 11(4)–(5) and Art 2(19) of the Directive.

²⁶Small or medium-sized enterprises (SMEs), as defined in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ [2003] L 124/36, are only liable for their own direct and indirect purchasers if their market share in the relevant market was below 5% at any time during the infringement and the application of the normal rules of joint and several liability would irretrievably jeopardise their economic viability and cause their assets to lose all their value. The exception, however, does not apply if the SME has led the infringement or has coerced other undertakings to participate therein, or if the SME has previously been found to have infringed competition law.

²⁷*Melicias* (n 2) 43.

a presumption of equal responsibility (based on fault, which is presumed equal), was, therefore, put aside.

B. Disclosure of Evidence

Bringing actions for damages for infringement of competition law is only possible if courts are also able to order that evidence relevant to damages claims be disclosed by third parties, including public authorities. In fact, given the information asymmetry in competition law litigation, it is necessary to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, namely, from national or European competition authorities. Concerning the relationship between national courts and the European Commission, the courts can order disclosure of evidence, following the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003. On the other hand, the Directive underlines that the principle of proportionality provides that disclosure can be ordered only where a claimant has made a plausible assertion; in other words, the claimant presents reasonably available facts in the reasoned justification.

Furthermore, the disclosure of evidence must also take into account the effectiveness of the leniency programme, which is labelled as an essential tool to combat secret cartels effectively.²⁸ In order to achieve an equilibrium between these conflicting interests, the Directive establishes that ‘Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions’ (Article 6, no 6).²⁹ With this solution, the Directive apparently clarifies the doubts arising from the *Pfleiderer* and *Donau* case-law holding that national courts must decide on a case-by-case basis whether or not disclosure is possible, weighing the interests of effective application of antitrust rules and the right of the claimant to full compensation.³⁰ With the Directive, this case-law will no longer apply to leniency statements and settlement submissions and that is why some authors have argued that EU policy makers are restricting the principle of effective redress.³¹

²⁸ As Wils explains, cf WPJ Wils, ‘Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future’ (2017) 40 *World Competition* 3, 33, ‘denying damages claimants access to leniency statements appears fully justified’, as leniency statements and settlements submissions would not have existed without the cartel participant’s voluntary act of making a leniency application.

²⁹ F Laina and A Bogdanov, ‘The EU Cartel Settlement Procedure: Latest Developments’ (2016) 7 *Journal of European Competition Law & Practice* 72.

³⁰ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389; Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* EU:C:2013:366.

³¹ S Peyer, ‘Access to Competition Authorities’ Files in Private Antitrust Litigation’ (2015) 3 *Journal of Antitrust Enforcement* 58.

These statements must, however, take into account Article 7 of the same Directive, which provides that:

Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

The word ‘*solely*’ used in this Article has raised certain doubts, namely whether the protection only extends to leniency documents obtained through the file of a competition authority and whether pre-existing documents should be disclosed. If the prohibition of disclosure only applies to documents in the possession of a competition authority, this would mean that leniency material in the possession of co-infringers is not blacklisted. The problem, as already pointed out, is that ‘the omission of the possibility that leniency statements may be held by a co-infringer is an unfortunate oversight that, if left unamended, might seem to leave a loophole that private litigants could use to obtain access to corporate statements’.³²

On the other hand, although the Directive allows the disclosure of infringement decisions of the competition authorities, the *Pergan* and *Pilkington* cases might make it difficult.³³ A possible solution would be to follow the experience of the High Court in the UK, which provides access to such documents, based on the views expressed by the EU Commission in correspondence exchanged with other players. In the context of the Damages Directive, if this example is followed, the scope of disclosure might be extended.³⁴

In the Portuguese context, the Act 23/2018 did not lead, in general, to wider disclosure of evidence than is provided for in the Directive. Nevertheless, it introduced certain specific solutions.

First, in order to assure pre-trial discovery, it allowed the alleged injured party to request the court to order immediate and effective provisional measures to preserve evidence of the infringement, in cases where there are strong

³² P van Osch, ‘Disclosure of Leniency Documents: Did the Dutch Highest Administrative Court Open Pandora’s Box?’ (2016) 7 *Journal of European Competition Law & Practice* 682, 685. The problem is that certain national courts, such as the Dutch court in the *CBB* case, had already ordered the disclosure of leniency transcripts, even if there were specific circumstances that could explain the decision.

³³ In the first case, Case T-474/04 *Pergan v Commission* EU:T:2007:306, the General Court refused the disclosure of a non-confidential version of a Commission’s infringement decision in a cartel case arguing that it contained several prejudicial references to the applicant which were not addressed in the decision. In the second decision, Case T-462/12R *Pilkington Group Limited v Commission*, upheld in Case C-278/13 *Commission v Pilkington* EU:C:2013:558, the Court also refused the disclosure of the decision as it would cause irreparable harm to Pilkington.

³⁴ A Howard, ‘Disclosure of Infringement Decisions in Competition Damages Proceedings: How the UK Courts Are Leading the Way Ahead of the Damages Directive’ (2015) 6 *Journal of European Competition Law & Practice* 256.

indications that it took place. Interim measures to preserve evidence are, therefore, a solution provided in Article 17 of the Portuguese Act.

Second, in order to deter behaviour, such as the destruction of relevant evidence and failure or refusal to comply with a court disclosure order, the Portuguese Act establishes penalty payments (compulsory sanctions) for delays in delivering evidence and fines (Article 18).³⁵

Finally, concerning settlement talks, while the Directive allows for the disclosure of withdrawn settlement submissions after the conclusion of the procedures, the Portuguese Act blacklists settlement talks that fail (ineffective submissions). In other words, Article 14(4)(c) of the Portuguese Act allows the disclosure of withdrawn settlement proposals after the close of the proceedings. Its Article 20.^o modifies the Portuguese Competition Act and provides that settlement talks that fail (called ineffective because the undertaking that proposed the settlement did not accept the Portuguese Competition Authority's proposal, but did not withdraw its proposal either) cannot be used as proof against those involved in the settlement procedure.

C. Effects of National Decisions

Since the *Masterfoods* case,³⁶ codified later in Article 16 of the Regulation 1/2003, it has been well known that Commission decisions are binding on national courts. The Court of Justice held that this solution did not violate Article 47 of the Charter of Fundamental Rights providing a right to an effective remedy and to a fair trial.³⁷

Following these solutions, Article 9 of the Directive provides that 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law', while equivalent decisions taken in another Member State should be considered at least 'prima facie evidence'.

Recital 34 of the Directive explains that the binding effect in follow-on actions for damages covers 'only the nature of the infringement and its material,

³⁵ Law n.º 114/2017, 29 December, Art 178.

³⁶ Case C-344/98 *Masterfoods and HB* EU:C:2000:689, paras 48–52. See also Case C-302/13 *FlyLAL-Lithuanian Airlines* EU:C:2014:2319, in which the Court of Justice allows the recognition and enforcement of rulings on antitrust damages from other Member States. On this topic, cf P Fruhlin and J Delarue, 'FlyLAL-Lithuanian Airlines: EU Rules on Jurisdiction Cover Antitrust Damages' (2015) 6 *Journal of European Competition Law & Practice* 493.

³⁷ Case C-199/11 *Europese* EU:C:2012:684. Notice that following this case-law the national court is required to accept a European Commission decision on an infringement of competition rules but the existence of a loss and the direct causal link between the loss and the agreement or practice in question remains a matter to be assessed by the national court (see para 65).

personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction' and Article 17(2) of the Directive provides a rebuttable presumption that cartel infringements cause harm.

The Portuguese Act transposes this disposition correctly and establishes, in Article 7, the irrefutable presumption of the existence of the infringement once there is a final decision of the Portuguese Competition Authority or of the Court of Appeal as to the existence, nature and material, subjective, temporal and territorial scope of the infringement. In addition, there is the rebuttable presumption of infringement (this solution goes beyond the need to establish *prima facie* evidence) of the equivalent final decisions adopted by the competition authorities of other Member States or by the Court of Appeal of other Member States of the European Union.³⁸

The problem of the probative value of infringement decisions, described above, is that, in the Portuguese legal order, courts are usually only bound by the decision of other courts in the context of a procedure of appeal and not by administrative decisions (especially because Article 206 of the Portuguese Constitution establishes that courts are independent and only have to respect the law).³⁹

Nevertheless, taking into account the case-law of the Court of Justice, the legal solutions provided in the previous EU Regulations, and the fact that administrative decisions are subject to judicial scrutiny, and that all the bodies of the Member States have to respect the principles of due process, effective judicial protection and the right to a fair trial, the solution described in the Directive and adopted by the Portuguese Act should not raise concerns.

D. Limitation Periods, Quantifying Damages and Passing-on Defence

In line with the Directive, under Article 6 of the Portuguese Act, Member States shall ensure that the limitation periods for bringing actions for damages are at least five years and that limitation periods shall not begin to run before the

infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know (a) of the behaviour and the fact that it constitutes

³⁸ The initial draft of the Portuguese Proposal also established a non-rebuttable presumption for the decisions of antitrust authorities of other Member States. However, given the negative reactions of the stakeholders during the workshop and public consultation, that solution was replaced by a rebuttable presumption.

³⁹ A similar issue was discussed in the Italian legal order. See C Massa, 'The Effects of Decisions Adopted by Competition Authorities in the Framework of Directive 2014/104/EU: Criticalities and Future Prospects' in R Mastroianni and A Amadeo (eds), *60 Years of EU Competition Law: Stocktaking and future Prospects* I Quaderni del Corso di Perfezionamento in Diritto Dell'Unione Europea Dell'Università di Napoli 'Federico II' 4 (Napoli, Editorial Scientifica, 2017) 113.

an infringement of competition law; (b) the identity of the infringer; (c) the fact that the infringement of competition law caused harm to it, even if it was not aware of the full extent thereof.

With this solution, the Portuguese general rule (Article 498, Civil Code), establishing the limit of three years for liability for tort, is set aside and effectiveness of the action is promoted. On the other hand, the Directive and the Portuguese Act do not explain the situations where the claimant knew or could be expected to know the relevant facts. However, certain literature and case-law hold that this should be the moment where a competition authority publishes an infringement decision.⁴⁰ Doubts remain, nevertheless, regarding situations without public enforcement decisions.

Concerning the quantification of damages, under Article 4 of the Portuguese Act, the obligation to pay damages shall include actual loss and loss of profits calculated from the time when the harm occurred and updated under Article 566(2) of the Civil Code. In addition, Article 9 (3) of the Portuguese Act, establishes that ‘it shall be presumed that cartels cause harm’ and if it is ‘impossible or excessively difficult to quantify the total harm’ the Portuguese courts shall decide on the grounds of ‘approximate best estimate assessments’; and the Portuguese Competition Authority shall assist the court in the quantification of damages upon request (unless the Portuguese Competition Authority requests, with due justification, to be excused). With this solution, the Portuguese legislator took into account the concerns of the Portuguese courts to fulfil this task, especially given the shortage of resources of the Portuguese courts.

Finally, in order to avoid overcompensation, the Portuguese Act follows the Directive and presumes, in certain circumstances, the passing on of the overcharges (Article 8).

V. AMENDMENTS BEYOND THE IMPLEMENTATION OF THE DIRECTIVE: COLLECTIVE REDRESS

Although the Directive does not deal with matters such as collective redress (which were dealt with under the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law), the Portuguese Act, in order to ensure full right to the full reparation of the injured parties, decided on the applicability of the ‘Popular Action’ regime, under Law 83/95, 31 August (Popular Action Act), and Decree-Law no 214-G / 2015, 2 October.

⁴⁰ See the cases *Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm); *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 mentioned in K Havu, ‘Limitation Periods in Damages Claims: Notes on a Finnish Supreme Court Precedent in the Context of the European Landscape’ (2016) 7 *Journal of European Competition Law & Practice* 402.

The European Commission favours the opt-in model (even if experience shows that it is not very effective) because it is compatible with the legal traditions of the Member States, respects the freedom of potential claimants to decide whether to take part in the litigation or not, and avoids abuses, such as overcompensating class representatives. On the other hand, opt-out group actions seem to be most useful where individual claims are difficult to prove or when the value of such claims is too low to motivate consumers to participate, reducing, in addition, transaction and information costs.⁴¹

Portugal is one of the EU Member States that has an opt-out collective redress model called '*Ação Popular*' (Popular Action) and it has been considered 'the most extensive form of collective action based on the "opt-out model" available in the EU'.⁴²

Article 52(3) of the Portuguese Constitution provides that:

Everyone shall be granted the right of popular actions, to include the right to apply for the adequate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine either personally or via associations that purport to defend the interests in question. That right shall be exercised namely to (...) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation for environment and the cultural heritage.

This constitutional right was implemented through Law 83/95 of 31 August and has a broad scope.

Among the substantive issues, the concepts of legal standing, quantification of damages and payment of compensation are probably the most controversial issues and are mentioned in the Portuguese Act, Article 19.

A Popular Action may be granted to: (i) any citizen; (ii) a legally constituted association or foundation (as long as it is a legal entity); and (iii) the public prosecutor's office, which may replace the claimants if the contested behaviour endangers the interests involved (Articles 2 and 3, Popular Action Act). In addition, Article 19 of the Portuguese Act adds: 'a) Associations and foundations whose aim is to protect consumers; and b) Associations of undertakings whose associates are injured by the infringement of antitrust rules'. Furthermore, under Article 19 'if the injured parties are not identified individually, the court shall set an overall amount of damages', which might have to be shared among them in proportion to the harm they have each suffered. Moreover, under Article 19, the judgment 'will identify the entity responsible for receiving,

⁴¹ See SO Pais and A Piszcz, 'Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?' (2014) 7 *Yearbook of Antitrust and Regulatory Studies* 210.

⁴² C Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (2011) 8 *The Competition Law Review* 91, who mentions, besides Portugal, the existence of opt-out collective actions in the Netherlands and Denmark. For a detailed analysis of Popular Action, see Pais and Piszcz, 'Package on Actions for Damages Based on Breaches of EU Competition Rules' (n 41) 209.

managing and paying the damages due to the injured parties not identified individually' and damages not paid will revert to the Ministry of Justice.

To sum up, with this solution the Portuguese Act aims to enhance consumer protection and encourage individuals and SMEs to use this mechanism and obtain compensation in an effective way.⁴³

VI. CONCLUSION

The Portuguese transposition procedure was transparent, inclusive and provided certainty and confidence. The Act 23/2018 adopted the solutions in the Directive, even if in certain specific areas it went beyond the existing ones with the aim of enhancing consumer protection. Although certain solutions might not be completely effective, as already mentioned, the final assessment is positive and the Portuguese Act managed to strike the right balance between private and public enforcement.

⁴³Melícias (n 2) 46.

