

# Practical challenges in implementing the Damages Directive in Portugal



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Preliminary Draft  
legislation  
implementing the  
Damages Directive  
entrusted by the  
Portuguese  
Government to the  
AdC

## I. Strategy of the transposition process in Portugal:

- Project planning
- main steps undertaken
- Underlying goals

## II. Highlights on novel substantive solutions – going beyond the Damages Directive

# I. An open, transparent and inclusive transposition process – main steps:

## 1) Working group of external experts:

A sounding board for AdC's preparatory works comprised of representatives from the judiciary, academia and private practice

## 2) Consultative workshop on the draft:

Market testing some of the proposed solutions before the public consultation - broad range of participants from around 30 organizations

## 3) Public consultation:

[http://www.concorrenca.pt/vPT/Noticias\\_Eventos/ConsultasPublicas](http://www.concorrenca.pt/vPT/Noticias_Eventos/ConsultasPublicas)



All work products  
posted online



AdC's main strategic goals:

Encourage public debate

**Engage stakeholders** so that they feel the new private enforcement regime as their own

Take advantage **of stakeholders operational know-how**



Ultimately: **for the regime to gain traction** once implemented

## II. Substantive Solutions

### Extension of the Scope

Extending the scope of the regime so as to cover **infringements that are purely domestic in nature, i.e., that do not affect trade between MS**



This  
solution  
ensures:

- Overall coherence of the legal system
- Equality of treatment between infringers and between victims
- Legal certainty – “impact on interstate trade”: flexible/contentious notion
- Automatic compliance with the principle of equivalence

## Who's liable? Notion of undertaking and imputability

### Problem

- Solving the “**mismatch**” between the subject of competition rules and liability
- Group of companies: identifying which legal entities within “an undertaking” may be held liable to pay damages

### Proposed solution

- Both the **legal entity** that **directly committed the infringement** and any of its **parent companies** that have **exercised decisive influence** over that entity's business may be held liable for damages
- **Rebuttable presumption** that a parent company holding 100% of the share capital of a subsidiary exercises decisive influence over that entity's business Or other indicia of control;
- Consistency with the **notion of undertaking** and the **ECJ's case law on parental liability** + consistency between public and private enforcement

## Joint and several liability - contribution

### Problem: measuring contribution

- Article 11(5) of the Directive: “Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their *relative responsibility for the harm caused by the infringement* of competition law. (...)”
- Portuguese Civil Law determines that relative responsibility of co-infringers is based on respective fault, which is **presumed equal**.

### Proposed solution

- Establishing a rebuttable presumption to measure contribution on the basis of the co-infringers’ **average market share throughout the duration of the infringement**
- More proportionate to the capability of each infringer to cause harm to the competitive process (proxy of market power) and to gain from infringement

## Binding effect of decisions of NCAs and Courts

Probative value of infringement decisions by national competition authorities (NCAs) and review courts of **other Member States**



More than *prima facie* evidence »»» ***Rebuttable presumption*** of infringement for the purposes of bringing an action for damages

- Similar underlying rationale as binding effect of AdC's and national courts' decisions
- MS share common legal traditions »»» due process
- However: important to mitigate the potential for ancillary litigation around the regime »»» **intermediate/ compromise solution**

# Substantive Solutions

## Access to evidence



### Pre-trial discovery

- Proposal does not lead to wider disclosure of evidence than is provided in the Directive, but rather extends its temporal scope to facilitate access to evidence necessary to bring damages actions

### Interim measures to preserve evidence

- An alleged injured party may request the court to order immediate and effective provisional measures to preserve evidence of the infringement, when there are strong indications that it took place

### Sanctions

- Penalty payments for delays in delivering evidence and fines of up to 500.000 euros to deter behaviour such as destruction of relevant evidence and failure or refusal to comply with a court disclosure order

# Substantive Solutions

## Monitoring private enforcement



Enable AdC to **monitor and influence private enforcement** »»»» Ensure consistency  
**btw public and private enforcement**

Enable AdC to intervene either as *amicus curiae* or in relation to request for  
**disclosure of evidence** included in its investigation files



Setting up an information system: creating duty for courts to notify the AdC of:

- any action or defence relying on breach of competition law
- requests for disclosure of evidence
- any ruling or judgement where an infringement of Articles 101 and 102 or the corresponding national provisions is considered

# Substantive Solutions

## Collective redress – Opt-out system

### Portugal's opt-out system (*Ação Popular*)



Draft legislation meant to overcome some practical obstacles of this “class action” regime

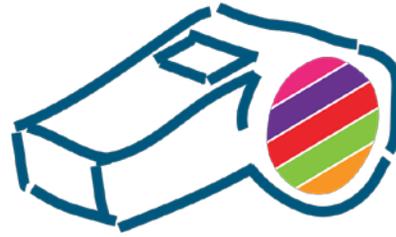
Encourage its use by both businesses and individuals

- May be initiated by **any citizen** to protect public interests (including the protection of competitive process)
- Constitutional right, enshrined in the Portuguese Constitution of 1976

- Compensation for harm suffered as a result of an antitrust infringement may be claimed under this law
- Standing: consumer, business associations, etc
- Identification of the possible victims
- Quantification of overall damages
- Management and payment of compensation
- Damages not claimed may revert to plaintiff

# Substantive Solutions

## Specialised court



Granting jurisdiction to hear damages actions to the **Court for Competition, Regulation and Supervision**, when the claim is **solely** based on antitrust infringements, instead of leaving competence with common civil courts

Already existing Court for Competition, Regulation and Supervision is **specialised in substantive issues of competition law** and holds powers **full jurisdiction in antitrust matters** (more than review court »» trial court)



Promotes the **consolidation of a legal culture of competition**

## Leniency Statements – Exclusion of pre-existing information

Portuguese Leniency Regime provides **broader protection** than Directive: currently protects **both leniency statements + evidence** submitted together with leniency application

Directive: Leniency statements are “black-listed”, but **pre-existing information may be disclosed**

Binding for Member States: neither wider nor stricter protection is allowed



Need to amend the Portuguese Competition Law to harmonize it with the Directive, **excluding the protection of pre-existing documents**

**»»» BUT ONLY VIA COURT ORDER**

# Substantive Solutions

## Protection of settlement talks that fail

Proposed provisions to make clear that settlement talks that fail are **absolutely protected** from disclosure: *ineffective Vs withdrawn* submissions

Directive allows for disclosure of *withdrawn* settlement submissions following the conclusion of an investigation but *black lists* other settlement submissions (including ineffective submissions)



Solution **protects the settlement procedure**



# FAIR PLAY.

With competition,  
everybody wins.

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