THE REALITY OF ACCESS IN ANTITRUST PRIVATE ENFORCEMENT: OVERVIEW OF 3 YEARS' EXPERIENCE IN PORTUGAL

Miguel Sousa Ferro

Abstract *This paper aims at bridging the gap between the theory and practice of access to evidence in antitrust private enforcement, focusing on the reality of the Portuguese legal order. It begins by providing an overview of the national legal provisions applicable to access to evidence, in the various contexts where it may take place. It then describes the reality and practice of the Portuguese administrative and judicial authorities, on the basis of empirical research. The comparison between the two allows identifying the real challenges and arriving at some suggestions for how to ensure to effectiveness of the rights of the parties to private enforcement litigation, when it comes to access to means of evidence.*

Key-Words Antitrust, Competition Law, Private Enforcement, Access to Evidence

1. INTRODUCTION

As was identified early on in the discussion about why actions for damages based on antitrust infringements were so rare in the European Union, *"access by claimants to* (…) *evidence is the key to making damages claims effective"*[1], and there were serious obstacles to such access throughout the EU. Accordingly, the introduction of harmonized rules on access to evidence was one of the

1 European Commission, 2005: §2.1.

main concerns of the Damages Directive[2]. The Directive proudly announces that the *"rules in this Directive on the disclosure of documents* (…) *ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages"*[3]. It's a bold statement.

But do the Directive's rules really ensure access to evidence and necessary information? Not just for claimants, but also for defendants? The goal of this paper is to tackle these questions, going beyond the letter of the law. Anchoring ourselves in the Portuguese legal order[4], the paper sets out to compare the existing theoretical legal framework with the underlying reality of legal practice, the living pulse of the law, as it truly exists in society.

Three years having elapsed since the entry into force of the transposition of the Damages Directive, it is a good time to take stock of how the rules on access have been applied in the Portuguese jurisdiction. We are unaware of similar studies for other EU jurisdictions, and so will not be able to establish comparisons with other Member States.

Adhering to the ASCOLA declaration of ethics, the author hereby discloses to be acting as a lawyer in several pending cases in Portugal, namely dealing with access issues and including cases mentioned in this paper. All efforts were made to ensure objectivity, providing factual descriptions and avoiding judgments and personal assessments, except in the conclusions. This has been done namely by consulting and presenting the views of legal counsel involved in antitrust private enforcement cases on both the claimants' (2 lawyers interviewed) and the defendants' side (3 lawyers interviewed). Additionally, the paper was subjected to peer review, including by one magistrate, and the paper was revised in light of the reviewers' comments.

2 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 (OJ L 349/1, 05/12/2014).

3 Damages Directive, recital 27 (emphasis added).

4 For an earlier analysis of the legal framework on access to evidence in Antitrust private enforcement, see: Rossi, L. & Sousa Ferro, M., 2015.

2. THE LEGAL FRAMEWORK

The relevant legal framework, described below, is complex and includes:

i) constitutional rights and fundamental rights;
ii) general right of access to means of evidence and pre-filing discovery mechanism;
iii) rules on publicity and access in civil procedure;
iv) rules on publicity and access in criminal procedure (applicable namely to public enforcement appeals);
v) rules on publicity and access to administrative documents (applicable namely to non-fining public enforcement procedures and to *res judicata* fining procedures);
vi) special rules for access to competition law public enforcement procedures and for access in the framework of antitrust private enforcement; and
vii) special rules for access to procedures by lawyers.

(i) Constitution and fundamental rights

The Portuguese Constitution guarantees the rule of law, the right of access to justice and to effective, equitable and timely judicial redress[5], as well as a right to information[6]. It guarantees that court hearings should be public, except when otherwise determined for the protection of specified interests[7]. These fundamental rights and principles find their parallel in the ECHR (as clarified in case-law)[8], which is binding in Portugal. And also in the EU Charter of Fundamental Rights, whenever EU Law is being applied[9].

The Constitution also protects personal domiciles and the confidential nature of correspondence and other means of communication (which cannot be interfered with, except in criminal proceedings), and prohibits access to others' personal data except when authorized by law[10]. Together with

5 Articles 2 and 20 of the Portuguese Constitution (see also Article 202(2)).

6 Articles 37 and 60(1) of the Portuguese Constitution.

7 Article 206 of the Portuguese Constitution.

8 Articles 6 and 13 of the European Convention of Human Rights.

9 Article 47 of the Charter of Fundamental Rights of the European Union. See also Articles 41 and 42, on right to good administration right of access to documents held by the EU.

10 Articles 34 and 35(4) and (7) of the Portuguese Constitution.

some legal provisions, these rules typically lead to debates about whether the Competition Authority may have access to emails and other correspondence which have already been opened[11].

The right of popular action, in representation of collective, diffuse or individual homogenous interests (which includes the pursuit of antitrust private enforcement actions), is constitutionally granted to individual citizens and to associations[12], and then regulated in general and matter-specific legislation[13]. This right has been, and continues to be, exercised in Portugal, in the context of antitrust private enforcement, to prepare or pursue representative opt-out actions on behalf of all injured consumers, and may also be used in the future to represent all injured undertakings.

(ii) General right of access to means of evidence and pre-filing discovery mechanism

The Civil Code[14] sets out the general rule according to which a person who has reasons to doubt the existence or content of his/her/its right, is entitled to access information and documents needed to make that determination (including making copies), and the holders of such information and documents have an obligation to grant access to them[15].

In order to protect this right, the Code of Civil Procedure[16] sets out a mechanism for pre-filing discovery, to obtain a decision from a court ordering one person to surrender to another documents to which the latter is entitled under those provisions of the Civil Code[17]. The procedure is supposed to be an expedited one (e.g., only 15 days for defence). If the court's order is not complied with, another action must be filed to obtain the judicial seizure of the documents. The Private Enforcement Act has clarified that this mechanism may also be used to assess or prove the existence of rights deriving from Antitrust law[18].

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11 In Antitrust, this issue has systematically been answered in the affirmative, but it is still litigated in every single public enforcement appeal.

12 Articles 52(3) and 60(3) of the Portuguese Constitution.

13 Law 83/95, as last revised by Decree-Law 214-G/2015 (Popular Action Act); Article 31 of the Code of Civil Procedure; Article 19 of Law 23/2019 (Antitrust Private Enforcement Act); Articles 31 and 32 of Decree-Law 486/99 (Securities Code); Article 18(1)(*l)* and *n)* of Law 24/96 (Consumer Defence Act); Article 7(2) *a)* of Law 19/2014 (Environmental Policy Act); Articles 9 and 10(4) of Law 107/2001 (Cultural Patrimony Act).

14 Decree-Law 47344/66, last revised by Law 65/2020.

15 Articles 573 to 576 of the Civil Code.

16 Law 41/2013, as last revised by Law 117/2019.

17 Articles 1045 to 1047 of the Code of Civil Procedure.

18 Article 13 of the Private Enforcement Act.

(iii) Civil procedure

The access regime to court cases and documents held by courts varies depending on the type of case – civil (e.g. antitrust private enforcement) or misdemeanor/criminal (e.g. appeal of public enforcement decision).

Both civil and criminal cases are carried out through the web-platform Citius, with all pleadings and decisions being submitted and notified electronically. This platform is accessible to judges, court clerks and lawyers. As a rule, access to case files, when requested by lawyers, is granted electronically through Citius. However, the platform does not allow differentiation between confidential and non-confidential documents or versions. Thus, whenever a case file includes even one confidential document, access can no longer be granted through the platform (even to the parties' lawyers), and the case must be consulted or physical or electronic copies of it obtained directly at or from the court. As an alternative, it seems possible to exclude confidential documents from Citius, keeping them in a separate physical file, so that the remaining continue to be accessible through Citius, but this did not occur in any of the cases analysed.

Access to civil court cases is governed by the *lex specialis* for competition law and by the Code of Civil Procedure. Under the latter, the right of access to justice includes the right to obtain a timely judicial decision and see it enforced, with an adequate mechanism necessarily being available to defend any right (a national expression of the principle of effectiveness)[19]. The principle of equality between parties should be ensured[20].

Civil proceedings are, as a rule, public[21]. Parties, lawyers and any person who can show a legitimate interest may access the case-file (in principle) through the Citius platform[22] and obtain copies (including certified copies) of any documents included therein[23]. Exceptions may be made to protect

19 Article 2 of the Code of Civil Procedure.

20 Article 4 of the Code of Civil Procedure.

21 As affirmed in doctrine and quoted in the judgment of the Southern Central Administrative Court, of 15 May 2008 (case no. 03111/07), "*the principle of publicity of procedural acts is a means to combat arbitrariness and ensure truth and justice in judicial decisions (…), namely the possibility of popular control of the bodies which – like the Courts – exercise powers of sovereignty*".

22 The Citius platform is accessible here: https://www.citius.mj.pt/Portal/Default.aspx. Citius is the name of an online platform (in fact, a collection of platforms) developed by the Portuguese Ministry of Justice to allow judicial procedures to be carried out electronically. Through these platforms, it is possible to submit, organize and archive, in electronic format, all documents in a court case file, and to electronically notify the parties' lawyers, as well as to consult the current state of the case-file at any time.

23 Articles 163, 165-167 and 169-171 of the Code of Civil Procedure. Articles 27 and 27-A of Order 280/2013.

human dignity, privacy, public morals, data protection rules or the efficacy of the decision-making in the case in question. Confidentiality (e.g., commercial secrecy[24]) is not mentioned in this general regime as possible grounds for an exception[25]. Access should be processed by the courts' secretariat, but whenever the latter has doubts about the existence of the right, or about how it should be exercised, it should submit the issue to be decided by the judge[26].

(iv) Criminal procedure (public enforcement appeals)

Access to appeals of decisions of the Portuguese Competition Authority ("AdC") is governed by the *lex specialis* for competition law, by the General Regime for Misdemeanors, and by the Code of Criminal Procedure[27]. Under the latter, judicial criminal proceedings are, as a rule, public. Exceptions ("segredo de justiça") are allowed only during the investigation phase (which does not apply to public enforcement appeals, because the investigation is carried out by the AdC), to protect individual's privacy or with other grounds which are not applicable to antitrust cases[28]. According to these basic provisions, publicity includes the right of everyone to attend hearings, to consult the case file and to obtain copies thereof[29]. Although the publicity of hearings may exceptionally be excluded by the court, the reading of the judgment must always be public[30].

The Code of Criminal Procedure includes special provisions regulating access by the media, by parties to the proceedings and by others.

Journalists can have access to and may describe the contents of this type of court files, but this right of description and the reproduction of parts of the

24 See Directive 2016/943 of the Parliament and of the Council, of 8 June 2016, on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157/1, 15/06/2016).

25 Article 164 of the Code of Civil Procedure.

26 Article 168 of the Code of Civil Procedure.

27 Applicable to misdemeanor proceedings (such as antitrust public enforcement cases) via Article 41 of Decree-Law 433/82.

28 Articles 86 and 87 of the Code of Criminal Procedure. As noted in Article 86(9) to (11), access is possible even during the investigation phase of court cases under "segredo de justiça", subject to case-by-case assessment of proportionality (to the extent this is indispensable for those persons to exercise their rights, including filing a civil claim for damages).

29 Article 86(6) of the Code of Criminal Procedure.

30 Article 87(5) of the Code of Criminal Procedure (see also Article 372(3)). See: Judgment of the Lisbon Appeal Court of 11 March 2015 (case no. 204/13.6YUSTR.L1-A), reaffirming the publicity of the judgment as a requirement of the rule of law.

case file can be subject to limitations until the judgment is adopted[31]. They are always deemed to have a legitimate interest simply by invoking journalistic access to sources of information[32].

Persons who suffered damage as a result of the crime (or misdemeanor), or who may be held liable for that damage, are granted the right to consult and obtain copies of the case file even during the investigation phase, and even if "segredo de justiça" has been decreed (unless the Public Prosecutor opposes this and the judge agrees)[33]. Once the case becomes public (which is always the case after the investigation phase), injured persons and those who may be held liable may request the free consultation of the case file (even to consult it outside the court)[34]. However, because the title of this provision refers to "parties to the proceedings", it has mostly been interpreted as applying only if the persons in question are parties to the proceedings. In criminal cases, injured persons can intervene in the case and become parties thereto, but in misdemeanor cases this has so far been deemed not to be possible. So a path for access and updated information which is open to injured parties in criminal cases has tended to be interpreted as not open to them in appeals of antitrust public enforcement decisions.

Other persons may also be granted access to the case file, and to obtain (at their expense) copies thereof, if they show a legitimate interest[35]. It is in this category that requests for access to public enforcement appeals by injured persons have generally been included.

(v) Administrative documents

Access to administrative documents, including documents held by the Portuguese Competition Authority, is governed by the *lex specialis* for competition law, by the Code of Administrative Procedure[36] and by the Access to Administrative Documents Act[37]. There is some legal uncertainty concerning

31 Article 88 of the Code of Criminal Procedure.

32 Article 8(2) and (3) of Law 1/99 (Journalism Act). Judgment of the Lisbon Court of Appeal of 18/09/2014 (case no. 3499/12.9JFLSB-F.L1-9).

33 Article 89(1) and (2) of the Code of Criminal Procedure.

34 Article 89(4) of the Code of Criminal Procedure.

35 Article 90(1) of the Code of Criminal Procedure. The only exceptions foreseen to this rule are not relevant for antitrust cases.

36 Decree-Law 4/2015, as revised by Law 72/2020.

37 Law 26/2016, last revised by Law 33/2020.

whether this regime applies also to access to documents held by the AdC in misdemeanor proceedings (e.g., declaration of antitrust infringements), or whether those proceedings are governed only by misdemeanor/criminal law, at least until the decision is *res judicata* (majority opinion seems to lean to the latter). It's certain, at least, that these provisions apply to access to AdC merger control cases.

Administrative proceedings are subject to the principle of open administration. Anyone, without having to show a specific interest, has the right of access to, and to copies of, administrative documents, as long as privacy, confidentiality and other interests are safeguarded[38]. This is further regulated in the Access to Administrative Documents Act, which (*inter alia*) transposes Directives 2003/4/EC and 2003/98/EC. Persons who see their right of access to documents held by any Portuguese administrative body infringed can appeal to an independent committee (Commission on Access to Administrative Documents), and this suspends the deadline to exercise the right of appeal before administrative courts.

(vi) Special competition law rules

The *lex specialis* for competition law is set out in the Competition Act[39] and Private Enforcement Act[40]. While requiring the AdC to protect confidential information[41], the Competition Act establishes that public enforcement cases are, as a rule, public (with the exception of ordering "segredo de justiça" while needed to protect investigations, at the latest up to the adoption of the final decision, but usually until the adoption of the Statement of Objections)[42].

Any third party which shows a legitimate interest has a right of access to, and to obtain copies of (at their own expense), the public enforcement case file[43]. Confidential information should be available only to external counsel

38 Articles 17, 18, 82, 84 and 85 of the Code of Administrative Procedure. See also Article 68, on legitimacy to initiate and intervene in administrative proceedings. The absence of a need to argue specific interest is made clear in Article 5 of the Access to Administrative Documents Act.

39 Law 19/2012, as revised by Law 23/2018.

40 Law 23/2018.

41 Articles 30, 32 and 33(4) of the Competition Act.

42 Article 32 of the Competition Act. Even while the case is subject to "segredo de justiça", duly pondered exceptions may be made to provide access to third parties (Article 32(5) of the Competition Act).

43 Articles 33(3) and 48 of the Competition Act.

or economic advisors of addressee undertakings (subject to safeguards), but an exception is explicitly made for access regulated by the Private Enforcement Act[44]. Statements and documents prepared specifically for leniency and transaction proposals are protected, as regulated further in Private Enforcement Act[45].

The Lisbon Appeal Court has once stated that the Competition Act does not govern publicity and secrecy during judicial review of AdC decisions, which is governed by the Code of Criminal Procedure[46], but in other judgments it has applied to the rules of the Competition Act to the appeal phase (including to access issues).

AdC antitrust decisions and judicial review decisions must be published by the AdC on its website[47]. The AdC also receives from the courts every private enforcement claim, defence and judgment, but the law does not require it to make them accessible[48].

When it comes to access to evidence, the Private Enforcement Act faithfully transposes Directive 2014/104/EU, without innovating or going beyond what was required, except in one regard. Its obligations are thus well-known to all those who are familiar with the Damages Directive[49]. This Act makes it clearer that courts confronted with requests of access to evidence needed to assess, or to prove, the existence of a right to damages arising from an antitrust infringement must grant access, even to confidential information (with the exception of legal privilege and black and grey-listed public enforcement documents), carrying out a proportionality assessment. Crucially, access rules must comply with the principle of effectiveness. They cannot make it impossible or excessively difficult to determine or prove the existence of a right to damages. The Act provides examples of the types of measures the courts can use to protect conflicting interests (e.g., excerpts or access only to lawyers and external consultants). It also sets out special fines for violation of access conditions. The innovative aspect of the Portuguese transposition is that it also regulates access to means of evidence prior to the filing of a private

44 Article 33(4) of the Competition Act.

45 Articles 22(16), 27(11) and 81(3) of the Competition Act.

46 Judgment of the Lisbon Appeal Court of 11 March 2015 (case no. 204/13.6YUSTR.L1-A).

47 Articles 32(6) and (7) and 90 of the Competition Act.

48 Article 94-A of the Competition Act.

49 Articles 12 to 18 of the Private Enforcement Act.

enforcement claim, referring to the civil procedure mechanism mentioned above[50].

Portuguese case-law has repeatedly affirmed that, in antitrust proceedings, information should be deemed confidential if: (i) the information is known only to a restrict number of persons; (ii) its dissemination can cause serious harm to the person who provided it or to a third party; and (iii) the interests which may thus be harmed are objectively worthy of protection[51].

(vii) Special rules for lawyers

The Bar Association Statutes includes a special provision according to which, in the exercise of their profession, lawyers have, before any court or administrative body, the right to request access to and copies of case files or documents which are not confidential, without having to show a power of attorney[52]. Access by lawyers is, as a rule, granted through Citius, for 10 days[53].

3. PUBLICITY AND DATABASES OF COURT CASES

It is important, as a preliminary step to the subsequent analysis, to explain the reality of the publicity which is given in Portugal to court cases and court rulings. Many of the difficulties faced by those seeking access are rooted in the surprising absence of information about pending cases or access to court decisions.

In Portugal (with very few exceptions which are not relevant in this context), first instance court judgments and orders are not published or even registered in a public database. 2nd and 3rd instance judgments are published, but, at least so far, not systematically (judges can, and sometimes do, request that the judgment not be published, and do not have to present a specific justification).

Some judges of the Competition Court have repeatedly asked that a means be provided for the online publication of all the Court's judgments, but so far this has not been achieved.

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50 Article 13 of the Private Enforcement Act.

51 See, e.g., judgments of the Lisbon Appeal Court of 18 December 2019 in case no. 228/18.7YUSTR-E, of 18 December 2019 in case no. 228/18.7YUSTR-G, and of 18 February 2020 in case no. 228/18.7YUSTR-I, not published but quoted, e.g., in Decision of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C.

52 Article 79(1) of the Statutes of the Portuguese Bar Association (Law 145/2015, as revised by Law 23/2020)

53 Article 27 of Order 280/2013.

The AdC is required by law to publish on its website the non-confidential version ("NCV") of all judicial decisions concerning its cases[54], but it does so non-exhaustively and often with large delays.

Crucially, there is no database in Portugal one can search to identify pending or decided court cases. Either one already knows about the existence of a case, its number and court where it is found, or one generally has no chance of discovering it or ever having access to it.

The filing and distribution of civil cases is published for a short time online on the Citius platform. While this data disappears after a period, it is collected by some (paid) sources and can thus be accessible later for a fee. This only indicates the name of the parties, the court, and the number and value of the case, with no indication about the cause of action or object of the litigation.

The filing and distribution of misdemeanor cases (including appeals in antitrust public enforcement cases) is not published. Unless one is a party to those proceedings, one has no way of knowing whether an appeal has even been filed, much less its number, details or how it has progressed. Typically, the only way a potentially injured person in Portugal finds out if a decision of the Competition Authority has been appealed, and if anything else has happened in such an appeal or how the case is going, is if this is reported in the media. Some examples were reported of the Competition Court's secretariat refusing to provide even the number of a pending case (required to duly submit requests for access through the Citius platform), when an appeal had been reported in the media.

The AdC is required by law to provide information on its website about whether appeals are pending, but it only started providing this information in July 2021 (without identifying the court case number)[55]. Potentially injured parties cannot trust that such information is up to date and often do not know whether AdC decisions (or their judicial review judgments) have become *res judicata*, finding it hard to make that determination. Several cases are known of the AdC refusing to provide third parties with the number of court cases related to its decisions.

In practice, the AdC only publishes information on judicial cases once a final ruling has been adopted (at least in the 1st instance). It does not publish court orders preceding judgments. And it does not publish judgments in

54 Articles 32(6) and (7) and 90 of the Competition Act.

55 Article 90(1) *in fine* of the Competition Act.

cases where the AdC has not yet adopted a final decision (i.e., judgments in interlocutory appeals concerning steps in the AdC's ongoing investigation). This means there are a large number of rulings in interlocutory appeals which are not available on the AdC's website[56]. The publication of judgments on the AdC's website can also take some time and it is not announced. The only way for users of the website to know that new judgments are available is to periodically go through each AdC's investigation individual page, one by one, and see if anything new is available[57].

As a rule, only the NCVs of judgments are made available. This can cause delays (often of several months) between the request and actual access, as courts – and the Competition Court in particular – do not always produce an NCV of judgments before receiving a request for access thereto.

The only time we could identify where this issue was discussed before a higher court, the Lisbon Appeal Court determined that the Code of Criminal Procedure requires judgments to be public, and that there is no legal basis for the production of an NCV of judgments. In this case, the Lisbon Appeal Court granted a consumer protection association (intending to file a follow-on claim) access to the full version of the 1st and 2nd instance judgments[58].

4. ADMINISTRATIVE ACCESS BEFORE THE COMPETITION AUTHORITY

As far as could be determined, there is no experience so far with Portuguese claimants, defendants or courts seeking disclosure of documents by the European Commission in the framework of Antitrust private enforcement.

As for access by third parties to documents held by the AdC, the reality of access varies according to the situation:

56 This assessment is based on outsiders' empirical experiences. The AdC's official policy is to publish all decisions when they are adopted, even prior to the adoption of the final decision, including judgments in interlocutory appeals, with the following exceptions: court rulings relating to cases which are still under "segredo de justiça" or which relate to appeals on confidentiality which have not yet been decided in a res judicata manner (i.e. decisions with information whose confidential nature is still subject to litigation).

57 The information provided concerns the period covered by the research for this paper. The AdC has since launched a revised website, in which some of the issues raised here have been tackled.

58 Judgment of the Lisbon Appeal Court of 11 March 2015 (case no. 204/13.6YUSTR.L1-A).

(i) documents in administrative proceedings (e.g., merger control): the AdC has tended to grant access to NCVs upon demonstration of legitimate interest, and the NCV is typically already prepared and available;
(ii) documents in misdemeanor proceedings (Antitrust):
   a) during the investigation, while still under "segredo de justiça": no access (although theoretically possible, we know of no instance where requirements for access during this phase were deemed to have been met);
   b) during the investigation, between lifting of "segredo de justiça" (typically after S.O.) and appeal: upon demonstration of legitimate interest, AdC has tended to grant access to NCV of case-files. There is often a time-gap 2 to 3 weeks to obtain a reply, and a time-gap of weeks or months between the request and actual access, namely due to the need to prepare the NCV;
   c) while judicial appeal of AdC decision is pending: AdC systematically refuses to grant access, instructing interested parties to direct their access requests to the courts where appeals are pending (even if it has previously not announced that an appeal is pending, and typically without indicating the case number).
   d) after the decision has become *res judicata*: access to NCV upon demonstration of legitimate interest.

The AdC has not been very demanding when it comes to the demonstration of legitimate interest, it normally sufficing, for example, to invoke the suspicion that one may have been injured by the practice in question.

The transposition of the Directive's rule according to which Competition Authorities should only be required to grant access to documents if no other party may reasonably provide them has led to uncertainty about whether the AdC may indeed be required to continue to grant access as it has done so far.

As expectable, NCVs of AdC case files (especially those where all undertakings settled or which were closed with commitments) tend to be sparce in information. Understandably, the AdC often seems to accept undertakings' claims of confidentiality, without any discussion or revision thereof, when this will not create problems for the adoption and confirmation of the AdC decision. This means that one sometimes finds entire chapters of documents deemed confidential, with the information or position provided by the targeted undertaking(s) being completely deleted.

But examples can also be found of AdC decisions rejecting claims of confidentiality by undertakings, especially when access by co-defendants and exercise of right of defence is an issue, and namely due to insufficient reasoning or insufficient description in the NCV (e.g., omitting values entirely instead of indicating brackets), the age (over 5 years) of the information, etc. A few such cases have led to in-depth and detailed review of these AdC decisions by the TCRS and the Lisbon Appeal Court[59]. In this context, the courts have clarified various broad points of law concerning protection of confidential information, relevant also to private enforcement. The TCRS has shown a willingness, when needed, to carry out a detailed review of the content of each document or category of documents. Overall, the appellants have won on some points and the AdC on others.

5. JUDICIAL ACCESS PRIOR TO FILING CLAIM

The most obvious path to obtain non-public documents needed to determine the existence of a right is to request them from their holder, which, in the case of antitrust, is usually the infringer(s), but can also be the AdC (see previous section), the TCRS or Lisbon Appeal Court (or another court), or even a third person.

As noted above, the Civil Code grants a right of access in such situations, and so these issues could, theoretically, be solved without ever resorting to a court. In practice, however, access to documents held by infringers is never obtained extrajudicially. Indeed, while a large number of precedents of refusal of access were identified, we couldn't identify a single instance of a company or a third person having granted any access to any document whatsoever upon request from a potentially injured person in Portugal. Addressees of such requests have systematically refused to provide access even to NCVs of documents in their possession.

Requests of access submitted to courts prior to filing a claim for damages can be divided into four categories:

(i) Access to civil litigation;
(ii) Access to appeals of public enforcement decisions;
(ii) Access to interlocutory appeals in public enforcement investigations.
(iv) Actions for pre-filing discovery;

59 For an example which mentions previous cases, see Order of the TCRS of 18 June 2020 in case n.º 243/18.0YUSTR-C.

5.1. Access to civil litigation

Access by third parties to the files of (pending or concluded) civil court cases has proven to be, as a rule, extremely simple, swift and efficient, particularly as access tends to be requested by lawyers and provided through the Citius platform. As far as could be determined, the practice of courts in this category of access has been very homogenous.

Standards for access applied by the courts have been undemanding, bordering on automatic granting of requests. It has proven unnecessary even to reference the appropriate legal basis for the request. Journalists, academics and lawyers have been presumed to have an interest in consulting any civil case, without having to argue or demonstrate a legitimate interest beyond the identification of their professional activity (e.g., lawyers do not have to claim to represent a party with a legitimate interest).

Journalists and academics have requested access, typically, through a short email, and have been granted the right to consult the entire case file at the court or granted copies in electronic format.

A multitude of examples were identified of access being given, either immediately or in a few days. No example of refusal or significant delay in access could be identified.

Access requests tend to be processed by the courts' secretariats themselves, with judges being involved only rarely. Only rarely have parties to the proceedings been consulted before access is granted.

The only difficulty in access to civil litigation worth mentioning is that, whenever the case is not recent (under 3 months) and its number has not been publicized, it is often a challenge to identify the case number, even knowing the parties, the court and general timing of its filing. Access requests without a specific case number tend not to be processed successfully by the court's secretariats.

From the perspective of the protection of confidential information and personal data, the manner in which access to civil litigation is processed and given stands in stark contrast to access to appeals of AdC public enforcement proceedings. In the vast majority of cases, there is no restriction whatsoever on access to information in the case file, which is made available in its entirety. Some examples were identified where parties to the dispute specified to the court that there was confidential information within their submissions and attached documents. In such cases, the Court will typically order that the case not appear in Citius (even to the parties themselves), so that access cannot be obtained through that platform and can be limited to

non-confidential elements. Access is then provided to third persons to the NCV of the full case-file.

As far as could be identified, the only situation where access to a civil case was refused to a third person (temporarily) was when access was requested prior to the notification of the defendant.

5.2. Access to appeals of public enforcement decisions

There is a significant number of precedents of requests submitted to courts for access by third persons to appeals of AdC decisions. Success in obtaining access has varied drastically depending on the nature of the petitioners and the judges deciding the request. 4 judges of the Competition Court have taken 3 diverging positions, which will be described below grouped as Judges A, B, C and D.

As will be seen below, the present situation of access by third parties to appeals of public enforcement decisions is seemingly more limited than it was over 10 years ago. At that time, the position of the Lisbon Commercial Court was that:

> *"it is possible to obtain a certified copy of the entire case file, and it should be recalled that there is no need to resort to the regime of the Code of Civil Procedure, as this matter is specifically regulated in the Code of Criminal Procedure"*[60].

One group of petitioners that, seemingly, has had little or no difficulty in obtaining access to case files (regardless of the judge) is journalists. Even in cases where the Court refuses access to other third parties (such as injured persons), journalists have apparently always been granted access[61], but not enough information could be obtained to estimate average time of waiting for access.

Academics have also tended to be successful in obtaining access, at least to NCVs of judgments, by invoking academic interest (except in one case decided by Judge D), but the sample which could be identified was limited.

As for injured persons and undertakings targeted in other proceedings, who almost always request access only to the NCV of the case files, the decision-making practice of the judges of the Competition Court is strictly

60 Order of the Lisbon Commercial Court of 21 February 2008 (case no. 1050/06.9TYLSB). See also Order of the Lisbon Commercial Court of 26 September 2006 (case no. 766/06.4TYLSB).

61 See cases no. 229/18.5YUSTR-F and 225/15.4YUSTR-W.

divided between the judges. All judges have consulted the parties to the proceedings before ruling on access requests (even if only to NCVs).

Judge A has given access to NCVs of the administrative case-file, the appeal and the AdC's defence[62]. The Court said requests to other documents in the case file could be granted, but a specific and justified request should be made, arguing that, even though they were public, providing access to them was burdensome. Because the case file included confidential elements and was not accessible through Citius, access was granted by electronic copies provided in a DVD or USB drive. The petitioner was not provided with an index or list of other documents existing in the case file, in order to prepare an access demand thereto, but it also did not specifically request it, and so it cannot be excluded that the Court would have provided it. Access was obtained in slightly under 2 months.

It remains to be tested (especially in light of the Lisbon Appeal Court judgment quoted below), to what extent the burden of providing access can be used as a justification for requiring an individualized justification before access is granted to case-file documents which have not been declared confidential.

Judge C was confronted with an access request from a consumer protection association to prepare a follow-on case, seeking the NCV of the case file (1 September 2020)[63]. 2 months later, the petitioner was informed by the Secretariat that the court had accepted its request, without reasoning. The petitioner requested and was refused a copy of the court's decision. The petitioner was refused access by the Secretariat to the NCV of the entire case file. Replying to an own initiative request for clarification from the Secretariat, the judge clarified its earlier order, stating that access should only be provided to the NCV of the administrative case-file, of the appeal and of the AdC's defence, refusing access to any subsequent document, including any decision or ruling taken by the court itself (6 November 2020). The Court recognized the petitioner's legitimate interest in consulting the case-file, but stated that the only NCV of the case file which existed was the one with the documents mentioned above, whose preparation the court had ordered prior to the petitioner's request, and that a legitimate interest cannot be used to consult any and all items in the case-file.

62 See, e.g., case no. 309/19.0YUSTR.

63 In case no. 71/18.3YUSTR-M.

The petitioner appealed this decision (12 November 2020), and the appeal was admitted one week later (against the position of the Public Prosecutor, who argued there should be no right of appeal, while also arguing that access should have been granted to the entire non-confidential case file).

The Lisbon Appeal Court ruled in favour of the access petitioner on 1 June 2021. It found, in summary:

> "*I – Court proceedings are public in nature, excluding only those acts and terms which, under the applicable law, are covered by 'segredo de justiça' or confidentiality; and which must be declared as such by a reasoned decision, as this is an exception to the rule of publicity of the proceedings.*
> *II – The public form of proceedings is ensured in the international legal order, final part of article 6(1) of the European Convention on Human Rights, in article 47(2) of the Charter of Fundamental Rights, in article 10 of the Universal Declaration of Human Rights, and in article 14(1) of the International Covenant on Civil and Political Rights, and in internal law, in article 163(1) of the Code of Civil Procedure, articles 83 to 85 of the Code of Administrative Procedure and articles 87 to 90 of the Code of Criminal Procedure.*
> *III – In the legal regime of Law 19/2012 (Competition Act), only in the cases foreseen in articles 30 and 81 is there protection of confidentiality.*
> *IV – The publicity of the proceedings under the Competition Act is set out in article 33(3), according to which 'Any natural or legal person showing legitimate interest in the case can request access to the file and request copies, extracts or documents from the file, at their own expense, except as set down in the previous article'.*
> *V – The rule is, thus, the right of access to procedural information (not covered by confidentiality) by the parties, their lawyers, and those 'showing legitimate interest'.*
> *VI – There is no place for the classification of acts, terms or procedural documents as non-confidential, since, if understood as 'public', this derives directly from the law.*
> *VII – In court proceedings, there is only place for the reasoned declaration of confidentiality*"[64].

Although the petitioner had been notified of its right of access at the end of October 2020, it only obtained the NCV of the AdC's defence (provided to the Court in November 2019) at the end of May 2021. It also asked the Court to provide a new NCV of the appeal by the undertaking concerned, given the excessive amount of omitted information. This new version was

64 Judgment of the Lisbon Appeal Court of 1 June 2021 (case no. 71/18.3YUSTR-P.L1).

requested on 17 November 2020 and was obtained on 4 May 2021. The access petitioner was not included by the Competition Court Secretariat, in Citius, as a party in its own appeal, and was only notified of the judgment of the Lisbon Appeal Court on 1 July 2021. Access to the remainder of the court proceedings, in compliance with the Appeal Court's ruling, was obtained on 21 July 2021 (more than 10 months after the initial request).

This case further clarified that no costs are owed for an appeal against a decision by the Court to refuse access to the public enforcement appeal's case file[65].

Judge D has, openly or in practice (by not deciding), refused to allow consultation by potential injured parties of public enforcement appeals. This judge has also refused to issue certified copies of the access requests and of any decision taken in relation to such requests. One such request for certified copies, limited to the access request procedure itself, submitted in November 2020, has not yet been decided by the Court[66]. This means that it is impossible for those requesting access to know what progress has been made, which parties have expressed opinions and in which sense, why no decision has been adopted, etc. The evolution of the access request is treated by the Court as secret for those requesting access. Information in that regard has been obtained only indirectly, by clarifications provided by the Court to the Conselho Superior da Magistratura (CSM), after requests for intervention of the latter submitted by the access petitioner.

In one case[67], an access request by a consumer protection association was submitted on 13 January 2021. On 17 March 2021, the petitioner requested a clarification as to why no decision had yet been taken. On 22 March 2021, the Court informed the petitioner that the appeal had been subject to "segredo de justiça" (even though this had been lifted by the AdC when it issued the Statement of Objections[68]) and ordered the petitioner to clarify how "it had

65 See Judgment of the Lisbon Appeal Court of 1 June 2021 (case no. 71/18.3YUSTR-P.L1) ("without costs"), and ruling of the TCRS of 26 September 2021 (case no. 71/18.3YUSTR-P), accepting the appellant's request that the initial court fee which had been paid out of precaution should be returned. The Public Prosecutor at the TCRS had argued against this outcome.

66 In case no. 229/18.5YUSTR-F.

67 Case no. 225/15.4YUSTR-W.

68 Prior to these rulings of Judge D, it had been the settled practice of the Competition Court and, previously, the Lisbon Commercial Court, that, once the AdC Decision is adopted, an appeal of that decisions cannot be covered by "segredo de justiça" and the proceedings are public – see, e.g., Orders of the Lisbon Commercial Court of 26 September 2009 (case no. 766/06.4TYLSB) and of 7 December 2006 (case no. 1050/06.9TYLSB). Judge D is the only Judge of the TCRS to submit appeals of AdC decisions to "segredo de justiça".

obtained computer access to the proceedings, including the case number"[69]. The petitioner replied that it knew about the case number from the AdC's website and from reports in the media, that it had submitted its request through the Citius platform, as legally required, and that it had not obtained any form of access to the proceedings. A hearing on the issue of access and confidentiality was held, without the presence of the access petitioner, who was not notified of the positions expressed by the court, parties or Public Prosecutor. At some unknown point before the beginning of the trial hearings, the "segredo de justiça" was lifted. The consumer association was allowed to be present at the trial hearing, while still having no access to any document in the case file, including a decision of the Court which seemingly declared the case time-barred for one of the Defendants. On 29 October 2021, the petitioner once again requested that a decision be taken concerning its original request. Up to the closing of this paper (November 2021), i.e. 10 months later, the Court has not yet decided this access request.

Only one example could be identified of injured parties seeking access to specific *confidential elements* within the case file. This occurred in an appeal in the insurance cartel case[70], which stands out for its eccentricities.

The AdC Decision in the insurance cartel, adopted with leniency and settlements, declared a market sharing cartel relating to "large clients", and it seemingly contained an explanation of what a large client was, or which specific large clients were encompassed by the cartel, but this info was deemed confidential. Accordingly, the only way for companies who believed they could have been affected by the cartel identified in the AdC Decision to confirm this was to request access to the confidential info on which large companies were encompassed by the cartel.

Two undertakings submitted, on 3 June 2020, an access request to the TCRS (Judge D). The lengthy request was based on the examination of the NCV of the AdC's case-file and sought access to information deemed confidential and alleged to be indispensable to determine if the petitioners fell within the concept of affected "large company". The case file was placed by

69 This should be read in the context that the Court's Secretariat seemingly received instructions by at least one Judge not to divulge case numbers, even when asked by third parties who wished to submit an access request.

70 Case no. 229/18.5YUSTR-F.

the Court under "segredo de justiça" (even though this had been lifted by the AdC when it issued the Statement of Objections). All parties, including the AdC and Public Prosecutor, opposed any form of access, with the latter suggesting that the request of access should be decided only after there is a *res judicata* judgment in this public enforcement appeal[71].

In mid-December 2020, the access petitioners asked the CSM to intervene, given that 8 months had elapsed without a decision being obtained. In mid-January 2021, the CSM decided that the Court was exercising its legitimate discretion and no intervention was justified.

At the end of January 2021, the Court rejected the request for access, addressing it as a request by the lawyer, rather than by the represented injured parties, basing the rejection on lack of reasoning, on the case file being subject to "segredo de justiça", on the existence of other means to have access to the required information[72], on the request consisting in a fishing expedition, and on the need to protect confidential information. In mid-February 2021, the access petitioners appealed this ruling.

In mid-March 2021, the Court replied to a request for information from the appellants about the progress of the appeal by saying that efforts were under way to ensure that a third party had not been given access to the case-file through Citius. In mid-May 2021, the appellants submitted a request for intervention to CSM. The Court informed CSM that it had asked the Institute which manages Citius to explain how the appellants had been able to submit the appeal through Citius in a case subject to "segredo de justiça", and that the admissibility of the appeal would only be decided after receiving such clarifications. In early June 2021, the CSM said its intervention was not justified.

At the time of the closing of this paper (1 year and 5 months after the initial request, and 9 months after the appeal), the appeal has not been approved nor rejected. With the rejection of intervention by the CSM, the appellants have no remedy in the Portuguese legal order to enforce their right to judicial review of the decision refusing access, as long as the Court does not adopt a decision on the admissibility of the appeal.

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71 As described in information provided by the Court to CSM.

72 At least one of the parties to the proceedings suggested that the access petitioner could have used the pre-filing discovery mechanism of Article 13 of the Private Enforcement Act, but given that the case file had been subject to "segredo de justiça", such use would likely be argued by the same parties to be an unlawful way of circumventing that "segredo de justiça" and gaining access to information in the case file subject to "segredo de justiça" (the decree of which should be challenged in the case where it was decreed).

There are, as of yet, few positions of the higher courts on these matters, beyond the judgment quoted above.

One case stands out for the direct involvement of the Lisbon Appeal Court and the position it took. During the 2nd stage appeal of an AdC Decision, the Lisbon Court of Appeal granted access to a consumer protection association[73] to the NCV of the case-file and, crucially, to the entire judgment of the Competition Court and of the Lisbon Appeal Court. The judge rapporteur affirmed that, under the rules of criminal procedure, judgments must be public, with no provision in the law allowing the drafting of NCVs of judgments[74].

The undertaking appealed to the collective panel of judges, who confirmed the decision[75]. It then appealed to the Supreme Court. The judge rapporteur rejected the appeal[76], and the undertaking appealed to the collective panel of judges, who confirmed the decision[77]. The undertaking then filed an extraordinary appeal for uniformization of case-law, which was deemed inadmissible[78]. While the various appeals were pending, the claimant was prevented by the Lisbon District Court from adding the judgments it had obtained to the file of the follow-on claim, causing a delay of 1,5 years between submission of the judgments and their admission to the case file[79].

5.3. Access to interlocutory appeals in public enforcement investigations

In recent years, it has become common, in some AdC investigations, for the Competition Court to receive a large number of interlocutory appeals, i.e., appeals of decisions which precede the final decision that closes the public enforcement investigation. Such appeals may concern the scope of the dawn raid mandate, the validity of evidence seized, the extent and validity of orders to provide the AdC with documents and information, etc.

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73 In order to obtain evidence for the follow-on class action filed before the Lisbon District Court as case no. 7074/15.8T8LSB (still pending).

74 Order of the Judge Rapporteur of 6 February 2015 (case no. 204/13.6YUSTR.L1-A).

75 Judgment of the Lisbon Court of Appeal of 11 March 2015 (case no. 204/13.6YUSTR.L1-A).

76 Order of the Judge Rapporteur of 17 November 2015 (case no. 204/13.6YUSTR.L1-A.S1).

77 Judgment of the Supreme Court of Justice of 7 January 2016 (case no. 204/13.6YUSTR.L1-A.S1).

78 Judgment of the Supreme Court of Justice of 14 June 2016 (case no. 204/13.6YUSTR.L1-A.S1).

79 Decision of admission of documents to the case file taken by the Lisbon Judicial Court on 6 September 2016.

When a potential claimant is pondering a follow-on action for damages, it is often confronted with a large number of interlocutory appeals which it knows were filed before the Competition Court, but it typically does not know the subject matter, what was argued, whether they have already been decided and, if so, their outcome.

These interlocutory appeals could determine, or at least suggest the likelihood or unlikelihood of, the subsequent annulment of the AdC's Decision declaring the infringement. When assessing the arguments of the parties in these appeals, the Court is sometimes called on to make extensive and detailed assessments of the evidence itself, leading it to make calls on whether such evidence supports the existence of an infringement[80].

Rulings in interlocutory appeals may also go into very detailed discussions about the confidentiality of certain documents and types of information, which can be useful for claimants in follow-on actions. It may be useful for claimants to quote the legal interpretations previously put forward by the court and, potentially, even by the undertakings themselves, in abstract. There may even be a precedent from the Court concerning the confidentiality of a specific document or information to which claimants will be seeking access in the private enforcement action. Examples of this can be found in one such appeal, where the Competition Court made the following broader clarifications, *inter alia*:

(i) that the burden to demonstrate confidentiality may not be met by simply identifying the nature of the information (e.g., not enough to say information concerns market shares, because those markets may have been made public; knowing a source of supplies may be irrelevant if it is insignificant for the undertaking's business) – the nature of the information may create a presumption, but it depends on the specific circumstances[81];

(ii) information only merits protection as confidential if it occurred within the lawful exercise of contractual freedom or commercial practices – if it was illegal, then it does not merit protection as confidential[82];

80 See, e.g., Order of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C.

81 Order of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C.

82 Order of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C, paras 56 and 140.

(iii) recommended prices may merit protection as confidential, namely when they were the basis for negotiation of wholesale prices[83];
(iv) information older than 5 years is in principle not worthy of protection, but there are exceptions to this, with the Court recognizing a very broad exception for information which relates to an ongoing commercial relation (e.g., with a distributor) or practice[84];
(v) need to ensure compliance with the GDPR[85].

The position of the judges of the Competition Court concerning access to interlocutory appeals has also varied very significantly, in reply to identical requests submitted by a consumer protection association at the beginning of April 2021. Access was sought to the entire case file, excluding any confidential information. In every case, the undertakings, the AdC and the Public Prosecutor opposed any and all access by the association.

Judges A and B granted partial access to all interlocutory appeals assigned to these judges, arguing:

> *"the access petitioner bases its request also on the need to access the case file to formulate an opinion about the viability of the public enforcement proceedings and the need or not to begin preparing a possible action for damages, alleging that access to the case file will allow it to assess the probability of the investigation leading to a decision which is likely to be confirmed judicially, so that it can decide whether or not it should begin, at once and if justified, to prepare a compensatory claim in representation of consumers. From this perspective, it cannot be excluded that the petitioner has a legitimate interest in knowing the object of these proceedings, if for nothing else, at least to conclude that they do not affect or interfere with the assessment of the viability of the public enforcement proceedings"*[86].

The Court, however, deemed that it was likely sufficient for the petitioner, in order to meet its goals, to have access to the court orders in these cases[87].

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83 Order of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C, para 94.

84 Order of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C, paras 95, 126, 129 and 143.

85 Order of the TCRS of 18 June 2020 in case no. 243/18.0YUSTR-C, para 162 et seq.

86 See, e.g., Order of the TCRS of 10 May 2021 in case no. 243/18.0YUSTR. See also, e.g.: Order of the TCRS of 12 May 2021 in case no. 228/18.7YUSTR.

87 Such court orders are legally required to be published on the website of the AdC, but continued not to be available on this website at the time of writing.

It noted that the preparation of NCVs of the entire case files would imply an additional burden, and left open the option for the petitioner to duly request access to other documents in the case file.

Judge C refused access. This judge noted that the interlocutory appeals in question concerned the validity of the seizure of emails by the AdC and whether certain documents should be deemed confidential, and added:

> *"In both cases, the issues discussed were evidently and merely procedural, with no issues being discussed concerning assignment of misdemeanor or any other type of liability to the undertaking in question. It's true that some documents are included in the case files, but those documents are also necessarily already in the administrative case file pending before the AdC, to which the petitioner has already been given access.*
> *Everything else, such as appeals, allegations and court rulings are procedural pieces which are limited to adjective matters, reason for which, with all due respect, we see no legitimate interest in the consultation of these proceedings by the petitioner, if what it is interested in is compiling elements which may be used in a potential claim for damages against the undertaking in question. It is necessarily and logically not through the consultation of proceedings where adjective matters are discussed that it will obtain such elements"*[88].

Judge C also affirmed that access cannot be requested to the entire case file. Although this judge had previously granted access to other public enforcement proceedings through DVD or USB drive (when access through Citius was impossible due to the presence of confidential documents), the Court this time stated that the law did not allow for access to be provided in that manner. The position expressed in this case was also not easy to reconcile with the position expressed by the same judge about a year earlier:

> *"While the present proceedings are not under 'segredo de justiça', confidential information must be safeguarded, of course, but such information is already duly identified by the application of the regime set out in article 30 of the Competition Act. What one cannot do is restrict the petitioners' right to consult the case file, as the undertaking in question seems to intend, by determining to which procedural documents the petitioner should have access. In truth, it is the publicity of the proceedings and their transparency which is at stake, and the undertaking in question is promoting an unjustified restriction of publicity, it not being up to it, with all due respect, to guess what may or may not be*

88 Order of the TCRS of 29 April 2021 in case no. 83/18.7YUSTR.

relevant for the access petitioner, as long as confidential information is safeguarded, as noted above. Openness and access to information allow for divergences between different points of view to be debated, and this contributes to give institutions greater legitimacy in the eyes of citizens and to increase their confidence. Indeed, absence of information and debate is a lever for the creation of doubts in the minds of the citizens, not just about the legitimacy of an isolated act, but also about the legitimacy of the entire decision-making procedure"[89].

On 11 May 2021, the access petitioner appealed to the Lisbon Appeal Court. The appeal was admitted on 13 May 2021, and sent up to the Appeal Court on 1 July 2021, after the submission of the position of the undertaking in question. The appeal is currently pending[90].

Judge D also refused access, on 15 September 2021[91], to a case which was already closed (*res judicata*) with the following justification: (i) the association does not have a legitimate interest because the case does not refer to the determination of the existence of an anticompetitive infringement and would not be useful for a follow-on action; (ii) only issues of confidentiality were discussed in this case, and conclusions are limited to the public enforcement case; (iii) the association should use other (unspecified) judicial means to have access to the court's case-file[92].

On 27 September 2021, the access petitioner appealed to the Lisbon Appeal Court. Until the closing of this paper, the Court (Judge D) has not decided whether to admit or reject the appeal, and no reason for the delay was communicated to the appellant.

5.4. Actions for pre-filing discovery

As far as could be determined, nine pre-filing discovery actions (eight relating to the same infringement) have been filed, in July 2021, under Article 13 of the Private Enforcement Act[93], to prepare potential follow-on claims based

89 See Order of the TCRS of 16 June 2020 in case no. 71/18.3YUSTR-M.

90 Case no. 83/18.7YUSTR-B.L1

91 Judge D began by asking the access petitioner to provide a commercial registry certificate describing its social object (the latter was quoted in the request for access) and managing bodies, in order to assess its legitimate interest. The claimant replied that, being an association, by law it had no commercial registry, and provided the Court with its officially published Statutes and the composition of its managing bodies.

92 See Order of the TCRS of 15 September 2021 in case no. 20/19.1YUSTR.

93 Case no. 6/21.6YQSTR and Cases no. 7/21.4YQSTR, 8/21.2YQSTR, 9/21.0YQSTR, 10/21.4YQSTR, 11/21.2YQSTR, 12/21.0YQSTR, 13/21.9YQSTR, 14/21.7YQSTR.

on European Commission decisions. No example could be identified of the same mechanism under the general rules of civil procedure being used before in the context of Antitrust private enforcement. The nine actions mentioned are still pending.

6. JUDICIAL ACCESS AFTER FILING CLAIM

It should be noted from the outset that, so far, in this context, there has been no noticeable difference between the rights of parties and their practical application by the courts, prior to and after the transposition of the Damages Directive.

The Portuguese legal order already had examples of courts ordering parties to disclose documents in the context of Antitrust private enforcement.

(i) Contracts

In one case, the court ordered one of the parties to disclose contracts between it and other trading partners, to assess allegations of discriminatory practices, and this evidence proved decisive in finding for the existence of such discrimination[94].

(ii) Defendant's internal documents

In another case, the Court accepted the claimant's request for disclosure of internal documents of the defendant, and these proved to include an apparent "smoking gun" for the existence of margin squeeze[95]. The claimant lost the case due to the way it alleged the facts (and the interpretation of the burden of allegation by the Court), an outcome which possibly could have been avoided had the evidence been sought and obtained prior to filing the claim.

While in other jurisdictions (e.g., Spain), the trucks cartel has given rise to countless decisions on access to means of evidence, by claimants and defendants, in Portugal, even though there are about 80 cases of this cartel pending before the Competition Court[96], and many rulings on access have already

94 Lisbon Judicial Court, 1ª Vara Cível, *Reuter Portuguesa v Mundiglobo Trading* (case no. 299/95).

95 Lisbon Judicial Court, Instância Central Cível, 1ª Secção (J20), *Optimus Comunicações (NOS) v Portugal Telecom* (case no. 1774/11.9TVLSB).

96 Cases no. 2/19.3YQSTR, 5/19.8YQSTR, 6/19.6YQSTR, 7/19.4YQSTR, 8/19.2YQSTR, 9/19.0YQSTR, 10/19.4YQSTR, 11/19.2YQSTR, 12/19.0YQSTR, 13/19.9YQSTR, 14/19.7YQSTR, 15/19.5YQSTR, 16/19.3YQSTR, 17/19.1YQSTR, 18/19.0YQSTR, 19/19.8YQSTR, 20/19.1YQSTR, 21/19.0YQSTR, 22/19.8YQSTR, 23/19.6YQSTR, 24/19.4YQSTR, 25/19.2YQSTR, 26/19.0YQSTR, 27/19.9YQSTR, 28/19.7YQSTR, 29/19.5YQSTR, 30/19.9YQSTR,

been adopted, these rulings have not been made public and so could only be assessed through interviews with the lawyers or specific access requests.

(iii) Claimants' documents for passing-on defence

A specific feature of access in the Portuguese trucks cartel litigation is that, as far as could be determined, claimants have not sought access to evidence in possession of the defendants or of third parties. Thus, the rulings on access have focused on defendants' requests for disclosure of evidence in possession of claimants, especially to support passing-on allegations.

Significant discrepancies have been observed between the rulings of the various judges of the Competition Court. One lawyer acting for defendants argued that it is still too soon to conclude that the issues will be decided differently, as the discrepancies observed so far may still disappear as the cases progress.

According to the assessment of some of the defendants' and claimants' lawyers involved in these cases, the Competition Court has tended to base its rulings on disclosure of evidence by the parties on the following criteria: (i) whether the documents actually exist; (ii) whether they are available to the person requesting the access; (iii) whether they are available to the person from whom access is requested; (iv) whether they are relevant for the facts alleged and requiring proof. But the outcomes arrived at have varied.

Some defendants asked the Court to order the claimants to produce the data used in the claimants' economist report, receiving varying responses. In several cases, the Court accepted claimants' argument that they did not possess this data, which had been purchased by the economists, and ordered their production by the economists (as third persons). Some decisions in this regard have not yet been taken or are not yet final.

The Court accepted claimants' arguments that they did not possess various types of documents, when it deemed these to be reasonable. Judges have disagreed on requests for the claimant's annual report, with one ordering its

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31/19.7YQSTR, 32/19.5YQSTR, 33/19.3YQSTR, 34/19.1YQSTR, 35/19.0YQSTR, 36/19.8YQSTR, 37/19.6YQSTR, 38/19.4YQSTR, 39/19.2YQSTR, 40/19.6YQSTR, 41/19.4YQSTR, 42/19.2YQSTR, 43/19.0YQSTR, 44/19.9YQSTR, 45/19.7YQSTR, 46/19.5YQSTR, 47/19.3YQSTR, 48/19.1YQSTR, 49/19.0YQSTR, 50/19.3YQSTR, 51/19.1YQSTR, 52/19.0YQSTR, 53/19.8YQSTR, 54/19.6YQSTR, 55/19.4YQSTR, 56/19.2YQSTR, 57/19.0YQSTR, 58/19.9YQSTR, 59/19.7YQSTR, 60/19.0YQSTR, 61/19.9YQSTR, 62/19.7YQSTR, 63/19.5YQSTR, 64/19.3YQSTR, 65/19.1YQSTR, 66/19.0YQSTR, 67/19.8YQSTR, 68/19.6YQSTR, 69/19.4YQSTR, 70/19.8YQSTR, 71/19.6YQSTR, 2/20.0YQSTR, 3/20.9YQSTR, 4/20.7YQSTR, 5/20.5YQSTR, 6/20.3YQSTR, 7/20.1YQSTR, 8/20.0YQSTR, 9/20.8YQSTR, 10/20.1YQSTR, 14/20.4YQSTR, 16/20.0YQSTR, 17/20.9YQSTR, 18/20.7YQSTR and 1/21.5YQSTR.

production and another arguing that this is a public document which can be obtained extrajudicially by the defendant. Two judges (Judges B and C) have refused access requests connected to tax issues (allegedly relevant to the quantification of the damage), as these were deemed to fall outside the scope of the action and the powers of the court.

As far as could be determined, no defendant has yet refused to provide a requested document on the grounds that it was confidential.

In several cases, at least one judge of the Competition Court (Judge B) rejected the defendant's request to have access to the claimants' accounting, and instead ordered, *ex officio*, a court appointed expert to carry out an assessment of the accounting in order to determine whether there was passing on of the surcharge. Defendants and claimants put forward lists of issues to be determined by the expert, but the Court reduced them to the essential fact to be determined, and challenges to this ensued in at least some cases. As clarified by the Court itself, the refusal of access to accounting data was not based on the inadmissibility of access to such documents in itself, but to the uselessness of adding them to the case file, given their technical nature and the fact that the Court did not deem itself technically capable of assessing them for the defendants' purposes (identifying possible passing-on of the surcharge).

Decisions on access requests have been described by all consulted lawyers as expeditious, tending to be taken within about one month (usually including a 10 days deadline for the opposing party to express its opinion). Seemingly, the opposing party has not always been consulted prior to the decision on the access request, the practice of the judges varying in this regard. Parties have been granted varying deadlines to produce the ordered evidence, sometimes going up to 120 days. One claimant's lawyer expressed the opinion that the Court is not always sensitive to the effort, (unrecoverable) costs and burden imposed on the disclosing party, in particular in the case of small undertakings.

(iv) Public enforcement judgments

In a follow-on private enforcement case, immediately after the reading of the 1st instance judgment in the public enforcement case (confirming the AdC Decision), the claimant asked the Court to order the Defendant to add a copy of the judgment to the case-file. The Defendant objected, *inter alia*, on the grounds that the claimant could obtain a copy of the judgment from the Court. Judge B decided that it was unnecessary to rule on these requests,

because of being aware of the judgment through her functions, and ordered *ex officio* the Court's Secretariat to add the judgment to the private enforcement case-file. The judgment thus became immediately available to the Court and claimant, in its entirety[97].

7. CONCLUSION

The experiences of access in Portugal have confirmed that the fears which led to the introduction of the Damages Directive's rules on access were well justified. This is so, not because problems arise systematically, but because approaches vary widely between judges. The system has worked very well in some cases. But when some judges refuse access to NCVs of public case files, consider the case number itself to be confidential, take months to decide access requests, or refuse to rule on appeals of their decisions rejecting access, there is still a long road ahead before the right of access is truly effective.

The analysis carried out highlights that, to a large extent, the transposition of the Damages Directive has had no perceptible impact on the rights of access to evidence in the context of Antitrust private enforcement. If anything, the recent positions of some of the judges of the Competition Court have been more restrictive of access by potential injured parties than ever before. The personal approaches and values of the judges hearing access requests have outweighed, by far, the impact of legislative reform.

There is profound heterogeneity in the reality of access depending on the type of case to which access is sought, who is seeking access, which judge hears the petition for access, etc.

It is difficult to see how an effective global solution may be achieved. Clearly, the transposition of the Directive has not been enough to ensure, in some cases, the intended outcome and the effectiveness of the right of access. As time goes by and some precedents are established by judgments of Appeal Courts, or even by the CJEU and ECHR, it is possible that diverging interpretations between judges will be reduced. The vastly diverging positions of the judges of the Competition Court on access issues, as described in this paper, suggest the importance of an intervention by the Supreme Court, with a case-law uniformizing judgment, the sooner the better. The CSM could also play a role, through the exercise of its powers over judges, but the experiences discussed in this paper show that it typically does not intervene.

97 Order of the TCRS of 2 November 2021 (case no. 20/20.9YQSTR).

It is tempting to think that the solution should be an amendment of the existing legal framework, but the experience with the implementation of the existing rules shows that any legal reform is likely to be merely a half measure, unless it includes time limits for all parties (including the Court itself) and effective and speedy judicial remedies.

Experiences of access such as some of those described in this paper show that no law, no matter how well written, can survive interpretation and application by an unwilling court, in particular where appeal and supervision mechanisms are absent or do not function adequately. The Portuguese legal system seemingly has no solution or effective remedy if a court simply does not decide an access request, or does not rule on an appeal of its rejection of an access request.

Having to fight for months and years just to find out if one was injured by a cartel will mean that only the most stubborn of (potentially) injured undertakings, in cases with potentially high damages, will keep on the fight to find out if it is entitled to compensation. And by the time it finds out (if it does), it is likely to face additional uncertainty and arguments from defendants as to time-barring of its right to damages.

A small legislative amendment which could dismiss some of the obstacles currently faced by access petitioners is to revise the law to make it clear that court cases are public and that anyone has a right of access to the NCV thereof, without having to show a legitimate interest. Proof of legitimate interest should only be required in order to apply the proportionality test to conflicting interests, but no (legitimate) interests are being harmed by access to an NCV of a public court case The burden of preparing an NCV version of a case file should not be legitimate grounds for failing to comply with the rule that court proceedings are public (excluding confidential elements).

That being said, one of the most important lessons from the overall analysis of the access experiences discussed in this paper is that an excessive amount of resources and time is being spent on these issues by access petitioners, judges, courts' secretariats, public prosecutors and other parties in court cases (and their lawyers).

On the one hand, many access requests could be avoided if there was public information about the status of court cases, and also if court judgments and orders were public and accessible by all, online, without having to make specific requests to obtain them (such as occurs, e.g., in Spain). As previously requested by judges of the Competition Court, the CSM or the Ministry of

Justice should provide for the publicity of competition cases (and not only). The transparency and public online availability of documents and information on proceedings before the UK's Competition Appeal Tribunal is a leading example to be followed.

Second, just like what happens, by law, in the administrative proceedings of the AdC, an NCV of court cases should be created as a matter of course, and with the least possible burden to courts themselves. Whenever Parties allege that their submissions include confidential data, they should be required to submit an NCV thereof within a short deadline (failing which the previously submitted version will be deemed the non-confidential one). Judges should also be required to produce an NCV of all court orders and judgments, within a short deadline. Any allegation or determination of confidentiality must be duly reasoned, in order to allow for effective judicial review. And sanctions should be foreseen for abuse.

Third, the Citius platform should be revised to allow for differentiated access to confidential versions and NCVs of case-files. Anyone adding a document to a case file (the court or the parties) should be required to indicate whether it is confidential, and, if so, to submit an NCV thereof. Court secretariats should then have the option of granting access to third parties, through Citius, only to the non-confidential documents within that case file. In order to be effective, failure to submit NCVs within the legal deadline must result in the confidential version being automatically made available in the non-confidential file.

The problems of access which are being felt in the Portuguese legal order do not seem to be growing pains. Rather, they seem to express cultural and systemic issues which will not easily go away. Even if appeal mechanisms and disciplinary bodies act to ensure compliance with the rights of access, this will not prevent long delays in order to have access to necessary documents, nor the dissuasion of private enforcement due to the unavailability of necessary information. Such systemic problems require systemic and largely automated solutions, which necessarily involve the revision of the Citius platform and the creation of websites for mandatory dissemination of court cases and rulings.

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