

PRESS FILE

6 September 2021

Popular action for the compensation of consumers injured by EDP's abuse of a dominant position

Consumer protection association Ius Omnibus submitted today, to the Portuguese Competition, Regulation and Supervision Court, a popular action aimed at defending Portuguese consumers injured by EDP Produção's unlawful practices identified in the Competition Authority's Decision (AdC) of 17 September 2019. Between January 2009 and December 2013, EDP abused its dominant position on the electricity system market for secondary regulation in Continental Portugal. For five years, by restricting its supply on the tele-regulation market, EDP caused a price increase on this market and in the compensation paid to EDP Production under the CMEC regime (Custos para a Manutenção do Equilíbrio Contratual), unlawfully raising its profits to the detriment of consumers. As the State has already acted to compensate consumers for a part of the damage caused by this practice, this action asks for consumers to be compensated only for the remaining part, estimated by the Competition Authority as 94.8 million EUR.

1. What is the object of this action?

It is a popular action for the defense of the diffuse and homogeneous individual interests, filed by Ius Omnibus.

It is a claim to defend consumers rights, brought under the Popular Action Act (Law no 83/95).

The practices adopted by Apple violated article 102 TFEU and article 11 of the Portuguese Competition Act.

The action is strictly based (follow-on) on the practice declared in the AdC's Decision of 17 September 2019 (PRC/2016/5), of which an appeal is pending before the Competition Court.

2. What were the unlawful behaviors of EDP?

The action is strictly based (follow-on) on the practice declared in the AdC's Decision of 17 September 2019 (PRC/2016/5), of which an appeal is pending before the Competition Court. The AdC found that EDP abused its dominant position in energy production for five years by restricting supply on the electricity system market for secondary in Continental Portugal. This restriction resulted from the fact that EDP Produção limited the supply from power plants that benefitted from public compensation under the CMEC regime and concentrated its supply through plants not covered by this compensation.

Through this behaviour, EDP Production unlawfully reduced its supply on the secondary regulation market by its CMEC power plants, causing an increase of the CMEC compensations it received and an increase of the prices on that market by way of (i) the submission of supracompetitive prices at purchasing auctions; (ii) the subsequent supply of energy by less efficient power plants; and (iii) supplying only through power plants operating in free market regime. This behaviour led to supracompetitive prices on this market and to overcompensations and surcharges paid to EDP, passed on to consumers.

3. Who is represented in this action?

Ius represents in this action all consumers who resided in continental Portugal during at least part of the period during which the anticompetitive practices in question occurred and had effects and who, during all or part of that period, had a domestic contract for supply of electricity, unless they explicitly indicate that they do not wish to be represented.

Consumers do not have to do anything to be represented and to be entitled to compensation if the action is successful.

Any consumer who does not wish to be represented in this action may exercise the right to opt-out, communicating this intention to the Court. Consumers may also decide to intervene in the process in support of Ius Omnibus.

4. How were Portuguese consumers harmed by EDP's unlawful practices?

EDP's behavior harmed Portuguese consumers in two ways: (i) it caused EDP to receive greater CMEC compensations, which are paid by consumers in electricity tariffs; and (ii) it

caused wholesale electricity prices to increase, which were passed on to consumers in the retail market.

The damages caused to consumers by these practices were quantified by an independent audit ordered by the Government, and were also estimated in the AdC's Decision.

The Government has already acted, through the CMEC revision mechanism, to indirectly compensate consumers for the damages caused by the first type of damage, in the amount of 72,9 million EUR.

But consumers must still be compensated for the part of the damage caused by the electricity surcharge which was passed on to consumers. This second type of damage was estimate in the PCA Decision as 94.8 million EUR (excluding update for inflation and legal interest).

Ius may still be required to act to compensate consumers also for the first type of damage, because EDP has appealed the Government's decision which would require it compensate consumers for the damage caused by the increase in the compensation paid to EDP Produção under the CMEC regime. This appeal is currently pending before the administrative court.

5. What is being asked in this action?

Ius is asking the Court to:

- i) declare that there was a harmful infringement of diffuse interests and of consumers rights and order EDP to publicly recognize this (including a publication in the national media);
- ii) order EDP to pay a compensation to all Portuguese consumers who suffered the damage resulting of the previously mentioned surcharge;

6. How does the popular action and consumers compensation work?

The mass consumer compensation mechanism used here, provided for in the Portuguese rules of class action, has not yet been tested in practice until the very last step. However, according to the law, the following will happen if the court finds in favour of Ius Omnibus:

- 1) the Court will set the overall amount of damages to be paid by EDP to consumers, to be deposited in a compensation fund;
- 2) the Court will designate an entity responsible for managing the compensation fund, including the receipt, management and payment of compensation to injured consumers;
- 3) the Court will set a deadline for consumers to claim their share of the compensation and this information will be publicized in various ways;
- 4) consumers will have to contact the entity that manages the compensation fund, as well as submit the court-decided evidence and the respective payment instructions, in order to receive their share of the compensation;
- 5) at the end of the legally established period, if a part remains of the global compensation that was not requested by consumers:
 - (i) that amount will be used to pay the expenses incurred by Ius Omnibus as a result of the action; and
 - (ii) what is left will be handed over to the Ministry of Justice, to be used to support access to law and justice, including the promotion of popular actions.

7. Do consumers need to contact the Court or Ius Omnibus?

Consumers do not need to contact the Court or Ius Omnibus, nonetheless it may be in their interest to do so.

All consumers who held domestic electricity contracts in continental Portugal during the period in which the practice in question produced its effects are automatically represented in this popular action. If they want to be represented, they do not need to do anything else for now to be entitled to compensation if Ius Omnibus wins this claim. At the end of the process, if successful, they will have to contact the entity appointed by the Court to request compensation. However, if they wish to intervene in the action in support of Ius Omnibus they may do so, within the time limit established by the Court.

All consumers represented in this action are invited to contact Ius Omnibus at once, so that their data be registered and they be informed by Ius of all developments in this case, guaranteeing that they don't miss the deadline to claim compensation, when that moment arrives.

8. About Ius Omnibus

Ius Omnibus is a non-profit association, created in March 2020, with the objective of defending consumers in European Union. It is headquartered in Portugal and has members from several European countries.

The Board of Ius Omnibus is composed by:



Sandra Passinhas
Presidente
Professora da Universidade de Coimbra



Julia Suderow
Vice-Presidente
Professora da Universidade de Deusto



Maria José Azar-Baud
Vice-Presidente
Professora da Universidade Paris-Saclay

Ius Omnibus is represented in this case by the law firm Sousa Ferro & Associados.