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Portugal CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Portugal.

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PORTUGAL CARTELS



1. What is the relevant legislative framework?

Law 19/2012 of 8 May 2012, as amended by Law 23/2018 of 5 June, and Decree-Law 108/2021 of 7 December 2021 (**Competition Act**), sets out the relevant legislative framework for cartels in Portugal.

Article 9 of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect the national market and which have as their object or effect the prevention, restriction or distortion of competition, in similar terms as the prohibition enshrined in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Since 1 January 2022, however, a ban on best-price clauses agreed between intermediaries operating through electronic platforms and suppliers in the tourism sector has been added to the non-exhaustive catalogue of prohibited practices included in the national provision.

Where efficiencies brought about from the prohibited practice may outweigh its restrictive effects, the practice may be exempted from the general prohibition in accordance with Article 10 of the Competition Act, which is largely based on Article 101(3) TFEU. For this to happen, certain requirements need to be met: (i) the efficiencies must contribute to improving the production or distribution of goods; (ii) the restrictions of competition must be necessary to achieve the efficiencies in that no less restrictive alternative exists (indispensability); (iii) the positive effects for consumers must offset the negative effects; (iv) competition must not be eliminated by the prohibited practice. As cartels are considered to be very serious infringements of competition rules, only in absolutely exceptional cases will this practice qualify for exemption.

The Competition Act is complemented by other legal acts. These include Regulation 1/2013 of the Portuguese Competition Authority (**PCA**) of 3 January 2013, which sets out the procedure for obtaining a waiver or reduction of a fine (**Regulation 1/2013**). A range of soft

law instruments issued by the PCA further complements this legal framework. With relevance to cartels, the PCA has issued a notice on leniency and guidelines on the method of setting fines and on the conduct of proceedings concerning anticompetitive practices.

2. To establish an infringement, does there need to have been an effect on the market?

Anticompetitive infringements may be established either by object or by effect. This means that if the cartel practice qualifies as an infringement by object (as it normally does in the case, for example, of price fixing and market and client partitioning), no effect on the market needs to be demonstrated.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The Competition Act applies to conduct that takes place within the national territory or which has or may have effects therein (Article 2). This means that the Competition Act may apply to conduct occurring outside Portugal, provided it may have effects inside the country.

4. Which authorities can investigate cartels?

The PCA, a legal person governed by public law, is the national authority with powers to investigate cartels. The PCA's Statutes are set out in Decree-Law 125/2014 of 18 August 2014.

The PCA has the nature of an independent administrative entity. In particular, the PCA is not subject to governmental supervision or oversight, and the government may not make recommendations or issue directives to the Board of Directors regarding the PCA's activity or the priorities to be adopted in the pursuit of its mission.

5. What are the key steps in a cartel investigation?

A cartel investigation can be started of the PCA's own motion if it has reasonable grounds for suspecting of an anticompetitive practice. The investigation may also be triggered either by leniency applications (which is relatively common nowadays) or by third parties' complaints (which can be made anonymously). The PCA has set up an online tool to report anticompetitive practices. As the PCA may assign different degrees of priority in dealing with the matters that it is called upon to analyse (principle of opportunity), the PCA is not obliged to investigate all potential restrictive practices of which it becomes aware.

If the PCA decides to open formal proceedings, these will be conducted in two phases: (i) an investigation phase, lasting, at the latest, 18 months from the opening of the proceedings, and (ii) an enquiry phase, lasting at the latest 12 months from notification of the Statement of Objections. These are non-binding deadlines, and the PCA may decide on its own to extend them, but it has generally complied with them.

In the investigation phase, the PCA typically carries out evidence-gathering measures. Usually, it is in the course of carrying out these measures that the undertakings under investigation become aware of the formal proceedings. At the end of this phase, the PCA may decide either to (i) begin the enquiry phase, by addressing a Statement of Objections (**SO**) to the undertakings under investigation; (ii) close the proceedings if the authority concludes that there is no reasonable possibility of a conviction being handed down; (iii) close the proceedings by issuing a settlement decision; (iv) close the proceedings by issuing a decision imposing conditions.

During the enquiry phase, the undertakings under investigation have the right to submit their written defence within no less than 20 working days from the notification of the SO (which can be - and normally is - extended, if justified). The undertakings investigated are also entitled to request any additional evidence-gathering measures considered necessary and that their written defence can be complemented by an oral hearing. Although the PCA does not normally carry out additional evidence-gathering measures, it may do so at any time during the enquiry phase. If the additional evidence-gathering measures lead to a material change of the initial charges against the undertakings concerned, a new SO will have to be issued by the PCA.

The enquiry phase - and the formal proceedings - end with a final PCA decision either (i) declaring the

existence of an anticompetitive practice (in which case a fine will be imposed) and, if applicable, consider it justified (in which case a fine will not be imposed); (ii) imposing a fine in settlement proceedings; (iii) imposing conditions; (iv) closing the case without imposing any conditions.

6. What are the key investigative powers that are available to the relevant authorities?

The PCA's key investigative powers are as follows:

i. Interviews and requests for information

The PCA may interview and request any person (including third parties) or entity (including public authorities) to provide documents and other information that the authority considers appropriate or necessary to clarify the facts. Requests for information are usually made in writing.

While there is a general duty to cooperate with the PCA, the answer to any self-incriminating question may be refused.

ii. Search-and-seizure procedures (dawn raids)

The PCA may carry out announced or unannounced search-and-seizure procedures. Unannounced dawn raids can only be conducted provided that a judicial warrant for that purpose has been issued in advance by the competent judicial authority (i.e., by a public prosecutor or a judge, depending on the specifics of the case).

Dawn raids may take place at premises, land or means of transport either of undertakings or associations of undertakings or of partners, members of management bodies or other people working for the undertakings or associations of undertakings.

These procedures can cover all extracts of writings and other documentation, regardless of the form in which they exist or are stored. The PCA may require the production of documents and require explanations of any such document. The PCA is also entitled to take copies of any relevant document and the authority usually hands over a copy of all documents taken at the end of the dawn raid.

During the time and to the extent strictly necessary to conduct the dawn raid, the PCA has

the power to seal any business premises where written records or other documentation are or may be found, as well as the respective media, including computers and other electronic data storage equipment.

Failure to cooperate with the PCA or obstruction of the exercise of its powers (e.g., by providing inaccurate, incomplete and misleading information) may be punished with a fine of up to 1 per cent of the undertaking's turnover or, in the case of an association of undertakings, the aggregate turnover of the associated undertakings in the financial year immediately preceding the PCA decision. Individuals can be fined an amount ranging between EUR 1020 and EUR 5100.

In addition, failure to cooperate with the PCA in the context of a dawn raid may amount to criminal liability for obstructing a public authority investigation.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The Statutes of the Portuguese Bar Association provide that legal privilege covers all facts that lawyers become aware of in the course of their work or the provision of their services and any documents relating to those facts.

However, the PCA has been adopting a restrictive (and disputable) interpretation of this concept whereby it considers that only documents containing legal advice are covered by legal privilege. Moreover, in recent years, the PCA has considered itself entitled, during dawn raids, to view emails exchanged between an undertaking and its lawyers, in order to determine whether or not those communications are covered by legal privilege (as interpreted by the PCA).

No distinction is made between external and in-house lawyers, provided they are active members of the Portuguese Bar Association.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The first undertaking that exposes a cartel in which it is involved may be granted full immunity. The PCA must, therefore, be provided with information allowing it to

conduct a dawn raid or to find the existence of a competition law infringement, provided the authority does not hold enough information to request a search warrant for a dawn raid or to find such anticompetitive practice.

In addition, in order to qualify for immunity, the applicant must put an immediate end to its participation (except if the PCA orders otherwise), must cooperate with the PCA in its cartel investigation and cannot be responsible for coercing other companies to participate in the practice. Directors, managers and persons holding equivalent positions in the business units involved in the cartel may also benefit from full immunity.

Leniency applications may be submitted either in writing or orally, and in Portuguese or in English. Under certain and properly justified circumstances, a summary application for immunity from fines may be submitted (a template for the submission of this summary is annexed to Regulation 1/2013 in both languages).

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

Applicants that are not eligible for immunity from fines (such as subsequent leniency applicants) may qualify for a reduction in the fine that would otherwise be imposed. For this purpose, applicants must provide the PCA with information that represents significant value to the cartel investigation. In addition, applicants must put an immediate end to their participation (except if the PCA orders otherwise) and must cooperate with the PCA in its cartel investigation.

The first applicant may be granted a reduction of 30 per cent to 50 per cent, the second applicant may be granted a reduction of 20 per cent to 30 per cent, and subsequent applicants may be granted a reduction of up to 20 per cent. These statutory percentages will be reduced by half in cases where the leniency application is submitted after the PCA has issued an SO.

10. Are markers available and, if so, in what circumstances?

Markers are available in order to ensure that a cartel participant is ranked in the order in which leniency applications are received by the PCA. After receiving the leniency application, the PCA may, at its own initiative or through a duly reasoned request, grant the applicant a marker, setting out a period of no less than 15 days for the applicant to complete its request with the remaining elements.

In order to qualify for a marker, the applicant must at least provide the following information: its name and address; information about the participants in the alleged cartel; the products and/or service concerned; the territories affected; an estimate of the period of the alleged cartel; the nature of the alleged cartel's behaviour; information on the existence of other leniency applications; and the reasons for its marker request.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Immunity/leniency applicants are required to cooperate fully with the PCA throughout the investigation; otherwise they may not be considered eligible for immunity from or reduction of fines. In the context of this cooperation, immunity/leniency applicants must fully and accurately provide all information or evidence to which they have access and answer any question that may help to establish the facts. In addition, immunity/leniency applicants must refrain from any action that may hamper the investigation (e.g., the destruction, falsification or suppression of information).

Immunity/leniency applicants are subject to ongoing confidentiality obligations, unless the PCA releases them from this obligation in writing.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

In Portugal, antitrust infringements are not criminal offences. Directors, managers and persons holding equivalent positions in the business units involved in the cartel may be granted immunity from or a reduction in fines under the Competition Act, provided the undertakings concerned cooperate fully throughout the PCA investigation. These natural persons can submit leniency applications on an individual basis, as well.

13. Is there an 'amnesty plus' programme?

There has been no "amnesty plus" programme in Portugal since the entry into force of the (new) Competition Act in 2012. The PCA no longer has the possibility to grant a special or further reduction of the fine which would otherwise have been imposed in respect of a certain practice if the undertaking is the first to submit information and evidence concerning a second

(different) infringement.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The PCA can consider settlement procedures under the Competition Act and the procedure can be started of the PCA's own motion or at the request of the undertaking concerned. However, the PCA retains broad discretion in deciding whether a case is suitable for settlement and which cases to settle in the light of the settlement discussions. No court approval is required.

These discussions can start either before or after an SO has been issued. Naturally, the PCA will be more willing to agree to enter into settlement at an earlier stage of the investigation, as this will contribute to achieving greater procedural efficiencies and resource savings.

Hybrid settlements are possible in Portugal and have already been accepted by the PCA.

15. What are the key pros and cons for a party that is considering entering into settlement?

If the settlement discussions succeed, the undertakings will be granted a reduction of the fine that would otherwise be imposed. No specific amount of reduction is set out in the Competition Act and, therefore, the undertakings concerned will not be aware of any possible amounts upfront. Settlement reduction can be granted in addition to any possible leniency reduction. In addition, a faster termination of administrative proceedings will contribute to reducing the undertakings' own costs in the case.

Entering into settlement can also be advantageous as the undertakings will have more control over the facts that will be included in the PCA decision, which will be significantly less comprehensive than a fine decision issued outside a settlement procedure. This may have a positive impact in follow on damages actions.

Having said this, undertakings wishing to settle must acknowledge their responsibility for an infringement and renounce their right to judicial review of the acknowledged facts. Settlement may, therefore, limit the undertakings' position before other authorities and civil claimants. Finally, settlement may cause a negative reputational impact and have a negative impact on business relationships.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

At the national level, the PCA cooperates closely with sector regulators in competition law matters. Indeed, both the PCA and the sector regulators must immediately communicate with each other once they detect activities that may constitute anticompetitive infringements. The PCA has further entered into memoranda of understanding with other entities, such as with INFARMED (the National Authority for Medicines and Health Products) and with IMPIC (the Institute of Public Markets, Real Estate and Construction).

In Europe, the PCA cooperates in close cooperation with other competition law enforcers, particularly within the European Competition Network (**ECN**), which comprises the European Commission and other European Union national competition authorities. The PCA is also a member of the European Competition Authorities (**ECA**) and has bilateral relations with European competition authorities. For example, it is engaged in the Iberian Competition Forum (with the Comisión Nacional de los Mercados y la Competencia) and in the Luso-French Competition Forum (with the Autorité de la Concurrence).

The PCA is also closely engaged in international cooperation with organisations such as the OECD and UNCTAD, and it participates both in multilateral cooperation networks such as the International Competition Network (**ICN**) and the Lusophone Competition Network. The members of the latter are the entities responsible for competition issues in Portuguese-speaking countries: Angola, Brazil, Cape Verde, Guinea Bissau, Mozambique, Portugal, São Tomé e Príncipe, and Timor-Leste. The PCA also engages in bilateral cooperation with other competition authorities such as the State Administration for Industry and Commerce of the People's Republic of China, the Competition Council of the Kingdom of Morocco and the Turkish Competition Authority.

17. What are the potential civil and criminal sanctions if cartel activity is established?

If cartel activity is established, either civil or administrative sanctions may be triggered. In Portugal, infringements of the Competition Act are not criminal offences.

- Civil sanctions

Practices restricting competition (such as cartels) are void. Claims for damages may also be brought against any legal and natural person that has infringed the Competition Act (see Questions 7.1 and 7.2 below).

- Administrative sanctions

At the end of the administrative proceedings, the PCA may impose fines of up to 10 per cent of the group's turnover or, in the case of associations of undertakings, of the aggregate turnover of all the associated undertakings in the year preceding the PCA's final decision. This statutory limit is calculated on the basis of the turnover of the "economic unit", i.e., the entire group of companies behind the infringing company. Parent companies may be held jointly and severally liable for the payment of the fine.

Natural persons may be fined by the PCA up to 10 per cent of their annual income in the undertaking concerned in the last full year in which the cartel practice was implemented.

The statutory limits on the fines may, in the PCA's view, be increased (i) in cases where the economic benefit obtained from the infringement is higher than the maximum applicable fine, up to the amount of the benefit, provided that it does not exceed one-third of the maximum applicable threshold (i.e., 13.33%), and (ii) in the case of multiple concurrent infringements, up to double (i.e., up to 20%).

In addition, the PCA may – and normally does – require the infringing undertakings to publish extracts from the infringement decision in the Portuguese Official Journal and in a general-circulation newspaper. The infringing undertakings and associations of undertakings are also required to put an end to infringements of competition law rules. Depending on the circumstances, the infringing undertakings and associations of undertakings may be deprived of the right to participate in public tenders for a maximum period of up to two years.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

In determining the amount of the fine, the PCA may

consider, inter alia, the seriousness and duration of the infringement; the nature and dimension of the market affected by the infringement; the degree of participation of the undertaking concerned in the infringement; the economic situation of the undertaking concerned; its collaboration during the investigation; and the existence of previous infringements. The exact amount of the fine is calculated in accordance with the PCA's guidelines on the method of setting fines and these guidelines are binding upon the authority.

The past decisions of the PCA show a trend to penalise cartels in an increasingly severe manner. In its latest decisions, the PCA has actually been applying fines in the amount of 10% of the turnover of the Portuguese undertaking concerned.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Parent companies may be presumed to be jointly and severally liable with the infringing subsidiary and, therefore, the conduct of a subsidiary may be imputed to a parent company.

20. Are private actions and/or class actions available for infringement of the cartel rules?

In Portugal, both private actions and class actions are available for infringement of the Competition Act. This sort of action is becoming much more common, particularly since the incorporation into Portuguese law of Directive 2014/104/EU of 26 November 2014 (**Private Enforcement Directive**), by Law 23/2018 of 5 June 2018 (**Private Enforcement Act**). In some past cases, the amount of damages claimed have dwarfed the fines applied in the administrative proceedings.

21. What type of damages can be recovered by claimants and how are they quantified?

Claimants can recover any losses suffered as a result of a cartel – namely direct loss, loss of profit and interest – so that they are restored to the position they would have been if an infringement had not occurred. Overcompensation is not allowed.

22. On what grounds can a decision of the

relevant authority be appealed?

An appeal against a PCA decision imposing a fine may be lodged at the Portuguese Competition Court (acting as a court of first instance) on points of fact and law. The Portuguese Competition Court has full jurisdiction over the PCA's decisions. An additional appeal on points of law may be lodged to the Lisbon Court of Appeal against judgments of the Competition Court.

Interlocutory decisions issued by the PCA are subject to appeal before the above courts, as well. These appeals are usually lodged in respect to procedural nullities (particularly in the context of dawn raids, if any), access to the file and confidentiality matters.

23. What is the process for filing an appeal?

The appeal against a PCA decision imposing a fine must be lodged to the Portuguese Competition Court within 30 working days of service of the decision. The appeal is filed at the PCA, which – after reconsidering its decision – must send the appeal together with the case file to the Portuguese Competition Court. This appeal has no suspensive effects, but there is the possibility to offer a bank guarantee, which – if accepted by the Competition Court – will avoid immediate payment of the fine.

The appeal against an interlocutory PCA decision is deemed to be lodged within 10 working days from service of the decision, as per the applicable subsidiary rules.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

In November 2021 the PCA announced that it had imposed fines of around €92 million on four supermarket chains, two board members and a common supplier for participating in a hub and spoke infringement between 2003 and 2016. The PCA found that the participating companies had aligned their resale prices through contacts via the common supplier, without having to communicate directly with each other. This case is illustrative of the PCA's special focus on both the retail/large-scale distribution sector and hub and spoke infringements – currently, there are 10 cases in the enquiry phase and 5 cases under appeal against a final PCA decision imposing a fine.

In another case, the PCA imposed fines amounting to

€2.9 million on six companies active in the market for the provision of services to waste management systems for implementing a non-compete agreement, between 2017 and 2019. The PCA also imposed fines on six managers and board members. The PCA concluded that these non-compete clauses amounted to horizontal market sharing agreements. The investigation began in 2019, following a merger control notification. After the notification, the PCA identified, in two contracts, the existence of non-compete clauses that exceeded the legal limits imposed by competition law and were therefore considered illegal.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

Fines imposed by the PCA have been hitting records. In 2021, the PCA imposed fines on twenty-two companies and ten natural persons for anticompetitive agreements in a total amount of €124.7 million (the highest of which was €92.8 million). environment and waste management, health and pharmaceutical, supply and food industry and trade and services were the main sectors affected by these infringements.

The PCA's enforcement activity is mainly focused on hub-and-spoke infringements and bid rigging. Additionally, its cartel enforcement is expanding to labour markets, particularly to no-poaching and no-wage agreements: in the first half of 2021, the PCA (i) announced an SO against the Portuguese Professional Football League and 31 of its teams for an alleged agreement not to hire any player who had terminated his agreement with another team for reasons relating to the Covid-19 pandemic, (ii) released a policy paper on labour market enforcement and (iii) published a Best Practices Guide in Preventing Anticompetitive Agreements in Labour Markets.

While the Covid-19 pandemic naturally caused some disruption in the PCA's work, the authority did not cease conducting its enforcement activity. Indeed, the PCA issued a statement warning that it remained particularly vigilant in its mission of detecting any abuses or anti-competitive practices exploiting the situation. Moreover, as a member of the ECN, the PCA signed a joint statement expressing its intention not to hesitate to act against undertakings taking advantage of the pandemic circumstances through cartelization. On-site dawn raids were actively resumed at the end of 2020.

No material decline in leniency applications nor in the number of settlement proceedings has been recorded.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

According to the PCA's priorities for 2022, its main focus will be on the following matters:

- Investigating most harmful anticompetitive behaviour;
- Combating abuse and collusion in digital markets, through its digital task force;
- Contributing to undisrupted supply chains;
- Embedding competition in economic recovery;
- Promoting open and innovative labour markets (investigating and sanctioning no-poach and wage-fixing agreements);
- Enhancing pro-competitive public procurement;
- Contributing to the competition neutrality of state financial support to companies.

The most expected legislative change foreseen for 2022 is the incorporation into Portuguese law of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (**ECN+ Directive**), which will significantly strengthen the effectiveness of cartel enforcement by the competition authorities. In addition to this, there will be changes in the Portuguese legal system in connection with the adoption of the Digital Markets Act by the European Commission and the new Guidelines on vertical and horizontal restrictions.

Regarding antitrust cases, a ruling by the Portuguese Competition Court is expected to be delivered in the "Bank cartel" saga, in April 2022 (around ten years after the beginning of the investigation by the PCA). In this case, the PCA accused 14 banks of exchanging sensitive information on their offers of credit products in retail banking, including mortgages, consumer and small and medium enterprises credit products.

Finally, several damages class actions are expected to be filed before the Portuguese courts in the coming months.

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