THE LIFE SCIENCES LAW REVIEW

ELEVENTH EDITION

Editor
Peter Bogaert

THE LAWREVIEWS

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CONTENTS

PREFACE

The eleventh edition of *The Life Sciences Law Review* covers a total of 24 jurisdictions, providing an overview of legal requirements of interest to pharmaceutical, biotechnology and medical device companies. The chapters are arranged so as to describe requirements throughout the life cycle of a regulated product, from discovery to clinical trials, the marketing authorisation process and post-approval controls. Certain other legal matters of special interest to manufacturers of medical products – including administrative remedies, pricing and reimbursement, competition law, special liability regimes and commercial transactions – are also covered. Finally, there is a special chapter on international harmonisation, which is of increasing importance in many of the regulatory systems that are described in the national chapters.

The past year showed a transition from the covid-19 pandemic to more normal health conditions, but also an enhanced awareness of new challenges. During the two preceding years, manufacturers of healthcare products, together with healthcare professionals and services, focused on the development and testing of vaccines, other drugs, biologics, diagnostics and personal protective equipment. This was done on an expedited basis, and regulatory agencies have reviewed marketing applications with unprecedented speed and efficiency. Manufacturers and international organisations have also worked closely together in an effort to ensure equitable access to vaccines and other important healthcare products in low- and middle-income countries, but much work remains to be done. Regulators are now making preparations for later emergencies and are also drawing lessons from the experience gained during the pandemic for the development and assessment of new health products in important therapeutic areas. Efforts to support effective and equitable access to key products at a more international level also continue.

Given the constant challenges and quick developments, it is vitally important that lawyers who advise companies in the life sciences sector and the business executives whom they serve have a working knowledge of the regulations and policies that govern drugs, biologics and medical devices. It is equally important to keep up to date with developments in the regulatory systems that govern access to the market, pricing and reimbursement, advertising and promotion, and numerous other matters that are essential to success. It is our hope that this year's publication will be especially helpful in this respect.

All of the chapters have been written by leading experts within the relevant jurisdiction. They are an impressive group, and it is a pleasure to be associated with them in the preparation of this publication.

Peter Bogaert
Covington & Burling LLP
Brussels
February 2023

Chapter 17

PORTUGAL

Francisca Paulouro, Pedro Fontes and Beatriz Albuquerque[1]

I INTRODUCTION

The life sciences sector in Portugal is heavily regulated, with the legal framework applicable both to medicines and medical devices closely following the European Union (EU) regulatory framework. Nevertheless, in some areas national legislation goes beyond what is provided in the relevant directives or regulations, whichever is applicable. This is particularly noticeable, for example, in matters related to promotion, wholesale distribution and clinical trials. Pricing and reimbursement are exclusively dealt with at national level, as they are outside the scope of EU legislation, except for transparency measures and procedural requirements set out in the Transparency Directive.[2]

The National Authority of Medicines and Health Products, IP (Infarmed) is the national regulatory agency for medicines and medical devices. In addition to its competence for technical health regulation, Infarmed's powers also cover pricing, reimbursement and market access, as it is the entity responsible to conduct the relevant procedures and propose decisions in this regard to the Minister of Health. Price approval of prescription products, including products for hospital use, is also attributed to this agency.

II THE REGULATORY REGIME

The Medicines Act[3] consolidates in a single legal act the regime applicable to, among others, the marketing authorisation, manufacture, import, export, marketing, labelling, promotion and pharmacovigilance of medicines; transposing into Portuguese law several directives, including Directive 2001/83/EC,[4] as amended (the Directive).

Medical devices, in turn, are now governed by the Medical Device Regulation No. 2017/745 (MDR),[5] which, after successive delays, became applicable on 26 May 2021.

1 Francisca Paulouro is of counsel, Pedro Fontes is a managing associate and Beatriz Albuquerque is an associate at Vieira de Almeida.

2 Council Directive 89/105/EEC of 21 December 1988.

3 Decree-Law No. 176/2006 of 30 August 2006, as amended.

4 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.

5 Medical Device Regulation No. 2017/745 of the European Parliament and of the Council of 5 April 2017.

In vitro medical devices are now governed by In Vitro Diagnostic Medical Devices Regulation No. 2017/746,[6] which became almost entirely applicable on 26 May 2022, repealing the corresponding national legislation

Notwithstanding the direct application of these regulations, there are several matters that continue to be governed by the former Portuguese Medical Devices Act (Decree-Law No. 145/2009, of 17 June). This transitory regime (the Transitory Regime) applies, for example, to matters related with the notification of manufacturing and wholesale distribution activities, until the Eudamed is operational. It applies also to matters attributed to each Member State by the MDR or not governed at all by said diploma, as is the case of the regime applicable to the promotion of medical devices.

i Classification

The definitions of a medicinal product for human use and of a medical device are identical to those arising from EU legislation. The distinction between them is, in essence, made based on the intended use and the mechanism through which this is achieved. As under the Directive, in case of doubt, the classification as a medicinal product prevails.

Other regulated products, such as food supplements or cosmetics, also closely follow EU legislation, particularly regarding their classification.

ii Non-clinical studies

Directive 2010/63/EU[7] on the protection of animals used for scientific purposes was transposed into Portuguese law by Decree-Law No. 113/2013,[8] establishing several requirements applicable to the use of animals for scientific or educational purposes, namely in what concerns the accommodation, care and use of animals in procedures; the origin, breeding, marking and killing of animals; licensing of breeders, suppliers and users; and the procedures for evaluation and authorisation of scientific or educational projects.

In addition, and similarly to what happens at EU level, the testing of finished cosmetic products and cosmetic ingredients on animals is prohibited, with the same applying to the marketing thereof if animal testing was conducted for cosmetic purposes.

iii Clinical trials

In April 2014, a legal regime for clinical research was approved,[9] consolidating in one legal act the provisions applicable to clinical studies, whether interventional or not, and covering medicines, medical devices and cosmetics. The regime encompasses the provisions of Directive 2001/20/EC[10] regarding the conduct of clinical trials on medicinal products for

6 In Vitro Diagnostic Medical Devices Regulation No. 2017/746 of the European Parliament and of the Council of 5 April 2017.

7 Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010.

8 Decree-Law No. 113/2013 of 7 August 2013, as amended.

9 Law No. 21/2014 of 16 April 2014.

10 Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use.

human use and the provisions of Directive 2007/47/EC[11] on clinical investigation with medical devices – the latter revoked with the entry into force of the MDR. Regulation No. 536/2014[12] on clinical trials on medicinal products became applicable on 31 January 2022, and Law No. 21/2014 was not revoked or amended. Until 31 January 2023, clinical trial applications could either be submitted through the Regulation or through Law No. 21/2014.

Under Law No. 21/2014, clinical studies are subject to a prior favourable opinion from the competent ethics committee. In addition, interventional clinical trials with medicines depend on authorisation from Infarmed.

Both the sponsor and the investigator are jointly and severally liable, regardless of fault, for material and non-material damage suffered by subjects – liability that must be covered by insurance. Should an interventional study be at stake, there is a legal presumption that damage which affects the health of subjects during the study and for a one-year period following its term (which may be extended by the ethics committee) is caused by the study. This reverses the general rule on burden of proof, subject to which whosoever alleges damage should demonstrate the causal relationship between the damage and the act (in this case, the study).

iv Named-patient and compassionate-use procedures

Similar to what happens under EU legislation, the general rule is that medicines can only be marketed following the grant of a marketing authorisation. In exceptional circumstances, however, Infarmed may authorise the use of non-approved medicines, such as when the product, subject to a clinical assessment, is considered indispensable for the treatment of a given pathology and there is no therapeutic alternative among authorised products or when it is necessary to prevent or limit the spread of pathogens, toxins, chemical or nuclear radiation agents likely to cause adverse effects. In February 2022, Infarmed published a list of medicines that are considered essential for the functioning of hospitals. When exceptional use authorisations are requested for these essential medicines, the request is exempted from presenting a clinical justification, to simplify the submission procedure.

Within the context of interventional clinical studies, following the conclusion of a study, the sponsor is under an obligation to supply the investigational medicinal product or device under clinical investigation for free until its marketing, if the investigator considers that continuation of its use by the former participant is indispensable and that there are no therapeutic alternatives with an equivalent degree of safety and efficacy.

v Pre-market clearance

The Medicines Act reflects EU rules in this regard. Medicines can only be placed on the market following the granting of a marketing authorisation, Infarmed being the competent authority for authorising medicines that follow national procedures.

11 Directive 2007/47/EC of the European Parliament and of the Council of 5 September 2007, amending Council Directive 90/385/EEC on the approximation of the laws of the Member States relating to active implantable medical devices, Council Directive 93/42/EEC concerning medical devices and Directive 98/8/EC concerning the placing of biocidal products on the market.

12 Regulation (EU) No. 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC.

The marketing in Portugal of medical devices bearing a conformity CE mark does not require any authorisation from Infarmed. Nonetheless, Infarmed must be notified of all medical devices marketed by a given entity prior to its commercialisation.

vi Regulatory incentives

The Medicines Act reflects the regime established in the Directive regarding regulatory data protection and market exclusivity. Generic applications cannot be submitted for a period of eight years following the first authorisation in the European Union. After this eight-year period has elapsed, the generic cannot be launched on the market for an additional two years. This period may be extended for one supplementary year should the innovator, within the data exclusivity period of eight years, obtain a marketing authorisation for one or more new indications of significant clinical benefit.

Patent linkage is not permitted. The Medicines Act expressly provides that marketing authorisation applications cannot be dismissed on the grounds of the potential existence of industrial property rights of the reference product. A similar rule exists for pricing and reimbursement decisions.

There are no special provisions to encourage the development or market launch of innovative products, including orphan drugs. However, special provisions to encourage the sale of generics exist in a variety of areas; for example, generics benefit from a simplified pricing and reimbursement regime and prescription is mandatorily made by active substance once a generic is launched in the market, generic substitution being the rule, except in very limited circumstances expressly provided for by law. Incentives of a similar nature also exist for biosimilars, although with a lower degree of intensity.

vii Post-approval controls

Pharmacovigilance rules applicable to medicinal products were modified in 2013 with the transposition into Portuguese law of Directives 2010/84/EU and 2012/26/EU.[13] In the same year, the provisions of Directive 2011/62/EU[14] regarding prevention of entry into the supply chain of falsified medicinal products were also transposed, with the Medicines Act currently closely following EU legislation on these matters, such as the placing of safety devices on the packaging of certain medicinal products to identify and authenticate them. Delegated Regulation 2016/161[15] established detailed rules for these safety devices, including a repository system containing information on the safety features, which were to be implemented by marketing authorisation holders (MA holders) up until 9 February 2019. In 2018, the Medicines Act was amended to adapt local legislation to Delegated Regulation 2016/161.

Vigilance requirements applicable to medical devices now stem from the MDR. Nevertheless, the notification of incidents and security measures falls under the scope of the Transitory Regime, until the Eudamed is fully functional.

13 Directive 2010/84/EU of the European Parliament and of the Council of 15 December 2010 and Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012.

14 Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011.

15 Commission Delegated Regulation 2016/161 of the European Commission, of 2 October 2015, as amended.

viii Manufacturing controls

In line with the Directive, the manufacture of medicinal products is subject to prior authorisation by Infarmed, even if products are intended for export. An authorisation will only be granted if the applicant has adequate premises that comply with the applicable legislation and with the European Commission Guidelines on Good Manufacturing Practice (in 2018, the Medicines Act was amended to transpose Directive 2017/1572)[16] and has a qualified person permanently and continuously at its disposal. The qualified person, who is responsible for all manufacturing activities performed, must be a pharmacist registered with the Portuguese Order of Pharmacists.

Any change to the manufacturing authorisation requires prior authorisation by Infarmed.

Manufacturers of active substances established in Portugal register their activity with Infarmed.

Subject to prior notification to Infarmed are, among others, the manufacture of medical devices, as well as the assembling, packaging, processing, fully refurbishing, labelling or assigning them to a different purpose than the original. The engagement in these activities is dependent on the applicant having adequate premises and equipment with capacity to ensure the manufacture, storage and conservation of medical devices and a technician responsible to ensure the quality of the activities performed.

In addition, manufacturers or their authorised representatives placing medical devices on the Portuguese market should, under the Transitory Regime, notify Infarmed, providing in the notification the required level of information depending on the classification or nature of the device concerned.

ix Advertising and promotion

The regime applicable to the advertising of medicines closely follows the regime set out in the Directive. The major differences relate to the definition of advertising, the scope of the prohibition on granting benefits to healthcare professionals and the prohibition on granting any kind of benefit to patients. In these matters, the Medicines Act goes beyond what is established in the Directive.

First, the definition of advertising under the Medicines Act is broader than that set out in the Directive. Under the Medicines Act, advertising is considered as any form of information, prospecting or incentive that has the purpose or effect of promoting the prescription, purchase sale, acquisition or consumption of medicines. Contrary to what is foreseen in the Directive, Portuguese law does not require that the conduct be designed to promote a given product for it to qualify as advertising. It suffices that the conduct at issue has that effect.

Second, the Medicines Act extends the scope of the prohibition on pharmaceutical companies granting gifts, pecuniary advantages or benefits in kind to healthcare professionals to also include bonuses – a notion that is associated with the granting of discounts in kind, such as free products. The broadening of this prohibition is particularly relevant to the relationship between pharmaceutical companies and pharmacies, being hardly in line

16 Directive 2017/1572 of the European Commission of 15 September 2017.

with the EU legal framework and with the principle that promotion rules do not apply to measures or trade practices related to prices, margins and discounts – provided for in both the Directive and the Medicines Act.

Finally, and similar to what happens in relation to healthcare professionals, pharmaceutical companies cannot grant or promise to grant, directly or indirectly, gifts, prizes, bonuses, pecuniary advantages or benefits in kind to patients.

Decree-Law No. 36/2021, of 19 May, approved an important update to the Medicines Act, establishing a clear prohibition of advertising discounts on the price of medicines which cannot be advertised before the general public (i.e., medicines subject to medical prescription, reimbursed medicines and medicines containing controlled substances). The legislator justified this change by arguing that, while discounts can protect the rights and interests of the consumers, advertising said discounts may undermine the rational use of medicines.

Although companies are under an obligation to provide Infarmed with a summary description of all advertising materials, no prior-approval requirement exists. In addition, companies must notify Infarmed in advance of the sponsorship of any congress, symposium or event of an educational or promotional nature.

The regime applicable to advertising and promotion of medical devices is very similar to that applicable to medicines. There is, however, no prohibition on granting gifts or benefits to the public. Medical devices whose use requires the intervention of healthcare professionals, such as implantable medical devices, cannot be promoted to the public.

Medical device companies are also required to notify Infarmed in advance of the sponsorship of any congress, symposium or event of an educational or promotional nature.

x Distributors and wholesalers

Wholesale distribution of medicines is subject to prior authorisation from Infarmed. Until 2019, the only exception to this rule applied to the holders of manufacturing authorisations in relation to the products covered by those authorisations (similar to what happens under the Directive). Further to the amendments introduced in the Medicines Act by Decree-Law No. 112/2019,[17] MA holders or their local representatives are also exempted from this obligation in relation to the products covered by those authorisations, as long as such activity is pursued by a duly authorised wholesaler. In such cases, MA holders are nevertheless required to register their wholesale activity before Infarmed.

In fact, the legal regime applicable to wholesale activity in the Portuguese territory suffered several amendments in 2019 with the entry into force of the above-mentioned Decree-Law. A distinction is now drawn between wholesalers and logistics operators and, more importantly, supply obligations falling upon wholesalers have been reinforced to ensure patient access to medicines – similarly to what happened with supply obligations falling upon MA holders.

The notion of 'logistics operator' was created – these are entities responsible for performing logistics services and pursuing wholesale activities on behalf of the MA holder or the manufacturer. The wholesale authorisation now details the wholesale activities for which it is granted and the premises where the activity is conducted, and it may be pursued by either a wholesaler or a logistics operator with premises in Portugal.

17 Decree-Law No. 112/2019 of 16 August 2019.

It is now clearly stated in the Medicines Act that the wholesale activity's main function is to guarantee adequate and continuous supply of the Portuguese territory. Wholesalers continue to be under a legal obligation to have medicines permanently available in sufficient quantity and variety to ensure the appropriate and continued supply of medicinal products to guarantee the satisfaction of patients' needs. However, it has been clarified that wholesalers can only export or sell within the EU after ensuring that they have fully satisfied national demand. In parallel, Infarmed has the power to prevent the sale and exportation of medicines – be it inside or outside the EU – on the grounds of protection of public health or to ensure patient access to a given medicinal product. These recent amendments do not arise from the Directive. Minimum quantities of products that wholesalers must keep at all times to ensure satisfaction of patient demand are set out in a regulation issued by Infarmed.

The granting of the wholesale distribution authorisation depends on the applicant having adequate equipment and premises located in Portugal to ensure proper conservation and distribution of medicines and a technical director to ensure, effectively and permanently, the quality of the activities carried out in the distribution premises. The technical director must be a pharmacist registered with the Portuguese Order of Pharmacists and personally fulfil his or her responsibilities in the wholesale premises. Technical directors may cumulate functions within the same wholesale premises, up to a limit of five wholesale distribution authorisations. In 2015, a new regulation on good distribution practices applicable to the wholesale distribution of medicines[18] was approved, closely following Commission Guideline 2013/C 343/01.[19] This Resolution was amended in September 2021[20] to bring its regime closer, in what the transport of medicines is concerned, to the regime provided for in the Commission Guideline.

The regime governing the brokering of medicinal products under the Medicines Act closely follows that of Directive 2011/62/EU.[21] Thus, engagement in the activity of brokering does not require prior authorisation from Infarmed and neither is it dependent on the existence of premises or a permanent address in Portugal. Persons brokering medicines with a permanent address in Portugal must register their activity with Infarmed.

In accordance with the Transitory Regime, engaging in the activity of wholesale distribution of medical devices, although not subject to express authorisation from Infarmed, must be notified in advance to that authority, and is only permitted if (as is the case for medicines) the applicant has adequate premises and equipment with capacity to ensure good storage, conservation and distribution of medical devices and a responsible technical director is appointed to the wholesale premises to ensure the quality of the activities performed. In contrast to the regime applicable to medicines, the technical director does not have to be a pharmacist but must have an adequate technical qualification to ensure the quality of the distribution activity, as well as adequate knowledge of the legislation and regulations applicable to medical devices. A final difference from the regime applicable to medicines is that wholesale premises do not have to be located in Portugal. Nonetheless, should the premises be located abroad, the applicant must comply with the Portuguese legal provisions applicable to the wholesale distribution of medical devices. This regime is extremely demanding and, in many aspects, follows the good distribution practices for medicines.

18 Infarmed Resolution No. 047/CD/2015 of 19 March 2015.

19 Commission Guideline 2013/C 343 of 5 November 2013.

20 Resolution No. 946/2021 of 13 September 2021.

21 Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011.

xi Classification of products

The criteria laid down in the Medicines Act for classifying a medicine for medical prescription are very similar to those set out in the Directive.

The classification has consequences for the regime applicable to advertising, pricing, reimbursement and dispensing. Only non-prescription products may be promoted to the general public, as under the Directive. In addition, while there is no price control for non-prescription drugs (unless these are reimbursed – the general rule, however, is that non-prescription products are not), prescription products have their maximum sale prices approved, regardless of whether they are reimbursed or not. Finally, whereas the dispensing of prescription drugs is restricted to pharmacies – unless subject to restricted medical prescription, in which case they can only be dispensed or administered in hospitals – over-the-counter products (OTCs) may be sold at points of sale duly authorised by Infarmed.

xii Imports and exports

In line with the regime laid down in the Directive, the importation of medicines is subject to prior authorisation from Infarmed, with requirements very similar to those applicable to the manufacture of medicines (see Section II.viii). The importation of active substances is also subject to registration with Infarmed. The export of medicinal products neither requires any authorisation from Infarmed nor any registration with this authority.

As regards medical devices, there are no additional requirements related to imports and exports other than those applicable to the manufacture, placing on the market and wholesale distribution analysed above.

xiii Controlled substances

The manufacture, use, marketing, distribution, importation, exportation and possession of narcotics and psychotropic substances are subject to a specific regime. Narcotics and psychotropic substances are divided into several categories, each identifying the relevant substances. Infarmed is responsible for authorising engagement in these activities in relation to certain categories of substances. Specific requirements also exist for prescribing, dispensing and keeping records when such substances are included in medicinal products.

Further to constituting a misdemeanour punishable with a fine, engagement in any of the above-mentioned activities without the relevant authorisation may be considered a criminal offence.

In addition, the use of cannabis-based medicines, preparations and substances for medicinal purposes was authorised under Law No. 33/2018.[22] 'Cannabis-based medicines, preparations and substances' are defined as the leaves, flowers and fruits of the cannabis plant, as well as oil and other standard extracts or preparations obtained from the plant.

Physicians are only allowed to prescribe cannabis-based products if conventional treatments with authorised medicines are not having the expected effects or are generating relevant adverse effects. Additionally, cannabis-based products can only be prescribed for use in indications authorised by Infarmed.

Law 33/2018 further indicates that these products must be prescribed by a physician, pursuant to a special medical prescription, which must be approved by the Ministry of

22 Law No. 33/2018 of 18 July 2018 (Law 33/2018).

Health. The prescription must mention the names of the physician and the patient, and it must identify the cannabis-based medicine, preparation or substance, as well as the relevant quantity, dosage and form of administration.

Law 33/2018 is regulated by Decree-Law No. 8/2019,[23] which defines and regulates the authorisations for the activities of cultivation, manufacturing, distribution, importing, exporting and transportation of cannabis-based medicines, preparations and substances. Ordinance No. 83/2021, approved in 2021, set forth the requirements applicable for requesting the authorisations for each of these activities. The placing on the market of cannabis-based preparations and substances depends on a marketing placing authorisation granted by Infarmed.[24]

Cannabis-based products can only be sold in pharmacies. The buyer is required to provide identification or evidence of being the legal guardian of the patient, together with the prescription. Each prescription can only be used once (i.e., the law does not provide for a renewable prescription, or for a prescription that can be used several times).

Ordinance No. 44-A/2019[25] establishes the pricing regime for cannabis-based preparations and substances.

xiv Enforcement

Infarmed is entrusted with the supervision and enforcement of regulatory provisions applicable to medicines and medical devices.

A breach of the provisions of the Medicines Act is considered a misdemeanour punishable with a fine calculated according to the infringer's annual turnover, or a fine of a predetermined fixed amount (whichever is lower). In addition to this penalty, a breach of these provisions, including advertising, may also give rise to ancillary sanctions to be applied by Infarmed, such as a prohibition on exercising the activity, exclusion from participation in public tenders and the suspension of any authorisations and permits – all up to a maximum of two years.

A breach of the provisions of the Medical Devices Act is also considered a misdemeanour punishable according to Legal Regime of Economic Offences. In this case, the main sanction is a fine; however, the respective amount is determined depending on the number of employees of the infringer.

Should the infringement of promotion rules be at stake, both regarding medicines and medical devices, Infarmed may order that the condemnatory decision be published in the media as well as the suspension of advertising of the product concerned for a period of up to two years. Medicinal products may further be delisted as a result of infringement of promotion rules.

Infarmed has broad inspection powers. For instance, it may carry out inspections at the premises of MA holders, verify their records, documentation and the pharmacovigilance system master file. It may also inspect premises and equipment of wholesalers whose distribution authorisation was granted by Infarmed or that are established in Portugal, at the request of competent authorities from other Member States or the European Commission.

23 Decree-Law No. 8/2019 of 15 January 2019.

24 ibid.

25 Ordinance No. 44-A/2019 of 31 January 2019.

III PRICING AND REIMBURSEMENT

On 1 June 2015, Decree-Law No. 97/2015 was published, creating the System of Assessment of Health Technologies (SiNATS). SiNATS consolidated the provisions applicable to pricing, reimbursement and prior evaluation procedures. It introduced three main changes: (1) clear reinforcement of the powers of public authorities, the state being granted the capacity to unilaterally and in an almost unlimited manner amend and terminate contractual agreements executed with the pharmaceutical industry; (2) an unprecedented concentration of powers within Infarmed; and (3) flexibility on applicable rules, considering that several matters are referred to governmental and Infarmed regulations, thus facilitating the swift amendment of provisions.

Several decrees have been approved since the entry into force of SiNATS, establishing the regime regarding specific matters, such as for reimbursement and prior evaluation procedures,[26] and the rules and procedures applicable to the setting and revision of prices of medicines subject to medical prescription and reimbursed OTCs, as well as corresponding marketing margins.[27]

Notwithstanding the importance of SiNATS, the essential features of the previous regimes remain untouched. For example, the rules on pricing and reimbursement of medicines continue to differ, essentially depending on the classification of the product for dispensing purposes.

Medicines subject to medical prescription, but not a restricted medical prescription, and generally sold in street pharmacies, must undergo a price approval procedure before Infarmed prior to being launched on the market. In this context, a maximum sale price is approved, which, in the case of branded products, is determined by reference to the price applied in three reference countries. This price is subject to annual revision in accordance with the same criteria.

The Minister of Health is competent to approve reimbursement, which will only be granted should the therapeutic added value and economic advantage of the product be demonstrated.

Another striking feature of SiNATS lies in the increased importance of the execution of agreements between Infarmed and the MA holders, although they are still not legally mandatory – save in the case of hospital products. These agreements typically set a maximum sale value for the product, which, once exceeded, will determine a payback by the MA holder to the NHS equivalent to the amount of public expenditure exceeding the established limit. Other types of agreements are expressly provided for under SiNATS, such as risk-sharing arrangements. SiNATS also approved specific rules for the reimbursement of similar biological medicines conditioning their approval to its price not exceeding 80 per cent of the price of the reference biological medicine.

A 'reference price' system exists in the context of reimbursement. Until a generic is launched on the market, the percentage of state reimbursement applies to the retail sales price of the product and ranges from 15 to 90 per cent, save in exceptional circumstances provided for in specific regulations. The placing on the market of a generic, however, gives rise to the creation of a 'homogenous group', composed of branded or innovative medicines and generics with the same active substance, dosage, method of administration and pharmaceutical form,

26 Ordinance No. 195-A/2015 of 30 July 2015 as amended.

27 Ordinance No. 195-C/2015 of 30 July 2015 as amended.

and to the approval of the corresponding reference price – equivalent to the average of the retail sale price of the five lowest-priced products included in the group. Following approval of the reference price, the maximum amount of state reimbursement for products included in the relevant group will be determined by applying the respective reimbursement percentage to said reference price.

Similarly, before they can be sold to NHS hospitals, medicines subject to medical prescription must undergo an evaluation procedure, where the applicable maximum sale prices are approved by the Ministry of Health, or Infarmed, should this competence be delegated. Until the approval of SiNATS, this regime only existed for medicines subject to restricted medical prescription. Note, however, that if the medicine is already subject to reimbursement, it is exempted from this procedure – unless otherwise decided by the Ministry of Health, or Infarmed, if applicable.

As with reimbursement, the therapeutic added value and economic advantage of the product under evaluation must be demonstrated for a favourable decision to be issued. That decision further implies the execution of an agreement between Infarmed and the MA holder. These agreements usually establish a maximum sale value for the product and, if this amount is exceeded, the difference should be refunded by the MA holder.

The relevance given to the economic advantage factor was further highlighted with the entry into force of Ordinance No. 391/2019,[28] which approved Methodologic Guidelines for Studies on Economic Evaluation of Health Technologies. Said diploma, together with the Guidelines published by Infarmed,[29] should be considered by pharmaceutical companies in the context of reimbursement procedures, as well as evaluation procedures applicable to products to be sold to NHS hospitals.

Prior to the approval of SiNATS in 2015, the applicable rule regarding medical devices was that the relevant sale price was either free or arose from public procurement procedures, whenever applicable, with the exception of test strips, needles, syringes and lancets destined for persons with diabetes that were subject to a price control and reimbursement regime.

Since then, reimbursement regimes have been set for pressurised inhalers,[30] medical devices for ostomates,[31] medical devices for patients with urinary incontinence and urinary retention[32] and medical devices for the continuous subcutaneous infusion of insulin.[33]

As a result of SiNATS, the medical devices sector may evolve from a state of relative commercial freedom, where only the prices of these products were controlled, to one of high regulation. In fact, SiNATS sets out the possibility of administratively determining the sale prices of medical devices and of approving their reimbursement, as well as requiring these products to undergo a prior evaluation procedure, similar to the existing procedure for medicines for use or purchase by NHS hospitals. In practice, this general legal framework has rarely been enforced and the medical devices sector continues to be poorly regulated.

In September 2017, significant changes were made to SiNATS.[34] Homogeneous groups were created for similar biological medicinal products and a maximum price was enacted for

28 Ordinance No. 391/2019 of 30 October 2019.

29 On 12 December 2019.

30 Ordinance No. 246/2015 of 14 August 2015.

31 Ordinance No. 284/2016 of 4 November 2016.

32 Ordinance No. 92-E/2017 of 3 March 2017.

33 Ordinance No. 187/2022 of 22 July 2022.

34 Decree-Law No. 115/2017 of 7 September 2017.

the sale of these products to NHS hospitals. Infarmed's powers regarding reimbursement have been strengthened. Not only can it modify the terms of reimbursement, but now it can also promote, on its own initiative and at any time, the evaluation or re-evaluation of reimbursement because of public health reasons.

There was a reiteration and reinforcement of the rule that medicines subject to prior evaluation can only be purchased by NHS hospitals without the execution of a prior evaluation agreement on an exceptional basis (namely, when the patient suffers from a life-threatening disease or risks severe complications and there is no therapeutic alternative), following a specific request from the hospital concerned and prior authorisation from Infarmed. This matter was further developed in a regulation approved by Infarmed regarding early access programmes.[35] Subject to this regulation, and in line with what is set out in the law, before obtaining a favourable decision within the context of a prior evaluation procedure, medicines should be supplied to NHS hospitals free of charge. Supply free of charge is subject to a maximum period, determined by reference to the legal deadline for the procedure.

IV ADMINISTRATIVE AND JUDICIAL REMEDIES

Final decisions from Infarmed in the context of regulatory, pricing and reimbursement matters are subject to judicial review by administrative courts. The decisions are immediately effective, with the initiation of legal action per se not suspending their effects. Matters of a technical nature are not reviewed by administrative courts, except in cases of manifest error, and administrative courts do not issue technical judgments.

In addition, decisions issued by Infarmed within the context of misdemeanour proceedings initiated for a breach of regulatory provisions are subject to appeal before the judicial courts.

V FINANCIAL RELATIONSHIPS WITH PRESCRIBERS AND PAYERS

The Medicines Act transposed into Portuguese law the provisions of the Directive on the promotion of medicinal products, including interactions with healthcare professionals. Pharmaceutical companies cannot offer or promise to offer, directly or indirectly, gifts, pecuniary advantages or benefits in kind to healthcare professionals, unless they are inexpensive and relevant to the practice of medicine or pharmacy. For several years there was no legal indication as to what should be considered inexpensive. This changed in 2013 when for the first time a decree set the limit for what is considered inexpensive – as had been foreseen in the Pharmaceutical Industry Association Code of Ethics. Since then, this amount has been increased and is currently set at €60.[36]

Transparency obligations were also enacted in 2013, requiring pharmaceutical companies to notify Infarmed of any payment or offer exceeding €60 made to any individual or legal entity, such as healthcare professionals, medical or scientific associations, patient associations and healthcare institutions. The recipient is also required to validate this notification. The absence of a validation or justification for rejection will be deemed equivalent to the notification being correct. This information is publicly available on Infarmed's website.

35 Infarmed Resolution No. 80/CD/2017 of 24 October 2017.

36 Order No. 1542/2017 of 31 January 2017.

Similar rules exist in the context of medical devices. The principle that no offer can be made to healthcare professionals unless of insignificant value and relevant to the healthcare professional's practice dates back to 2009 and, as from 2017, is subject to the same limit as for medicinal products: €60.[37] Currently, and since 2017, pharmaceutical companies and medical device companies are subject to the exact same transparency rules.

In early 2014, a specific conflict-of-interest regime for the health sector was approved. The regime prevents, among other things, members of commissions, working groups, juries and NHS consultants whose role involves the market access of products (e.g., involvement in pricing and reimbursement procedures, in pharmacoeconomic assessments, in the approval of therapeutic guidelines and purchase procedures) from performing functions paid by pharmaceutical companies, either regularly or occasionally. A breach of these rules constitutes a misdemeanour punishable with a fine. In addition, in the event of such a breach, the opinions issued or decisions adopted by the commissions, working groups, juries and consultants do not produce any legal effects and any decisions adopted by decision-making bodies based on the same are considered null and void.

Decree-Law No. 5/2017[38] provided that NHS establishments and services were prohibited from receiving direct or indirect financial benefits or benefits in kind from pharmaceutical and medical device companies, unless it could be demonstrated that receiving these benefits did not compromise the establishment or service's exemption or impartiality, and prior authorisation from the Ministry of Health is obtained. Educational or scientific events with promotional purposes or sponsored by pharmaceutical or medical device companies could not take place in NHS establishments and services. The scope of these prohibitions was restricted by Order No. 5657/2017,[39] as it clarified that pharma companies may support scientific events taking place in NHS establishments, except if those events have a promotional character.

VI SPECIAL LIABILITY OR COMPENSATION SYSTEMS

Except for damages arising from harm suffered by subjects in clinical studies (see Section II.iii), there is no specific compensation or liability regime applicable to damages arising from harm caused by the use of medicines or medical devices. Product liability claims are therefore subject to the general legal regime concerning liability for defective products.

VII TRANSACTIONAL AND COMPETITION ISSUES

The Portuguese Competition Law (PCL) prohibits agreements, concerted practices and decisions by associations of undertakings, as well as abuses of a dominant position, capable of preventing, distorting or restricting competition in the Portuguese market. Competition rules apply to healthcare undertakings, in particular to pharmaceutical companies, despite being subject to sector regulation in matters such as market access, distribution and pricing.

In August 2022, Law 17/2022 was enacted, transposing the ECN+ Directive (Directive (EU) 2019/1), empowering national competition authorities with appropriate enforcement tools to achieve a genuine common competition enforcement area. Law 17/2022 introduces

37 ibid.

38 Decree-Law No. 5/2017 of 6 January 2017.

39 Order No. 5657/2017, of 28 June 2017.

several changes to the PCL, namely extending the material scope of the fines: the maximum amount of 10 per cent will now consider all the legal persons that comprise the infringing undertaking (i.e., considering the entire group).

On June 2017, the Lisbon Court of Appeal confirmed a decision by the Portuguese Competition Authority (PCA) fining the National Association of Pharmacies (ANF) and three undertakings controlled by ANF for an abuse of dominant position in the form of a margin squeeze in the provision of market intelligence services related with pharmacies' commercial data. The Court of Appeal reduced the amounts of the fines significantly. In September that year, the Competition, Regulation and Supervision Court (TCRS) confirmed another PCA decision, to close an investigation into pharmaceutical companies that had unilaterally decided to refuse to supply a new wholesaler. The TCRS concluded, essentially, that: even if a company holds a dominant position, a refusal to deal may be justified by objective reasons related to legitimate commercial interests of the supplier; and the effects of the refusal to deal on consumer welfare may be disregarded as long as the wholesale distribution market remains competitive.

In September 2018, the PCA and Infarmed signed a memorandum of understanding agreeing on a regular exchange of information on the supervision and monitoring of the sale and consumption of medical products for human use, medical devices and cosmetics, aimed to facilitate the detection of evidence of anticompetitive practices in the pharmaceutical sector.

In 2019, the PCA continued to engage in a nationwide awareness campaign on the need to fight bid rigging, with a focus on awarding authorities. In that year, a limited number of first phase merger approvals were decided. One second phase hospital merger clearance was granted on the grounds of the failing firm defence.

In 2020, no decisions were taken against pharmaceutical companies on the grounds of infringement of competition rules on restrictive agreements or market power abuses. All merger cases were cleared in the first phase. In May 2020, the PCA issued guidance regarding a proposal of the ANF on the maximum margin to apply in the sale of personal protective equipment against covid-19.

In April 2021, the PCA issued several recommendations, addressed to the Portuguese government, in the context of the provision of hemodialysis, to promote effective patient choice and the removal of unnecessary barriers to opening new clinics.

In May 2021, the PCA sanctioned a medical device manufacturer for concluding a vertical agreement involving market sharing and ban on passive sales, with potential impact on the determination of prices and other commercial conditions to be practiced by distributors.

In July 2022, the PCA issued a decision against five healthcare groups (CUF, Trofa Saúde, Hospital Particular do Algarve, Lusíadas and Luz Saúde) and the Portuguese Private Hospitalization Association (APHP) for an alleged agreement or concerted practice restricting competition in the negotiation process with public health sub-system the Institute for Health Protection and Assistance (ADSE). The total fines imposed on the five private healthcare groups and APHP amounted to €191 million. These undertakings and the ADSE were condemned of having coordinated while negotiating ADSE prices to be charged for medical services rendered to the ADSE, as well as coordinating the (threat) of suspension or termination of the agreement concluded with the ADSE to hinder the regularisation of the invoicing by the ADSE for 2015 and 2016 .

In September 2022, the PCA issued a statement of objections against ITM (Instituto de Telemedicina), Affidea Group, Lifefocus Group and GS24 for allegedly participating in a cartel in public tenders for the provision of teleradiology services to hospitals and hospital

centres in Portugal. These undertakings were charged for having implemented an agreement and concerted practice under which they jointly defined which companies would submit the winning bids in the public tenders for the provision of teleradiology services.

In 2022, all merger operations regarding the health and pharmaceutical sector were cleared by the PCA, and one company was convicted for gun-jumping, (i.e., for implementation of a notifiable merger transaction before a clearance decision issued by the PCA imposing a record fine of €2.5 million). In 2022, the PCA issued four statements of objections and 10 sanctioning decisions, imposing fines amounting to €480 million. It also carried out three unannounced inspections at nine premises of 18 entities, namely in the healthcare and IT consulting areas.

VIII CURRENT DEVELOPMENTS

Several legislative and regulatory measures were adopted in the context of the covid-19 pandemic covering matters such as vaccination and testing, while simultaneously focusing on guaranteeing availability of medicines.

Appendix 1

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She has worked in the firm's life sciences practice group for more than 15 years, and has significant expertise in regulatory matters related to pharmaceuticals, biotechnology, medical devices and cosmetics, under both EU and national law, and has been involved in several cross-border projects. She is fully dedicated to life sciences, assisting, on a day-to-day basis, several major innovative pharmaceutical companies operating in Portugal, and the Portuguese Pharmaceutical Industry Association. Her expertise and work with clients cover a wide range of matters, including, among others, licensing requirements, data exclusivity, pricing, reimbursement, market access, compliance, marketing and promotional activities, clinical trials and distribution. She is ranked by Who's Who Legal as a recommended lawyer for life sciences.

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