

Cartels

Enforcement, Appeals & Damages Actions

Fourth Edition

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Overview of the law and enforcement regime relating to cartels

Law No 19/2012 of 8 May (the ‘Portuguese Competition Act’) contains the essentials of Portuguese Competition Law from both a substantive and a procedural standpoint. It mirrors the European Union competition regime, as regards both antitrust and merger control.

The provisions of the Portuguese Competition Act have been further implemented by a number of regulations and guidelines issued by the Portuguese Competition Authority (‘PCA’). As at 5 November 2015, the PCA has notably issued a regulation on leniency applications, and guidelines on antitrust investigations, on fining methodology and on enforcement priorities.

The PCA is the main body in charge of competition law enforcement in Portugal. Subject to judicial review, the PCA is empowered to enforce both national competition provisions and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

The PCA integrates a specific Anti-Cartel Unit within its Department of Restrictive Practices.

Overview of investigative powers in Portugal

The PCA starts investigations on its own initiative or following complaints filed by third parties.

Although the PCA records every complaint that is submitted, it will only open a formal investigation in a case that fits with its current enforcement priorities.

Once a case is formally open, the PCA’s investigative powers are aligned with those of the European Commission under Regulation (EC) 1/2003.

The PCA may address requests for information to the undertakings under investigation as well as to any third parties. It may likewise question any person and require them to produce any possibly relevant documents. All natural persons and legal entities are under an obligation to collaborate with the PCA. In addition to being capable of qualification as a criminal obstruction to an investigation by a public authority, failure to comply with an information request from the PCA or the provision of false, inaccurate or incomplete information is also a minor competition law infringement, which may attract a fine of up to 1% of the company’s turnover in the previous financial year.

This year saw the first three fining decisions from the PCA for provision of false, inaccurate or incomplete information: on 22 June 2015, Peugeot Portugal Automóveis, S.A. was fined €150,000 for having provided false, inaccurate or incomplete information in response to a request for information from the PCA in the context of an antitrust investigation concerning Peugeot’s automotive warranties; on 16 July CP Carga was fined €100,000 for having

provided false, inaccurate or incomplete information in response to a request for information from the PCA in the context of an investigation of an alleged abuse of dominant position in the market for rail freight transport by containers; lastly, on 21 September, Ford was fined €150,000 for having provided false, inaccurate or incomplete information in the context of a PCA supervision procedure in the automotive sector.

On condition that a court issues a warrant to that effect, the PCA may also perform on-the-spot inspections, commonly termed ‘dawn raids’, at the premises of undertakings and associations of undertakings. In case there are solid indicia of a serious competition infringement, such inspections may also be carried out between 7am and 9pm at the homes of partners, managers/directors and collaborators of undertakings or associations of undertakings, or in their vehicles, as well as at legal and medical practices before the warranting judge and a legal representative of the corresponding professional association. Non-compliance with the court warrant may entail criminal prosecution and may in any case be practically overcome by public force, notably a police force. Obstruction to an inspection, or failure to collaborate with the PCA in this context, is also a minor competition law infringement, which may attract a fine of up to 1% of the company’s turnover in the previous financial year.

In the course of the aforementioned inspections, the PCA may request oral explanations from collaborators, who must fully cooperate and reply to any query within the scope of the inspection, unless that would entail the admission of any wrongdoing by the company.

The PCA may likewise examine, withhold, obtain copies of or extracts from books and records, regardless of the medium, print or electronic, on which they are stored. Courts must authorise or sanction any seizure of documents. Documents covered by legal or medical professional privilege can only be seized by the PCA if they are the very object of the infringement or an element thereof. Courts have also consistently held that unopened correspondence, including emails, may not be seized.

The PCA also has the power to seal any business premises, books or records, for the period and to the extent necessary for the inspection.

Overview of cartel enforcement activity during the last 12 months

On 10 August 2015, Algeco – Construções Pré-Fabricadas, S.A. (‘Algeco’), Elevatrans – Pré-fabricados, S.A. (‘Elevatrans’), Grupo Vendap S.A. (‘Vendap’), Movex – Produção, Venda e Aluguer de Módulos Pré-Fabricados, S.A. (‘Movex’) and U.E.M. – Unidade de Estruturas Metálicas S.A. (‘U.E.M.’) were fined a total of €831,810 for market-sharing and price-fixing in the context of public tenders held by Parque Escolar, E.P.E. in 2009 and 2010, for supply and assembly of prefabricated classrooms. The PCA had initiated its investigation in January 2014 pursuant to a leniency application from Algeco, which was ultimately awarded full immunity. The other four undertakings benefited from a 10% fine reduction under the settlement procedure.

Although this has been the sole public cartel decision in Portugal over the last 12 months, the PCA has been active in the field of horizontal restrictions of competition, in line with the express branding of the fight against cartels as the PCA’s foremost priority in 2015.

On 29 May 2015, statements of objections were addressed to 15 financial institutions for alleged anticompetitive information exchanges in retail banking, notably with regard to mortgages, consumer credit and loans to firms. The investigation had started in March 2013 with dawn raids at the premises of various financial institutions.

On 13 and 14 July 2015, the PCA undertook dawn raids at seven company premises in the ports of Lisbon, Setúbal, Sines and Viana do Castelo, for a suspected market-sharing cartel in the port services sector.

Following dawn raids on 26 February 2015 at seven company premises in Lisbon and Oporto, on 29 September 2015 statements of objections were addressed to five companies active in the manufacturing and distribution of office supplies for having allegedly participated in a 14-year-long price-fixing and market-sharing cartel.

Key issues in relation to enforcement policy

The PCA is not bound by a legal duty to act on all cases brought to its attention. Although it records every complaint that is submitted, the PCA will only open a formal investigation in cases that fit with its current enforcement priorities. When the PCA decides not to further investigate a complaint, the complainant(s) must be given no less than 10 (ten) working days to submit their observations.

The PCA has expressly branded cartels as its foremost priority in 2015, especially in the context of public tenders.

The aforementioned fining of an alleged cartel, in the context of public tenders for the supply and assembly of prefabricated classrooms, mirrors the central relevance of cartel fighting in the PCA's current agenda.

Vertical restraints, notably in the context of agreements, have also been given priority by the PCA.

In this respect, on 3 February 2015 the PCA fined Petrogal, Galp Açores and Galp Madeira, all three part of the Galp Energia group ('GALP'), a Portuguese energy group active in the production, refining, and marketing of oil and gas (and their derivatives) in 15 different countries across three continents, over €9m for having allegedly prohibited their distributors of bottled liquefied petroleum gas (around 300 SMEs) from engaging in passive sales to the detriment of consumer choice. In view of their reported duration of roughly 15 years and of their estimated impact on over two million families in Portugal, GALP's alleged practices attracted one of the largest fines ever imposed on a single group for antitrust infringement: €9.29m.

Fuel, ports and telecoms are among the sectors where the PCA's antitrust scrutiny has been most intense.

Key issues in relation to investigation and decision-making procedures

When the PCA decides to formally open an investigation, it has an 18-month deadline to issue a statement of objections or terminate the proceedings. This deadline may be extended, however, provided that the undertakings under investigation are informed of this extension and of its length. Access to the file during this phase may be restricted in general, in case the PCA takes the view that keeping the proceedings public may harm the investigation, or specifically with respect to individual access.

The PCA's statement of objections is subject to commentary from the addressee undertakings. Within 12 months as of the notification of the statement of objections, the PCA shall issue a final decision based on the report of the investigation team. This deadline may likewise be extended, provided that the addressees of the statement of objections are informed of this extension and of its length.

Antitrust infringements also have limitation periods of five years, except for breaches of the duty of collaboration with the PCA, notably regarding requests for information, inspections

and other investigative measures, whose limitation periods are of three years. These deadlines may, however, be suspended in a number of circumstances provided for in the Portuguese Criminal Code, which the Portuguese Competition Act expressly refers to in this respect.

Following notification of the statement of objections, its addressees are awarded full rights of defence.

Although the PCA is an administrative body integrating powers of investigation, prosecution, decision-making and imposition of sanctions, all its decisions may be appealed to the judiciary, except when they respect the mere management of the file or aim at terminating the proceedings. In addition to fining decisions, appeals are most commonly lodged against decisions restricting access to the file.

The Competition, Regulation and Supervision Court has unlimited jurisdiction to review the PCA's decisions, whereby it imposes a fine or a periodic penalty payment, and may therefore reduce or increase the fine or payment imposed.

The orders and judgments handed down by the Competition, Regulation and Supervision Court are further subject to appeal to the Lisbon Court of Appeals, which acts as the court of last resort.

The appeals regime currently applicable to PCA's decision is in line with that of the European Commission. Appeals do not have suspensory effect, except when the appealed decision imposes structural remedies. When the decision imposes fines or other sanctions, the appellant may request the appeal to have suspensory effect, provided that they are capable of proving that the implementation of the decision is likely to cause them serious harm, and of providing security to that effect.

In the past, the PCA often found itself at odds with the judiciary. Many fining decisions of the PCA have been reversed on procedural grounds and the proceedings subsequently returned to the PCA, most often on the basis of breaches of the undertakings' rights of defence, particularly with respect to access to file.

Recent years have, however, shown a tangible improvement in this respect, with a higher number of the PCA's decisions holding up in court, even if often with a fine reduction.

Leniency/amnesty regime

A leniency regime was first introduced into Portuguese Competition Law in 2006, through Law 39/2006 of 25 August.

The leniency programme was later provided for in the 2012 Portuguese Competition Act, which aligned the Portuguese regime with the one in force in the EU. Regulation 1/2013 of the PCA of 29 November 2012 sets forth the procedural steps and formalities required to obtain immunity from fines or a reduction thereof.

Under the Portuguese leniency programme, an undertaking may be exempted from fines if it is the very first one to provide complete and accurate evidence that enables the PCA to undertake a 'dawn raid' in relation to a cartel or to find an infringement in connection with the alleged cartel, provided that at the time the PCA did not have enough evidence to justify the dawn raid or to find a cartel infringement. Immunity from fines is conditional on: (i) full cooperation with the PCA in the course of the investigation, notably by refraining from destroying, falsifying or concealing any evidence and from disclosing the submitted or intended application, except if the PCA authorises such disclosure in writing; (ii) ending the infringement, unless further participation in the cartel is deemed necessary to safeguard

the investigation; and (iii) not having coerced other undertakings to participate in the cartel. When an undertaking does not qualify for an exemption from the fine, it may still be eligible for a fine reduction, in case it has provided the PCA with evidence of the infringement that represents significant added value with respect to the evidence already in the PCA's possession. The undertaking will only benefit from a reduction if it has fully cooperated with the PCA in the course of the investigation, and ended the infringement – unless otherwise required by the PCA. The first undertaking to provide significant added value shall have a reduction of 30-50%; the second a reduction of 20-30%; and subsequent undertakings a reduction of up to 20%.

Leniency extends to those individuals who may be liable for competition infringements, namely managers, directors, heads of unit and supervisors of the business areas at issue. Individuals have already benefited from leniency in cartel cases investigated by the PCA.

From the outset, the leniency programme has proven very important in the detection and investigation of cartels by the PCA. Most of the cartel investigations initiated after the introduction of a leniency regime into Portuguese Law have indeed originated from a leniency application.

Administrative settlement of cases

The Portuguese Competition Act provides for a fast-track settlement procedure between the investigated undertaking(s) and the PCA, which is in line with the settlement procedure of the European Commission.

Settlement discussions may be pursued on the PCA's own initiative or at the undertaking's request. The undertakings benefit from early disclosure of information on the PCA's part, and are expected to produce a settlement submission in writing, in which they must confess the facts and acknowledge their liability. If the case proceeds to a settlement, the undertaking(s) shall obtain a reduction on the fine that would have been imposed otherwise. Although the Competition Act does not specify the fine reduction and the PCA's Guidelines on fining methodology and on antitrust investigations give the PCA leeway in this respect, a 10% fine reduction has been consistently granted in settled procedures.

Third-party access to settlement submissions shall only be allowed if authorised by the undertaking that produced them.

The Portuguese Competition Act also provides for the termination of an antitrust investigation with commitments from the undertaking under investigation, in a similar fashion to the commitments of Article 9 of Regulation (EC) 1/2003.

Draft commitments may be submitted to the PCA on the initiative of the undertaking under investigation or if the PCA notifies it to do so in response to its preliminary assessment of the case.

In case the commitments are deemed capable of addressing the competition concerns raised by the PCA, this latter shall publish a summary of the case and the main content of the commitments, third parties being given up to 20 working days to submit their observations.

In case a decision to close the file with legally binding commitments is adopted, the proceedings shall end without any formal finding of infringement or imposition of a fine.

In 2015 the PCA closed three investigations with commitments: the first on 23 March regarding the investigation against Peugeot Portugal with respect to its automotive warranties; the second on 3 June concerning Controlinveste Media's contracts with football clubs, notably with regard to the corresponding multimedia and television broadcasting

rights and in-stadium panel and virtual advertising rights; and the third on 18 September in the investigation against Ford Lusitania, S.A. concerning its automotive warranties.

Third party complaints

Third party complaints remain a relevant source of information for the PCA. Out of all the antitrust investigations that have been formally opened after the introduction of a leniency programme into Portuguese Competition Law, the only two that reportedly did not originate from a leniency application were triggered by third party complaints.

Although the PCA records every complaint that is submitted, it is not legally bound to open a formal investigation thereon. In addition to the possible merits of the case, the PCA's current enforcement priorities also play a pivotal role in its decision of which complaints to take up.

The complainant is recognised limited procedural rights. When the PCA decides not to further investigate a complaint, the complainant(s) must be given no less than 10 (ten) working days to submit their observations. If complainants submit their observations within the deadline set by the PCA but they do not lead to a change in the PCA's view, the PCA's subsequent decision to close the file may be appealed to the Competition, Regulation and Supervision Court.

At present, complaints to the PCA must be submitted through the PCA's online complaint form. The PCA has accepted and taken up even anonymous complaints in the past.

Civil penalties and sanctions

Under the Portuguese Competition Act, cartels are subject to fines of up to 10% of each infringing undertaking's turnover in the previous financial year. Managers, directors, heads of unit and supervisors of the business areas at issue may also be fined for cartels, the applicable fine being capped at 10% of their annual pay in the infringing undertaking in the last full year of the infringement. In case the benefits extracted from the infringement may be ascertained and exceed the maximum applicable fine, the PCA may impose a fine up to the amount of those benefits, provided that the fine does not go above the aforementioned fine cap by more than 1/3; in other words, the fine may only go up to 13.33% of the annual turnover or annual pay.

The PCA issued Guidelines on fining methodology in December 2012, which mirror the EC's Guidelines on the subject. Under the Guidelines, the fine to be imposed must be calculated as a percentage of the undertaking's turnover attained in the affected market(s) for the duration of the infringement, such percentage varying in accordance with the seriousness of the infringement. Cartels are likely to attract the highest fines, for they are considered to be among the most serious competition law infringements.

Parent companies may be liable for the behaviour of their subsidiaries, for the Portuguese Competition Act expressly provides for the single economic entity doctrine.

With this latter caveat, joint and several liability for antitrust infringements is unlikely, as each infringing entity is fined separately in view of their particular involvement and financial capacity. As a result, cartel cases have often led to distinct levels of fines for each undertaking.

The Portuguese Competition Act also provides for accessory penalties: (i) publication of an extract of the PCA's Decision in the official gazette and in one of the newspapers with the highest circulation in the relevant geographic area (national, regional or local); and (ii)

in case of infringements connected with public procurement, restriction of participation in public tenders for up to two years.

Furthermore, anticompetitive agreements are null and void under Portuguese Civil Law.

Right of appeal against civil liability and penalties

The sanctions imposed by the PCA may be appealed within 30 working days of the notification of the Decision to the Competition, Regulation and Supervision Court. This court has unlimited jurisdiction to review the PCA's decisions whereby it imposes a fine or a periodic penalty payment, and may therefore reduce or increase the fine or payment imposed.

The Competition, Regulation and Supervision Court's judgments may be further appealed to the Lisbon Court of Appeals, limited to issues of law.

Under the 2012 Portuguese Competition Act, appeals no longer have suspensory effect, although the appeal court may suspend the execution of the sanctions, based on an application from the appellant proving that the implementation of the decision is likely to cause them serious harm and providing an appropriate security to guarantee future payment.

Although in most cases the courts have confirmed the substantive assessment of the PCA, in the past many of this latter's sanctioning decisions were reversed on procedural grounds, most often on the basis of breaches of the undertakings' rights of defence, particularly with respect to access to file.

Although at present most of the PCA's decisions in antitrust proceedings hold up in court, fines are often reduced by the judiciary. For example, a €1.97m fine levied by the PCA on 31 December 2010 on ANEPE (the National Parking Operators Association) for a decision of an association of undertakings, consisting of a recommendation to its associates on the need to change the agreed price lists, was lowered to €969,000 following judicial review.

Criminal sanctions

Antitrust infringements are not criminal offences under Portuguese Law and are therefore not punished in themselves with criminal sanctions.

Nonetheless, it cannot be excluded that competition law-breaching behaviour simultaneously infringes criminal law, notably with respect to abuse of privileged information, fraud or usury.

Cross-border issues

In addition to being part of the European Competition Network, the PCA also cooperates with various other competition authorities on a bilateral basis.

Particularly relevant in this respect is the Iberian Competition Forum, developed in 2004. In the context of the latest Forum meeting, held in mid-October 2015, proposals were made to strengthen the cooperation between the Portuguese and the Spanish competition authorities in view of the ever-increasing integration of both national markets. Cartel fighting and public policy advocacy were listed among the competition enforcement priorities in both countries.

Although the Competition Act provides for the investigation of any practice likely to affect competition in the Portuguese market or in a part thereof, even if with a wider scope, the cartels investigated by the PCA thus far have been generally restricted to Portugal.

Developments in private enforcement of antitrust laws

Private competition law enforcement in Portugal has thus far focused primarily on the so-called ‘competition defence’, put forth by a party contesting a contractual obligation in the context of civil litigation with a view to having the clause or the whole agreement declared null and void.

Based on the competition defence in civil litigation, the Portuguese Supreme Court of Justice awarded a defendant compensation in the amount of €50,000 (2013), and the Lisbon Court of Appeals reduced compensation for breach of contract in one case (2014), and in another case declared a contract null and void and imposed the return of the consideration, in the amount of €49,000, as a result (2005).

Damages actions for competition law infringements have been negligible until now. No stand-alone cases are known with respect to antitrust infringements, and follow-on actions have also been rare.

On 12 March 2015, the so-called *Observatório da Concorrência* (‘Competition Observatory’) filed the very first damages class action for competition law infringement in Portugal, whereby it requested Sport TV to compensate all subscribers harmed by Sport TV’s abuse of dominance in the Portuguese market for premium sports channels between January 2005 and June 2013. The lawsuit is still pending a court decision.

It is not yet clear how the EU Directive on antitrust damages actions (Directive 2014/104/EU) will be implemented into Portuguese Law and the full scope of the changes it will bring about.

In any case, implementation of the EU Directive on antitrust damages actions can only help bring damages actions to the forefront of private enforcement in Portugal. A relevant incentive to the filing of further damages actions is notably expected from the binding effect of the PCA’s decisions on courts as regards infringement, as provided for in the Directive.

Reform proposals

Besides the upcoming developments as regards private enforcement, no other reforms are expected in Portuguese Competition Law, which underwent a major overhaul in 2012.

The PCA has often been requested to issue guidelines clarifying where it stands on a number of competition law issues, both from a substantive (e.g. exchanges of information) and a procedural (e.g. access to the file and confidentiality) standpoint.

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As Chairman of the Board of the Circle of Portuguese Competition Lawyers (2013/2014), Nuno Ruiz organised and hosted the 2014 Lisbon Annual Conference on Competition Law and Practice.

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Ricardo Filipe Costa has authored and co-authored over 50 publications in the field of competition law, most notably the monograph '*The Murphy judgment and the underlying Internal Market imperative*' in two language versions (English and Portuguese) (Almedina, 2014).

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