

Portugal



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THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The statutory basis for the prohibition of cartels in Portugal may be found in Law no. 18/2003 of 11 June 2003 ("Competition Act") in its Article 4 ("Article 4") which is modelled on Article 81 EC.

The violation of Article 4 constitutes a misdemeanour ("administrative offence"), there being no criminal sanctions under Portuguese law for anti-competitive behaviour.

Undertakings which participated in a cartel are punishable with a fine that may go up to 10% of the previous year's turnover for each of the undertakings participating in the infringement.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 4 of the Competition Act prohibits *"agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, the object or effect of which is to appreciably prevent, distort or restrict competition in the whole or a part of the national market."*

In line with Article 81 EC the Competition Act expressly prohibits certain types of restrictive agreements, such as price-fixing agreements, agreements which restrict supply by limiting the sales or production capacities, and/or divide up markets or consumers.

1.3 Who enforces the cartel prohibition?

The Portuguese Competition Authority ("PCA"), created in January 18 2003 by Decree-Law 10/2003 ("Statutes of the Authority") is the competent authority in enforcing competition law in Portugal.

With the publication of Regulation No. 1/2003 of 16 December 2002 ("Regulation 1/2003"), the PCA is also entitled to apply, along with the Commission, Article 81 EC to agreements which may affect trade between Member States.

Pursuant to its statutes, the PCA enjoys general supervisory and regulatory powers as well as the powers to apply sanctions.

The decisions of the PCA leading to the imposition of sanctions can be appealed to the Commercial Court of Lisbon (see question 7.1. below).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The procedure regarding anti-cartel enforcement in Portugal is laid down in the Competition Act and, on a subsidiary basis, in the Misdemeanour Act (Decree-Law no. 433/82 of 27 October as amended) which in turn makes a further subsidiary reference to the Portuguese Criminal Procedural Code (Decree-Law no. 78/87 of 17 February as amended).

This misdemeanour procedure comprises two general stages: an administrative stage, conducted by the PCA; and a subsequent judicial stage, before the courts.

The administrative stage may be subdivided into two phases: a first phase of inquiry ("*fase de inquérito*"); and a second investigation phase, to allow further evidence gathering ("*fase de instrução*").

The Competition Act does not provide for any time limits for either phase.

Phase of Inquiry

Whenever the PCA becomes aware, by whatever means - *ex officio*, complaint, leniency application, etc. - of the existence of an alleged cartel it orders the opening of the inquiry and promotes the necessary investigative actions.

If the facts under investigation pertain to an area subject to sector-specific regulation, the PCA immediately notifies the competent national regulator informing it of the opening of investigations and setting a deadline for the submission of observations.

At the end of the *inquiry phase* the PCA, adopts a decision: (i) to close proceedings; or (ii) to open a second investigation phase.

If the PCA closes proceedings for lack of evidence and the origin of the case was a complaint, it must first notify the complainant of its intended decision and give it the opportunity to submit observations.

If the complainant fails to submit observations or does not adduce new evidence, the PCA closes proceedings and notifies the complainant and the parties to the alleged infringement.

A final note should be made to the latest legislative alterations to the Criminal Procedural Code, in August 2007. Prior to this reform, misdemeanour proceedings were subject to secrecy rules which meant, in practice, that until the end of the first phase, the complainant, the undertakings under investigation and the general public could not have access to the file.

Secrecy rules applied for the purposes of protecting the course of the investigation and, more importantly, to protect the principle of presumption of innocence of the investigated undertakings.

With the revision of the Criminal Procedural Code, criminal proceedings are now - in general - public.

Everything seems to point out that this revision applies to misdemeanor proceedings, thus rendering anti-cartel proceedings public. This may have implications on many aspects relating to competition investigations. The PCA has not yet commented on this matter.

Second Investigation Phase

If the PCA opens a *second investigation phase* it shall formally notify the parties to the alleged infringement of its decision and send them a statement of objections ("*Nota de Illicitude*").

The parties to the alleged infringement shall be afforded a "reasonable deadline" - never inferior to 10 days - to present their written pleadings or, if requested, oral pleadings. The parties may request the adoption of new investigative measures.

Following the submission of the pleadings, the PCA may order new investigative measures and even send the parties another statement of objections, as long as it gives them the chance to submit observations.

Further to the above, the PCA may, during both the first and second investigation phases, in certain circumstances, order interim measures whenever the investigation reveals that the anticompetitive practice under investigation may cause irreparable damage to competition or third parties.

Upon conclusion of the second phase investigation, the PCA adopts a final decision to:

- Close proceedings.
- Declare the existence of an anticompetitive practice and order the parties to put the infringement to an end.
- Impose fines, periodic penalty payments or additional sanctions provided for in national law.

If the decision pertains to an area subject to sector-specific regulation the PCA must, before adopting a final decision, provide the competent national regulator with a final draft and await its technical opinion.

Furthermore, if acting under Article 81 EC as well as national law, the PCA must inform the European Commission of the envisaged case decision and the sanctions applied.

The decisions of the PCA leading to the imposition of sanctions are subject to appeal to the Commercial Court of Lisbon (see question 7.1 below).

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences or exemptions for anti-competitive cartels in the Competition Act. Undertakings managing services of general economic interest are subject to competition law insofar as this does not impede their tasks.

Any agreement violating its Article 4 is to be considered justified - even if it does not affect trade between Member States - if it satisfies the requirements laid down in any of the EC Block Exemption Regulations adopted under Article 81(3) EC. Therefore, if any of Article 81(3) Block Exemptions apply to the cartel in question, it shall be applicable and enforceable in the national territory.

Furthermore, similarly to Article 81(3) EC, Article 5(1) of the Competition Act sets forth the possibility of an agreement benefiting from an exemption when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided certain requirements are fulfilled.

1.6 Is cartel conduct outside Portugal covered by the prohibition?

Cartel conduct which takes place outside of Portuguese jurisdiction shall only be caught if its effects occur within the national territory.

2 Investigative Powers

2.1 Summary of general investigatory powers

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes*	No
Carry out an unannounced search of residential premises	No	No
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	No
■ Right to retain original documents	Yes*	No
■ Right to require an explanation of documents or information supplied	Yes	No
■ Right to secure premises overnight (e.g. by seal)	Yes*	No

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the PCA.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

In what regards the *power to order the production of specific documents or information* by way of a request for information, an undertaking may be fined up to 1% of its previous year's turnover if it fails to provide the information requested or provides incomplete/inexact information.

In this respect, a judgment of the Commercial Court of Lisbon of May 2007, dealt with a case where the PCA had fined three undertakings (average €85.000 each) for the failure to supply information in response to a request.

The Court concluded that the legal protection against self-incrimination, constitutionally protected, was applicable in misdemeanour proceedings and that, in line with EC case law, an undertaking can not be compelled to provide the Authority with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Authority to prove.

However, this right on the part of the undertaking is not extensible to documents requested, even if their disclosure may incriminate the undertaking insofar as it can subsequently demonstrate that they should be interpreted differently.

In what regards the *right to 'image' computer hard drives using forensic IT tools*, the PCA may do so during the course of an inspection, within certain limits and provided it has previously obtained an authorisation warrant from the competent authority.

One can not object to the "imaging" of a computer hard drives as long as the files contained therein are relevant to the investigation, are not protected by legal professional privilege and can not be considered as "correspondence" under Portuguese Law (see below, question 2.7).

In this respect, a 2004 judgment of the Court of Appeal of Lisbon concerning the apprehension of a computer during searches conducted by a judicial authority concluded that an investigating entity can apprehend a computer and copy the contents of its hard drive provided it does not copy e-mails considered as "correspondence".

2.3 Are there general surveillance powers (e.g. bugging)?

The PCA does not have general surveillance powers. In what regards bugging, a means of evidence specifically provided for in the Criminal Procedural Code for certain types of criminal offences in strict circumstances, to intercept or record telephone communications outside the cases (crimes) expressly provided for in the said Code, renders such evidence null and void and it can not be used in a court of law.

2.4 Other powers of investigations

There are no other powers of investigations.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

When national legislation is applied, it is the PCA that shall conduct inspections at the business premises of undertakings to gather evidence or proof of an anticompetitive practice.

A PCA raid is conducted by its officials who can be accompanied by the police authorities. The investigating officers must carry credentials issued by the Authority as well as a warrant issued by the competent judiciary entity stating the purpose and scope of the investigation.

Under the Competition Act, the PCA may inspect "*the premises of the undertakings or associations of undertakings involved*", which includes land and means of transportation.

The Misdemeanour Code does not allow the conduction of inspections in private homes. Therefore the Authority does not have the powers to conduct inspections in residential premises. Any evidence gathered in this manner cannot be used against the company.

In what regards legal advisors, the PCA does and has recognised the right of a company to the presence of its lawyers during a raid. Accordingly the person co-ordinating the company's response during the investigation should formally request the inspectors to wait for the arrival of the lawyers.

Nevertheless, even if the presence of external lawyers is endorsed, in many cases the PCA investigators do not wait for the lawyers to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

If the searches are conducted by the PCA under national rules, the protection of professional privilege is linked to the membership of the Portuguese Bar Association. Apparently, national law seems to protect in-house legal advice insofar as the targeted in-house lawyer is a member of the Portuguese Bar Association.

The Portuguese system makes no distinction between legal advisers who are employed from those who are not employed by the company to which they give advice. Every lawyer enrolled in the Bar is subject to the duties provided for in the professional Code of Conduct, including the duty of legal professional privilege.

This being said, the national courts have not taken a stance on the matter and thus the question whether such courts would consider in-house lawyer communications as protected by legal professional privilege in the context of PCA inspections under national law remains open.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals

The PCA's investigatory powers are subject to the following material limitations: (i) documents subject to legal professional privilege (see above, question 2.6.); (ii) documents which fall outside the scope of the investigation, as defined in the warrant; and (iii) "correspondence".

In investigations subject to national law, if the inspectors request access and obtain documents outside the scope of the investigation, the company may allege that such documents can not constitute means of evidence against the undertaking.

In what regards the notion of "correspondence", although disputed, this constitutes another limitation to the inspectors' powers in light of the Portuguese criminal procedural legislation. Both the Constitution and the Misdemeanour Code protect the violation of "correspondence" insofar as it may be seen as an intrusion into matters of private life.

In its 2007 Salt Cartel judgment, the Court expressly held that the provisions of the Misdemeanour Code are applicable to competition investigations and therefore the PCA must not apprehend correspondence. In that specific case, the PCA only apprehended e-mails which had already been read/printed, and therefore the Court concluded they were no longer "correspondence" and could be validly apprehended and used as evidence.

Conversely, in another decision, the same Court did not distinguish between open and unopened "correspondence", stating that the violation of "correspondence" by the PCA is not to be admitted *tout court*.

The PCA's practice has been to consider that read/printed correspondence, including e-mails, should not be treated as privileged documentation, despite conflicting jurisprudence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?

The failure to co-operate with the PCA officials during the course of an inspection or the obstruction of the exercise of their inspection powers may constitute an administrative offence punishable with a fine up to 1% of the previous year's turnover for each of the undertakings involved.

Moreover, to disregard a legitimate order issued by the PCA may constitute a criminal offence, provided for in the Portuguese Criminal Code, which can attract a prison sentence of up to 1 year as well as a fine. Until today, the PCA has never applied a fine to an undertaking for the failure to cooperate during an inspection.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Under Article 4, companies which participate in a cartel may be punishable with a fine up to 10% of the previous year's turnover for each of the participating undertakings.

If the cartel is also caught by Article 81 EC this does not mean that the undertaking can be fined twice for the same practice. This much was stated by the Commercial Court of Lisbon in the Salt Cartel Case.

3.2 What are the sanctions for individuals?

Under the Competition Act individuals may be held responsible for the participation in a cartel and subject to special fines.

This only applies to members of the board of directors, the only representatives of companies that can be personally liable for competition infringements insofar as they should have known or knew of the infringement and did not put an end to it.

Until today this provision has never been applied by the PCA.

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

The rules on periods of limitation for the imposition sanctions are laid down in the Competition Act.

On the one hand, the Competition Act sets down a five-year limitation period for the commencement of proceedings from the date the infringement was committed after which the right to commence proceedings becomes extinct.

Any action taken by the PCA for the purpose of the investigation shall interrupt running of the limitation period, including:

- Any communication to the undertakings under investigation such as decisions, measures taken or notifications in general, e.g. requests for information.
- Any investigative measures such as inspections, or requests to the police authorities or other administrative authorities.
- The initiation of proceedings by the Commission or by the PCA.
- The notification of the statement of objections of the Commission or of the PCA.

Each interruption starts time running afresh.

The Competition Act also lays down the periods of limitation for penalties, which is five years from the date the decision which determined its application becomes final or *res judicata*.

3.4 Is cartel conduct by individuals potentially an extraditable offence?

Cartel conduct by individuals is not a potential extraditable offence insofar as under Portuguese Law only certain types of criminal offences constitute extraditable offences.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Penalties imposed on directors are often covered by insurance.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The leniency programme for companies was approved in 2006 by Law No. 39/2006 of 25 August ("Leniency Law").

The PCA subsequently approved Regulation no. 214/2006 of 25 August ("Leniency Regulation") setting the procedural rules regarding the application for leniency.

Prior to the adoption of this legislation, the Competition Act already provided that the PCA could take into account the degree of an undertaking's co-operation in an investigation when considering the level of the fine.

Under the Leniency Law, the PCA may grant total immunity or a reduction in fines in proceedings concerning agreements and concerted practices prohibited by Article 4 and Article 81 EC.

The applicant must fulfill the following cumulative requirements to become eligible for full immunity:

- be the first to provide information/evidence on a prohibited agreement before the PCA opens proceedings;
- offer full and continuous co-operation to the PCA from the moment it establishes contact, by: (i) providing all the evidence it has or will obtain; (ii) readily responding to any request for information; (iii) avoiding actions that may hinder the investigation; and (iv) not informing the other participants in the cartel of its application for leniency application;
- leave the cartel at the latest when it provides the PCA with the information; and
- not have coerced the other undertakings to participate in the breach.

The applicant must provide complete and precise information and evidence on the companies involved, the products or services concerned and the nature, geographic scope and duration of the breach.

The Leniency Law also provides for the reduction in fines for those cases where the applicant comes forward with the information after the PCA has already opened proceedings but has not yet notified the cartel participants of the initiation of proceedings.

In this case, only the first two leniency applicants can benefit from a reduction in the fine and a distinction is made between the first and second applicants. Whereas the first applicant may obtain a reduction of at least 50%, the second applicant can only obtain, at the most, a maximum reduction of 50%.

In determining the degree of reduction to the fine, the PCA takes into account the applicant's contribution to the investigation.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

An application for leniency, whether be it for full immunity or reduction of the fine, will only be accepted by the PCA within certain conditions.

4.3 Can applications be made orally (to minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation)?

A leniency application must be done via the submission of a written

application form which can be found at the PCA's website.

The applicant may either send the application form by e-mail, registered mail or in hand, at the PCA's offices.

4.4 To what extent will the application be treated confidentially and for how long?

The Leniency Law does not provide any orientation in what regards the confidentiality of an application for leniency, merely stating that the decision to offer immunity or a reduction in fines is taken in the final decision in anti-trust proceedings.

Until today, the PCA has not adopted any decisions applying the leniency regime.

Nevertheless, given that immunity or reduction of the fine is offered in the final decision at the term of the proceedings, the identity of the undertaking(s) which applied for leniency will be disclosed.

In past cartel cases, the PCA has adopted decisions where it took into account the extent of cooperation afforded by the undertakings in determining the fine and disclosed, in its press releases, the identity of such undertakings.

In an October 2005 decision, in which it fined with €16 million five pharmaceutical companies for a cartel, the PCA reduced the fine applicable to one of the undertakings for having cooperated and revealed its identity as well as the identity of the remaining undertakings. The same happened in its decision in the Salt Cartel Case.

With the revision of the Criminal Procedural Rules the proceedings - in general - are now public and the investigated undertakings, the complainant or the general public can access the file, which seems to indicate that the application for leniency may be disclosed. This matter has yet to be clarified.

Notwithstanding, under the Competition Act the PCA must at all times, when investigating anti-trust infringements, safeguard the protection of the legitimate interests of the undertakings investigated (including leniency applicants) by not disclosing their business secrets.

4.5 At what point does the continuous cooperation requirement cease to apply?

The provisions of the leniency regime seem to indicate that the requirement to cooperate does not cease to apply at any given time; undertakings must offer full and continuous co-operation from initial contact, providing all the evidence they obtain.

It would therefore seem that the cooperation duty ceases when the PCA has enough evidence to build a case.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The law does not lay down any procedures for individuals to report cartels independently of their employer.

The members of the board of directors may also benefit from the immunity or reduction in the fine due to the provision included in the Competition Act according to which the members of the board of directors can be held responsible for competition infringements.

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

There are no other settlement or plea bargaining procedures provided for in the competition legislation.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

The decisions of the PCA which lead to the application of fines, periodic penalty payments or additional sanctions provided for in national law are subject to appeal to the Commercial Court of Lisbon.

The appeal must be lodged before the PCA within 20 working days from the date the defendants are notified of the decision.

The lodging of an appeal suspends the effects of the PCA's decision in relation to fines until subsequent judicial confirmation. Undertakings must however comply with any order to terminate the cartel.

Having received the parties appeal, the PCA must forward it within 20 working days to the Public Defendant's office ("*Ministério Público*") and, when doing so, it may attach its own written observations ("*alegações*").

The PCA may therefore respond to the appeal lodged by the parties, but may not adduce new facts.

Once the Commercial Court of Lisbon has handed down its judgment, this decision may be appealed to the Court of Appeal of Lisbon, the last judicial instance.

The decisions handed down by the Court of Appeal of Lisbon are not subject to further ordinary appeal, but the parties may appeal to the Constitutional Court, if applicable.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds.

Since 2003, only nine Article 4/81EC cases have been decided by the PCA, despite the priority it gives to these types of infringements.

Only one cartel case subject to a PCA decision has been subsequently confirmed by the Commercial Court of Lisbon and the Court of Appeal of Lisbon. This is first case where all instances for judicial review have been exhausted.

In this particular case (the Salt Cartel Case), the Court reduced only slightly the fines imposed on each company by the PCA (on average from €20,000-€150,000).

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Private enforcement of competition law in Portugal is still very incipient. However any person or firm affected by the anti-competitive behaviour resulting from a cartel case may bring the matter to the Portuguese judicial courts and seek damages on the basis of the general regime of civil liability.

It should be noted that the PCA only has administrative powers to impose sanctions but does not have judicial powers to award damages.

The Civil Procedural Code lays down the procedural rules for civil damages actions according to which the plaintiff has 3 years to file the action from the date he becomes aware of his alleged right to claim damages.

The conditions to sue for damages are to have suffered an injury as a consequence of an anti-competitive conduct, to be able to prove the defendant's fault or negligence in performing the unlawful conduct, the extent of the injury and the link between the two. The burden of proof generally lies on the plaintiff.

In what regards calculation of damages, the courts will not take into account the fines imposed by the PCA for setting damages. In general, the courts will award an indemnity corresponding to the difference between the actual situation of the injured party and the situation it would have been in, had the infringement not occurred.

8.2 Do your procedural rules allow for class-action or representative claims?

Law 83/95 of 31 August provides for a class action or collective action for damages ("*Acção Popular*" or "*Acção para a tutela dos interesses difusos*") for certain purposes, amongst which for the protection of consumer rights.



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8.3 Have there been successful civil damages claims in the past?

Until today, as far as we know, there have been no cases awarding damages for breach of competition rules.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

None to report.

9.2 Please mention any other issues of particular interest in Portugal not covered by the above.

None to report.



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