

Unclassified

DAF/COMP/GF/WD(2016)36

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

22-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution from Portugal

-- Session IV --

1-2 December 2016

This contribution is submitted by Portugal under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

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JT03405923

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SANCTIONS IN ANTITRUST CASES

-- Portugal --

1. Legal Framework

1. The Portuguese Competition Authority may impose fines on companies and individuals when they infringe the Portuguese Competition Act (the Act)¹. In addition, the Portuguese Competition Authority may impose ancillary sanctions, when the seriousness of the infringement and the fault of the party concerned so justifies.

2. The fines and ancillary sanctions imposed by the Portuguese Competition Authority have an administrative nature and aim to punish the offenders and deter them from future violations, as well as to deter the wider community from breaching the competition rules.

3. According to the Act, the Portuguese Competition Authority may impose a fine up to 10% of the company's total turnover in the business year preceding the Portuguese Competition Authority's decision². The Portuguese Competition Authority may also impose fines on administrators and directors of the companies involved up to 10% of their remuneration. These individuals are liable where they are, or should have been, aware of the infringement and fail to take appropriate measures to terminate it³.

4. The Act also lists the main criteria for determining the fines' amount. Within the limits set by the Act, the Portuguese Competition Authority enjoys a considerable margin of discretion when imposing a fine. Notwithstanding, the offenders can appeal to the courts against the Portuguese Competition Authority's decision to impose a fine.

5. In order to ensure the transparency, impartiality and legal certainty of its decisions, as well as the deterrence effect of its fines, the Portuguese Competition Authority has adopted guidelines on the method for setting fines in December 2012, following the entry into force of the 2012 Competition Act. These Guidelines follow closely the practice of the European Commission.

2. Determination of the fine

6. The Portuguese Competition Act establishes the upper limit of the fines and foresees the main factors to take into account when determining the fine's amount. These factors are: (i) seriousness and (ii) duration of the infringement; (iii) the nature and size of the affected market; (iv) the level of the company's involvement in the infringement; (v) the gains taken from the infringement; (vi) whether the company has terminated the infringement and has repaired damages; (vii) the financial and economic situation of the company; (viii) whether the company is a repeated offender; (ix) the level of cooperation with the

¹ Article 68 of the Portuguese Competition Act (the Act).

² Article 69 (2) and (4) of the Act.

³ Articles 69 (4) and 73(6) of the Act.

Portuguese Competition Authority throughout the investigation⁴. This list is not exhaustive and the Portuguese Competition Authority may take into account other factors to determine the amount of fines.

7. According to the Portuguese Competition Authority's 2012 Guidelines, the Portuguese Competition Authority follows a three step methodology to set the fines. First, it establishes the basic amount of the fine of each company involved. Secondly, it adjusts that basic amount taking the specific aggravating or mitigating circumstances into account. Thirdly, it may revise the adjusted basic amount upwards or downwards for specific deterrence and proportionality reasons.

8. The basic amount is determined by reference to the value of sales of goods (or services) to which the infringement relates. The value of sales is determined before VAT and other taxes directly related to the sales. Where the figures available are not reliable or where the sales related to the infringement are disproportional to its economic impact, the Portuguese Competition Authority may take the total turnover as a reference (bearing in mind the legal limit of the fine).

9. Depending on the gravity of the infringement, the Portuguese Competition Authority establishes a percentage (up to 30%) of the value of sales to take into consideration. This proportion of the sales' value is then multiplied by the number of years the company has participated in the infringement, in order to set the basic amount.

10. The basic amount will be adjusted upwards or downwards depending on the aggravating or mitigating circumstances.

11. Among aggravating circumstances, the Portuguese Competition Authority usually takes into account: (i) recidivism, (ii) leader or instigator role, including any steps taken to coerce other companies to participate in the infringement, or retaliatory measures to enforce the anti-restrictive practice; or (iii) refusal to cooperate with, or obstruction of, the Portuguese Competition Authority's investigation.

12. As mitigating circumstances, the Portuguese Competition Authority takes into account: (i) the fact that the conduct was authorised or encouraged by a public authority or legislation; (ii) evidence that the company's involvement was substantially limited and, while being part of the offending agreement, the company avoided its implementation by adopting a competitive conduct; (iii) any steps taken by the company to terminate the infringement and to repair respective damages; or (iv) cooperation with the Portuguese Competition Authority during its investigation (outside the Leniency Programme).

13. As a third step, this adjusted amount may be revised upwards in order to ensure deterrence, where the company has significant market power and financial resources, or where it is necessary to exceed the gains improperly made as a result of the infringement, or/and the affected market is of particular economic relevance.

14. Conversely, the Portuguese Competition Authority may revise the basic adjusted amount downwards to ensure proportionality where the company's core business takes place on the affected market.

15. In exceptional circumstances, the Portuguese Competition Authority may also take into account the company's inability to pay the fine. In this case, a reduction may be granted solely on the basis of evidence that the imposition of a fine (determined according to the Guidelines) would irreversibly jeopardise the economic viability of the company and cause its assets to lose their value.

⁴ Article 69 (1) of the Act.

16. When submitting their inability to pay claim, companies are requested to show financial evidence of their profitability, liquidity and solvency, as well as to demonstrate a direct link between the imposition of a fine and the devaluation of their assets. The Portuguese Competition Authority may also consider redundancies or restructuring programs which were not already scheduled and would result from the imposition of the fine (before a reduction)⁵.

3. Practical issues in determining the amount of fines

17. In 2015, the Portuguese Competition Authority imposed two of its biggest fines since its creation in 2003: a fine of 10.34 euros in an abuse of dominance case in the pharmaceutical sector and a fine of 9.29 million euros in a vertical restraint case in the energy sector.

18. In practice, when the Portuguese Competition Authority determines the amount of a fine, it is bound by other rules, such as the parent company liability rule, and also makes use of other instruments, such as the leniency program and the settlement procedure.

19. The Portuguese Competition Act is unclear as to under which circumstances a parent company may be held liable for an antitrust offense directly committed by a subsidiary (except of course where the parent participates directly in the infringement). In order to ensure an appropriate level of deterrence, the Portuguese Competition Authority recent decision making practice is thus endeavouring to impute liability to parent companies, by resorting to the notion of undertaking as a single economic unit, which is enshrined in the law, and the established ECJ's case law on parental liability, whenever there is evidence that a parent company exercises decisive influence over a subsidiary's activity⁶. However, some practical issues still remain unsettled, e.g. the type of evidence required to show effective exercise of control, legal basis for joint and several liability of the parent, etc.

20. In cartel cases, it is also necessary to take into account the Portuguese Competition Authority's leniency program when determining the fine. The first company that comes forward and complies with the program requirements can receive full immunity from fines. The second and third companies that come forward with valuable evidence and comply with the program requirements may have a fine reduction of 30% to 50% and 20% to 30%, respectively. Other companies, which are still able to bring evidence with added value and fulfil the requirements may have a fine reduction up to 20%.

21. The amount of fines may also be reduced through a settlement procedure. The Portuguese Competition Act does not set a limit for the reduction. In the last years, the Portuguese Competition Authority has followed the European Commission's approach and did not offer a reduction, on this ground, higher than 10%.

⁵ Differently, after setting the fine and notifying the company thereof, the PCA may accept a company's request to pay the fine by instalments. Instalment plans cannot exceed a period of two years from the moment the decision becomes final. The PCA has accepted instalment payments in a bid rigging case concerning public tenders for pre-fabricated modules for schools.

⁶ In a recent abuse of dominance case, the Portuguese Competition Authority considered a parent company liable for an infringement committed by a subsidiary, based on evidence that showed the parent company influenced its subsidiaries market conduct. This enable the Portuguese Competition Authority to impose over 9 million euros fine on that parent company in a case of abuse of dominance in the pharma intelligence sector. See press release: http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201531.aspx?lst=1&Cat=2015. This decision was substantially upheld on appeal by the Competition, Regulation and Supervision Court (1st instance). The fine was reduced to 7 million euros for unrelated reasons. The appeal in 2nd instance Court is pending.

22. The Portuguese Competition Authority may accumulate the leniency reduction with a settlement reduction. This has already happened in two cartel cases: a bid rigging case regarding public tenders for the supply of prefabricated modules for schools, and a cartel case in the form of price fixing and market sharing in the sector of office supplies.

23. In the bid rigging case in the construction sector, the first company received full immunity under the leniency program and the remaining three companies received a reduction of 40%, 30% and 20% of the respective fines, depending on the value of the evidence brought by each one. All of them later entered into a settlement agreement and received an additional reduction of 10% of fines each⁷.

24. In the cartel case regarding in the sector of office supplies, the second company that came forward with evidence received a reduction of 50% of the fine under the leniency programme, and later it entered into a settlement agreement and received an additional reduction of 10% of the fine⁸.

25. Ultimately, the amount of fines determined by the Portuguese Competition Authority can be reviewed by the courts on appeal.

26. Under article 88 of the Portuguese Competition Act, the Competition, Regulation and Supervision Court has powers of full jurisdiction and can reduce or increase the amount of the fine or of the periodic penalty payment.

27. The review Court has reduced the amount of fines imposed by the Portuguese Competition Authority on various grounds⁹. For example, they have concluded that direct intent was not established or have valued differently mitigating circumstances, such as no prior convictions; termination of the infringement before, or as soon as, the Portuguese Competition Authority intervened; cooperation with the Portuguese Competition Authority.

28. The appeal against a fining decision by the Portuguese Competition Authority does not suspend the duty to pay the fine. Companies must apply for suspension if they want the fine to be stayed during the appeal. In that case, companies must show that paying the fine causes them considerable harm and are required to pay a deposit.

29. So far, the Portuguese Competition Authority has not encountered a situation where a company refused to pay a fine when the decision became final. The only instances where the Portuguese Competition Authority failed to retrieve fines were related to companies undergoing insolvency and liquidation processes.

30. In any event, the Portuguese Competition Authority can impose periodic penalty payments for each day of delay in complying with a Portuguese Competition Authority decision imposing a sanction or ordering the adoption of certain measures. These periodic penalty payments may not exceed 5% of the

⁷ See press release:
http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201518.aspx?lst=1&Cat=2015

⁸ See press release:
http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201612.aspx?lst=1&Cat=2016

⁹ Under article 88 of the Act the Courts may also revise the fine upwards, which was not possible under the previous competition act. So far, the Courts have not use this prerogative.

average company's daily turnover in Portugal in the financial year preceding the Portuguese Competition Authority's decision¹⁰.

4. Other sanctions and means of deterrence

31. In addition to fines, the Portuguese Competition Authority may impose on companies two other kind of sanctions, the so-called ancillary sanctions.

32. The Portuguese Competition Authority may publish, at the companies' expense, a summary of the decision in the Official Journal and in a national, or regional, high circulation newspaper (depending on the scope of the relevant geographic market), the moment the decision becomes final (the period to appeal has expired or the appeal has been made and is determined).

33. In cases of bid rigging for public contracts, the Portuguese Competition Authority may prohibit the companies involved from participating in similar bids for a period up to two years, from the moment the decision becomes final. This sanction has never been imposed so far.

34. Another important element for the deterrence of competition infringements is private enforcement.

35. Private enforcement is starting to develop in Portugal, following the adoption of the EU Antitrust Damages Actions Directive. This June, the Portuguese Competition Authority submitted to Government a draft legal diploma to transpose the EU Directive into national law.

36. The draft diploma submitted by the Portuguese Competition Authority includes an amendment to the Portuguese Competition Act in order to include compensation for damages in the list of criteria to take into account when determining the fine¹¹.

37. If the Portuguese Competition Authority's proposal is accepted, the Portuguese Competition Authority will most likely amend its guidelines accordingly and consider damages paid to the injured parties, including out-of-court settlements, as a mitigating circumstance when calculating the amount of the fine.

¹⁰ Article 72 of the Act.

¹¹ See http://www.concorrenca.pt/vEN/News_Events/Noticias/Documents/ENGLISH%20VERSION%20-%20proposal%20for%20a%20law%20transposing%20the%20Damages%20Directive.pdf