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Criminalisation of cartels and bid rigging conspiracies – Note by Portugal

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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Portugal

1. Introduction

1. The Portuguese Competition Authority (Autoridade da Concorrência, AdC) considers the fight against cartels as one of its main priorities, given the harm they cause to the economy and consumers, both intermediate and final. Coordination by competing firms through price fixing, geographic or customers' market allocation, or the limitation of production to raise prices is deemed as one of the most serious infringements of competition law.
2. The President of the AdC establishes and publishes the AdC's competition policy priorities on an annual basis. Fighting cartels is one of the main issues for the AdC to tackle¹, regardless of the relevant market, or size of the undertakings involved. A particular focus is given to public procurement as it represents an important part of the country's national economy.
3. The AdC acknowledges that, due to their secret nature, cartels can be difficult to detect and investigate. In that regard, to facilitate the detection and investigation of cartels, the AdC established a Leniency Program², whereby leniency applicants may obtain full immunity from fines, or a reduction thereof.
4. Under the Portuguese Competition Act, and similarly to other infringements of competition rules, cartels are deemed to be administrative offences and not criminal offences. Therefore, the AdC may impose fines and decide to apply other ancillary administrative sanctions in response to cartel infringements, but not criminal sanctions. These sanctions may be imposed both to undertakings and individuals.
5. As both undertakings and individuals may be sanctioned, the AdC's leniency program also foresees the possibility of individuals benefiting from applications submitted by their respective companies. Individuals may also submit independent leniency applications, and secure their place in the leniency queue.
6. In certain circumstances, the facts constituting a cartel involving public procurement may be investigated by the Public Prosecutor's Office as a crime of disruption of public tenders and such conduct could result in criminal sanctions.
7. The current system of administrative sanctions has allowed for effective enforcement of competition rules against cartels. Reinforced investigative powers deriving from the transposition of the ECN+ Directive³ may further improve the current system.
8. In this contribution, we will focus on the assessment of the legislative framework for cartels in Portugal, sharing some milestones and recent developments in the AdC's fight against cartels, particularly considering the case of bid-rigging in public procurement. We will also share our practical experience, taking in consideration the relevance of a continuous

¹ See, for instance, the AdC's [Competition Policy Priorities for 2017](#), [Competition Policy Priorities for 2018](#) and [Competition Policy Priorities for 2019](#).

² Articles 75 to 82 of Law No. 19/2012, of 8 May (hereinafter Portuguese Competition Act).

³ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

cooperation at the EU and international level in the fight against cartels, as these anticompetitive conducts meet no borders.

2. Legislative framework for cartels in Portugal

9. Cartels are prohibited under Article 9(1) of the Portuguese Competition Act, in similar terms to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).
10. In pursuit of its sanctioning powers, the AdC has the power to enforce the provisions of the Portuguese Competition Act, including the prohibition of cartels. According to its organizational chart, the AdC has a specific Anti-Cartel Unit, within the Restrictive Practices Department, focused on the fight against cartels.
11. In Portugal, the applicable sanctions deriving from competition law for engaging in a cartel are administrative and not criminal⁴. Engaging in a cartel constitutes an administrative offence that can be punished by the AdC as either an intentional or a negligent conduct⁵. The AdC may impose a fine both to undertakings and individuals (members of the board of directors or managers).
12. In this regard, in 2013, the AdC published its Guidelines on the Handling of Antitrust Proceedings⁶, which clarify how the AdC acts when investigating and handling antitrust procedures, under the Portuguese Competition Act, thus enhancing transparency.
13. In the exercise of its sanctioning powers, the AdC has general investigatory powers granted by the Portuguese Competition Act, which include the powers of inquiry (written requests for information or interviews) and the power to carry out inspections to search and seize evidence⁷. The use of these powers must comply with certain safeguards provided to investigated companies and individuals. Some important safeguards include the right to access the file, the right to a hearing, the right to request further inquiries for evidence, or the right to appeal against an interlocutory or a final decision adopted by the AdC.
14. In regard to the opening of investigations, there are three basis for the AdC to initiate cartel proceedings: (1) following complaints, (2) following leniency applications or (3) *ex officio*.
15. According to Article 7 of the Portuguese Competition Act, the AdC exercises its sanctioning powers on a case-by-case basis, according to the principle of opportunity, considering the public interest and taking into account the priorities on competition policy and the matters of law and of fact brought by the parties to the file, as well as the seriousness of the alleged infringement, the likelihood of being able to prove its existence and the extent of investigation required to fulfil its mission and ensure compliance with Articles 9, 11 and 12 of the Portuguese Competition Act and Articles 101 and 102 of the TFEU.
16. In case the AdC decides there are sufficient grounds to initiate a cartel investigation, the proceedings are split in two different phases: (1) the investigative phase and (2) the prosecution phase.
17. The investigative phase can result in a decision of the AdC to either:

⁴ Article 67 of the Portuguese Competition Act.

⁵ Article 68 of the Portuguese Competition Act.

⁶ See http://www.concorrenca.pt/vPT/Praticas_Proibidas/Praticas_Restritivas_da_Concorrenca/Documents/LO_Instrucao_Processos_2013.pdf (available only in Portuguese).

⁷ Article 18 of the Portuguese Competition Act.

- proceed with the case, by initiating the prosecution phase, notifying the defendant of a Statement of Objections;
- close the case, when the investigation undertaken does not support the conclusion that there is a reasonable likelihood of adopting a decision imposing a sanction;
- settle the case following a decision imposing a sanction, adopted as part of a settlement procedure; or
- close the case following a decision imposing commitments⁸.

18. As for the prosecution phase, it can conclude with:

- a decision declaring that a prohibited practice has taken place, but considering such practice justified pursuant to Article 10 of the Portuguese Competition Act;
- a decision imposing a sanction in the context of a settlement decision pursuant to Article 10 of Portuguese Competition Act;
- a decision ordering the case to be closed with the imposition of commitments; or
- a decision ordering the case to be closed without the imposition of any commitments⁹.

19. In case a cartel decision imposing a fine is issued, in accordance with Article 68 of the Portuguese Competition Act, the maximum fine applicable amounts to 10% of the previous year's turnover of each participating undertaking or, in the case of associations of undertakings, the aggregate turnover of its members¹⁰. Individuals may be fined up to 10% of their annual income deriving from the exercise of their functions in the undertaking concerned, in the last full year when the prohibited practice occurred. For purposes of transparency in the imposition of fines, the AdC has adopted its Guidelines on the Method of Setting Fines¹¹.

20. In addition to a fine, the AdC may impose ancillary sanctions to cartel participants, such as:

- the publication in the Official Journal of the Portuguese Republic and in a national, regional or local newspaper, at the expense of the party concerned, of the relevant parts of the decision issued; and/or
- a ban on the right to take part in tender procedures for contracts where the purpose is to offer services typical of public work contracts, such as public service concessions, leasing or acquisition of movable assets or the acquisition of services or procedures involving the award of licenses or authorizations, in the cases where the practice that led to an administrative offence punishable with a fine has occurred during or because of such procedures (this ancillary sanction may last for a maximum of two years)¹².

⁸ Article 24 of the Portuguese Competition Act.

⁹ Article 29 of the Portuguese Competition Act

¹⁰ Article 69(3) of the Portuguese Competition Act.

¹¹

See http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orienta%C3%A7%C3%A3o_Coimas_DEZ2012.pdf (only available in Portuguese).

¹² Article 71 of the Portuguese Competition Act.

3. Ban on public procurement tender participation – the AdC’s practical experience

21. The ban on the right to participate in public procurement tenders is particularly relevant in the context of bid-rigging in public procurement.
22. In the last few years, fighting bid-rigging in public procurement has been one of the priorities of the AdC. In 2016, with the aim of raising awareness regarding bid-rigging in public procurement and promoting competition in this area, the AdC launched a countrywide campaign. By 2020, the AdC had reached to over 2,300 participants from adjudicating bodies, leading to a significant increase, both in terms of quantity and quality, of the complaints received concerning public procurement.
23. In particular, this campaign has led to a sanctioning decision in case *PRC/2016/6 – cartel in railway maintenance services*¹³. This case relates to a price fixing and market sharing cartel in the sector of railway maintenance services, with the investigation leading to a total of € 3.4 million in fines imposed on five undertakings and respective board members and directors.
24. Besides the imposed fines, and taking into account the severity of the infringement, the AdC imposed for the first time ancillary sanctions of exclusion from public contracting procedures to two of the involved undertakings. The ban was limited to the tenders relating to the market for maintenance services for track equipment on the national rail network, for a period of two years.

4. Interplay between criminal and administrative bid-rigging sanctions

25. In addition to the sanctions foreseen under the Portuguese Competition Act, bid-rigging in public procurement may also be subject to criminal sanctions. According to Article 230 of the Portuguese Penal Code, the disruption of public tenders is a criminal offence punished with a sentence of imprisonment of up to two years or with a penalty fine of up to 240 days, if a more serious sentence is not applicable by virtue of another legal provision.
26. Under the existing framework, the prosecution of criminal infringements resides exclusively within the remit of the Public Prosecutor’s Office. As such, while the AdC is competent for investigating infringements to competition, when those infringements concern facts that also constitute criminal offences the AdC is precluded from investigating and sanctioning such infringements, unless the Public Prosecutor’s Office decides not to pursue the criminal case.
27. The recent ECN+ Directive¹⁴ may change the interplay between the AdC’s administrative power and criminal proceedings initiated in Portugal, or elsewhere in the EU, as it requires as a rule that Member States ensure the protection of directors, managers and other members of staff of applicants for immunity from fines against sanctions imposed in criminal proceedings, in relation to their involvement in cartels covered by the leniency application¹⁵.

¹³ See http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202002.aspx?lst=1&Cat=2020.

¹⁴ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

¹⁵ See Article 23 of the ECN+ Directive.

5. International cooperation

28. At the EU level, and following the decentralization carried out by Council Regulation No. 1/2003, cooperation between the AdC, national competition authorities of EU Member States and the European Commission occurs in the framework of the European Competition Network (ECN). Regulation 1/2003 establishes a system which ensures that the EU competition legal framework is applied effectively and uniformly also at Member State level, while fostering the sharing of experiences.
29. Regarding the exchange of information between competition authorities, which is particularly relevant in the detection and investigation of cross-border cartels, it follows from Article 12(3) of the Council Regulation No. 1/2003 that the information exchanged can only be used as evidence to impose sanctions on natural persons where:
 - the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Articles 101 and 102 of the Treaty; or, in the absence thereof,
 - the information has been collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.
30. The ECN cooperation mechanisms have allowed the AdC to effectively cooperate in the enforcement of competition rules at the EU level. The AdC does not have substantial experience in cooperating with jurisdictions that provide for criminal sanctions, both at the EU and international level.

6. Concluding remarks

31. Under the Portuguese Competition Act, cartels are administrative offences and not criminal offences. Therefore, the AdC may impose fines both to undertakings and individuals and decide to apply other ancillary administrative sanctions.
32. The current system of administrative sanctions has allowed for effective enforcement of competition rules against cartels.
33. One of the possible ancillary sanctions is the exclusion from public contracting procedures. For instance, in the cartel case in railway maintenance services, the participation in a cartel resulted in the imposition by the AdC of a ban from participating in tenders relating to the market for maintenance services for track equipment on the national rail network, for a period of two years, for two of the companies involved.
34. While the Portuguese legal framework does not foresee criminal sanctions for cartel behavior, it envisages the criminal sanctioning of some of the facts which constitute a cartel when the latter takes place in the context of bid-rigging and under certain circumstances, leading to a disruption of public tenders.
35. In respect of the interplay between administrative and criminal proceedings, the implementation of the ECN+ Directive will potentially bring changes. In particular, by foreseeing the protection of immunity applicants from criminal sanctions under certain circumstances, it may create further incentives for the cooperation of companies and respective staff, managers, and board of directors involved in anticompetitive practices, and potentially enhance the efficiency of the leniency programs.