

12th EU-China Competition Week

Process for Applications for Exemptions From the Prohibition on Anti-competitive Agreements

Tânia Cardoso Simões



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Portuguese Legal Framework on Individual Exemptions in a nutshell

- **1983:** Decree Law 422/83 + Ministerial Order 820/84 – exemption procedure by the Competition Council
- **1993:** Decree-Law 371/93 + Ministerial Order 1097/93, of 29 October – exemption procedure by the Competition Council
- **2003:** Decree Law 10/2003 creates the Portuguese Competition Authority (PCA) + Law 18/2003 + Regulation 9/2005
- **2012:** Law 19/2012, of 8 May + 2012 Competition Specialised Court + Decree Law 125/2014, of 18 August (New Bylaws of the PCA)

European Legal Framework on Individual Exemptions in a nutshell

- **Article 101** of the Treaty on the Functioning of the European Union (TFUE) (previous Article 81)
- **Regulation 17/62** - First Regulation implementing Articles 85 and 86 of the Treaty
- **Regulation 1/2003** - Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
- **EC Article 81(3) Guidelines** (*Official Journal C 101, 27.4.2004, p. 97*)

Article 101 of the TFUE

Article 9 of the Portuguese Competition Law (Agreements, concerted practices and decisions by associations of undertakings) // Article 4 of Law 18/2003, of 11 June

1 – Agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part, and to a considerable extent, are prohibited, in particular those which:

- a) Directly or indirectly fix purchase or selling prices or any other trading conditions;*
- b) Limit or control production, markets, technological development or investment;*
- c) Share markets or sources of supply;*
- d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

Article 10 of the Portuguese Competition Law

//Article 5 of Law 18/2003 - previous Portuguese Competition Law

1 – Practices (...) may be considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, they:

- a) Offer the users of such goods or services a fair part of the benefit arising therefrom;*
- b) Do not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives;*
- c) Do not grant such undertakings the opportunity to suppress the competition in a substantial part of the goods or services market in question.*

Exemption System

- Only for infringements exclusively of Portuguese Law
- Justification is similar to article 10 Law 19/2012(number 1 and 3)
- Prior assessment system was similar to the European - Regulation 17/62 [article 4(1)] + Guidelines on the application of Article 81(3) of the Treaty (“EC Article 81(3) Guidelines”)

Article 5 of Law 18/2003, of 11 June + Regulation 9/2005, of 28 December 2004

The practices provided for in Article 4 **may be the subject of prior assessment by the Competition Authority**, according to the procedure to be established by the PCA’s regulations

The Authority may withdraw the benefit if, in a particular case, it ascertains that a practice covered by it has effects incompatible with the provisions of the justification

Scope of Prohibition and Justification

- **All sectors (except special legal framework of block exemptions)**
- **Types of practices**
 - Agreements
 - Decisions of associations of undertakings
 - Concerted practices (Energy Agency)
- **Types of anticompetitive agreements eligible**
 - CFI – there are no types of anticompetitive agreements which – as a matter of law - could not be exempted (Matra Hachette v Commission T-17/93)
 - But naked cartels difficult to fulfil conditions
 - Nonetheless – maritime transport provided block exemptions for horizontal price fixing agreements
 - Reims II 1999 (renewed 2003) the Commission exempted agreement between most of the public postal operators in Europe to pay another for the onward delivery of letters
 - Visa International – Multilateral Interchange Fee 2002 (agreement between “acquiring” and “issuing” banks within the Visa card system)
- **Ex PT SAS Hotels 1998**

All four requirements - ex Court of Justice decision in *Métropole Télévision SA v Commission* – T-528/93 (1996)

- An Improvement in the Production or Distribution of Goods or the Promotion of Technical or Economic Progress
- Offer the users of goods or services a fair part of the resulting benefit
- No imposition on the Parties of restrictions that are not indispensable
- The agreement does not grant the Parties the opportunity to substantially eliminate competition

Improvement in the Production or Distribution of Goods or the Promotion of Technical or Economic Progress

- **Objective creation of value for the community and not only for the parties themselves**
- **Benefits that can be argued (not necessarily cumulative; common overlap):**
 - Contribute to improving the production - for example specialisation agreements (economies of scale and scope) – ex PT Sovenia (1985)
 - Contribute to improving the distribution of goods and services - for example exclusive dealing agreements – ex PT Sumolis (1997) and Deltapress (2001)
 - Promoting technical or economic development – for example research and development projects
- **Efficiency gains (§48 to 72 Guidelines) - necessary to check:**
 - The nature of the efficiency
 - The link between the agreement and the efficiency
 - The probability and extension of the efficiency
 - The procedure and timing to achieve the efficiency
- **Types of efficiencies:** Cost and qualitative efficiencies

Offer the Users of Goods or Services a fair Part of the Resulting Benefit

- **Users** – consumers or other users in the value chain
- Users benefited generally fall in the same relevant market where efficiencies are obtained (compensation idea; for example, an increase in prices should be **compensated** with greater quality or other benefits)
- Commission's decisions where this criteria was met:
 - Reims II (1999)
 - CECED (2000)
- Commission's decisions where this criteria was not met:
 - VBBB and VBVB (1982) - Resale price maintenance in books
 - Vichy (1991) - Exclusive distribution of skin products in pharmacies
 - Screensport/EBU (1991) - Eurosport
 - Re VNP and Cobelpa (1977) – information agreement only on the supply side
- PT ex: APETRO (2001) ; ADN (1998)

No Imposition on the Parties of Restrictions that are not Indispensable

- *“Restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or would make it significantly less that they will materialise” (§79 Guidelines)*
- **Examples:**
 - Specialisation agreements
 - Research and development agreements
 - Distribution agreements: acceptance of prohibition of active sales when passive sales are allowed - ex. PT Sumolis (1997) and Stihl (2001)
- **Usually not accepted:** absolute territorial protection
- Commission’s decisions where this criteria was met:
 - Visa International – Multilateral Interchange Fees (2002)
 - IFPI “Simulcasting” (2003) fees set for royalties by copyright collecting societies were not unreasonably high
- Solution to guarantee indispensability: impose conditions in the exemption decision // same result as commitments (art. 9 of Regulation 1/2003)

The Agreement does not Grant the Parties the Opportunity to Substantially Eliminate Competition

- Quantitative and qualitative elements used to analyse the elimination of competition:
 - Static analysis (market structure)
 - Dynamic analysis (barriers to entry, potential competition)
- Commission's decisions where this criteria was met:
 - Bayer/BP Chemicals (1988)

- **Infringement**
 - Burden on the Authorities analysing/opposing an agreement
- **Justification**
 - Burden on the undertakings interested in defending the legality of the agreement
 - Parties have to demonstrate that all conditions are met

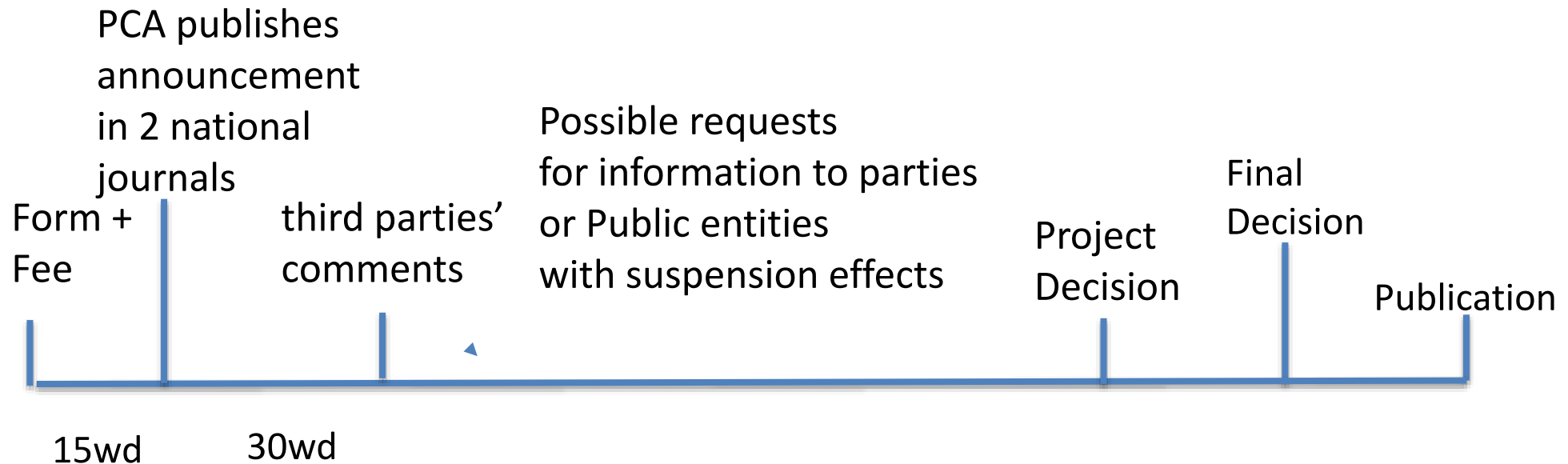
Procedure

- Involvement of all parties
- If more than one, a common representative is necessary
- Identification of confidential information
- Possible informal meetings before the application, after and in case a decision with conditions is being envisaged
- Specific Form + Fee

Procedure – Form Regulation 9/2005

- 1 Purpose of the Request – declaration by the PCA of: (i) Legality of the Agreement; (ii) Inapplicability of the Law to the Agreement and (iii) Renovation of exemption
- 2 Type of agreement (agreement; decision of association or concerted practice)
- 3 Identification of Parties and Representatives (with power)
- 4 Proof of information to all parties
- 5 Description of activities of the Parties and the economic group they belong to
- 6 Turnover of the Parties in the last year
- 7 Description of the practice (object and purpose, relevant dates, describe the aspects of the practice that have an impact on competition)
- 8 Annex the relevant documentation (contracts)
- 9 Relevant indications on Product and geographical market (dimension, turnover of the parties by market, market structure and barriers)
- 10 Demonstration of all the 4 elements should be a proportionate
- 11 Declaration and signature

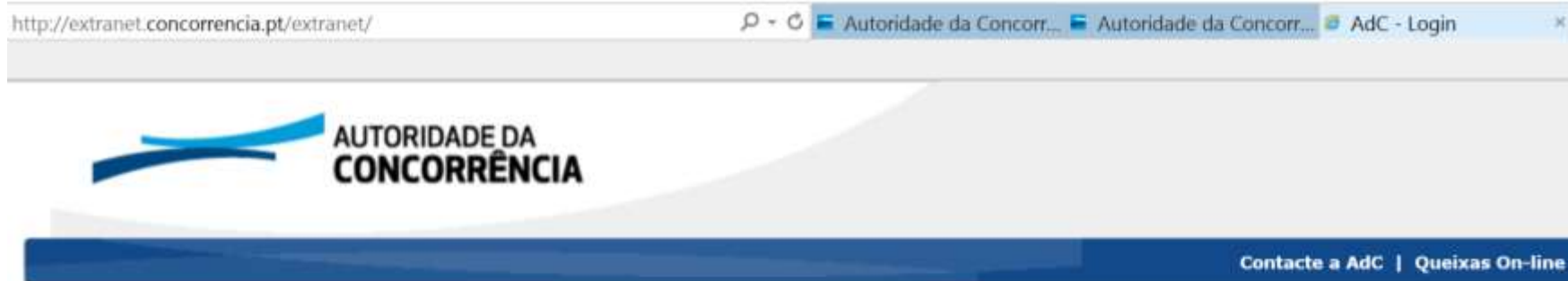
Procedure



- If the PCA does not decide in 90 wd the Parties may ask for an interim authorisation
- The PCA decides in 10 wd

- Decision (inapplicability, conformity of the agreement with the Law, illegality)
- Authorisation is given for a pre determined period and may be renewed if conditions are the same
- It may include conditions and obligations
- Final decision is preceded of prior hearing (except if it the decision is favourable to the Parties and no third parties argued against the agreement)

Electronic Notification System



Welcome to the Extranet of the Portuguese Competition Authority

Autenticação com o Cartão do Cidadão



Identification Card

Para fazer login com o Cartão de Cidadão Português deve ligar o leitor de cartões e assegurar-se que o software está correctamente instalado.

1. Insira o cartão no seu leitor.
2. Clique no botão para validar.
3. Introduza o PIN do cartão.

[Aceder com o cartão do cidadão](#)

Autenticação com Nome de Utilizador e Password

Utilizador:

Password:

[Entrar](#)

[Registe-se](#) para criar um novo processo.

Drawbacks of the System

- *Ex ante* control system raised efficiency problems
- Some measures were adopted by the Commission:
 - Introduced the concept of appreciable effect on competition, which allowed more minor cases to be removed from the scope of Article 85(1)
 - Issued general notices in order to clarify the conditions under which certain restrictive practices would not normally have the object or effect of restricting competition and would not therefore be caught by Article 85 (1):
 - (i) exclusive dealing contracts with commercial agents
 - (ii) agreements, decisions and concerted practices in the field of cooperation between enterprises
 - (iii) certain subcontracting agreements and
 - (iv) cooperative joint ventures
 - Block exemptions system

Change in the System

- System ceased to exist at the **European** level on 1 may 2004, when Regulation 1/2003 (“Modernisation Regulation”) entered into effect that:
 - Abolished notification
 - Abolished the exclusive competence of the Commission to apply article 81(3) to individual agreements; from then the European Commission, the national courts and the national competition authorities (“NCAs”) share the competence to apply it to any agreement
- **Portugal** – the system was eliminated in the New Competition Law
 - The Modernisation Regulation limited the scope for the application of exemptions to cases that simultaneously infringed national and European Law
 - The Portuguese Framework was only applicable to strictly national infringements (without an effect on European trade)
 - Relevant burden for the PCA and the companies
 - Notified agreements were not necessarily the ones with the more anticompetitive impact



FAIR PLAY.

With competition,
everybody wins.



AUTORIDADE DA
CONCORRÊNCIA