# *Cartelization in Times Of Covid* – Infringement Notice

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On December 13, 2022, The Portuguese Competition Authority (PCA) adopted a Statement of Objections (accusation) against seven laboratories and a business association for their involvement in a cartel in the provision of clinical analyses and COVID-19 tests. The PCA opened the investigation on February 24, 2022, following a leniency application that led to inspections at the headquarters of the companies targeted, to gather evidence of the accused practice. It is worth mentioning that the Statement of Objections ("SO") does not determine the outcome of the investigation. It is also given the opportunity for companies to exercise their rights of defence in relation to the unlawful conduct found.

Before delving into the analysis of the SO, it is relevant to note that a cartel is an anti-competitive practice adopted by companies to obtain market power, such as the power to keep their prices above average in a competitive market.

Within the European context, there was some difficulty in defining the concept of cartel. The OECD defined, in 1988, the "carteis unjustifiable" or "hardcore carteis" as an agreement, concentrated practice or "arrangement" between anti-competitive competitors "for pricing, *presentation of combined tenders, establishing restrictions on production or quotas, or sharing or dividing markets by the allocation of customers, supplier, territories or areas of activity* ".[1] The TFEU has not defined any specific infringement corresponding to a cartel, and this concept had only recently appeared on Directive no 2014/104/EU. In Article 2(14) of that Directive, the concept of cartel is defined as "*a concerted agreement or practice between two or more competitors with the aim of coordinating their competitive conduct on the market or influencing the relevant parameters of competition, through practices such as, but not least, fixing or coordinating purchase or sale prices or other transaction conditions, including in relation to*

[1] MOURA E SILVA, Miguel (2020). *Competition Law*. Reprint. AAFDL Publisher, p. 630.

*intellectual property rights, allocate production or sales quotas, share markets and customers, including concertation at auctions and public tenders, restrict imports or exports or conduct anti-competitive actions against other competitors* (...)". We conclude, therefore, that a cartel is the result of a concerted agreement or practice between competing undertakings with a view to setting higher prices on a market operating with normal competition between the various economic operators[2].

Cartels are prohibited, as undertakings collude in such a way as to harm final consumers, and the damage resulting from their operation does not produce efficiency gains that may justify their acceptance. It is a common for consumers who purchase products covered by the cartel to pay prices which do not match the production costs and the natural profit margin of the sellers, subject to a decrease in supply and to pay a value manifestly higher than the price that should result from the normal functioning of the market[3].

In the present case, although we do not have extensive evidence, we can draw from the given facts that we are dealing with a horizontal agreement, given that these different laboratories are at the same level of the economic process. As far as the type of restriction is concerned, price-fixing agreements are considered to be restrictions by object. Since it is a restriction by object, it is not necessary for the PCA to demonstrate that this horizontal agreement had negative effects on the market and, as such, it is for the targeted companies to rebut the presumption that the agreement had negative effects on the market. It is even a possible claim that the targeted companies did not intend to restrict competition in any way to remove the application of the sanctions[4].

The PCA accuses laboratories and the business association of involvement in a cartel which aimed at setting prices applicable to the provision of clinical analyses and the provision of COVID-19 tests, as well as the distribution of the market and sources of supply, including the commitment not to raise/hire workers from competing laboratory

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[2] GIRÃO, Laura (2019), *The Leniency Regime in Competition Law*. Master's thesis. University of Lisbon, p. 9.

[3] GIRÃO, Laura (2019), *The Leniency Regime in Competition Law*. Master's thesis. University of Lisbon, p. 12.

[4] Judgment CJEU from 6 April 2006, *General Motors BV* (C-551/03 P), C.J. (2006) I-3173, paragraph. 77-78: "*proof of this intention [Competitive of the parties] No is an element of necessary to determine whether an agreement is objective such restriction (...). On the other hand, while the intention of the parties No constitute an element necessary to determine the character restrictive of an agreement, nothing prevents the Commission or the Organs Jurisdictional Community to take account of this intention*"

groups. We are therefore dealing with a horizontal agreement on price-fixing and market-sharing carried out within a cartel's framework.

Concertation between the laboratories concerned allowed them to increase their bargaining power vis-à-vis the entities with which they negotiated the provision of clinical analyses and COVID-19 tests, leading to potentially higher pricing than those resulting from individual negotiations within the normal functioning of the market, preventing or postponing price review and reduction.[5]

But what makes this practice, *in casu*, so harmful to the market and to consumers? Pricing is a problem in itself, as it does not allow consumers to choose which product best meets their needs, limiting market supply. In addition, in this case, we are looking at COVID-19 tests and clinical analyses. In our view, this situation is extremely serious, as we have recently gone beyond a pandemic that lasted about two years, where the demand for tests and analyses was enormous for public health reasons. Consumers have not started a colossal demand for these products by personal choice, but they were often obliged to look for them in various situations, such as if they wanted to go on holiday. Thus, because we are dealing with products for which there was a very high demand during the period of the cartel agreement, this practice becomes even more serious for the normal functioning of the market, since, in addition to restricting free competition, it was created at a time when consumer vulnerabilities were at their peak.

However, we do not yet have any decision to confirm that we are facing an anti-competitive practice since, despite the adoption of the SO, companies which benefit from the presumption of innocence (Article 48 of the CF, Article 32/2 of the Portuguese Constitution, Article 11 of the UDHR, Article 6 of the ECHR) are given the opportunity, to exercise their rights of defence in particular, the right to be heard in relation to the alleged unlawful conduct found by the PCA.

[5] With regard to the positive aspects of this practice, *see*, JONES, Alison; SURFIN, Brenda (2016). *EU Competition Law - Text, Cases, and Material*. Oxford, 6th edition, p. 719. | BRODLEY, Joseph (1982). *Joint Ventures and Antitrust Policy*. *In fashion* Harvard Law Review, vol. 95, p. 1521.