

**Portuguese Competition Authority  
Questions and Answers  
(Appendix to Communiqué no. 06/2010)**

**1. What organisation has been deemed to be guilty in this case?**

The Association of Chartered Accountants (known by its Portuguese acronym OTOC, *Ordem dos Técnicos Oficiais de Contas*). This is an association, registered as a corporate body, with the responsibility (for which it charges a fee) of representing the professional interests of chartered accountants and of overseeing everything related to the functions that it carries out.

**2. What caused a case to be opened?**

The case was opened after an anonymous complaint was received. The fundamental information was subsequently reiterated by the Portuguese Association of Accountants (known by its Portuguese acronym APOTEC, *Associação Portuguesa dos Técnicos de Contabilidade*).

**3. What period do the infringements relate to?**

The infringements analysed in the report started on 12 July 2007, with the publication of the OTOC's Regulation on the Credits for Training Courses attended (*Regulamento da Formação de Créditos*) in the Official Journal of the Portuguese Republic, 2<sup>nd</sup> Series. The practice has not been discontinued.

**4. For what practices was the OTOC deemed guilty?**

The OTOC was deemed guilty of structuring an association of undertakings, the purpose and effect of which, in this instance, is to prevent, restrict or distort competition in a significant way and involves abuse of a dominant position.

**5. In what market did the practices take place?**

The practices at issue took place in the domestic market for mandatory training of chartered accountants, and the purpose was to control the quality of these specialists in their work. The market was created by the OTOC through an official regulation, and was subdivided into two segments, one covering institutional training and the other vocational training.

**6. What legislation prohibits the practices at issue?**

The decisions of an association of undertakings are prohibited under domestic legislation when their purpose and/or effect is to prevent, restrict or distort competition in a significant way. This is covered by article 4 of Law no. 18/2003 of 11 June, and in European Union law by article 101 of the Treaty on the Functioning of the European Union.

The abuse of a dominant position is prohibited in domestic legislation, as laid down in article 6 of Law no. 18/2003 of 11 June, and in European Union law, article 102 of the Treaty on the Functioning of the European Union.

**7. What is meant by the expression “a decision by an association of undertakings”?**

In the acceptance of paragraph 1 of article 4 of Law 18/2003 of 11 June,

OTOC is deemed to be an association of undertakings when it adopts a regulation that expresses the will of the representatives of the members of a profession so that the latter can adopt a specific form of behaviour within the scope of its economic activities (as is the case with the Regulation on Training Credits). In other words, the OTOC is seen as the regulator of a profession, and exercising this profession is an economic activity.

In addition, a professional organisation that has this kind of regulatory powers cannot avoid application of article 4 of Law no. 18/2003 of 11 June, nor of article 101 of the Treaty on the Functioning of the European Union, to the extent that, in this context, it is not carrying out a social mission based on the principles of solidarity, nor does it have responsibilities typical of public powers.

**8. At what point is a decision by an association of undertakings deemed to be in violation of competition law?**

A decision by an association of undertakings is deemed to be in violation of competition law when its purpose and/or effect is to prevent, restrict or distort competition in a significant way.

**9. In this particular case, how did the decision of the association of undertakings restrict competition?**

In this case, the decision of the OTOC took the form of approving a Regulation on Training Credits and the effect of this is to prevent, restrict or distort competition in a significant way. The Regulation enabled the OTOC to artificially divide up the market in the training of chartered accountants (known by their Portuguese acronym TOC, *Técnicos Oficiais de Contas*); it reserved for itself the exclusive right to provide a third of the training; and it set out its own criteria for the enrolment of other organisations as trainers, with the courses that they were giving being equivalent to its own for the purpose of giving credits to the specialists involved.

**10. What constitutes “abuse of a dominant position”?**

Abuse of a dominant position means that an undertaking is making undue use of its power in the market, leading to the exclusion of competitors through the creation of artificial barriers to entering or staying in that specific market; or when this undue use leads to the imposition of prices or other discriminatory conditions. The undertaking involved here (OTOC) uses its market power to obtain advantages that it would not obtain if there was free competition.

**11. In this particular case, what form did the abusive behaviour take?**

In this case, the abuse of a dominant position came about because OTOC was able to compete, as a training organisation, in a market which it had itself divided up artificially and where it could decide what other organisations could compete against it, and what the terms and conditions were, following its own criteria. Moreover, it charged fees for access to the specific market at issue and for working there.

**12. Can the OTOC be at one and the same time an association of undertakings and an undertaking in its own right acting in the same area?**

Yes. It acted on the one hand (when approving the regulation regarding training credits) as a regulator for a profession which has an economic activity (as explained before) and as

such is deemed to be an association of undertakings for the purposes of applying Law no. 18/2003, of 11 June (and of article 101 of the Treaty on the Functioning of the European Union). On the other hand, as an organisation acting as a trainer for accounting specialists, it exercises an economic activity in its own right, and as such is deemed to be an undertaking for the purposes of application of article 6 of Law no. 18/2003, of 11 June (and of article 102 of the Treaty on the Functioning of the European Union).

**13. What was the amount of the fine it had to pay?**

In this case, the OTOC was ordered to pay a fine of €229,308.20 euros (two hundred and twenty-nine thousand, three hundred and eight euros and twenty cents).

**14. What is the maximum fine that could have been levied?**

For each infringement made by an undertaking and/or an association of undertakings, the maximum fine that can be levied is 10% of its turnover in the last year that the infringement was committed (under the terms of the provisions set down in paragraph a) of article 43 of Law no. 18/2003 of 11 June). In this particular case, and given that we are looking at two infringements operating in tandem, the maximum that can be levied (corresponding to the sum of the fines to be levied) would have as a maximum limit double the amount of the higher fine at issue (under the provisions of article 19 of the General Regime of Administrative Offences).

**15. Were the details of this case sent to the European Commission?**

Yes. This decision was based on the terms laid down in paragraphs 3 and 4 of article 11 of Regulation (CE) no. 1/2003 of the Council of 16 December 2002, which stipulates that whenever there is the possibility that intra-community trade might be affected, the PCA will inform the European Commission that a case has been opened and what the decision is when taken.

**16. Can an appeal be lodged against the decision?**

An appeal can be made through the Lisbon Court for Commerce (*Tribunal de Comércio de Lisboa*), under the terms of paragraph 1 of article 50 of Law no. 18/2003 of 11 June.

**17. Is this the first time that the Portuguese Competition Authority has found a professional association guilty of an administrative offence?**

This is the first time that a professional association has been fined for abuse of a dominant position (article 6 of Law no. 18/2003, of 11 June and, in this case, article 102 of the Treaty on the Functioning of the European Union).

However, the PCA has already levied fines on other professional associations for infringement of article 4 of Law no. 18/2003, of 11 June (for setting binding fee scales), these being:

- a) the Association of Veterinary Practitioners, which was fined €75,935.00 in 2005 (this decision was subsequently upheld by the Lisbon Court for Commerce, which did, however, reduce the fine to €18,000.00; the Lisbon Appeal Court upheld this ruling in 2007);
- b) the Association of Dental Practitioners, which was fined €160,181.00 in 2005 (this decision was subsequently upheld in 2005 by the Lisbon Court for Commerce, which did, however, reduce the fine to €50,000.00; the Lisbon Appeal Court upheld this ruling in 2006);

c) the Association of Medical Practitioners, which was fined €250,000.00 in 2006 (this decision was subsequently upheld in 2007 by the Lisbon Court of Commerce, which did, however, reduce the fine to €230,000.00; the Lisbon Appeals Court upheld the decision, issuing its own ruling in 2007).

There had already been a decision by the previous Competition Council against the OTOC in 2000, for infringement of competition rules for the existence of binding fee tables, with a fine of €99,759.58 (the decision was subsequently confirmed by the Lisbon Court for Commerce, but with the fine reduced to €49,879.79; and then by the Lisbon Appeals Court, though with a further reduction of the fine, this time to €24,939.89).