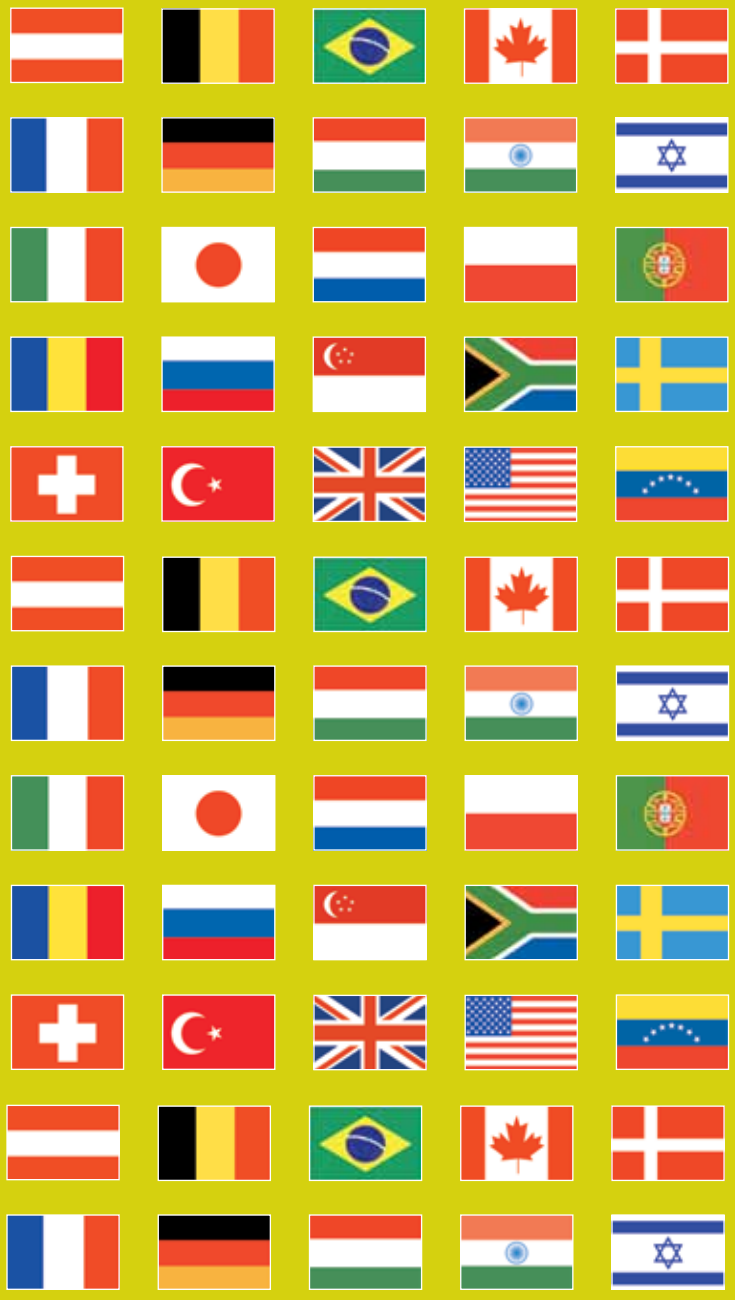
GETTING THE DEAL THROUGH

Life Sciences

in 25 jurisdictions worldwide

2012

Contributing editors: Alexander Ehlers and Cord Willhöft



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Portugal

César Sá Esteves and Ana Menéres

SRS Advogados

Organisation and financing of health care

1 How is health care in your jurisdiction organised?

The Portuguese Constitution establishes the right of all Portuguese citizens to benefit from public health care, which is provided through a health-care system that should cover the whole population and that should be universal. Citizens of other member states of the European Union may be entitled to public health care in accordance with the applicable EU rules. Foreign citizens that are resident in Portugal may also benefit from public health-care provision in the case of a reciprocal agreement with the foreign national's state.

The main principles and rules governing public health care and the structure of the health-care system are established in the 1990 Health Law (Law 48/90 of August 24).

The health-care providers in Portugal are the hospitals, health-care centres for outpatients and other entities included in the National Health-Care System (NHS). The NHS depends on and is financed by the Portuguese state and the public budget. Private entities and professionals may also render health care services to NHS patients pursuant to agreements with the entities representing the Health Ministry.

All the services and institutions of the NHS fall under the supervision of the Ministry of Health, which is ultimately responsible for the health-care sector, defining the government's national health-care policy.

Successive Portuguese governments have been organising and reorganising the NHS through the years, mainly since 2002, specifically regarding the nature and functioning of the hospitals integrated in the NHS and the creation and extinction of public bodies and entities.

In 2002, the rules were approved respecting the health public-private partnerships (Decree Law 185/2002, of 20 August) and the rules clarifying the legal framework applicable to each type of hospital integrated in the NHS (Law 27/2002 of 8 November).

The hospitals may have different legal forms. Some remain public hospitals, but the majority are now public corporate entities, which are public entities regulated by public law rules, but with a certain degree of autonomy with regards to their management. Some of these were formerly (until 2005) state-owned share companies governed by private law and with management autonomy. Various governments have been testing several legal and economic solutions for NHS hospitals to increase economic efficiency. The quality of health-care services and equipment, generally speaking, is not at stake, the main discussion points regarding the NHS have been the excessive cost for the public budget.

Presently, Portugal is divided into five health regions with health-care centres serving the outpatients of each region and approximately 57 public hospitals.

2 How is the health-care system financed in the outpatient and in-patient sectors?

The financing of the health-care system is also governed by the Constitution, which states that the right to benefit from public health care is ensured through a universal health-care system, taking into account the social and economic conditions of all citizens and usually with no costs to the patients. This is also mentioned in the Health Law Act but mitigated with the obligation of patients to pay for public health-care services in certain cases.

The NHS is financed by the state budget. Fees can be charged to certain outpatients, but they only represent a small part of the cost of the service. Patients with chronic diseases or in difficult economic situations, certain pensioners, and registered unemployed and others included in an exemption list, are exempt from the payment of these fees.

There has been some internal political discussions regarding fees for outpatients, and increases and the narrowing of the exemption list are expected in 2012.

Compliance – pharmaceutical manufacturers

3 Which legislation governs advertisement of medicinal products to the general public and health-care professionals?

The rules regarding advertising of medicinal products are contained in the Code of Medicinal Products approved by Decree-Law 176/2006 of 30 August (the Code of Medicinal Products), which came into force on 31 August 2006, and consolidates several pieces of legislation. This code also transposes EC Directive 2001/83/EC on the Community Code Relating to Medicinal Products for Human Use (as amended) into national law. The Advertising Code approved by Decree-Law 330/90 of 23 October (the Advertising Code) governs advertising in general, including the advertising of medicinal products in all aspects not specifically set out by the Code of Medicinal Products.

4 What are the main rules and principles applying to advertising aimed at health-care professionals?

The Code of Medicinal Products establishes that all advertising to health-care professionals must include the following:

- the name of the medicinal product;
- essential information compatible with the summary of the product characteristics (SPC);
- the supply classification of the medicinal product, namely if the supply depends on medical prescription; and
- if its cost is reimbursed by the state.

The advertisement to health professionals can consist in a mere reminder in which case it should be composed only of the name of the medicinal product.

Prescription-only medicines may only be advertised to health-care professionals. Furthermore, only the products that have a valid marketing authorisation or registration in Portugal may be advertised within Portuguese territory.

Infarmed is the national agency responsible for the manufacturing and marketing authorisation of medicinal products. All activities regarding the life cycle of the products are subject to its regulatory and supervising powers, including the advertising of medicinal products. Advertising to health-care professionals is subject to the rules contained in Infarmed's regulation (44/CD/2008), which states the cases where, taking into account the advertising medium, a reduced version of the essential information compatible with the SPC may be included.

5 What are the main rules and principles applying to advertising aimed at the general public?

Only medicinal products with a valid marketing authorisation or registration in Portugal that are classified as not subject to medical prescription can be advertised to the general public.

Furthermore, these medicinal products must not contain psychotropic or narcotic substances or benefit from state subsidy.

Pursuant to the Code of the Medicinal Products, vaccination campaigns or campaigns promoting generic medicines carried out by the industry and approved by Infarmed may be advertised to the general public.

The use of comparative messages in the advertisement to the general public and the direct supply of medicinal products to the general public is also forbidden.

Advertisements to the general public must contain the following information:

- the name of the medicine and INN or brand name;
- the essential information for the rational use of the product, including therapeutic and special precautions; and
- a warning to the patient to peruse the information in the outer packaging and in the package leaflet and to contact a doctor or a pharmaceutical if symptoms persist.

6 What are the most common infringements committed by manufacturers with regard to the advertisement rules?

The most common infringements committed by manufacturers regarding advertisement rules arise from the misinterpretation of advertising rules, namely regarding comparative advertising. Certain cases of counterfeiting products, which also involved mislabelling of medicinal products, have occurred. According to Infarmed's Activities Report of 2010, several initiatives have been taken against counterfeiting, specifically alerting the general public to the dangers of buying medicinal products online and outside the specialised and authorised places.

7 Under what circumstances is the provision of information regarding off-label use to health-care professionals allowed?

The inclusion of information regarding off-label use in an advertisement is not permitted, as advertisements to health professionals must contain the essential information compatible with the SPC. It is not forbidden, however, to provide information regarding off-label use in a scientific event organised for health-care professionals pursuant to the Code of Medicinal Products. Furthermore it is not forbidden to provide information regarding off-label use in answer to a specific question addressed by a health professional to the company holding the marketing authorisation in Portugal.

8 Which legislation governs the collaboration of the pharmaceutical industry with health-care professionals? Do different rules apply regarding physicians in the in-patient and outpatient sector?

The Code of Medicinal Products governs the collaboration of the pharmaceutical industry with health-care professionals (articles 157 to 162), regulating the activities of medical sales representatives, offers and grants, consulting services, advertising and transparency in scientific, training or promotional events for health professionals, hospitality costs and free samples.

The Code of Ethics regarding the promotional practices of the pharmaceutical industry in collaboration with the health-care professionals approved by the Portuguese Association of the Pharmaceutical Industry (Apifarma) regulates these matters in detail. There are no different rules for physicians in the in-patient and outpatient sectors.

9 What are the main rules and principles applying to the collaboration of the pharmaceutical industry with health-care professionals?

The holders of marketing authorisations of medicinal products, must create and maintain a scientific service responsible for the information and advertisement regarding all medicinal products.

The medical sales representatives must have adequate training and scientific knowledge in order to provide accurate and complete information regarding the medicinal products.

It is forbidden to provide or promise gifts, pecuniary advantages or benefits in kind to health professionals, unless they are inexpensive and relevant to the practice of medicine or pharmacy. In accordance with Apifarma's Code of Ethics, an object may be considered inexpensive if it does not exceed €25.

The sponsorship of events, seminars, congresses or any scientific or promotional event or action, directly or indirectly, by a manufacturer, holder of a marketing authorisation or distributor of medicinal products, must be mentioned in the documentation related to such events. Training or informative events or sales promotion may only be addressed to health professionals. There are hospitality rules limiting the number of days of the events and the selection of the location of the event.

Free samples are allowed within certain limits – 12 samples per product, per year to each health professional – and the health professionals must request the samples in writing, and each sample shall be no larger than the smallest presentation and accompanied by a copy of the SPC.

The Apifarma Code of Ethics regarding the promotional practices of the pharmaceutical industry in collaboration with the health-care professionals cover all these matters clarifying certain rules by providing further details and guidelines to the companies regarding the allowed practices.

10 What are the most common infringements committed by manufacturers with regard to collaboration with health-care professionals?

The most common infringements committed by manufacturers arise from misinterpretations of the rules applicable to promotional events and medical sales representatives visits.

11 What are the main rules and principles applying to the collaboration of the pharmaceutical industry with patient organisations?

The main principles applying to the collaboration of the pharmaceutical industry with patient organisations are found in Apifarma's Code of Ethics. This Code establishes guidelines stating that pharmaceutical companies that intend to render financial support directly or indirectly to patients' associations must enter into an agreement signed by both parties following a template that is attached to this Code of Ethics. Each company must establish an internal procedure

regarding the approval of these agreements.

The use by a pharmaceutical company of a logo or other material protected by copyright belonging to the patients' associations must be duly authorised. Furthermore, the companies should not influence the contents of the associations' materials, although they are allowed to proceed to material or scientific corrections. A patients' association may not be sponsored exclusively by one company.

Companies, according to this Code, may organise or sponsor events for patients' associations within adequate and reasonable limits as to hospitality costs.

12 Are manufacturers' infringements of competition law pursued by national authorities?

Manufacturers' infringements of competition law are pursued by the Competition Authority.

The Competition Law (Law 18/2003 of 11 June, recently amended by Law 46/2011 of 24 June, that will be amended again shortly) applies to anti-competitive acts or agreements and mergers occurring in national territory or having effects within the national territory.

13 Is follow-on private antitrust litigation against manufacturers possible?

Yes, the private antitrust litigation against manufacturers in case of infringement of the competition rules causing damage to third parties is possible.

Compliance – medical device manufacturers

14 Is the advertising of medical devices and the collaboration of manufacturers of medical devices with health-care professionals and patient organisations regulated as rigorously as advertising and collaboration in the pharmaceuticals sector?

Medical devices are regulated by Decree-Law 145/2009 of 17 June which establishes the rules regarding investigation, manufacturing, commercialisation, functioning, supervision and advertising of medical devices and respective accessories, transposing into national law Directive 2007/47/EC. The rules applicable to the advertising of medical devices are identical to the rules applicable to medicinal products. Apormed, the Portuguese Association of the companies manufacturing and marketing medical devices, approved its Good Commercial Practice Code with guidelines regarding the relations between the companies and the health-care professionals. The supervision of the compliance with these rules might not be as rigorous as in the pharmaceutical sector.

Pharmaceuticals regulation

15 Which legislation sets out the regulatory framework for granting marketing authorisations and placing medicines on the market?

The Code of the Medicinal Products provides the legislative framework for granting marketing authorisation, manufacturing authorisations and the import, export, marketing, labelling, information, advertising, pharmacovigilance and use of medicinal products for human use. This extensive Code transposes into Portuguese law six Directives of the European Union and regulates the entire life cycle of medicinal products in Portugal. There are two areas that are regulated in separate legal frameworks: clinical trials, and pricing and reimbursements.

16 Which authorities may grant marketing authorisation in your jurisdiction?

The sole entity with powers to grant marketing authorisations in Portugal is Infarmed, which is a public institute under the direct administration of the Portuguese state. Although Infarmed has administrative and financial autonomy, it follows the aims of the health minister and depends and acts under the minister's supervision.

17 What are the relevant procedures?

The procedures that must be followed to obtain a marketing authorisation in any member state of the European Union are regulated by:

- Regulation 726/2004 of 31 March 2004 regarding the centralised procedure that must be filed at the European Medicines Agency (EMA) for certain types of medicinal products; and
- EC Directive 2001/83/EC of 6 November 2001 regarding the national procedure, the mutual recognition procedure and the decentralised procedure.

The centralised procedure at EMA is mandatory for certain medicinal products, such as those developed by means of a biotechnological process, advanced therapy medicinal products, new active substances for which the therapeutic indication is the treatment of very serious diseases (HIV, neurodegenerative disorder, diabetes, auto-immune diseases and other immune dysfunctions and viral diseases) or orphan medicinal products.

The centralised procedure may also be followed, not on a mandatory basis, for active substances that constitute a significant therapeutic, scientific or technical innovation or that are in the interests of patients' health.

The three relevant procedures that may be filed at Infarmed to obtain a marketing authorisation are:

- the national procedure to obtain a national marketing authorisation;
- the mutual recognition procedure with the view of obtaining the recognition in Portugal of a marketing authorisation granted in another member state or vice versa; and
- the decentralised procedure, in which case the applicant files the procedure simultaneously in several agencies of several member states, one of which will act as a reference member state with the responsibility to prepare the assessment report on the medicinal product.

18 Will licences become invalid if medicinal products are not marketed within a certain time? Are there any exceptions?

Yes, a marketing authorisation will elapse and cease to be valid if the medicinal product has not been effectively marketed on the Portuguese market for a continuous period of three years. The holder of the marketing authorisation must notify Infarmed of the date of the commencement of the effective marketing of the medicinal product.

19 Which medicines may be marketed without authorisation?

In principle medicinal products marketed in Portugal must all have a marketing authorisation. There are exceptional cases where Infarmed may grant special use authorisation or exceptional authorisation as mentioned under question 20.

Homoeopathic medicinal products may be marketed without an authorisation. These products are subject to a simplified registration if the products do not have specific therapeutic indications placed on the label or on any product information. Furthermore, to qualify for simplified registration these products must have a certain pharmaceutical form (oral or external), thereby not representing risks to the patients.

20 Are any kinds of named patient programmes in place? If so, what are the requirements for pre-launch access?

Named patient programmes are specifically regulated by the Code of Medicinal Products. In exceptional cases Infarmed may grant special-

use authorisation or exceptional authorisation to medicinal products that are not authorised by the common procedures.

Special-use authorisations may be granted in certain cases listed in the law, such as where:

- there are medical justifications where the medicinal product is absolutely essential for certain pathologies;
- the medicinal product is required to combat the spread of harmful agents; or
- the products are purchased by hospital pharmacies for named patients.

Exceptional authorisations are granted strictly for public health reasons.

Pricing and reimbursement of medicinal products

21 To what extent is the market price of a medicinal product governed by law or regulation?

The market prices of medicinal products are regulated by law. The prices of medicinal products not subject to medical prescription and not reimbursed by the NHS may be freely fixed by intermediary agents in the sales circuit. The prices of medicinal products subject to medical prescription and the products reimbursed by the NHS must comply with very strict rules regarding the calculation of the maximum price for sale to the public (outpatients). These rules are based on a reference system, pursuant to which the prices must not exceed the average wholesale price for the same product in Spain, Italy and Slovenia and are subject to annual price reviews.

The prices of these products must be approved by the General Directorate for Economic Activities (DGAE). These powers should shortly be transferred to Infarmed.

The prices of the medicinal products that are subject to restricted medical prescription for hospital use must pass an evaluation test based on Infarmed's technical, scientific and economic criteria. In case of a favourable evaluation, Infarmed will approve the maximum price for sale to the hospitals of the NHS.

22 Must pharmaceutical manufacturers negotiate the prices of their products with the public health-care providers?

Regarding the relation with public-careproviders, two stages must be distinguished. In a first stage the suppliers of the NHS are selected through centralised public tenders, where the manufacturers or holders of the marketing authorisation bid with their maximum price applicable to all NHS hospital and services, pursuant to the rules of the Code of Public Contracts (approved by the Decree-Law 18/2008 of 29 January). The NHS enters into public supply agreements with the selected suppliers.

In a second stage, regulated by the same Code, there is an invitation addressed by each hospital to suppliers to propose better conditions and win the hospital's contracts, which may involve a negotiation phase.

23 In which circumstances will the national health insurance system reimburse the cost of medicines?

The NHS reimburses the cost of certain medicinal products, provided that the following cumulative requirements are met (pursuant to Decree-Law 48-A/2010 of 13 May):

- there is technical and scientific evidence of the added value in therapeutic terms or of the therapeutic equivalence for the therapeutic indications of the products; and
- there is evidence of the economic benefit.

Furthermore, the NHS reimbursement may also depend on the product filling a therapeutic gap in the market, the product having new active ingredients or the product having a similar composition to other marketed and reimbursed medicinal products but having a price 5 per cent lower when compared with the branded equivalent. Reimbursement will also also arise in several other cases, basically following the added therapeutic value or economical added value criteria, or both.

The reimbursement follows a regressive scale of 100 per cent in certain cases for medicinal products subject to medical restricted use (in-patients) or in case of certain serious pathologies (in-patients and outpatients) and it can range from 90 per cent to 15 per cent in other cases (outpatients). Medicines for compassionate use must be provided for free by the manufacturer to the subject of clinical trials even after the trial is completed, if the physician considers that it is essential and there are no therapeutic alternatives.

24 If applicable, what is the competent body for decisions regarding the pricing and reimbursability of medicinal products?

The competent body for decisions regarding the pricing of medicinal products subject to medical prescription or reimbursed by the NHS, is the DGAE, according to the legal framework for pricing established in Decree-Law 65/2007 of 14 March. The reimbursability of medicinal products is decided by Infarmed (Decree-Law 48-A/2010 of 13 May).

Infarmed is competent to authorise the maximum prices for sale to the NHS hospitals of medicinal products for restricted hospital use (Decree-Law 195/2006 of 3 October). The aforementioned legal provisions have suffered several amendments to their original version.

25 Are manufacturers or distributors of medicinal products statutorily obliged to give a discount?

Discounts (reducing the maximum fixed prices) are allowed in the whole medicinal product circuit, by the manufacturer, distributors and retailers, but they are not mandatory. The law sets the maximum marketing margins, calculated as a percentage of the price to the public, that are granted to wholesalers and retailers, but these margins are commercial and do not have the nature of a discount.

Medicine quality and access to information

26 What rules are in place to counter the counterfeiting and illegal distribution of medicines?

The counterfeiting and illegal distribution of medicinal products in Portugal is not specifically provided for; general legal provisions penalise these illicit activities. The Criminal Code foresees that counterfeiting activities of medicines and food is classified as a crime punishable by up to five years' imprisonment. However, the application of this legal provision requires that evidence of a threat to life or a serious physical threat to individual health be produced. These requirements have been an obstacle to the pharmaceutical companies seeking to combat counterfeiting.

The Industrial Property Code also states that counterfeiting activities of any product protected by proprietary rights are sanctioned with a fine or up to three years' imprisonment.

Most recently, the European Directive 2011/62/EU of 8 June 2011 (amending Directive 2011/83/EC) introduced changes as regards the prevention of the entry into the legal supply chain of falsified medicinal products. This Directive has not yet been transposed into national law (due in January 2013).

Update and trends

Changes aiming to reduce public spending and create incentives on the selling of less costly pharmaceutical products, implementing measures included in the government's programme, and commitments laid down in the memorandum of understanding entered into with the European Commission, the European Central Bank and the International Monetary Fund are forthcoming.

Parliament approved Law No. 62/2011 of 12 December 2011, establishing a mechanism of dispute settlement that issues, in a faster way, a decision related to the violation of intellectual property rights, resorting to arbitration. Arbitration is compulsory when a generic medicinal product company requires a marketing authorisation from Infarmed, a price approval or reimbursement of the medicine from the state. The legislative proposal also establishes the reduction of the price of generic medicines to 50 per cent of the selling price of the reference medicine.

Another recently approved decree-law No. 12/2011 of 29 November 2011 reviews pharmaceutical pricing, through the adoption of a new methodology of selling prices of reimbursed medicinal products subject to medical prescription. The reference countries are Spain, Italy and Slovenia and the commercial margins to wholesalers and retailers will be regressive depending on the price.

Finally, a legislative proposal (No. 92/2011 of 10 October 2011) soon to be approved by Parliament states that the prescription of medicinal products by international non-proprietary name (INN) is mandatory for the purpose of promoting the prescription and consumption of generics.

27 What recent measures have been taken to facilitate the general public's access to information about prescription-only medicines?

Parliament recently approved Law No. 5/2012 of 23 January 2012, which envisages a nationwide registration of health data, defining the conditions of treatment of personal data that are health-related, creating a nationwide data registration system and resorting to information technologies, within the NHS.

This law applies to all health entities and other legal persons capable of handling the treatment of information and will facilitate the access to all the health data and the prevention of fraud in the management of and payment for the health-care services, therefore guaranteeing transparency.

Electronic prescription for medicinal products and diagnostic means covered by public reimbursement has been mandatory for physicians in the public and private sector since August 2011.

28 Outline major developments to the regime relating to safety monitoring of medicines.

All developments regarding the safety monitoring and, specifically, the pharmacovigilance of medicinal products that are placed on the Portuguese market, including those that are sent by EMA, are published on a daily basis on the Infarmed website.

The legal framework has suffered no major developments in this respect. Pharmacovigilance is regulated in the Code of the Medicinal Products, which regulates the National System of Pharmacovigilance transposing the rules in EC Directive 2001/83/EC. Infarmed in its Activities Report for 2010 mentions the results of certain initiatives concerning pharmacovigilance, such as the supervision of thousands of health products in the context of campaigns, the organisation of training sessions in hospital units regarding the verification of conformity, medical investigation and vigilance of medical devices, among other initiatives.

FOCUS MATTERS.

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