

The Portuguese Competition Authority forbids abusive behaviour and imposes commitments in agricultural market (Sugalidal-Heinz)

Portugal, Unilateral practices, Tying, Abuse of dominant position, Commitments, Private enforcement, Food products

Last October 15th, the Portuguese Competition Authority (Autoridade da Concorrência, hereinafter "PCA") decided that Sugalidal abused its dominant position in the market for seeds by imposing farmers to acquire and plant only Heinz seeds.

According to the Press Release 20/2009, the cPCA decided to "discontinue" the procedure, given the commitments offered and accepted by the dominant tomato concentrate producer Sugalidal.

The facts were clearly made public: Sugalidal imposed to the tomato-growers an obligation to acquire and plant only Heinz seeds, practice that allowed Sugalidal to maintain a superdominance in the tomato seeds markets due to the dominant position it was considered to hold in the first transformation market.

It is useful to recall that the Sugalidal Group, a major economic group, operates in all the relevant tomato markets, from the seeds to the final products. However, the abusive practices recognised by the PCA occurred in the markets for the sale of tomato seeds for industrial use, through Heinz exclusive distributor Cifo (1) and purchasing markets of fresh tomatoes for primary industrial processing.

The PCA concluded that the "tied sales practice" constituted an abuse of dominant position under article 6 (1) of Law 18/2003 [1]: "through the processing contracts signed with the grower's and grower's organisations, Sugalidal - which is dominant in the market for the tying product, i.e. the market for the primary processing of tomatoes - made the acquisition of fresh tomatoes (the tying product) conditional on the use of Heinz seeds in their production (the tied product)", where is publicly known that Sugalidal has been holding for several years now a market share of over 90% of the relevant market.

The PCA expressly stated that its reasoning and decision followed the *Michelin v. Commission* case law (case 322/81) and the recent Commission's Guidance Paper (*Guidance Paper on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, available in the OJ, C 45, of 24.2.2009).

Besides from imposing Sugalidal to cease the practice, altering the contracts, Sugalidal also accepted the commitment of sending "a circular to the Grower's Organisations, informing them of the elimination of the contract clause on the preference for tomatoes of a Heinz seeds' variety".

It is worth noting some particular aspects of the procedure followed by the PCA. First, that the decision was not notified in its full extent to the complainant, which found out about the commitments in the PCA press release. Second, that the Portuguese Competition Law does not contain any specific provision allowing the PCA to close a procedure whenever it finds that the law was breached, as it in fact did in the present case. Third, that this type of decision resembles, as far as private competition litigation is concerned, the "Trojan Horse" that Valentine Korah classic manual referred to in the nineties and under the former centralised procedure of Regulation 17/62 (at the time, however, at stake were the comfort letters sent by the Commission to the companies stating that the restrictive practice could benefit from a exemption that,

however, the Commission decided not to approve, for lack of community interest). In fact, the complainants and any third party affected by the Sugaldal practice may find a case for an action for civil liability against Sugaldal.

Finally two notes. First, to say that the PCA understood the need and ensured, during the procedure, the total confidentiality of the complainant's identity. Second, being the procedure closed, we feel obliged to inform that Sérvulo & Associados acted on behalf of the complainant during the procedure.

NB On this case, see also Miguel Mendes Pereira and Nuno Carolo dos Santos, *The Portuguese Competition Authority dismisses tying charges following commitments (Heinz tomato seeds - Sugaldal)*, e-Competitions, n° 29130

[1] Portuguese Competition Law.

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