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PORTUGUESE COMPETITION AUTHORITY CLOSES PROCEEDINGS BUT ORDERS SUGALIDAL TO CEASE ABUSIVE PRACTICES AND TO ADOPT A TRANSPARENT BEHAVIOR

Competition Law has specific dynamics which sometimes transcend the law itself. Portugal is able to provide some good examples of this.

Law 18/2003 (Competition Act, CA) does not explicitly allow the closing of procedures when the Portuguese Competition Authority (PCA) has identified the presence of a restrictive practice, e.g. an anti-competitive agreement (Art. 4 CA) or an abuse of a dominant position (Art. 6 CA). However, this hasn't stopped the PCA, in varying circumstances, from closing proceedings even when it concludes that there were anti-competitive practices prohibited by the Competition Act.

Although precise details are not publicly available, this has happened, it is assumed, in previous proceedings relating to **agreements or concerted practices** (Unicer, case 1/03, on 28.12.2004; *Bayer Crop Science*, case 10/06, on 28.6.2007; or Nestlé, Delta *et al.*, on 6.7.2008), to **abuses of economic dependency** (Unibetão, Secil *et al.*, case 1/06, on 1.3.2007) and, more recently, to **abuses of a dominant position** (Sugalidal, case 8/08, on 15.10.2009, see http://www.concorrencia.pt/download/pressrelease2009_20.pdf).

The most recent example is impressive. The PCA announced that it was dropping the case, even though it *"concluded that there was an abuse of a dominant position, through a tied sales practice (in this case, purchases)*: (...) *SUGALIDAL* (...) *made the acquisition of fresh tomatoes (the tying product) conditional on the use of Heinz seeds in their production (the tied product).* (...) *Thus, the practice described corresponds to the concept of tied selling, which presupposes that consumers are obliged to accept, directly or indirectly, «additional services»"*.

Furthermore, and in accordance with the PCA's press release, the proceedings were closed on the basis that *"SUGALIDAL submitted and assumed the following commitments: (i) Withdrawal of the contract clause stipulating the preference for tomatoes of a Heinz seeds' variety; (ii) (...); (iii) Mailing of a circular (...) informing (...) of the withdrawal of the contract clause stipulating the preference for tomatoes of a Heinz seeds' variety. In the light of these commitments, the Competition Authority has decided to drop the case"*. Such commitments would be perceived as being beneficial for market competitiveness and as meeting the concerns raised by the complainant, including, specifically, that, as under Reg. 1/2003, *"the decision not to proceed does not bind the Authority in the event of an alteration to the information and/or assumptions on which it is based; in such a case, an inquiry may be opened to examine the alterations"*.

This decision raises several interesting issues:

(1) It is clear that the PCA considers that it can bring proceedings to a close, even when it finds that there has been a violation of the Competition Act, through a flexible interpretation of article 28(1)(a) CA. Undoubtedly, the PCA can impose "behavioral remedies", but it can be argued that, given the specificities of Portuguese law, this is possible only in cases where it *"declares that a practice restricting competition exists"* (article 28(1)(b) CA – and was this not the case at hand?) or when it applies EU law (article 5 of Reg. 1/2003). Yet, the PCA decided to drop the case and stated it was not applying EU law. Shouldn't it have done so?

(2) It facilitates private liability claims against the defendant for damages inflicted on competitors, clients and suppliers, as a result of the abusive practice.

To conclude, two final considerations, showing that the PCA's different scopes of intervention will inevitably become entangled. In our view, the 2007 mergers in which this group was implicated (cases 23/2007 and 75/2007) show:

(1) That a merger control system based on market share is essential to prevent the creation of 1st grade (economically more relevant) and 2nd grade markets (simply because of smaller turnovers);

(2) There needs to be a greater level of rigor in the analysis carried out by the PCA and the companies (including their consultants). Indeed, the merger approval decisions of 2007, especially in case 23/2007, show *clear evidence* (quoting a known author) of being based on *"information which is* [at least] (...) *inaccurate as regards the essential*

circumstances underlying the decision and as supplied by the participants in the merger". This would probably justify the opening of own initiative proceedings under article 40(1)(b) CA.

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