

The Portuguese Competition Authority insists on adopting a new decision about a price cartel case in which its previous ruling was annulled by Courts (Cerealis - Milling cartel)

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In the beginning of July the Portuguese Competition Authority (hereinafter, 'ADC') has adopted a decision imposing significant fines to a group of eleven undertakings active in the market of bread making and milling (this being a very sensitive market since its functioning determines the price of bread which still corresponds to one of the most essential goods to an extensive group of consumers and of accrued importance in periods of economic crisis).

The feature which makes this decision particularly noteworthy is not in itself the decision to determine the existence of an infraction to national competition rules and of imposing the corresponding fines, but the fact that the ADC has adopted it after a Court decision that had annulled a previous decision concerning the same undertakings (on the basis of the same alleged infractions that the ADC has now taken into consideration once again).

In fact, the ADC had adopted a previous infraction decision in 2005, concerning those eleven undertakings, which the Lisbon Commercial Court declared void in February 2008 (on the basis of alleged procedural irregularities underlying the 2005 ADC decision).

This position of the ADC follows a string of cases in which Portuguese Courts - particularly the Lisbon Commercial Court - overruled decisions adopted by this Authority, raising an issue of legal consistency of its practice of application of national and EC competition rules (although, conversely, it should be recognised that the ADC has known important successes in which the Lisbon Appeal Court confirmed, through definitive decisions, major cartel decisions of the Authority, as it happened, e.g., in the so called salt cartel case in the last quarter of 2007 [1]). It is clear both from the contents and the context of adoption of the aforementioned July 2009 decision that the ADC has meant to send a clear message of insisting in the merits of the cases which it considers to represent clear substantive offences to competition law, notwithstanding possible procedural problems underlying those cases.

This also emphasizes the fact that Portuguese law concerning administrative offences ('contra-ordenações'), which has been tailored on the basis of penal law principles and legal categories, is perhaps too dependent on formal and procedural guarantees of defence (which may create serious obstacles to a vigorous enforcement of the national competition rules, at least as the application of fines for committing administrative offences are concerned).

In this particular case, and after being notified of the February 2008 decision of the Lisbon Commercial Court, the ADC decided to take up the case again in order to reinforce the procedural basis and soundness of its legal assessment of the practices carried out by the milling undertakings. In the course of this new procedure the ADC, on the whole, did not identify new facts or practices by the infringing undertakings and it largely focused again its attention and its assessment in the very same facts concerning the period comprehended between 2000 and 2004 that had been covered in the previous investigation and in the corresponding 2005 decision (the difference here lying basically in the procedural

patterns and steps followed by the ADC in the course of the new procedure).

Accordingly, at stake in this new July 2009 decision were essentially the same facts occurred between 2000 and 2004, whereby the eleven milling undertakings developed practices of applying uniform and concerted increases in the price of flour (concerning the value of the price increases, the dates on which the clients were informed of the new price lists and the timing of the coming into force of those prices).

Such facts were discovered by the ADC in the course of its permanent monitoring of the markets at stake, initiated in January 2004, scrutinizing the market under a twofold perspective: upstream market scrutiny covering the milling industry and downstream market scrutiny covering the bread-making industry. Through the inquiry initiated in January 2004 and on the basis of several investigation actions - including searches to the premises of nine of the undertakings at stake - the ADC was able to verify that the price rises which had triggered the whole inquiry (the retail prices charged by the bakeries to the final consumers) actually reflected the selling prices of wheat flour charged in the upstream market by the flour milling companies.

The investigation carried out by the ADC actually produced evidence of strong price parallelism in the markets at stake and of an organised practice of price collusion developed by the milling undertakings, the stability, organisational level and results of which allowed for its qualification as a price cartel (carried out by the milling companies). Such practice amounted therefore to a clear breach of article 4(1) of the Portuguese Competition Act (CA) of 2003, a rule which corresponds to article 81(1) of the EC Treaty.

Furthermore, and beside the fact that price cartels represent one of the most serious offences to competition rules, threatening the most fundamental basis and values of the competition process, the ADC found no redeeming factors that could be taken into consideration under article 5 of the CA (a rule which largely corresponds to article 81(3) of the EC Treaty providing for the possible exemption of infractions to the general rule on anticompetitive cooperation between undertakings). In fact no relevant efficiency elements were identified in the case and, on the contrary, the interests of final consumers were seriously affected by the cartel actions.

The seriousness and actual impact of the offence to competition law were also magnified on account of the oligopolistic structure of the markets at stake in Portugal and of the fact that the undertakings involved in the cartel price controlled a major market share of such markets.

This market structure makes this sector prone to the multiple practices of competition law infringements which somehow justify the particular concerns of the ADC. In fact, in another recent decision (of December 2008), the ADC determined that the Lisbon Bread makers Association had infringed article 4 of the CA through a decision by an association of undertakings with the object of preventing, restricting or distorting competition (in that case by means of an exchange of information on prices).

It remains to be seen if the July 2009 decision represents the definitive evaluation of the price cartel of the milling and bread-making companies and, above all, it remains to be seen if the ADC will adopt the same position in similar cases (in which its previous infringement decisions may have been overruled by the Courts on the basis of chiefly procedural issues but with the ADC standing by the substantive merits of the cases).

Up to now, it may be considered that the ADC is sending mixed signals as regards its purposefulness to develop an aggressive scrutiny of price fixing cooperation agreements. Very recently - in April 2009 - the ADC closed eight investigations initiated in 2004 for alleged anticompetitive practices of oil companies operating in Portugal, due to lack of sufficient evidence of breach of competition rules (despite the alleged retail price parallelism). Conversely, this may represent an accrued awareness on the part of the ADC of higher standards of proof required to sustain the test

of judicial scrutiny of its decisions. The next couple months should provide further clarification in this field.

[1] On this case, see our Case Law Comment, Luís D. S. Morais, The Lisbon Appeal Court confirms a major NCA's cartel decision paving the way for a robust practice of control of anticompetitive agreements in Portugal ('Salt Cartel' - Salexpor, Salmex, Vitasal), e-Competitions, n° 15173.

Luís D. S. Morais | Paz Ferreira (Lisbon) | luis.morais.adv@netcabo.pt

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