

# Margin squeeze win for Competition Authority reversed almost entirely on appeal

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In a significant defeat for the Competition Authority, the Lisbon Court of Appeal<sup>(1)</sup> partially reversed a first-instance judgment and repealed the main fine imposed in a margin squeeze case which involved pharmacies' sales data for prescription medication and consumer health products, and the sale of market studies based on such data.

## Facts

After an investigation initiated in September 2009 following complaints from IMS Health and Apifarma, the Portuguese pharmaceutical industry association,<sup>(2)</sup> the Competition Authority issued a December 22 2015 decision fining the National Pharmacies' Association (ANF) and three of its subsidiaries for abuse of dominance in the form of margin squeeze. The defendants were held to have foreclosed access to marketing data from a number of pharmacies by:

- ceasing to provide such data to the complainant, IMS; and
- incorporating a subsidiary – Health Market Research (HMR) – to process the data and sell market studies equivalent to those previously published by IMS.

The Competition Authority imposed fines on ANF, the association controlling the ANF Group, and the following subsidiaries:

- Farminveste SGPS, a holding company incorporated in September 2010 and directly controlled by ANF, with a 90.26% shareholding;
- Farminveste IPG, wholly owned by Farminveste SGPS and directly held by ANF before September 2010; and
- HMR, incorporated in June 2009 and wholly owned by Farminveste IPG.

The heaviest fine of €9.08 million was imposed on Farminveste SGPS. On appeal, the Competition, Regulation and Supervision Court reduced this to €6.082 million. The Lisbon Court of Appeal has now annulled the fine entirely. The smaller fines imposed on ANF, Farminveste IPG and HMR were reduced by approximately 35% as a result of the initial appeal. These have been upheld.

Since 1987 IMS had acquired from ANF commercial data on purchases and sales by individual pharmacies and had entered into successive contracts for that purpose. On December 18 2008 both parties entered into a contract (effective from January 1 2009), under which IMS would pay Farminveste IPG a €255 monthly fee for each pharmacy providing sales data, as well as compensation for an alleged revenue shortfall under a prior contract. IMS claimed that the new contract was signed by an unauthorised corporate officer and, in turn, ANF suspended its services by ceasing to provide data to IMS, alleging non-payment of compensation invoices.

Using software provided by ANF to its associated pharmacies, Farminveste IPG continued to collect extensive commercial data automatically from more than 80% of pharmacies in Portugal. Each

pharmacy's sales data was then sold at €255 per month (a price deemed excessive by the Competition Authority) to the recently incorporated HMR, which used the data to produce market studies formerly published by IMS. HMR allegedly sold these studies between 2010 and 2013 at below-cost prices resulting in negative retail margins.

During the infringement period, IMS was unable to obtain alternative access to a sufficiently wide sample of pharmacies and, therefore, ceased to publish most of its market studies. As a result, its market share dropped from 90% to 100% in 2007 to 0% to 5% in 2013, having been essentially transferred to HMR.

## Decision

On appeal, the main point reviewed was the grounds on which the Competition Authority held Farminveste SGPS liable for the margin squeeze. Although the abusive conduct – upstream and downstream – was enacted by two subsidiaries that were lower in the shareholding structure (ie, Farminveste IPG and HMR), and although ANF had ultimate control over the ANF Group, Farminveste SGPS was fined for failing to act to put an end to the infringement. The Competition Authority argued that as an intermediate holding company, Farminveste SGPS was guilty of omission by failing to observe a duty of control and vigilance, in particular considering that its board of directors had the same composition as those of its two subsidiaries and that they shared the same premises.

The Lisbon Court of Appeal soundly rejected this reasoning and held that the omissions in question were insufficient for Farminveste SGPS to be held liable as a perpetrator for the following reasons:

- Farminveste SGPS could not have acted to cease the abusive conduct of its subsidiaries given that they were under ANF's ultimate control.
- Farminveste SGPS's inertia was not an adequate cause of the infringement as the margin squeeze did not constitute a typical result of a parent company's failure to intervene in the affairs of a subsidiary; in fact, the margin squeeze had been in place since January 2009, almost two years before Farminveste SGPS was incorporated in September 2010.
- Under corporate law, a parent company – although entitled to do so – has no legal duty to issue instructions to a subsidiary and therefore cannot be considered bound by a duty of vigilance to prevent unlawful acts carried out by the subsidiary.

## Comment

Although the judgment also covered issues relating to whether the facts of the case could technically qualify as a margin squeeze, the main takeaway was that it re-emphasised the autonomy, for antitrust liability purposes, of separate legal parties in the same economic group. Faced with the question of whether an intermediate holding company's failure to intervene to prevent or end abusive conduct by a subsidiary is sufficient for it to be liable by omission, the court clearly answered no, thereby limiting the scope for further fines in similar circumstances.

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## Endnotes

(1) Case 36/16.OYUSTR.L1 (Third Chamber judgment, June 14 2017).

(2) Case PRC-2009/13.