

Competition - Portugal

Court upholds controversial fine for information-sharing agreement

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Summary

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In December 2008 the Competition Authority fined the Association of Bakers of Lisbon €1.177 million for an alleged restrictive practice consisting of an agreement to share information on retail prices for bread. On June 25 2010 the Lisbon Court of Commerce confirmed the decision and dismissed the association's appeal.

The authority penalised the trade association for its implementation of a system for exchanging pricing information between its members. This information sharing allegedly resulted in the distortion, prevention and restriction of competition in the consumer market for bread between 2002 and 2005. The association asked its members to submit their price lists and any subsequent pricing changes. These requests were usually accompanied by a brief justification, such as "the association intends to control market prices", "the aim is to analyse market prices" or "the purpose is to give sectoral orientation to the country's various geographical areas".

Court of Commerce decision

Evoking EU case law,⁽¹⁾ the court considered that up-to-date individual price lists are commercially sensitive information; therefore, their exchange is likely to infringe competition rules, as it normally enables competing companies to predict each other's future price behaviour.

The court rejected the parties' arguments that such practices were for internal use and for the compilation of statistics, as it found insufficient evidence to support such claims. On the contrary, the court concluded that the association collected and shared information with the sole purpose of controlling the movement of prices, as referred to in the communications' justifications. The court also established that within the companies which regularly replied to such communications, in particular those represented on the association's statutory bodies, the exchange of confidential information coincided with the alignment and coordination of the companies' pricing behaviour.

It was found that the individual exchange of information constituted an agreement which restricted competition by object, as prohibited by Article 4 of the Competition Act (in terms similar to those of Article 101 of the Treaty on the Functioning of the European Union). Therefore, a full review of the context in which the exchange of information took place and of its effects on the actual prices charged was not required. The court stated that:

"even if those effects [on prices] had not taken place, the nature of the information in this case and the method used to collect it revealed in itself a system of exchange of commercially sensitive information which violated competition law."

As a result, the court confirmed the fine. The amount took into account the aggregate turnover (ie, €17.6 million) of the 14 members of the association that allegedly took part in the restrictive behaviour. The act provides that in cases involving associations of undertakings, the fine for anti-competitive behaviour may not exceed 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour.⁽²⁾ Undertakings which are part of an association of undertakings that is subject to a fine are jointly and severally liable for payment.⁽³⁾

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Comment

In this case, it was the information exchange system as a whole that was considered anti-competitive, rather than the possible existence of a cartel.

In terms of economic analysis, the court confirmed the authority's view that the association's members which chose to reply to the communications had similar prices, since "the average price in the period under analysis (ie, 2002 to 2005), excluding the outliers, ranged from €0.09 to €0.11, and in each year the annual increase was approximately 11%". However, in the absence of additional evidence, it is hardly convincing to state that price differences of around 20% (ie, from €0.09 to €0.11) between members correspond to analogous prices and parallel behaviour in the relevant market.

The identification of the offending parties that had participated in the anti-competitive behaviour was crucial, as it influenced:

- the calculation of the relevant turnover;
- the size of the fine; and
- the nature of liability (as the offending parties were jointly and severally liable for payment of the fine).

It is strongly arguable that without additional evidence, it is incorrect to presume that members of an association are involved in prohibited behaviour merely because they are represented on the association's statutory bodies.

Moreover, the fine imposed by the authority and upheld by the court seems disproportionate, as it failed to take account of the fact that:

- the focus was not on establishing a hardcore cartel, but on uncovering the illicit exchange of sensitive and confidential information on prices;
- with limited exceptions, most of the information in question related to current prices, not future prices; and
- the association represented only 200 bakeries (out of a total of 7,000).

The court's decision may be appealed to the competent appellate court, which is the court of final appeal (except in the event of an appeal to the Constitutional Court). If appealed, the ruling will be suspended.

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Endnotes

(1) See the Court of First Instance ruling in *John Deere Ltd v European Commission*, Case T-35/92, October 27 1994.

(2) Article 43(2).

(3) Article 47(4).

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