

The portuguese competition authority sanctions supplier's prohibition of retailers applying discounts to recommended retail sales prices (Royal Canin Portugal)

Portugal, Anticompetitive practices, Refusal to supply, Price fixing, Anticompetitive object/effect, Distribution/Retail

Portuguese Competition Authority, Royal Canin Portugal, n° PRC 2008/09, 4 February 2010

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I. Background

The Portuguese Competition Authority (PCA) decision in case PRC 2008/09, was triggered by an anonymous retailer antitrust complaint (imperceptibly signed and without sender) lodged against Royal Canin Portugal, S.A. (*Royal Canin*). The complaint argued that supplier Royal Canin did not allow retailers to apply discounts to its recommended retail sale list prices regarding pet food.

II. The conducts adopted by the supplier before retailers

Per PCA's decision of 4 February 2010, Royal Canin, active in pet food supply, notably for cats and dogs, in its General Sale Conditions applied to retailers in 2006, 2007 and 2008 (until October), included a clause pursuant to which "the recommended retail sales prices are identified, equally, in [price] lists and include VAT, and **discounts are not allowed**" (our bold). In accordance with the PCA findings, this clause, that impeded retailers to apply discounts to recommended retail sale prices before end consumers, also led Royal Canin to terminate supply agreements with retailers due to their non compliance with the company's recommended retail sale prices.

III. The PCA's legal reasoning

The PCA defined the relevant market as "the product market of pet food, at the retail level." with a national geographic dimension, the latter anchored in the Commission's merger practice in case M.2544, *Masterfoods - Royal Canin*, where it is acknowledged "*the purchasing pattern even of internationally active retailers is still predominantly national, and that significant price differences and market structures exist between Member States.*"

The competition authority for the purpose of determining the existence of a vertical agreement caught by the national provision equivalent to Article 101 TFEU, deemed that a vertical agreement is not subject to any specific requirements. Hence, the fact that the prohibition of a retailer offering discounts is found in the unilateral supplier imposed General Sale Conditions, does not impede the PCA to consider that such agreement was concluded and performed between the supplier and respective resellers. In this setting the PCA underlines that the prohibition to offer discounts is not a conduct that can be enforced solely and exclusively by the supplier, as it requires the consent of resellers, who *in casu* manifested their consent by continuing to acquire Royal Canin's products and cumulatively refrained from offering discounts to recommended retail sales prices in accordance with the supplier's instructions (or in some cases providing *hidden* discounts, without the supplier's knowledge).

The illegal vertical conduct, per PCA's reasoning, was not limited to the mere existence of a prohibition to apply discounts on Royal Canin's products, but also to the *de facto* termination of supply agreements in cases where a given retailer granted discounts to recommended retail sale prices. Such conclusion was drawn by the PCA based on the elements gathered during the inquiry, notably documental evidence regarding retailers to whom Royal Canin stopped supplying its products due to non-observance of recommended retail sale prices.

Further, the PCA considered that a supplier banning a retailer from offering discounts on recommended retail sale prices, consubstantiating a minimum retail sale price policy, configured a very serious restriction of competition per *object*. In this setting the PCA concluded in its decision of 4 February 2010 that Royal Canin breached the national Competition Act provision equivalent to Article 101 TFEU. The PCA applied fine amounted to 218.000 Euros.

IV. Comment

This case highlights that supplier's General Conditions of Sales to retailers containing a prohibition to grant discounts on recommended retail sales prices are not admissible under the PCA's antitrust standards. Furthermore, companies should not reason the termination of supply agreement based on the non observance of recommended retail sale prices by clients, since such actions, if led to the knowledge of the PCA, may lead to the opening of an antitrust inquiry and to the application of a considerable fine.

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