

## Competition - Portugal

### Catering Cartel: First Application of Leniency Statute and Managers' Liability Rule

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On December 30 2009 the Competition Authority imposed fines totalling €14.7 million on five companies for allegedly operating a price-fixing cartel in the market for the operation and management of catering services at canteens, refectories and corporate restaurants. The companies involved - Trivalor, Eurest, Uniself, ICA/Nordigal and Sodexo - are the largest sector operators in Portugal. Their individual fines ranged from €6.8 million to €357,000.

This is both the first case in which the 2006 Leniency Statute has been applied and the first time that board members and managers have been fined in addition to their infringing companies.

#### Facts

According to the information available, the companies entered into an agreement to fix prices for bids in open competitions or invitations to tender, implementing a "system guaranteeing that each undertaking would retain its customers". The companies agreed to grant the incumbent contract holder the right of first refusal in order to divide the market among themselves. The authority found that the agreement, which was nationwide and lasted from 1998 to 2007, included compensation payments to each company not awarded a contract. It also enabled the incumbent to trigger a new tendering procedure if it was dissatisfied with the price offered by the client, knowing that its competitors would collaborate by presenting higher-priced proposals.

The authority also condemned the defendants for carrying out a prohibited exchange of sensitive information, which resulted in an appreciable restriction of competition in the market. This infraction was not punished separately, but was combined with the agreement in a single offence. However, the authority considered the exchange of information to be particularly serious, as it amounted to a cooperation mechanism which replaced the normal uncertainty of market conditions.

#### First Application of Leniency Statute

In at least one previous case the authority has rewarded companies with significantly reduced fines under the general procedural rules for their cooperation in providing relevant evidence. However, this is the first known case initiated by a leniency application under the leniency statute. It is also the first time that full immunity has been granted to an individual applicant.

Under the statute, full immunity can be granted only in 'first in' situations, where an undertaking or person involved in an infringement comes forward before an investigation is initiated and provides sufficient evidence to prove the existence of an infringement under the Competition Act. Reductions in fines are available to undertakings and persons providing significant added-value evidence after the opening of an investigation.

This investigation is believed to have been initiated in response to a complaint submitted by a present or former manager of Eurest. As the applicant received full immunity, and as Eurest was the only company whose managers were not fined, it is assumed that the authority was contacted before it became aware of the infraction and that the information and evidence provided were crucial to the case. It can also be inferred that the application was made on a personal basis, not on behalf of the

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company, as Eurest received the second-highest fine.

### First Conviction of Individuals

The authority has never before fined an individual. The entry into force of the act in 2003 made managers of infringing undertakings potentially liable to substantial fines - in theory, up to half of the fine imposed on the undertaking - if they were aware (or should have been aware) of the infraction and failed to take immediate and adequate measures to stop it.

The authority stated that its main objective in imposing fines (totalling €20,000) on managers of Trivalor, Uniself, Ica and Sodexo was to emphasize that companies must be operated according to competition law and managers must actively prevent infringing conduct. This statement suggests that competition law rules may be more vigorously enforced on individuals in future.

### Collusion in Open Tenders

The authority has followed public procurement closely for several years and has condemned undertakings in a number of cases for colluding when bidding for public contracts. The most recent amendment to the act - the new Article 45 - provides that the authority may impose an ancillary penalty to prohibit companies found guilty of collusion in public tenders from bidding for public contracts for up to two years. However, the authority was prevented from imposing such a penalty in this case because the infringing behaviour ended before July 29 2008 - the date on which the amendment entered into force.

### Appeals and Damages Actions

The authority's decision may be appealed to the competent commerce court. An appeal suspends the effect of the ruling and may be further appealed to the competent appeals court, which rules as a court of final appeal (without prejudice to a possible appeal to the Constitutional Court). If the parties choose to challenge the decision, as they are likely to do, a final decision may be several years away.

Regardless of the appeals process, clients harmed by the alleged cartel may sue the infringing companies for damages resulting from the illegal conduct in question. The primary claimants would probably be the public and private entities, such as hospitals, schools, prisons and petrol station operators, which contracted with participating companies for catering services in the period during which the infraction took place.

Although damages actions are still uncommon in Portugal, competition authorities in Europe have actively encouraged private competition litigation as a way of complementing public enforcement. Recent press reports indicate that the government is considering whether to sue the infringing companies for damages to the state finances resulting from the price-fixing agreement. If it does so, the catering cartel case may become a landmark in yet another respect.

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