

Competition Authority finds that exchange of information on prospective prices did not infringe competition law

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In a September 2017 decision, the Competition Authority ended an investigation into the exchange of prospective prices between pork meat producers, meat processors and slaughter houses with no finding of anti-competitive practice.

Facts

The Pork Exchange Association is a non-profit association composed of several pork producer associations, a meat processor association and a pork trader association.

From 2010, the Pork Exchange Association established a system of weekly meetings – the so-called 'table of quotations' – in order to set quotes for the sale of pork and Type E pork carcasses with 57% muscle.

The table of quotations was composed of legal persons – including associations designated by the Pork Exchange Association's members – of which 50% represented the supply-side of the market (ie, pork producers) and 50% represented the demand-side of the market (ie, slaughter houses and meat processors). The meetings could take place only when more than 50% of the designated members were present.

The weekly quotations:

- were set on the basis of a weighted average of prices and quantities traded (ie, simulated deals);
- considered quotations from the Spanish pork market organisation (the Mercolérica); and
- required the favourable vote of a least 80% of members.

The mechanism for overcoming the absence of an 80% majority included a nominal voting system in which each member would propose an alternative market price within a range of -€0.10 and €0.10 compared with the previous week's reference price. The final price would be the result of an average between the price of each representative group.

The Competition Authority became aware of this practice in 2012 and started an investigation. In 2016 the Competition Authority decided to initiate a separate infringement investigation.

In the course of 2016, the Pork Exchange Association decided to adopt new rules regarding how the table of quotations worked. The new rules were notified to the Competition Authority on August 7 2017 and included:

- the suppression of any reference to price fixing from the regulation governing the operation of

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- the table of quotations;
- the introduction of a specific rule clarifying that the table of quotations only discusses guideline quotations (ie, orientations);
- the elimination of the 50% representativeness requirement for meetings to take place and its replacement with:
 - a requirement that supply-side and demand-side representatives be present (regardless of their number and representativeness); and
 - the introduction of a 50% weighting average for each party's vote;
- a nominal voting system (used to overcome situations where an 80% majority is not reached) based on individual votes on specific prices through which an average quotation of each group of representatives can be calculated; and
- the introduction of written summaries of the sessions, including reference to:
 - the final guideline prices;
 - the members of the round table present and their respective proposals; and
 - whether or not a consensus was reached.

The Competition Authority acknowledged that:

- the guideline quotations may differ depending on the payment terms and quantities purchased; and
- no penalty or any other consequence has been established for a failure to comply with such orientations.

Assessment

Although the Pork Exchange Association's setting and disclosing of indicative guidelines may have constituted a decision by an association of undertakings, the Competition Authority found that this practice had no anti-competitive object or effect.

The authority considered the following aspects to support its conclusions:

- The table of quotations intended to simulate "the normal functioning of the market" (ie, real world transactions involving the supply and demand side of the market and the freedom of each member in respect of proposals presented and votes cast).
- The non-binding nature of the quotes established the freedom of each member to deviate from the approved guideline quotes without any penalties.
- Such indicative indexes were publicised – in particular, they were communicated to the Ministry of Agriculture to compile data on the sales price of pork carcasses in the national market and the consumer market in general.
- The product at stake was a commodity with a significantly fragmented supply, which made the increased transparency introduced by the table of quotations system beneficial and could lead to the optimisation of purchasing decisions on the demand side.

Comment

While the type of information exchanged could support an infringement of competition law (in light of previous Competition Authority practice), the authority did not establish any anti-competitive object or effect. On the contrary, it identified a pro-competitive effect associated with reduced information asymmetries for purchasers and closed the case at the end of the first investigation stage.

In this case, the Competition Authority's approach appears to have been influenced by:

- the bilateral nature of the conversations – prices were discussed and agreed upon not strictly between suppliers, but between suppliers and purchasers;
- the attempt by stakeholders to replicate a normal market; and
- the publicity given to the resulting price orientations.

However, in a case from 2011, the authority had previously considered that meetings between the supply and demand sides of a market to discuss prices may facilitate collusion between purchasers,

as such meetings would contribute to an exchange of information on existing and future prices (and should not be promoted by the government).

Two additional Competition Authority investigations involving pure information exchange schemes between competitors in the context of associations (ie, the Portuguese Association for Leasing, Factoring and Renting and the Association of Specialised Credit Institutions) were recently proposed to be closed following the acceptance of commitments by the investigated associations, which can be seen as an indication of the authority's more lenient approach to pure information exchange schemes.

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