

Press Release No 20/2009

## Competition Authority instructs Sugalidal to stop harmful practices

The Competition Authority has instructed the undertaking Sugalidal – Indústrias de Alimentação to put an end to the anti-competitive practices included in its contracts with tomato-growers.

Following the opening of the case and the competition-law concerns expressed by the Competition Authority, the undertaking Sugalidal, Indústrias de Alimentação SA submitted and took on the commitment to put an end to the anti-competitive practices included in contracts with growers of tomatoes for industrial uses, in particular the obligation to use seeds of the Heinz variety in their production. This variety is marketed in Portugal exclusively by another undertaking in the group to which Sugalidal belongs.

On the basis of a complaint made in June 2008 and the analysis carried out, the CA concluded that there was an abuse of a dominant position by Sugalidal, in the form of the practice of tied purchases, which was not justified by the efficiency gains.

As a result of Sugalidal's commitment to stop the practices in question, the CA has discontinued the case, though it may be reopened if the undertaking does not comply with the commitments assumed.

### 1. The Decision

With conditions attached, the Competition Authority discontinued the administrative-law case for restrictive practices brought against the undertaking SUGALIDAL – Indústrias de Alimentação SA (henceforth referred to as SUGALIDAL)<sup>1</sup>. The case arose from a complaint made to the Competition Authority in 2008 alleging abuses of a dominant position by the SUGALIDAL Group, which involved the markets for (i) the sale of tomato seeds for industrial uses and (ii) the purchase of fresh tomatoes for primary industrial processing. The abuses resulted from the contractual obligation for tomato growers to supply the undertaking SUGALIDAL with fresh tomatoes for industrial use produced from *Heinz* seeds, which are exclusively marketed in Portugal by the undertaking CIFO – Sociedade de

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<sup>1</sup> The undertaking SUGALIDAL – Indústrias de Alimentação SA resulted from a merger by incorporation involving TOMGAL (after its constitution, TOMGAL acquired the whole of the registered capital of the undertaking IDAL - Industrias de Alimentação SA); SUGAL – Alimentos SA was the incorporating company and TOMGAL – Industrias de Alimentação SA the incorporated company.

Fomento Agrícola Lda (henceforth referred to as CIFO), a member of the group to which the undertaking SUGALIDAL belongs.

## 2. The Case

Various procedures were carried out within the scope of the investigation – in particular, requests for information and enquiries – and the standard SUGALIDAL contracts signed in each season with the growers or growers’ organisations were analysed. It was confirmed that they contained a clause requiring that the fresh tomatoes to be delivered by the suppliers to SUGALIDAL should be *Heinz varieties (or others with similar technological characteristics)*.

In this context, it should be recalled that Article 6 (1) of Law No 18/2003 of 11 June, states that “*one or more undertakings shall not engage in the abusive exploitation of a dominant position in the national market or a substantial part of it, with the object or effect of preventing, distorting or restricting competition*”.

In the light of the above, the Competition Authority concluded that there was an abuse of a dominant position, through a tied sales practice<sup>2</sup> (in this case, purchases): through the processing contracts signed with the growers and growers’ organisations, SUGALIDAL – which is dominant in the market for the tying product, i.e. the market for the primary processing of tomatoes – made the acquisition of fresh tomatoes (the tying product) conditional on the use of Heinz seeds in their production (the tied product). Since the relationship mentioned above is contained in the clauses of a contract, the practice is termed *tying-contract purchases*. Thus, the practice described corresponds to the concept of tied selling, which presupposes that consumers are obliged to accept, directly or indirectly, “*additional services*” such as those provided for by Article 4 (1) g) (by force of Article 6 (3) a)) of Law No 18/2003 of 11 June<sup>3</sup>.

The analysis carried out ascertained the following elements – necessary for performance of the type of practice, in law, of tied purchases as an abuse of a dominant position – as defined by the consolidated case law<sup>4</sup> and contained in the Commission’s *Guidance Paper* (and, earlier, *Discussion Paper*<sup>5</sup>) on the application of Article 82 of the EC Treaty<sup>6</sup>:

<sup>2</sup> Cf. in particular the CFI judgment of 12 December 1991 in Case T-30/89, *Hilti v Commission*, upheld by the CJEC judgment of 2 March 1994; also the CFI judgment of 6 October 1994 in Case 333/94, *Tetra Pak v Commission*, upheld by the CJEC judgment of 14 November 1996.

<sup>3</sup> Point 3 of the precept mentioned presents various examples of abusive exploitation, in a list that is not exhaustive. Of particular significance for the case in hand is Article 4 (1) g) (by force of Article 6 (3) a): “*subjecting the signing of contracts to the acceptance of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*”.

<sup>4</sup> See, in particular, the CJEC judgment of 9 November 1983 in Case 322/81, *Michelin v Commission*.

<sup>5</sup> See *DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses* (§ 182).

<sup>6</sup> See *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (§ 20).

- (i) SUGALIDAL is a dominant undertaking in the market for the primary processing of tomatoes (*the tying market*);
- (ii) The tying and tied products are distinct from each other, i.e. the tomato seeds and fresh tomatoes are distinct products;
- (iii) SUGALIDAL's practice of tied purchases has anti-competitive effects;
- (iv) The practice of tied purchases, i.e. SUGALIDAL's requirement that the fresh tomatoes supplied be grown from *Heinz* seeds, cannot be justified objectively on the grounds of efficiency gains.

### 3. The Competition Authority's Intervention

Following the opening of the case and the competition-law concerns expressed by the Competition Authority, SUGALIDAL submitted and assumed the following commitments:

- (i) Elimination of the contract clause on the preference for tomatoes of a *Heinz* seeds' variety;
- (ii) Adaptation of the contract to the imminent merger between SUGALIDAL and IDAL SA and to the consequences of this operation;
- (iii) Despatch of a circular to the Growers' Organisations, informing them of the elimination of the contract clause on the preference for tomatoes of a *Heinz* seeds' variety.

In the light of these commitments, the Competition Authority has decided to drop the case.

It should be stressed that the decision not to proceed does not bind the Authority in the event of an alteration to the information and/or assumptions on which it is based; in such a case, an inquiry may be opened to examine the alterations.

Lisbon, 15 October 2009