

Descriptive summary of the case

The case relates to price fixing and market sharing concerning certain wheat mill products in Hungary.

The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) initiated the case on 3 June 2008 with the suspicion that several undertakings had concluded bilateral and multilateral agreements on the allocation of the Hungarian flour (and other wheat mill products) market and on the application of minimum prices and on (the extent and timing of) intended price rises.

Dawn raids were conducted at several undertakings, where data and information were gathered from the undertakings concerned. The GVH also requested information from third parties, in particular the large buyers of milling undertakings (especially retail chain stores). Several hearings were also held, both with parties and witnesses.

After the initiation of the proceeding one of the undertakings submitted a leniency application concerning the alleged infringement. The party also submitted a detailed written submission and later on in the course of the investigation its representatives made detailed oral statements revealing the operation of the cartel. The party cooperated with the case handlers during the whole investigation.

The infringement took place from February 2005 to April 2008.

As the investigation revealed, the representatives of the undertakings intended to pursue their activity without any written evidence.

According to the available data, the mills, which were significant market players at national level, played a decisive role in the cartel as the agreement that was concluded between them formed the main stream of the restrictive practices under investigation. Generally the most relevant mills, which possess 70-80% of the capacity of the Hungarian mill industry, participated in the national meetings. These undertakings typically own several mills all around the country and due to the location of their mills and the control relations between the undertakings, the majority of these undertakings are active in several regions of Hungary.

Meetings were also held not only at national level but also at regional level, with the participation of further representatives of the industry. In addition to the significant market players that were present at the national level meetings, representatives of smaller mills operating at regional level also appeared at these regional meetings. (The regional meetings targeted the involvement of smaller mills in order to convey and reinforce the agreements that had been made at national level. By doing so, the undesirable phenomena that smaller mills “pick” from the market to the detriment of larger mills by applying lower prices could be avoided. Accordingly, the agreed price increase was forced on the customers in the whole geographic territory of Hungary). The GVH revealed many meetings in which discussion took place on these subject matters.

The subjects of the collusion were to agree on the prices of whole-grind, flour and bran, the possible increase of the prices and the issues of implementation (method, timing) in relation to them. From time to time agreement was made at the meetings about whether the colluding parties would increase the prices of flour products – white flour and other types of flour – and in the case of affirmation, the new price was set and the date from which it will be in force. As regards the by-product of whole grinding, namely the bran, the colluding parties

primarily informed each other of the amount and the certain price of the distributed products, sometimes also agreeing on the prices among themselves.

There was a lot of evidence indicating that mills aimed to maintain the “status quo”, thus they refrained from entering into each other’s market, and additionally they undertook to respect the existing customer relations (namely, which customer belongs to which certain mill). As regards the larger customers that were of key importance, the mills were required to comply with the existing “status quo”.

With their conduct the undertakings that usually have diverse leadership structures (i.e. some undertakings have Hungarian private or institutional ownership, some of them are owned by municipalities, while others operate under foreign management) have obviously caused harm to Hungarian consumers, because due to price-fixing and market-sharing there was no effective competition on the market in respect of prices. Therefore the bakeries, which purchase baking products, the food-industry distributors and also the customers, could only obtain the products at a higher price.

Besides infringing Hungarian competition law, the parties also breached EU competition rules. By organising meetings both at national and regional level, the restrictive agreements concerned the whole territory of Hungary, one of the Member States of the European Union. Flour is mainly imported into Hungary from Slovakia, but there are some other neighbouring countries that transport flour to the country. The agreements covered the whole territory of Hungary; furthermore, they could have an effect on the movement of goods and the economic activity affecting at least one other EU Member State directly, and thus were able to have an effect on trade between the Member States.

The parties infringed Article 101 TFEU and Article 11 of the Hungarian Competition Act. The agreement between the milling companies constituted a single, complex and continuous infringement, which restricted competition by its object, and may also have restricted competition in effect.

The single, complex and continuous nature of the infringement is based especially on the following:

- the undertakings met regularly and systematically to negotiate prices, which was the primary aim of these meetings,
- the agreement was organised at national and regional level to involve almost all of the milling companies in the country (regardless of their size or position),
- the agreement covered the setting of prices and the allocation of buyers, and these elements complemented and strengthened each other in the successful implementation of the agreement,
- the group of participants were similar in the meetings,
- the products concerned in the negotiations were also similar, as well as the means and mechanisms for the meeting.

The agreement was of a horizontal nature and covered the whole territory of Hungary. The size of the market is higher than 40 million EUR and the market share of the companies is, in any case, higher than 5 %. Mills from other MSs of the EU (especially Slovakia) are active on the market through the importation of their flour products, and evidence suggests that the price of the Slovakian imported flour was taken into account by the Hungarian mills when setting the minimum price. These facts supported the finding that the alleged infringements affected trade between Member States.

The fact that the alleged infringement is a hardcore restriction, and therefore cannot fall under the de minimis rule under either EU law or the Hungarian Competition Act, means that the final conclusion on market definition could be left open.

In its decision dated the 28 October 2010 the GVH established that out of the 25 undertakings under proceeding, 17 had participated in the cartel activity. Most of the undertakings (Cerbona Élelmiszeripari és Kereskedelmi Zrt., DIAMANT Kft., Első Pesti Malom- és Sütőipari Zrt., Gyermely Zrt., Hajdúsági Gabonaiipari Zrt., Ócsai Malom Kft., Júlia-Malom Élelmiszeripari és Kereskedelmi Kft., Pannonmill Malomipari Zrt., „SIKÉR” Zrt., SZATMÁRI Malom Termelő és Kereskedelmi Kft., ABO MILL Malomipari Zrt., Szécsény-Mill Kft.) cooperated continuously during the infringement (i.e. from February 2005 until April 2008), while 5 undertakings (Cornexi Élelmiszeripari Zrt. f.a., Budai Malomipari Kft., „GA-BO” Élelmiszeripari és Kereskedelmi Kft., LAMEPÉ Agrokémiai Vagyonkezelő és Szolgáltató Kft., MARIA-MALOM Malomipari Termékeket Gyártó Kereskedelmi és Szolgáltató Kft.) were found to have participated in the infringement only occasionally by attending certain meetings.

The GVH imposed a fine of 2,3 billion HUF (Approx. 8,4 million EUR) on 16 undertakings.

When setting the amount of the fine, the GVH took into consideration that the fine has to comply with the seriousness of the committed infringements and in addition, it has to convey a clear deterrent message. The decision has to make it clear that it is in no way rewarding for the participating parties and for other undertakings representing other sectors to organise and to maintain cartels. According to the approach applied by the GVH, the decision has to comply with the level of the committed infringement and also with the status of the parties.

When evaluating the amount of the fine, the GVH paid special attention to the fact that the infringement is regarded – due to its price-fixing and market-sharing attributes – as an especially serious competition law infringement. The undertakings were pursuing their complex and infringing activity in a persistent way, over a long period of time and covered the whole territory of Hungary. The GVH also paid attention to the fact that a lot of the parties or their predecessors (Cerbona Zrt., DIAMANT Kft., Első Pesti Malom- és Sütőipari Zrt., Gyermely Zrt., Pannonmill Zrt., „SIKÉR” Zrt., SZATMÁRI Malom Termelő és Kereskedelmi Kft., Cornexi Élelmiszeripari Zrt. f.a., Budai Malomipari Kft.) were recidivists because they had already participated in an infringing collusion of the same kind. These kind of infringements are regarded as special recidivism, namely if the undertaking breaches the competition law rules by the same or almost the same kind of infringement several times. According to the GVH, the recidivism and the special recidivism had to be regarded as serious aggravating circumstances.

When setting the amount of the fine, the GVH also considered the level of intensity and the time period of participation of the parties in the infringement. It was regarded as an aggravating circumstance if some of the undertakings (Pannonmill Zrt.) coerced others to comply with the collusion and also if they were taking a leading role (e.g. arranging meetings) in the organisation of the cartel. In contrast, it was regarded as a mitigating factor if the undertaking participated in the cartel activity just in a narrow scope and as a “sufferer” of the infringement.

When evaluating the proportionality of the fine, as well as taking into account the level of the infringement, the GVH also took into consideration the special economic situation of the given sector and undertakings, which meant that the financial situations of the undertakings carried relevance. As a consequence of this, the seriously difficult financial situations of some of the undertakings were regarded as a mitigating factor, thus some of the parties received reductions in the imposed fines due to their exceptional, certified special statuses. Following

the above-mentioned reasoning, the GVH gave five undertakings the opportunity (Cerbona Zrt., Első Pesti Malom- és Sütőipari Zrt., Gyermely Zrt., Hajdúsági Gabonaipari Zrt., ABO MILL Zrt.) to pay their fines in instalments.

The conduct of Júlia-Malom Kft. was regarded as a mitigating factor because the undertaking collaborated with the GVH within the framework of the leniency policy, thus the GVH granted it immunity from a fine. Namely, the undertaking provided the GVH with sufficient evidence, which enabled the authority to prove the above-mentioned complex infringement.

According to the available evidence, the GVH came to the conclusion that in the case of 8 undertakings (AGROMAG Mezőgazdasági Termékelőállító, Forgalmazó és Szolgáltató Kft., ECCOFOOD Termelő, Kereskedelmi és Szolgáltató Kft., Káta-Mill Kft., TÁPIÓ-MALOM Élelmiszer- és Malomipari Kft., VÁCI-MALOM Gabonafeldolgozó és Értékesítő Kft., BÁCSALMÁSI MALOM Kft., Egri Malom Zrt., Nyírségi Gabonafeldolgozó és Forgalmazó Kft.) their participation in the restrictive agreements could not be proved without doubt, thus the authority terminated its competition supervision proceedings with regard to them.