



GAZDASÁGI
VERSENYHIVATAL

No food production chain code, no GVH proceeding

The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) has terminated in the investigative phase by order its proceeding against the signatories of the Élelmiszer Termékpálya Kódex (Code of Ethics on the Food Production Chain). The Code was not capable to restrict the competition and since it had not come into effect, it did not have an appreciable effect on the market.

The GVH launched a competition supervision proceeding on 21 May 2009 against Mezőgazdasági Szövetkezők és Termelők Országos Szövetsége (Hungarian Association of Agricultural Allies and Producers), Magyar Agrárkamara (Hungarian chamber of Agriculture), Élelmiszerfeldolgozók Országos Szövetsége (Hungarian Association of Food Processors), Tej Termék Tanács (Product Council of Milk and Dairy Products), Magyar Zöldség-Gyümölcs Szakmaközi Szervezet és Termék Tanács (Hungarian Organisation and Product Council of Vegetables and Fruits), Vágóállat és Hús Szakmaközi Szervezet és Termék Tanács (Professional Organisation and Product Council of Fat Stock and Meat), Baromfi Termék Tanács (Product Council of Poultry), Országos Kereskedelmi Szövetség (Hungarian Trade Association) and Általános Fogyasztási Szervezetek és Kereskedelmi Társaságok Országos Szövetsége (Hungarian Association of Everyday Consumption Co-ops and Trade Associations) after these organisations signed the Code of Ethics on the Food Production Chain (Code) on 9 April 2009. The GVH presumed that some points of the document might have been capable to restrict competition.

Before the initiation of the proceeding, the GVH identified five points of the Code which might have infringed the Competition Act, since those might have a restrictive object. These were the following:

5.15. The undertakings of the production chain do not apply in their pricing policies tools which endanger the market, in particular

b) do not sell products made by themselves under first cost;

c) do not sell seasonal products at a promotional price at the beginning of the given product's domestic selling season.

(The GVH presumed that the provisions are capable to restrict price competition among undertakings.)

7.2. As regards the domestic products of high importance, the undertakings of the production chain would only widen the range of products by foreign products.

(The import products widen the range of products and put competition pressure on less effective undertakings. This point of the Code may clearly restrict import products with lower price which otherwise may stimulate stronger competition, therefore the GVH presumed that it inheres the possibility of the restriction of competition.)

7.3. The proportion of the domestic products of high importance in the range of food products of undertakings of the production chain which are engaged in selling, in case of the domestic products of high importance which are produced on the territory of the Republic of Hungary continuously and in due quantity, - in periods when these products are produced on the territory of the Republic of Hungary in a significant quantity – reach 80% on the basis shelves' surface of the primary and secondary putting outs.

(The GVH presumed that this rule is discriminative and hinders commercial putting out of import products, therefore it is capable to restrict competition.)

7.5. The undertakings of the production chain which are engaged in production do not import agricultural raw materials, which belong to the category of domestic products of high importance, with the aim of undercutting prices.

(In case of formation of high prices – due to any reason – in a geographic market, the processors cannot sell their products on those higher prices, they are enforced to search for lower priced raw materials. So the interchanging with cheaper imports can be regarded as a rational business behaviour. The hindering of imports which have the aim of undercutting prices is in itself restricts competition between suppliers, therefore the GVH made it probable that the provision implies the possibility of restricting the competition in prices.)

7.7. The undertakings of the production chain which are engaged in agricultural production, would only export the surplus quantity of domestic products of high importance which cannot be sold in the domestic market, and do not export agricultural raw materials which belong to that category with the aim of drawing up prices.

(In case of formation of low buying-up prices – due to any reason – in a geographic market, the producers may be interested in selling products in other geographic markets, if this may result in plus income for them. So the searching for selling possibilities with higher prices can be regarded as a rational business behaviour. The hindering of exports which have the aim of drawing up prices is in itself restricts producers' possibilities to benefit from the price differences among single geographic markets, therefore the GVH made it probable that the provision implies the possibility of market allocation.)

Concerning the other five points of the Agreement (according to the numbering of the Code, points 4.5., 5.5., 5.15., 7.4., 7.6.) it seemed likely that their application could result in anticompetitive effects.

This means that although the GVH could greet 94 points of the '*Food Production Chain Code*', it had concerns towards 10 points of the Code.

The Competition Act prohibits the conclusion of agreements, which have as their object the direct or indirect fixing of purchase or selling prices; the limitation of production or distribution; the allocation of sources of supply; the allocation of markets, the hindering of market entry or discrimination between trading parties. In addition to this, according to the Competition Act in these situations the expression of the intention in itself is sufficient for the violation of the law and it is not necessary that the anticompetitive agreement be put into operation. However, even in these latter situations it has to be analysed whether the violation is appreciable.

All these facts in themselves would not have been sufficient to initiate proceeding by the GVH, since in order to commence a competition case three conjunctive conditions have to be met, namely: in addition to a likely violation of the Competition Act the GVH has to have competence in the case and public interest has to be also effected.

The signing of the Code definitely showed that the signatories of the document intend to implement it. In this case the undertakings of the agricultural, food processing and food retailing sectors would have pursued an activity that violated the Competition Act. This would have influenced all the sectors of the economy and all the consumers, this way the practice would have harmed public interest. Since it is the task of the GVH to take action against anticompetitive behaviours, it seemed clear that all the three conditions for the initiation of a proceeding were met – this way the competition authority did not have any other possibility but to initiate a proceeding.

Since – considering that most of the objected points would have made import more complicated – the agreement by its very nature would have been capable of affecting trade between the EU Member States, the GVH started its investigation on a parallel legal basis, in addition to the Hungarian competition rules the EC competition law was also invoked.

During the investigation the situation has considerably changed. E.g. it became clear that the signatories to the document were not authorised by their members, meaning that under the Act on Assembly the signatories could neither have represented their members which did not agree with the provisions of the Code nor could they have undertaken any commitments on their members' behalf. This way the Code could not have been applicable at all.

In addition to this after the entry into force of the Code (i.e. after 1 July 2009) the signatories of the document announced that they either would not apply the code or would suspend its application until the GVH makes its decision. Later the signatories made it also public that the Code would be applicable only if each interested organisations participate in its implementation. However, soon after this step the organisations representing the retail sector rejected the implementation of the Code referring to the '*Act on Ethics of Food Production Chain*'. This way the provisions of the Code could not enter into force and those will not enter into force in the future either since the interest representation bodies of the retail sector have definitely rejected its implementation.

According to the Competition Act the GVH may, by order, terminate the proceeding in the investigatory phase in so far as any the three conditions of case initiation (violation of the Competition Act, competence of the GVH, public interest) would seem not to exist,

furthermore, if the evidences acquired during the investigation do not prove the violation and result may not be expected from the continuation of the investigation either.

Since due to the leaving of the signatories of the Code it lost its importance, according to the competition authority the violation could not be realised. Consequently there is no need for the continuation of the intervention by the GVH, so the GVH, by its order terminated the proceeding.

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