

A Kazakh Court imposes fines for an anticompetitive concerted practice in the milk market (Sut, MolCOM)

Kazakhstan, Anticompetitive practices, Concerted practices, Price coordination, Sanctions/Fines/Penalties, Liability (group), High market shares, Prices increase, Effect on competition, Anticompetitive object/effect, Agriculture/Food products

Specialised Administrative Court of Pavlodar city, 8 June 2012 and 18 September 2012, Sut JSC, MolCOM-Pavlodar JSC

Aldash Aitzhanov, Anara Batyrbayeva, e-Competitions | N° 51471, www.concurrences.com

Facts

"Sut" JSC ('Sut') and "MolCOM-Pavlodar" JSC ('MolCOM') are the main milk processing enterprises of Pavlodar region. By the decision of the Competition Protection Agency ('Agency') both are included into the State Register of market entities having a dominant or monopolistic position ('Register') as for 2010 with the total share of more than 50% of the relevant market, particularly with the market shares of Sut and MolCOM equal to 63.7% and 16.1% respectively.

(for information: according to Article 12 of the Law "On Competition", the position of any one of the several market entities shall be deemed dominant if: 1) the total share of no more than three market entities that have the largest shares in the relevant commodity market makes up 50% or more; 2) the total share of no more than four market entities that have the largest shares in the relevant commodity market makes up 70% or more.)

As established by the Agency, Sut and MolCOM constantly increased their prices for milk and kefir (thick milk drink) parallel to each other during February and June 2011 for average 10%.

The Agency came to conclusion that, taking into account the decrease in the price of raw milk, specific gravity of which constitutes about 60% of the cost value of the products concerned, during the period between February to September 2011 and the escalation of both producers' profitability during the price increase period, producers reaped a profit that was not expected in the absence of concerted actions.

While as a reason of the price-rising Sut referred to the increase in products' cost, MolCOM claimed the price increase was evoked by the necessity for minimization of production and sales costs of

butter, which is considered as a loss-making product.

Law

Article 11 of the Law "On Competition" prohibits any concerted actions by market entities aimed at restricting competition including those to the following effect:

- ▶ 1) establishment and(or) maintenance of prices or other conditions for purchase or sale of goods;
- ▶ 2) unjustified restriction of production or sale of goods;
- ▶ 3) unjustified refusal from conclusion of agreements with specific sellers (suppliers) or purchasers;
- ▶ 4) application of discriminatory conditions to equal agreements with other entities;

Moreover, such actions of the market entities may be recognized to be concerted provided they meet in aggregate the following conditions:

- ▶ 1) parallel actions were performed by market entities within a three-month period which resulted in each market entity making a profit entity that was not expected in the absence of concerted actions;
- ▶ 2) actions of the market entities are known to each of them;
- ▶ 3) actions of each of the above market entities have not caused by circumstances that equally impact on these market entities at the relevant commodity market.

Under Part 2 of Article 147 of the Code on administrative violations, anticompetitive concerted actions, if these actions do not contain elements of a criminal offense, shall be punishable by a fine on legal entities of small or medium business in the amount of five percent of income (revenue) derived from the implementation of monopolistic activity, with or without the confiscation of the monopolistic income earned as a result of the monopolistic activities of not more than one year.

Judgment

The court in both cases found the Agency's conclusions correct and corresponding to the requirements of law.

Due to the absence of documental evidence the concerted practice can be established providing that all criteria for tacit collusion are met.

With the fulfillment of the 'parallel actions' criteria, the proven awareness of *Sut* and *MolCOM* of each other's actions and non-establishment of any circumstances that could equally impact on them and subsequently cause their parallel price-rising actions, the court decided that parallel price increase undertaken by *Sut* and *MolCOM* amounted to anticompetitive concerted practice and infringed Article 11.

Thus, following Part 2 of Article 147 of the Code on administrative violations, the court imposed on both producers a fine in the amount of 5 percent of income (revenue) derived from the implementation of monopolistic activity with the confiscation of the monopolistic income earned as a result of the monopolistic activities, in particular, that resulted in KZT 57,6 mn for *Sut* and KZT 834182 for *MolCOM*.

The sufficiency of fulfilling three criteria set in Article 11 for finding a tacit collusion may blur the

difference between anticompetitive practice and legal profit-making behaviour. Evidently, same approach is expected for further cases unless changes or additions are made to the Law.

Aldash Aitzhanov | Center for competition policy development and advocacy (Astana) | aldash@mail.ru

Anara Batyrbayeva | Agency of the Republic of Kazakhstan for Competition Protection (Astana) | anara90@yandex.kz

This document is protected by copyright laws and international copyright treaties. Non-authorized use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a € 300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.