

## **SUMMARY OF RESOLUTION CASE S/0251/10 ENVASES HORTOFRUTÍCOLAS**

### **1. BACKGROUND**

On 11 May 2009 the company INFIA filed an application for exemption from fines in relation to the existence of a cartel to limit competition in the manufacture and sale of plastic baskets for packaging fruits and vegetables that was participated in by INFIA itself, AUTOBAR (now VERIPACK), NESPAK, S.p.A. (NESPAK), ILIP, PLASTIC COMPANY, S.r.l. (PC) and ISAP PACKAGING, S.p.A. (ISAP), as well as the Spanish distributors of ISAP (PLÁSTICOS ALZIRA) and of ILIP (AGROENVAS, S.L. and EUROPLASTIC DEL PENEDÉS, S.L.).

On 2 March 2010 an inspection was conducted at the offices of AGROENVAS, S.L., VALPACKAGING IBÉRICA, S.L., VERIPACK and ILIP. Two months later, on 10 May 2010, a proceeding was opened against INFIA, ILIP, VERIPACK and AGROENVAS.

The Council resolved on the case on 23 November 2011.

### **2. CONTENT OF THE RESOLUTION**

The Council holds that the evidence shows that from 1999 through November 2005 the producers and marketers of fruit and vegetable containers INFIA, ILIP, NESPAK (of the GUILLIN group), ISAP, PC, VERIPACK (formerly AUTOBAR and since 8 June 2006 owned by the GUILLIN group) held annual meetings, at the end of each year, normally in Italy, in which they agreed the prices for a series of models and sizes of said packaging and concerted their offers in response to the invitations to bid issued by a number of large customers, usually farm cooperatives or associations of cooperatives. For the 2006/2007 marketing year, INFIA, ILIP and VERIPACK scheduled a meeting for 30 November 2006 in Barcelona, at which minimum prices were agreed for the containers for the 2006/2007 season and a strategy was established for their participation in the tender called by the cooperative society SUCA for 13 December 2006.

The Council finds that this conduct qualifies as a single continuing offence, materially consisting of price fixing and market sharing which were repeated each year at the beginning of the marketing campaign and which together constituted a plan aimed at restricting or distorting competition in the fruit and vegetable containers market.

The Council has also concluded that ILIP and its distributor in Huelva and Sevilla, AGROENVAS, acted as a single economic unit in the market under ILIP's control and that ILIP must be sanctioned in respect both of its direct turnover and the revenues obtained through AGROENVAS.

It also bears noting that VERIPACK, a company created in May 2006 by the GUILLIN group and which took over the packing container business of AUTOBAR as from 8 June 2006, admitted in its submissions that it had participated in the November 2006 meeting in Barcelona, and did not deny its liability for the cartel as from the time it

took charge of said business. It nevertheless argued that no liability could be attributed to it for any previous acts because it did not exist prior to that date, and that although it did acquire AUTOBAR PACKAGING SPAIN in June 2006, the seller remained in existence and should thus in all events be the one to bear liability and be the object of any related enforcement actions.

In this regard, the CNC Council has concluded that although the general rule in administrative sanctioning law in Spain and in the EU applies the liability principle, it is not applicable in this case inasmuch as AUTOBAR was dissolved in 2007, that is, at the time the proceeding was opened.

In cases such as this where no legal person exists to whom liability can be attributed, the principle of effective enforcement of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) mandates that there be applied the principle of economic continuity and that liability for the infringement be transferred.

Likewise to ensure the effectiveness of competition rules, which are a matter of public policy (*ordre public*) —in which respect there may be cited as representative of all relevant precedents the judgment issued on 11 March 1998 by the Court of First Instance in case T-134/94 NMH Stahlwerke GmbH v Commission— the Council rules that VERIPACK must be held accountable for the infringement committed during the entire period and not just the time during which it formed part of the cartel.

**Fines levied:**

- INFIA: 8,371,740 euros. Its parent company LINPAC is held to be jointly and severally liable for 7,709,070 euros of this amount, and is exempted from payment thereof by virtue of its leniency application.
- ILPA: 1,003,583 euros.
- VERIPACK: 2,850,790 euros. Its parent company GRUPO GUILLIN, S.A. is held to be jointly and severally liable for 2,250,515 euros of this amount.