

The duty of associations not to interfere with the free competition of their associates in Private Tenders: the APAN and APAP case - PRC/2018/3

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On December 14, 2021, the Portuguese Competition Authority (PCA) adopted a Final Decision through which it determined the condemnation of the Portuguese Association of Advertising, Communication and Marketing Agencies (APAP)¹ for the adoption of a decision of association of companies², insofar as it constituted an agreement restricting competition for the purposes of the provisions of subparagraphs a) and b) of paragraph 1 of article 9 of Law n.º 19/2012.

It was between January 2008 and February/March 2009, that APAN, following a proposal from APAP, decided to create a joint working group that culminated in the approval and subscription of a “Guide to Good Practices”.

The “Guide to Good Practices” contained a rule (No. 4) according to which advertisers (clients) must “[decide] the tender based on a list of only 3 agencies. If the current agency is invited to participate then it can go to 4 agencies in total [...]” and “[make] known to competitors the number of agencies invited and whether or not their current agency is included”.

In this sequence, it was drawn up in the minutes of a meeting of the APAP Board the following recommendations:

- (i) The limitation to a maximum of 3 or 4 agencies to be included in the short-lists of private tender procedures for the acquisition of advertising content services constitutes one of the basic good practices;

¹ This association of companies represents a significant portion of the offer in the market for the provision of advertising content production services in the Portuguese national market, aggregating the main advertising agencies.

² According to the Lisbon Commercial Court (4th Court), in Proc. 178/09.8TYLSB, decisions of association of companies consist of “acts of collective will emanating from the legally or statutorily competent body of the respective association, although not necessarily, since priority should also be given, in this area, to an interpretation with based on the purpose of the ban, provided that there is an externalization that reflects, with average precision and intelligible to its recipients, the desire or will of that association to coordinate the behavior of its members”.

- (ii) “All APAP associates should be involved in this issue and commit to demanding their respect, up to the limit of not participating in competitions that do not respect these Good Practices”.

From then on, when the existence of a tender procedure that did not comply with the good practices defined by APAP in that Commitment was detected, APAP would contact the advertisers, with the explicit threat of non-participation or withdrawal of tenders by the subscribing agencies of the Compromise, if the procedure was not changed.

From a legal point of view, “The activity of business associations has [...] limits that result from the legislation that frames their activity, and in which competition law must be included. In this perspective, neither the statutes of business associations, nor their initiatives, should establish or enhance limitations or constraints on the free determination of the options of the associates related to the economic activity they carry out. Nor can associations be the instrument of a reprehensible concertation in the light of competition law”.³

Thus, the concept of a decision by an association necessarily encompasses all types of conduct that an association may carry out to direct the behaviour of its members in order to exercise a significant influence on the game of competition in the market in question.

In its defence, APAN states that the main motivation behind the preparation of the Guide together with APAP was “the increase in efficiency, transparency and objectivity in the process of detecting advertising agencies in the context of contests launched by advertisers”.

On the contrary, in the PCA's position, to which we subscribe, the limitation of the number of agencies invited to the short list of competitive procedures of private advertisers “becomes concretely able to reduce the competitive pressure between the agencies, being liable to change the result that would be obtained through the free competitive game, replacing it with one that is influenced, or even determined, by the supply side.”

In addition, the decisions of advertisers themselves as to the way they defined and conducted their contracting procedures became also constrained by the risk that, if they did not respect the maximum number of agencies to invite to the short list, it is possible

³ See Competition Council, Activity Report, 1992, Ed. Ministry of Commerce and Tourism, p. 15 and 16;

that their competition could be negatively affected by the withdrawal of some or even all of the competitors.

Consequently, the PCA concluded that APAP's conduct was classified as a decision by an association of companies whose objective was to prevent, distort or significantly restrict⁴ competition in all or part of the national market.

In this way, the PCA imposed a fine of €3,600,000 (three million, six hundred thousand euros) addressed to APAP and, as an accessory behavioural measure, the immediate revocation of the “Commitment to Private Tenders” by APAP.

Additionally, an obligation was imposed to APAP to refrain from inciting its members to not participate or to withdraw from competitions that do not comply with said Commitment, as well as to refrain from interfering in specific competitions.

We can conclude that the definition of market conditions and the commercial policy practiced by economic agents must result only from the free play of the market.

In this sense, APAP had a duty not to interfere in the normal tender procedure. Only in this way would it be possible to guarantee the commercial freedom of its associates and preserve the competitive uncertainty of other competing companies that submitted to tender.

⁴ The imposition of a limiting condition on the offer of those services and translated into a threat directed at advertisers, demonstrates “the sensitive nature” of the affectation of competition in the market in question.