

SUMMARY OF CASE S/0162/09 SUNFLOWER SEEDS

I. BACKGROUND

On 16 June 2009 the Investigations Division (ID) of the Spanish competition authority, the Comisión Nacional de la Competencia (CNC), received an official communication from the Regional Commission of Castilla-La Mancha (CRCLM) formally remitting:

- a model contract and all of the farming, sale-purchase and reception contracts for sunflower seeds intended for producing oils to be used as energy sources that had been signed by ACEITES DEL SUR-COOSUR, S.A. (ACESUR) with farmers in the Castilla-La Mancha region;
- a model contract for farming and sale-purchase of energy sunflower signed by SOS CUETARA, S.A. and the farmers; and
- a model contract for farming and sale-purchase of oleaginous seeds to be transformed into products for energy use signed by AGRUFAL, S.A. with farmers.

The alleged infringement consisted of tying, by contract, the harvesting of sunflower seeds destined to be transformed into oil as an energy source to prior acquisition of the crop seed. This could mean that farmers would not be allowed to buy seeds in the market and also harm sellers of crop seed. Given that the possible anti-competitive effects of this conduct would extend beyond one single regional government, the CNC was deemed competent to analyse the arrangement. The CNC conducted a confidential inquiry which led to the following decision:

- (i) The AGRUFAL model contract with producers-sellers did not contain clauses that tied the acquisition of the sunflower seed for processing into biodiesel to prior purchase of the crop seed by the farmers from AGRUFAL.
- (ii) The opening of formal proceedings on 14 December 2009 against SOS CUÉTARA, S.A. and ACEITES DEL SUR-COOSUR, S.A. for possible violation of article 1 of the Spanish Competition Act (LDC) and article 101 of the Treaty on the Functioning of the European Union (TFEU), consisting of tying, by contract, the purchase of the harvest of sunflower seed destined for transformation into biodiesel to prior acquisition of the crop seed. An analysis was conducted of the contracts between ACESUR and farmers in Castilla-La Mancha and Castilla y León, and of the contracts between SOS and farmers in Andalusia, Castilla y León and Castilla-La Mancha:

1. ACESUR model contract: *“The producer undertakes to purchase exclusively from ACEITES DEL SUR-COOSUR, S.A. the crop seed needed for the contracted area” and “The producer expressly authorises ACEITES DEL SUR-COOSUR, S.A. to retain the amount corresponding to the crop seed, and to deduct said amount from the sum payable for delivery of the seed”.*
2. SOS model contract: *“The producer is (sic) expressly authorises the first processor to retain the amount of the Koipesol crop seed and deduct it from the sum payable for the harvest delivered”.*

On the 8th and 9th of June, the ID respectively received submissions from ACEITES DEL SUR-COOSUR, S.A. and SOS CORPORACIÓN ALIMENTARIA, S.A. requesting the commencement of a procedure for a negotiated settlement to the proceedings and proposing certain commitments. On 15 June 2010 the Director of Investigations at the CNC issued the decision to begin the settlement procedure.

After notifying the parties and the CNC Council of the respective commitments proposed, and after SOS and ACESUR had stated their approval thereof, on 7 July 2010 a proposal for settlement of case S/0162/09 was submitted to the Council, which entered its decision on 6 September 2010.

II. THE PARTIES

1. ACEITES DEL SUR-COOSUR (ACESUR)

ACESUR is, through Olcesa Biodiesel, one of the leaders in the production of biodiesel with third generation technology from locally produced oleaginous seed oils. It does not produce sunflower seeds for planting, but resells to farmers, cooperatives and traders seeds produced by various third party suppliers, to whom it is not bound by exclusivity arrangements.

Its share of sunflower seed sales in the 2008/2009 and 2009/2010 seasons was less than 10% and only one third of those sales were direct to farmers.

Its share of the purchase of the sunflower seed harvest (for all uses) in Spain in those seasons was also less than 10%.

In those years ACESUR signed 27 and 333 biodiesel contracts. The percentage of farmers who signed those contracts and also acquired crop seed from ACESUR was less than 30% in both seasons.

2. SOS GROUP

SOS has operated in the seed oils market since the 1960s.

The crop seed sold by the SOS Group to farmers are from Koipesol, a company that belongs to the Syngenta Group with no ownership links to SOS. ACISA, a wholly owned subsidiary of SOS, has an agreement with Koipesol for sale of crop seed and the provision of related services.

The sales of sunflower crop seed from Syngenta intermediated by ACISA accounted for at least 25% in both 2008 and 2009.

In 2008 SOS's share of the market for purchase of sunflower seed in Spain for all uses was below 5%.

III. COMMITMENTS

The parties proposed the following commitments in their respective submissions of 9 June and 8 and 29 June:

1. SOS

1. *“SOS and the SOS group companies will abstain in the future from including any contract clause, and from applying any mechanism, that has the aim or effect of establishing any tie, whether legal, economic or de facto, between the purchase of sunflower crop seed by the farmer or any company (in or out of the SOS group) and the sale of the sunflower seed harvest by the farmer to any company (in or out of the SOS group); the farmer will thus be free to contract both transactions (purchase of crop seed on the one hand and sale of sunflower seed harvest on the other) with the company of his choosing, with no ties between one transaction and the other.”*
2. *“With respect to the contracts formalised by SOS for growing and sale of energy sunflower with compensatory aid with a view to obtaining materials for the production of energy products in the EU, in relation to the 2009-2010 marketing year, SOS undertakes to notify the farmer signatories to those contracts, in the manner the CNC deems sufficient and within one month after approval of the settlement agreement, that Clause 8 of the said contracts must be construed so that the producer is free to acquire the crop seed from one operator and sell the harvest to a different one, with no ties between one operation and the other; in the understanding that said Clause 8 be amended if necessary by adding the following: “without prejudice to the freedom of the producer to acquire the crop seed from one operator and to sell the harvest to another different one”.”*

2. ACESUR

1. *“Abstain from including in such future contracts for sale-purchase of sunflower seed for energy uses as ACESUR may make with farmers any clause that imposes an obligation on the farmer to acquire sunflower crop seed from ACESUR.”*

2. *“Notify the farmers with whom ACESUR has made contracts for sale-purchase of sunflower seed for energy use during the 2009-2010 year of ACESUR’s commitment not to require fulfilment of any clause contained in those contracts that can be construed as obliging the farmer to acquire sunflower crop seed from ACESUR.”*
3. Demonstrate its willingness to accept commitments with the same verbatim wording as those contained in the SOS proposal if the ID deems appropriate, and likewise expressly state its commitment to *“abstain in the future from including any contract clause, and from applying any mechanism that has the aim or effect of establishing any tie, whether legal, economic or de facto, between the purchase of sunflower crop seed by the farmer from ACEITES DEL SUR-COOSUR S.A. or any company, and the sale of the sunflower seed harvest by the farmer to ACEITES DEL SUR-COOSUR S.A. or to any company”*.

In its assessment of the conducts and commitments the ID made the following points:

- With respect to the production of biodiesel, European rules require the farming and sale-purchase of the seeds to be set out in a written contact as a condition for eligibility for CAP aid.¹ Nevertheless, this type of aid was no longer contemplated in Council Regulation (EC) 73/2009, so the signing of such contracts will no longer be necessary as from the 2010/2011 year.
- The ACESUR and SOS contracts that have been analysed appear to tie the sale of sunflower seed destined for transformation into biodiesel to the prior acquisition of the crop seed from the same processor. Therefore, they do not give the farmer freedom to acquire the crop seed from any producer other than the ones who will later buy the farmer's harvest.
- The shares of the parties in respect of the tied and tying goods are less than 30%, but the existence of parallel networks suggests there is a violation of competition rules not allowed under Regulation 2790/1999 on vertical restraints, which was in force when the contracts were signed.
- Although, in principle, after the entry into force of Regulation (EC) 73/2009,² there will be no more contracts of the type analysed, the ID believes that the solution to these problems requires elimination in the existing contracts and in possible future contracts of any clause that ties the sale of sunflower seed for energy use to the prior acquisition of the crop seed from the processor itself, along with any mechanism that has such tying aim or effect.
- The **first commitment** undertaken by ACESUR and SOS would resolve the anti-competitive effects that could arise if said tying arrangements were to be maintained

¹ Art. 90 of Council Regulation (EC) 1782/2003 of 29 September 2003 (OJ L of 21 October).

² Council Regulation (EC) 73/2009 of 19 January 2009 (OJ L of 31 January).

in such potential contracts for sale-purchase of sunflower for biodiesel as may be signed in the future.

- The **second commitment** to notify the farmer signatories to the contracts for the 2009/2010 marketing year that they are free to acquire the crop seed from one operator and sell their harvest to a different one, with no tying between one transaction and the other, would eliminate the anti-competitive effect contained in the contract and safeguard the public interest.

IV. RESOLUTION OF THE CNC COUNCIL

The Council finds there has been strict compliance with the procedures set out in the rules on reaching agreed settlements and agrees with the ID that application of the proposed commitments resolves the possible impact on competition that could arise from the conducts examined in these proceedings.

Therefore, and to ensure fulfilment of the commitments and facilitate their monitoring by the CNC, the Council believes it is appropriate, as proposed by the ID, that ACESUR and SOS:

1. Notify the content of this Resolution to the farmers or to the cooperatives to which they belong, and
2. Submit to the Investigations Division of the CNC a copy of the aforesaid notice to the farmers or cooperatives to which they belong.

It is therefore, **RESOLVED**:

ONE: To approve the agreed settlement of the disciplinary proceedings and declare the commitments presented by ACEITES DEL SUR-COOSUR, S.A. and SOS CUÉTARA, S.A. to be binding.

TWO: To require ACEITES DEL SUR-COOSUR, S.A. and SOS CUÉTARA, S.A. to fulfil the obligations set out in Foundation in Law FOUR.

THREE: Breach of any of the above commitments and obligations will be considered a very serious infringement for the purposes of article 62.4 c) of the Competition Act (LDC) and article 39.7 of the Competition Regulation (RDC).

FOUR: Charge the ID with the monitoring of this Resolution.