

## Italian Competition Authority Finds Abusive Conduct in Withholding Data and Internal Communications Praising Company Strategy

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On 5 July 2011, the Italian Competition Authority imposed fines of €5.1 million on a multinational crop protection company for having abused its dominant position on the market for fosetyl-based systemic fungicides in breach of Article 102 of the Treaty on the Functioning of the European Union. In addition, the Authority issued an injunction restraining the company from such conduct in the future.

The Authority considered that the multinational was able to increase its prices for finished products on the downstream market while increasing the volume of its own sales, showing a high degree of pricing policy independence.

In making its decision, the Authority also took into account the fact that, in addition to its high market share, the multinational was the only vertically integrated manufacturer with significant financial capability and it owned certain research data required for the commercialisation of fosetyl-based products. According to the Authority, these data are vital for accessing the market, given that they are indispensable for competitors seeking to renew marketing authorisations, because the current legislation restricts the repetition of tests on vertebrate animals. The Authority noted that certain competitors that had joined a task force for the purpose of negotiating access to the multinational's data were disqualified from renewal of their marketing authorisations and had to leave the market. Refusal by the multinational to grant access to the data was therefore found to be abusive.

The Authority reviewed a number of the multinational's internal communications that praised the results obtained in the fosetyl-based business in Italy, thanks to the strategy adopted by the company. According to the Authority, these communications proved that the company was aware of the anti-competitive character of their conduct.

In the Authority's view, the company's conduct constituted a serious infringement and therefore deserved a very high fine.

### Comment

The case highlights the dangers faced by a dominant market player that owns intellectual property rights or data that are essential for other companies to compete. The case also illustrates the importance of the language used by businesses in their internal communications, given that internal communications are often used by the Authority when reaching a decision on potential infringements.

Refusals to licence or grant access to market-essential data can only be made if there are objective grounds for doing so. This is a difficult issue on which dominant companies should seek legal advice.

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