

INFORMATIVE NOTE



EU AND COMPETITION LAW

COMMERCIAL RELATIONSHIPS BETWEEN LARGE FOODSTUFFS DISTRIBUTORS AND SUPPLIERS

On October 6, the Portuguese Competition Authority ("PCA") has presented in the joint parliamentary hearing of the committee for economic affairs, innovation and energy and the committee for agriculture, rural development and fishing of the Portuguese Parliament the final report on the commercial relationships between large foodstuffs distributors and their suppliers¹.

In December 2009, the PCA had submitted a preliminary report in which it already reached a number of conclusions, in particular that potential problems concerning trade relations between the Large Foodstuffs Distributors ("LFD") and their suppliers relate mainly to Large Retailer Groups ("LRG")², considering their increased buyer power in purchasing markets and the correlative fewer importance of other groups, namely the regional wholesale and retail chains.

The main conclusion of the Final Report points to the existence of a disparity

in the negotiating power between the suppliers and the LRG, generally to the detriment of suppliers. Four main areas in which this disparity seems to be more prominent have been identified: (i) unilateral imposition of contractual conditions (i.e. standard contracts); (ii) discounts and other benefits; (iii) penalties; and (iv) payment delays.

In fact, the PCA has come to the conclusion that currently the LRG act as the true "gatekeepers" in the access of final consumers to products of the manufacturing industry and that the growing market power of LRG in the retail trade and as industry's customers, reinforced by the tendency of some LRG to centralize purchases and to vertically integrate, has contributed to a progressive loss of the industry's market power, giving rise to tensions between suppliers and distributors.

The PCA has also come to the conclusion that, although the gains resulting from the growing market power of LRG tend nowadays to be favorably passed-through to consumers, the current expansion of the distributors' own brands (also named private labels) and the tendency to the strengthening of the degree of concentration of GGR may give rise to concerns regarding the possible future effects of this expansion, both on the supply industry and on the pass-through to consumers. Thus, the PCA alerts to the fact that the purchasing power of LRG can, in the future,

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Chambers Europe Excellence 2009, IFLR Awards 2006 & Who's Who legal Awards 2006, 2008, 2009, 2010

"Corporate Law Firm of the Year - Southern Europe"
ACQ Finance Magazine, 2009

"Best Portuguese Law Firm for Client Service"
Clients Choice Award - International Law Office, 2008, 2010

"Best Portuguese Tax Firm of the Year"
International Tax Review - Tax Awards 2006, 2008

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¹ The PCA analysis focus on the "fast moving consumer goods" ("FMCG"), in particular, UHT milk, rice, edible pasta, milk flour and flour for culinary use, breakfast cereals, cookies, vegetable-fat products, fruit and vegetables, soft drinks and coffee and coffee substitutes.

² The PCA Report identifies nine Large Retailer Groups ("LRG") acting in Portugal: Aldi, Auchan, Minipreço-Dia, El Corte Inglés, E. Leclerc, ITMI-Os Mosqueteiros, Jerónimo Martins, Sonae MC and Lidl.

The final report also makes a brief reference to the recent VAT increase, as of 30 June 2010, concluding that the analysis of the information provided to the PCA did not show sufficient evidence that LRG have passed said increase through to their suppliers.

represent a relative weight which is sufficiently significant so as to no longer be seen as a priori pro-competitive market power, as it is seen today.

The PCA further states (i) that it is not possible to conclude that the distribution network of the LRG can be considered as an “essential facility” for the distribution of the products of the manufacturing industry, even when there is competition from distributors’ own brands, and (ii) that the increase in sales of distributors’ own brands tends to generate a market expansion effect, either through the “democratization” of the consumption of products with a high degree of substitutability with respect to the manufacturing industry’s products, or by supplying a product at lower price than that of comparable industry’s products.

As a result, the PCA states that the practices examined do not strictly fall within the prohibitions of the Competition Act or the Treaty on the Functioning of the European Union. The PCA submits that, despite the disparity in the negotiation power, it does not seem that the contractual provisions that have been examined have as their object or effect the appreciable prevention, restriction or distortion of competition (Article 4 of the Competition Act), and that no evidence has been brought from the analysis carried out regarding abuses of dominant position (Article 6 of the Competition Act) or abuses of economic dependence (Article 7 of the Competition Act). However, the PCA admits that some of the practices that have been examined can be appraised in light of the legislation on restrictive commercial practices, according to which they must continue to be closely monitored, in particular as regards “abusive commercial practices” and “resale at a loss”.

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analysis of the information provided to the PCA did not show sufficient evidence that LRG have passed said increase through to their suppliers.

Finally, the PCA makes some recommendations. The first one, addressed to CIP, APED and Centromarca in their capacity as the most representative associations of the parties involved, refers to the need of reactivating the CIP/APED Code of Good Practices of 1997 or to adopt a new Code of Conduct, with the aim of promoting a competition culture through an effective self-regulation process. In the PCA’s view, the Code should include a mechanism of conflicts’ resolution, the appointment of an Ombudsman and the establishment of the principles to be observed in the negotiation of contracts, such as the exclusion of the application of penalties to the retroactive effects of the contracts, the obligation for the LRG to provide a well-timed justification for the delisting of manufacturing industry’s products or for their substantial reduction in terms of shelf space, and the definition by consensus of the rules regarding payment deadlines.

The PCA also recommends the elaboration or adoption of a document containing the standard conditions applying to any contract regulating a supply relationship, with the objective of promoting the balance and transparency in the negotiation of contracts between distributors and suppliers.

The other two PCA’s recommendations, addressed to the Government, refer (i) to the need to regulate the commercial practices that have been considered problematic but cannot be caught by the Competition Act or the legislation on restrictive commercial practices and (ii) to the need to reinforce the collection, processing and disclosure of statistical information on prices throughout the food supply chain, complemented by the corresponding statistical information on quantities.

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