Vertical Agreements & Restriction of Competition by Object: What’s New in Europe?

Article By:
Jacques Buhart
Stéphane Dionnet
Frédéric Pradelles

On June 29, 2023, the Court of Justice of the European Union (CJEU) delivered a preliminary ruling in the Super Bock Bebidas vs. Autoridade da Concorrência case (C-211/22) on the questions referred by the Tribunal da Relaçao de Lisboa (Lisbon Court of Appeal). To some extent, the recent judgement is not particularly noteworthy or innovative, as it mainly applies well-established EU competition law principles prevalent through existing case law. However, the Super Bock case marks a significant step forward by introducing these principles for the first time in the context of vertical price-fixing agreements.

In Depth

Background

Super Bock Bebidas is a well-known Portuguese company that primarily produces bottled waters and beers. For the purpose of distributing beverages in hotels, restaurants and cafés, Super Bock concluded exclusive distribution agreements with independent distributors. Those distributors sell beverages purchased from Super Bock in almost the entirety of the Portuguese territory. In July 2019, Super Bock Bebidas S.A., along with one of its board members and a company director, were fined EUR 24 million by the Autoridade da Concorrência (AdC- the Portuguese Competition Authority) for fixing minimum resale prices and other resale conditions.

Resale price maintenance (RPM) is a vertical agreement or concerted practice that occurs when a supplier and its distributors agree on the price to be charged by the retailer for the resale of the supplier’s products. In this specific case, the AdC found that Super Bock and its sales department had consistently established and enforced, over a period exceeding 10 years, the terms of business that all distributors were required to follow when reselling the products in Portugal. More specifically, the sales department of Super Bock regularly approved a list of minimum resale prices which were then communicated to the distributors either verbally or through written means such as email. The distributors usually adhered to these prices, and Super Bock monitored their compliance through a
tracking system. When distributors deviated from the prescribed resale prices, Super Bock enforced retaliatory measures like removal of financial incentives, such as trade discounts on the purchase of products and the refusal to supply and replenish stocks. To mitigate the risk of facing these measures, distributors frequently sought guidance from Super Bock regarding the resale prices they should apply.

The Competition, Regulation and Supervision Court in Portugal upheld the AdC decision. Super Bock brought an appeal against that judgment before the Tribunal da Relação de Lisboa which subsequently submitted 6 questions to the CJEU. In particular, the referring court sought clarification on the interpretation of Article 101 on the Treaty of the Functioning of the European Union (TFEU) within the context of vertical price-fixing agreement. In its June 2023 judgement, the CJEU grouped the questions around the following 4 issues.

**A Minimum Resale Price-Fixing Agreement Does Not Inherently Breach Competition Law**

The key issue in the Super Bock judgment is whether a vertical price-fixing agreement could be considered as a restriction of competition by object under Article 101 TFEU.

As a reminder, Article 101 of the TFEU prohibits both horizontal and vertical agreements that have as their object (or alternatively, effect) the restriction of competition. Restrictions of competition by object are restrictions that by their very nature have the potential to restrict competition\[1\]. This means two things:

- Once an agreement is classified as a restriction by object, the actual effects of the agreement do not need to be assessed;

- The parties to the illicit agreement have to demonstrate efficiencies as outlined in Article 101(3) of the TFEU to be exempted from the prohibition set out in Article 101 – which is rather challenging. Another way for a vertical agreement to be exempted is to satisfy one of the EC block exemptions. However, it should be noted that some practices that generally constitute restrictions of competition by object are identified by the Commission in its notices, guidelines and block exemptions as 'hardcore' restraints. Such restraints are assumed to infringe Article 101(1) and presumed not to satisfy the criteria in Article 101(3). Once it has been established that a particular agreement contains a hardcore restriction, the agreement automatically cannot benefit from any of the Commission’s block exemption regulations.

Article 4(a) of the Block Exemption Regulation on Vertical Restrain (VBER) provides that minimum RPM arrangements are hardcore restrictions and are thereby presumed to infringe Article 101(1) TFEU by object. Therefore, minimum RPM arrangements are presumed anticompetitive, and the block exemption does not apply. It is important to note that while there is a possibility for minimum RPM to be exempted from Article 101(1) through an efficiency defense under Article 101(3) on a case-by-case basis, RPM faces challenges in fulfilling the conditions of Article 101(3). For instance, in the case of SA Binon & Cie v. SA Agence et Messageries de la Presse, which dealt with the legality of a clause in a selective distribution system allowing the distributor to set prices and enforce them on retailers, the CJEU ruled that “any price-fixing agreement constitutes, in itself, a restriction on competition and is therefore prohibited by [Article 101(1) TFEU].\[2\]” Consequently, RPM
arrangements are unlikely to qualify for exemption under the VBER Regulation and the efficiency defense under Article 101(3), making them susceptible to being deemed void and unenforceable under Article 101 TFEU.

Over time, the interchangeable use of the concept “hardcore restriction” under the VBER regulation and “by object restriction” under 101 TFEU has caused confusion. In the Coty[3] judgment, the CJEU first set out the distinction assessing whether a manufacturer’s restriction on its retailers, which forbids them from selling through third-party platforms to preserve the luxury image of the products, qualifies as a competition restriction “by object” under Article 101 TFEU. Furthermore, the CJEU examined whether such a restriction falls within the scope of passive sales restrictions as defined in Article 4(b) of the VBER. In its analysis of these two inquiries as distinct issues, the Coty case appears to have implicitly acknowledged that the equivalence between these two concepts is no longer justified without explicitly stating this conclusion.

This distinction is now confirmed by the CJEU. In the Super Bock case, the Court upheld this approach by affirming that the classification of RPM as a “hardcore restriction” under the VBER Regulation does not inherently imply that it constitutes a “restriction by object.” More precisely, the CJEU ruled that it requires a contextual analysis of the “degree of harmfulness to competition”. The Court made it clear that a restriction by object may only be established after considering the content of the agreement, the economic and legal context of the case, as well as the nature of the goods and services affected. With this decision, the CJEU has simply applied long-established EU law principles[4] to vertical price-fixing agreements for the first time.

The Unspoken Agreement in Supplier-Distributor Relationships

In its second question, the referring court requested clarification on the notion of ‘agreement’ as defined in Article 101 TFEU to ascertain whether, in the specific circumstances of the main proceedings, an agreement exists between Super Bock and its distributors.

To answer this question, the CJEU unsurprisingly relied on previous case law by restating that an agreement requires a concurrence of wills between both parties[5]. More precisely, in the context of vertical price-fixing, the CJEU affirmed that for agreement to be characterized, it is necessary to establish whether the distributors have either implicitly or explicitly agreed to comply with the supplier’s request to maintain resale prices. The mere act of transmitting minimum prices and distribution margins to distributors, along with requests for compliance under the threat of retaliation or negative distribution margins, does not automatically imply the existence of an agreement.

Thus, although it would seem that it is unilateral conduct for a supplier to send distributors lists with minimum prices and to ask these distributors to follow those prices, which it monitors under threat of retaliatory measures, the distributors’ acceptance and adherence to the suggested prices, without raising any objections to the supplier may imply a tacit agreement or acceptance of the supplier’s practice. The rest is in the hands of the referring court, who will have to provide final assessment on the facts in a subsequent ruling.

Uncovering the Connection Between Supplier and Distributor Through Indirect Evidence

Thirdly, the referring court asked if the existence of an agreement between a supplier and its distributors may be established solely on the basis of direct evidence.
On the basis of a well-established case law[6], the CJEU reaffirmed that the principle of effectiveness is sufficient to establish the existence of an agreement on minimum resale prices not only through direct evidence, but also through coincidences and indicia (being objective and consistent). In the present case, an agreement could be inferred when a supplier invited its distributors to apply recommended minimum prices and that the distributors, in practice, followed the prices communicated by the supplier.

**Local Agreements May Still Affect Trade Between Member States and be Subject to EU Competition Law**

Finally, the referring court raised concerns regarding the scope of the agreement, as Super Bock’s direct sales did not cover the entirety of Portugal’s territory. They were confined to specific local areas until 2013, and subsequently expanded to include other territories in Portugal from 2014 onwards.

The CJEU simply applied the applicable case law on this point. To determine if an arrangement has a significant impact on trade between Member States, it is essential to examine its economic and legal context. The Court, quoting *Ziegler v Commission*[7], reiterated that impact on cross-border trade usually results from a combination of multiple factors that, when assessed individually, may not be decisive. It is therefore necessary to ascertain, with a “sufficient degree of probability”, whether the agreement possesses a significant “direct or indirect, actual or potential influence” on trade between Member States, even if it covers only part of the territory of a Member State.[8]

Thus, according to the CJEU, a vertical price-fixing agreement which applies to most, but not all, of a Member State’s territory, can still impact trade between Member States within the meaning of Article 101 TFEU.

**Conclusion & Key Takeaways**

The *Super Bock* judgment confirms that while a vertical price-fixing agreement could be considered as a by object restriction, it does not inherently constitute a violation of competition law. Rather, a case-by-case analysis must be conducted to determine the extent of harm the agreement poses to competition, i.e. by assessing the content of the agreement, its objectives and the economic and legal context of which it forms part – the three legal pillars necessary to establish a restriction of competition by object.

The responsibility now lies with the Portuguese court to ascertain whether, based on the specific factual evidence, the agreements in question are likely to violate competition law.

In EU law, the relevance of this judgment will have to be considered in the context of the updated Guidelines on Vertical Restraints, which reaffirms that “the Court of Justice of the European Union has held on several occasions that RPM is a restriction of competition by object within the meaning of Article 101(1) of the Treaty”[9]. Despite being effective only from June 1, 2022, the new Guidelines appear to have quickly lost their relevance on this specific subject.

On a broader scope, the approach adopted by the CJEU is also noteworthy as it seems to align with its US counterpart. In the United States, minimum RPM was traditionally seen as a per se violation (i.e. a category of agreements that are presumed to violate antitrust laws) for almost a century. However, in 2007, the US Supreme Court Leegin case shifted the approach to a rule of reason.
analysis, abandoning the automatic prohibition of minimum RPM. Sixteen years later, the Super Bock case has paved the way for EU law to adopt a more flexible and informal approach towards RPM, close to the one applied in the United States.

*Trainee Mathilde Cosperec also contributed to this article.*

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