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Unravelling the ECJ's Verdict in Case C-211/22 – Super Bock: The Golden Rules to Assess Vertical Price-Fixing Agreements in EU Competition Law

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Introduction

On 29 June 2023, the European Court of Justice (**ECJ or Court**) issued its judgment in case C-211/22, where it reiterates the legal framework applicable to vertical price fixing agreements under EU competition law. The focus on the need to assess the legal and economic context in which the agreement is celebrated is particularly important in qualifying a restriction of competition as a by object one. The Court emphasizes that this requirement should not be neglected.

The judgement addresses object restrictions in competition law and its impact on the interpretation of the Vertical Block Exemption Regulation (**VBER**) and the extent to which vertical agreements limited to the territory of a single Member State affect the internal market.

In this brief, after a summary of the main proceedings that gave rise to the reference for a preliminary ruling by the Portuguese Court of Appeal, we will focus on the Court's findings on vertical agreements and their analysis within the framework of competition law enforcement.

As we will conclude, there are eight golden rules that represent the core of a "*substance-based approach*".

The main proceedings

The reference for a preliminary ruling originated in the proceedings opposing Super Bock and the Portuguese National Competition Authority (**NCA**).

The dispute is based on exclusive distribution agreements between Super Bock and its independent distributors.

According to the facts considered proved by the national court, for approximately 11 years Super Bock had widely and consistently imposed on its distributors the commercial conditions under which they had to resell its products. Minimum resale prices that were communicated by Super Bock were allegedly applied by the distributors in order to ensure the maintenance of stable and

uniform minimum prices in the Portuguese 'HoReCa' sector, also called the 'on-trade' sector (see para 12 of the ruling for an explanation). A control and monitoring system was set up by Super Bock, under which distributors were required to provide information on resale to the latter, such as quantities sold and prices. Failure to do so could result in the loss of the guarantee of positive distribution margins that had been granted to them under those marketing terms.

The NCA considered this practice to be restrictive of competition, within the meaning of Articles 9(1) of the Portuguese Competition Law and 101(1) TFEU and imposed fines on Super Bock, on a member of its board of directors and on a head of its commercial department. All sanctioned parties appealed to the Portuguese Competition Court, which upheld the NCA's condemnatory decision.

The Court's judgement was then appealed to the Lisbon Court of Appeal, which decided to stay the proceedings and to refer a set of questions to the ECJ for a preliminary ruling. While being extensive and subject to some criticism by the ECJ (see paras 20-25 and 45), the questions relate to: *i)* whether the imposition of minimum resale prices by a supplier on its distributors constitutes an agreement for the purposes of competition law; *ii)* whether direct evidence is needed to prove the existence of an agreement; *iii)* the interpretation of the concept of restriction by object and whether or under what conditions resale price maintenance ('RPM') is to be considered as such; and *iv)* whether an agreement, which covers almost the entirety, but not all, of the Portuguese territory, is capable of affecting trade between Member States.

Unilateral vs. joint intention

Is there an agreement when a supplier imposes on its distributors minimum resale prices of the products that it markets? In its judgement, the Court recalls that it is sufficient that the undertakings have expressed a common will to behave on the market in a certain way. In this regard, while an agreement derives from the concurrence of wills of at least two parties, it can certainly be found in scenarios of unilateral expression of one party to the distribution contract, when the other expressly or tacitly adheres. In this particular case, if a supplier imposes minimum resale prices and the distributors act accordingly (i.e., by implementing those prices), there is an agreement if the distributor's compliance reflects the concerted will of those parties. Contrarily, if a supplier imposes minimum resale prices and no distributor follows its instructions, an agreement does not arise for EU competition law purposes. Although this conclusion is not entirely new, it is reinforced by the decision.

Golden rule no 1: following the settled case law, an agreement cannot be based on a statement of purely unilateral policy of one party to a contract for distribution. However, an apparently unilateral act or conduct may constitute an agreement when the specific circumstances of the case attest to explicit or tacit acquiescence, for instance, because the prices a supplier regularly transmits to its distributors are complied with by the latter (paras 44-52).

Burden of proof *vs*. standard of proof

In order to prove the existence of vertical agreements, the principle of procedural autonomy applies. This means that the Member States are competent to set the rules governing proof,

provided that the principles of effectiveness and equivalence are respected. As a result, national procedural rules must not be less favourable or make it excessively difficult to exercise the rights conferred by the Treaties.

Remember the Court's decision in *Eturas* (C?74/14)? Well, it seems to be alive and kicking. The existence of an agreement must be inferred from a series of coincidences and indications which, taken together and in the absence of any other plausible explanation, may constitute evidence of an infringement of competition rules. In sum, a vertical agreement between a supplier and its distributors can also be proven through *indicia*, where no alternative reasonable explanation is put forward.

Golden rule no 2: in light of the principle of effectiveness, an infringement of EU competition law may be proven through objective and consistent indicia, when there is no other plausible explanation for the anti-competitive behaviour (paras 54-58).

Can a beer get you drunk if you don't drink?

What do we mean for an agreement to be a restriction by object? Object restrictions are, by their nature, harmful to the proper functioning of normal competition. In its judgement, the ECJ began by recalling the landmark judgement in *Maxima Latvija* (C?345/14), which established that, once the anti-competitive object of an agreement has been established, it is not necessary to examine its effects. However, if the content of the agreement does not reveal a sufficient degree of harm to competition, the effects should then be examined in order to understand whether competition has actually been prevented or restricted.

This leads to a crucial question: can a competition authority find an object restriction without examining first whether a vertical agreement fixing minimum resale prices raises a sufficient level of harm to competition? In other words, can a competition authority simply presume that such an agreement presents a sufficient level of harm to competition at face value?

The ECJ's answer is clearly negative: a quick look at the context is mandatory and the burden of proof lies on the NCA.

Let us be clear: the ECJ's judgement is no less stringent because vertical agreements are at stake. In particular, the Court clarified that the fact that vertical agreements tend to be less restrictive than horizontal agreements does not exclude the possibility of finding a restriction of competition by object. So, vertical agreements can also have particularly significant restrictive potential.

In order to determine whether an agreement presents a sufficient degree of harm to competition, a competition authority cannot simply look at the bottle's label. A formalistic approach should be supplanted by a substantive analysis, under which i) the content of the agreement's provisions, ii) its objectives and iii) the economic and legal context of which it forms a part are properly considered. In its judgement, the ECJ pointed to certain elements that should be included in the analysis, such as the nature of the goods or services concerned, and the operating conditions and structure of the market(s) affected.

The judgement's importance does not stop here. It also clarifies the interpretation of the exemptions and derogations provided for in the VBER. In particular, the ECJ explains that the

vertical restrictions mentioned in the Regulation have the sole object of excluding certain vertical restraints from the scope of the block exemption. In short, agreements containing hardcore restrictions need to be examined on a case-by-case basis in light of Article 101(1) TFEU and under the legal criteria set by the Court.

Nothing new on the horizon. But sometimes the obvious must be restated. Five golden rules are now clear.

Golden rule no 3: the concept of restriction of competition by object must be interpreted restrictively and cannot be presumed nor assumed by competition authorities or courts (para 32)

Golden rule no 4: even if vertical agreements are by their nature often less damaging to competition, they can also comprise a restriction of competition by object (para 33).

Golden rule no 5: there is no closed or pre-defined list of restrictions by object that exempt competition authorities from the burden of proving a restriction of competition by object (para 35).

Golden rule no 6: when the parties to the agreement demonstrate *i)* relevant *ii)* sufficiently significant *iii)* procompetitive effects i*v)* intrinsic to the agreement concerned, these must be properly considered by the competition authority, in light of the doubts as to whether the agreement itself presents a sufficient degree of harm to competition (para 36).

Golden rule no 7: hardcore restriction lists are no shortcuts for competition authorities. The fact that an agreement falls within the category of hardcore restrictions for the purposes of a block exemption regulation does not authorise its automatic classification as restriction by object, since the concepts of hardcore restrictions and of restriction by object are not conceptually interchangeable and do not necessarily overlap (paras 38-42).

National or EU?

As regards the scope of the agreement, the ECJ recognised that a vertical agreement limited to the territory of one Member State, may, with a sufficient degree of probability on the basis of a set of factual and legal elements, actually or potentially affect trade flows between the Member States and constitute an obstacle to the achievement of the internal market.

The ECJ recalls, once again, that in order to determine whether an agreement affects trade, it must be examined in its economic and legal context. The fact that an agreement relates only to the marketing of products in a single Member State is not sufficient to rule out the possibility that trade between Member States is hindered. The very nature of agreements covering the territory of a Member State has the effect of reinforcing barriers of a national dimension, thereby hindering the fulfilment of the freedoms envisaged by the Treaties.

Golden rule no 8: the need to consider the agreement's economic and legal context is also relevant for the condition of effect on trade between Member States to be fulfilled, in particular for agreements that cover only part of the territory of a Member State (paras 59-65).

Conclusion

In this judgement, the ECJ highlights that the finding of an object restriction in vertical agreements must be carried out in a context-specific manner by assessing its economic and legal context. The agreement's restrictive nature cannot be presumed. It must be proved. And in order to prove it, the national competition authority cannot consider the formal features of an agreement alone.

While reaffirming past case law, this judgement's value lies precisely in the consistency of the message. The Court recognises again the non-static nature of competition law. The scope of an agreement cannot be overlooked by framing certain behaviours in a formal approach. It is true that moving away from a stricter framework of object and hardcore restrictions may entail a less objective application of the law, but this judgement promotes a greater sense of responsibility in the analysis of vertical agreements and their relationship with competition law. The binomial justice *vs*. certainty dichotomy is alive. Automatic by object restrictions are dead. Long live the rule of law.

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** The authors are members of the competition law team at Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL. The piece does not represent the views of the Law Firm or of its clients, including Super Bock.*

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