



## 'Hub-and-spoke' saga to be continued...

### CONTENTS

1. The first two 'hub-and-spoke' decisions
2. How does a 'hub-and-spoke' work?
3. Challenges to be faced by competition authorities
4. The fines

### 1. The first two 'hub-and-spoke' decisions

For the first time, the Portuguese Competition Authority (*Autoridade da Concorrência* – 'AdC') issued not one but two decisions on 'hub-and-spoke' arrangements in alcoholic and spirit beverages market imposing a total fine of circa €304 million – the largest fine ever imposed by AdC – against six large food retail chains.

Both cases now fined are not the first 'hub-and-spoke' cases investigated by AdC. The large retail chains sector is a key-sector on the watchdog of AdC. During 2017, AdC carried out dawn-raids into the premises of 44 entities and from which would result the opening of 16 proceedings, mostly against large retail chains.

Currently, investigations have led to seven statement of objections for "hub-and-spoke" arrangements, including the one issued a week ago. Last week, AdC had issued a statement of objections against three of the six large food retail chains now fined – Modelo Continente, Pingo Doce and Auchan – for another 'hub-and-spoke' arrangement in cosmetics and personal care products market.

In the first decision, AdC considered that the six large food retail chains Modelo Continente, Pingo Doce, Auchan, Intermarché, Lidl and E. Leclerc (the spokes) used the commercial relationship with the supplier (the hub) Sociedade Central de Cervejas ('SCC') – which commercializes, among others, beers Sagres and Heineken, ciders, such as Bandida do Pomar and sparkling water such as Água do Luso – to progressively increase their prices in the retail market. A SCC board member and a business unit director of Modelo Continente were also fined by AdC.

The AdC's investigation concluded that the distributors and the supplier concerted prices between 2008 and 2017, that is, for more than nine years, at the consumers' expense.

In the second decision, AdC fined the same four large food retail chains (Modelo Continente, Pingo Doce, Auchan and Intermarché), as well as Lidl and Cooplecnorte (E. Leclerc), for concerting prices, through the spirits supplier Primedrinks, in various alcoholic and spirit beverages, including wines from Esporão and Aveleda producers, whiskies such as The Famous Grouse or Grant's, Hendrick's gin or Stolichnaya vodka. This 'hub-and-spoke' arrangement occurred between 2007 and 2017, that is, more than 10 years.

Although 'hub-and-spoke' arrangements differ from traditional horizontal cartels in the lack of direct communication between the horizontal competitors, the adverse market effects may be similar – both may result in a hard-core price-fixing cartel, through a common supplier, thus restricting price competition between players and depriving consumers from price differentiation.

Under the current two decisions, AdC imposed, other than fines, the undertakings to immediately cease the 'hub-and-spoke' arrangements, as AdC was not able to rule out whether the investigated practices would continue.

### ✉ CONTACTS

Cláudia Fernandes Martins  
cmartins@macedovitorino.com

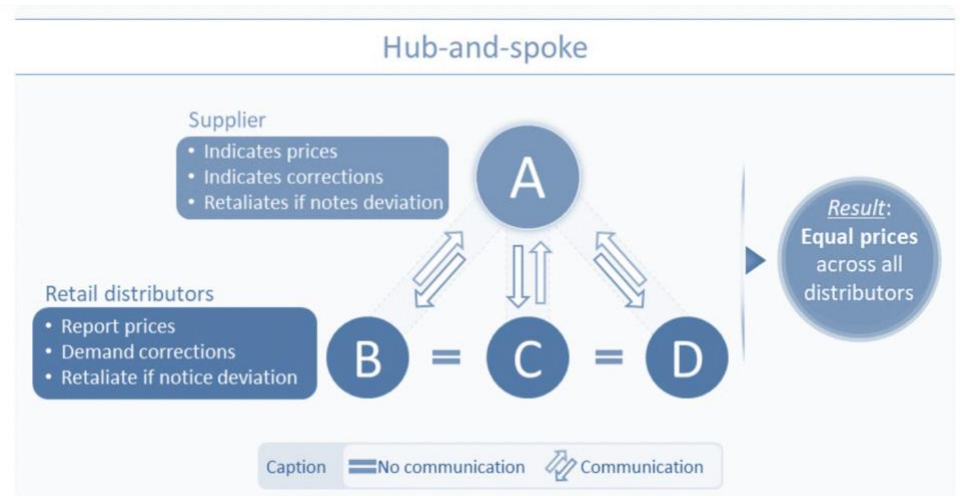
Simona Segundo  
ssegundo@macedovitorino.com

*This information is provided for general purposes only and does not constitute professional advice.*

Competition authorities may face some challenges to prove a 'hub-and-spoke' arrangement. The strategic nature of information exchanged between suppliers and retailers cannot be the ultimate criterion.

## 2. How does a 'hub-and-spoke' work?

'Hub-and-spoke' arrangements are horizontal restrictions on the supplier or retailer level (the 'spokes'), which are carried out through vertically related players that serve as a common 'hub' (e.g., a common retailer or service provider). The hub enables the coordination of competition between the spokes without direct contacts between the spokes, as shown below.



Source: AdC

## 3. Challenges to be faced by competition authorities

For competition authorities, it could be difficult to prove a 'hub-and-spoke' arrangement. The strategic nature of information exchanged between suppliers and retailers (which could be a necessary pro-competitive practice) cannot be, however, the ultimate criterion for an unlawful 'hub-and-spoke' arrangement.

It can be challenging to set boundaries between legitimate exchanges and indirect horizontal collusion and be necessary to go beyond the exchange of forward-looking pricing information and actually try to demonstrate that the operators' goal was to carry out indirect horizontal collusion.

The following potential issues could arise: (i) the 'hub-and-spoke' evidence (e.g., retail price setting/alignment, control and monitoring of retail prices, retail price deviation corrections); (ii) the legal framework of the arrangement, depending on either it is an horizontal or vertical arrangement; (iii) the means used to carry out the anticompetitive practice, e.g. Resale Price Maintenance agreements (RPM); and (iv) the purpose and awareness of the involved players.

Considering this, it is apparently justified that AdC has disclosed excerpts of the emails exchanged between the hubs and spokes (please see the example below) in its press release, which was outstanding considering AdC's former practice.

## 4. The fines

Fines are ultimately aimed at prevention, and must hence fulfil two main purposes: to punish (infringing competition rules would be profitable if it went unpunished) and to discourage undertakings from engaging in the same anticompetitive behavior in the future (i.e. specific deterrence), as well as to dissuade other potential undertakings from carrying out the same behavior (i.e. general deterrence).

Fines on 'hub-and-spoke' arrangements are limited up to 10% of the overall annual turnover of the involved undertaking(s). The 10% maximum limit may be based on the turnover of the group to which the undertaking belongs if the parent company of that group exercised decisive influence over the operations of the subsidiary during the infringement period.

The starting point to determine the fine is the percentage of the undertaking's annual sales regarding product related to the infringement during the last full year of the violation. The fine is also linked to the duration of the infringement. For instance, an infringement that lasts for ten years is assumed to be ten times more damaging than an offense that lasts for two years.

To set the fine, aggravating and/or mitigating factors should also be considered. For example, if the undertaking has been convicted for these offenses before, that will constitute an aggravating factor; or if the undertaking's role was limited, or if it cooperated with AdC during the investigations this could be a mitigating factor.

In the cases at stake, AdC imposed the largest fine ever applied: €304 million, as follows:

Undertakings	Fines
Sociedade Central de Cervejas (SCC)	€29,500,000
Board Member of SCC	€16,000
Diretor of Modelo Continente	€2,000
Primedrinks	€7,010,000
E.Leclerc	€2,060,000
Lidl	€10,550,000
<b>In overlapping:</b>	
Modelo Continente	€121,930,000
Pingo Doce	€91,090,000
Auchan	€22,250,000
Intermarché	€19,390,000
<b>Total</b>	<b>€303,798,000</b>

Both cases now fined anticipate that exemplary fines on ongoing investigations will be addressed to large food retailers in a near future and that they will sum the fines totalling €733 million imposed by AdC in the last two years.

Example of interchanged email (\*):

«From: [Supplier 1]  
Sent: Friday, 4 November 2011 10:58  
To: [Employees of the Supplier 1]  
Cc: [Employee of the Supplier 1]  
Subject: Urgent – Prices [Supermarket 1]

Dear All,  
As you already know, we are on the verge of getting some items up in [Supermarket 1]:

- TFG 13,49
- TFG Black 15,99
- Grant's 12Y 17,99
- Ermelinda Reserva 6,99
- Glenfiddich 12 Years 25,99
- Pisang Ambob 11,49
- Bols Blue 11,99
- Bols Avocat 11,99

It is **mandatory** to ensure that the other players will not compromise this movement, and thus please **DO NOT PUT** these items on brochures and ensure that the products are not locked for fairs ([Supermarket 2]/[Supermarket 3]).

Any questions, please give us prompt feedback.  
[Supplier 1]  
National Account Manager»

Source: AdC

(\*) Our reading translation. This email is disclosed in Portuguese only on the AdC's press release at [www.concorrencia.pt](http://www.concorrencia.pt).