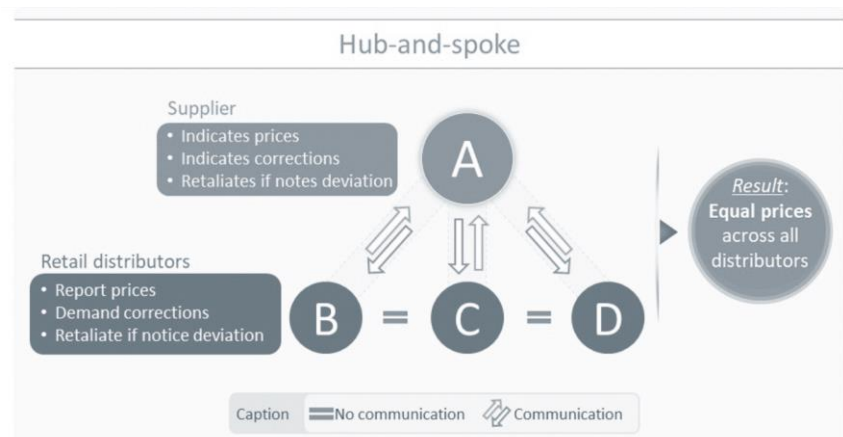


‘HUB-AND-SPOKE’ SAGA, TO BE CONTINUED (PART III)...

Three of the biggest Portuguese supermarket chains – Auchan, Modelo Continente and Pingo Doce – were once again fined by the Portuguese Competition Authority for a ‘hub-and-spoke’ arrangement.

The Portuguese Competition Authority (AdC) once again sanctioned three of the biggest supermarket chains in Portugal – Auchan, Modelo Continente and Pingo Doce – for a ‘hub-and-spoke’ arrangement, this time with the common food supplier Bimbo Donuts of packaged bread, Donuts, Bollycao or Manhãzitos.

‘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

The three largest food retailers, Auchan, Modelo Continente and Pingo Doce, established the alignment of retail prices in their supermarkets through contracts entered upon with Bimbo Donuts. The AdC investigation determined that the practice lasted for at least eleven years - between 2005 and 2016.

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.

AdC considered these practices to be highly damaging to consumers since the chains involved represent a large part of the Portuguese food retail distribution market, affecting the generality of the Portuguese population. Such a practice jeopardizes competition, depriving consumers from opting for better prices, while generating profit for the entire distribution chain, including supplier and supermarket chains.

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For competition authorities, it could be however challenging 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 the ultimate criterion for an unlawful ‘hub-and-spoke’ arrangement.

It can be tricky to set boundaries between legitimate exchanges and indirect horizontal collusion and be necessary to go beyond the exchange of forward-looking pricing information and 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 provided evidence for the allegedly eleven year arrangement available at its [website](#).

Bimbo Donuts will have to pay the largest fine amount, € 7.353 million, followed by Pingo Doce, with € 7.196 million, Modelo Continente, with € 7.161 million and Auchan with € 2.981 million, in a total of € 24.691 million. The fines imposed were determined by the sales volume of the four undertakings in the affected markets during the duration of the arrangement.

Under Portuguese Competition Law, these fines 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 eleven years is assumed to be eleven times more damaging than an offense that lasts for three years.

All the undertakings involved said to reject AdC’s decision and that they were going to appeal. Appealing will not, however, suspend the execution of the fines. Undertakings may however request the appeal court to suspend the enforcement of the decisions if (i) they demonstrate that it causes them considerable prejudice and (ii) they provide an effective guarantee in its place.

In December 2020 and recently, on November 2, 2021, AdC had already sentenced these and three other supermarket chains and three beverage suppliers, Sociedade Central de Cervejas, Primedrinks and Super Bock, for the same type of practice.

‘Hub-and-spoke’ arrangements in the large retail chains sector are in the loop of AdC and it is likely that new developments are expecting in a near future.

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