

## **The decision of the Portuguese Competition Authority (Ref. PRC/2016/4) and the Judgment of the Court of Competition, Regulation and Supervision (Case no. 71/18.3YUSTR-M)**

**"PCA condemns Super Bock for setting minimum resale prices for its products in hotels, restaurants and cafes."**

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*Tomás Carvalho Guerra*

§1. On 3 June 2016, following two complaints from former Super Bock Bebidas distributors (from now on "SBB"), a lawsuit was initiated by the Portuguese Competition Authority ("PCA") against SBB. Such a procedure aimed to investigate suspected restrictive practices by the SBB, in particular, because it allegedly set minimum resale prices for its products and thus unlawfully restricted competition.

§2. The PCA concluded, after an extensive investigation, that the SBB, between May 2006 and January 2017 (approximately 11 years) set minimum prices to be practised by its distributors and determined the marketing margins and other direct or indirect remuneration of distributors in the beverage brands on the HORECA channel<sup>1</sup>. On 25 July 2019, the PCA ordered the SBB to pay a fine of more than EUR 24 million. In addition, it imposed a fine of EUR 12,000 on the administrator of SBB and a fine of EUR 8,000 on his commercial director.

§3. Regarding the existence of an agreement that restricts competition, we must assess whether (i) we are dealing with two or more undertakings, (ii) whether there is an agreement, (iii) whether that agreement restricts competition and (iv) whether it affects trade between the Member States.

§4. *In casu* the PCA considered that (i) we are dealing with two or more undertakings<sup>2</sup>, (ii) there is a vertical agreement between the undertakings involved in the proceedings<sup>3</sup>, (iii) that the agreement restricted competition<sup>4</sup>, accusing the SBB of a vertical resale pricing agreement, since the SBB deprives its distributors of the freedom to define the prices at which they will resell the products (cf., *above*, §1, §2) and (iv) that "(...) *on the basis of these elements, (...) the agreement*

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<sup>1</sup> The HORECA channel corresponds to the area of economic activity where the hospitality, catering and cafeteria sectors operate.

<sup>2</sup> It should be seen that the PCA states in its decision that "*in the present case, both the Defendant Super Bock and the distributors qualify as 'undertakings', since they all carry out economic activities, in accordance with and for the purposes of the competition rules*" (paragraph 1074 of the PCA decision).

<sup>3</sup> One means used as evidence was electronic correspondence between distributors and the SBB. This correspondence shows that the prices and discounts transmitted internally by the Sales Directorate to the respective teams were forwarded to distributors in writing, via email, with the warning of their mandatory character.

<sup>4</sup> This restriction may be by object/objective (by default, price-fixing agreements) or by effect. As far as restrictions by object go, the Court has already held that the subject matter of the practice corresponds to its purpose and objective in its economic and legal context and not to the intention of the parties (cf. judgment of the CJEU General Motors BV, 06.04.2006, proc. C-551/03 P). The practice itself is regarded as harmful for the functioning of the market competition. Therefore, European case law has identified vertical agreements and resale pricing as being, *itself*, anticompetitive.

*in question is liable to strengthen national barreas, contributing to the isolation of the national market and hindering the economic penetration sought by the TFEU"* (paragraph 1178 of the PCA's decision).

§5. Supported by all the facts laid out, the PCA concludes that the practice of the Defendant falls within the category of a vertical agreement restricting competition by object and, being the four conditions in Article 101/1 met, the penalty provided in Article 101/2 has been applied, the agreement is null and void. However, the SBB claims that it never intended to recommend or fix prices (see paragraph 1115 of the PCA's decision).

§6. We should also underline that the SBB has a significant weight in the market as one of the leading beverage producers/distributors in Portugal (which results from its market share: SBB has a market share of around 50%-60% in the domestic market for beer and unflavored gas) and an annual turnover of around millions of euros.

§7. In order to benefit from the possibility of justification under Article 101/2, the SBB strongly argues that its practice has always been aimed at benefiting consumers and enhancing competitiveness. However, the Competition, Regulatory and Supervisory Tribunal ("TCRS") – deciding on an appeal brought by the SBB – reiterates the PCA's view that *"the evidence supports an interpretation which is absolutely contrary to that of the alleged justification of the practice"* (paragraph 1201 of the PCA's decision), and concluded that *"the cumulative conditions referred to in Article 10 are not met, paragraph 1 and 2 of the RJC and Article 101(3) of the CJEU, and the agreement between companies cannot be considered justified"* (paragraph 12918-12920 of the TCRS's decision).

§8. The TCRS, by a judgment given on 6/10/2021, upheld the PCA's decision, ordering the SBB to pay a fine of 24 million euros, and also sentenced its administrator and commercial director to a fine of 12 thousand euros and 8 thousand euros, respectively (paragraphs 14065-14073 from the TCRS's decision). In addition, it also declares unfounded the request for the unconstitutionality of the seizure of electronic correspondence, clarifying that, after being received, *"the message is now considered archived information and not correspondence"* (paragraph 14032-14035, 2385-2389 of the TCRS' decision).

§9. Following the confirmation of PCA's decision by the TCRS, there is now a popular action of *"private enforcement"* brought out by the consumer protection association "Ius Omnibus" against the SBB, representing all Portuguese consumers harmed by Super Bock's anticompetitive practices identified by the PCA.