BETWEEN A BOCK AND A HARD PLACE: DOES EUROPE'S RESALE "PINT" MAINTENANCE DECISION MEAN MORE RESALE PRICING CONTROL FOR SUPPLIERS?

Date: 26 July 2023

Policy and Regulatory Alert

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In late June 2023, Europe's highest court confirmed in a hotly anticipated judgment involving leading Portuguese beer and beverage producer Super Bock Bebidas that resale price maintenance (RPM)—namely the *vertical fixing of customers' resale prices*—does not automatically constitute a "by object" restriction of competition under EU antitrust law. This welcome judgment clarifies that RPM should not automatically be presumed to infringe the law, and antitrust enforcers must do more to conclude there is a serious infringement.

Thus, the question for suppliers is: Does the *Super Bock* decision pave the way for a more lenient treatment of RPM and other vertical restraints in Europe?

BACKGROUND

The EU Law Rule at the Center of the Case

Article 101(1) of the Treaty on the Functioning of the EU (TFEU) prohibits agreements that have as their object or effect the prevention, restriction, or distortion of competition. "By object" restrictions comprise a category of the most serious restrictions that, based on experience, have such a high potential of negative effects on competition that the law regards it as unnecessary to demonstrate any actual effects on the market. This is similar to the US concept of a "per se" violation. By contrast, if a restriction does not fall within the "by object" bucket, the regulator is obliged to carry out a full empirical assessment of the agreement's actual effects on competition in the market and prove that these are sufficiently harmful before it can make an infringement finding.

The Application of the Rule in Super Bock

In 2019, following a three-year investigation into Super Bock's pricing practices, the Portuguese competition authority imposed a fine of €24 million on Super Bock, a director, and a board member for fixing minimum resale prices in the Portuguese restaurant and hospitality sector.[1]

The extensive evidence showed that Super Bock had, for over a decade, sent customers lists of minimum resale prices on a monthly basis, monitored their resale prices, controlled margins, and taken retaliatory measures in cases of noncompliance.

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Although seemingly an extreme example of RPM, Super Bock appealed the fine, arguing that the authority had failed to demonstrate (i) an agreement, and (ii) sufficient harm for the purposes of a “by object” finding.

Following escalation up through the Portuguese courts, in March 2022, the Lisbon Court of Appeal asked the Court of Justice of the European Union (CJEU) for a preliminary ruling providing guidance on the correct interpretation of the legal test and, in particular (among other questions), if RPM constitutes a “by object” restriction under Article 101(1) TFEU.

The CJEU concluded: “not automatically.”

CJEU CONFIRMS IT IS ABOUT SUBSTANCE OVER FORM

The CJEU restated that the concept of a “by object” restriction must be interpreted narrowly and that the determination that an RPM practice is a “by object” restriction:

[M]ay only be made after having determined that that [it] presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterize the economic and legal context of which it forms part.

The CJEU also stressed that where the parties to the agreement rely on its procompetitive effects, those effects “must, as elements of the context of that agreement, be taken into account."

Thus, where an initial analysis does not reveal an obvious likelihood of serious harm, or where doubt is cast on this because there are indications that the restriction pursues or achieves legitimate, pro-competitive aims, the authority will not simply be able to make an automatic infringement finding without conducting a full effects analysis (which is a much higher threshold to meet).

BUT I THOUGHT RPM IS A HARDCORE RESTRICTION?

The CJEU also reminded authorities that the fact that RPM is categorized as a “hardcore” restriction under the Vertical Agreements Block Exemption Regulation (VBER) does not necessarily make it a “by object” infringement. The two concepts are very different: The “hardcore” designation simply means that a restriction will not benefit from the automatic legal exemption under the VBER safe harbor and will need to be individually assessed under Article 101 TFEU. For this reason, the CJEU effectively warned that VBER cannot be used by antitrust authorities and courts as a shortcut for an infringement analysis.

Thus, the fact that there is a “hardcore” restriction under VBER does not automatically presuppose an infringement.

DOES THAT MEAN SUPPLIERS ARE NOW FREE TO FIX THEIR DISTRIBUTOR'S RESALE PRICES?

Not so fast. The Super Bock judgment only means that an authority cannot jump to a “by object” conclusion too quickly. The matter will now revert to the Lisbon Court of Appeal, who may well conclude that the conduct was egregious enough to constitute a “by object” infringement after all.

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Thus, as a general rule, RPM is likely to remain a high risk in many if not most cases (see our prior alerts here and here), and RPM motivated solely by maintaining or increasing market prices realistically risks being treated as a "by object" infringement under the CJEU's test.

But Super Bock is potentially highly encouraging where a supplier imposes minimum resale prices that pursue or achieve pro-competitive aims, such as legitimate protection against unfair free-riding, protection of distributors' material investments in promotion, quality and customer service, or protection of the supplier's significant investments in bringing innovations to market (which would not be made without such protection).

Where an effects analysis is necessary, that would still involve a rigorous exercise and turn on factors such as the supplier's market position, the structure of the market, and critically the strength of the evidence of the RPM's actual or likely effects on competition in the market. However, in these cases which pursue aims besides just the restriction of price competition, the Super Bock judgment could open up promising opportunities for RPM that suppliers were reluctant to pursue previously.

The CJEU's substantive approach further implies that there might be broader scope for RPM than the narrow circumstances set out in the European Commission's revised guidelines on vertical restraints (Vertical Guidelines), namely for new product launches, short-term coordinated promotions, to prevent below-cost selling by distributors who use a brand's product as a loss leader, and to support partners' additional pre-sales services. Notably, the Vertical Guidelines currently provide that the burden is on the supplier to prove that the RPM here is strictly necessary and that there are no less restrictive viable alternatives if the supplier wishes to benefit from an individual exemption under Article 101(3) TFEU.

It also follows from the rationale in Super Bock that, besides a variety of RPM cases, the CJEU's analysis should apply to other (hardcore) vertical restraints, such as online sales restrictions and cross-border sales restrictions that pursue pro-competitive aims. In these cases, the authority or court cannot automatically categorize these as "by object" restraints—it must properly assess both their negative and positive effects on competition before it can conclude Article 101(1) TFEU is infringed.

WILL A UNILATERAL PRICING POLICY NOW BE POSSIBLE IN EUROPE?

As a final observation, an interesting feature of the *Super Bock* case was a debate around whether Super Bock's RPM practices constituted an "agreement" for the purposes of Article 101(1) TFEU. The CJEU concluded that an agreement will not arise from purely unilateral conduct of the supplier. Specifically, it concluded that asking distributors to comply with minimum resale prices or imposing retaliatory measures for failure to do so will not *by themselves* be enough for an agreement under Article 101(1) TFEU. Rather, a "concurrence of wills" of at least two parties is required.

A cursory reading of this judgment might spark interest from brands in adopting a "unilateral pricing policy" (UPP) as is common in the United States. However, in our view, *Super Bock* does not open up a viable unilateral option in Europe and is a red herring given the technical difference between what triggers an illegal "agreement" in the United States as compared with the European Union.

In the United States, a UPP is generally permissible where it is limited to a brand (i) announcing a minimum resale price and then, (ii) refusing to deal with a reseller in nonacquiescence. It is any supplier actions beyond refusal (e.g., negotiations, warnings, further forms of retaliation) that can lead to a once unilateral policy becoming

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an illegal bilateral agreement. Whereas in the European Union, it is not further supplier actions that would seem to create an agreement; instead, this judgment implies that the market's acquiescence or compliance with the policy that is the trigger. So while a brand may be able to technically announce a unilateral policy in the European Union, should resellers choose to comply with that policy (which is the objective), it becomes a bilateral agreement on price.

CONCLUSION

It has been far too easy for competition authorities to get away with harsh infringement findings and fines without having to conduct any effects analysis or prove harm, including in cases where the legitimate objectives of the vertical restraint were acknowledged. This decision is an important reminder for authorities and courts that a formalistic application of Article 101(1) TFEU, with little regard to the substance of a practice in context, is vulnerable to challenge.

FOOTNOTES

[1] See https://extranet.concorrencia.pt/PesquisAdC/PRC_OR_INC_OR_PCC_Page.aspx?IsEnglish=True&Ref=PRC_2016_4.

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