



Capsulas

Form and substance, recommendations, and price fixing

Judgement of the Court of Justice of 29 June 2023 in case C-211/22 Super Bock

Background

Super Bock, a Portuguese beer manufacturer, provided a list of the minimum resale prices to its distributors, either orally or by email. This list was generally followed by the distributors, and compliance with it was monitored and incentivised with discounts. The Portuguese Competition Authority found this conduct to be a restriction of competition by object and, therefore, presumed its anticompetitive effects. The Lisbon Court of Appeal referred to the Court of Justice (CJEU) for a preliminary ruling on the question of whether a unilateral conduct, as described, could be deemed equivalent to a bilateral agreement. Additionally, it asked whether a vertical agreement fixing resale prices could be considered a restriction of competition by object, without first examining whether it revealed a sufficient degree of harm to competition.

A unilateral conduct can be considered as a bilateral agreement

In line with previous doctrine, the CJEU held that even if the transmission of the list, monitoring, and retaliatory measures are unilateral acts, the compliance with prices by the distributors may imply tacit acquiescence and express the concurrence of wills between two parties. Therefore, it can be qualified as an “agreement” within the meaning of Article 101 TFEU.

Substance above form

On the other hand, the CJEU held that to penalise the existence of an anticompetitive agreement

(even if it includes hardcore restrictions) it is always necessary to consider its context. Similar to horizontal agreements, to determine that a vertical agreement reveals a sufficient degree of harm to competition, and can be considered a restriction by object, one must consider its content, objectives and context. Factors such as the nature of the products, market structure, and pro-competitive effects must be considered.

The CJEU has consistently emphasised the need to consider the context of a practice when assessing its degree of harm to competition and categorisation as a restriction by object. However, vertical price fixing resisted this approach. Since the Binon case in 1985, this conduct has been considered, by its nature, a restriction of competition by object. Therefore, its anticompetitive effects were presumed. With this judgment, the CJEU clarifies this situation and confirms the need to consider the context even in cases of vertical price fixing.

Vertical price fixing tends to restrict competition

That being said, the guidelines remain the same. Imposing resale prices presents significant risks. Caution is paramount when incentivising distributors to align with resale price recommendations, as this can be deemed an indirect means of imposing them. Indeed, following the CJEU judgment, the Lisbon Court of Appeal confirmed Super Bock’s infringement and upheld the 24 million euros fine.