

Competition - Portugal

Regulator reports on large retail groups and suppliers

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Introduction

Main issues

Comment

Introduction

In October 2010 the Competition Authority issued its final report on commercial relations between grocery retailers and their suppliers,⁽¹⁾ bringing to an end a sector-specific study that was initiated in 2009.

The comprehensive 700-page report is a detailed survey of the production, procurement and food-based retailing markets. It focuses on the activities of the large retail groups operating in Portugal. These include international retailers Aldi, Auchan, Carrefour, El Corte Inglés, E Leclerc, ITMI and Schwarz (Lidl), as well as the two largest Portuguese-based retailers, Modelo Continente and Jerónimo Martins.

The initiative partly reflects concerns elsewhere in Europe about the functioning of retail markets, particularly for food-based retailing, which have led to several political initiatives at EU level and have prompted sector-specific studies and investigations of alleged restrictive practices at national level.

Main issues

The most positive aspect of the report is the recognition that food retailing in Portugal is a pro-competitive market. No cause for concern was identified in the traditional fields of application of competition law (ie, individual or collective abuse of dominance and restrictive agreements or practices) or in relation to abuse of economic dependence, which is a notable feature of competition legislation in Portugal (as in certain other jurisdictions).

Furthermore, a thorough quantitative assessment of procurement markets did not reveal widespread buyer power on the part of large retail groups in relation to their suppliers. However, there are some exceptions to this overall picture. The authority considers it likely that large retail groups will gain countervailing buyer power in relation to their suppliers in the coming years, specifically in sectors where such groups act as 'gatekeepers' between suppliers' branded goods and end consumers.

Despite the generally favourable diagnosis in respect of market competition, the report raises a number of new issues. The report identifies an imbalance between the relative positions of large retail groups and their suppliers when negotiating and concluding agreements. This imbalance - in favour of the groups - has been identified as the basis of the unilateral imposition of contractual conditions by recourse to a contracting model based on retailers' general terms and conditions, discounts and other benefits granted to large retailers, penalties for suppliers' breach and payment terms.

As a result, the authority's final recommendations seek to address the issue of imbalance in negotiations. The authority recommends that self-regulation be promoted by a code of conduct, whereby the relevant market players would regulate issues such as:

- dispute resolution mechanisms;
- the appointment of an ombudsman;
- the establishment of guidelines for standard contracts;
- the inapplicability of retroactive penalties;
- shelf-space management; and
- payment terms.

The authority suggests that new legislation be adopted to deal with contentious trade practices that are

not covered by existing legislation.

The authority also recommends the establishment of a price-monitoring entity to deal with the collection, treatment and dissemination of statistical information on prices along the food supply chain. This recommendation is consistent with the European Commission's policy recommendation to EU member states on the functioning of the supply chain.

These principal proposals are complemented by additional recommendations on:

- more active and effective enforcement of existing legislation, particularly in respect of individual unfair trade practices and payment deadlines;
- measures regarding lookalike and copycat products;
- incentives to encourage the establishment of small and medium-sized firms in local markets with a focus on food-based retailing; and
- the protection of products bearing designations of origin or geographical indications.

Comment

The report and final recommendations raise an number of questions. The imbalance in negotiating positions between large retail groups and their suppliers, which has a key place in the authority's conclusions, is not strongly substantiated in legal terms. Moreover, this finding seems to be partly contradicted by the authority's economic analysis, which shows that large retail groups do not have widespread countervailing buyer power over their suppliers, at least at present.

The authority acknowledges that many of the imbalance issues are relevant from an ethical and commercial point of view or from a private contract law perspective, rather than in competition law terms. This underlines the need for caution in implementing the corresponding measures, as excessive regulation of the content of agreements or heavy-handed legislative intervention might adversely affect the promotion of competition policy.

Overall, the report represents an important analysis of the retail sector and its upstream production activities. It offers an appropriate framework within which to assess some of the sector's forthcoming problems and challenges, and market players should carefully assess its conclusions and recommendations. Nevertheless, doubts remain about the practical implementation of the recommendations and the need for and proportionality of certain proposals, which makes a debate on the issues all the more necessary.

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Endnotes

⁽¹⁾ An abridged English version is available at www.concorrencia.pt/download/AdC_Relatorio_Final_Distribuicao_Fornecedores_Outubro_2010_en.pdf.

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