Your World First

October - November 2015

Consumer Products

1.More about the DIA/EROSKI agreement: The stakes are high…

The last two weeks have been dominated by the implementation of a joint purchase agreement announced in June between DIA and EROSKI, leading to the filing of two complaints by the Spanish Federation of Food and Beverage Industries (FIAB) against the two distributors, an unprecedented event. The first complaint, filed before the National Markets and Competition Commission ("-CNMC-"), relates to an infringement of articles 1, 2 and 3 of the Spanish Competition Act ("-SCA-"). The second, filed before the Spanish Information and Food Control Agency ("-AICA-"), corresponds to an infringement of articles 12 and 13 of the Food Supply Chain Act ("-LCA-").

Background

According to the available information, following the pause in July and August, DIA and EROSKI began joint negotiations with the various affected suppliers. Both companies invited the representatives of each affected supplier to set out their new demands -summarised in the joint petition for an economic contribution for each one of the distributors to be paid in the short term, with the associated counterparts, as the case may be, to be negotiated separately in the medium term-, as well as the procedure followed to generate such demands -a comparison of the purchasing conditions, on a list by list basis, between both companies and the application of a more favourable client clause whereby each company becomes a creditor against the supplier due to the differences found-[1].

Complaint before the AICA

The opening section of article 12 of the LCA prohibits unilateral amendments to agreements. Thus, only mutually agreed amendments are permitted. Nevertheless, the second section of said article is stricter in the sense that it prohibits any additional payments to the agreed price, even if the two parties conform to it [2]. Despite clashing with the principle of autonomous free will and providing the advantage of preventing rigidity in some commercial relationships -which are and must remain very dynamic-, the mandatory nature of the foregoing is explained by the requirement to prevent the strong party to the agreement circumventing the prohibition of unexpected unilateral amendments by relying upon the fact that weak party has given in to the pressure and provided its consent. In addition, sections 3 and 4 of article 13 of the LCA prohibit the parties using the commercially sensitive and confidential information provided by the counterparty for any means other than those prescribed from the outset. The complaint filed by the FIAB represents a baptism of fire for the AICA with regards to the relationship between manufacturers and distributors. Moreover, it shall set the criteria to be followed in the strict interpretation of the aforementioned regulations.

A literal interpretation of articles 12 and 13 of the LCA appears to lead to the conclusion that DIA and EROSKI have infringed said provisions. Regarding the unauthorised use of confidential information, the accused must have shared their respective suppliers' information in order to carry out the comparison exercise. Meanwhile, the request for additional contributions based on the purchasing conditions in force, without being associated to any counterparts regarding the listing of products or promotional activities, may infringe article 12 of the LCA. Nevertheless, there would be no requirement for DIA and EROSKI to absorb their demands, exactly what the regulation seeks to avoid.

As in most cases, the conclusion appears more complex. It is necessary to analyse the specific aspects of the execution of the agreement -for example in order to carry out a comparison, both entities would have used an independent third party to safeguard against any confidentiality issues- without it turning into a general crusade against the distribution sector. Moreover, joint purchasing agreements are common practice in the agri-food sector -see IFA and EUROMADI-. Nevertheless, in our opinion, it may not be concluded that such agreements automatically entail an infringement of the referred regulations.

The Director of the AICA has declared that the investigation shall be "*very lengthy*" and "*complicated*", and that the organisation is to put together an inspection plan affecting many companies [here]. Without ignoring the obvious difficulty of the task, it is hoped that the Director is mistaken about the duration of the procedure, given that the operators need to know as soon as possible –companies find themselves currently negotiating the staff for 2016- which are the rules of the game.

Complaint before the CNMC

The application of articles 2 and 3 of the SCA -referring to the prohibition of the abuse of a dominant position and unfair practice affecting public interest- to the agreement between DIA and EROSKI appears particularly complex in the beginning. This is due to the difficulty in verifying the existence of a dominant position -if the supply market is national in scope, could it be said that one of the distributors holds a dominant position?-, as well as the authority's traditional reluctance to apply article 3 of the SCA, particularly when the existence of unfair conduct would be justified by an infringement of the LCA, something which holds little affection among the CNMC's officers.

Nevertheless, the question as to whether the agreement represents a competition-restricting agreement prohibited in article 1 of the SCA appears more straightforward. With regards to this issue, we have already pointed out here, here and here how these horizontal cooperation agreements must be analysed in accordance with the European Commission Guidelines and how purchasing agreements between distributors have lately been more scrutinised by the competition authorities of other Member States such as Italy, Germany and, more recently, France.

Said Guidelines, as well as the precedents of other authorities, indicate that the CNMC's analysis must focus exclusively on the specific aspects of the agreement between DIA and EROSKI. Moreover, similar to an

infringement of the LCA, said analysis should distance itself from a general judgment against the alleged unfair distribution practice.

The supply market

Thus, the authority shall analyse whether the agreement causes issues regarding the exclusion of certain suppliers in the upstream market -please consider, for example, the two distributors' capacity to strengthen the credibility of a threat of delisting-. In view of the foregoing, we believe that the CNMC should review its previous actions when defining a single supply market throughout national territory, as well as how other authorities or the European Commission have assessed the purchasing power of DIA and EROSKI, distinguishing by product category and excluding the distributors' own brand and, at least for specific categories, by geographical area.

Moreover, if the CNMC uncovers a joint market share of more than 20%, 30% or even 50% following said analysis, we believe that such conclusion would provide more than sufficient justification for a detailed study on the effects of the agreement in question.

The retail distribution market

In our opinion, the most concerning effects of the agreement would be directed *downstream*, in the retail distribution market, insofar as the intensity of the competition between DIA and EROSKI to attract end customers (or even between these two and the rest of the distributors) may be affected. In this regard, the CNMC should review whether the specific system implemented by the two companies guarantees that the exchange of information is limited to that strictly necessary for the purposes of the agreement[3].

Even more importantly, the CNMC should take into account the specific incentives derived from the agreement, as established thereby. In essence, from the distributors' perspective, there is a risk that the strategy followed by DIA and EROSKI to improve their competitive position produces a domino effect -as has occurred in France-.

Thus, regarding the logical fear that DIA and EROSKI may repeat the comparison exercise in future years, the suppliers shall make their best efforts to avoid such price differences occurring in the future (for the already marketed lists and above all for new lists). This would lead to an alignment -possibly upwards- of the suppliers' prices, not only between DIA and EROSKI, but with all distributors, entailing the consequences which the foregoing would likely have on the reduction of competition between retailers and the price increase for final consumers[4].

2. Short Comment on the CGMP recently approved

Finally, the Code of Good Mercantile Practices in the food supply chain ("CGMP") was signed last 24th November, although perhaps not with the expected consensus. The self-regulation of commercial relations and their main features were already foreseen in the LCA, entered into force on January 2014. However, it's been nearly two years later when, after many negotiations and multiple versions, the final text has gone through.

In essence, the CGMP establishes general principles on which the commercial relations and practices, the circumstances for adhesion and leave from the Code, and not least important, the system for conflict resolution must be based.

Amongst these general principles we find the clarity and concretion of the agreements, the loyalty regarding the exchange of information, equity when transferring risks and responsibilities between operators and the non-imposition of unjustified conditions. More precisely, other obligations concerning key aspects such as commercial negotiation (which must be closed within a maximum of three months from its start), contracts (always in writing without exception, and with a more developed minimum content than in the LCA), the category management or the innovation, promotion activities, the supply chains and logistics, payments, communication of commercially sensitive information and food security, quality and information to consumers are included.

Regarding the conflict resolutions, mediation is promoted over arbitration, which is seen as a subsidiary procedure. The CGMP contemplates a prior claim proceeding before a "customer and supplier ombudsman" for those companies which are not SME, as well as a confidential procedure of collective claim.

However, the CGMP doesn't yet grant in a specific way the independence of the mediators or foresees a specific

institution to make available the arbitration, in line with what the CNMC stated in its report on the proposal of the Code. Likewise, the drafting of the collective claim remains unclear, as it fails to establish if it is a procedure to be started by one of the above mentioned instruments (prior claim, mediation or arbitration) or not. On top of this, the possibility of an anonymous complaint to individual operators is not extended, as proposed by the CNMC.

For the moment, professional agricultural organizations ASAJA, COAG and UPA, the agro alimentary cooperatives of Spain, the Spanish Federation of Food and Beverage Industries (FIAB) and the Spanish Association of Self-service and Supermarket Distributors (ASEDAS) –which includes MERCADONA and DÍA amongst others – have subscribed the CGMP, whilst certain associations of the distribution sector, the National Association of Big Distribution Companies (ANGED) and the Spanish Association of Supermarket Chains (ACES), who's main represented include CARREFOUR and EL CORTE INGLÉS, have turned aside from signing the document at the last moment.

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3. Mergers

European Commission

COCA-COLA M.7763

09/11/2015. The European Commission has cleared the merger comprising the merging of COCA-COLA ENTERPRISES, COCA-COLA IBERIAN PARTNERS and COCA-COLA ERFRISCHUNGSGETRÄNKE into a single bottling entity for the whole of Western Europe. Said entity shall operate under the name COCA-COLA EUROPEAN PARTNERS.

The Commission concluded that the operation did not pose competition problems given the absence of geographical overlaps and the fact that consumers would continue to have enough alternatives.

The companies estimate net consolidated sales to reach EUR 12.6 billion across 50 bottling plants.

AB INBEV/SABMILLER

11/11/2015. Early November saw the conclusion of the purchase by Belgian brewer AB InBev of its British competitor SABMiller for GBP 71 billion (EUR 99.4 billion) to create a sector giant owning popular brands such as Budweiser, Corona and Peroni.

As mentioned here, the resulting entity shall be responsible for the production of 30% of the beer consumed worldwide with a presence in more than 80 countries.

The sale to Molson Coors Brewing of SABMiller's 58% stake in MillerCoors had already been agreed within the master agreement.

For the sake of removing the possible obstacles placed by the competition authorities, recent news suggest that AB InBev is planning to sell several brands such as Peroni and Grolsch (currently owned by SAB Miller). In essence, it appears that within the premium bottled beer/lager category, the SAB Miller brands Peroni and Grolsch compete directly with those belonging to AB InBevm - Stella Artois and Corona -, especially in key markets such as the UK.

UK

HEINEKEN / DIAGEO (Press release)

20/11/2015. The CMA is investigating the acquisition by HEIKEKEN N.V. of some assets associated with Diageo plc's beer business, including the manufacturing and distribution of the Red Stripe, Dragon Stout and D&G Malta brands in the UK. On the 20 November, the CMA announced the launch of its merger inquiry by notice to the parties.

Germany

The authority obliges the dissolution of a merger in the dairy sector (Press Release)

05/10/2015. The two largest dairy producers in Germany, ANDECHSER MOLKEREI SCHEITZ GMBH and MOLKEREI

SÖBBEKE GMBH, formed part of the French group SAVENCIA S.A. (known until recently as BONGRAIN). In 1999, SAVENCIA purchased shares in ANDECHSER and acquired SÖBBEKE between 2011 and 2013. This transaction was authorised in 2011 by the German competition authority based on inaccurate information provided by SAVENCIA during the merger control procedure.

After becoming aware that the company had provided inaccurate information, the Bundeskartellamt began a thorough investigation which led to a proceeding of dissolution of the merger. From a Competition Law perspective, the authority believes that we must distinguish between products made with conventional milk and those produced with organic milk. The joint market share of the two dairy producers exceeds 50% in relation to the so-called "white line", in particular natural yoghurts and organic fruit, as well as organic drinks and organic fruit curd. According to the Bundeskartellamt, the merger significantly hindered effective competition in several markets. In order to prevent the dissolution of the merger, SAVENCIA has offered to withdraw its stake in ANDECHSER.

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4. Conducts

Investigations

Spain

Nappies for adults (S/DC/0504/14)

06/11/2014. The CNMC has sent the Statement of Objections (SO) to the manufacturers and distributors of nappies for adults involved in this matter. Among those are LABORATORIOS INDAS and two subsidiaries.
According to the parent company's communication to the American SEC, the alleged acts entailed price fixing and market sharing between December 1996 and January 2014. Among the 15 companies charged are Procter & Gamble and Domtar Lux.

UK

Sports Equipment (Press release)

18/11/2015. The authority has revealed that it is investigating the sports equipment sector for anti-competitive practices- Although nothing else is derived from the reasons of the investigation-.

Portugal

Office consumables (24/2015)

29/10/2015. The competition authority has sent an SO to five office consumables manufacturers in view of their possible involvement in a price fixing and market sharing agreement. Such acts are alleged to have been committed over the course of approximately 14 years.

Sanctions

Germany

MATTRESSES (Press release)

22/10/2015. The Bundeskartellamt has imposed a new fine of EUR 15.5 million on TEMPUR DEUTSCHLAND GMBH, STEINHAGENM for fixing the resale price to its distributors.

According to the aforementioned authority, the distributors would have agreed to bind themselves to the agreement in fear of reprisals on the manufacturer's part upon failing to respect the recommended prices. If at any point a certain distributor deviated from the recommended price by 5%, TEMPUR contacted the distributor in question to induce him to raise his sales prices to the recommended level. If the distributor refused, it was forced to suffer considerable delays in supply or even a discontinuation of supply.

France

ADIDAS (Press release)

18/11/2015. The French Competition Authority has closed the investigation -carried out in collaboration with the German authority- against ADIDAS following its commitment to amend the sale conditions of its products. ADIDAS distributes via a selective system, thus preventing its distributors from marketing their products on the so-called "market place" websites (eBay, Fnac.com, Amazon, etc.).

ADIDAS has committed to remove such prohibition from its distribution agreements, thus enabling its distributors to use said "market places". This shall be carried out provided that the distributors respect certain quality criteria, and in doing so shall subsequently become authorised distributors.

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5. The Courts

Germany

EDEKA

18/11/2015. The Regional High Court of Düsseldorf has overturned the *Bundeskartellamt's* decision delivered in August 2014 declaring the demand for special "wedding rebates" by EDEKA following the 2009 acquisition of its competitor PLUS as unlawful. In essence, the *Bundeskartellamt* deemed that EDEKA had infringed the German *Anzapfverbot* law, which protects suppliers against purchasing power and prohibits distributors from demanding related benefits "without just cause".

ASICS

13/11/2015. Sports footwear manufacturer ASICS has appealed the Bundeskartellamt's decision delivered in August 2014 declaring that its online distribution policy restricted competition (see here).

Austria

SPAR

30/10/2015. The Supreme Court of Austria has confirmed the fine imposed on SPAR for fixing the resale price of dairy products. Moreover, the Court has increased the fine from EUR 3 million to EUR 30 million, given the deterring effect of the fines in view of SPAR's significant turnover and the profits resulting from its anti-competitive practice.

CJEU

Commercial premises

26/11/2015. EU Court of Justice rules that a commercial lease agreement granting an anchor tenant the right to oppose the letting of commercial premises to other tenants does not restrict competition by object. The CJEU's ruling was issued in response to a question referred from the Latvian Supreme Court, in the course of an appeal

from Maxima Latvija, a Latvian food retailer against the competition authority's decision concluding that the commercial lease agreements in question restricted competition "by object".

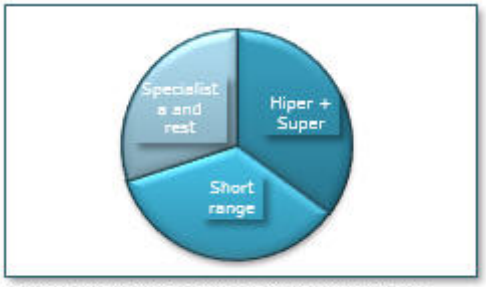
6. Others

Spain

Distribution in Spain

24/11/2015. KANTAR WORLDPANEL has recently published a study on the evolution of the retail distribution of consumer goods sector for 2015 in our country [see here].

The fastest growing operators in said year are the DIA group (DÍA, El Árbol, La Plaza and Clarel) and LIDL (half a percentage point share). Allowing DIA to position in the second place of the ranking, with a share of 8.7%, whilst LIDL reaches 3.5%. MERCADONA continues to lead the market with a share of 22.9%, and an increase of 0.2 percentage, CARREFOUR has increased by the same amount, with an 8,5% it has been relegated to the third place. EROSKI group is the only distributor to see its share fall (-0.1%), reaching 6.3%, whilst ALCAMPO remains a market share of 3.8%. In effect, the six main distributors in Spain hold a share of 53.7% in the food and personal care market.



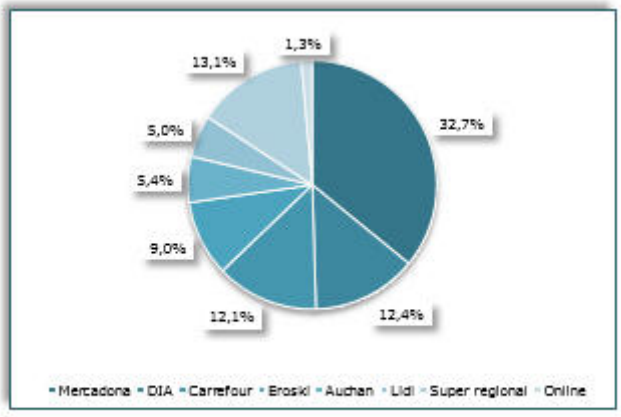
Own development from KANTAR WORLDPANEL's data

In a general way, the study shows how the market is divided more or less equally between the hypermarket + supermarket channel (which remains more or less stable with a 35%); the short range channel, which includes hard discounters + MERCADONA (which grows the fastest and already reaches nearly 35%); and the specialist channel (the one who loses the battle, falling to 30%).

(Own development from KANTAR WORLDPANEL's data)

However, if the specialist channel is excluded for the market definition, the market shares from the different operators would remain as shown in the following chart.

MERCADONA would therefore exceed the threshold of 30%, whilst DIA (12.4%) and EROSKI (9.0%) would jointly surpass 20%. In total, the six first operators would reach 85% of the sales.



Own development from KANTAR WORLDPANEL's data

(Own development from KANTAR WORLDPANEL's data)

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[1] In more straightforward terms, if a supplier sells the same units - "A" - to DIA and EROSKI and the first company pays 100 but the second only 90, such transactions would generate a difference of 10 in favour of DIA. Said difference would have to be claimed from the supplier. If the same supplier then sells the same units - "B" - to the two companies, however on this occasion EROSKI pays 110 whereas DIA only pays 100, a new difference would be generated in favour of EROSKI for the same amount. Thus, each company would claim 10 monetary units, regardless of the fact that overall they are paying the same price (hence the significance of the comparison being made on a list to list basis).

[2] The exceptions to the foregoing provided by said legal provision do not apply to this case since they refer to two very specific scenarios, namely the listing of new products and the co-financing of promotional activities. These scenarios do not align with the general petition for the improvement of conditions submitted by DÍA and EROSKI.

[3] With regards to this issue, the analysis included in the French Report on the different systems implemented in said country provides interesting reading.

[4] In practical terms, a scenario such as the one described -whereby the suppliers have all the motivation to avoid discriminating between their distributors clients- would lead to a de facto situation similar to that seen in France up to the middle of the 2000's with the Galland Act, approved in 1996, which explicitly prohibited the differentiation of prices between clients. In this regard, there is ample economic literature outlining the inflationary effect caused by such regulation.

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