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Law . Tax


December 2015 - January 2016

## Consumer Products

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### 1. What to expect from 2016

The uneasy ending of 2015 makes it possible to anticipate an interesting 2016, from the perspective of the application of competition regulation and organisation of the market to the sector of consumer products both nationally and in the whole of Europe.

These are the main issues which, in our opinion, will get people talking during the next year.

#### E-commerce

The removal of the numerous existing barriers to the development of electronic commerce constitutes one of the European Commission's main objectives.

In May 2015, the Commission adopted the [Strategy for a Single Digital Market](#) intended to improve consumers and companies' access to digital goods and services; to guarantee the equality of conditions; and to maximize said market's potential.

Within this strategy's framework, the Commission has recently adopted two proposals of harmonization of the Member States' regulation: one for the digital content and another one for the online sales of products (see further on).

More importantly, last year the Commission launched an ambitious study which is gathering information of owners of digital content, online trading platforms and traditional manufacturers on the way in which each one of them is approaching the cross-border electronic commerce (for more information, please see [here](#)).

The last of the requirements, for which the Commission bears a striking secrecy, was sent at the end of November to manufacturers of sports clothing, electronics, clothing, toys and appliances. These have, according to the information available until mid-January to give an answer. In principle, the European Commission is expected to

submit a preliminary report by the middle of this year to undergo public consultation. The final report is expected by 2017.



Likewise, it is likely to expect the competition authorities of the different Member States – especially those from Germany and Austria, which have been by far the most active ones in this matter – to continue to solve sanctioning proceedings on vertical restraints included by manufacturers of consumer products in their contracts. These restrictions are included in order to limit online sales (price restrictions, the usage of platforms from third parties, quantitative restrictions, etc.). In this sense, who knows if in the next twelve months we will finally see the Spanish authority debut with this matter and take a position?

## Proceedings pending of resolution before the Spanish authorities

Nationally, there are serious of matters pending of resolution by the Spanish Competition Authority ("CNMC") –and of the AICA- of particular importance to the sector:

### **(i) Complaint against DIA & EROSKI**

As we mentioned [here](#), the joint purchase agreement announced in June between DIA and EROSKI gave place to two complaints from the Food and Beverages Industries' Federation at the end of the year against both companies: one of them before the CNMC, for an infringement of articles 1,2 and 3 of the Spanish Competition Act, and the other one before the AICA, for an infringement of articles 12 and 13 of the Food Supply Chain Act.

The matter has a great interest since it is the first complaint filed by the processing industry against (a part of) the distribution. This is mainly explained by the manufacturers' fear to confront their customers. Furthermore, the complaints are connected to the joint purchase agreements between retailers, which, as we already explained [here](#), [here](#) and [here](#), has sparked an intense debate (unsolved in most cases) in other countries of our environment. And finally, there is no doubt that the AICA is facing its first big litmus test, it must take position regarding the more or less rigid interpretation of articles 12 and 13 before mentioned.

More precisely, it is not realistic to expect the proceeding before the CNMC to be resolved during this year. But at least the authority should pronounce itself on the next few months as to whether it decides, or not, to initiate the sanctioning proceeding. If the CNMC considers there is sufficient evidence of infringement as to initiate a formal proceeding, this would be a boost for the industry, which would see its negotiating position strongly reinforced against both pennants of distribution. On the other hand, if the CNMC decides to directly file the complaint, the distribution would render clearly victorious, and this is not strange, given the fact that as a result, similar movements in other players would multiply, in a sort of domino effect already gone through in other countries (such as France).

### **(ii) Relations between franchisor and franchisee**

Another important matter expected to be resolved by the CNMC on 2016 is its proceeding S/DC/0510/14 initiated against FOOD SERVICE PROJECT.

In this case, the authority should firstly pronounce itself on the possible price fixing of a franchisor to its franchisees and its compatibility with the new regulation applicable. This does not appear to be very controversial, given the severity with which the European competition authorities in general (including the European Commission and its vertical guidelines) tend to tackle the question, (see for example the cases of DIA or CARREFOUR of 2014 in which the authority decided not to open a proceeding only because the price fixing by the franchisor had not been accredited, but not because of this not being anticompetitive).

However, much more interesting should be to get to know the position adopted by the CNMC on the legality from the competition law perspective of the imposition to the franchisees of all suppliers of the goods and services in the framework of the franchise agreement. And there is no doubt that, when solving affirmatively, this may significantly alter the practice of many franchise chains operating in our country which, with these measures search not only a bigger homogenization of the network but also a better use of synergies by centralized bargaining and goodwill generated.

### **(iii) SCHWEPPES, trademark law and parallel imports**

It is possible that in 2016 we may also see the CNMC's resolution on the SCHWEPPES case, which will determine to what extent this company has the capacity of restricting the commercialization of Schweppes Brand products which have not been manufactured by the company and, thus, limit parallel imports of these products. For more information, we refer to the comments made [here](#).

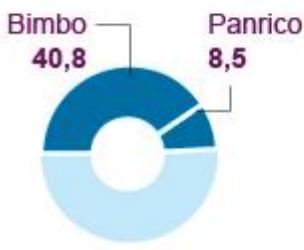
### **(iv) BIMBO acquires PANRICO**

In the concentrations section it is worth mentioning proceeding C/0703/15 BIMBO/PANRICO, and that, according to the CNMC's website, is still in the first phase, in spite of having been notified in mid-October (such as it occurs in Portugal).

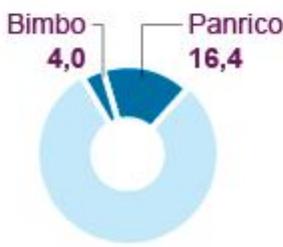
#### **► Reparto del mercado español**

Cuota en %

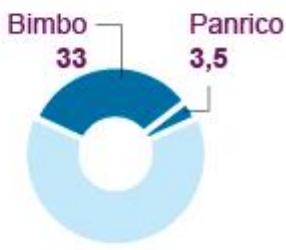
##### **Pan de molde**



##### **Bollería dulce**



##### **Bollería salada**



Fuente: Bimbo, IRI Group.

EL PAÍS

Source: Bimbo, IRI Group. Published: *El País*.

As it can be observed from the infographic picture above, the resulting entity would have a market share of nearly 50% in value in the market of sliced bread in Spain; its main competitor would be the MDD (47% in value and more than 60% in volume). Precisely for this reason, according to information in the press, the parties would have accorded to exclude the business of PANRICO's sliced bread from the transaction, which would be acquired by a third player.

This is an extremely interesting transaction not only for the affected companies and their competitors, but for all of the industry and distribution. This is because the authority must take position on important issues such as if it decides to include the MDD in the relevant market or not, and if it analyzes the integration of the closest competitors or the efficiency of the fix-it-first remedies in a market as narrow as sliced bread market, as a consequence of the strong growth experienced by the MDD.

## **2. Merger Control**

### **European Commission**

BALL / REXAM ([Press release](#))

15/01/2016. The European Commission has approved with commitments the merger notified on the 15th June 2015 consisting on the acquisition of beverage can manufacturer REXAM by its rival BALL. Both supply beverage cans and, to a lesser extent, aluminum bottles to manufacturers of soft drinks, beer and energy drinks.

The Commission's investigation showed that the transaction, as notified, considerably reduced competition in the already concentrated market for beverage cans, due to the fact that REXAM and BALL are the main manufacturers in the EEA. They are also the two market leaders worldwide and their main competitors -CAN-PACK and CROWN-

would not have a sufficient competitive constraint. According to the authority, the transaction would have significantly reduced competition in the locations of Benelux, Central Europe, France, the Iberian Peninsula, Italy, North-East Europe, Nordic countries, South-East Europe, UK and Ireland. Moreover, it would be an industry characterized by its strong barriers to entry which requires manufacturers to have a certain size and geographic spread to compete effectively for the largest volumes and provide a wide variety of can sizes and shapes required by customers in each area.

To address the Commission's concerns, BALL submitted commitments consisting in the agreement to divest twelve plants in the EEA, two of them are the plants of REXAM located in Valdemorillo. The commitments have been considered sufficient enough to solve the competition problems as long as a suitable purchaser is found, who guarantees an alternative capable of competing effectively with the merged entity.

In any case, the parties may not carry out the transaction until a binding agreement is signed with the suitable purchaser which must be approved by the Commission.

#### COTY / PROCTER & GAMBLE ([M 7726](#))

12/01/2016. The manufacturer of cosmetics COTY has finally notified the European Commission the purchase of 43 beauty and cosmetic brands of PROCTER & GAMBLE'S for 12.500 million euros (see [here](#)).

It is mainly brands of hair care products (colour and hairstyle), colour cosmetics and fragrances. The deadline for the first phase is scheduled for the 16th February.



#### CARREFOUR / RUE DU COMMERCE ([M 7790](#))

04/01/2016. Carrefour has announced the closure of the acquisition of 100% of the share capital of ALTAREA COGEDIM's internet sales place RUE DU COMMERCE, specialized on non-alimentary product sales. This operation has been authorized by the European Commission on its decision of the 24th November 2015.

#### **Spain**

##### HIG CAPITAL / BEAUTY BELL ([C/0714/15](#))

10/12/2015. The CNMC has authorized the acquisition of sole control by HIG CAPITAL of BEAUTY BELL, the parent company of GRUPO BODYBELL , dedicated to the wholesale -CADYSSA- and retail trade -BODYBELL and JUTECO- of drugstore and fragrance products.

#### **France**

##### BURGER KING / QUICK ([Press release](#))

10/12/2015. The French authority has authorized, subject to remedies, the acquisition of the sole control over QUIK by BURGER KING. The Authority distinguishes between low-cost fast food and sophisticated catering, which includes table service. Following a market study, the authority found that there is enough competition between the main "English style" fast-food brands, except for the area of Ajaccio in Corsica where neither MC DONALD'S, KFC, QUICK, BURGER KING nor SUBWAY are present. BURGER KING has committed to terminate the franchise agreement with QUICK in Ajaccio and not to subscribe it again during a period of ten years.

#### **Germany**

##### BONGRAIN / SÖBBEKE ([Press release](#))

07/01/2016. The Bundeskartellamt has sanctioned BONGRAIN, which belongs to the dairy products group SAVENCIA, with a fine of 90.000€ for providing incorrect information during the notification of a merger. The

concentration took place in 2011 and consisted on the acquisition of a majority shareholding in the dairy firm SÖBBEKE. BOGRAIN would have sub estimated the organic yogurt sales volumes of SÖBBEKE and ADECHSER MOLKEREI.

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### 3. Anticompetitive Practices

#### INVESTIGATIONS

##### ***European Commission***

###### MC DONALD'S

12/01/2016. Italian consumer associations have denounced MC DONALDS before the Commission. They consider their franchise contracts to include restrictions incompatible with the European regulation. In particular, according to these associations, MC DONALD'S would be abusing of its dominant position charging excessive rents to the franchisees where the firm is the landlord (MCDONALD'S requires the franchisees to rent commercial premises of its own) and restricting the capacity of the franchisees of changing their franchiser.

###### DAIRY SECTOR ([Press release](#))

08/01/2016. As we explained [here](#), after an important crisis in the sector, the French Government organized several round tables between the French breeders, industry and retailers which finished with the adoption at the end of July of a deal consisting, inter alia, in:

- Price increases in milk up to 34 cents and in pork meat up to 1.40 €/kilo.
- The compromise of acquire and distribute French milk only.

According to the press, it seems that the Commission is investigating the legality of these deals, after receiving complaints from the German agricultural sector –probably supported by Dutch and Belgian breeders-. In fact, the European authority would be already addressing separate requests for information to the assistants to these meetings asking, mainly, meeting records, the list of attendants, documentation submitted, etc.



#### ***France***

###### ***VIDEOGAMES SECTOR ([15-D-18](#))***

02/12/2015. The French authority has filed the initiated proceeding against NINTENDO for fixing the resale price of the Wii console and its games and accessoriizes between December of 2006 and 2007.

What is interesting about this case is that the authority considered that the announcement of the sale prices by the chairman of the group during a press conference announcing the launch of the Wii console in London, consisted on a targeted communication to the French retailers about recommended prices, which should be investigated. However, the authority finally decided to file the issue as there was no evidence on reprisals taken against those retailers who applied lower prices than the ones communicated by the company.

#### ***UK***

## RESTRICTIONS TO ONLINE SALES

04/12/2015. The British authority is investigating alleged anticompetitive conducts within the framework of the online sales of sport and entertainment merchandise and other consumer products. As part of its investigation, the authority registered the headquarters of the English firm TROD LIMITED, and one of the employee's residences. TROD LIMITED and his owner are being investigated by the antitrust division of the Department of Justice of the United States for the possible price fixing of certain posters sold online to American consumers by AMAZON MARKETPLACE. ([Case 50223](#))

28/01/2016. The British authority has sent a statement of objections to the manufacturer of bathroom accessories, ULTRA FINISHING, and to the supplier of commercial refrigeration appliances, FOSTER REFRIGERATOR, for introducing a minimum price for their internet sales. ([Press Release](#))

## SANCTIONS

### ***Germany***

LEGO ([Press release](#))

12/01/2016. The Bundeskartellamt has imposed a fine of 130.000 euros to LEGO for imposing the resale price of the so-called "highlight products".

LEGO had regularly updated lists in which the name of the articles and the retailers selected were included. In some cases, the retailers were threatened with a reduction on supplies or even with the negative of supply if they denied to establish the price set by the company on the list. In other cases, the LEGO's discounts for the retailers were conditioned to the maintenance of the resale prices established on the lists.

## 4. News on Courts

### **CJUE**

MINIMUM PRICE ALCOHOL ([Press release](#))

23/12/2015. In 2012, the Scottish Parliament passed legislation a rule foreseeing the introduction of a minimum price for alcoholic drinks based in the strength and volume of alcohol in the product. Its entry into force was suspended due to the judicial remedies raised.

Between others, The Scotch Whisky Association brought proceedings against the decree considering it constitutes a quantitative restriction on trade. After having seen its claims rejected at first instance, the association appealed before the Supreme Court which decided to refer questions to the Court of Justice of the European Union ("CJUE") for a preliminary ruling.

In its ruling of 23 of December, the CJUE has failed that the Scottish legislation does constitute an obstacle to free movement of goods, which could only be justified on the grounds of the protection of health. However, for the CJUE, the measure adopted is not proportional to the objective pursued (reduce the dangerous consumption of alcohol), given that a tax measure designed to increase the price of alcohol may be less restrictive than the one imposing a minimum price for unit of alcohol.

### ***Germany***

### ONLINE SALES

05/01/2016. A German court has ruled in favor of the legality of the imposition of restrictions to distributors by manufacturers to prevent the first from reselling their seconds' products in web pages of third parties such as AMAZON MARKETPLACE. The Court has ruled that DEUTER, backpack manufacturer, may include these types of restrictions in its contracts with its authorized distributors, inasmuch as it has the right to protect the quality of its brand by determining how and where its products are going to be sold – as far as these conditions are necessary for the achievement of quality standards-. This decision seems to contradict the much more rigid position adopted by the Bundeskartellamt on this matter (see for example the ASICS case, of August 2015 available [here](#)).

## 5. Other issues

### ***European Commission***

#### **ONLINE CONSUMPTION (Press release)**

09/12/2016. On the 9th December the Commission presented two directive proposals on the sale of digital contents and online products. The objective of this package of reforms is to remove the regulatory barriers existing between the different Member States and to simplify and encourage the Access to digital contents and online sales in the EU. Both proposals only apply to contracts with consumers.

On a substantive level, the first of the proposals extends the definition of "digital content", including the storage in the cloud and the services on social networks. Then, it proposes a series of dispositions on, between others, the modalities and time of supply, the conformity criteria to evaluate the quality of the contents or the possibility of resolving the contract in case of prejudicial modifications for the consumer. The second proposal includes key aspects for the distance sales and guarantees of consumer products. It searches, between many other things, to extend the period during which a defect is presumed to have already existed at the moment of the delivery (from 6 months to two years). The national parliaments may pose objections to these proposals during a period of eight weeks.

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This Newsletter has been created by the Consumer Products team at CMS Albiñana & Suárez de Lezo. It contains a general overview of selected press releases, and does not intend to be exhaustive. The comments included do not constitute professional opinions or any form of legal advice.

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For any queries please contact:

diego.crespo@cms-asl.com  
clara.lombao@cms-asl.com

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CMS Albiñana & Suárez de Lezo, Paseo de Recoletos, 7-9, 28004 - Madrid, España  
T +34 91 451 93 00 [www.cms-asl.com](http://www.cms-asl.com)

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