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Consumer Products

1. Reflection on the sale below cost

During the last months we have been hearing numerous news related to *problems* created by sales below cost, more specifically when it came to agro food products and distributors. In this context, for example, the Food Control and Information Agency (FCIA) has initiated a fight against practices involving sales below cost, even though these practices have not been regulated in the Food Supply Chain Act, and thus are outside its competence. In addition, complaints from farmer and breeder organizations before the Autonomous Communities' Departments and even before the competition authorities have multiplied, (see below the news about the closing of the complaint against LIDL). More recently, the discussion has gone further with the publication of the Spanish Competition Authority (CNMC)'s Report about the Code of Good Commercial Practices (see below), where it is openly said that sales below cost could be pro-competitive, this has generated anger within the production sector according to the declarations collected daily in the press.

The opinion held by the CNMC is not new and can be found in numerous agro food sector reports, unfair practices regulation in the food chain or modification of the Retail Trade Regulation (even asking for the derogation of the prohibition).

Currently, the prohibition of the sales below cost is regulated in three different Acts:

- The Spanish Retail Trade Act 7/1996 (SRTA) directly prohibits, in its article 14, sales below cost, save some specific cases. In this case, the competence for its prosecution corresponds to the Autonomous Communities (a complaint is enough) and the failure to comply may be subject to administrative sanctions.
- The Unfair Competition Act 3/1991 (UCA), establishes sanctions when sales below cost may mislead consumers about the establishment's price levels; when its final aim is to damage a product's image or when it is part of a strategy that seeks to eliminate a competitor (article 17). In this case, the competence corresponds to the ordinary Courts.
- The Spanish Competition Act 15/2007 (SCA), which also bans sales below cost but only in case of dominant position (predatory pricing case of article 2) or as an act of unfair competition under article 3.
  From the three previous possibilities, the only really effective one -at least from a distribution practices' point of view- would be the first one. Indeed, the prosecution by the UCA requires filling a lawsuit (which is very expensive) and the proof of the damage if redress is sought, whilst following the route of the SCA

would be pointless due to the CNMC's position- pointed as very strict by some- about the position of distribution operators in the market (which is not dominant) or the real affectation to public interests in these kind of practices (LIDL case).

Nevertheless, the effectiveness of the regulation in the SRTA is limited by different issues such as the varying sensitivity of economy authorities regarding the alleged damages caused by these practices; the small amounts of the sanctions (up to a maximum of €30,000 as serious penalties); the difficulty – and complexity- of the proof, particularly to the plaintiff who has no access to the purchase prices; the fear to distributor's reprisals; the doubts about the interpretation of the rules(for example, the reference to the UCA); etc.

These are the reasons why the different agents of the chain are still stuck in a continuous fight to modify the regulation, through the creation of "cost observatories" which provide transparency to the purchase prices of the distributors- the example of the recently agreed commitments assumed by the dairy sector is, from our point of view, the most paradigmatic one- or of the intents to regulate "bait prices" in the Food Supply Chain Act or in the Code of Good Commercial Practices.

However, in our opinion, this is one of the most im-portant issues related to the regulation of the relations along the chain. It is, possibly, the point where the two faces of the chain are more divergent: while producers blame the "bait practices" applied by distribution industry of *devaluating* the products (from the consumers' perception), distribution claims its right to adapt with the greatest possible agility to the circumstances of the market at all times (competition, the consumer, etc.). This dispute has reached institutions, with the MAGRAMA and CNMC (and Economy State Department), clearly positioned on either side.

Regarding the industry, the question is not so clear. Certainly, it does not look like the cohabitation with the SRTA is uncomfortable, even though, under the Sixth Additional Disposition, the prohibition could also be applied to them (at least in some cases). On the other hand, the specific rules of application given in article 14.2 and 14.3 (taking as a reference the invoice price, while discounts out of invoice and those referring to service compensations are not taken into account) allow them to play with the assignment prices to the distributor (from "net 1" to "net 3") which, in some way, is not allowed by competition law (which, as we know, completely bans any interference of the supplier in the resale price applied by the distributor).

In fact, the possibility of playing with the different sale prices has led to one of the most interesting cases regarding anticompetitive practices between manufacturers and distributors in France (Decision 14-D-19 December 18th of 2014 about practices in drugstore and hygiene sector products[1]) and has opened several discussions from the *Galland* Act to the *Hamon* Act about the quality of the regulation and its impact on the incentives of the different actors and their price- fixing strategies.

In relation to this, questions arise as to what would be the impact in Spain of a modification of the SRTA consisting in the maintenance of the prohibition – despite the pressure of the CNMC, the suppression seems to be an impossible background- although removing, as it was already done in France, the rules that oblige not to take into account discounts out of invoice. What impact would it have on negotiations between manufacturers and distributors: would they come to negotiate in net 3? And regarding the price strategies of distributors: would the distance between manufacturer and distributor be shortened? Which would be the position of the primary sector?

Given that the spirits are heated, it might be the time for all the sectors involved to initiate a profound thinking process on these matters, as it has been done in our neighbor states.

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2. Mergers

Spain

IBERLECHE CAPSA (C/0677/15)

07/23/2015. The CNMC has authorized the acquisition of sole control of the private label dairy business of CAPSA (CENTRAL LECHERA ASTURIANA) by IBERLECHE (LECHE CELTA)[2]. In addition, CAPSA has signed a long-term supply contract under which it will exclusively provide IBERLECHE with dairy private label products, together with a non-compete commitment in relation to the transferred business.

According to the CNMC report, IBERLECHE would have less than 30% market share of private label milk and 10% in other products such as yoghurt or butter. The authority discards problems since there are relevant competitors and a high countervailing power of the demand side; there is neither brand loyalty (especially in private label) nor barriers to entry.

Regarding the manufacturers' brand markets, the CNMC analyzes the survival of the two companies as independent competitors to exclude the risk of coordinated effects given the differences between the two companies and the existence of relevant competitors. The same is true with regard to the supply of raw cow's milk where, according to the CNMC, the fact that it is a very fragmented, slightly transparent market, with bilateral negotiations and the end of the milk quota system, reduces the risks of coordinated effects resulting from the transaction.

European Commission

DUFRY/WORLD DUTY FREE AGREEMENT (M.7622)

09/05/2015. The Commission has cleared the acquisition of control by DUFRY over WORLD DUTY FREE, both devoted to retail distribution in duty free stores in airports, ports, etc.

ARCHER-DANIELS – MIDLANDS/ AOR (**M.7625**)

09/08/2015. The Commission has authorized the acquisition of AOR by ARCHER-DANIELS-MIDLANDS in the market of refined seed oils.

STAPLES / OFFICE DEPOT (Press release)

09/25/2015. The Commission has opened an in-depth investigation into the merger transaction consisting in the purchase of office supplies distributor OFFICE DEPOT by its competitor STAPLES.

AB INBEV/SABMILLER

09/16/2015. AB InBev is preparing a takeover bid on SABMiller. These are the world's largest brewers and are valued at 162,000 and 80,000 million respectively in London, Brussels and New York's stock exchanges. The transaction would create a beer monster with a turnover of EUR 65,000 million a year (they would sell one in every three pints of beer in the world). The transaction is subject to approval by the competition authorities in multiple jurisdictions including the European Union, US, Mexico, Brazil, China, etc.

France

BAIN CAPITAL / DAGIVEL (Press release)

09/18/2015. The acquisition of sole control of DAVIGEL GROUP, who holds, among others, the exclusive right of distribution of Nestlé ice cream in France by BRAKES GROUP -distribution of foodstuffs for the on-premises channel- has been notified to the European Commission. Indeed, the transaction had been partially referred to the French authority at the request of the notifying party (decision on 7 September), while the effects on other members states -including Spain- will be analyzed in Brussels (to the extent that no competition problems are advanced). The French authority has experience in these markets since it has recently analyzed them in a similar transaction[3].

According to the French competition authority, the analysis will be carried out both at national and local level.

AUCHAN / SYSTÈME U (Press release)

09/01/2015. Another merger that the Commission has referred to the French authority is the alliance agreement between AUCHAN and SYSTÈME U. The transaction, referred at the request of the notifying party, implies the rapprochement between the fifth and the sixth large retail operators in France, with overlaps in more than 400 areas and relevant involvements for the product supply market.

This alliance seems to go beyond the joint purchase agreement signed a year ago between the two operators that has already been analyzed by the French authorities in its June 2015 report (see here). Indeed, according to press reports, the parties would have extended its previous agreement to private label, including the creation of a joint steering committee for the two networks and the exchange between distributors of a large number of stores (247 Simply supermarkets shall become Super U, while 70 Hyper U hypermarket will move to Auchan system).

Indeed, on 22 September, METRO Group announced its joining to the alliance led by AUCHAN (thus strengthening the joint international collaboration started a year ago), giving a mandate to the purchase center for the supply of products from major brands at national level (see here). Note that under the terms of the Macron Act passed in July (art.37), the alliance between METRO and AUCHAN must be communicated two months in advance to the competition authority.

Belgium

AHOLD / DELHAIZE

09/01/2015. Belgium has requested the referral of the merger between two large operators of the large retail industry in The Netherlands and Belgium (AHOLD and DELHAIZE) to the European Commission. The merger would lead to the creation of the fifth retail group in US and the fourth one at European level, with particular presence in Belgium and Eastern Europe.

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3. Sanctioning proceeding

SANCTIONS

Spain

REFRIGERATED TRANSPORT (**S/454/12**)

07/25/2015. The CNMC has imposed a fine amounting to EUR 8.8 million on 12 companies dedicated to refrigerated road transport and its trade association ATFRIE for price fixing. According to the CNMC the conduct occurred from 1993 to 2012 and consisted in fixing tariffs to international refrigerated road transport services and the creation of a franchising entity.

Germany

ASICS (Press release)

08/27/2015. The *Bundeskartellamt* has declared that ASICS, the market leader for running shoes in Germany, restricted competition by imposing certain restrictions to its authorized dealers for online sales.

ASICS has a selective distribution system, where the manufacturer imposes certain conditions in order to safeguard quality standards of its authorised dealers. Nevertheless, according to the German authority, by prohibiting its dealers from using price comparison engines and using ASICS brand name on the websites of third parties, ASICS wanted to control price competition in both online and offline. Additionally, it has prevented consumers from accessing to small and medium-sized distributors, for the benefit of ASICS and some big online retailers.

The Bundeskartellamt has not imposed sanctions but has declared the illegality of the practices. ASICS has amended the clauses objected to.

This decision is part of the extensive debate currently taking place in Germany and Europe, on the assessment of the restrictions in the online market from a European law perspective (here).

CLOSINGS OR SETTLEMENTS

Spain

LIDL (S/DC/0520/14)

07/30/2015. The CNMC has decided not to take further action in regard to the complaint coming from the Galician competition authority and lodged by the UNIÓNS AGRARIAS (UPA) and the Local Poultry Farmers Association (ACRIAGA) regarding practices which could be contrary to what article 3 of the Spanish Competition Act lays down.

The practices consisted in the sale below cost of whole chickens in Santiago de Compostela.

Competition Authority considers that the sale below cost has not been sufficiently proved. Moreover, requirements for the application of article 3 have not been met: (i) major distortion of competition and (ii) affectation of public interest.

Hungary

BREWERS (Press Release)

07/30/2015. Brewers companies HEINEKEN, DREHER and BOROSODI have accepted the removal of their exclusivity clauses from some of their on-trade distribution agreements, as they were impeding importers and small breweries to access the market. More specifically, brewers have committed to reduce the number of single outlets under exclusivity by the end of 2017, falling from a tied market share of 44% to around 30%.

We could highlight the fact the analysis carried out by the authority has been focused on the cumulated effects of the exclusivity agreements of the main brewer companies, rather than in the unilateral practices of the different companies.

INVESTIGATIONS

SCHWEPPES (Press release)

09/22/2015. The CNMC has initiated a sanctioning proceeding against SCHWEPPES for restricting the marketing of products under the brand *Schweppes*, which have not been manufactured by the Company and therefore restricting parallel imports of these products.

The opening of this sanctioning proceeding seems to come from the conflict existing between the Company and the importers of the products branded *Schweppes* manufactured in United Kingdom and where the trademark does not belong to SCHWEPPES but to the COCA-COLA Company (after the sale of the brand a few years ago).

Conflict between free movement, competition law and trademark rights

It is true that the general principle is the permission of parallel imports, as it would be contrary to article 101 TFEU the fact that by exercising the exclusive trademark right you may impede effective competition in an important part of the internal market.

Initially jurisprudence followed this guideline even in the cases where the same trademark belongs to two different entities in different Member states, reaching the same conclusions based on various theories.

Thus, the common origin doctrine was applied, according to which the holder of a registered trademark cannot restrict imports whether the product has been legally distributed in a third EEA member state, or by a third party with the same trademark whether it has a common origin.

However, this theory was abandoned by the Court of Justice in the Hag II case (C-10/89), according to which in the event of identical trademarks within the EEA with holders legally and economically independent, general rules on exclusive trademark rights would apply. Therefore, each of the holders would be legitimated to impede the entrance of the other's products to their respective territories covered by their right.

In the Ideal Standard case (C-9/93) the Court of Justice confirmed the abandonment of the common doctrine origin and admits the solution of the insulation of markets with different holders of the trademark, provided that they do not have any economic link between them, as the function of the trademark is threatened by the freedom to import.

To enable the trademark to play its part, it should guarantee that all the designated products have been manufactured under the control of a sole entity, which could be responsible of their quality. In conclusion, according to this theory, the unilateral exercise of the exclusive trade mark right to prevent the entry of products under an identical trade mark in force in another Member State but belonging to a third party, is not, in principle, contrary to competition. Nevertheless, when this exercise is not unilateral, but arising from any agreement or concerted practice for the re-establishments of frontiers in the internal market, the exclusive trade mark right would be surpassed by the free movement of goods principle.

France

FRUIT POUCHES (Press release)

09/22/2015. The French competition authority has raided companies suspected of having implemented anticompetitive practices in the sector of processed fruits packaged in cups and pouches. No more information in this regard has been provided yet.

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4. Others

Spain

CODE OF GOOD PRACTICES

09/22/2015. The CNMC has published its annual report about the Code of good commercial practices within the food procurement (CGCP). As expected, the Promotion directorate of the CNMC is not very enthusiastic with the CGCP (it was not, and so it makes clear, with the Food Supply Chain Act), nevertheless it does not show total opposition.

The CNMC has several necessary compliance requirements: (i) not inclusion of clauses which restrict competition (ii) free and voluntary adherence and (iii) provision of effective mechanisms for conflict resolution. Although in the opinion of the CNMC these requirements are met in general terms, certain aspects are still improvable:

- Free and voluntary adherence: The CNMC doubts about the real voluntariness of the CGCP because it responds to a legal mandate and it seems like priority in certain aids or subsidies is going to be given to the signatories of the CGCP.
- Effective mechanisms for conflict resolution: The CNMC insists that these should be effective, independent and with technical capacity. There-fore, it proposes the removal of the prior com-plaints procedure provided in the CGCP which only delays the access to the mediation or arbitration appeal, shows its reluctance towards the possibility of mediation regarding disagreements in prices in first sale food contracts (which should be clarified in any case), recommends the creation of a sole and independent arbitrator with technical expertise such as the Groceries Code Adjudicator in the United Kingdom and requires the extension of the anonymous complaint to individual operators.
- Not inclusion of restrictive clauses: The submission of the CGCP to the competition rules should be strengthened, especially when referring to the cooperation between companies regarding cases of sectoral crises (such as the milk case).

When it comes to the specific commercial practices pointed out as troubled, the CNMC repeats that not always do they have negative effects and it briefly evaluates each one of them. In fact, it is particularly concerned about issues regarding the exchange of information, whilst it considers that the innovation regulation is a mere declaration of intent. Where the CNMC shows the strongest is in terms of sales below cost where it not only criticizes its inclusion in the CGCP, but also suggests that it considers its blanket ban inconsistent. In the CNMC's opinion, the sales below cost may result pro-competitive in certain circumstances. It is also concerned about the reference to the follow-up of the AECOC's recommendations, given the fact that this may be a practice contrary to the competition rules.

Finally, regarding the additional payments, it warns that the CGCP is confusing and even goes against the provisions of the law (as it admits them in certain cases) and it includes a warning about the fact that some operators of the chain (industry and distributors) highlight the value of agricultural proximity products for *"they may negatively alter the purchasing decisions, introducing undue geographical restrictions which should be avoided"*.

DAIRY SECTOR AGREEMENT

09/21/2015. After the covenant reached in France (see here), an agreement has finally been reached in our country between producers, industry and distribution government-sponsored.

According to the information published, the agreement will finally not include a minimum price – aspect considered illegal by the CNMC – but industry and distribution have committed to "*enhance milk and milk products*", preventing its use as "*bait products*" and sharing that enhancement with the breeder[4]. More specifically, the aim is to include in the contracts the necessity of the prices' and the sales volume's contribution to the sustainability of the exploitations and to the assurance of the collection to the producer. Moreover, the distribution has committed to extend the contracts signed with the dairy industry. Finally, the agricultural cooper-atives and associations undertake to promote the formation of producer organizations integrating the largest possible number of farmers. Apparently, the General Secretariat of Agriculture and food will monitor the application of the commitments. In order to facilitate this control, the dairy industry must monthly provide to the MAGRAMA information on transfer and sale prices regarding private and manufacturer labels.

Germany

DAMAGES

08/17/2015. NESTLÉ has filed a lawsuit for damages against the sugar factories SÜDZUCKER, NORDZUCKER and PFEIFFER & LANGEN amounting to around 50 million euros for the damages suffered as a result of the price fixing sugar cartel in Germany.

The *Bundeskatellamt* sanctioned these three sugar companies in February 2014 because of their participation in the cartel with fines of more than 250 million euros.

It looks like NESTLÉ isn't the only applicant for damages, SÜDZUCKER is facing another lawsuit filed by the candy manufacturer VIVIL for a total of 1.3 million euros.

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.

The CMS team specialized in consumer products is made up of lawyers with ample experience giving advice in a myriad of different fields, including competition law, distribution agreements, joint ventures, sales and mergers of companies, legal advice for brand protection, outsourcing agreements, product liability, judicial proceedings, compliance programs, etc. Our clients work in a wide range of sectors including food and beverages, cosmetics and personal hygiene, textiles, technology, household products, distribution, sanitary products etc.

For any queries please contact:

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

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1 http://www.autoritedelaconcurrence.fr/pdf/avis/14d19.pdf

2 CAPSA will acquire a non-controlling stake in the social capital of IBER-LECHE

3 On 26 June 2015, the French competition authority authorized the pur-chase of eight Relais d'Or Miko's network members by the Pomona group.

4 MERCADONA has announced that it will raise by up to two censt per liter the price of the mil it sells.

CMS Albiñana & Suárez de Lezo, Paseo de Recoletos, 7-9, 28004 - Madrid, España
T +34 91 451 93 00 www.cms-asl.com
