

Questions & Answers

The AdC imposed fines on supermarket chains and beverage supplier for price fixing, harmful to consumers

1. What is a hub-and-spoke practice? If the suppliers were responsible for the communication of prices, why are the supermarkets sanctioned as well?

A 'hub-and-spoke', generally referred to as 'hub and spoke' cartel, is an antitrust practice, and consists in the exchange of commercially sensitive information, in this case, prices, between competing distributors via a third party, a common supplier, and not between competitors, as usual in a cartel.

There is a hub and spoke in a supplier-distributor relationship when the supplier acts as a 'hub' between the competing undertakings, the 'spokes', facilitating, promoting or guaranteeing the illicit collusion of commercial strategies and prices, thus constituting a serious restriction to competition.

Thus, the supplier is instrumental in ensuring an alignment that favours supermarket chains and the supplier itself (in these cases, SCC and Primedrinks). The ultimate goal is to achieve this alignment and the suppliers' intervention was used as a means of avoiding direct contacts, which would result in a traditional cartel.

2. Why are these practices not admissible? Is it not legitimate for a supplier and a distributor to agree on sales terms?

The existence of contacts on commercial strategy between non-competing commercial partners - supplier and distributor - is in itself not illegal. It is, in fact, inherent in that type of partnership.

Thus, discussions on appealing ways to store products in stores, design of distinctive and more innovative products that respond to the needs of consumers, promotional activity, negotiation of commercial conditions, mere recommendations for selling prices to the public, as well as other ways to make the supply more efficient, are lawful and acceptable practices within the scope of such a commercial relationship.

However the exchange of information between competing undertakings via a third party related to each one of them with the purpose of aligning strategies in the market is not a normal and lawful business relationship between companies.

The practice in question exceeds the limits of what is acceptable in a supplier / distributor negotiation.

In a competition environment, each economic agent defines autonomously its conduct on the market. This request for autonomy in operating in the market (for example in terms of price determination) is directly opposed to any contact, direct or indirect, between companies, which is likely to influence a competitor's market behaviour.

On the contrary, a hub-and-spoke practice implies the exchange of sensitive information, related to the present and future commercial strategy between companies and the dissemination of this information, indirectly, to competing companies, in order to condition their respective behaviours.

In the cases of the hub-and-spoke now decided by the AdC, the communications were aimed at fixing the selling prices to the public of most of the products from the supplier and, thus, promoting, guaranteeing or maintaining an alignment of these prices in the food-based retail distribution market, with the purpose of making them rise, gradually progressively, over a certain period of time.

As well as threats, retaliations, pressures and conditional discounts (both from the suppliers and the distributors) were addressed to companies that resisted or deviated from this alignment, which is neither admissible nor lawful.

3. What is the motivation of undertakings for participating in a hub and spoke?

The motivations of each of the companies participating in a hub-and-spoke can be diverse, but they are all oriented towards a common objective: to be favoured by decreasing the competitive dynamics by controlling the market behaviour of all the involved.

On the one hand, suppliers try to fix the price of their products at an artificially higher level, so that they are not subject to contractual renegotiations by the distribution companies and can maintain the margin that they idealized in the sale of their products. On the other hand, distribution companies eliminate the uncertainty associated to a “price war”, guarantee the expectation of receiving a certain margin in the sale to the public and sell the products at a higher price than what would result from a market operating in undistorted competition.

Consumers are harmed, with no possibility of choosing the product for the price, not benefiting from the lower prices that would result from the competitive functioning of the market.

4. What is the impact of this practice on the consumer and how is it affected?

As said before, each economic agent should define in an autonomous way the strategy in the market, to guarantee competition and consumers' welfare.

A competitive market allows consumers to obtain lower prices, higher quality of goods and services, greater choice among products that offer better value for money, more innovation and also the strengthening of the external competitiveness of agents.

This form of coordination of behaviour in the market - as, indeed, any other form of collusion between competitors - involves a high degree of harmfulness to competition, as it causes a reduction in production, division in the market and price increases, leading to the poor allocation of resources to the detriment of consumers.

5. If the practice has occurred since 2007, why does the AdC only now sanction it?
Is it difficult to detect this type of practice?

Cartel practices, or equivalents, are secret by definition, and so difficult to prove. During the AdC's investigation, evidence showed that the involved undertakings were conscious of the infringement, showing this in communications calling for the destruction of evidence.

During the unannounced inspections that the AdC carried out in 2017 at more than 40 facilities of large distribution and suppliers across the country, evidence of this practice was seized and it was found that it went back to 2007.

These unannounced inspections led to the opening of more than a dozen investigations by the AdC. In the present case, the Statement of Objections was issued in 2019 and the respective final decision in 2020, despite the high litigation of companies in the administrative phase of the process.

6. What is the consequence of involvement in this type of practice for companies?

When the involvement in this type of practice is established, as happened in the cases now decided by the AdC, this constitutes an infringement to Competition Law, punishable by a fine, which cannot exceed 10% of the turnover achieved by each company in the year immediately preceding the final decision.

The fines to be imposed are decided on the basis of the Competition Law and the [Guidelines for the Application of Fines](#) [in Portuguese].

The AdC also imposed to all the involved undertakings an immediate cessation of the practice.

7. Why did the Competition Authority apply a cumulative payment of fines to four of those involved?

The Portuguese Law determines that when any of the offenders has committed more than one infringement before the conviction for any of them becomes final, the fine to be applied - the so-called legal cumulation - must take this plurality of infringements into account.

It is not a question of adding the applicable fines, but of facing and sanctioning the set of infringements in a global perspective.

In the two cases now decided, the four undertakings concerned actively participated in both, so the cumulative fines imposed on them reflect this plurality of infringements.

8. In addition to the fines, the AdC imposed an immediate cessation of the practice. How does the AdC impose the cessation of this practice?

In the event of failure to comply with the decision to cease the practice, the AdC may impose a penalty payment of no more than 5% of the daily average of the company's turnover in the year immediately preceding the decision, per day of delay, from the date of notification.

Once the existence of a restrictive practice of competition is declared by the AdC, this decision may be accompanied by an admonition or the application of fines and other sanctions provided for in the law and, if necessary, the imposition of conduct or structural

measures that are indispensable for the cessation of the restrictive practice of competition or its effects. This happened in this case, as it is not possible to exclude that the investigated behaviours are still ongoing.

December, 21, 2020

