

Most relevant legal developments in the consumer good's sector

February 2017



Editorial

This issue analyses some of the most important recent developments in the FMCG sector as regards competition law, from the –always difficult– treatment of restrictions to e-commerce [the European Commission has just launched three new investigations following last year's preliminary report] to the most recent upheavals in the longstanding conflict between manufacturers and distributors [purchasing alliances continue to generate a lot of discussion], the recent developments in terms of resale price fixing [the German authority has published an interesting guidance note], and the benefits of compliance programmes [reference is made to a recent Italian case where these were recognised as a mitigating factor].



We hope you find this useful and, please, do not hesitate to contact us should you have any question.

Marimón Abogados' FMCG Team



E-commerce

The European Commission has just launched three investigations into potential, unjustified restrictions affecting e-commerce

As stated in the [press release](#) of 2nd February 2017, the EC has opened three investigations into potential unjustified restrictions to e-commerce affecting the sectors of consumer electronics, video games and hotel accommodation.

As regards consumer goods, the investigation targets manufacturers Asus, Denon & Marantz, Philips and Pioneer, and focuses the restrictions imposed to online distributors when setting resale prices, apparently aggravated by the increased use of different software applications allowing automatic adaptation of prices to those of competitors¹.

Accordingly, it appears that the Commission's sector inquiry on restrictions to e-commerce starts to come to fruition.



The European Commission's preliminary report on e-commerce restrictions

Last September, the EC released a preliminary report with the findings of the investigation undertaken. It includes interesting assessments on the impact of the increasing growth of e-commerce on manufacturers of consumer goods and, especially, on all those manufacturers interested in selective-distribution systems, who have been particularly affected by the investigations undertaken by antitrust authorities in this field.

Indeed, based on the market data gathered, some traditional approaches are being revisited, like the prohibition of sales through marketplaces such as Amazon or eBay; the requirement to have a brick-and-mortar store before engaging in online sales; restrictions to the use of price comparative tools²; or the risks (and also the benefits) of resale price maintenance, in order to bring some order amidst the growing number of –even diverging– decisions made by European national authorities.

¹ The investigation into video games concerns geo-blocking [blocking of access depending on the country of residence], while the one concerning hotel accommodation focuses on the introduction of discriminatory mechanisms depending on clients' location.

² Click [here](#) to see a recent case resolved by CMA in the UK.



More on the relations between manufacturers and distributors



Finally, debate continues over relations between manufacturers and distributors, purchasing power, unfair business practices, regulation of the supply chain, etc.

At the European level, the EC is currently revising the conclusions reached regarding the purchasing power of distributors, the growth of MDD and, above all, the buying alliances on the national and international scene in order to determine whether, after the new developments (see the cases in France in 2014), competition in the food industry is being damaged (in terms of prices and/or innovation). See [here](#).

As regards France, reference should be made to the [report](#) of 15 December 2017 on the effects of the Law on Economic Modernisation of 2008 (LME), that changed the negotiation rules between manufacturers and distributors in France and those pertaining to joint buying agreements between the main distribution labels in 2014, and which contains an interesting overview of all of the economic literature on these matters: negotiation strategies, possibility to discriminate among clients, sales at a loss, market power vs. buyer power, town-planning access barriers, etc. With respect to joint purchasing agreements, the study commissioned by the Minister of Economy recommends that the conclusions of the French competition authority stated in the 2015 report be revised, as in their opinion they did not take into consideration some restrictive effects like the complexity of price negotiations and the relevance of further rebates granted by manufacturers but not reflected in the corresponding invoices [in order to circumvent sales at loss prohibition] that, at the very least, make it difficult to automatically transfer to consumers the benefits of the price reductions obtained by suppliers through an increased purchasing power. In addition, higher attention should be paid to the risks of information exchange and the incentives for the coordination among retailers in the downstream business -what the LME precisely wanted to tackle-, etc⁴.

Similarly, it is worth noting the [Decision](#) rendered by the French authority on 2nd February 2017 regarding the concentration of Metro and Colruyt, where the impact of purchasing alliances between among different distributors are taken into account for the first time in the analysis of the effects on the procurement market.

As from Spain, regardless of the recent momentum gained by the Code of Good Practice (to which a significant number of companies and associations have adhered, and has finally been published — see [here](#) —), very little is known about the cases relating to the alliance between Día and Eroski following the claim lodged by the manufacturers association with the Supply Chain Supervisory Body (AICA) or the competition authority (CNMC) other than the dismissal decision adopted by the latter has been challenged before the Court (Audiencia Nacional).

⁴ Besides this, the situation in France between manufacturers and distributors seems complicated, as it can be inferred from the [statement](#) issued by the Ministries of Economy and Agriculture on the meeting held with suppliers and distributors, as a joint effort to face the increased prices of raw materials.

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