

Insights

FORMALISM ON THE CHOPPING BOCK – THE ECJ’S JUDGMENT IN SUPER BOCK

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SUMMARY

The ECJ’s recent preliminary ruling in C-211/22 - *Super Bock Bebidas* (“**Super Bock**”) is significant for businesses and competition authorities. It is well-established that categorisation of conduct as a ‘by object’ infringement of Article 101(1) TFEU must be considered by reference to whether, on a case-by-case basis, the agreement presents a sufficient degree of harm to competition. *Super Bock* is the first occasion on which the ECJ has applied this principle to vertical agreements fixing minimum resale prices (aka resale price maintenance, or “**RPM**”).

In applying established principles to the vertical RPM setting, the ECJ’s analysis in *Super Bock* is unsurprising. However, it does formally reverse the Court’s earlier judgment in C-243/83 - *SA Binon*, and in doing so continues the ECJ’s retreat from assessing ‘by object’ infringements as according to their form, rather than their substance, under Article 101 TFEU.

In this article we assess the impact of *Super Bock*, with analysis of its impact for businesses and competition authorities.

BACKGROUND

In 2019, Portugal’s competition authority (the Autoridade da Concorrência) fined Super Bock Bebidas, a leading brewer in Portugal that manufactures and markets (primarily) beer and bottled water, €24 million for including RPM clauses within its agreements with its downstream distributors. These agreements acted to fix the prices at which Super Bock’s distributors sold Super Bock’s products, to customers such as hotels, bars and restaurants. According to the Portuguese authority, these agreements constituted ‘by object’ infringements of Article 101.

A restriction of competition ‘by object’ is a key classification of anti-competitive behaviour contrary to Article 101 TFEU, which outlines that agreements between businesses “*which may affect trade between member states and which have as their **object** or **effect** the prevention restriction or*

distortion of competition” are prohibited. Case law has established that when assessing whether an agreement is compliant with Article 101, it is necessary to **first** consider the object of the agreement. Should the agreement be restrictive by object, there is no need to assess the agreement’s effects, as restrictions by object are those agreements which reveal a sufficient harm to competition **in themselves** without reference to their effects. Should the agreement **not** be restrictive by object, then an effects analysis is necessary for a finding of infringement under Article 101. Object infringements therefore, such as the RPM infringement found against Super Bock, usually pertain to the most serious infringements of competition law.

Following a series of appeals at the national level, a request to the ECJ for a preliminary ruling was made. The questions (broadly) put to the ECJ were:

1. Whether the concept of ‘restriction of competition by object’ is capable of covering a vertical RPM agreement.
2. The meaning of the concept of ‘agreement’ where RPM is imposed by a supplier on its distributors.
3. Whether the concept of ‘effect on trade between Member States’ in Article 101 TFEU may include the consequences of a distribution agreement which affects, solely, almost the entirety of the territory of one Member State.

In this article we outline the ECJ’s conclusions in respect of questions (2) and (3), before then analysing in more detail the ECJ’s response to question (1).

JUDGMENT

A MATTER OF DEFINITION: THE MEANING OF ‘AGREEMENT’ AND ‘EFFECT ON TRADE BETWEEN MEMBER STATES’

In relation to question (2), the ECJ reiterated the established case law regarding the meaning of an ‘agreement’ under Article 101 (such as C-306/20 (*Visma Enterprise*)). It requires a “concurrence of wills”, rather than a purely unilateral policy. This concurrence is potentially evidenced by the terms of the agreement at issue, including, in relation to RPM whether: the distribution contract contains an express invitation to comply with minimum prices or a right for the supplier to impose the same, the parties’ conduct, and any explicit or tacit ‘*acquiescence*’ of the downstream party to comply with a minimum resale price.

In relation to question (3), the ECJ restated the recognised position that national restrictions can be capable of effecting trade between member states, for example in instances where national restrictions can reinforce the partitioning of markets on a national basis, and even in some instances where national restrictions cover only **part** of the national territory. The ECJ reiterated that

the answer as to whether an agreement is capable of affecting trade between member states is for the referring court to determine by reference to the agreement's economic and legal context.

The ECJ's response to both of these questions is nothing out of the ordinary. In relation to question (2) however it is unfortunate that the ECJ did not elaborate on the concept of 'acquiescence', as there is little guidance on how extensive this concept is. The significance of this is that it bears on whether RPM can be categorised as an 'agreement' under Article 101 TFEU (as in *Super Bock*) or as an abuse of a dominant position under Article 102 TFEU. Both concepts have very different frameworks for businesses; a company can breach Article 101 with an agreement with its downstream distributors, but lack the dominance in its markets to breach Article 102. Further clarification for businesses on the circumstances where a downstream distributor 'acquiesces' to RPM (as per Article 101) or has RPM unilaterally imposed on them (Article 102) would be welcome in order for businesses to adequately manage their compliance risk.

VERTICAL RPM AND 'BY OBJECT' INFRINGEMENTS

The ECJ's judgment makes clear that the essential legal criterion for assessing whether an agreement is restrictive of competition by object, whether horizontal or vertical, involves an analysis as to whether the agreement in itself presents a "*sufficient degree of harm*" to competition. To determine this, the ECJ reiterated that regard must be had to the content of the agreement's provisions, objectives, and its legal and economic context. When determining that context, the ECJ reiterated that it is necessary to take into account the nature of goods and services affected, as well as the actual conditions of the functioning and structure of the market(s) in question. In relation to RPM, the assessment of the legal context must account for RPM constituting a hardcore restriction under the Vertical Block Exemption Regulation (VBER). However, this is only **part** of the context and does not exempt a competition authority from conducting an analysis of whether the agreement is sufficiently harmful to constitute an object restriction.

In relation to the assessment of pro-competitive effects, the ECJ reiterated that these effects must be analysed in relation to the context of the agreement, and provided the effects are demonstrated, relevant, and intrinsic to the agreement concerned **and** sufficiently significant, may provide reasonable doubt as to whether the agreement is sufficiently harmful to competition to constitute an object restriction.

IMPLICATIONS

IMPLICATIONS FOR AUTHORITIES

In many ways the judgment is as expected. The framework for assessing whether an agreement is restrictive by object by reference to the agreement's legal and economic context is well established in EU case law (e.g. Case C-67/13 P *Cartes Bancaires*, C-307/18 *Paroxetine*). It is important to remember though that notwithstanding this general framework, the 'official' approach to assessing

RPM as an object restriction was formalistic – insofar as the mere presence of RPM within an agreement was sufficient for the agreement to be restrictive by object without reference to any other factors. *Super Bock* is a reminder that a regulator cannot rely on an agreement being restrictive by object without an assessment of the agreement's legal and economic context; formalism by reference to Article 101 has been laid to rest.

It is important to be clear, however, that the judgment does not open the door for an effects analysis in assessing whether an agreement is restrictive by object. The work involved in assessing the legal and economic context of an agreement is not equivalent to the work needed to assess the effects of an agreement. Furthermore, insofar as pro-competitive effects are outlined, these assess whether the agreement is **sufficiently harmful** in itself to be an object restriction such that its effects do not need to be analysed. Should the agreement not be sufficiently harmful in itself to constitute an object restriction, it will then be assessed by reference to its effects.

In relation to hardcore restrictions, *Super Bock* is an apt reminder that, although the European Commission ("**Commission**") has previously outlined that hardcore restrictions are 'generally' restrictive by object, this is not conclusive and regulators may only view a restriction being hardcore as an element of the legal context of the restriction.

Super Bock has therefore equalised the Commission's burden with regards to the assessment of RPM as an object restriction and the assessment of other object restrictions under Article 101 TFEU. Whether *Super Bock* changes the prioritisation principles of the Commission and other national authorities in deciding whether to pursue a RPM case remains to be seen. In addition, it is unclear whether the UK Competition and Markets Authority and UK courts will follow suit with the approach of the ECJ (although a significant divergence is unlikely).

IMPLICATIONS FOR BUSINESSES

What can businesses take away from this? On the one hand, that agreements are not restrictive by object by reference to their form **alone** is an acknowledgement of the ECJ's (and EC's) approach towards a non-rigid understanding of competition law based on the *substance* of agreements.

Although this approach provides less certainty for businesses in its lack of rigidity, it will:

1. lessen harmful false-positives (object classifications where an agreement is not restrictive by object);
2. allow more room for businesses to rebut an object classification and therefore push regulators into undertaking an onerous effects analysis (which in turn allows more scope for a company to dispute a finding of anti-competitive effect).

To expand on (ii), the ECJ's approach may provide more comfort to businesses in their risk assessment of RPM; in that businesses now have the opportunity to advance pro-competitive

efficiencies to **resist** an object classification of their RPM agreements. For example, certain RPM practices can have pro-competitive efficiencies and legitimate objectives, such as agreeing fixed pricing with downstream distributors to establish a short-term low-price campaign (which may aid entry into a market). The previous approach under *Binon* would have arguably classified this as restrictive by object, but the approach in *Super Bock* may allow businesses the scope to advance pro-competitive efficiencies to rebut an object classification.

However, it is important to reiterate that agreements that include ‘naked restraints’ will find it difficult to resist a classification of being restrictive by object. Restrictions within agreements are ‘naked’ where they have no plausible objective other than a restriction of competition. Businesses that fix minimum prices, for example, with the objective solely to prevent downstream price competition will find it hard to resist that this conduct represents a naked restraint.

These naked restraints are not inconsistent with *Super Bock* – the judgement that these types of restriction consist of no other plausible objective other than a restriction of competition is reached by reference to their legal and economic context. This is the central ratio of Case C-373/14 P (*Toshiba*); in which the ECJ ruled that in the context of these naked restraints, which have previously been established as object restrictions, analysis of the economic and legal context may be limited to “*what is strictly necessary in order to establish the existence of a restriction by object*”.

It is vital therefore that businesses continue to exercise caution in the negotiation and drafting of their commercial agreements, and seek advice should any competition law issues arise.

Should you want to know more about this decision; including how it may impact your agreements directly or indirectly, please speak to Andrew Hockley, Ben Bolderson, Dave Anderson, George Christodoulides, or your usual BCLP contact.

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