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**LATIN AMERICAN COMPETITION FORUM**

**Session III - Competition Issues in the Groceries Sector: Focus on Conduct**

**-- Contribution from Portugal --**

**23-24 September 2015, Montego Bay, Jamaica**

*The attached document from Portugal is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 23-24 September 2015 in Jamaica.*

Contact: Ania Thiemann, Global Relations Manager, OECD Competition Division,  
Tel: +33 1 45 24 98 87, Email: Ania.Thiemann@oecd.org.

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# LATIN AMERICAN COMPETITION FORUM



23-24 September 2015 • Montego Bay • Jamaica

## Session III - Competition Issues in the Groceries Sector: Focus on Conduct

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### THE PORTUGUESE EXPERIENCE CONTRIBUTION FROM PORTUGAL

#### Executive Summary

1. The contribution of the Portuguese Competition Authority (PCA) to the OECD 2015 Latin America Competition Forum on *Competition Issues in the Retail Grocery Sector* sets out an overview of the Portuguese “food chain industry”, following the October 2010 PCA Report entitled *Final Report on the Commercial Relations between the Large Retail Groups and their Suppliers*<sup>1</sup>, as well as later developments.
2. The October 2010 PCA Report identified four main areas of concern directly related to an imbalance in bargaining power between food suppliers in general and large retail groups:
  - The unilateral imposition of contract conditions (on top of a pre-set purchasing agreement);
  - The unilateral imposition of discounts (sometimes retroactive in nature);
  - The imposition of penalties including de-listing;
  - The violation of payment terms.
3. These concerns do not fall necessarily under the scope of prohibited practices in competition law, a finding that is in line with similar studies undertaken in other countries of the European Union. Specifically:

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<sup>1</sup> [http://www.concorrenca.pt/vEN/Estudos\\_e\\_Publicacoes/Estudos\\_Economicos/Other/Pages/Final-Report-Commercial-Relations-Between-Large-Retail-Groups-and-Suppliers.aspx?lst=1](http://www.concorrenca.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Other/Pages/Final-Report-Commercial-Relations-Between-Large-Retail-Groups-and-Suppliers.aspx?lst=1).

- The provisions of the contracts between the two sides do not impede, distort or restrict competition in any substantial way (article 9 of the Portuguese Competition Act, or Article 101 TFEU);
- There is no case for an abuse of dominance, bearing in mind that none of the large retail groups (LRG) has a dominant position (Article 6 of the Portuguese Competition Act or Article 102 TFEU);
- Although some suppliers only work with one LRG, there is no evidence that equivalent alternatives do not exist, meaning that there is no evidence of abuse of suppliers in terms of economic dependence (Article 7 of the Portuguese Competition Act).

4. Some issues, however, may fall within the provisions of legislation on (individual) unfair trading practices. This point, however, does not detract from the fact that a detailed analysis of the many contracts signed between distributors and suppliers and their follow-up reveal an imbalance in bargaining power, generally to the detriment of suppliers.

5. On the basis of the market study carried out, and the applicable legal framework, both domestic and European, the PCA put forward a raft of recommendations geared at promoting a culture of competition, which could contribute to address the identified concerns and to push for effective action by the authorities that have jurisdiction in the matter, together with an effort by the different operators along the vertical chain to credibly self-regulate their B2B relations.

## **1. The October 2010 PCA Report**

6. The Report focused on the business relations between the nine largest retailers operating in Portugal – the so-called large retail groups (LRG) – and their suppliers for most of the “fast moving consumer goods” (FMCG).

7. This Report was undertaken following an on-going public debate on potential unbalanced commercial relations between LRG and their suppliers and increasing tensions in these relations, resulting not only from the commodity price increases between 2006 to 2008, but also in the aftermath of the 2003 reform of the Common Agricultural Policy (CAP).

8. In this Report, ‘primary production’, the upstream activity to suppliers, is only analyzed in the sectors where either suppliers are vertically integrated on the production side (e.g. large multinationals), or suppliers operate as producers (e.g. in the meat, fish, and fruits and vegetables sectors). For these reasons, we refer to “suppliers” or to the “supplying sector” as the overall upstream activity to large firms acting as purchasers in this sector, which include general wholesalers and large retailers.

9. In turn, wholesalers (Cash & Carry chains and others) act as intermediate suppliers of firms which do not have the dimension and/or the logistical capacity to purchase directly in the upstream supplying sector. These smaller dimension customers are the so-called “traditional retailers”, which include, among others, traditional small grocery stores, bakeries, local municipal markets as well as small dimension firms within the HORECA (i.e., Hotels, Restaurants, and Cafeterias) channel.

10. Hence, in its Report, the PCA addressed the following three stages of the “food supply chain”:

1. The upstream supplying activity, whether or not this includes ‘primary production’;
2. The wholesaling activity of sales to small retailers which do not have the dimension to buy in the upstream supplying sector; and
3. The retailing activity of sales to final consumers.

11. In particular, wholesalers and LRG compete in the upstream supplying level as buyers, but not downstream. Wholesalers act as sellers to small retailers, and these latter compete with other retailers, including LRG as well as other regional-based retailing chains (see below), on sales to final consumers.

12. In Portugal, as in many other European countries, wholesalers along with their major customers (traditional retailers) have been showing a decline in both their sales (in volume and value) when compared with large retailers, and in number of stores. For this reason, rather than considering wholesalers, the PCA Report focused mostly on the commercial relations between LRG and their suppliers in the FMCG sector.

13. The large retailers which are, along with wholesalers, direct customers of the supplying sector, include large dimension firms within the HORECA channel, regional retailing chains, and the LRG. Although the Report considered the 9 largest LRG in Portugal, there are actually 10 such LRG. Together, these 10 currently represent more than 90% of total FMCG retail sales in mainland Portugal:

- *Continente* (Portuguese, from the Sonae Group);
- *Pingo Doce* controlled by Portuguese Group Jerónimo which, apart from the Pingo Doce retailing chain, has one wholesaling chain “Recheio”;
- *Intermarché* (French, also called “Les Mousquetaires”) with two types of retailing stores in the Portuguese FMCG sector: the discount stores “Netto” and the Intermarché/Ecomarché super/hypermarkets;
- *Auchan* (French);
- *Lidl* (German);
- *E. Leclerc* (French);
- *Carrefour* through its ‘Dia%/Minipreço’ small stores network (French);
- *Aldi* (German);
- *El Corte Inglés* (Spanish); and
- *Spar* (Dutch).

14. As opposed to traditional retailers, LRG along with general wholesalers, have a large network of small to large dimension stores and the entire network buys, in general, as a single unit through a specific purchasing center, from the different suppliers. Their large dimension, as well as the fact that they centralize their purchases, allows these groups to have a much higher buyer/bargaining power over their suppliers than traditional retailers.

15. Also as a consequence of their high buyer power, LRG tend to be more price competitive in downstream sales to final consumers than traditional retailers. This partially explains the progressive decline of traditional retailers when compared with LRG, as well as the decline of wholesalers, i.e., the traditional retailers' major suppliers, when compared with LRG. The present situation in Portugal suggests that traditional wholesalers' customers which are still present in the market – i.e., traditional retailers and most of the HORECA channel – tend to move their purchases from wholesalers to LRG (see also section IV below).

16. The October 2010 PCA Report made several recommendations to the Government, stakeholders and an independent entity. These recommendations were mostly related with:

1. The updating of existing legislation, notably on the required evidence for individual restrictive commercial practices;
2. The establishment of a successful self-regulatory framework, including a new voluntary Code of Best Practices or Code of Conduct, buttressed by some form of binding power, e.g. the creation of the figure of an Ombudsman, who would be able to collect relevant data from the different parties, especially those in conflict, and take action against violations of the Code;
3. Stressing the importance of market monitoring and of enforcing national legislation on individual restrictive commercial practices, as well as of the new legislation on payment delays, with a special emphasis on the joint work carried out on these matters by the Portuguese Economic and Food Safety Authority (ASAE) and the PCA;
4. The promotion of a regular collection, treatment, and dissemination of statistical data (mostly on prices and quantities) along the food vertical chain, over its four stages, 'primary production', 'supplying sector', 'wholesaling', and 'retailing', to allow a faster and more effective intervention by the responsible public entities, in particular, ASAE and the PCA; and,
5. The proactive participation by the competent Portuguese authorities on the work undertaken by European institutions dealing with these issues.

17. Following the setting up of the Platform for the Monitoring of the Vertical Food Chain (PARCA, or "Plataforma de Acompanhamento das Relações na Cadeia Alimentar") by the Government, with the participation of different stakeholders, in November 2011, new legislation was passed on payment deadlines and delays, and on individual restrictive commercial practices, imposing more severe penalties for violations (such as, sales below cost), apart from other initiatives on data collection, treatment and dissemination, and on self-regulation.

18. Following the 2010 report, and as a member of PARCA, the PCA has been monitoring the progress in the implementation of its recommendations.

## **2. Competition Law and PCA Enforcement Powers**

19. Like most competition authorities, the PCA has a limited scope to address business practices resulting from bargaining power imbalances between contracting parties, apart from the so-called "abuse of economic dependence", specific to some jurisdictions like the Portuguese. Instead, and in the absence of evidence of dominant positions held by any LRG, most of these practices fall under specific sector regulations – e.g. 'individual unfair commercial practices' -, which do not require the occurrence of 'harm to competition', as competition law does. In turn, on economic grounds, it might be conceptually difficult to define what one ought to understand by an 'unfair commercial practice' when this refers to the relation between a large buyer exerting its stronger bargaining power over a comparably weaker seller.

20. In other words, ‘unbalanced bargaining powers’ between large buyers and comparatively smaller sellers – i.e., between LRG and their suppliers – are, usually difficult to be framed within:

1. Practices which harm competition i.e., which fall within the scope of competition legislation, notably, those falling under the provisions of “prohibited agreements” or of “abuse of dominance”; and,
2. Practices which may be considered, on economic grounds, as conceptually ‘unfair’.

21. Most of these practices may be better framed within sector specific regulations, or self-regulation codes, namely:

1. Within legislation regarding ‘individual unbalanced bargaining powers’, whereas this ‘imbalance’ may or not be considered ‘unfair’ on economic grounds; or,
2. In ‘codes of conduct’ (i.e., codes of good commercial practices, which the parties, buyers and sellers abide to on a voluntarily basis and may or may not involve some sort of penalties for violations); or even,
3. In legislation regarding concerns on national food security.

## **2.1 Specific sector regulation which falls outside the scope of competition rules**

### **2.1.1 Specific legislation on ‘individual restrictive commercial practices’**

22. In Portugal there is specific legislation on so-called “individual restrictive commercial practices”. This legislation is outside the scope of competition law as it is related to individual practices between two or more parties without requiring the existence of harm to competition. It addresses commercial practices deemed unfair or abusive, some of which may be relevant when analyzing commercial relations relate LRG with their suppliers.

23. In particular, the legislation on individual restrictive commercial practices prohibits:

1. “*Sales below cost*” i.e., that the retailer cannot sell a specific good below the price it effectively paid the supplier for it. The ‘effective price’ is defined as the ‘tabulated price’ subtracted from discounts the retailer got from the supplier; and,
2. “*Abusive bargaining practices*”, which consider, among others, the imposition from LRG on their suppliers of payment conditions, selling or commercial cooperation conditions which result in granting an advantage to the purchaser [the retailer] that is either not proportional to the volume of purchases or to the value of services rendered on the supplier’s request.

24. According to the recent legislation on individual restrictive commercial practices, adopted in December 2013, the investigation and handling of these cases are undertaken by ASAE. According to the previous legislation, the PCA would handle these cases following investigations by ASAE.

2.1.2 *Codes of Conduct or Codes of Good Practice*

25. Alongside legislation addressing individual restrictive commercial practices, as well as payments delays and other harmful B2B practices, in many jurisdictions, stakeholders have adopted Codes of Conduct or Codes of Good Practice, to which they often abide on a voluntary basis.

26. However, it has been the PCA's view that in the absence of some type of enforcement mechanisms (e.g. the existence of an Ombudsman with monitoring powers, the power to ensure compliance and to impose some type of penalties on deviants), this type of Codes may not be fully effective. That seems to have been the case with the 1997 "Code of the Best Commercial Practices" signed by the Portuguese Industry Confederation (CIP) and APED. As the Code's provisions were non-binding, its practical effects have fallen short of what would have been desirable.