



DEFENCE OF COMPETITION  
IN TIMES OF INFLATION

**RECOMMENDATIONS  
ON THE VALUE CHAIN  
OF CONSUMER  
GOODS**

**APRIL 2023**



## Executive Summary

**The current inflationary context has had a significant impact on the purchasing power of households, particularly when it comes to food products.** In February 2023, the index for unprocessed food products recorded a variation of 20.1%<sup>1</sup>. Several factors have contributed to this increase, namely the disruption of global agricultural markets caused by the war in Ukraine, in particular regarding cereals and fertilizers, the weather conditions and the rising energy costs<sup>2</sup>.

**The enforcement of the Portuguese Competition Law contributes to keep consumer goods markets open and competitive.** Therefore, detecting, investigating and sanctioning anti-competitive practices with a more substantial impact on families remains one of the priorities set by the Portuguese Competition Authority (AdC) for 2023.

**More competition between companies results in lower prices**, through downward pressure on profit margins and costs, to the benefit of consumer welfare and competitiveness of the economy.

**All companies in the value chain of consumer goods must take their market decisions autonomously** and without sharing strategic and commercially sensitive information with their competitors. From the point of view of vertical relationships in the value chain, retailers must determine their selling price unilaterally and without undue influence from upstream suppliers.

These aspects are crucial to ensure competition in the market, to reduce the risk of supply disruptions and to offer better prices, more quantity and higher quality of the products to consumers.

**The behaviour and interaction of economic agents in the market must be based on the merit of their products or services.**

**On the contrary, all practices that can be considered restrictive of competition** and, as such, could infringe the Portuguese Competition Law as well as, if applicable, the Treaty on the Functioning of the European Union, should be avoided. **Prohibited practices may involve:**

- **Vertical restriction**, if it occurs between economic agents at different levels of the production or distribution chain (e.g., between suppliers and distributors);
- **Horizontal restriction**, if it occurs between competing companies at the same level of the production or distribution chain;
- **Hybrid restriction (hub-and-spoke)**, if it has both vertical and horizontal characteristics.

These types of practices can be harmful to competition in several ways, to the detriment of consumer welfare and the good functioning of the market.

**Since 2017, the AdC has investigated and decided several cases involving food-based retail distribution companies and their common suppliers**, in markets related to diversified

---

<sup>1</sup> Cf. INE, [Consumer price index](#), February 2023.

<sup>2</sup> Cf. Eurostat, [Agricultural annual prices in 2022 – first estimates](#), 12.01.2023.

categories of Fast-Moving Consumer Goods (FMCG), namely beverages, packaged bread and cakes, hygiene and home care products<sup>3</sup>.

**This paper aims to raise awareness among companies which take part in the value chain of consumer goods to the importance of adopting market strategies which align with the best competition practices.** This is crucial to ensure the effective functioning of markets, while simultaneously ensuring that prices paid by households are fair and competitive in the current economic circumstances.

**The purpose of this paper is also to highlight the type of behaviour prohibited by the Portuguese Competition Law,** including those which are likely to arise in the context of the relations between suppliers and distributors, hence using concrete examples of conducts that should be avoided.

---

<sup>3</sup> Proceedings nos. 2017/01, 2017/03, 2017/04, 2017/05, 2017/06, 2017/07, 2017/08, 2017/11 e 2017/13, currently under judicial review, details of which can be found at: [AdC - PesquisAdC \(concorrencia.pt\)](http://www.concorrencia.pt/PesquisAdC).

## 1. Prohibited price fixing practices

The existence of competitive markets and an efficient enforcement of competition law play an essential role in the economy, especially in times of crisis.

In this context and from a preventive perspective, the AdC identifies, based on its experience, potential risky behaviours for competition that should be avoided by economic agents at different levels of the value chain.

In particular, the AdC will focus on vertical resale price maintenance and horizontal retail price alignment achieved by retailers through the intervention (and prices) of suppliers.

### 1.1. Legal and economic framework

Typically, in a market economy, commercial partners operating along the value chain interact with each other. Although these interactions serve as a basis for the integrated circulation of products and services, one shall also recognise the potential or actual impact they might have on competition conditions in the market.

Competition law seeks to guarantee that economic agents, as autonomous entities, decide their strategies freely and independently, competing on the basis of their products or services' merit and individually assuming the risk of their commercial activity.

If a company's decision on strategic and commercial behaviour is not free and autonomous, but rather the result of some kind of coordination, a restrictive practice could be at stake.

The price charged for a product or service is an important parameter of competition, being a fundamental factor both in a company's commercial strategy and for the consumer.

Behaviour between companies aimed at fixing or imposing a resale price constitutes a restrictive practice. These strategies are prohibited and punishable under both the Portuguese Competition Law and the European Union Law <sup>4</sup>, regardless of their duration or the companies' importance in the market.

The prohibition on fixing resale prices covers not only behaviour between competitors, but also between companies in different levels of the production or distribution chain, namely between suppliers and distributors or between wholesalers and retailers, constituting a vertical resale price maintenance (RPM).

Thus, in the event of a common plan - an agreement or a concerted practice - aimed at fixing or imposing prices to the public, the economic agents involved can be sanctioned.

For example, if two or more competitors agree or concert the selling prices of their products, either directly or through the use of a facilitator or a common partner, or put

---

<sup>4</sup> In this case, whenever the conducts are likely to affect trade between Member States, in other words, when these are objectively capable of producing negative effects on the internal market, to the detriment of consumers.

pressure on their suppliers to fix the resale price of their products across the market, such behaviour is unlawful.

An agreement or a concerted practice in which the supplier of a product imposes the price at which its distributors must resell that product, or limits the discounts these can offer, is equally unlawful.

On the one hand, an agreement is any form of expression of the common will of several companies regarding their conduct in the market. It does not require a formal, written, legally valid, signed and binding contract.

On the other hand, a concerted practice refers to informal coordination between companies, which decide to replace the risks of competition with practical co-operation between them. Even if, in a specific case, the intention to fix prices is not evident and can only be inferred, these behaviours may give rise to serious restrictions of competition, and the verification of collusion is enough for the practice to be prohibited, without any need to analyse its effects on the market. In fact, it is presumed that these behaviours lead to appreciable distortions of competition at the market level.

Horizontal price fixing and vertical resale price maintenance are likely to restrict both inter-brand competition (competition between suppliers of different brands) and intra-brand competition (competition between distributors of the same brand) and can also lead to the exclusion of economic agents from the market. The companies involved in a practice of this kind are prevented or have no incentive to reduce their selling prices, consequently leading, from the outset to an increase in the prices of these products for the final consumer.

Vertical resale price maintenance is also likely to facilitate collusion between suppliers and between distributors, given the increased price transparency in the market, which leads to a slowdown in competition, while also reducing the incentives of suppliers to charge lower prices to distributors.

It can also lead to an increase in suppliers' and distributors' margins, which is a recognised incentive to resort to this prohibited practice.

In addition, there could be a reduction in the dynamism and innovation at production and/or distribution level, which could create barriers to entry in the market to possible competitors, particularly smaller ones.

## **1.2. Retail price maintenance (RPM)**

RPM is defined by the disproportionate interference of a supplier in setting its products' retail prices in the market<sup>5</sup>.

---

<sup>5</sup> Only in exceptional cases can vertical pricing have positive effects, in terms of efficiency gains, which must be proportional and passed on to consumers. These circumstances must be alleged and proven by the company carrying out the pricing. For example, in the case of imposing resale prices when a new product is

Restricting the ability of an independent distributor (e.g., a retailer) to set its selling price may include the imposition of a fixed or minimum selling price, the definition of a price range within which the retailer must sell the products, or even a request for a price increase, which the retailer accepts.

The restrictive behaviours concerning imposition of resale prices also include practices that indirectly fix a minimum resale price, including, therefore, any incentives to the establishment of a minimum price or disincentives to deviate from it. Examples of indirect forms of minimum price fixing include at the following<sup>6</sup>:

- fixing the resale margin;
- fixing the maximum level of discount that the retailer can grant from a certain prescribed price level;
- granting of rebates or the reimbursement of promotional costs by the supplier, subject to the observance of a given price level;
- imposing minimum advertised price policies (which prohibit the retailer from advertising prices below a certain level set by the supplier);
- linking the established resale price to competitors' resale prices; as well as
- threats, intimidation, warnings, penalties, delay or suspension of deliveries or termination of contracts depending on the observance of a given price level.

### **1.3. Hub-and-spoke**

RPM does not exhaust the types of price-setting behaviours involving suppliers and distributors that could potentially constitute serious restrictions of competition in the market.

The investigations conducted and the decisions adopted by the AdC between 2017 and 2023 in the food-based retail distribution market have shown that the practices in stake included, in addition to a set of bilateral vertical practices or agreements to fix the resale price, further elements that configured a multilateral collusion between competitors, facilitated by a common supplier.

In competition law, the practice of fixing resale prices between competing companies through the supplier has a hybrid nature, with characteristics that are both vertical and horizontal, translating into a hub-and-spoke agreement or concerted practice.

---

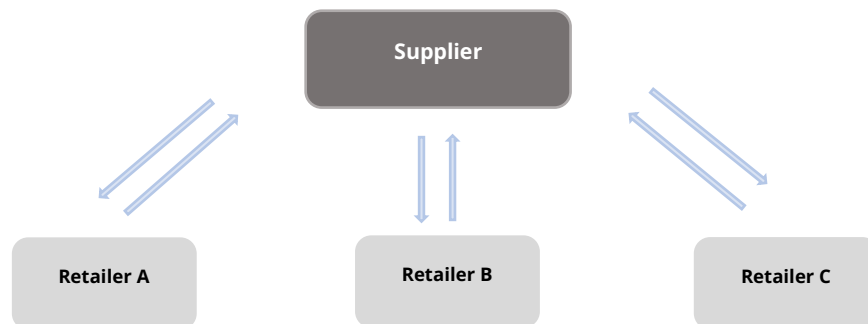
introduced into the market, or in the case of a one-off, short-lived promotional campaign, or in cases where the imposition of resale prices may allow retailers to provide additional pre-sale services, particularly in the case of complex products, it is up for the supplier to demonstrate that there is a risk of free-riding at the distribution level and that fixed or minimum resale prices provide sufficient incentives for investment, and that there is no realistic or and less restrictive alternative means of eliminating it. See Communication from the Commission “Guidelines on vertical restraints”, OJ, 30.6.2022, C 248/01, section 2.1.

<sup>6</sup> *ibidem*, paragraph 187.

These behaviours are similar to a cartel, with two particularities: (i) they involve companies at different levels of the value chain, both the retailers and suppliers, and (ii) the competing operators (retailers or suppliers) do not communicate directly with each other, but instead use a common supplier or distributor (hub).

In the case of a hub-and-spoke scheme in which the hub is the common supplier and the spokes are the retailers, it is the supplier who, through a set of bilateral communications with the different retailers, facilitates, promotes and/or guarantees the illicit collusion between the companies at the bottom of the distribution chain (the retailers - spokes) (Figure 1).

**Figure 1: Hub-and-spoke where the hub is the common supplier, and the spokes are the retailers.**



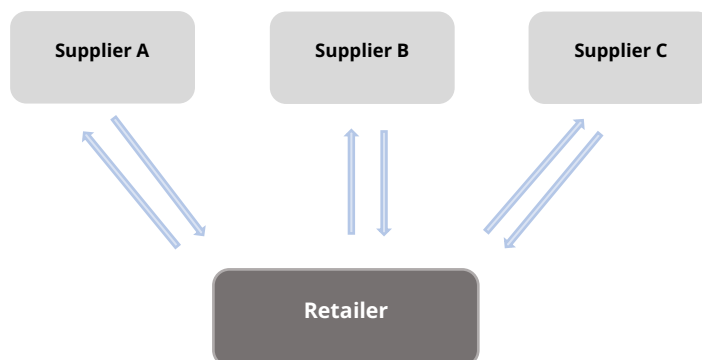
Vertical communications take the form of direct contacts between the supplier and each distributor through which they establish the resale prices that should be applied to a set of products at a given time, while guaranteeing that these will be the prices that the market (i.e., competing retailers) either is or will be practicing.

In other words, the resale prices fixed horizontally are established through the bilateral vertical relations between the supplier and its various retail customers, smoothing out downstream competition.

Vertical price fixing is, therefore, instrumental in the strategy of coordinating the level of the products' resale price, contributing to its implementation. The hub plays the role of connecting link, intermediary or facilitator in the coordination of strategies, both proactively and reactively. It is used by the different retailers to exchange sensitive commercial information and ensure that all retail competitors implement the agreed resale prices.

There is also an "inverted" hub-and-spoke practice (Figure 2).

**Figure 2: *Hub-and-spoke* where the hub is the common retailer, and the spokes are the suppliers.**



In this case, the hub is the shared distributor, and the spokes are the suppliers. The distributor or retailer, through a set of communications with the various suppliers, facilitates, promotes and/or guarantees illicit collusion between the companies that are in the superior level the distribution chain (the suppliers - spokes).

In this situation, the softening of competition takes place upstream.



### Hub-and-spoke prohibition decisions adopted in other countries

In the **United Kingdom**, the Office of Fair Trading (OFT)<sup>7</sup> adopted several prohibition decisions regarding hub-and-spoke practices. In a case that ended in 2011, the OFT considered that some of the largest supermarket chains had unlawfully exchanged information on prices for dairy products. Following an appeal against the prohibition decision, the court found that the companies had participated in illicit exchanges of information with competitors and imposed fines totalling close to £50 million<sup>8</sup>.

Previously, in 2003, the OFT adopted a prohibition decision against a company supplying football equipment and three of its distributors on the retail market<sup>9</sup> for hub-and-spoke practices. The Competition Appeal Tribunal upheld this decision. In another case, involving distribution companies and one of the UK's largest toy and games manufacturers<sup>10</sup>, the OFT considered that, even in the absence of direct communication between the distribution companies, the agreements they had concluded with the supplier constituted evidence of continuous behaviour aimed at a common goal: the supplier's recommended pricing policy would be followed.

In **Belgium**, in 2015, the competition authority adopted a prohibition decision (in a settlement procedure) and imposed fines on retail companies in the field of distribution and on their suppliers for their involvement in a collusive practice of both vertical and horizontal nature, in the perfumery and toiletries sector, between 2002 and 2007. Price coordination was carried out through indirect contacts between the retailers, with the suppliers acting as intermediaries in these exchanges of information<sup>11</sup>.

In the **Netherlands**, in 2020, the competition authority adopted a decision condemning four of the main cigarette producers for having exchanged information, between July 2008 and July 2011, via their retailers on future prices for cigarette packets. The authority concluded that the producers regularly adjusted their retail prices on the basis of the information about their competitors' future prices, which they received from retailers. Consequently, once the producers were able to coordinate their pricing strategies, there was distortion of competition<sup>12</sup>.

In the **United States of America**, this practice has been analysed in more detail, in a wide range of cases, since the 1930's<sup>13</sup>.

In **Chile**, one of the most recent cases of hub-and-spoke on the international scene has been investigated and confirmed in court<sup>14</sup>.

These cases illustrate examples in which competition authorities and the courts have condemned companies for their participation in hub-and-spoke practices.

<sup>7</sup> Currently designated Competition and Markets Authority (CMA).

<sup>8</sup> See OFT decision from 26.07.2011, proceeding no. CE/3094-03 (*Dairy retail price initiatives*).

<sup>9</sup> See OFT decision of 01.08.2003, case no. CP/0871/01 (*Price-fixing of Replica Football Kit*).

Hub-and-spoke practices, given their hybrid nature — simultaneously vertical and horizontal —, imply specific and different behaviours and roles for suppliers and distributors.

The following is a non-exhaustive list of behaviours of suppliers and distributors that could potentially fit in a hub-and-spoke scheme, where the hub is the common supplier. It should be noted that, out of context, some of these behaviours are also compatible with an RPM, but, in this wider scenario with other elements, should be considered as an integral and instrumental part of a hub-and-spoke scheme:

- (i) Definition of the resale price level and creation of the conditions for it to be implemented, in the future, by the various retailers in the market, as well as the adoption of a timetable for the respective price modification (including promotional ones).
- (ii) Communication, between competing retailers, via the supplier, of information on their respective resale price positioning, including future resale price.
- (iii) Implementation of mechanisms to monitor retailers' prices, in order to detect deviations from the agreed resale price and to promote the respective correction.
- (iv) Pressure or retaliation, so as to ensure that the resale price is adjusted in accordance with the agreed level.

These practices exceed the limits of what is lawful and acceptable in a relationship between supplier and distributor, as well as between competing distributors through the intermediation of the supplier.

A concerted hub-and-spoke practice can be aimed at a common goal shared by the supplier and the retailers: eliminating the degree of uncertainty inherent in free competition and guaranteeing margins along the distribution chain, to the benefit of the companies involved and to the detriment of the consumer.

On the one hand, retailers benefit from less competition, without sacrificing margins. On the other hand, the supplier may have incentives to facilitate this type of practice. For

---

<sup>10</sup> See OFT decision of 21.11.2003, case no. CP/0480-01 (*Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games*).

<sup>11</sup> See the decision of Autorité Belge de la Concurrence of 22.06.2015, *Hausses coordonnées des prix de vente de produits de parfumerie, d'hygiène et de droguerie*, case no. CONC-I/O-06/0038.

<sup>12</sup> See the decision of Autoriteit Consument en Markt (ACM) of 27.05.2020, case no. ACM/19/035337.

<sup>13</sup> For example, *Greggar S. Isaksen v. Vermont Castings, Inc.* (Seventh Circuit – 1987); *Big Apple BMW, Inc. v. BMW of North America, Inc.* (Third Circuit – 1992); *Thomas G. Lovett v. General Motors Corporation* (Eight Circuit – 1993); *Toys "R" Us v. FTC* (7th Cir 2000); *Euromodas, Inc. v. Zanella* (First Circuit – 2004). See also the hub-and-spoke cases, recognised by US case-law as violations of the Sherman Act, from the Supreme Court of the United States of America, *Interstate Circuit v. United States*, 306 U.S. 208 (1939) and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

<sup>14</sup> See the decision of *Tribunal de Defensa de la Libre Competencia* do Chile of 28.02.2019, Sentencia no. 167/2019, case Walmart, decision upheld by the Chilean Supreme Court which, on 08.04.2020, ordered the companies Cencosud, SMU and Walmart to pay a fine of 21 million US dollars.

example, when retailers have sufficiently strong bargaining power *vis-à-vis* the supplier, the latter may benefit from a softening of downstream competition, which makes it possible to secure a higher wholesale margin<sup>15</sup>.

### **How to define if the facts reflect RPM or, instead, a hub-and-spoke in which RPM is instrumental?**

When it comes to framing these types of practices (RPM or hub-and-spoke), it is important to consider (i) the negotiation context between suppliers and distributors and who is exerting pressure to maintain and/or increase trade margins, (ii) the incentives of the companies involved, and (iii) whether the behaviour in question reveals the retailers' awareness of the indirect exchange of sensitive information and the knowledge that their competitors are also engaging in a similar conduct.

When the negotiating context of the companies concerned, the alignment of incentives and the available evidence reveal a reality consistent with a hub-and-spoke practice, this will be the appropriate theory of harm, whereas a RPM approach will not adequately and fully reflect the multilateral dynamics of commercial relations between supplier and retailers.

#### **AdC investigations – hub-and-spoke cases**

The investigations of hub-and-spoke cases conducted by the AdC from 2017 onwards concluded that there were indirect exchanges of communications between retailers, via their common suppliers, in order to agree among themselves on the products' resale prices. The recommended resale prices were taken as future reference prices for retailers, while the reciprocal contacts between each supplier and the retailers reduced the latter's uncertainty about their competitors' pricing intentions.

In the event of differences being identified between the recommended resale price and the resale price implemented by competitors (deviations), the retailers either asked the supplier to intervene with the deviating competitor to correct this, or charged the supplier for the costs incurred to equalise the price charged by the deviating competitor, always ensuring, at the same time, that their own margins were not affected (this only being possible by reducing the supplier's margin).

In this negotiation, instead of the wholesale purchase price, the retailers' margin was maintained through the implementation of the recommended resale price. The supplier contributed with an amount corresponding to the difference between the recommended resale price and the competitor's lowest resale price, this way guaranteeing that the retailer's margin remained unchanged. This financial contribution made by the supplier is called a reimbursement. If there was no agreement between the parties, the retailer

<sup>15</sup> See, e.g., Garrod, L., Harrington Jr, J. E., & Olczak, M. (2021). *Hub-and-spoke cartels: Why they form, how they operate, and how to prosecute them*. MIT Press.

would occasionally send unilateral debit notes, demanding payment from the supplier for the differences identified in resale prices.

Reimbursements were also used in the context of promotional activities organised jointly between supplier and retailer, subject to the retailer's commitment to practice the agreed resale price. The commercial conditions agreed involved, among other indicators, the depth of the promotional activity, its timing and the promotional resale price.

## 2. Practical assessment of risky behaviours along the value chain

Based on the above, it is important to present some guidance to economic agents with an active role in the consumer goods sector, including food products, concerning the limits of companies' lawful conduct, particularly regarding communications between suppliers and retailers.

Concrete examples of risky behaviour, from the point of view of competition, are also included. It should be noted that economic agents' actions are not exhausted by the examples set out below, nor is any conclusive judgement made based on these as to the individual conduct of any company.

### ***A recommendation on retail prices should not eliminate the companies' ability to freely set its prices***

Resale prices are a crucial element in product positioning in the market and an important variable in brands' commercial policy.

Suppliers can communicate recommended resale prices as long as these are truly non-binding, i.e., in case these are mere references<sup>16</sup>.

On the contrary, recommended prices are not lawful if, instead of being optional, these turn out in practice to be real fixed prices to be charged in the market.

Moreover, recommended (or fixed) selling prices shall not induce or materialise a strategy of horizontal alignment of resale prices.

#### **Example:**

Supplier A sends Retailer B an email requesting a resale price alteration:

<sup>16</sup> Nonetheless it is not ignored that there are risks to competition associated with the existence of mere recommendations for resale prices, namely the fact that these can act as a reference point for distributors. These can slow down competition or even encourage collusion between both distributors and suppliers.

*"Please advise this alignment to the stores. All the operators have been informed and have committed to implement these resale prices. Please change the resale price for items X, Y and Z, as last Friday they were completely out of line."*

A mere price recommendation should not be associated with any additional information on price implementation strategies by competitors, nor its modification dates or any other aspect intended to coordinate the market strategies.

Likewise, the information conveyed should not comprise the imposition of a minimum or fixed selling price, as a consequence of pressure or incentives from any of the parties, for example, as a condition for providing a product (by of the supplier) or purchasing it (by the retailer, as a condition of the transversal implementation of a certain price level in the market).

It is highly likely that a concerted practice of indirect price fixing is in place if the prices indicated by the supplier to its retailers are effectively considered and discussed as resale prices to be implemented by the various retailers in the market in the future, with the latter expressing their consent on the assumption or in the expectation of achieving alignment with competitors.

**Example:**

Supplier A sends Retailer B the new recommended retail prices (RRP). The latter confirms that the prices will be implemented as soon as the competitors do the same:

Supplier A to Retailer B: *"Please find herewith the new RRP for all customers. These shall be applied from 1 November onwards, as already agreed with the other retailers".*

Retailer B to Supplier A: *"We will implement the new RRP from 1st November onwards if the market is already aligned."*

It is up for the AdC to assess and investigate the influence of price recommendations on the definition of the final resale price, as well as to ascertain whether the price fixing is solely vertical or whether it reflects a horizontal practice (triangular, in case of the hub-and-spoke). It is also for the AdC, within the scope of its attributions, to carry out a global analysis of price recommendations in the context of other information exchanged between the supplier and each distributor/retailer, specifically regarding the distributor's response to and expectation towards the recommendations in question.

***Resale price maintenance and the exchange of strategic and commercially sensitive information in promotional contexts is illegal***

The exchange of information between supplier and retailer regarding promotional activity is particularly important, not only regarding the choice of items and their respective

framework, but also in order to guarantee the availability of the product and the reimbursement — in the case of promotional activities reimbursed by the supplier.

Nevertheless, apart from occasional, short-lived promotional activities or the launch of new products, the imposition of resale prices in the promotional context is illegal.

A retailer should define its promotional activities autonomously, guaranteeing its own freedom to set promotional prices, even in case of rebates supported by the supplier.

Equally to the recommended resale prices, any commitment made by the retailer to the supplier regarding the promotional resale price it intends to implement can be problematic from a competition point of view. This is aggravated if there is the risk, expectation or intention that the information is shared with other retailers.

Therefore, in the case of promotional activity supported by the supplier, the negotiation should focus on the value of the reimbursement and not on the promotional resale price.

**Example:**

Supplier A sends Retailer B the recommended promotional prices, alongside with the corresponding registration in the campaign material and information about the date for their implementation:

*"On 3 August, the recommended promotional prices will decrease (previously €3.49, now €2.99). The rest of the market will keep their non-promotional prices and your price will be more competitive. At the end of the campaign, increase the price to €3.49".*

In response, Retailer B circulates the aforementioned information internally, with a request to implement the promotional resale prices, copying Supplier A: *"Please modify the resale prices described below, effective from 3 August onwards."*

Similarly, in markets where there is a preponderance of promotional activities supported by suppliers, it must be ensured that these do not constitute coercive measures against suppliers to pressure these into correcting any deviations from an agreed price.

The same attention should be paid to the **communication** by the supplier of information on the planning and scheduling of promotional activities by the various retailers, as this is sensitive information and could potentially restrict competition.

***Margins should not be guaranteed at the expense of price fixing between companies***

Suppliers and retailers can discuss margin related issues with each other on multiple occasions, and it is normal and expected to share concerns on this matter.

The wholesale price at which a retailer is willing to buy a product depends on the price at which it expects to resell it. The resale price recommended by the supplier can have an influence on retailers' expectations of the resale price to be charged.

Notwithstanding, it should be reminded that a mere resale price recommendation should not imply an expectation, let alone a guarantee, as to the resale prices to be implemented across the market.

**Example:**

Supplier A confirms Retailer B that:

*"In order to try to respond to your concern about margins, it is imperative to change the resale price of our products throughout the market. As agreed, we are sharing the resale price that shall be implemented from 5 March onwards, and during this week we will meet with other clients to put the new RRP in place immediately."*

The resale prices must be defined autonomously by the retailers. At times, in the interaction between supplier and retailer, compensation guarantees by the supplier to the retailer may arise, departing from the traditional risk allocation between these agents.

The existence of a fixed margin or negotiations regarding a compensation to safeguard this margin can be concerning, in particular when its request by a retailer is linked to an expectation of a price alignment in the market or as a consequence of a price deviation by its competitor.

In this case, the resale price level fixing guaranteeing higher margins along the value chain is illegal and comes at the cost of restricting competition to the detriment of consumers.

**Example:**

Supplier A sends a list of RRP to Retailer B stating: *"The resale prices on the list below are the Recommended ones, with which we can all secure higher margins"*.

***Monitoring tools should not be used as a price fixing instrument***

The use of price monitoring tools is, in itself and in principle, lawful, insofar as it means the collection of public information is accessible to the generality of companies regarding current market prices.

Companies can be expected to adapt intelligently to the known and predictable behaviour of their competitors. Companies can, in fact, use tools to control and monitor market prices in order to understand their positioning.

However, the fact that there may be lawful goals behind the monitoring of market resale prices does not preclude the possibility of this behaviour being directed and mobilized with the aim of pursuing other, unlawful, goals explicitly aimed at correcting and (re-)aligning resale prices.

In other words, if these tools can be used for the lawful purposes described above, it is no longer admissible for these same tools to be used as a way of detecting deviations from a prescribed resale price agreed between retailers and/or as a way of demonstrating the respective price correction (for example, by sending purchase receipts).

**Example:**

Supplier A sends Retailer B a purchase receipt proving the retail price charged by Retailer C's shop, which has corrected the deviation detected by Retailer B:

Supplier A to Retailer B: *"Please find attached a copy of a purchase receipt for Product X at Retailer C's shop, where you have monitored the price. On this receipt you can confirm that Retailer C has Product X at €1.5.*

*I would ask you to correct the price points as follows:*

*Product X - €1.5"*

Retailer B to Supplier A: *"Product X will be at €1.5 the day after tomorrow".*

In this context, one cannot assume that the purpose of the supplier's price monitoring is solely to check adherence to a particular recommendation. Legitimate purposes, if they exist, can effectively coexist with the aim of verifying compliance with the prescribed resale prices and of enabling deviation rectification.

**Example:**

After a monitoring action, Supplier A triggers an internal procedure with a request to check the resale prices, asking for a quick intervention:

Employee 1 Supplier A: *"Please confirm that these resale prices are indeed assured. If so, it's important to intervene quickly to avoid reactions from other retailers and the spreading of this problem."*

Employee 2 Supplier A: *"Yes, these are the current resale prices. I've already sent an email calling for these to be rectified and tomorrow I'm going to the shop to reinforce the request."*

***Competing companies should not exchange strategic and commercially sensitive information with each other***

The existence of contacts on commercial strategy between non-competing business partners — supplier and distributor — is not in itself illegal. It is, in fact, inherent to this type of partnership and absolutely necessary.



A commercial relationship that lasts over time involves frequent communication between the heads of the respective commercial departments addressing sensitive negotiating issues and discussion on prices (albeit essentially from a wholesale perspective).

Thus, many of the discussions about appealing ways of arranging products in shops, designing different and more innovative products that respond to consumer needs, promotional activity, negotiation of commercial conditions, mere recommendations of retail prices, as well as other ways of making supply more efficient, are generally lawful and acceptable practices within the scope of such commercial relationship.

On the contrary, the exchange of sensitive information regarding commercial strategy and the disclosure of this information indirectly (for example, through the common supplier) to competing companies, with the aim of conditioning their behaviour, constitutes a practice that restricts competition (hub-and-spoke concerted practice).

Under these circumstances, the exchange of information is both bilateral, as each retailer only communicates with the supplier, and multilateral, as the supplier circulates the information resulting from the various sets of communications exchanged with the different retailers.

Information on prices or other conditions is generally passed on by the employees of a particular retailer to the supplier's interlocutor (and vice versa), who then relays this information to the employees of competing retailers.

**Example:**

Supplier A shares information with Retailer B about the future positioning of competing retailers:

Supplier A to Retailer B: *"Can you confirm that you are OK with the price change for tomorrow:*

*Product X - 1€*

*Product Y - 1.5€"*

Retailer B to Supplier A: *"I confirm the changes for tomorrow. Have we secured global market repositioning?"*

Supplier A to Retailer B: *"We have discussed the price readjustment with the entire market. I can't guarantee that we won't have misaligned shops tomorrow, but we have ensured that the majority of the market will be levelled by the end of the week."*

Thus, the supplier is the vehicle for the information transmitted by a retailer, acting as a link to transmit that same information to a competing retailer, ensuring that it circulates to all competitors.

**Example:**

Supplier A coordinates a price increase for the week with Retailer B:

Supplier A to Retailer B: *"We're going to coordinate a price increase for Product X to €3 for next Thursday. I ask for your help to ensure that the price is aligned in your shops."*

Retailer B to Supplier A: *"Will the whole market go up to €3 this day? Because only with this guarantee can we raise the resale price."*

Supplier A to Retailer B: *"The whole market is going up to €3, including the operators who were 'breaking' prices".*

Retailer B to Supplier A: *"Let's line up for tomorrow at €3".*

The information communicated could reveal the existence of a common plan between competing retailers and the supplier. On the one hand, the supplier may have an interest in defining and setting the resale price of its products. On the other hand, retailers may resort to this exchange of information for the purpose of promoting horizontal alignment of the resale prices or simply to soften downstream competition.

***Pressure, coercion and retaliation should not be used as price fixing instruments***

A supplier can, under certain circumstances, lawfully decline a retailer's purchase orders, if there is a belief that they do not fit in with its business model or commercial positioning.

Likewise, a distributor must be free to decide the products that should be resold and the conditions under which the resale will take place.

The decisions made by the supplier to reduce or cut supply and by the retailer to reduce or cease purchases do not, from the outset, raise competition issues if they have been adopted autonomously and not as part of a strategy of pressure to align and coercively implement the resale prices of certain products in the market.

If, for example, the supplier explicitly communicates that the reason behind the decision to terminate an existing business relationship with a retailer is due to the retailer's pricing policy, this could be perceived as an attempt to put pressure on the retailer to change its resale prices, which is prohibited under competition law.

The same applies to cases where the supplier refuses to supply due to the rejection of the implementation of recommended resale price, as a minimum retail price, by the retailer.

**Example:**

Supplier A informs Retailer B:

*"Attached you may find your leaflet, which shows a promotional level not at all recommended by us for several of our brands (specifically, you only respected the resale price of Product X).*

*Unfortunately, the situation is evolving towards a strategy of yours that is not align with ours. This is forcing us to take a tough stance, which I'll be taking up with your board."*

The supplier may not openly communicate its dissatisfaction with the retailer's resale price, but may make some references to the issue and implicitly reveal its expectations about the retailer's pricing policy.

In the cases where suppliers and retailers engage in a concerted practice aimed at fixing resale prices, such as a hub-and-spoke practice, there may be pressure, coercion or retaliation from the supplier if a retailer fails to implement the prescribed resale price in the agreed terms or to correct any deviation identified.

This type of conduct aims to achieve the common goal of ensuring that the resale price is altered in accordance with the desired level.

Coercion, pressure, and retaliation, in the context of a hub-and-spoke practice can also arise from retailers against suppliers, pressuring the latter to act towards the deviating retailers to correct the resale price deviation detected by the former. In these situations, retailers put pressure on suppliers and retaliate against them if they fail to ensure that the prescribed price level is aligned on the market.

Typically, retailers' reactions can consist of (threatening or) suddenly lowering the resale price, imposing or demanding new reimbursements or rebates from suppliers, and/or (threatening or) suspending purchases/withdrawing products from suppliers' portfolios.

**Example:**

Retailer B turns to Supplier A:

*"We've noticed that Retailer C is keeping the old promotional prices. This situation is causing a lot of discomfort in our stores and we're under a lot of pressure to react.*

*If this situation continues, we will have to follow the market.*

*Thus, we ask you for a rebate to be sent until market conditions change.*

*Without these extra conditions, we won't be able to continue selling your products. Therefore, the sale of your products in our stores is being reviewed until this issue is resolved."*

It should be noted that, in these cases, the retailers' main interest in maintaining resale price alignment will lead, primarily, to applying pressure on suppliers to correct the deviations detected and, only if they fail to do so, these will demand conditions for implementing the market prices (which will cause a realignment to a lower level) without losing their margins.

### 3. Conclusions

There is an upward inflationary trend in the current economic context, particularly in the food sector, raising pressing concerns about the purchasing power and well-being of families, particularly those in vulnerable situations.

Given this context and these concerns, it is essential that companies behave competitively in the market.

This document aims to raise awareness, among the various economic agents along the value chain of consumer goods about the importance of deciding freely and autonomously about their behaviour in the market, without, directly or indirectly, sharing strategic and commercially sensitive information with competitors.

Competition is a fundamental element in creating incentives for operators in the consumer goods value chain, enabling them to offer more competitive prices, greater quantity and higher quality. Competition is also crucial when it comes to guarantee that, once the factors that triggered increases in production costs abate, operators have incentives to reflect cost reductions in the prices charged to final consumers.

The functioning of these competitive mechanisms is essential to the well-being of families, but also to the competitiveness of the economy, particularly in times of crisis.

There are behaviours that have been proven to restrict competition, damaging the fair and efficient allocation of resources in the market.

Thus, companies should avoid all practices that can be considered restrictive of competition, such as horizontal price fixing and direct or indirect vertical resale price maintenance.

**Therefore, AdC recommends operators in the value chain of consumer goods to periodically review their commercial behaviours in order to prevent risky conducts along the value chain,** taking into account the following situations:

- A resale price recommendation should not eliminate companies' freedom to establish their own prices.
- Resale price maintenance and the direct or indirect exchange of strategic and commercially sensitive information is illegal, even in the promotional context.
- Margins along the value chain should not be guaranteed at the expense of price coordination between companies.
- Resale price monitoring tools should not be used as an instrument for coordination and price fixing.
- Pressure, coercion and retaliation aimed at ensuring price coordination are not acceptable under the Portuguese Competition Law.

Finally, it should be noted that temporary disruptions to supply chain or any form of public price announcement should not be used to hide or camouflage restrictive practices.

Within the scope of its legal powers, the AdC will continue to ensure the protection of competition by fully exercising its competences to investigate and sanction anti-competitive practices.