

### The portuguese competition authority sanctions supplier recommended retail sale prices materially imposed as minimum prices before retailers (Sera, Unipessoal)

**Portugal, Anticompetitive practices, Refusal to supply, Resale price maintenance, Price fixing, Anticompetitive object/effect, Distribution/Retail**

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#### I. Background

The Portuguese Competition Authority (PCA) decision of 21 March 2013, in case PRC 2009/12, was triggered by an antitrust complaint of June 2009, filed by a national online retailer (Pet4you) active in the sale to end consumers of aquarium products against Sera GmbH and Sera Portugal Unipessoal, Lda . The retailer's complaint was based on measures adopted by the supplier aimed at fixing the retail sale price of its products in the Portuguese territory.

#### II. The factual measures adopted by the supplier before retailers, per PCA decision

Per PCA decision, supplier SERA GMBH, the parent company of Sera Portugal, on February 27, 2008 sent an e-mail to the online retailer Pet4you, ordering the retailer to comply with supplier's recommended retail sales prices, and further informing that supplies would be suspended in the absence of compliance with such minimum prices. Additionally online retailer Girafaonline received a similar e-mail from SERA GMBH on February 28, 2008, through which the online retailer was also requested to comply with the recommended retail sale prices of SERA. Girafaonline complied with SERA'S request, while PET4YOU did not. As a consequence, SERA ceased on February 2008, onwards, the supply of its products to PET4YOU. When this retailer informed SERA in September 2009 of its intent to give notice of Sera's conducts to the PCA, Sera restarted supplying Pet4you with its products.

#### III. The PCA's legal reasoning

The competition authority for the purpose of determining the existence of a vertical agreement caught by the national competition law provision equivalent, *mutatis mutandis*, to Article 101 TFEU,

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deemed that an *agreement* is not subject to any specific formal requirements.

Hence, the fact that the obligation for a retailer to apply sale prices in strict conformity with the recommended retail sales prices is not found in a written agreement does not impede the PCA to consider that such agreement was concluded and performed between the parties.

In this context the PCA underlines that the imposition of retail sales prices is not a conduct that can be enforced sole and exclusively by the supplier, as it requires the consent of retailers (*in casu* of those active in online sales), who manifest their consent by continuing to acquire the supplier's products and cumulatively applying the recommended retail sale prices before end consumers in accordance with the supplier's instructions.

Thereby the illicit antitrust conduct, per PCA reasoning, was not the mere existence of a recommended retail sale price policy applicable to supplier's products, but the supplier's recurrent e-mails requests addressed to specific retailers requesting them to apply Sera'S recommended prices before end consumers. Such conclusion was based on the documental evidence gathered by the PCA during the inquiry, notably supplier's e-mails, underlining that *de facto*, per supplier's requests, retailers complied with the recommended retail sale prices, *de facto* acknowledging them as minimum prices to be applied before end consumers.

The PCA dismissed SERA'S argument that a vertical illicit agreement was absent (as Pet4you did not comply with the recommended retail sale prices), sustaining that a retailer's refusal not to comply with SERA'S recommended retail sale prices did not invalidate the conclusion that all other retailers acted in accordance with Sera'S price instructions.

Further, the PCA established that a minimum retail sale price policy consubstantiates a serious infringement and a restriction of competition per *object*. Also in this setting the PCA concluded that in addition to the national provision, Article 101 TFEU was also breached, as the products had their origin in another EU member state and were sold online by the retailers. The PCA decision, which applied a fine in the amount of 4.188,67 Euros to Sera GmbH and Sera Portugal, was not apparently subject to judicial review.

#### IV. Comment

The PCA decision of 21 March 2013 highlights that a simple recommended retail sale price list, if *de facto* enforced by the supplier before retailers as minimum retail sale prices, notably through a track record of e-mails demanding retailers to comply with such prices, can lead to a condemnatory antitrust decision against such company. Hence, it is no longer sufficient for a company to limit its antitrust compliance toolkit to formal standard documents exchanged with clients, including price lists, but is also relevant to instill the *do's and don'ts* of competition law before suppliers representatives and commercial teams in *day to day* operations, so that such contacts are not afterwards sanctioned by a competition authority.

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