

PRESS RELEASE

15 December 2020

**Opt-out action
to compensate Portuguese consumers for
anticompetitive practices by
Super Bock**

An opt-out representative action (popular action) was filed yesterday at the Portuguese Competition, Regulation and Supervision Court by Ius Omnibus, a consumer protection association, aimed at compensating all Portuguese consumers who were injured by Super Bock's anticompetitive practices, identified by the Portuguese Competition Authority.

If it is successful, this action will force Super Bock to pay damages in an estimated total of about 400 million EUR, granting each Portuguese consumer the right to an average compensation of 40 EUR.

1. Who is Super Bock?

Super Bock is a large Portuguese beverages manufacturer, one of the two oligopolists in the Portuguese beer market, marketing leading brands in beer (Super Bock and Carlsberg), cider (Somersby), waters (Água das Pedras, Vitalis) and others.

60% of Super Bock's share capital is directly and indirectly owned by Carlsberg Breweries A/S (Denmark).

2. What is the object of this action?

It is a popular action in the defense of diffuse and individual homogenous interests, filed by Ius Omnibus (consumer protection association).

It is an action in defense of competition and a damages action based on damage caused to consumers by Super Bock's anticompetitive practices, which infringed article 101 TFEU and article 9 of the Portuguese Competition Act (and provisions which preceded it), filed under the Popular Action Act (Law no. 83/95) and the new Private Enforcement Act (Law no. 23/2018).

3. Super Bock's behaviours in their broader context

Portuguese competition authorities have 3 times found that Super Bock infringed Competition Law, always due to behaviour which boiled down to imposing prices on its distributors (resale price maintenance – “RPM”):

- a) Decision of Competition Council of 16/12/**1985**: identified RPM clauses in contracts used for several years by Super Bock;
- b) Decision of Competition Council of 13/07/**2000**: concluded that Super Bock's RPM practices had not ceased since 1985;
- c) Decision of Competition Authority of 24/07/**2019**: identified similar RPM practices by Super Bock in the HORECA channel, finding evidence for the period between 15 May 2006 and 23 January 2017, and imposing a **fine of 24 million EUR**.

According to these decisions, Super Bock has, for decades, continuously and systematically, behaved unlawfully on the market, imposing resale prices on its distributors and injuring consumers, even though competition authorities have repeatedly concluded that it was breaking the law. Super Bock continues to refuse to admit that it has ever behaved in this way, it has never compensated consumers for the damage it caused them, and is doing all it can to never compensate consumers and to shirk its responsibilities.

Super Bock's RPM Practices, apparently, are not limited to the HORECA channel. On 22 March 2019, the Competition Authority announced it had accused Super Bock of, between 2003 and 2017, coordinating with 4 large Portuguese food retailers, coordinating the prices at which they sold its products, reducing competition between them and causing price increases for consumers. The Competition Authority has not yet announced the adoption of its final decision in this case.

4. What are Super Bock's anticompetitive behaviours raised in this action?

The action is based on Super Bock's **behaviour of determining resale prices in the HORECA sector, identified in the Competition Authority's recent decision.**

As determined in this decision of 24 July 2019 (whose appeal is pending), Super Bock, in the entire national territory, continuously for 11 years, **from 15 May 2006 to 23 January 2017:**

- a) at the wholesale level, determined, by direct and indirect means, prices and other conditions for the resale of its products (beer, cider, flavourless flat and sparkling water, sodas, iced tea, wines and sangria) by a network of independent distributors in the HORECA sector;
- b) at the retail level, determined, by direct and indirect means, resale prices for consumers of its products in the HORECA sector;
- c) regularly monitored compliance with the resale conditions it determined; and
- d) threatened retaliations and indeed retaliated against distributors who did not comply with the resale conditions it determined.

This behaviour caused an increase in the prices paid by consumers for Super Bock beverages in the HORECA sector (in restaurants, cafés, bares, hotels...), for 11 years.

Among the evidence collected by the Competition Authority, there are numerous exchanges of messages between Super Bock workers and between these and distributors, with contents such as the ones that follow:

- *“this is not the agreed price and in this case the distributors cannot sell, close the tap right now...” (24/01/2007)*

- *“I’m tired of this conversation, so the rules are the following: Either the Distributor implements the prices we have indicated and are implementing, or there will be more restocking. This month’s restocking is already gone. I’m sorry, but I’m losing too much time with shit like this, we either control the Distributors or it’s not worth it. We all want to sell, but the rules are the same for everyone, no exception” (28/06/2007)*
- *“The minimum resale price for the distribution network, for SB 0,33 TR [0-1] has been set again” (12/02/2008)*
- *“Here are the resale prices, it’s forbidden to offer greater discounts than these, because at the end of the month we will need to compare with the invoices” (31/03/2009)*
- *“There are no exceptions, the pricing policy is set by Unicer and Distributors cannot do whatever they want” (12/10/2009)*

Although the Competition Authority’s Decision identified Super Bock’s behaviour only during those 11 years (due to the evidence collected), there are reasons to believe that the practice already occurred prior to that, and there is no reason to believe that Super Bock changed its behaviour after 23 January 2017.

The action claims and will try to prove that the **practices in question already occurred** prior to 2006, **at least since 2000, in the entire national territory**, and that they **continued after 23 January 2017**, continuing to this very day and, probably, continuing for all or some of the period during which the action will be pending before the courts.

5. Who is represented in this action?

All consumers residing in Portugal are represented in this action. Specifically, all-natural persons who lived in Portugal for at least part of the period during which the anticompetitive practices occurred (2000 to 2020).

If you are a consumer who lived in Portugal and bought a Super Bock beer, a Somersby cider, an Água das Pedras, etc., during this period in a bar, restaurant, café or hotel, you are represented.

Consumers needn't do anything in order to be represented and to be entitled to compensation if the action is successful.

Any consumer who wishes not to be represented in this action may exercise the right to opt-out, by communicating that intention to the court. Consumers may also decide to intervene in the case in support of Ius Omnibus.

6. How were Portuguese consumers injured by Super Bock's anticompetitive practices?

Super Bock's anticompetitive behaviours reduced competition between wholesalers and between retailers who sold Super Bock products in the HORECA channel, causing an increase in the price of these products.

All consumers who resided in Portugal and bought Super Bock products in bares, cafés, restaurants, hotels, etc., between 2000 and 2020, were affected by Super Bock's anticompetitive practices, in the sense that they paid more for those products than they would have paid had Super Bock complied with the law.

The precise amount of the price increase caused by Super Bock's illegal practices is still to be determined. But it should be noted that, between 2008 and 2014, the minimum resale prices set by SB for Super Bock 0,33 beer in the HORECA channel increased by 30%, whereas Super Bock's production costs in the same period increase only 6%. In other words, the price of this product **increased 24% more than would be justified by the increase in costs.**

7. What is Ius Omnibus seeking?

Ius Omnibus asks that the Court declare that Super Bock infringed, continuously, between 2000 and 2020, and is still infringing European and Portuguese Competition Law, directly and indirectly causing damage to consumers who acquired Super Bock products in the HORECA channel in Portugal.

It asks that Super Bock be ordered to put an end to these anticompetitive behaviours and to compensate the represented consumers for the damage which they suffered as a result of those behaviours, corresponding to the amount of the surcharge caused by the products they acquired which was caused by Super Bock's anticompetitive behaviour, updated to take into account inflation and with interest.

8. What compensation will consumers be entitled to?

The value of the compensation will depend on the scope of the anticompetitive behaviours which the Court will conclude to have been proven. Ius Omnibus estimates that the behaviours in question, between 2000 and 2019, caused Portuguese consumers total damages of **401 million EUR (four hundred and one million euros)** – value of the global compensation to be paid by Super Bock.

The value of the individual compensation each consumer will be entitled to will depend on the value of the global compensation determined by the Court and of the characteristics of each type of consumer. A consumer who purchase more Super Bock beverages in the HORECA sector suffered more damage than a consumer who purchased less.

On average, if Ius Omnibus' estimate for the global compensation is confirmed, **each represented consumer** will be entitled, **on average**, to about **40 EUR (forty euros)**.

These figures do not include legal interest until complete payment, which are to be added.

9. How does the popular action and the compensation of consumers work?

The mechanism for mass compensation of consumers used in this case, foreseen in the Portuguese rules on popular actions, has never been tested in practice, until the last step. However, according to the law, the following will happen if the Court finds in favour of Ius Omnibus:

- 1) the Court will determine the amount of the global compensation to be paid by Super Bock to consumers, to be paid out to a compensation fund;
- 2) the Court will decide how to identify the injured consumers and how to calculate how much each consumer is entitled to, and what he/she must present in order to claim his/her compensation;
- 3) the Court will appoint someone to manage the compensation fund, including the receipt, management and payment of compensation to injured consumers and the submission of reports to the Court;
- 4) the Court will set a reasonable deadline for consumers to claim their share of the compensation, and this will be publicized in various ways;
- 5) consumers will then have to contact the compensation fund manager and provide the evidence decided by the court and payment instructions, in order to receive their share of the compensation (without having to contribute to any part of the costs of the case);
- 6) at the end of the legally set deadline, if part of the global compensation has not been distributed to consumers:
 - (i) that amount will be used to pay the expenses incurred by Ius Omnibus in the pursuit of this action; and

- (ii) the amount which is left will be surrendered to the Ministry of Justice, to be used to support access to the law and justice, including the promotion of popular actions.

10. Are there other actions of this type in Portugal?

Actions of this type have been, so far, extremely rare in Portugal (as, indeed, across all of Europe). Most countries have very restrictive laws when it comes to the defense of consumer rights in court. Most countries do not allow, as in Portugal, for an association to seek compensation of all injured consumers (in the opt-out system).

Portuguese laws are extremely protective of consumers, but they have not been applied frequently, in part due to the interpretation made by some 1st instance courts of the mechanisms set out in the law and the time which the cases take to be decided, but especially due to the fact that, until the recent change of the law, it was not clear that the promotor of the popular action could be reimbursed for its expenses in promoting the action, making it absolutely impossible to promote complex popular actions such as this one.

To the best of our knowledge, there are only two other examples in Portugal of popular actions for the defense of consumers injured by anticompetitive practices: (i) a case against Sport TV, promoted by Observatório da Concorrência, pending before the Lisbon Judicial Court for 5 years and a half; and (ii) a case against Mastercard, promoted by Ius Omnibus, filed a few days ago at the Competition, Regulation and Supervision Court.

11. How is this action funded?

Preparing an action of this nature in an adequate way, which allows for its success, is extremely costly, requiring the hiring of specialized lawyers, economists and consultants. The action's success is dependent on suitably handling very broad and technical facts and an extremely complex area of legal-economic knowledge, as well as reacting effectively to the vast financial and human resources which will be deployed by the other side, who benefits from profound information asymmetry.

The lack of financial resources by consumer protection associations is one of the, if not the main factor which accounts for why these legal mechanisms have not been more used so far. Indeed, in the absence of public funds which can be used to finance popular actions of this nature, it is impossible for an individual consumer or an association of consumers to take on the several hundreds of thousands of euros in costs which inevitably are required to pursue such an action.

The only way to pursue an action of this type it to resort to litigation funding. The practice of litigation funding is well established in other EU Member States and it is now beginning to be used in Portugal. It was litigation funding which allowed the pursuit of an opt-out consumer damages action against Mastercard in the UK. The UK's Competition Appeal Tribunal confirmed that the action would have been impossible without that funding and that, therefore, to refuse the possibility of such funding and the remuneration of the funder would be to deny access to justice and the exercise of the rights in question.

The present action is funded by Telluride, a litigation funder headquartered in the United States of America.

The funder assumes all costs of Ius Omnibus' costs of the litigation and all its risks. It will only recoup its investment if the action is successful, if and to the extent the Court authorizes it, and if enough money remains in the global compensation fund, after distribution of compensations to consumers who request their share. Under these conditions, Ius Omnibus committed to returning to the funder the money it invested, plus a fair remuneration for the risk and time it was deprived of its capital, the proportionality of which will be assessed and controlled by the Court.

The funding agreement guarantees the prevention of money laundering and terrorism financing and the transparency of the source of funding before the Court.

This funding model ensures that consumers will not have to bear any of the costs of pursuing this action, and that **any consumer who claims their share of the compensation** at the end of the case **will be entitled to 100% of his/her compensation**.

12. About Ius Omnibus

Ius Omnibus is a not-for-profit association, created in March 2020, with the objective of defending consumers in the European Union. It is headquartered in Portugal and has members from several European countries. The members of the bodies of Ius Omnibus are not remunerated.

The Board of Ius Omnibus is as follows:



Sandra Passinhas
President (provisional)
Professor at University of Coimbra



Julia Suderow
Vice-President
Professor at Deusto University



Maria José Azar-Baud
Vice-President
Professor at Paris-Saclay University

Ius Omnibus is represented in this case by the law firms Sousa Ferro & Associados and Cardigos & Associados.

For further information or requests for interviews, please contact:

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