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NEWS IN BRIEF

SPECIAL CONTRIBUTION: MATTOS FILHO

A good example of the importance of judicial review of the Commission's criteria for dismissing complaints for alleged anticompetitive practices

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The dismissal by the European Commission ("Commission") of a complaint on alleged infringements of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 102 TFEU may prove to be a sensitive subject. More precisely, it may entail the consideration of some arguably complex features whose interpretation is not always clear cut and reinforces the importance of their judicial scrutiny.

In this way, the judgment of the General Court of the European Union ("General Court") of December 15, 2010, in case T-427/08, *Confédération européenne des associations d'horlogers-réparateurs* ("CEAHR") *v. European Commission*, is of particular interest. CEAHR is a non-profit association consisting of seven national associations of six Member States representing the interests of independent watch repairers. The same has lodged a complaint with the Commission against several undertakings active in the watch manufacturing sector, including Richemont (which intervened in favor of the Commission in the appeal), alleging the existence of an agreement or a concerted practice between those manufacturers and the abuse of a dominant position resulting from their refusal to continue to supply spare parts to independent distributors. The Commission adopted a Decision C(2008) 3600 of July 10, 2008, in Case COMP/E-1/39097 ("Decision"), which rejected the complaint from CEAHR on the ground that there was insufficient Community interest in continuing the investigation into the alleged infringements and the General Court annulled it for the reasons summarized hereunder.

Courts' jurisdiction is limited to assessing materially incorrect facts, errors of law, manifest errors of assessment or misuse of powers

This case concerned the product market and the after-sales service market (respectively the market(s) for spare parts and the watch repair and maintenance services market). The Court's review of the decision focused first on the Commission's definition of relevant market(s) and concluded that the Commission's findings, that those did not constitute relevant markets to be examined separately, were vitiated by manifest errors of assessment. Moreover, the Commission failed to take account of a relevant factor raised in the complaint concerning the extent of the territory concerned by the practices, necessary for the definition of the size of the markets and their economic importance, besides the Commission itself failed to present figures or estimates on the size of the same. Consequently, the Court held that the Commission infringed not only its duty to give reasons but also its duty to take into consideration all the relevant matters of law and of fact and to consider attentively all of those matters which the applicant brought to its attention in the complaint.

Subsequently the Court analyzed whether, in spite of those errors, the Commission was legitimately able to conclude that there was insufficient Community interest in continuing its investigation. In this context, the low probability of the existence of infringements of Articles 101 TFEU and 102 TFEU was one of the main reasons supporting the Commission's conclusion that there was no such interest. Thus, the Court analyzed whether the erroneous definition of the relevant market could have vitiated the Commission's finding and has concluded affirmatively. Lastly, the Court assessed whether there was insufficient Community interest in continuing the investigation on the basis of the Commission's only assertion that the same was considered to be valid - that the national competition authorities and courts were well placed to investigate possible infringements of Articles 101 TFEU and 102 TFEU and to deal with them. The conclusion of the Court was negative, as several factors were considered suggesting that action at the European level could be more effective than various actions at the national level.

According to settled case law, on the one hand, the Commission may determine the priority of examining complaints brought before it on the basis of existence of Community interest. But on the other hand, in that context the Commission must take into account the circumstances of the case and in particular the matters of law and fact set out in the complaint in question. More precisely, the Commission must weigh the importance of the alleged infringement as regards the functioning of the common market against the probability of its being able to establish the existence of the infringement and the extent of the investigative measures necessary in order to fulfill, under the best possible conditions, its task of ensuring the observance of the same TFEU provisions. Thus, when a Commission decision is scrutinized by the courts in the context of an appeal, the latter have to ascertain whether it is clear from the decision that the Commission has complied with the referred criteria when undertaking the referred balance. The courts' jurisdiction is nonetheless limited to assessing whether the contested decision is based on materially incorrect facts, vitiated by an error of law, a manifest error of assessment or misuse of powers and cannot replace the Commission in its assessments. ■

Be careful with the cleaning lady? Tampering with a European Commission seal can cost a company 38 million euros

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The General Court of the European Union on 15 December 2010 confirmed in case T-141/08, "E.ON Energie v Commission" the €38 million fine imposed by the European Commission on E.ON Energie (***E.ON***) for breaking a seal affixed to an office during an inspection.

EU Regulation no. 1/2003, on the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union, provides that the Commission can impose fines on companies of up to 1% of their turnover for breaking, either deliberately or negligently, seals affixed by the Commission during an inspection.

During an investigation into alleged anti-competitive practices on the German electricity market in May, 2006, the Commission carried out inspections at the Munich premises of E.ON.

Because the inspection was not able to be completed in a single day, May 29, 2006, documents which had been selected for a more detailed examination were placed in a room made available by the company to the Commission. The door to this room was locked and the official seal of the Commission was affixed to it at 19h15m. The key to the door was taken by the inspectors. On the following day, May 30, 2006, at 8h45m, when the team of inspectors returned to continue the inspection and opened the door to the room, it was apparent that the seal had been breached. A Commission's seal is a plastic sticker. If it is removed, it does not tear but the word "VOID" irreversibly appears on its surface. Thus, the word "VOID" was visible on the seal that had been affixed the previous evening in the said room. By a decision dated 30 January 2008, the Commission imposed a fine of €38 million on E.ON for allegedly having broken the seal affixed during the inspection.

E.ON brought an annulment action before the General Court requesting the Commission's decision to be annulled, or at least that the fine be reduced. The Court dismissed all the legal and factual arguments put forward by the company, ruling that the Commission was entitled to consider in the present case that, at the very least, the seal had been negligently broken. The Court also stated that E.ON was required to take all necessary measures to prevent any tampering with the seal.

The General Court also ruled that the 38 M€ fine imposed on E.ON was not disproportionate to the infringement, given the particularly serious nature of the breaking of a seal, the size of the company, as well as the need to obtain a sufficient deterrent effect by the fine so as to ensure that it is not advantageous for a company to break a seal affixed by the Commission during an inspection.(sounds like punitive damages) ■

From our legal standpoint, the 38M€ Commission fine, confirmed by the Court, seems to be disproportionate, as the apparent tampering of the seal was negligent (it could have been a cleaning lady when cleaning the door in the night-time), there was no evidence that the door had been actually opened by the company and finally the used seal validity, according to the manufacturer's technical guidelines, had expired a year and a half prior to its use in the company's location by the Commission.

Commission can impose fines on companies of up to 1% of their turnover for breaking, either deliberately or negligently, seals affixed by the Commission during an inspection

TeliaSonera: ECJ Guidance on abusive margin squeeze by dominant companies

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In the recent *TeliaSonera* judgment of 14.02.2011[1], the European Court of Justice had the opportunity to clarify the criteria on the basis of which a pricing practice causing margin squeeze should be held to constitute an abuse of dominant position pursuant to Article 102 of the Treaty on the Functioning of the European Union (TFEU)

The proceedings

The background of this case is an action brought by the Swedish competition authority (*Konkurrensverket*) before the Swedish courts, requesting that TeliaSonera, the incumbent Swedish communications operator, be ordered to pay a fine for abusing its dominant position, thereby infringing Article 102 TFEU and the relevant provisions of national competition law. The controversial issued concerned the sales prices of certain ADSL wholesale (or input) services provided to other communications companies which competed with TeliaSonera in the provision of broadband services to end users.

The Swedish competition authority argued that TeliaSonera abused its dominant position insofar as the difference between the price of the ADSL wholesale services (in the wholesale market) and the prices of the services offered to end users (in the retail market) were insufficient to cover the costs which TeliaSonera itself had to incur in order to distribute those services to the end users concerned. In this framework, the Swedish court made a reference for a preliminary ruling to the Court of Justice concerning the interpretation of Article 102 TFEU with regard to the criteria to determine that a margin squeeze practice constitutes an abuse of dominant position.

The Judgment

The ECJ starts by declaring that margin squeeze constitutes an independent form of abuse, distinct from that of refusal to supply. The Court therefore rejects the argument raised by TeliaSonera (with the approval of the Advocate-General) according to which margin squeeze is a particular manifestation of a refusal to deal, or "a constructive refusal to deal", which should only be found abusive when the dominant company is under a regulatory obligation (imposed by the competent authorities) to supply the input services or when these are indispensable or essential for competitors to compete effectively in the retail market.

In this context, the Court considers that the absence of a regulatory obligation to supply the ADSL input services has no effect on the question of whether the pricing practice is abusive, and that the stricter criteria set by the case-law regarding refusals to supply (in particular in the *Bronner* judgment[2]) are not applicable to margin squeeze cases.

However, while the Court considers that the indispensability of the input service for the sale of the retail service is not a necessary condition, it nevertheless acknowledges that indispensability is an important factor for competition authorities to prove that the pricing practice produces probable or at least potential anticompetitive effects. According to the Court, it is not necessary to prove that a margin squeeze practice produces a concrete anticompetitive effect, but a demonstration that there is at least a potential anticompetitive effect is required.

The Judgment also confirms that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the dominant company on the retail services market. Only where it is not possible, in particular circumstances (such as when the cost structure of the dominant company is not precisely identifiable for objective reasons) to refer to those prices and costs should those of its competitors on the same market be examined. The Court therefore confirms, further to its ruling in *Deutsche Telekom*[3], that the "as efficient competitor" test is the relevant test to determine the abusive nature of a margin squeeze.

Finally, the Court clarifies that it is not necessary that the undertaking concerned be dominant in the retail market, when it is dominant in the wholesale market. According to the court, in the absence of any other economic and objective justification, a margin squeeze conduct in the wholesale market can be explained only by the dominant company's intention to drive out at least equally efficient competitors in the downstream market and to strengthen its position, or even to acquire a dominant position in that market by using means other than reliance on its own merits. ■

Comment

The *TeliaSonera* judgment clarifies the requirements applicable to margin squeeze practices, in particular with regard to the relevance of the indispensability of the wholesale service and the role of the "as efficient competitor" test. However, the judgment also reflects the Court's concern "not to unduly reduce the effectiveness of Article 102 TFEU". Companies with leading market positions should therefore be aware that the scope of the margin squeeze prohibition is not necessarily limited to cases where there was a regulatory obligation to supply the wholesale service, or to inputs which are essential to compete in the downstream retail market.

[1] Case C-52/09, Konkurrensverket c. TeliaSonera Sverige AB, opinion of the Advocate-General of 14.10.2010.
[2] Judgment of 26.11.1998 in case C-7/97, Bronner.
[3] Judgment of 14.10.2010 in case C-280/08P. See Newsletter 4/2010, p. 2.

Competition Authority sanctions National Parking Companies Association and vertical agreement in the hospital sector

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On 19 January 2011 the Portuguese Competition Authority (PCA) fined the National Parking Association (Association) € 1,971,397.17 for allegedly engaging in anti-competitive activity in the sector for the management and provision of parking lots.

According to available information, the infraction dates back to 2006, when the Government approved Decree-Law no 81/2006, 20 April, which established the conditions for the use of parking lots and parking zones. Among those conditions was the determination of prices applied for each parking place. According to Article 12(1) of the said Decree-Law in the case of short duration (up to 24h) parking, the price to be paid by users must be fractioned in maximum periods of 15 minutes, and the user must only pay for the time fraction(s) actually used, even if the full term of the fraction is not used.

The proceedings were initiated *ex officio* by the PCA, following the publication of Decree-Law No 81/2006 and public statements made by representatives of companies from the sector that raised suspicions over the existence of anti-competitive behavior. During the course of the investigation, the Authority concluded that ANEPE had issued recommendations to its associates to adapt their pricings to the new legal regime.

According to the PCA, ANEPE conveyed to its associates that the mere portioning of the parking prices into 15 minutes fractions would lead to a loss of revenue for the companies. Thus, ANEPE allegedly recommended the application of an "entrance price", *i.e.*, a fixed amount that users would pay just for entering the parking lot, which would accrue to the first parking fraction, along with a 2.5% increase in the price. As an alternative to the this scheme, ANEPE suggested that its associates raise their prices by 15%.

The PCA found that several companies within ANEPE actually changed the respective pricings in line with the Association's recommendations, which according to the PCA may have contributed to align or raise the prices charged in parking lots.

ANEPE was thus sanctioned for adopting a decision by an association of undertakings whose object or effect was to restrict competition. Under the Competition Act (Law No 18/2003, 11 June), in the case of associations of undertakings the fine shall not exceed 10% of the aggregate annual turnover of the associated companies that have participated in the infringement. The aggregated turnover of these companies in the year of the infringement (2006) amounted to € 57,982,269.70, so the fine imposed represented circa 3.5% of that amount.

Although the sanction was imposed on ANEPE, the Competition Act provides that companies belonging to an association of undertakings that is subject to a fine are jointly responsible for the payment of such fine.

To the best of our knowledge, this is the first infringement decision issued by the PCA in 2011 and although the Authority has often sanctioned in the past anti-competitive decisions by associations of undertakings, it is the first time that the Authority applied a penalty in the parking sector.

The PCA's decision is appealable to the competent commerce court with suspensive effect.

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Competition Authority punishes vertical RPM agreement in the hospital sector

The February edition of the European Competition Network's (ECN) newsletter[1] gives word of a fine of approximately 530,000 euros imposed by the PCA on 10 December 2010 in the context of an alleged vertical resale price maintenance agreement in the hospital sector.

Oddly no news was given of the fine on the website of the PCA and the brief reference made to the case in the ECN newsletter does not disclose the details of the decision, such as the name of the companies involved.

According to available information, the agreement was concluded between a supplier and a distributor of hospital equipment, more specifically in the area of automated medicine dispensers used in hospital pharmacies. Under the agreement, the distributor would offer the hospital, in the context of public tenders, the price set by the supplier. Simultaneously, the supplier itself would participate in the tenders promoted by the hospitals, thus competing with the distributor.

Following the investigation initiated in 2006, the PCA concluded that, by fixing the resale price of the equipment, the parties were reducing intra-brand competition and increasing market transparency. Ultimately, because both parties were also competing with each other in the tender procedures, the agreement eliminated mutual pressure and uncertainty as to the bid prices.

As a result, the PCA imposed fines on both companies totaling 530,768.01 euros, as well as an additional penalty to promote the publication of an extract of the decision in the official gazette and in a national newspaper. In setting the amount of the fine, the PCA considered as attenuating circumstances the cooperation rendered by the distributor, even though this was outside the scope of the leniency program, and the fact the distributor terminated the contract in the meantime.

The decision was appealed to the Lisbon Commerce Court. ■

[1] http://ec.europa.eu/competition/ecn/brief/01_2011/brief_01_2011_short.pdf.

The Portuguese Competition Authority launches public consultation on merger control

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At the end of 2010, the Portuguese Competition Authority ("PCA") launched a public consultation on "Guidelines for the adoption of commitments in merger control procedures" ("Guidelines"), aiming at increasing the transparency, efficiency and celerity of merger control procedures.

Public consultation is the best process for discussion and joint reflection between the PCA, undertakings, lawyers and the scientific community on matters of utmost importance to all parties involved.

Morais Leitão, Galvão Teles, Soares da Silva & Associados ("MLGTS") joined the initiative and presented comments regarding the document expecting that its participation would contribute to the increase of the quality of decisional practice regarding commitments. We present bellow a summary of several suggestions and comments submitted to the PCA.

Nature and purpose of the commitments

Companies and other economic operators are particularly sensitive to the adoption of commitments within merger control procedures. If the requirement of prior authorization to implement a concentration comprises a limitation, although justifiable, to the freedom of economic initiative and corporate restructuring, the adoption of commitments to obtain a decision approving the transaction is, *a fortiori*, an additional limitation that should only be used solely in a logic of strict proportionality and very carefully.

The basis for adopting commitments in merger control procedure resides in the need to overcome, or to limit, competition concerns arising from a transaction identified by the authority during the competition analysis.

MLGTS joined the initiative and presented comments regarding the document

In order that the notifying parties present commitments capable of responding adequately, sufficiently and proportionally to the competition concerns identified during the investigation, the PCA needs to clearly identify all competition concerns and disclose them to the parties. A "statement of objections" is particularly important in phase 2 of the procedure inasmuch as the PCA stated in the decision opening phase 2 that it had serious doubts of the compatibility of the transaction and the notifying parties were not aware of the investigation results or the state-of-play of the analysis.

The proposal for commitments

Regarding this particular topic, we suggested the inclusion in the final version of the Guidelines a reference to when the PCA believes the notifying parties should submit a proposal for commitments and a timetable of the proceedings that follow, in both phase 1 and 2 of the merger control procedure. This information from the PCA would allow notifying parties to act more efficiently and rapidly.

Equally, a reference to which cases the PCA requires the proposal of divesture and/or monitoring trustees within the Guidelines would be of great value as it would allow the notifying parties to submit a more complete proposal for commitments.

Time limit to execute the commitments

Regarding this specific topic, we suggest a harmonization of the Guidelines with the European Commission decisional practice, although time limits established therein should be adaptable to the particularities of the case in question.

From the wording of the Guidelines, it seems that the PCA has a preference for divesture commitments in which the divesture is completed previously to the transaction or even to the adoption of the final decision. We do not envisage any reasons that support this understanding.

On the contrary, our suggestion is to rule in the sense that divestures should be concluded within the time limit established by the PCA, with no reference or relation to the transaction or to the adoption of the final decision.

Modifications and termination of commitments

We are rather apprehensive about the section of the Guidelines that analyzes the problematic of the modification of commitments after approval by the PCA.

We find the solutions presented by the PCA excessively rigid considering the inexistence of relevant decisional practice and jurisprudence about this matter. We also believe it to be premature for the PCA to adopt final positions regarding theoretical concepts and regulations applicable to this question as it may be counterproductive and increase legal uncertainty for the companies.

The legal qualification of commitments presented by the PCA in the Guidelines – that in our opinion is not correct – is an

example of the matter related to modification of commitments that we believe should not be included in the Guidelines. The discussion around this topic is too theoretical to be included in a document aiming at presenting practical solutions and guidelines to companies.

Notwithstanding, we clarify in our comments that, in our opinion, the legal qualification of commitments as an obligation of result has for immediate consequence the employment of the liability risk regime in case of failure to execute the commitments, which the law does not consider or allow. The failure to execute the commitments should be restricted to cases where the notifying parties are responsible for such failure, and in any case the PCA must not exclude the possibility of failures caused by objective impossibility.

With reference to modification of commitments, we believe to be of utmost importance to companies and other economic operators the clarification of two specific issues by the PCA.

Firstly, the revoke and substitution of commitments are not the only two possibilities to change commitments. Cases of no further need for commitments in light of new events should also be included in the Guidelines.

Secondly, in our opinion, the Guidelines should clarify that change in the commitments (including changes in the context of a revision clause) that negatively affect the notifying parties, and should always require the consent of the latter. ■

Final remarks

The promotion of a public consultation by the PCA on the Guidelines for the adoption of commitments in merger control procedures should be applauded and constitutes, undoubtedly, an important step towards the participation of all interested parties in the adoption of mechanisms to increase transparency and legal certainty regarding commitments.

To ensure those objectives are achieved, a final document capable of presenting practical and simple guidelines and endorses specific solutions for individual cases is required.

In fact, it is important to bear in mind that, in our opinion, commitments should always be regarded with good sense and in a strict logic of proportionality towards the competition concerns they intend to overcome given the fact that they represent a restriction to constitutional principles such as freedom of economic initiative and corporate restructuring. Particular attention should be paid to all interests at stake and an innovative sense to solve problems is clearly required.

Carlos Botelho Moniz appointed to the Presidency of the Direction of *Círculo de Advogados Portugueses de Direito da Concorrência* and to the Executive Committee of *Union des Avocats Européens*

On 28 December 2011 at the general assembly of the Circle of Portuguese Competition Lawyers (*Círculo dos Advogados Portugueses de Direito da Concorrência*, CAPDC), an association that gathers competition law experts, Carlos Botelho Moniz, partner and head of the EU and Competition Law department of MLGTS, was appointed President of the Board of Directors for the biannual 2011/2012.
Recently, Carlos Botelho Moniz was also appointed as Portuguese delegate to the Executive Committee of the European Lawyer's Union (*Union des Avocats Européens*, UAE), an association based in Luxemburg whose members are lawyers exercising the profession in Member States of the European Union in several areas of law. ■

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SPECIAL CONTRIBUTION MATTOS FILHO

Development of the applicable fines in cartel cases in Brazil

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There has been a remarkable intensification of cartel prosecution in Brazil during the past few years. The effective use of more sophisticated investigation tools by the Secretariat of Economic Law of the Ministry of Justice ("SDE"), such as the leniency program and active cooperation with both the Public Prosecutor's Office and the Federal Police, has resulted in a significant increase in the number of investigations, as well as in substantial fines imposed on companies and their executives. In particular, the recent decisional practice of the Administrative Council for Economic Defense ("CADE") shows this trend in terms of level of fines.

The Brazilian Competition Law (Law No. 8.884/94) sets forth that anticompetitive conducts are subject to, amongst other penalties, fines that range from 1% to 30% of the companies' annual gross revenues, excluding taxes. The applicable level of the fine will depend upon the specific features of the case and will be doubled in the event of recidivism. The executives involved in the conduct are subject to fines that go from 10% to 50% of the amount to be paid by the company.

CADE's first final decision in a cartel case imposed fines of 1% of the companies' turnover.[1] Following this first case, it is possible to note a significant increase on the level of fines imposed by the tribunal.

In 2002, CADE fined a number of gas stations in the amount equivalent to 10% of their gross revenues, while their executives had to pay, individually, 10% of the fine applicable to their respective companies. Interesting fact: CADE imposed a higher fine (15%) on the executive who was found to have played a central role in the conduct.[2]

In 2005, based primarily on evidence gathered during the first dawn raid undertaken in an antitrust investigation in Brazil, CADE fined companies active in the crushed rock sector 15% to 20% of their annual gross revenues.[3] Similarly, in 2007, in the first investigation resulting from a leniency application, CADE fined the companies involved once again 15% to 20% of their respective turnover, their executives being fined, individually, 15% of the amount to be paid by the company.[4] Also in 2007, CADE ruled on its first international cartel investigation – the so-called *Vitamins case* –, in which three multinational companies received fines of, respectively, 20%, 15% and 10% of their gross revenues in Brazil.

In 2008, CADE once again increased the level of the pecuniary sanction for cartels, having fined companies involved in the so-called *Sand case* in amounts equivalent to 22.5% of their respective gross revenues. On this occasion CADE also fined the accounting consultancy for having assisted the companies involved in the anticompetitive conduct by presenting studies on price parallelism.

Recently, in the *Industrial gases case*, CADE has awarded the highest level of fines for cartels in Brazil: 25% of the companies' gross revenues. The base fine was doubled (50%) for one of the companies involved that was found to be a recidivist.

The brief overview presented above shows that this new phase of antitrust enforcement in Brazil requires companies and executives to give special attention to the competition law aspects of their day-to-day business in Brazil, working in particular on the prevention of potentially anticompetitive conduct so as to reduce their antitrust exposure. ■

[1] Case No. 08012.015337/94-48, decision of October 27, 1999.
[2] Case No. 08012002299/2000-18, decision of March 27, 2002.
[3] Case No. 08012.002127/2002-14, decision of July 13, 2005.
[4] Case No. 08012.001826/2003-10, decision of September 1, 2007.
[5] Case No. 08012.009888/2003-70, decision of September 1, 2010. One of the companies involved cooperated with the authorities and had its fine reduced to 10%.