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& Associados
Sociedade de Advogados

NEWSLETTER

ISSN 1647-272
No 16
JULY 2013

EU and Competition Law

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The new Competition Act of Mozambique

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Introduction

11 April 2013 was an important milestone for the Mozambican economy, with the publication of Law no. 10/2013, which establishes the legal framework for competition in Mozambique and creates the Competition Regulatory Authority ("ARC"), which will enforce it.

The new law, which is inspired by the laws in force in Portugal and in most European countries (which, in turn, gather inspiration from European Union law), comes as a result of the efforts made in recent years by the Mozambican government to streamline economic initiative and liberalize some key sectors, such as communications, ports, railways and financial services.

Mozambique thus becomes the first Portuguese-speaking country in Africa to be equipped with a modern competition enforcement system.

Competition Regulatory Authority

The ARC will be an independent authority, endowed with administrative and financial autonomy, with broad supervisory, regulatory, investigatory and sanctioning powers, pursuant to which it will be able to inquire relevant persons, request documents and conduct searches and seizures and the sealing of the premises. The ARC will coordinate closely with the other sectoral regulatory authorities.

The ARC may assign different priorities to certain practices or sectors (under the designated "principle of opportunity," recently introduced in Portugal) and should publish in the last quarter of each year its enforcement priorities for the following year.

Prohibited Practices

The new law has a wide scope, as it applies to both private companies and State-owned companies, and covers all economic activities which produce effects in Mozambican territory (with a number of exceptions).

As under the EU and Portuguese regimes, the new law prohibits agreements and practices which restrict competition, both between competitors (**"horizontal" practices**, of which the most serious example are the so-called cartels), and between companies and their suppliers or customers (**"vertical" practice**s).

The law also prohibits **abusive practices by dominant undertakings** (including, among others, the refusal to grant access to essential infrastructure and the unjustified termination of a business relationship), as well as the abuse by one or more companies of the **state of economic dependence** of their suppliers or customers.

The Act provides, in any case, that **prohibited practices may be justified** if they lead to economic efficiencies, as well as if they promote the competitiveness of small and medium enterprises and the consolidation of the national economy (as long as such practices do not eliminate competition and are indispensable for the objective to be achieved).

Merger Control

The new law introduces merger control in Mozambique. All concentrations which meet the market share or annual turnover criteria, to be determined by the Council of Ministers, will be subject to **mandatory notification to the ARC, within 7 working days after conclusion of the agreement** or its project, and cannot be implemented before clearance. The validity of all legal instruments depends on the express or tacit approval by the ARC.

Concentrations subject to prior notification (as well as others on which the ARC decides to request information) **should be blocked** if they are likely to **create or strengthen a dominant position** which may significantly impede effective competition in the relevant markets.

Significant Sanctions

Violation of the prohibitions contained in the new law subjects infringing firms to **fines up to 5% of the turnover** of each company in the previous year. In addition, the breach of the duties to notify concentrations within the statutory period and to cooperate with the ARC is punishable with **fines up to 1% of annual turnover**.

The law also provides for **penalty payments**, where appropriate, as well as potentially serious **ancillary sanctions**, not only because the offender may find itself excluded from participating in tenders for five years, but because it can even find itself confronted with the **possible break-up of the offending undertaking**. Finally, agreements and practices concluded in breach of the law are **null and void**.

Comment

The new law will go into effect next July 10, and should be implemented (including, among others, the approval of the Statute of the ARC) by October 8, 2013.

The practical application of the law will depend largely on the organization and functioning of the ARC, and the priorities it will set for the enforcement of competition law. If the ARC follows the example of most European authorities, among priority cases there will be cartels, distribution agreements fixing resale prices, abuses foreclosing competitors by dominant firms, and the implementation of an effective merger control system.

As recognized by the Mozambican government, the implementation of the new competition law should be gradual, and a number of the public interests to be enforced go beyond the protection of a competition process, such as the promotion of national products and services, the competitiveness of SMEs and the consolidation of the national economy (incidentally these are objectives that can justify restrictive agreements).

In any case, given the broad powers and heavy penalties available to the ARC, there is no doubt that **all companies with presence (present or future) in Mozambique should consider carefully the impact of the new law on their activities in order to avoid the risk of their market conduct being regarded contrary to the Competition Act**.

Modelo Continente's proposed acquisition of supermarket chain in Madeira cleared by the Competition Authority on the basis of the failing firm defence

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On May 2, 2013, the Portuguese Competition Authority ("PCA") authorized a concentration consisting in the acquisition, by Modelo Continente Hipermercados, S.A. ("MCH") of 9 "Hiper Sá" supermarkets ("Hiper Sá"), located in the Madeira Island and owned by Jorge Sá, S.A.

This was the first concentration authorised in the national market solely on the basis of a so-called "failing firm defence", also referred to by the PCA as the "imminent failure argument".

What does the "imminent failure argument" consist of?

A concentration subject to prior mandatory notification shall be authorized if it is not found likely to create significant impediments to effective competition in the market. The underlying assessment focuses on the modifications to the competitive situation brought about by the concentration when compared to the market situation in the absence of the concentration, i.e., when compared to an alternative hypothetical scenario usually referred to as "counterfactual".

When the concentration notified concerns an undertakings which is about to exit the market due to financial difficulties, the relevant counterfactual is not likely to be the market situation at the time the concentration occurs but rather, an (alternative) scenario in which the exiting of such undertaking is factored in (hence, the "imminent failure argument").

In order for the argument to be considered, certain condition or requisites must be met. In this regard, the PCA refers in particular to two key requisites: (i) a finding that the target company is indeed facing financial difficulties and (ii) a finding that there are no alternative less restrictive scenarios.

The "imminent failure argument" in practice ...

Jorge Sá, SA is the mother company of a Madeira-based group involved for several decades in retailing and which had conducted a successful regional-wide food-based retailing operation.

For the past two years, however, the economic and financial situation of the group was deteriorating and in November 2012, the company was subject to a "Special Revitalization Procedure" (the *Processo Especial de Revitalização* or "PER").

Apart from the Sá Group, the main food-based retailers present in the Madeira Island are MCH (the Acquirer and Notifying party in this concentration) and Pingo Doce. The remaining "modern" retailing offer is divided between the Spar supermarket chain (operating mainly in the Funchal Municipality) and other smaller players.

The concentration was therefore of horizontal nature and concerned two of the three largest market *players*. The relevant (local) markets were highly concentrated and the three largest players were found to be close competitors.

An assessment of the concentration considering the market situation prior to the concentration would therefore point to potential serious concerns on its impact on competition, taking into account the "disappearing" of one relevant player and the fact that it would be acquired by a close competitor (MCH).

However, an assessment of the economic and financial situation of the Sá Group showed that it was necessary to assess the real effects of the concentration by reference to a different counterfactual, in light of the severe financial

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THE PCA DECIDED TO INQUIRE DIRECTLY A SET OF COMPETITORS REGARDED AS LESS RESTRICTIVE ALTERNATIVES. NO CREDIBLE MANIFESTATIONS OF INTEREST WERE RECEIVED IN RESPONSE TO SUCH INQUIRIES.

difficulties faced by the company and the absence of less restrictive alternative scenarios.

Indeed, the seller was facing a severe inability to fulfill its legal obligations towards suppliers and employees; it was unable to obtain appropriate financing and to guarantee the operation of its stores. The fact that the company had been subject to a PER was a strong indication of such difficulties but not conclusive in itself, as the PER is mainly intended to create conditions for the company to recover. In the case at hand, however, it was clear that the transaction notified would be an essential pillar to such recovery, and that in the absence thereof, the company would end up being subject to a bankruptcy procedure. The PCA's own inquiries during the proceedings corroborated this.

On the other hand, the factual information on the target-stores *performance* evidenced a drastic reduction in the sales, a deterioration of their operating conditions, all of which was made more serious in light of the group's inability to ensure the keeping in operation of the stores: 4 out of the 9 target-sores had already been shut down at the time of filing of the notification and 3 others were closed while the proceedings was pending due to outstanding debts with the electricity company that determined the stopping of electricity supplies by the latter.

As a result of the above, the existence of severe financial difficulties could be established. As a subsequent step, it was necessary to ascertain whether there were, *in casu*, any less restrictive alternatives to the acquisition notified. The (recent) events that preceded the initiation of the PER indicated that the Sá Group had not received any alternative offers from (several) other retailers contacted to that effect. Likewise, no alternative solutions to the definite sale of stores had been possible to implement. Despite this "historical" background, the PCA decided to inquire directly a set of competitors regarded as less restrictive alternatives (to MCH) about their potential interest in acquiring all or part of the target-stores or associated assets. No credible manifestations of interest were received in response to such inquiries.

At the same time, the drastic reduction of sales by the target-stores and the closing of the majority of them (all of which was exogenous to the concentration notified) had already resulted in a diversion of demand from the target-stores to the stores of MCH as well as of its main competitor. Indeed, the calculations run by the Notifying party is respect of effective and/or estimated diversion ratios indicated that a very significant part of the sales lost by the target-stores had been captured by the Notifying party and by its main competitor.

Finally, an alternative scenario whereby the assets would be acquired pursuant to bankruptcy procedure (in case of failure of the PER) and then reopened to the public in the short term was found to be unlikely and merely theoretical, in light of the information made available in the merger control proceedings.

As a result of the above, the relevant counterfactual against which the effects of the concentration was to be assessed – the bankruptcy of the Sá Group – was characterized by a disruption of supply in the supply in the relevant markets, a transfer of clients to competitors, a reduction in the level of service, a loss of value and deterioration of the assets and a negative effect also on the remaining retailing assets of the Sá Group (namely, the stores not involved in this concentration). Considering this counterfactual, it could be concluded that the notified concentration was not likely to create significant impediments to effective competition in the relevant markets and, as a consequence, it was authorized by the PCA. ■

European Commission proposes Directive to enhance damage claims by victims of antitrust infringements

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Antitrust infringements, such as cartels or abuse of dominance conducts, can be harmful to the economy considered as a whole, but also to private entities, such as consumers and economic agents. The case-law of the European Union Court of Justice has recognized in several judgments[1] that victims of an antitrust infringement have the right to be compensated for the harm they suffered.

In this context, the European Commission considers that victims of antitrust practices currently face several practical hurdles to judicially claim the damages they have endured – such as procedural obstacles and legal uncertainty – when trying to obtain a fair compensation. According to the Commission, in the last seven years apparently only 25% of its antitrust infringement decisions led the victims seek to obtain compensation.

One of the main reasons for such unsatisfactory results is related to the fact that there are very different national procedural rules governing antitrust redress claims. Thus, according to the Commission, in the majority of cases the probability of the victims being duly compensated for the damage suffered due to an antitrust infringement is greatly dependent upon the Member State in which the claimant happens to be located.

Hence, the Commission has now proposed a new Directive [COM(2013) 404 final, of 11 June 2013] with the aim of discontinuing several procedural obstacles and facilitating damage claims by victims of antitrust breaches. The proposed Directive would apply to legal claims in EU Member States and comprehends the following non-exhaustive measures:

- Easier access to evidence – the victims shall obtain a court order for the disclosure by other parties or third parties of the documentation necessary to sustain a claim;
- Clarification of rules on limitation periods in order to reduce the uncertainty regarding the period of time within which plaintiffs can bring an action for damages (it is proposed a period of at least five years to file a claim from the date in which the victim acknowledges that it has suffered harm);
- Possibility to obtain full compensation, including lost profits (*lucrus cessans*);
- Clarification of defendants liability rules on *passing on defense*;
- Provision of a rebuttable presumption that cartels cause harm, with the aim of easing the quantification of the damage the plaintiffs suffer;
- Joint liability of the infringers for the harm caused to the victims – exceptions may apply, for instance when the wrongdoers cooperate with the investigation and obtain immunity from the application of fines they shall only, as a rule, compensate the respective customers;
- Measures aimed to enhance consensual settlements in order to allow a faster resolution of disputes and reduce the costs for the involved parties.

In addition to the proposed Directive, the Commission has also adopted a *Communication on quantifying antitrust harm* [C(2013) 3440, of 11 June 2013] and a *Practical Guide* [SWD(2013) 205, of 11 June 2013] in order to assist the courts and parties in antitrust damage actions.

Furthermore, in order to improve access to justice for victims of such antitrust breaches, the Commission has also issued a *Recommendation* [C(2013) 3539/3] addressed to EU Member States on the implementation of *collective redress mechanisms*.

Despite the foregoing, we deem, as considered by the Commission, that the proposed Directive does not seek to implement a new system in which the punishment and deterrence shall be left to private plaintiffs. Competition authorities, both EU and national, will continue to play an important and unique role in the investigation and sanction of antitrust infringements. The proposed Directive should, thus, from our perspective, be viewed as aimed to enhance the use of damage actions by private parties, ensuring that fair compensation is granted to those who are victims of antitrust infringements. ■

In our perspective, the proposed Directive, aimed at simplifying antitrust damage claims rules, in the benefit of victims of antitrust infringements, should be viewed as a step forward in the reinforcement of the EU Competition Law, notably through the adoption of legal mechanisms enhancing the possibility of those who suffered harm to be adequately compensated.

[1] *See* rulings in cases C-453/99, *Courage and Crehan*, of 20 September 2001; joined cases C-295/04 to C-298/04, *Manfredi*, of 13 July 2006; C-360/09, *Pfleiderer*, of 14 June 2011; C-199/11, *Otis et al.*, of 6 November 2012; and C-536/11, *Donau Chemie*, of 6 June 2013.

Competition Authority approves Guidelines on the Conduct of Proceedings regarding anticompetitive infringements

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At the end of March 2013, following a public consultation, the Portuguese Competition Authority ("PCA") approved a set of Guidelines on the Conduct of Proceedings ("Guidelines") concerning the enforcement of Articles 9, 11 and 12 of Law no. 19/2012, of 8 May (the "Competition Act"), that is to say, on the conduct of infringement proceedings for anticompetitive practices.

The Guidelines focus on some of the main innovations introduced by the new Competition Act and help to clarify the PCA's understanding of some of the applicable legal rules, with the goal of "*ensuring greater transparency and predictability*" on the conduct of infringement proceedings (paragraph 2 of the Guidelines).

The PCA may itself become aware of anticompetitive practices or receive such information on the basis of a complaint submitted by third parties. In relation to opening the initial stage of an investigation, the new Competition Act has introduced a model based on a principle of opportunity (as opposed to strict legality) according to which the Authority is no longer legally bound to open an inquiry each time it receives a complaint. It can now assess the public interest in pursuing the inquiry based on the specific aspects of each case, notably in light of its "*competition policy priorities*" (Article 7(2) and 7(3) of the Competition Act) which must be defined each year.

Among the fact-finding powers at the PCA's disposal, the Guidelines clarify the Authority's understanding on several topics, such as, for example, the fact that the seizure of open correspondence (including e-mails) is considered admissible in the context of infringement proceedings given that "*After it has been opened, correspondence becomes a mere written document, which may, without limitation, be seized in the course of an inspection*" (paragraph 51 of the Guidelines).

On the other hand, some of the new provisions introduced by the Competition Act are emphasised in the Guidelines, such as (i) the possibility of conducting inspections – subject to mandatory authorisation by a judicial magistrate – to the homes of shareholders, directors, employees or agents of undertakings and associations of undertakings (Article 19 of the Competition Act) or (ii) the possibility of the PCA conducting inspections and audits subject to the consent of the undertakings in question, which must be notified at least 10 days in advance of the Authority´s intention to carry out these actions.

In accordance with Article 24(1) of the Competition Act, the initial stage of an investigation (the inquiry phase) is now subject to a maximum duration of 18 months, although this is merely indicative and not mandatory, and can be concluded with one of four types of decisions: (i) the investigation advances to a second stage (the instruction phase) with the PCA issuing a statement of objections to the undertakings in question, if it considers there is a *reasonable likelihood* of proving the infringements; (ii) the investigation is closed; (iii) a decision finding an infringement is adopted in the context of a settlement procedure; (iv) the investigation is closed in exchange for commitments offered by the undertakings in question.

In the event the proceedings advance to the instruction phase, this should be concluded within a (once again, indicative) a maximum period of 12 months following the statement of objections. The defendant undertakings have a time period of not less than 20 business days in which to present their written defence, although the PCA states that "*As a rule, the Authority shall set a term of 30 business days*" (paragraph 93 of the Guidelines). This deadline may be extended, at the most for an equal period of time, if there is a reasoned request. In their written response to the statement of objections, defendants may request an oral hearing (which is recorded) to complement their written defence.

The two main developments in the structure of infringement proceedings are, however, the possibility for cases to be closed if the undertakings offer *commitments* and, on the other hand, the introduction of a *settlement procedure*.

Defendant undertakings may now, both in the inquiry and instruction phases, offer voluntary commitments to remedy the anticompetitive effects of the practices under investigation. If these (structural or behavioural) commitments are accepted by the PCA, it will adopt a decision closing the investigation in light of those commitments and imposing conditions. This possibility – which is not available for more serious infringements, such as cartels – allows undertakings to avoid an infringement decision and the corresponding fines, and enables the PCA to restore competitive conditions on the affected markets more swiftly. Commitments must be fully implemented within 2 years of the PCA's decision and, if this is adopted at the instruction stage, any breach of conditions is liable to fines of up to 10% of turnover.

In addition, the Competition Act has introduced a settlement procedure which allows an undertaking to acknowledge its participation in an infringement and, as a result, obtain a reduced fine. In order to do so, the undertaking must present an irrevocable settlement proposal, which it can do both during the inquiry and the instruction phases. Unlike the offer of commitments, in this case the PCA adopts an infringement decision. The facts admitted by the company in question cannot be judicially challenged for the purposes of an appeal and, when the fine is paid, the settlement is converted into a definitive infringement decision.

In these and other matters, the Guidelines provide a useful indication of how the PCA proposes to apply the new Competition Act in the context of infringement proceedings. ■

Chartered Accountants' Mandatory Training Regulation in breach of Competition Law[1]

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Introduction

In a recent preliminary ruling (C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, of 28 February 2013, not yet reported), the European Court of Justice (ECJ) clarified that a regulation adopted by a professional association establishing a system of compulsory training for its members must be regarded as a **decision of an association of undertakings** under Article 101(1) TFEU and constitutes a **prohibited restriction** of competition to the extent it **eliminates competition** in a substantial part of the relevant market and **imposes discriminatory conditions** that are detrimental to competitors.

The case

In 2007 the Portuguese Order of Chartered Accountants (OTOC), a professional association under a public law statute and with wide ethical, training and disciplinary powers over all chartered accountants, adopted a regulation which put in place a system of compulsory training for accountants, whereby accountants must obtain annually 35 credits for training provided by the OTOC or approved by it. Training bodies wishing to provide 'professional training', also offered by the association, had to apply for registration with the OTOC, pay a fee for the application and each course provided, and comply with criteria set by the association, which also had the power to decide on the approval of training. At least 12 credits must be earned from "institutional training", which could only be provided by the OTOC.

Further to complaints, the Portuguese Competition Authority decided on 7 May 2010 that by adopting the contested regulation, the OTOC had infringed Articles 101 and 102 TFEU and the equivalent provisions of the Portuguese Competition Act (see Newsletter of June 2010). The Authority found the regulation constituted both a **decision of an association of undertakings** and an **abuse of dominant position** in the market for the compulsory training for chartered accountants in Portugal, and imposed a **fine of €229,300** on the association. The decision was upheld on appeal by the Lisbon Commerce Court with regard to the infringement of Article 101, although the court dismissed the claim that the regulation also breached Article 102. The OTOC appealed again, this time to the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*), which stayed the proceedings and submitted four **questions to the Court of Justice for a preliminary ruling**.

Public law regulations as decisions of association of undertakings

It was not disputed that chartered accountants, which carry on an economic activity, are 'undertakings' for the purposes of Article 101 TFEU. Nevertheless, the Lisbon Court of Appeals doubted whether a regulation adopted by a professional association such as the OTOC, which is required by law to adopt binding rules of general application, and in particular to put into place a system of compulsory training for its members with a view to providing citizens and corporation with quality, reliable accounting services, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU, or should be considered, on the contrary, a decision of a public authority outside the scope of that provision.

Recalling *Wouters*[2], the Court stated that EU competition rules do not apply to a given activity only when such activity, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity. The OTOC claimed that the regulation did not have any direct effect on the economic activity of the chartered accountants themselves. However, the Court noted that the association provided training for chartered accountants, and the regulation set out the standards which should

EU competition rules do not apply to a given activity only when such activity, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity

[1] Article first published in the International Law Office Competition Newsletter in April 2013.
[2] Case C-309/99 *Wouters and Others* [2002] ECR I-1577.

Elimination of competition for training sessions lasting less than 16 hours could not 'in any event' be regarded as necessary to guarantee the quality of accountants' services

be met by other providers wishing to offer such training. Consequently, **such regulation had a direct impact on the market of compulsory training for chartered accountants**, where the OTC itself carried on an economic activity.

The fact that the OTOC was legally required to put into place a system of compulsory training for its members was not found to be relevant. Rules adopted by a professional association remain State measures, outside the scope of EU rules applicable to undertakings, only when the Member State defines the public interest criteria and the essential principles with which the association's rules must comply, and retains its power to adopt decisions in the last resort. This was not the case of the OTOC, as **the law allowed the association a wide discretion as to the principles, conditions and methods to be followed by the compulsory training scheme**, and did not lay down any conditions for access by training bodies to the market for compulsory training for accountants. The rules drawn up by the association where accordingly, according to the Court, "a matter for it alone".

The Court therefore concluded that the regulation at issue must be regarded as a decision of an association of undertakings in the meaning of Article 101(1) TFEU.

Restrictive effects: elimination of competition and discriminatory conditions

Replying to the question of whether the contested regulation infringed Article 101 TFEU, the Court observed at the outset that the regulation was capable of **affecting trade between Member States**. Not only it applied to the whole territory of the Member State in question, but, more importantly, the provisions on access to the market of compulsory training for chartered accountants appeared to be of significant importance to undertakings in other Member States choosing on whether or not to enter the Portuguese market.

The Court recognized that the contested regulation did not have **the *object* of restricting competition**, as it sought to guarantee the quality of the services offered by chartered accountants by putting into place a system of compulsory training. By contrast, the regulation was found by the Court to have **anticompetitive *effects*** on two accounts.

First, by decreeing that 12 of the 35 mandatory annual credits had to be obtained from 'institutional training', which could only be provided by the OTOC, the Court found **the regulation reserved for the association a significant part of the relevant market**. In addition, each programme of 'professional training' (the category which was open to the competition of private training bodies) had to last longer than 16 hours, which could have the result of preventing alternative training bodies which wished to offer short training programmes from doing so. Such rules therefore appeared to the Court as likely to distort competition on the relevant market 'by affecting the normal play of supply and demand'.

Second, the **conditions of access to the relevant market** (for bodies other than the OTOC) were found by the Court to be **discriminatory**. The Court noted that, although private bodies had to ask for specific approval of each training session, at least 3 months in advance, and pay a fee for each session, the OTOC, which also provided professional training in competition with those training bodies, was not subject to any approval procedure.

Moreover, the rules set by regulation which must be met by training bodies were found to be drafted in vague terms, which could lead the OTOC (holding the power to rule unilaterally on applications) to distort competition by favouring the training which it organised itself. The requirement of three months' notice before the start of the session was also found to prevent alternative training bodies from offering, in the near future, training on current issues giving entitlement to those credits, while requiring them systematically to 'reveal detailed information about all training proposed'.

Again evoking *Wouters*, the Court recognised that not every decision of association which restricts the freedom of action of the parties necessarily falls within the prohibition of Article 101(1) TFEU. It accordingly analysed whether the restrictive effects of the regulation – which recognisably pursued the public interest objective of ensuring continued professional education of accountants – could reasonably be regarded as necessary to guarantee the quality of services offered by chartered accountants, and whether those effects did not go beyond what was necessary to ensure the pursuit of that objective.

In this respect, the Court stated clearly that elimination of competition for training sessions lasting less than 16 hours could not 'in any event' be regarded as necessary to guarantee the quality of accountants' services. Similarly,

the objectives underlying the conditions for access could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory and reviewable criteria likely to ensure training bodies equal access to the relevant market. For these reasons, the contested regulation was found to be against Article 101(1) TFEU.

The Court finally dismissed the argument that the contested regulation of the exempted under Articles 101(3) and 106(2) TFEU. **The restrictions of competition imposed by the regulation appeared to go beyond what was necessary** to ensure either the improvements in accountants' services, under Article 101(3), or the performance of the particular tasks assigned to the OTOC, under Article 106(2), even if the compulsory training could be viewed as a general economic interest activity, which the Court doubted. The regulation also made it possible for the OTC to eliminate competition on a substantial part of the training services for chartered accountants, which further precluded the application of Article 101(3).

Comment

The reference in OTOC gave the Court of Justice an opportunity to recall and articulate **long-established principles of competition law**, such as that public law entities that carry out economic activities are subject to competition law rules, and that professional associations, when putting in place rules of general application, must take care in ensuring that those rules do not distort competition 'by affecting the normal play of supply and demand', and allow for 'equality of opportunity between the various economic operators'.

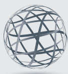
The Court also confirmed that the public **interest objective exception** provided in *Wouters* is subject to a **strict proportionality test**, similarly to the examinations carried out under Articles 101(3) and 106(2) TFEU, both of which has been rendered more exacting by the case law in recent years.

The judgment offers food for thought for professional associations organising compulsory training programmes which could be provided by private training bodies, which is a widespread practice in many jurisdictions for so-called 'liberal' professionals such as lawyers, doctors, pharmacists, accountants, architects, engineers, etc. In particular, **when the associations themselves provide training services, i.e. operate on the market, rules on access to the market (including regarding approval procedures) should be clear, objective, transparent and non-discriminatory, and allow further review** – including from a court of law. The Court also appears to be concerned with 'equality of opportunity' of third parties in accessing the market, and with the professional association systematically acquiring 'detailed information' (i.e., commercially sensitive information) about all training proposed by competing providers.

The *OTOC* judgment appears to suggest that **in such cases the 'commercial' and 'regulatory' functions of the professional association should be kept separate**, in order to prevent the association from having the ability to distort competition by favouring the training which it organises itself, a line of thought reminiscent of the principle of 'unbundling' of activities which has been thoroughly developed and detailed by EU law in certain network industries, such as the energy sector[3].

Associations of undertakings which are subject to public law duties and simultaneously carry out economic activities, in (actual or potential) competition with other economic operators, should therefore adopt caution when regulating and exercising activities which are, or have no reason not to be, open to competition. ■

[3] See *inter alia* Directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and natural gas, respectively (OJ L 211, 14.8.2009, p. 55–136).



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