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SPECIAL CONTRIBUTION: MATTOS FILHO

First EU Directive on the award of concession contracts

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Introduction

Almost 14 years after the inaugural case law of the European Court of Justice in the *Telaustria*[1] case dealing with the issue of concessions in the light of European Union law, EU institutions and the Member States have finally reached an agreement to endorse the first European body of law concerning the award of concession contracts: Directive 2014/23/EU, of 26 February ("Directive").

To a certain extent, the new Directive consolidates the vast case law of EU courts on this matter, which, in itself, has the merit of strengthening legal security. However, there are also a number of innovative and relevant solutions that will certainly impact on the way that Member States structure their supply of goods and services.

Why was there a need for the Directive ?

Until the Directive was approved, concession contracts were not entirely subject to harmonized legal discipline in the European area. The classic directives on public procurement, which address the award of public contracts, expressly exempt from their scope – since their first generation in the beginning of the 1970s – the so-called 'service concessions'. They only cover the 'works concessions'.

> Until the Directive was approved, concession contracts were not entirely subject to harmonized legal discipline in the European area.

Despite this exclusion, it was common ground on the case law of the Court of Justice and the decision practice of the European Commission, at least since the *Telaustria* judgment, that, notwithstanding the fact that service concessions were not caught by EU directives on public contracts, the awarding entities concluding them were nonetheless bound to comply with the fundamental rules and principles of the Treaties, in particular those concerning non-discrimination on the ground of nationality, equality of treatment, transparency, mutual recognition, proportionality and securement of competition within the internal market.

In practical terms this means that, even before the Directive, awarding entities had the obligation to ensure, for the benefit of any potential tenderer, a degree of advertising adequate to enable the services at stake to be opened up to competition and the impartiality of the proceedings to be reviewed.

Having said this, the fact remains that there was always a considerable divergence on the way that each Member State interprets such rules and principles and implements them in the framework of concession procedures, which led to the fact that a significant part of the case law in this field was built at the expense of preliminary rulings to the ECJ by national courts, in the first moment, and subsequently of infringement proceedings brought by the Commission against Member States. From this standpoint, the Directive brings the advantage of stabilising a set of procedural and substantive rules applicable to concessions, thus contributing to ensure uniform application of EU law.

Scope of the Directive

As a result of the principle of neutrality of the EU vis-à-vis the system of property ownership of Member States,[2] the Directive acknowledges and reaffirms the right of States to decide the means of administration they deem to be most appropriate for performing works and providing services. In particular, nothing in the Directive limits the choice between public or private management models. However, if Member States decide to award to third parties (be they public or private) the supply of goods or services, EU law comes into play.

The Directive covers the majority of works and service concessions, although there are important derogations to the general provisions (*v.g.*, in respect to the energy, transport and postal sectors) and even exclusions (*v.g.*, in respect to the water, air transport, defence and security, certain audiovisual and radio media services, gambling and betting and financial securities sectors or in respect to activities that are directly exposed to competition).

Another important exclusion has to do with in house procurement. Following on from the extensive case law of the Court of Justice launched by the *Teckal*[3] rendering, the Directive recognises that public contracting authorities and entities are not required to follow the Directive if *(i)* they exercise over the concessionaire a control which is similar to that which they exercise over their own departments, *(ii)* the concessionaire carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or contracting entity and *(iii)* there is no direct private capital participation in the concessionaire with the exception of non-controlling and non-blocking forms of private capital required by national legal provisions, in conformity with the Treaties, which do not confer a decisive influence over the concessionaire.

This last condition applicable to in house procurement represents a considerable evolution when compared to the current status of the

[1] Judgment of 7.12.2000, case C-324/98.
[2] Article 345 TFEU.
[3] Judgment of 18.11.1999, case C-107/98.

European case law and decision practice in this field, which – sometimes unreasonably – tend to consider that the holding of a participation, even as a minority, of a private undertaking in the capital of a concessionaire excludes in itself the possibility of public contracting authorities and entities exercising over such concessionaire a control similar to the one they exercise over their own internal departments.[4]

In the Directive, it is now clear that such type of private holding in concessionaires does not preclude the direct award of public tasks to these entities «*as such participations do not adversely affect competition between private economic operators*».[5] At the same time, the fact that the Directive only imposes a ban on the «*direct*» participation of private capital may give Member States an additional room to shape their in house arrangements.

Outside the scope of the contemplated derogations and exceptions, the Directive essentially lays down a coordination of national procedures for the award of concessions that, in view of their value (equal to or above EUR 5.186 million), are likely to raise greater cross-border interest. As a rule, the award of these concessions should be preceded by publication of a notice in the Official Journal of the European Union in accordance with standard forms to be approved by the Commission.

There is now also a level playing field as regards essential terms of the award proceedings, such as a minimum time limit for the receipt of applications (in principle 30 days from the date on which the concession notice was sent), award criteria (that must be proportionate, non-discriminatory, fair, linked to the subject-matter of the contract, previously disclosed and listed by their order of importance) and the duration of concessions (for concessions lasting more than 5 years, the maximum duration of the concession shall not exceed the time that a concessionaire should reasonably be expected to take to recoup the investments made and the costs incurred, together with a return on capital under normal operating conditions).

Other relevant aspect of the Directive is the fact that it helps clarifying the situations under which modifications of a concession during its performance require a new concession award procedure. This is the case in particular where the amended parameters would have dah an influence on the outcome of the procedure, had they been part of the initial procedure (*v.g.*, scope of the concession or mutual rights and obligations of the parties). There are, however, a few provisions dealing with review clauses for changes of circumstances contained in the initial concession documents and that provide for *de minimis* thresholds, below which a new award procedure is not required.

Entry into force and transposition

The Directive entered into force on 17 April 2014 and shall be transposed by Member States into their national laws by 18 April 2016.

Final remarks

It took the Member States a few years to accept the relevance of drafting harmonised legal rules within the European area applicable to concessions.

The negotiation of a legal regime with such wide implications represents, in view of its complexity, duration and diversity, a particularly demanding challenge from a legislative point of view. This is to say that, any legal attempt made in this field, has to strike a sensitive balance between, on the one hand, basic guarantees in favour of equal treatment and competition among operators and, on the other, flexibility for Member States to define and organise the procedure leading the choice of a concessionaire.

In the confrontation between these two interests, which were always present throughout the legislative work that resulted in the approval of the Directive, the final product seems to be a globally balanced text that enhances legal security for both public and private entities. ■

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[4] This line of reasoning was first adopted on case C-26/03 *Stadt Halle and RPL Lochau*, of 11.1.2005, and was later affirmed in a number of subsequent cases. Alon the same lines, see also the Commission interpretative communication on the application of Community law on public procurement and concessions to institutionalised public-private partnerships, of 12.4.2008.

[5] Recital (46), § 2.

50 years later … the direct effect of non-implemented Directives is far from outdated

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"*Although the Court has recently commemorated the fiftieth anniversary of its emblematic judgment in van Gend & Loos, the discussions relating to the consequences of recognising the direct effect of EU law are far from closed. (…) in particular with regard to the scope of the direct effect of directives.*", so wrote Advocate-general Wahl in the introduction to its Opinion in Case C-425/12 – *Portgás – Sociedade de Produção e Distribuição de Gás, SA contra Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, which is the subject matter of this article.

It is well established that whenever the provisions of a directive can be regarded as unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to timely implement the directive in domestic law, or has failed to do so correctly (this is the so-called "vertical" and "upwards" direct effect). Conversely, the State cannot rely on the provisions of a Directive against an individual, thereby benefiting from its own failure in to implementing it ("downwards" or "inverted" vertical effect). Pursuant to the established case-law of the Court, a non-implemented directive cannot result, in and of itself, in obligations being imposed upon individuals.

What happens, though, when a state authority intends to rely on the provisions of a directive against a private company which is, at the same time the exclusive holder of a public service concession? Will this be still a case of "downwards" vertical effect prohibited under the existing case-law? And is it of relevance for the case that the company in question is a "contracting entity" within the personal scope of application of the Directive?

> The Court first dealt with the question of whether Portgás could be considered as part of that set of entities against which the rules of a non-implemented Directive may, as a rule be relied on.

The Court was called upon to assess in Case C-425/12, which concerned a preliminary ruling requested in the context of a national dispute around the validity of a decision ordering the return of a financial support granted to Portgás on the grounds that the latter had failed to comply with the rules on public procurement contained in Directive 93/38/EEC of 14 June 1993 on the coordination of procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 ('Directive 93/38').

Those directives should have been implemented by the Portuguese State no later than 1.01.1998 (as for the initial version of Directive 93/38/CEE) and 16.02.2000 (as for subsequent changes). However, the Portuguese implementing legislation was only adopted in August 2001 and entered in force on December that same year.

In July 2001 and therefore, after the deadline for implementation has expired but before the entering in force of the implementing legislation, Portgás entered into a contract for the supply of gas meters, without however complying with the public procurement procedure imposed by the directive. Portgás argued it was only bound by existing national legislation and that the Portuguese State could not have relied, against Portgás, on compliance with the provisions of a directive, which had not yet been implemented and which was therefore unable to produce a direct effect in relation to Portgás, according to the established case-law.
The Portuguese State contended that Directive 93/38/EEC is addressed not only to the Member States but also to all contracting entities covered by its scope of application and that Portgás, in its capacity as the holder of the only public service concession in the area covered by the concession, was subject to the obligations arising from that directive, even without implementation.

Given the interpretation doubts raised the national judge decided to refer to the Court, for a preliminary ruling, the question of whether the provisions of Directive 93/38/EEC and the general principles of UE law can be interpreted as creating obligations for private persons who hold public service concessions (in particular entities covered by scope of application of Directive 93/38/EEC) where that directive has not been implemented into national law by the Portuguese State, so that failure to comply may be invoked against the concession-holder by the Portuguese State (through acts attributable to one of its Ministries)?

In its assessment, the Court first dealt with the question of whether Portgás could be considered as part of that set of entities against which the rules of a non-implemented Directive may, as a rule be relied on (or, in other words, whether Portgás could be included, to that effect, in the – broad – notion of State).

In opposition to the argument used by the Portuguese state, the Court clarified that a reply to this question is not dependent upon the fact that Portgás is within the scope of application of the Directive: " *(…) the mere fact that a private undertaking which is the exclusive holder of a public service concession is among the entities expressly referred to as constituting the group of persons covered by Directive 93/38 does not mean that the provisions of that directive may be relied on against that undertaking.*"

On the contrary, a reply to this question will depend ultimately on whether or not such entity carries out a public service under the control of a public authority and benefits, to

Secondly, the Court assessed whether the provisions of Directive 93/38/EEC could also be relied on by the Portuguese authorities against an entity that which features amongst the entities against which, the provisions of Directive 93/38/EEC may be relied on.

that effect, of special powers beyond those which result from the normal rules applicable in relations between individuals.

Although expressly stating that this assessment should be carried out by referring court, the Court left, in this judgment, some relevant indications for the solution of the specific case at hand, for example, in relation to the notion of "special powers": the Court states that the fact that the undertaking enjoyed, pursuant to the concession contract, special and exclusive rights, that does not mean, that it had such special powers; also that a finding of "special powers" cannot be derived solely from the fact that Portgás is entitled to request that the expropriations necessary for the establishment and operation of the infrastructures be carried out, without, however, being able itself to do so.

Secondly, the Court assessed whether the provisions of Directive 93/38/EEC could also be relied on by the Portuguese authorities against an entity that which features amongst the entities against which, the provisions of Directive 93/38/EEC may be relied on.

The Court began by recalling the binding obligation of Member States to adopt all measures necessary to achieve the result prescribed by a directive and that such obligation is binding on all the authorities of the Member States (including bodies which, under the control of those authorities, have been given responsibility for a public-interest service and which have, for that purpose, special powers).

The Court further considered it would be contradictory to rule that State authorities and bodies satisfying the conditions set out above are required to apply Directive 93/38/EEC, while denying those authorities the possibility to ensure compliance with the provisions of such directive by a body satisfying those conditions. Also, failure by such bodies to ensure compliance with the provisions of the directive would – in the Court's opinion – allow the Member State to take advantage of its own failure to comply with EU law.

In addition, such a solution would give rise to a non-uniform application of Directive 93/38/EEC in the domestic legal system of the Member State concerned because whether or not a contracting entity would be required to comply with the provisions of Directive 93/38/EEC would depend on the nature of the persons or bodies relying on the directive.

As a result of the above, the Court concluded that a private undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38/EEC and the authorities of a Member State may therefore rely on those provisions against it.

Final comment

This ruling brings about important clarifications as to scope and reach of the obligations of the different entities involved and its relevance exceeds the particulars of the case at hand. Indeed, the Court reiterated the limits of the so-called "downwards" (vertical) direct effect by making it clear that no exemptions apply due to the fact that the individual/company at stake is within the (personal) scope of application of the Directive. In addition, the ruling of the Court makes it clear that an entity caught within the broad notion of "State" to this effect must comply with the provisions of a non-implemented directed regardless of who is relying on such provisions. At the same time, however, it is clear that whether or not the entity at stake is caught by said notion depends upon proof that requirements of state control and special powers are met in the case, a proof which – in light of the Court's reasoning in that regard - seems to be open to a demanding scrutiny. ■

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Human Rights: Portugal breaches the right to a fair trial

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According to European Court of Human Rights' settled case law the concept of fair trial implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed in the judicial proceeding, being at stake litigants' confidence in the workings of justice, which is based, *inter alia*, on the knowledge that they have had the opportunity to express their views on every document in the judicial file. The European Court Of Human Rights declared that this principle, guaranteed by Article 6, § 1, of the Convention, was not complied with by Portugal in a procedure before the Constitutional Court.

The European Court of Human Rights in case 21976/09, Gramaxo Rozeira V. Portugal, by recent judgement of 21 January 2014, declared that Portugal breached Article 6 of the European Convention on Human Rights (***Convention***), regarding the right to a fair trial, in a judicial proceeding before the Portuguese Constitutional Court.

This case regards the failure to communicate a document in the course of proceeding before the Portuguese Constitutional Court. In March 2002 the plaintiff was recruited as a lecturer by a Polytechnic Institute for an initial one-year contract, renewable for two biannual periods. In March 2005 the Institute informed the plaintiff that his contract had expired, and that the Institute's scientific board had not agreed to re-appoint him.

The ordinary appeals lodged by the plaintiff before the Portuguese administrative courts were unsuccessful. He then lodged an appeal with the Portuguese Constitutional Court, alleging that Article 12 of the Staff Regulations for teachers in polytechnic higher education was unconstitutional.

In the course of the proceedings, a letter and respective annexes from the government, in reply to an *ex officio* request for information from the Constitutional Court judge-rapporteur on the disputed issue of whether or not trade unions had taken part in drawing up Article 12 of the Staff Regulations, was not transmitted to the applicant in the proceeding before the Constitutional Court, or to the respondent party. On 11 February 2009 the Constitutional Court, by judgment no. 74/2009[1], dismissed the applicant's appeal, sustaining that Article 12 of the Staff Regulations was constitutional.

In 2009 the Portuguese citizen lodged a complaint before the European Court of Human Rights alleging that the non-disclosure of the letter sent by the government to the Constitutional Court, following the judge-rapporteur request, and the fact that it had been impossible for him to respond to it in the course of the Constitutional Court proceedings, had infringed his right as guaranteed by Article 6, § 1, of the Convention. The legal provision states that:

> "In the determination of his civil rights and obligations (…) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The European Court Of Human Rights in the assessment of the complaint against Portugal recalled its settled case law which establishes that the notion of fair trial implies the right of parties to have knowledge off all observations submitted to court, aimed at influencing the judicial decision and to comment such elements[2], as the parties must be able to comment on the observations, irrespective of their actual effect on the court, and even if the observations do not present any fact or argument which has not already appeared in the impugned decision in the opinion of the appellate court[3].

Moreover, according to the European Court Of Human Rights judicial *acquis* the parties to a dispute should be given in a judicial procedure the possibility to state their views as to whether or not a document calls for their comments – considering that it is particularly at stake litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file[4].

Thus, the European Court Of Human Rights concluded that the respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant before the Portuguese Constitutional Court was informed and given the opportunity to comment on the letter of the government. However, the applicant was not afforded such possibility. That finding led the European Court of Human Rights to denote a breach of Article 6, § 1, of the Convention by Portugal in the procedure before the Constitutional Court. ■

[1] Avalaible at http://www.tribunalconstitucional.pt/tc/acordaos/20090074.html.
[2] Among many other EUROPEAN COURT OF HUMAN RIGHTS rulings, see LOBO MACHADO v. PORTUGAL, 20 February 1996, § 31; VERMEULEN v. BELGIUM, 20 February 1996, § 33; NIDERÖST-HUBER v. SWITZERLAND, 18 February 1997, §§ 23-24 and recently NOVO AND SILVA v. PORTUGAL, 25 September 2012, § 54.
[3] *See* NIDERÖST-HUBER v. SWITZERLAND, 18 February 1997, §§ 26-32.
[4] *See* ZIEGLER v. SWITZERLAND, 21 February 2012, § 38.

ECJ rules that 2006 Data Retention Directive is invalid for breaching right to privacy and protection of personal data

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On April 8th, 2014, the Grand Chamber of the Court of Justice of the European Union ("ECJ") issued a judgment declaring Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, to be invalid. In response to two requests for a preliminary ruling, from the High Court (Ireland) and the Verfassungsgerichtshof (Austria)[1], the Court held that Directive 2006/24/EC did not comply with the principle of proportionality in light of Articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union (the "Charter")[2].

Directive 2006/24/EC (the "Data Retention Directive", or "Directive") harmonised Member-State rules on the retention, by providers of publicly available electronic communications services or public communications networks, of certain traffic and location data related to fixed and mobile communications, internet access, e-mail and internet telephony. The aim was to ensure that the data in question remains available for purposes related to the investigation, detection and prosecution of serious crime, such as organised crime and terrorism.

The Directive covers an extensive array of traffic and location data, pertaining to communications by both legal entities and natural persons. Under Articles 3 and 5 of the Data Retention Directive, the data which providers must retain include data necessary to trace and identify the source of a communication, as well as its destination, to identify the date, time, duration and type of communication, to identify user's communication equipment and the location of mobile handsets. Relevant information in this context consists of, among others, the name and address of the subscriber or registered user, the calling telephone number, the number called and the IP address for internet services.

Pursuant to Articles 1(2) and 5(2) of the Data Retention Directive, no data pertaining to the actual content of any communications may be retained. Nevertheless, as noted by the ECJ, the data which are to be retained make it possible "*…to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place*" as well as "*the frequency of the communications of the subscriber or registered user with certain persons during a given period*" (paragraph 26). The Court added that these data, taken as a whole, "*…may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them*" (paragraph 27).

The Court held that the retention of data required by the Data Retention Directive constituted a particularly serious interference with the rights to the respect for private and family life and to the protection of personal data, guaranteed by Articles 7 and 8, respectively, of the Charter. The ECJ

The Court held that the retention of data required by the Data Retention Directive constituted a particularly serious interference with the rights to the respect for private and family life and to the protection of personal data.

[1] Joined Cases C-293/12 and C-594/12
[2] (2010/C 83/02)

THE ECJ RULED THAT THE DATA RETENTION DIRECTIVE EXCEEDS THE LIMITS IMPOSED BY COMPLIANCE WITH THE PRINCIPLE OF PROPORTIONALITY AND IS, THEREFORE, INVALID.

went on to consider that the Data Retention Directive did not adversely affect the essence of those rights and that the retention of data in accordance with the Directive genuinely satisfies an objective of general interest (to contribute to the fight against serious crime and, ultimately, to public security).

However, the Court concluded that the interference with those rights resulting from the Directive failed the test of proportionality, according to which the acts of EU institutions must not exceed the limits of what is appropriate and necessary in order to achieve their legitimate objectives. And here the ECJ identified three main issues affecting the Data Retention Directive.

First, the Court noted that the Directive covers "*…all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception…*" and applies "*even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime*" (paragraphs 57/58). In addition the Directive does not require, also, "*…any relationship between the data whose retention is provided for and a threat to public security*" (paragraph 59).

Secondly, the Data Retention Directive "*fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use*" or by which "*the number of persons authorised to access and subsequently use the data retained is limited to what is strictly necessary in the light of the objective pursued*" (paragraphs 60/61). Above all, "*the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body*" (paragraph 61).

Thirdly, Article 6 of the Directive sets a data retention period ranging from a minimum of 6 months to a maximum of 24 months but does not state that determination of the specific retention period must be based on objective criteria to ensure it is limited to what is strictly necessary.

The Court concluded that the Directive (i) does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter; (ii) does not provide for sufficient safeguards to ensure effective protection of the data retained against the risk of abuse and against unlawful access and use of that data; (iii) and does not ensure the irreversible destruction of the data at the end of the data retention period.

In light of these considerations, the ECJ ruled that the Data Retention Directive exceeds the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter and is, therefore, invalid.

Regarding the effects of this ruling, although a judgment given under Article 267 of the Treaty declaring an act of an EU institution to be void is directly addressed only to the national courts that requested the preliminary ruling, "*it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give*"[3]. As such, this finding that the Data Retention Directive is invalid should be respected by other national courts. In addition, and in light of the principle of uniform application of EU law, national courts must also give due consideration to this ruling by the ECJ when applying the national legislative instruments that implemented the Directive (in the case of Portugal, Law no. 32/2008, of 17 July). ■

[3] ECJ judgment of 13.05.1981, Case 66/80 – ICC v. Amministrazione delle Finanze, ECR 1191

Court of Justice restricts access to Documents in Antitrust Cases

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The Court of Justice of the European Union recently decided to restrict third party access to documents in antitrust cases (in particular by damages claimants) under the EU general rules on access to administrative documents, by overruling a judgement of the EU General Court regarding an access request to the Commission's file in the *gas insulated switchgear cartel*[1]. Companies harmed by illicit behaviour will have to rely on specific competition law rules on access to documents, such as those of the future EU damages actions directive.

The Transparency Regulation and the Document access request

Following a 2007 Commission infringement decision fining several electrical components international companies (such as Siemens and ABB) for participating in a cartel regarding gas insulated switchgear, EnBW, a German energy distribution company, requested the Commission to provide access to the documents in the Commissions' file in order to support a judicial damages claim action before the national courts for harm caused by the concerted practices of price fixing and market sharing. This request was based on the general right of access to documents of the European Union institutions enshrined in Regulation (CE) no. 1049/2001("Transparency Regulation").

The Transparency Regulation establishes a general right of access by the public to documents of the European institutions. In order to guarantee the "widest possible access" to documents, the exceptions to the general rule of accessibility to institution's documents are exhaustive and are usually applied restrictively by the European courts. Among the exceptions, the possibility of refusal is granted to the institutions in cases where disclosure would undermine the protection of *(i)* commercial interest of a natural or legal person; *(ii)* court proceedings and legal advice; e *(iii)* the purpose of inspections, investigations and audits, unless there is an overriding public interest in the disclosure.

The Commission denied, in June 2008, access to the documents in the file (including documents submitted by the defendants in their leniency applications), arguing that the categories of documents requested by EnBW were covered by the exceptions provided by the Transparency Regulation, in particular those relating to the protections of business secrets and the inquiry activities of the Commission. Nonetheless, the General Court annulled the decision in May 2012, concluding that the Commission could not rely in a presumption of applicability of the exceptions and should have undertaken a concrete and individual examination of the application of the exception to each document concerned. The Commission disagreed with the General Court's judgement and filed an appeal to the Court of Justice.

The decision of the Court of Justice

The judgement of the Court concerns, essentially, the question of whether the Commission, when denying access to the file in antitrust cases to third parties harmed by the prohibited conducts (in order to substantiate their damages claims), can rely on a general presumption that all the documents

Is there a presumption that documents from a case concerning restrictive pratices are covered by the exception to the "transparency regulation"?

[1] Decision of 27 of March 2014 in case C-365/12 P *Commission/EnBW Energie Baden-Württemberg* and decision of the General Court of 22 of May 2012 in case T-344/08, *EnBW/Commission.*

THE ECJ AIMED AT PROTECTING THE LENIENCY REGIME.

in the file are covered by the exceptions in the Regulation or, on the contrary, the Commission must undertake a concrete and individual examination of each document.

According to the Court, the Commission has the right to assume that disclosure of documents in antitrust cases may, in principle, undermine the protection of commercial interests of the companies involved in the cartel proceedings, as well as the Commission's investigation activities. The Court noted that antitrust proceedings are regulated by specific rules which pursue different objectives from the those safeguarded by the Transparency Regulation, and that the Commission must ensure the respect of the rights of defence of the parties concerned and the diligent handling of complaints, as well as the respect for the obligation of professional secrecy.

The Court of Justice thus concluded for the existence of a general presumption that the documents comprised in Commission proceedings relating to Article 101 TFEU violations are covered by the exceptions established by the Transparency Regulation (similarly to its previous case law relating to state aid and merger control), allowing the Commission to deny access to those documents, unless if the third party rebuts the presumption and demonstrates that there is an overriding public interest in the disclosure of a certain document.

Commentary

THE FUTURE EU DIRECTIVE WILL PROVIDE FOR THE RIGHT OF PARTIES INJURED BY A CARTEL TO OBTAIN DOCUMENTS.

In the specific case of access to documents in cartel cases, there is a tension between the general right of access to documents of the EU Institutions, established by the Transparency Regulation (especially relevant in this case, considering that the documents were instrumental for exercising the right of compensation of parties injured by cartel practices, recognised by settled case law of the Court of Justice) and, on the other hand, the need to preserve the effectiveness of the leniency procedure and, ultimately, of the Commission investigations in cartel cases.

The leniency procedure, through which companies that participated in cartel can obtain immunity or reduction in the fine should they provide evidence of the existence of the illegal conduct, is a fundamental tool in cartel investigations, by allowing the Commission to become aware of the existence of agreements or concerted practices which would, otherwise, hardly be discovered.

The judgment of the Court of Justice, by excluding the application of the Transparency Regulation (applicable in general to the documents of the European Institutions), clearly favoured the safeguard of the leniency procedure.

In any case, and even though this decision apparently seems to have made the access to documents by parties injured by cartel conducts more difficult, the Court may have in fact been aware of the more favourable access rules of the upcoming EU directive on damages actions for competition law infringements. The future directive will very likely establish the right to obtain the elements necessary to prove the existence of the illegal conduct, both directly from the participants in the cartel as well as from the competition authorities (not even excluding, in certain cases, the disclosure of leniency application or settlement proposals). It is expected that, further to the recent political agreement of the European Parliament and the of Council, the new directive will be adopted in the next few months[2]. ■

[2] Cfr. Commissioner Almunia's speech of 3 of April de 2014 (SPEECH/14/281) and the approval in First Reading by the Parliament on 17 April 2014.

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SPECIAL CONTRIBUTION MATTOS FILHO ADVOGADOS

CADE proposes amendments to the Brazilian Merger Control Regulation

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On February 19, 2014, the Administrative Council for Economic Defense (CADE) published for consultation proposed amendments to the Brazilian merger control regulation. Comments and contributions could be sent to CADE until April 22th. The proposed amendments aim at clarifying specific issues related to the type of transactions that are subject to mandatory filing with CADE, as well as to render a greater level of transparency to Brazil's merger review procedure.

CADE will review the comments that have been submitted over the past months, and will publish the final wording of the amendments in Brazil's Official Gazette. For the moment there are no estimates of when the amendments will be published.

Main amendments concerning the types of transactions subject to CADE's approval

Acquisitions of Minority Shareholding and Convertible Debentures

The proposed amendments bring the following relevant changes to the list of acquisitions of minority shareholding subject to merger control in Brazil:

(i) The exclusion of the obligation to notify transactions concerning the consolidation of control by the controller.

(ii) The obligation to notify the acquisition of convertible debentures that may result in (a) the acquisition or change of control; (b) the acquisition of 20% or more of the voting or total shares of the invested company, if the parties are not competitors or active in vertically related markets; or (c) the acquisition of 5% or more, if the parties are competitors or have activities in vertically related markets. The draft also allows CADE to determine that, once the investor decides to convert the debentures into shares, a new filing is required.

Collaborative Agreements

Pursuant to Article 90, IV of the new Brazilian Competition Law (Law No. 12,529 of 30 November 2011), collaborative agreements are subject to mandatory filing. The lack of clear guidelines on the definition of "collaborative agreements" has rendered an undesirable level of uncertainty since Law No. 12,529/2011 came into force. In view of this, one of the proposed amendments aims at clarifying the transactions that fall within the "collaborative agreements" concept.

CADE proposes that the following transactions shall be subject to mandatory filing, provided the turnover thresholds set forth in the new Competition Law are met:

(i) Any agreement between competitors; and

(ii) Agreements between companies that are active in vertically related markets, as long as one of the parties holds at least a 20% market share in one of the relevant markets and at least one of the following conditions is met: (a) the parties to the agreement will share revenues and costs in the context of that specific agreement, or (b) there is a formal or a de facto exclusive relationship between the parties in the context of the agreement.

Economic Groups concerning Investment Funds

Under the current merger regulation, the definition of economic group in cases involving investment funds comprises (a) the manager/sponsor; (b) the investment funds under the same management/sponsorship; (c) the investors directly or indirectly holding 20% or more of at least one of the manager/sponsor's funds; and (d) the entities in which the funds hold more than 20% interest. This rule captures a high number of entities and, as a consequence, an excessive volume of information to be submitted to CADE.

CADE proposes that the manager/sponsor and the funds under the same management/sponsorship which are not directly related to the transaction shall not be considered for antitrust filing purposes. Notwithstanding, the portfolio

companies in which the funds under the same management as the funds directly involved in the transaction hold at least 20% stake would continue to be considered. Also, the portfolio companies in which the funds directly involved in the transaction hold at least 20% stake shall be considered. The economic groups of the investors directly or indirectly holding 20% or more of funds involved in the transaction would also continue to be considered in the definition of economic group for notification purposes.

Main amendments concerning the merger review procedure

Acquisitions through the Stock Exchange
Under Article 109 of CADE's Internal Regulations (CADE's Resolution No. 1, dated May 29, 2012), public takeovers may be notified as of their publication, and may be concluded before CADE's clearance.
One of CADE's suggestions is to clarify that all transactions performed through the stock market – and not just public takeovers – fall within the rule of Article 109. One must note that, in these cases, if the turnover thresholds are met, the buyer shall refrain from exercising political rights derived from the shares acquired until final antitrust clearance; except when authorized by CADE.

Transactions Subject to the Summary Procedure
A positive aspect of the proposed amendments is the expansion of the list of transactions that may be reviewed under the summary procedure, which is considerably simpler and faster than the regular procedure. The current rules establish that only transactions resulting in combined market shares below 20% are eligible to the fast track procedure, as well as those in which none of the groups involved holds at least 20% market share in one of the vertically related markets.

CADE suggests the following new criteria for the eligibility to the summary procedure:

(i) Transactions resulting in combined market shares between over 20%, and 50%, provided the increment in market share is not relevant; and

(ii) Transactions in which the parties or groups involved hold at least 30% market share in one of the vertically related markets.

Recently, CADE's President Vinicius Marques de Carvalho, when addressing the proposed amendments to merger regulations, raised the possibility of including transactions concerning the resulting the transfer of rights and obligations related to concession agreements for the exploration of oil and gas in the list of transactions that may benefit from the summary, as they usually do not raise competition concerns.

Second review by the Tribunal
Finally, CADE also sought to give more transparency and legal certainty to the procedures for the Tribunal to request a case that has been approved by the General Superintendence for a second review. Recent experience has shown that, at the moment, there is no clear consensus on the correct interpretation of the applicable rules for the procedure. CADE's draft clarifies that:

(i) The decision should be made by reasoned request from a Commissioner within fifteen days, counted from the publication of the General Superintendence's clearance decision.

(ii) The request for second review must be confirmed by CADE's Tribunal at the first hearing session immediately following the date on which the request is made. The Tribunal is not bound by the decision issued by the General Superintendence. ■