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SOCIEDADE DE ADVOGADOS

NEWSLETTER

ISSN 1647-272
NO. 22
OCTOBER 2015

EU AND COMPETITION LAW

IN THIS EDITION

ARTICLES

SPECIAL CONTRIBUTION: MATTOS FILHO

CJEU finds purchase of Member State government bonds by ESCB to be compatible with EU law

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By its decision on 16 June 2015 in the *Gauweiler* case,[1] the Court of Justice of the European Union ("CJEU") found the *Outright Monetary Transactions* programme ("OMT"), which had been announced by the European Central Bank ("ECB") in September 2012, to be compatible with the EU Treaties.

The case was brought up before the CJEU for a preliminary ruling requested by the German Constitutional Court – the first preliminary ruling of the CJEU ever requested by that constitutional court – in which it referred several questions regarding the compatibility of the aforementioned programme with the range of powers granted to the European System of Central Banks ("ESCB"), as determined in the Treaties, the prohibition on monetary financing of the Member States and the principle of proportionality.

The OMT programme grants the ESCB the possibility to purchase government bonds from Eurozone Member States in the secondary market, provided that certain conditions are verified. The programme was announced following the statement by Mario Draghi that the ECB, within its mandate, was ready to do whatever it took to preserve the euro.[2]

This programme for the purchase of government bonds is intended to promote a better functioning of the mechanisms for the transmission of the monetary policy's impulses to other sectors of the economy. According to the ECB, the difference in the interest rates associated with the government bonds of each Eurozone country, as well as their volatility, would undermine the monetary policy transmission and hinder the singleness of the policy in the EU.

As it is stated by the CJEU, even though the OMT programme may have effects on the stability of the Eurozone, which, according to the Treaties, is an issue for the EU's economic policy, the primary objective of the programme is of a monetary nature, aiming to safeguard the singleness of this policy as well as the transmission of its impulses. According to the CJEU, "*a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area*". Therefore, as a measure within the monetary policy of the EU, it is considered to be under the scope of powers of the ESCB.

With regard to an alleged violation of the monetary financing of Member States' prohibition, the CJEU reasoned that such prohibition does not inhibit the adoption of the OMT programme, under its proposed terms, given that the programme does not entail the acquisition of government bonds directly from the Member States but rather only allows their purchase in the secondary market.

The CJEU warns that the purchase of government bonds in the secondary market may, nonetheless, produce an equivalent effect to the purchase in the primary market, and therefore circumvent the prohibition of monetary financing of Member States, in the event the potential purchasers in the primary market "*knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.*" However, the CJEU considered that the specific conditions established by the ECB for the use of this purchase mechanism, namely concerning the minimum interval period between the issuing of government bonds in the primary market and its repurchase, constitute adequate safeguards to deter such potential equivalent effect.

Lastly, the measure also passed the proportionality test, insofar as it is restricted to a limited amount of government bonds issued only by Member States which have been selected according with predetermined criteria. On the other hand, in accordance with the ECB, this mechanism would only be implemented if the economic situation in the Eurozone so required.

This decision of the CJEU places the German Constitutional Court in a delicate position given that the questions referred for preliminary ruling indicated that court's position towards the incompatibility of the OMT programme with EU law. Considering the favourable ruling to the ECB by the CJEU, we shall now wait to see how the German Constitutional Court will apply this decision to the case under its assessment.

It should also be noted that, with this decision, the CJEU appears to be inverting its seemingly previous unwillingness to take a firm stand on issues regarding the ECB and its competence, hereby reinforcing its role in the application and interpretation of the Treaties. ■

[1] Case C-62/14 *Gauweiler v Deutscher Bundestag* [2015] available at http://curia.europa.eu.
[2] Speech of the President of the European Central Bank Mario Draghi at the *Global Investment Conference* in London, 26.07.2012.

National Port Sector targeted by the Portuguese Competition Authority

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Introduction

Competition in the national port sector is the subject matter of a recent study by the Portuguese Competition Authority ("PCA"), carried out under the latter's supervisory powers and put to public consultation between 13.07.2015 and 30.09.2015. Simultaneously with the announcement of the public consultation, the PCA carried out surprise inspections on the premises of companies located in the ports of Viana do Castelo, Lisbon, Setúbal and Sines, in the context of an investigation into cartel suspicions , allegedly in the form of market partitioning, in the port services sector.

The two initiatives, albeit of a very different legal nature (only the second one refers to an administrative offence procedure), show that the Portuguese Port Sector is currently under the close scrutiny of the PCA.

The study and its proposed recommendations

The study identifies "symptoms" of inefficient functioning of the sector as well as several competitive constraints as possible underlying causes, amongst which (i) supply-side concentration, (ii) high installed capacity utilization rate observed in several port infrastructures (and associated risks of bottlenecks); (iii) different levels of specialization of port infrastructures (and consequent softening of competition between them); (iv) high barriers to entry; (v) vertical integration of certain port operators; (vi) absence of countervailing buyer power by users of port infrastructures.

The analysis undertaken by the PCA resulted in a series of recommendations aimed at promoting the efficiency, quality, and competitiveness of national ports.

The first recommendation concerns **the governance model for the port sector**.

It points to the need for clear separation between the activities of regulation, port administration, provision of services and operation of port terminals, and for the attribution of regulation functions to the Authority for Mobility and Transports, the new sector-specific regulator. Port administrations should have as main goals for their activity the promotion of an efficient use of infrastructures, of port services performance, and of value for money generated for port users. This, in turn, requires effective competition between port terminals and between port service providers as well as reduction of the rents charged (to a level that is strictly necessary to assure the economic and financial sustainability of port administrations and their ability to finance investments).

The PCA further recommends that port administrations periodically disclose indicators of efficiency and productivity of ports and port terminals that allow for a comparison of performance between national and international ports.

The second recommendation refers to **the concession model**.

Concession proceedings and contracts should be designed so as to secure effective competition between candidates and should assure a more frequent "return" of the concession to the market.

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In this respect, the PCA's recommendations include - in line with the principles and solution established in Directive 2014/23/EU on the award of concession contracts - (i) the setting of contract duration strictly in light of the timing required for recoupment of the investment (in certain cases even below such timeframe, against adequate compensation to the concession holder), (ii) anticipated contract termination mechanisms, (iii) an effective transfer of risk to the concession holder, (iv) the launching of new tender procedures in case of substantial modifications to the concession, and (v) proportionate, non-discriminatory and equitable criteria for the awards. The PCA further recommends that port authorities should be granted the power to exclude certain candidates whenever competitive conditions in the market are at risk.

The third recommendation concerns **the rent model**.

The recommendations proposed by the PCA cover different stages of the port sector value chain and correspond to an attempt to carry out a profound intervention in a sector that is of high strategic value to the national economy

The PCA recommends a reduction in the level of remunerations earned by port administrations, in particular, a reduction of variable rents. Indeed, a reduction in the level of variable rents is expected to result in lower marginal or variable costs for concession holders, which would allow the latter to charge lower the prices downstream. In addition, a decrease in the weight of variable rents is also recommended as such a modification would have the advantage of decreasing the level of risk undertaken by port administration regarding demand fluctuations on the one hand, and, on the other hand, increasing the incentives of port operators to attract additional cargo.

Finally, it is suggested that these principles apply already in renegotiation processes for existing concession contracts, provided however that any reduction of the rents charged should have as countermeasure a reduction of the duration of the concession.

The forth recommendation concerns **the liberalization of access to port services**.

It advocates in favour of a general rule of freedom of access to port services and limitations in the number of services providers as the exception. Said limitations should be justified only in case of space limitations, in which case a number of at least two service providers for each type of service (selected pursuant to competitive tenders and for short-terms contracts) should always be retained. Another possible justification for limiting freedom of access might be the need to impose public service obligations.

Finally, measures should be adopted to ensure **the pass-through of costs along the value chain**, so that reductions achieved upstream translate into benefits downstream. To that effect, contract mechanism linking incentives to performance should be created, e.g., by including in concession contracts performance indicators and specific objectives in terms of cargo movements and level of use of infrastructure (alongside with the respective penalties and premiums) and port administrations should implement a system of effective monitoring of compliance with those indicators and objectives.

Comment

The recommendations proposed by the PCA cover different stages of the port sector value chain and correspond to an attempt to carry out a profound intervention in a sector that is of high strategic value to the national economy.

At present, the results of the public consultation are not yet known and there is also no public calendar for the PCA's analysis of the contributions and potential modifications to the conclusions of the study.

Once the final recommendations are issued, the PCA may, according to the law, monitor compliance with the recommendations and request from the addressees all information necessary to assess their implementation. ■

European Court of Human Rights finds that antitrust inspections and seizures at company's premises by competition authorities require specific review of proportionality and detailed judicial review

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The European Court of Human Rights, in case *Vinci Construction and GTM Génie Civil et Services v. France*, registered under applications no. 63629/10 and 60567/10, by judgment of 2 April 2015[1], condemned France for breach of Articles 6(1) (right to a fair trial)[2] and 8 (right to respect for private and family life, home, and correspondence)[3] of the European Convention on Human Rights (***ECHR***).

The applicants before the Court, *Vinci Construction and GTM Génie Civil et Services*, are companies based in France.

This case concerned inspections and seizures carried out at the referred companies' premises on 23 October 2007, in the context of administrative antitrust proceedings which were opened by the French Department for Competition, Consumer Affairs, and Fraud Prevention (***DGCCRF***)[4] and concerned alleged anti-competitive conduct adopted by the companies. Such inspections and seizures were authorised by the liberties and detention judge of the Paris *tribunal de grande instance* (***LDJ***) on 5 October 2007 and resulted in the seizure of several documents and computer files, as well as of the entire contents of e-mail accounts of certain employees of the applicant companies.

On appeals before the LDJ, the companies in question argued that the seizures conducted by the DGCCRF had been widespread and indiscriminate and included many documents unrelated to the investigation or protected by legal professional privilege. The applicants had also argued that they were not able to inspect the content of the seized documents prior to their seizure and therefore were unable to properly exercise their right of defence. The LDJ dismissed all the claims put forward by the applicant companies. Further appeals before the *Cour de cassation* were also dismissed by two judgments of 8 April 2010.

In this context, the applicant companies lodged a complaint before the European Court of Human Rights relying, *inter alia*, on Articles 6(1) and 8 ECHR, claiming that their right to an effective remedy was violated considering that *(i)* they were not able to lodge a full appeal against the LDJ decision authorising

This judgement of the European Court of Human Rights is particularly relevant, as it highlights the necessity of detailed judicial examination and specific review of proportionality regarding the lawfulness of searches and seizures in the context of antitrust investigations where the companies concerned are not able to inspect the content of the material being seized or to discuss the pertinence of their seizure, in particular in cases where documents unrelated to the investigation or covered by lawyer-client privilege are seized by the competent competition authorities

[1] Ruling accessed and available at http://www.echr.coe.int/Pages/home.aspx?p=home&c=.
[2] ECHR Article 6(1), under the title "**Right to a fair trial**", states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
[3] ECHR Article 8, under the title "**Right to respect for private and family life**", states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[4] *Direction générale de la concurrence, de la consommation et de la répression des fraudes.*

The European Court of Human Rights highlighted the necessity to provide companies with the possibility of effective judicial review of the lawfulness of a seizure

the inspections and seizures, and *(ii)* these can only be challenged before the judge that authorised them who, in the applicant companies' opinion, lacked the necessary impartiality. Furthermore, they also qualified the seizures at issue as a disproportionate interference with their defence rights and with the right to respect for home, private life and correspondence, considering widespread and indiscriminate nature of such seizures, which included, in particular, documents protected by legal professional privilege.

With regard to Article 6(1) ECHR, the Court in the April 2015 judgment considered that the French law at the time did not provide the possibility of effective judicial review of a decision by the LDJ authorising inspections and seizures, and therefore upheld the applicants' complaint in this matter.

In respect of Article 8 ECHR, although the Strasbourg Court considered that the search and seizure in question was in line with the requirements provided therein – inter alia, an interference in accordance with the applicable national law, based on legitimate aims of protecting the economic well-being of the country and preventing disorder of crime – it also noted that the seized material included several documents non-related to the investigation and other protected by legal professional privilege and the fact that the applicant companies had not been able to inspect the content of the documents being seized or to discuss the pertinence of their seizure during the inspection conducted by the DGCCRF.

In this regard, the European Court of Human Rights highlighted the necessity to provide the companies in question with the possibility of effective judicial review of the lawfulness of such seizure and found that in the appeal lodged by the companies the LDJ had merely examined the formal regularity of the seizures, without carrying a detailed review of the actual circumstances in which they were performed.

In the view of the Court, the LDJ was required to rule on what would happen to the documents unrelated to the investigation and to those covered by legal professional privilege after conducting a detailed examination and a specific review of proportionality, and subsequently to order their restitution where applicable. Therefore, it found that the inspections and seizures conducted by the DGCCRF at the applicant companies' premises were disproportionate in breach of Article 8 ECHR. ■

TeliaSonera and Telenor abandon Danish merger: what can this case signal for further in-country consolidation in the telecom sector?

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On 11 September 2015, TeliaSonera and Telenor announced they were abandoning their plans to merge their fixed and mobile business units in Denmark. The merger, involving the establishment of a full-function joint venture encompassing the activities of TeliaSonera AB and Telenor ASA in Denmark, had been notified to the European Commission on 27 February 2015[1], and was undergoing a Phase II in-depth investigation during which the parties had already submitted proposals for remedies.

Although details of the Commission's assessment of the transaction are not known, several aspects from this case raise questions as to how similar mergers between players in the European telecom sector will be decided in future.

According to a statement by Commissioner Vestager[2], the main issue underlying the Commission's concerns about a possible negative impact on competition was the fact that, in the mobile telecommunications market, the merger would reduce the number of mobile network operators from four to three. Apparently, the remedies offered by the merging parties were insufficient to allay the competition concerns surrounding the transaction: "Every case has to be assessed on its own facts and merits. In this specific case, based on the Commission's in-depth analysis and evidence gathered, we are convinced that the significant competition concerns required an equally significant remedy. *This means the creation of a fourth mobile network operator*. What the parties offered was not sufficient to avoid harm to competition in Danish mobile markets".

This structural concern had already been spelled out in April, when the Commission decided to open an in-depth investigation of this merger. According to its press release at the time[3], the Commission feared that, in the Danish mobile markets, the merged entity might not face a sufficient competitive constraint from the two remaining mobile network operators (MNOs): "The proposed transaction would combine the number two and number three operators in the mobile retail market and would reduce the number of Mobile Network Operators in Denmark from four to three. It would create the largest player both in terms of revenue and number of subscribers, followed by similar-sized TDC and smaller player Hi3G".

As a result, the Commission voiced concerns that the merger would reduce the incentives for the remaining MNOs to compete, leading to higher prices, loss of innovative offers and lower quality. In particular, the Commission pointed out that the merger would result in a highly concentrated market structure with two large and symmetric operators at the retail and wholesale levels, which could lead to coordination between the remaining mobile operators.

It is reported that the merging parties had offered to sell two blocks of 2100MHz spectrum and to rent up to 15% of their combined network capacity to a new player. At a later stage, the remedies package was apparently reinforced with an offer to sell up

Several aspects from this case raise questions as to how similar mergers between players in the European telecom sector will be decided in future

[1] Case M.7419 TeliaSonera/Telenor/JV.
[2] Statement/15/5627, dated 11 September 2015 - http://europa.eu/rapid/press-release_STATEMENT-15-5627_en.htm.
[3] IP/15/4749 – http://europa.eu/rapid/press-release_IP-15-4749_en.htm.

In this merger between Danish mobile operators, the Commission has shown a bias in favor of a market structure with at least 4 MNOs. This may affect its assessment of other mobile communications mergers that also reduce the number of market players to only 3 network operators

to 40% of their joint network infrastructure unit TT-Netvaerket to a new rival, who would also be given access to the joint venture's network technologies and be allowed to sell network capacity on a wholesale basis.

The Commission's stance in this case, focusing on the importance of a market structure including at least four MNOs, seems to contradict its previous decisions in several 4-3 mobile mergers.

In 2014, the Commission cleared two high-profile mergers that also involved reducing the number of MNOs from 4-3 in their respective Member-States.

In the H3G/Telefonica Ireland case[4], the Commission issued a conditional clearance decision based on several commitments offered by the merging parties, including an upfront mobile virtual network operator (MVNO) with an innovative capacity-based model, involving a commitment from the new entrant to purchase a minimum of network capacity (up to 30%) from the merged entity. In the Telefonica Deutschland/E-Plus case[5], the Commission also conditionally cleared the transaction, subject to several commitments including a capacity-based MVNO remedy similar to the Irish case.

But there are less recent examples of similar clearance decisions in 4-3 mobile merger cases: the T-Mobile/Orange Netherlands merger was unconditionally cleared in 2007[6] and the H3G Austria / Orange Austria merger received conditional clearance in late 2012[7], subject to a remedies package including the divestment of spectrum to a new MNO and the provision of wholesale network access to several MVNOs.

Although its exact assessment of the transaction (based on the specific facts of the Danish mobile market) is not known, the Commission's apparent insistence on a mobile market structure with at least four network operators, in the face of spectrum divestment and wholesale access remedies, goes against the general trend of its previous decisions regarding mobile mergers in much larger markets than Denmark.

This may signal difficulties for other 4-3 mobile mergers subject to the Commission's approval. In the UK, Hutchison Whampoa is in the process of buying the mobile operator O2 from Telefónica[8] and, in Italy, Hutchison has recently agreed to a joint venture between its 3 Italia operations and Wind Telecommunicazioni, held by Vimpelcom.

It will be interesting to see how, if at all, this more structural (or static) approach by the Commission will affect merger control policy in other cases involving mobile network operators. Furthermore, to the extent that this Danish case leads to a greater regulatory hurdle for in-country consolidation between mobile operators, it remains to be seen what impact this may have on the volume of cross-border transactions in the telecom sector. ■

[4] Case M.6992 Hutchison 3G UK/Telefonica Ireland, cleared subject to conditions and obligations on 28.05.2014.
[5] Case M.7018 - Telefonica Deutschland/E-Plus, cleared subject to conditions and obligations on 02.07.2014.
[6] Case M.4748 T-Mobile/Orange Netherlands, cleared unconditionally (phase I) on 20.08.2007.
[7] Case M.6497 Hutchison 3G Austria/Orange Austria, cleared subject to conditions and obligations on 12.12.2012.
[8] Case M.7612 Hutchison 3G UK / Telefonica UK (notified to the Commission on 11.09.2015).

Breaching the duty to make a preliminary reference to the ECJ: *Silva e Brito v. Portugal* and the civil liability of member states

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A reference for a preliminary ruling from a Lisbon court gave the Court of Justice of the European Union ("Court of Justice") the opportunity to clarify, in *Silva e Brito v. Portugal*[1], the extent of the duty of national higher courts to make a reference for a preliminary ruling to the ECJ on the interpretation of European Union ("EU") law.

In a landmark judgment, the Court of Justice also analysed the compatibility of a national prevision requiring the prior annulment of a national court decision infringing EU law before a damages claim based on such breach can be brought by injured parties against the Member State.

The proceedings before the national court

At the origin of the case is a series of contradictory decisions by Portuguese courts on a dismissal of workers of the airline Air Atlantis in the context of the company's winding up in 1993. A final appeal was decided by the *Supremo Tribunal de Justiça* ("STJ"), which rejected the workers' claims and declared the lawfulness of the dismissal.

The main contentious issue was the interpretation of the concept of "transfer of business", presently defined by EU Directive 2001/23/EC[2]. Although this concept had already been the object of differing interpretations by the lower courts in the proceedings, the STJ considered that no "*relevant doubt*" arose in the interpretation of the directive, and rejected the appellant's request to refer a question for preliminary ruling to the Court of Justice. (Under Article 267 of the Treaty on the Functioning of the European Union, national courts against whose decisions there is no judicial remedy under national law are under the duty to make a request for a preliminary ruling when faced with a question on the interpretation of EU law relevant for the outcome of the proceedings.)

The workers then brought an action for damages against the Portuguese State, based on the erroneous interpretation of a EU law concept, as well as on the violation by the STJ of the duty to refer the case to the Court of the Justice. The competent national court (*Varas Cíveis de Lisboa*) decided to stay the proceedings and to refer three questions for a preliminary ruling.

The STJ's duty to make a reference for a preliminary ruling

On the first question, regarding the interpretation of Directive2001/23/EC, the Court of Justice disagreed with the STJ, concluding that the situation at stake indeed involved a "transfer of business": TAP Air Portugal (Air Atlantis' parent company, that had decided to wind up its subsidiary) was itself active in the aviation sector, had notably succeeded Air Atlantis in aircraft leasing agreements and charter agreements with travel agents, and had reinstated a number of employees seconded to Air Atlantis to perform identical functions.

Moving to the second question, the Court then recalled that when a national appeals court whose decisions cannot be subject to further review is faced with a question of interpretation of EU law, such court must comply with its obligation to refer the question to the Court of Justice, unless it *has established that the question raised is irrelevant, the provision of EU law concerned has already been interpreted by the Court of Justice or the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.*

> This judgment bears important consequences for the practice of the High Courts and the liability of the State for illegal judicial decisions

Although acknowledging that the mere existence of prior contradictory decisions is not, in principle, sufficient to impose on the national appeals court a duty to make a preliminary reference, the Court of Justice considered that the EU provision at hand involved not only *difficulties of interpretation*, but also the *risk of divergences in judicial decisions* within the European Union. For the Court, when a European law concept is characterised both by *conflicting lines of case law at the national level* and by *recurring difficulties of interpretation* in several Member States (as it was the case), the national court is bound to make a reference in order to avert the risk of an incorrect interpretation of EU law.

[1] Judgement of 9 September 2015 in case C-160/14, *João Filipe Ferreira da Silva e Brito and others v. Estado Português*, not yet reported.
[2] Directive 2001/23/EC of the Council, of March 12, 2001 (OJ L 82, p.16) codifying Directive 77/187/EEC of the Council, as amended.
[3] Law no. 67/2007, of 31 December 2007, establishing the rules on the non-contractual civil liability of the State and other public bodies.

State liability for national court decisions in breach of EU law

Pursuant to Article 13 (2) of the Portuguese Regime on the Civil Liability of the State[3], a claim for damages in respect of illegal judicial decisions is conditional upon the prior annulment of the court decision that caused the loss or damage. In the damages action brought by Air Atlantis's employees, the Portuguese State claimed that, because the STJ's decision had not been annulled, the applicants did not have the right to compensation.

Under settled case law, the reparation of damages suffered as a consequence of the violation of EU law is entrusted to the national courts, deciding on the basis of national procedural rules, provided that these are not less favourable than those relating to similar domestic claims (*principle of equivalence*), and do not make it, in practice, impossible or excessively difficult to obtain reparation (*principle of effectiveness*).

The issue with the legal provision at issue is that, as a rule, judgments of the STJ cannot be appealed, which means that, other than in exceptional circumstances (apparently not applicable in the proceedings at issue), these decisions cannot be set aside. For this reason, the Court of Justice had no doubt in declaring that the provision under analysis may make it *excessively difficult to obtain reparation for the loss or damage caused by the infringement of EU law in question*.

The Court of Justice also rejected Portugal's claim that the mentioned national provision was necessary to ensure the principles of *res judicata* and legal certainty (arguing that if the STJ is meant to put a definite end to the proceedings under national law, its decisions cannot be appealable). In fact, a damages action against the State does not have the same purpose and does not necessarily involve the same parties as the proceedings in which the STJ decision acquired the status of *res judicata.* In any event, according with the Court of Justice, the principle of legal certainty *cannot frustrate the principle that the State should be liable for infringements of EU law*.

The judgment therefore concluded that the national provision at issue constitutes an important obstacle to the effective application of EU law, which cannot be justified by the principles invoked by the Portuguese State. Consequently its application to cases such as the one at hand is incompatible with EU law.

Comment

The *Silva e Brito v. Portugal* judgment is likely to have important implications that go beyond the present proceedings, not only for the practice of Portuguese appellate courts and their relation with the Court of Justice, but also as regards the interpretation (and future amendment) of the legal regime establishing the State's liability for illegal court decisions.

Although Portugal has been a member of the European Union for more than three decades, the Portuguese courts (with some notable exceptions, such as the *Supremo Tribunal Administrativo*) have shown themselves to be reluctant in referring questions to the Court of Justice, frequently with the reasoning that the interpretation of the EU provision at issue *is clear and does not raise doubts*.

This reluctance is apparent in the case of the STJ, which, until the end of 2014, had referred questions to the Court of Justice in only *four* proceedings; as a means of comparison, the Spanish *Tribunal Supremo* made 53 requests in the same period, and the Austrian supreme court (*Oberster Gerichtshof*), in only twenty years, made 103 requests[4].

As mentioned by Advocate-General Bot, in cases where European law provisions are characterised by a case-by-case approach (as it was the case with the concept of "transfer of business"), or where the jurisprudence of the Court of Justice is in permanent evolution, national higher courts – and in this case the STJ – should be especially *prudent* before deciding to not make a request, and should not be, in particular, *over confident in the consolidated nature of the Court's case law*.

It is therefore hoped that the *Silva e Brito v. Portugal* judgment may contribute to a closer (and beneficial) cooperation between the STJ and the Court of Justice and, in particular, to a more frequent use of the preliminary ruling mechanism (long recognised as an essential tool for the development and uniform application of EU law) in cases raising questions of interpretation of EU law relevant for settling the dispute. To this end the role of lawyers is also essential, in identifying and raising before the national judge EU law questions deserving a reference for a preliminary ruling, as in the present case.

For the moment, *Silva e Brito v. Portugal* should also lead to Portuguese courts' setting aside, in damages proceedings against the State for judicial decisions in breach of European law, the national rule requiring the annulment of the court decision causing the damage or loss, when such decision cannot be subject to further appeal.

In time, it is expected that the national regime on the State's civil liability (and in particular Article 13(2)) is once again amended. These provisions have in the past been declared incompatible with EU law by the Court of Justice, originating the first penalty payment against the Portuguese State for non-complying with a judgment of the Court of Justice (analysed in **issue 1/2008 of this Newsletter, p. 5**). ■

[4] 2014 Annual Report of the Court of Justice, pp. 123-124.

Competition Authority sends out warning against false and misleading statements

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Main takeaways

The Portuguese Competition Authority has recently set a new sanction trend by imposing its first fines for the provision of false, inaccurate or incomplete information in response to a request addressed by the Authority.

Last June, Peugeot Portugal was the first company to be sanctioned on these grounds, with a fine of EUR 150,000, in the context of "an antitrust investigation into the motor sector", which later led to the imposition of an equal fine on Ford in September.[1]

Meanwhile, during the proceedings regarding an alleged abuse of dominant position in the market for rail freight transport– which has been closed since December, 2014 – the Authority fined CP Carga in the amount of EUR 100,000.[2]

Regrettably, the press releases made public by the Authority do not clarify whether the fine levied on these three cases was so on account of false or inaccurate or incomplete information, or all the three combined. This would certainly be a relevant aspect for companies and the legal community to apprehend, since the gravity of each of such practices does not seem equivalent.

With regard to the sanctions imposed on the motor sector companies, the Authority has neither confirmed which proceedings triggered the information request that led to the wrongful response given by Peugeot and Ford, but it is possible that the case might be related to the antitrust investigation carried out into Peugeot Portugal and Ford Lusitana in June 2013 and concluded last March and July (respectively), with the imposition of commitments to deal with concerns of exclusionary vertical effects arising from the companies' extended warranty policy for motor vehicles. According to the Authority, the companies allegedly refused warranty coverage to their brand's vehicle owners when they used independent repair centres outside the authorised repair network for the maintenance of their vehicles. The Authority's preliminary assessment found that their extended warranty agreements made the activation of the warranty conditional on the selection of a repair centre within Peugeot and Ford's network of authorised repairers and thus the Authority accepted a number of commitments from the companies to change their existing restrictions.

As for CP Carga, the information request referred to the investigation of an alleged abuse of dominance by practices of predatory prices in the rail freight transport corridor of Sines-Entroncamento, which was initiated by a complaint from a competitor in June 2012. After the preliminary competition assessment, the Authority concluded that CP Carga had not priced below its average avoidable cost ("AAC") and, thus, its conduct did not constitute an abuse of dominant position.

Comment

The lack of response to a request made by the Authority in the use of its sanctioning or supervisory powers, or the provision of false, inaccurate or incomplete information following such request is a serious breach of the obligations imposed on undertakings by the competition act. Offenders are subject to a fine that may be up to 1% of their turnover in the year immediately preceding the decision.

In these cases, there is no readily available data that may help to determine the percentage of turnover that served as a basis for the calculation of the fine. In any event, it is likely that the intensity of the fine might have been reduced since this was the first time the Authority applied a such type of penalty.

Given that these were the first fines imposed by the Authority on these grounds, they provide an important precedent for future proceedings, not only in antitrust proceedings but also in the field of merger control or even market studies and enquires conducted by the Portuguese competition agency. Further, and considering that all three companies were fined over the last months, its seems the Authority is now more willing to make use of its punitive prerogatives whenever it feels companies are intentionally or negligently obstructing an investigation.

It goes without saying that this impetus needs to be carefully balanced against companies' rights of defence, in particular the right against self-incrimination. ■

[1] Press release no. 12/2015, 22.06.2015, and Press Release no. 21/2015, 22.09.2015
[2] Press release no. 15/2015, 16.07.2015.

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SPECIAL CONTRIBUTION MATTOS FILHO ADVOGADOS

CADE submits draft Competition Compliance Programs Guide

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The Administrative Council for Economic Defense (in Portuguese, "CADE") has submitted for public review a draft "Compliance Program Guide" ("Guide") through which it will provide guidelines to companies as regards the structure and benefits resulting from the adoption of violations to the economic order prevention programs – known as "compliance programs". CADE will meet with scholars, attorneys and representatives of companies to discuss the matter. Suggestions on the contents of the Guide may be submitted to CADE up to October 18.

Compliance programs help to prevent risks arising from breaches of law, maintaining the good reputation of companies and their officers and making employees aware of the importance of the topic. The Guide offers guidelines on the structuring of compliance programs that are effective in preventing and tackling anticompetitive behavior and that may be realistically adopted by small, medium and large size companies.

In accordance with the Guide, programs deemed robust demand: (i) an effective commitment with ethics by the companies through the involvement of the high managing bodies, allocation of proper resources and autonomy of the officer in charge of the program; (ii) previous assessment of the risk to which the company is liable to in its activities, prioritizing compliance activities in areas which pose greater competition risks; (iii) executing inner trainings, inserting compliance provisions in conduct codes, monitoring the program's implementation, documenting compliance activities and punishments; and (iv) a continuous review and adjustment to the program.

A thorough violation prevention program must also bear provisions on specific situations that may take place in accordance with the environment where the companies operate. The goals are to identify situations of greater violation risks and set standards to be followed in such situations. With this is mind, the Guide offers suggestions of measures to be adopted with the aim of settling competition concerns in connection with: (i) markets more subject to cartel arrangements; (ii) attendance of meetings in associations and standards setting organizations ("SSOs"); (iii) adoption of unilateral conducts aimed at excluding competitors; (iv) execution of associative agreements and *joint ventures*; and (v) merger and acquisitions transactions.

In addition to identifying risks, effective programs must allow prompt identification of any violation. This promptness may translate into several benefits to the companies, such as obtaining administrative and criminal exemption as a result of the execution of a leniency agreement. To obtain such benefit the company must be the first to present itself to CADE to convey the infraction and confess participation. Being quick is therefore essential.

Even if the company is not qualified for executing the leniency agreement, having a solid compliance program brings further advantages. One is the possibility of executing a Cease and Desist Commitment Agreement, through which the company is assured of a reduction of the expected fine in exchange for co-operation in the investigation. Although it is not sufficient to avert the possibility of imposition of penalties by CADE, compliance programs may also have a favorable impact at the setting of the applicable fine.

On the other hand, the adoption of "fake" programs - designed by the company only to pretend to have any interest in committing – may be seen as evidence of the company's bad faith. In this case, the Guide foresees the possibility of hardening the applicable fines. ■