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The scope of protection of leniency material – The ECJ judgment in case C-162/15P, *Evonik Degussa*

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Background

In 2006, the European Commission ("Commission") sanctioned Evonik Degussa GmbH ("Degussa" or "Appellant") and 16 competitors for having participated in a cartel in the hydrogen peroxide and perborate sector, which lasted for approximately six years. Degussa actively contributed to the Commission's investigation and proof of the infringement, as it was the first to give the Commission information on the functioning of the cartel under the leniency regime in force at the time. In exchange for such cooperation, Degussa was not fined.

After publishing, in 2007, a first non-confidential version of the fining decision (the "PHP decision"), the Commission decided, in 2011, to publish on its site a new non-confidential version with more details than the first one.

Degussa objected to the publication, alleging that the new version contained confidential information and that its publication would breach its legitimate expectation that the information voluntarily disclosed to the Commission under the leniency regime would not be disclosed as well as the principle of equal treatment (in respect of other cartel participants who did not cooperate with the Commission), while at the same time having an adverse effect on the Commission's investigations.

The Commission agreed to delete from the new version all the information that would allow the source of the information communicated under the leniency regime, and the names of Degussa's employees, to be identified. However, it considered that there was no reason to grant the benefit of confidentiality to the remaining information for which Degussa had requested such confidential treatment ("the contested information").

Degussa then requested the Hearing Officer – who is in charge of ensuring the effective exercise of procedure rights at the administrative stage of the proceeding (before the Commission) – to delete from the new version all information supplied by it pursuant to the 2002 Leniency Notice. However, the Hearing Officer rejected the request as it considered that Degussa did not show that the publication of the contested information was likely to cause it serious harm. In addition, the Hearing Officer considered itself incompetent to answer Degussa's argument that disclosure to third parties of the information which it had communicated to the Commission in the context of leniency would breach the principles of protection of legitimate expectations and equal treatment.

Degussa appealed this decision to the General Court and later on (as the General Court rejected its appeal) to the European Court of Justice (ECJ).

The contested information

The contested information consisted broadly of additional details regarding the elements constituting the infringement and in the appellant's participation in it, in particular, by referring to the names of products covered, prices charged and the objectives pursued by the participants in respect of prices and

market shares, all of which would put more focus on the infringing behaviour of Degussa. The contested information would make it easier for potential victims to show the damage caused by Degussa as well as the causal link between the infringement and the damage caused.

The judgment of the ECJ

The ECJ first assessed the issue of the Hearing Officer's powers and considered – contrary to the assessment of the Hearing Officer and of the General Court – that the grounds which may restrict the disclosure of information communicated with a view to obtaining leniency are not limited to the rules affording specific protection against disclosure to the public and that the Hearing Officer must, therefore, examine any objection based on rules or principles of EU law, relied on by the interested person in order to claim protection of the confidentiality of the contested information. For the ECJ, a different interpretation would run counter to the aim of the Hearing Officer's terms of reference – the safeguard of the effective exercise of procedural rights – and would limit considerably the ability to raise objections to disclosure of information before the Hearing Officer. The ECJ annulled the appealed decision on this ground.

In what concerns the other objections raised by the Appellant against the publication of the contested information, they were all rejected by the ECJ, in particular, based on the following:

- The contested information was more than five years old and was therefore presumed to have already lost its secret or confidential nature due to the passage of time; also, Degussa failed to rebut this presumption: in particular, it did not show that, despite its age, such information still constituted an essential element of its commercial position;

- The ECJ also considered that the interest of an undertaking which has been fined, in the non-disclosure to the public of the details of the offending conduct of which it is accused is an interest that does not warrant any particular protection;

- In the present case, there is no presumption that the disclosure of the contested information is contrary to the protection of the commercial interests of the undertakings concerned or to the objectives of the investigation. Such a general presumption exists only in respect of access by third parties to documents in the Commission's administrative file (in article 101 of the Treaty on the Functioning of the European Union (TFEU) proceedings) and cannot be transposed to the publication of decisions on infringements of Article 101 TFEU given the different underlying interests in each case;

- The fact that, in the Leniency Notice, the Commission acknowledges that the disclosure of leniency statements is capable of undermining the protection of the purpose of inspections and investigations does not mean that the Commission is prevented from publishing information relating to the elements constituting the infringement submitted to it in the context of the leniency programme and which does not enjoy protection against publication on other grounds.

Final remarks

The question of whether publication of the contested information by the Commission constitutes a breach of the principles of protection of legitimate expectations and of equal treatment remained open in this case and will now have to be assessed, first of all, by the Hearing Officer.

The judgment confirms that information/documents that are voluntarily conveyed to the Commission in the context of a leniency programme do not automatically benefit from a blanket protection against publication.

In respect of the scope of protection given to information delivered under a leniency programme, the ECJ draws a distinction between verbatim quotations from leniency statements, which are never permitted, and verbatim quotations of information from the documents provided in support of a leniency statement made, which can be published, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information.

Citizen antitrust: Commission introduces new anonymous whistleblower tool

Joaquim Vieira Peres

Gonçalo Rosas

The European Commission ("Comissão") announced, on 16 March, a new tool according to which any individual may anonymously report any antitrust violations.

This new tool follows the successful leniency program that was responsible for the detection of most cartels in the last years and which allows businesses to report their own involvement in a cartel in exchange for full immunity or reduction of the fine that would otherwise be imposed upon them.

According to the Commission, the new whistleblower tool aims at complementing the leniency program, giving 'an opportunity also to individuals who have knowledge of the existence or functioning of a cartel or other types of antitrust violations to help end such practices'.

Those programs have therefore different targets and scopes: while under the leniency program, a company involved in a cartel reports its own activity to the European Commission, the whistleblower tool can be used by any individual[1] whether or not involved in the conduct and can be used to report any anticompetitive behavior, and not just cartels.

Before blowing the whistle, an individual has, first of all, to decide if:

- He/she wants to reveal his/her identity, hence using the e-mail address or phone number indicated in the Commission website; or
- He/she does not want to reveal his/her identity, therefore using the encrypted communications system provided by the Commission to send his messages and receive replies from the Commission Services.

For whistleblowers who are also representatives of a company involved in a cartel, the Commission recalls that the leniency program is also available (under which a company may completely avoid or reduce a fine and benefit from the protection provided to a leniency applicant).

While the Commission commits to protect the identity of a whistleblower, it is not clear how a whistleblower may be protected if his identity is disclosed by any reason (*e.g.*, technical failure of the system, hacking attack, etc.). At European level, there is no specific legislation on this area, thus national laws would apply (with different levels of protection).

If a whistleblower is a legal representative or a director of a company and decides to report the involvement of his company in a cartel against the strategy or decision of that company, that whistleblower may lose the protection of its identity in further proceedings (*i.e.*, of criminal nature) initiated by national competition authorities to investigate such behaviors, which may become public by a decision of those authorities. In this case, an anonymous whistleblower would have – in principle – a lower level of protection *vis-à-vis* a director or manager that applied for leniency.

[1] Although the Commission's communication refers only to "individuals", it is not expressly excluded that a company (through its legal representatives) may use this tool to report to the Commission an anticompetitive practice.

Furthermore, although this initiative should be welcomed as it increases the chance of the Commission detecting anticompetitive conducts, the wide range of anticompetitive conducts that may be denounced may hamper the management of the system by the Commission, if there is a high number of non-relevant reports.

In recent years, some Member States created anonymous whistleblower tools. However the former do not reach the same success of leniency programs. In the UK, the Office of Fair Trading (OFT)[2] introduced such a mechanism, offering whistleblowers a reward up to GBP 100,000 for their information, depending on the success of the case and the information provided. The Competition and Markets Authority decided to continue this program, but there is no available data on its effectiveness, on the number of (relevant) reports or on eventual rewards paid to whistleblowers. Hungary also created a similar system, as well as Denmark and Spain, which presented good results[3].

In Germany, the Bundeskartellamt has an anonymous whistleblower tool, but it does not offer any reward. This tool is however limited to cartels, thus having a more limited scope than the European one.

The introduction of whistleblower tools by Competition Authorities reinforces the importance of companies implementing comprehensive and effective compliance programs by establishing anonymous whistleblower mechanisms, such as a hotline or a specialized ombudsman, in order to allow an early correction (and discussion) of anticompetitive conducts.

2 This authority has ceased to exist and its powers have been transferred to the Competition and Markets Authority, which has maintained the anonymous whistleblower mechanism.

3 According to the Danish Competition Authority, around 10% of the reports result in some form of investigation. The Spanish Competition Authority claims that, since 2008, 94 cases were initiated in result of information provided by whistleblowers.

Religious belief *v.* neutrality: lifting the veil on EU law's outlook

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Introduction

In March 2017, the Court of Justice of the European Union ("CJ" or "Court") handed down two judgments of high legal and symbolic value in the cases of *Samira Achbita* and *Asma Bougnaoui*[4]. This was the first time that the Court ruled on the possibility of restricting the use of religious symbols in the workplace. In particular, the question was whether an employer may bar the use of an Islamic headscarf by a female worker of Muslim faith.

The significance of this topic goes far beyond the legal framing of the two decisions, and international echoes – both supportive and critical – were felt worldwide. However, it seems that sometimes the urge to comment on these decisions overlooked their real meaning and scope. Thus, a legal commentary on the judgments in question requires a strict delineation of the relevant facts and legal framework on which the CJ's judgment relied upon, for only then can one draw the appropriate conclusions.

The facts

Both judgments refer to the dismissal of women workers on account of wearing Islamic headscarves in private workplaces and in jobs involving contact with clients. Islamic scarves – also called *hijab* – only cover the head, contrary to the *burka* (which cover the whole face).

In the first case mentioned above, Samira Achbita worked as a receptionist between 2003 and 2006 at the Belgian company G4S, which provides reception and host services for customers. Throughout this period there was a rule at the company (initially unwritten and subsequently enshrined in an internal regulation) according to which workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace nor practice any ritual of such beliefs. In 2006 Samira Achbita started wearing the Islamic headscarf at work and was dismissed for breaching the neutrality rule in force.

In the second case, Asma Bougnaoui already used the Islamic headscarf when, in 2008, she was hired by the French computer company Micropole as a project engineer. Although it appears from the file that the company respected the expression of religious beliefs by its workers in the workplace – and thus apparently there was no general rule of neutrality in respect of political, philosophical and religious beliefs – the company had informed Asma Bougnaoui that she would not be able to wear the veil if this would run counter the expressed will of a client with whom she would come in contact. This was precisely what happened: as a result of complaints from a particular client (based on an alleged discomfort with the situation) Asma Bougnaoui was asked to cease wearing the Islamic headscarf; having refused, she was dismissed one year after taking office.

4 Jugments *G4S Secure Solutions*, case C-157/15, EU:C:2017:203, and *Bougnaoui & ADDH*, case C-188/15, EU:C:2017:204, both of 14 March 2017.

Legal framework

The two proceedings at issue were referred by the national courts dealing with the cases: the Belgian Court of Cassation in the case of *Achbita* and the French Court of Cassation in *Bougnaoui*.

This means that, due to the legal nature of such cases (referrals for a preliminary ruling), the CJ is limited in its powers. The Court can only rule on the interpretation (or validity, which in this case was not raised) of European Union (EU or "Union") law, and not on the interpretation of national law or on questions of fact discussed in the main proceedings. On the other hand – and this aspect is particularly relevant in relation to the two judgments concerned – in a reference for a preliminary ruling the CJ does not apply EU law to the dispute at stake and does not decide the latter. The Court seeks to provide a useful answer to the solution of the national claims, but it is for the referring court to draw the concrete consequences of the guidelines received and ultimately settle the case.

Having said that (and this precision was not always adequately weighed in the public comments made to the two judgments), it does not seem that these decisions address specifically the essence and scope of the fundamental right to religious freedom – which the Court clearly recognises within the framework of EU law, the European Convention on Human Rights and the constitutional traditions common to the Member States – but rather balances the way in which it is expressed in workplaces, and in private workplaces and companies that assumed (sometimes wrongly, as we shall see) a policy of neutrality *vis-à-vis* religious, political and philosophical symbols even before admitting the two workers in question.

Hence, in our view, these judgments concern more labour issues than religious rights, and this also follows from the questions referred for a preliminary ruling by the national courts, which raised doubts of interpretation regarding provisions of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. In particular, the Belgian court sought to ascertain whether the prohibition on wearing, as a female Muslim, a headscarf at the workplace constitutes a form of "direct discrimination"[5] where the employer's rule bans all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace. In its turn, the French court questioned the CJ on whether the wish of a customer, no longer to have information technology services provided by an employee wearing an Islamic headscarf, can be regarded as a "genuine and determining occupational requirement" by reason of the nature of the particular occupational activities concerned or

5 Under Article 2(2) of Directive 2000/78, "direct discrimination" shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 (religion, belief, disability, age or sexual orientation as regards employment and occupation). "Indirect discrimination" shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a disadvantage compared with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

of the context in which they are carried out[6].

Court's ruling

Taking the particular questions posed and referred to the CJ into the equation – and therefore the subject-matter of the Court's assessment – we can hardly see how the Court's answer could have been different from the one given to the national courts. It should be noted that the CJ even adopted a solemn and extensive formation to rule on the cases, deciding them through the Grand Chamber, typically reserved for causes of great complexity or importance.

In a nutshell, the Court's position was as follows:

(i) *Achbita* judgment: an internal rule of a company which prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination against workers using the Islamic headscarf;

(ii) *Bougnaoui* judgment: in the absence of such a general and abstract rule, the willingness of an employer to take account of the wishes of a client no longer to have the company's services provided by a worker wearing an Islamic headscarf cannot be deemed as an occupational requirement capable of ruling out discrimination.

Comment

The Court's outcome in *Bougnaoui* does not appear to offer any doubts. In fact, it is only in very limited circumstances that a characteristic related to religion may constitute an essential and determining professional requirement. As the CJ pointed out, that concept refers to a requirement that is objectively dictated by the nature or the context governing the pursuit of a professional activity and does cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of a customer.

However, the approach followed in *Achbita* was severely criticized by those who believe it legitimates religious discrimination. Our opinion is that the answer given by the CJ seems to be correct and balanced overall, but the Court has made some *obiter dicta* on the legal treatment of the facts at stake that are not exempt from criticism.

In particular, while one can accept that an undifferentiated policy of political, philosophical and religious neutrality does not establish a difference of treatment "directly" based on religion (and there is why we understand that the answer to the question referred by the French court could not be otherwise), we believe the Court's assessment should have gone further in discussing the event that such a policy might result in "indirect" discrimination based on religion, which could occur if it was esta-

6 Under Article 4(1) of Directive 2000/78, Member States may provide that a difference of treatment that is based on a feature related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a feature constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

blished – something that is up for the national court to ascertain – that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a specific religion or belief being put at a particular disadvantage. Under Directive 2000/78, such indirect discrimination is only admissible if it is objectively justified by a "legitimate aim" and if the means to achieve that aim are "appropriate" and "necessary".

The rationale of the Court in this respect rests first and foremost on the idea that an employer's willingness to project an image of neutrality towards its customers is legitimate since it follows from the freedom to conduct a business as recognised by the Charter of Fundamental Rights of the EU. However, our understanding is that the Court ought to have expanded its views over this concept, since in *Bougnaoui* the CJ refused the possibility that customers' wishes may restrict the right of workers to express their religious beliefs.

Secondly, the Court held that the prohibition to display signs of political, philosophical or religious beliefs is capable of ensuring the proper application of a policy of neutrality, provided that that policy is genuinely pursued in a consistent and systematic manner. It goes without saying that this requirement must be verified by the national court, but this aspect seems sufficiently relevant to have deserved a deeper analysis by the Court. In fact, ensuring compliance with such demand is an exercise of greatest difficulty and slenderness in a company's daily life. For instance, is the use of a wedding ring or in general of any jewel with religious symbolism incompatible with a consistent policy of total neutrality? And what about a garment parading against certain political regimes (*e.g.*, dictatorships, anarchies, etc.)?

Lastly, the Court stated that the neutrality rule will be strictly necessary to achieve the aim pursued so long as it covers only employees who interact with customers. In this respect, the CJ also took the view that, in the light of the constraints inherent to the company and without G4S being required to take on an additional burden, the national court should examine if it would have been possible for the company to offer Samira Achbita a post not involving visual contact with those customers, rather than dismissing her. This is another topic where the Court should have undertaken a broader and more robust examination.

Indeed, it does not seem that the suggestion to "transfer" workers who manifest their religious faith to back-office positions is desirable as a generic measure, whereas the focus, even from the perspective of an employer, should instead be targeted to the provision of a good service to customers. In this context, the Court could, for example, affirm the need for the national courts to examine the extent to which a neutrality policy is really essential for an undertaking to protect its corporate image *vis-à-vis* its customers and how may such image be damaged in the absence of that policy. On the other hand, the indication of the CJ can easily be misunderstood by companies and lead to discriminatory practices in the hiring of certain workers for high profile jobs.

National courts will have the final say on the outline of these balances in the individual cases brought before them. In the disputes giving rise to the two judgments of the Court a later appeal to the European Court of Human Rights should not be ruled out, and the Strasbourg court has already shown a stiffer view of the balance between religious freedom and corporate image[7].

7 See, *v.g.*, the judgment of 15 January 2013, *Eweida and others v. The United Kingdom*, cases 48420/10, 59842/10, 51671/10 and 36516/10, which sentenced the United Kingdom to pay a compensation of EUR 2,000 to a British Airways *check-in* desk female worker that was suspended for wearing a Catholic cross visibly around her neck.

EU General Court annuls for the first time a Commission decision based on an antitrust settlement procedure

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Dzhamil Oda

The General Court of the European Union ("Court"), in case T-95/15, *Printeos and Others v Commission*, by judgement of 13 December 2016[8] ("Judgement"), ruled on the validity of a decision adopted by the Commission in a settlement procedure related to a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement concerning stock and catalogue envelopes and special printed (transactional and/or bespoke) envelopes of all shapes, colours and sizes[9].

Moreover the Commission found that, through a series of collusive contacts, the participating undertakings: *(a)* allocated customers and agreed on sales volumes; *(b)* agreed on customer specific and non-customer specific price increases and shared customer reactions following such increases and non-customer specific increases often aimed at passing-on the rising cost of paper; *(c)* coordinated their responses to tenders launched by major pan-European customers. In this context, they aimed at fixing actual tender prices and protecting their existing supplies; *(d)* put in place mechanisms aimed at maintaining the *status quo* by compensating the cartel participants for the loss of sales volumes and/or individual customers to another cartel participant; and *(e)* exchanged commercially-sensitive information, in particular on commercial strategies, customers and sales volumes.

The geographic scope of the conduct regarding all parties covered Denmark, France, Germany, Norway, Sweden and the United Kingdom.

The decision was adopted on 10 December 2014 in the context of a settlement procedure, as all of the undertakings involved expressed their willingness to take part in settlement discussions with the European Commission. The applicants in the proceedings before the Court were imposed, jointly and severally, a fine of EUR 4,729,000. The Commission applied different rates of reduction to the undertakings concerned in the settlement procedure.

In the case before the Court, Printeos and other undertakings challenged the Commission decision, notably in what regards the amount of the fines applied, arguing the Commission: *(i)* failed to state adequate reasons for adjusting the basic amount of the fines imposed on the undertakings concerned and for applying different fine reduction rates, notably *vis-à-vis* the rate of reduction granted to one of the cartelists, and as such misused its powers; *(ii)* breached the principle of equal treatment; and *(iii)* failed to take into account the principles of proportionality and non-discrimination when determining the amount of the fines.

The Court upheld the arguments submitted by the undertakings, in particular their first plea in law.

8 EU:T:2016:722. Accessed and available at curia.europa.eu.

9 Please see Decision C(2014) 9295 final, of 10 December 2014, in case AT.39780 – Envelopes, accessed and available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39780.

This judgement of the EU General Court underlines the importance of the European Commission, and indirectly of national Competition Authorities, providing sufficient and adequate reasons on the methodology followed for the application of fines in settlement procedures. The Court also highlights that this requirement is particularly relevant and must be thoroughly complied with in cases where Competition Authorities have adopted guidelines with a methodology for setting fines

First, the General Court recalled that 'it is established case-law that the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement'[10].

Indeed the Court highlighted that the statement of reasons 'must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review'[11]. In accordance with the General Court such analysis depends on the circumstances of each case and the adopted measure.

Furthermore, the General Court also emphasized the special importance attached *(i)* to the Commission's duty to adequately state the reasons for its decisions imposing fines in competition cases, namely to explain the weighting and assessment of the various factors taken into account in determining the fine amounts, and *(ii)* the Court's duty to verify if such reasons have been satisfactorily provided by the Commission.

As noted in the Judgement, this is far more important in cases where the Commission departs from the general methodology set out in the relevant guidelines on the method of setting fines[12], as in this case. In such situations, the Court considers that 'the Commission's respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance' and, in this particular case, 'the Commission was required (…) to explain with sufficient clarity and precision the way it intended to use its discretion, including the various facts and points of law it had taken into consideration for that purpose'[13].

In light of the above, the General Court found that the Commission failed to state sufficient reasons for its decision regarding the adjustments to the basic fine amounts imposed and the respective justifications, as it was vague and did not provide enough information to the undertakings concerned. Hence, the first plea in law of the applicants was upheld by the Court who considered that the Commission's decision was vitiated by failure to state adequate reasons for the purposes of Article 296 TFEU, second paragraph.

10 See § 44 of the Judgement.

11 *Idem*.

12 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) no. 1/2003 of 16 December 2002, OJ C 210 of 01.09.2006, p. 2 *et seq*.

13 See §§ 48 and 49 of the Judgement.

Competition Authority redefines the geographic market for rental of shopping spaces

Gonçalo Machado Borges

Nuno Igreja Matos

Introduction

By decision dated 20 January 2017, the Competition Authority cleared a merger involving the acquisition, by Via Holdco (Lux) S.à.r.l. ("Via Holdco"), of an outlet centre owned by the companies IRUS Vila do Conde, S.A. ("IRUS I"), IRUS Vila do Conde II, S.A. ("IRUS II") and IRUS Vila do Conde III, S.A., ("IRUS III"), through the acquisition of the majority of the share capital of the target companies.

In this decision, the Competition Authority reversed its previous position and concluded that the geographic market for the rental of shopping spaces is regional in scope (rather than national), in a decision that will have a significant impact in assessing the market shares of companies active in this sector.

The decision

In its notification concerning the acquisition of sole control over IRUS I, IRUS II and IRUS III – companies whose object is the acquisition and operation of all kinds of real estate, including, among others, the "Vila do Conde The Style Outlets" –, Via Holdco held, first of all, that the operation fell within the scope of a wider product market for the rental of retail real estate in retail centres and in shopping centres (including, at least, the shopping centre format, retail parks and outlet centres).

In this decision, the Competition Authority started its analysis with the product market definition and rejected the possibility of a wider definition.

In fact, the Authority dismissed the conclusions put forward by Via Holdco concerning the overlap of brands between outlet centres and shopping centres and the alleged substitutability between the different formats of shopping spaces, stating that these formats differ from each other in respect of a variety of characteristics (value of rentals, target customers, sales area, storage area, services provided) that indicate, not the existence of substitutability between those formats, but rather the existence of a complementary relationship. Thus, the Authority defined the relevant product market as the market for rental of shopping spaces (specifically) in an outlet centre format.

However, the main novelty of the decision concerns the definition of the relevant geographic market.

The Notifying Party, relying on studies and on client and owner surveys, sustained that the geographical definition of the market should be assessed by reference to a regional scope based on the "catchment area" of the shopping spaces, defined as an area corresponding to a 60-90 minutes' travel distance from the respective shopping zone.

Reversing the position it previously sustained (concerning the identification of a national market, in light of the homogeneity of competition conditions throughout the national territory), and in line with the allegations of the Notifying Party, the Authority now concluded that an outlet centre has a "catchment area" which is, at most, regional in scope. Supporting its position with

the findings of the market investigations that were carried out, the Authority left open the question of knowing whether that catchment area goes farther than the 60 minutes distance (until a 90 minutes distance) because such specification would not affect the conclusions of its assessment.

Comment

The decisional practice of the Competition Authority regarding the market for rental of shopping spaces evolved towards a narrower definition. After a first analysis under decision 1/2006 (*Grosvenor/Sonae/Sonae Sierra*), with its decision 8/2006 (*Sonae/PT*) the Authority established a detailed characterization, segmenting this market into traditional or specialized formats for integrated shopping spaces. This distinction, that the Authority reaffirmed and detailed, among others, in the decisions 27/2007 (*Carlyle/Freeport*), 73/2007 (*Sonae Sierra/Gaiashopping/Arrabidashopping*) and 25/2014 (*Alaska*Auchan/IAPAT*), was also restated in this January 2017 decision.

As for the geographical market, this new decision in case 62/2016 (*Via Holdco/Irus*) represented a genuine rupture from the previous position. The adjustment from a market which is national in scope to a regional market will therefore result in an increase of the (regional) market shares of each player active in the rental of integrated shopping spaces, with immediate and important consequences.

On the one hand, this may give rise to market shares being qualified as evidencing a "dominant position" in some regional markets, which would make it advisable for the companies in question to carefully review their business strategy in order to prevent any behaviour from being considered abusive. On the other hand, and in light of the importance of the market share criteria for the jurisdictional purposes of determining when a merger filing is required (article 37 of Law 19/2012, of 8 May), the new position concerning the geographical market will tend to increase the number of operations in the sector subject to mandatory notification to the Competition Authority.

Fighting bid rigging: Competition Authority's advocacy initiative in public procurement

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Tiago Coelho Magalhães

Introduction

The "Fighting Bid Rigging in Public Procurement" campaign is a highlight of the Competition Authority's recent advocacy initiatives. It was launched in June 2016 and recently reached the milestone of 1,000 participants. The campaign is intended to raise awareness among state bodies which regularly award public contracts of the most common issues concerning bid rigging in public procurement. It also advises on how to detect illegal practices in the context of public tenders and design tender programmes in a way that inhibits potential collusive tendering.

Bid rigging in Portugal

Collusive behaviour between competitors in the context of a public tender is considered one of the most serious violations of Portuguese and EU competition law and has been severely punished by the Competition Authority. Collusive behaviour compromises the efficient allocation of public resources, producing less favourable conditions for the state and therefore generating less innovation, reduced quality and higher prices. It ultimately harms the economy, consumers and taxpayers.

Certain economic sectors and activities are more propitious to bid rigging, such as those characterised by regularity and predictability concerning contractual procedures or those which have few operators, homogeneous products or structural or other links between market operators. The most frequent examples of collusion in public procurement include arrangements in which competitors decide the winner alternately and other bidders strategically withdraw from the tender or submit higher or less attractive bids so that the arranged winner (often selected on a rotational basis by the colluding companies) can be awarded the contract.

The Competition Authority has previously investigated bid rigging conduct in public procurement in several sectors, including education, health and firefighting, and its record in this regard has evolved over the past decade:

- In 2005, the Authority fined five pharmaceutical companies over EUR 3 million for bid rigging in a public tender launched by the Hospital of Coimbra and subsequently imposed additional fines on the same companies for rigging 36 other public tenders that took place in 22 different hospitals. Both decisions were annulled on appeal, as the courts found that the Authority had violated the defendants' defence rights. However, the decisions were later reissued by the Authority and were, after further appeals, partially confirmed by the courts, although with significantly reduced fines.

- In 2007, the Authority fined two companies EUR 310,000 for forming a consortium which was the only bidder for a public contract for the provision of helicopter services to fight forest fires (in previous years, each company had submitted a separate bid). However, the Lisbon Commerce Court decision ruled that the Authority had not adduced sufficient evidence to demonstrate

anti-competitive object and effects and reversed the decision.

- In December 2009, the Competition Authority imposed fines totalling EUR 14.7 million on five companies for allegedly operating a price-fixing cartel in the operation and management of catering services at canteens, refectories and corporate restaurants, in a case which marked the first application of the leniency statute and the first time that board members and managers were fined in addition to their infringing companies. Having bee annulled on appeal for procedural reasons, the decision was reissued by the Authority, but appealed again and lapsed due to the statute of limitations.

- In 2011, two industrial cleaning companies were fined over EUR 315,000 for colluding in 16 public tenders. The decision was confirmed on appeal.

- In 2015, the Authority fined five pre-fabricated equipment suppliers over EUR 830,000 for price fixing and market sharing in public tenders launched between 2009 and 2010 by state-owned school infrastructure company Parque Escolar. All defendants cooperated with the Authority under the leniency statute and subsequently obtained further reductions under the settlement programme.

Anti-bid rigging campaign

In order to alert and inform adjudicating bodies involved in public procurement procedures, the Competition Authority has held several sessions throughout the country in which its staff have explained how to detect and prevent bid rigging, as well as ways to cooperate with the Authority's investigation and enforcement of such practices.

Checklist for identifying collusion

The Authority has provided the following practical checklist detailing the main signs of potential collusive behaviour that public authorities should be alert to:

- As regards bid submissions:
  - The number of bids is less than usual;
  - Bids are withdrawn unexpectedly;
  - Regular bidders fail to submit a proposal;
  - Bids are submitted jointly when they could have been presented individually; or
  - Bids share suspect similarities, such as the same errors, missing information, specific wording, formatting, last minute corrections, letterhead, contact information, postal registration stamps or physical submission time or, in the case of online submissions, the same IP address.

- Commercial terms and bidder statements include:
  - High prices relative to the cost estimate of the awarding Authority;
  - Different bids with identical prices;
  - Uniform price increases;
  - Price decreases when a non-regular bidder appears;
  - Non-explicable price differences between bids; or
  - Significant fluctuations in the prices submitted by the same company in different bids;
  - Preference or exclusivity for a certain geographical area or clients; or
  - References to competing bids, to guidelines or sectoral associations.

- Bid results display:
  - Suspect patterns of rotation or geographic distribution between winning bids.

- As regards bidder behaviour:
  - The winning bidder repeatedly subcontracts other bidders;
  - The winning bidder withdraws and is subsequently subcontracted by the selected bidder;
  - Certain bidders do not request a quote from a usual or go-to supplier; or
  - Several bidders hire the same consultant when preparing the bid.

Guidelines for designing public tenders

The Competition Authority also recently issued guidance to public authorities concerning the design of public tenders with a view to mitigating the risk of collusive behaviour. In particular, the Authority recommends:

1. **Incentivising the participation of bidders** by avoiding unnecessary requirements that restrict participation (*e.g.*, certifications, financial guarantees or the minimal dimension of bidders); publicising adequately in order to reach national and international bidders; dividing contracts into several lots (as long as such division does not facilitate market partitioning); reducing bid submission costs (*e.g.*, simplifying and aggregating procedures, maintaining updated records of approved and certified bidders, establishing appropriate deadlines for bid submission and using online procedures);

2. **Setting clear requirements and reducing the predictability of tenders**: requirements should be clear and objective, regular tenders (as regards timing, value or number of contracts) should be avoided and public authorities should consider organising tenders jointly with other contracting authorities;

3. **Human resource training and the scrutiny of tender information**, such as: implementing continuing training programmes for staff; collecting information regarding past

tenders; reviewing periodically historical bids for certain products and services; comparing lists of interested companies in the tender and lists of actual bidders; conducting interviews with bidders that have withdrawn or have a pattern of presenting losing bids; promoting an easy communication channel for companies to report their concerns regarding competitors' behaviours; and incentivising staff to report suspected behaviour to the Competition Authority;

4. **Defining evaluation and selection criteria that promote competition by**: considering carefully any non-price-related criteria (if used, they should be clearly and objectively specified); not valuing prior performance without justification; and reviewing the impact of selection criteria in the context of competition in the tender and future bids; and

5. **Mitigating opportunities for communication between competitors**: 1. any contacts between the awarding Authority and bidders should be carried out individually; the anonymity of proposals should be promoted; the information made available by the awarding Authority should be carefully considered; advisers should be clear of conflicts of interest and subject to confidentiality obligations, subcontracting should be previously disclosed by bidders, and references to the consequences to competition law violations should be included in the tender documents.

Comment

The "Fighting Bid Rigging Campaign", which is ongoing, represents a significant investment by the Competition Authority in training the public authorities that award public contracts on the prevention and prosecution of collusive behaviour.

Recent statements by the Competition Authority suggest that several investigations into suspected bid rigging have already been initiated further to the Campaign. While it is yet unclear whether these will be translated into further fining decisions, companies participating in public tenders in Portugal should be aware that the Authority considers collusion in public procurement an enforcement priority and will continue to subject this area to close scrutiny.

It is therefore advisable that companies operating in public procurement markets and their advisers, including external consultants, develop and maintain effective competition compliance programmes in order to mitigate any risk of collusive behaviour and seek specialised competition advice notably when planning joint bids, attending meetings where other competitors are present or selecting a consultant who may be working for other competitors.

EU General Court reinforces procedural rights of transaction parties in EU merger control proceedings and annuls EU Commission decision to block the proposed UPS/TNT tie-up

Philipp Melcher

Leonor Bettencourt Nunes

In a ruling issued on 7 March 2017, in Case T-194/13[14], the EU's General Court (GC) annulled the decision by the European Commission to prohibit the acquisition by United Parcel Service (UPS) of its competitor TNT Express (TNT)[15].

Background

In June 2012, UPS notified its proposed acquisition of TNT to the Commission for clearance under the EU Merger Regulation (EUMR). Both UPS and TNT are providing international express small package delivery services within the European Economic Area (EEA). In its prohibition decision of January 2013, the Commission found that the operation would have reduced the number of major providers in this market to three or even two (UPS/TNT plus DHL and/or FedEx) and likely resulted in material price increases for customers and thus in a significant impediment to effective competition (SIEC) in 15 EEA Member States.

In October 2012, during the in-depth investigation, the Commission had informed the parties in its Statement of Objections (SO) of its provisional view that the transaction would likely result in a significant impediment to effective competition in 29 EEA Member States. In reaching this view, the Commission based itself on an econometric analysis to predict the price effects of the merger, which was challenged by the parties for being based on a flawed model. Following an exchange of views and econometric analyses based on different models, the Commission prohibited the deal, finding that it would likely lead to SIEC in 15 EEA Member States. However, the model relied upon by the Commission in the final decision differed materially from both the version used in the SO and those discussed with the parties thereafter.

UPS appealed the prohibition decision to the GC, arguing, inter alia, that the decision infringed its rights of defence, as it had not been given opportunity to access and comment on the econometric model used by the Commission to block the transaction. The GC considered UPS' plea to be well founded and annulled the prohibition decision.

The General Court's Judgment

Rights of defence

The GC recalled that observance of the rights of defence was a fundamental right which must be guaranteed in all proceedings, including merger proceedings before the Commission. The right to a fair hearing, being one of those rights, required that undertakings concerned must have been afforded the opportunity, during the administrative procedure, to make known their views on the truth and relevance of the facts, circumstances and documents relied upon by the Commission in its decisions.

As the final version of the econometric model on which the Commission had

14 EU:T:2017:144.

15 Decision of the European Commission of 30 January 2013 in case COMP/M.6570 – UPS/TNT Express.

based itself in its decision to establish that the transaction would likely lead to a SIEC in 15 EEA Member States had not been communicated to UPS during the administrative procedure, despite differing materially from all versions previously discussed, the GC found that UPS' rights of defence had been infringed.

Necessity for speed in merger proceedings

In relation to the Commission's argument that its final assessment regarding the econometric model to be used had to be left to the final decision, given the late date at which UPS had submitted its last econometric analysis, the GC stressed that while it is indeed necessary to take into account the necessity for speed in proceedings under the EUMR (*i.e.*, the tight deadlines within which proposed mergers must be assessed), the Commission had chosen the final model two months before adoption of the final decision and, therefore, had enough time to communicate its essential elements to UPS.

UPS might have been better able to defend itself

However, in order for the infringement of its rights of defence to lead to the annulment of the prohibition decision, UPS still had to demonstrate that it might have been better able to defend itself in the absence of the infringement. The Commission argued that it had relied on a wide range of information, both quantitative – including the econometric analysis – and qualitative, so that an absence of the infringement would not have had any impact on its findings.

The GC found the Commission had reduced the number of SIEC countries after the SO (from 29 to 15) in light of the new results of the econometric analysis, which showed that those results were capable of countering the qualitative information taken into account, and that UPS had already had, during the procedure, a significant influence on the development of the model proposed by the Commission, since it raised technical problems to which it provided solutions. Access to the final model could have therefore allowed UPS to submit different results of the effect of the merger on prices, which might have given rise to a reassessment by the Commission of the scope of information taken into consideration and, accordingly, to a further reduction in the number of SIEC countries.

Comment

The GC judgment adds to the list of recent cases where the EU courts reinforced due process rights of undertakings, in particular with regard to cartel investigations[16], and reconfirms the fundamental importance of their observance also in merger control proceedings, despite the ubiquitous "necessity for speed". Strict judicial scrutiny in respect of undertakings' procedural rights is particularly crucial in light of the limited judicial review often observed in re-

16 The Court of Justice recently annulled COM requests for information and inspection decisions for being insufficiently reasoned (*e.g.*, cases C-247/14 P, EU:C:2016:149, HeidelbergCement; C-583/13 P, EU:C:2015:404, Deutsche Bahn).

lation to the substance of the Commission's assessments.

The judgment is also welcome for extending this scrutiny to cases where the Commission relies on the results of econometric analyses, a nowadays regular feature of complex EU merger control proceedings. In such cases, it is essential for undertakings to be aware of the analytical model used to predict the effects of the concentration, as they are otherwise unable to effectively challenge the results of the analysis.

In practical terms, the judgment puts pressure on the Commission to structure its investigations such that the econometric model is either not changed after the SO or, if changed, its final version is adopted and communicated at a time that still allows the parties to submit observations and the Commission to take them into account in the final decision. In order to avoid protracted consultation with the parties, which are potentially incompatible with its tight procedural deadlines, the Commission might even be deterred from basing its findings on econometric analyses in the first place.

While the judgment is positive for notifying parties in general, it will likely be of little consolation to UPS, as TNT was acquired by FedEx in the meantime. Moreover, chances for UPS to successfully claim damages from the EU pursuant to Article 340(2) TFEU[17] seem to be rather limited.

17 *Cf.* General Court, T-351/03, EU:T:2007:212, Schneider Electric, confirmed on appeal by ECJ – case C-440/07P, EU:C:2009:48.

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Brazilian Antitrust Authority approves agreement between LATAM, Iberia and BA

The Brazilian antitrust authority – the Administrative Council for Economic Defense (CADE) – approved, on 27 March 2017, a Joint Business Agreement (JBA) between TAM Linhas Aéreas S.A. ("LATAM"), Iberia Líneas Aéreas de Espana, S.A. Operadora, Sociedad Unipersonal ("Iberia"), and British Airways Pico ("BA") (together, the "Airlines").

The JBA, which concerns the air transport of passengers and cargo within Europe-South America routes, was submitted to CADE in June 2016. The agreement provides for metal neutrality, through which the Airlines will sell all products and services as if they were offered by their own airline network, regardless of its operator or seller.

The JBA provides that the Airlines will make joint decisions regarding the offer of seats, pricing, purchases, sales, marketing capacity and revenue sharing, resembling the effects of a traditional merger, with the combination of assets.

According to CADE's analysis, the transaction would result in competitive concerns in the air transport of passengers in the São Paulo-London non-stop route, where CADE alleged that a monopoly would be created. According to CADE, the efficiencies provided by the Airlines were not sufficient to counterbalance the creation of such monopoly. Consequently the transaction was approved under commitments and remedies agreed between the Airlines and CADE. Such remedies aimed to eliminate barriers for new players to entry the São Paulo-London non-stop route, limiting the Airlines' eventual exercise of market power and stimulating the transfer of the transaction's benefits to the final consumer.

In this sense, the Airlines have committed to provide available slots at the London Heathrow and London Gatwick airport for a potential entrant in the market, without costs and for a period of 10 years, for daily non-stop flights departing from Guarulhos airport in São Paulo. This commitment was accepted by CADE after its market test, in which competitors showed interest in operating the route only if the slots were to be provided free of charges and for a term of no less than ten years.

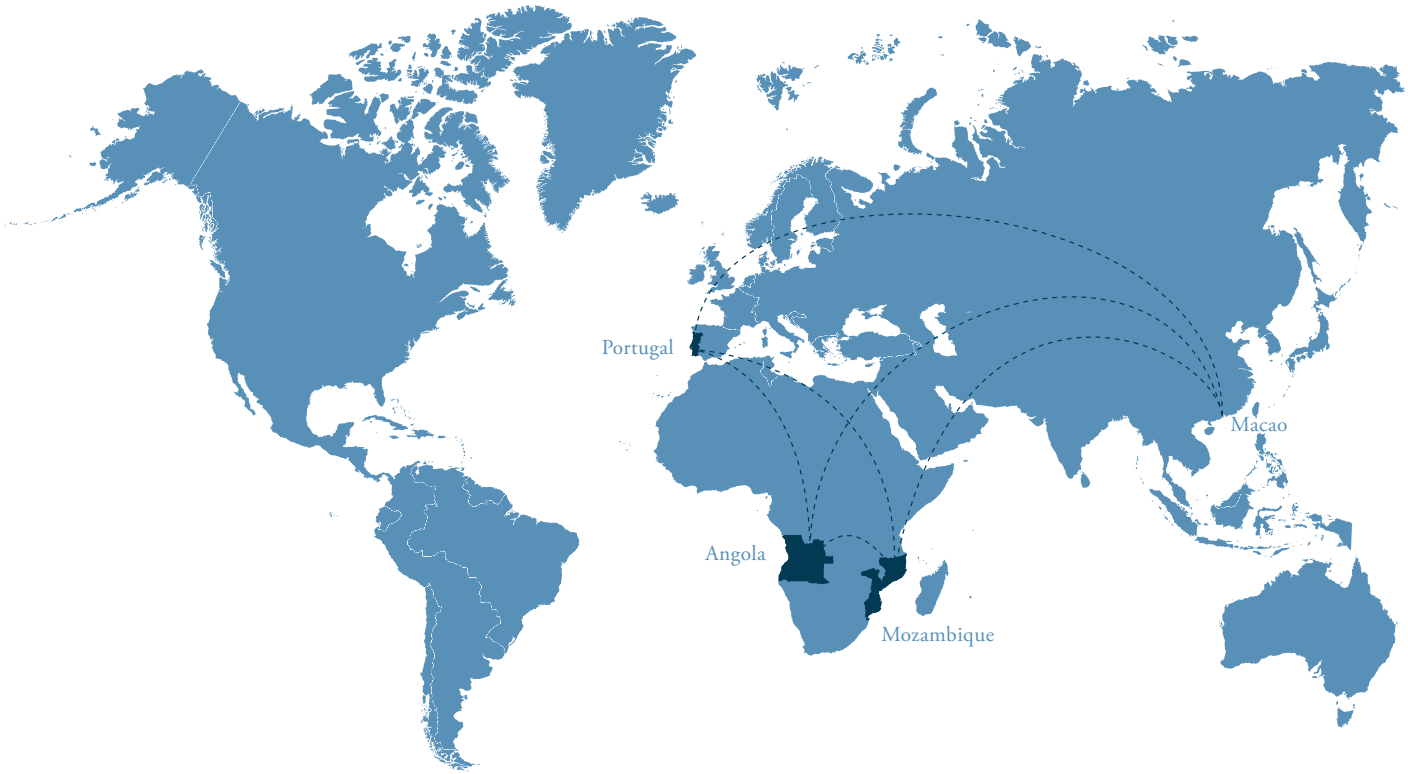
In addition, CADE concluded for the existence of an additional barrier to entry by competitors in international routes. In CADE's view, it would be necessary to guarantee the possibility for an entrant to capture passengers from other cities in order to reach the required minimum capacity to operate. The Airlines agreed to enter into a Special Prorate Agreement (SPA or "interline agreement") with a potential entrant for routes departing from the cities of São Paulo and London. The potential

entrant will be able to choose 15 routes departing from London and eight routes departing from Guarulhos/São Paulo, under "most favored nation" conditions among the SPAs that the Airlines may have with other airline companies – with the exception of those entered into with members of the OneWorld alliance.

In case no potential entrant is interested in operating the São Paulo-London route under these conditions, the Airlines have agreed to maintain the capacity level (seats offer) they currently operate in such route, for a period of seven years. Such commitment will remain in force even if a new airline starts to operate the route and subsequently decides to leave it.

Lastly, LATAM must create two additional routes between Brazil and Europe, one of them departing from a city other than São Paulo or Rio de Janeiro. This commitment will be in force for a period of seven years. The origins and destinations of the new routes will be chosen by the Airlines in order to minimize the impact on their airline networks.

JBAs are relatively common in Europe, the United States, Australia, Japan and Canada, but this was the first time that CADE reviewed a cooperation agreement between airline companies with such high level of integration and overlap.



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