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The end of the beginning? Brexit six months later

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Introduction

More than six months have passed since the referendum of 23 June 2016 in which the majority of British voters voted to leave the European Union. Yet to this day there has not been any change in the status of the United Kingdom as a full Member State of the EU.

Indeed, until such time as an exit agreement is concluded, on the basis of the procedure established in the Treaty on the European Union, EU legislation as well as all rights and obligations resulting therefrom will continue to apply in full to the UK.

The British Government has announced that the procedure will be initiated by the end of March this year, meaning that in principle by the end of March 2019 the UK will no longer be a Member State of the EU. However, the content of the exit agreement and the terms of the UK's new relationship with the EU remain surrounded by some uncertainty, as we shall see below.

The exit process

The right to secede and the process for a Member State exiting the EU are established in Article 50 of the Treaty on the European Union since the entry into force in 2009 of the Treaty of Lisbon. This provision, which is being applied for the first time, provides the legal basis for the negotiation and implementation of the UK's exit from the EU.

The Article 50 procedure must be initiated by the Member State which intends to withdraw from the EU by formal notification to the European Council of its intention to leave. This notification triggers a period of two years for the Member State and the EU to negotiate the conditions of exit. After the expiry of the two-year period, even if an agreement has not been reached the State will automatically cease to be a member of the EU unless the European Council unanimously agrees to extend that term.

There is no deadline for the "Article 50 notification" and the timing for its submission is therefore essentially a political decision.

After much controversy in the UK over the government's competence to serve the Article 50 notification, on 24 January 2017 the United Kingdom Supreme Court upheld in *Miller* that the (unwritten) principles of the UK Constitution prevent the Government from unilaterally deciding to initiate the exit procedure under Article 50 TEU without the prior approval of the British Parliament[1].

Further to the *Miller* judgment draft legislation was introduced in Parliament in order to authorise the Government to invoke Article 50. According to Prime Minister Theresa May the notification will be submitted to the European Council by the end of March 2017[2].

In recent months there have been a number of calls, particularly in the UK, for

1 R (*Miller*) *v Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin) and [2017] UKSC 5, available at <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>.

2 BBC, 2 October 2016, *Brexit: Theresa May to trigger Article 50 by end of March*, <http://www.bbc.com/news/uk-politics-37532364>.

informal negotiations with the European institutions to start before the formal notification of Article 50. However, the Heads of State and Government of the remaining 27 Member States, as well as the Presidents of the European Council and of the Commission, stated peremptorily that *"there can be no negotiations until such notification has been made"*[3] and the Commission President announced he had prohibited Commissioners and senior staff from initiating talks with British representatives until formal notification is received[4].

Further to the notification the European Council will adopt guidelines for the negotiation of an agreement with the UK. In practice, negotiations are likely to be conducted between the Commission as the EU's representative and the UK Government. The result of such a negotiation should consist of a treaty between the EU (at 27) and the UK setting out the detailed conditions for exiting the EU, also *"taking account of the framework of its future relations with the Union"*. However, the precise scope of the exit negotiations and the extent to which they will cover the future relationship of the UK with the EU (which may be the subject of a separate agreement) remains open and should be agreed between the parties.

After negotiation the exit agreement should be approved by the European Parliament (by simple majority) and signed by the Council of the EU (acting by a qualified majority, without the UK). The agreement should subsequently be ratified by the UK in accordance with its constitutional provisions.

Estimates for the duration of the exit negotiations vary considerably. In the campaign leading up to the referendum, the British government stated that it would take *"more than a decade"* to negotiate the UK's exit, the terms of the future relationship with the EU and international agreements with third countries (since international agreements in which the EU is a party will no longer apply to the UK after its exit from the Union).

According to recent statements by the British Government, the UK intends to conclude an agreement on the future relationship with the EU by March 2019, followed by a phased process of implementation, in which both the UK and the European institutions and the Member States will gradually adjust to the agreed new relationship, the duration of which may vary depending on the issue (e.g. immigration controls, cooperation in criminal matters or regulation of financial services)[5].

Possible Models for the Future UK-EU Relationship

Several existing models could form the basis of a future relationship between the UK and the EU:

- **The "Norwegian model": joining the European Free Trade Association (EFTA) and the European Economic**

3 Statement of the "Informal meeting at 27", Brussels, 29 June 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/06/29-27ms-informal-meeting-statement/>, para. 3.

4 The Group "Far Deal for Expats" has announced its intention to challenge this "presidential decision" before the EU courts (BBC, *"Brexit: British expats sue EU's Juncker over talks"*, 7 October 2016, <http://www.bbc.com/news/world-europe-37586587>).

5 Theresa May, *"The government's negotiation objectives for exiting the EU"*, speech of 17 January 2017, Lancaster House, London, available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

Area (EEA) Agreement, in order to ensure access to the European internal market[6]. As a member of the EEA the UK would be required to apply notably the EU legislation on the free movement of persons, one of the main controversial issues in the context of the referendum, as well as to contribute financially to the functioning of the Union, in a measure to be determined (although it would no longer benefit from European funds, which are reserved for Member States).

• **The "Swiss model": joining only EFTA, with bilateral agreements**, like Switzerland, the only member of that association which has not joined the EEA, which maintains a set of bilateral agreements with the EU giving it access to certain areas of the European internal market. Significantly, however, the agreements in force with Switzerland do not include financial services, which are essential to the UK economy. Switzerland has also accepted the principle of free movement of EU citizens.

• **A bilateral free trade agreement, such as those concluded with Canada or Singapore**[7]. These bilateral agreements, when they in force, will provide virtually complete access to the internal market for goods and partial access to the market for services, although not including the acceptance of the free movement of persons. Exporting countries should nevertheless comply with EU rules and regulations when exporting to the EU, but would have no influence on their adoption.

• **Membership of the World Trade Organization (WTO).** As member of the WTO the UK would be able to negotiate trade agreements with other members, including the EU. However, as long as such agreements did not enter into force, the UK should apply equal tariffs and conditions for all countries (under the "Most Favoured Nation" principle). Exports from the UK to the EU would also be subject to the EU's external tariff.

The future: what we do know

During several months following the referendum the UK's intentions were surrounded in mystery. The members of the European Council (without the UK) and the President of the Commission have expressed their wish that the United Kingdom be a close partner of the EU, but warned that *"any agreement concluded with the United Kingdom will have to be based in a balance between rights and obligations"* and in particular that *"access to the single market requires the acceptance of the four freedoms"* (free movement of persons, goods, services and capital)[8].

On 17 January 2017 the British Prime Minister gave a speech in which she sought to clarify the UK's objectives as to the terms of exiting the EU and set out a number of principles which, while gener-

6 The EEA, which includes the 28 EU Member States and three of the four EFTA States (Iceland, Liechtenstein and Norway) provides for the application of EU legislation in a number of areas, including the four freedoms, but does not cover policies such as agriculture, employment and social affairs or justice and home affairs.

7 The EU and Canada concluded on 30 October 2016 the *Comprehensive Economic and Trade Agreement* (CETA), which will have to be approved by the European Parliament and by national parliaments before it enters into force (http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/). Negotiations with Singapore were concluded on 17 October 2014, but the initialled agreement still awaits the approval of the European Commission, as well as the consent of the Council and the European Parliament.

8 Statement of the "Informal meeting at 27", Brussels, 29 June 2016, *cit.*, para. 4.

al in nature, are nevertheless welcome for bringing greater clarity to what may be the UK's position in the upcoming negotiations[9].

In particular, **the British Government recognizes that it will not have full access to the EU internal market**, as it considers essential (i) to regain full control over its borders, which means restricting the entry and residence of EU citizens in the UK, and (ii) to "take control over the UK laws", meaning to remove the jurisdiction of the European Court of Justice to interpret laws and regulations applying in the UK.

The UK also intends to negotiate a "**bold and ambitious free trade agreement**" with the EU, while maintaining freedom of negotiation with other third countries. This means that Britain wishes to set its own tariffs within the WTO, which would be incompatible with (at least full) membership of the European Customs Union.

At any rate, as noted above, the British Government acknowledges the need to negotiate a **transitional period for a phased implementation of the UK's exit from the EU** after March 2019, in order to allow for the significant changes to the applicable legislative and regulatory framework to take full effect.

In the light of the British Government's stated views, the possibility of the UK acceding to the EEA, like Norway, or staying in EFTA and concluding a number of bilateral agreements to gain access to the European internal market, such as Switzerland, can be excluded, since in both cases such third countries accept the free movement of EU citizens. It is possible that the UK will attempt to negotiate and conclude a bilateral free trade agreement with the EU (like Canada). However, in view of the complexity of the exit negotiations and the tensions that may arise between the UK and some of the 27 Member States that will remain in the Union, a likely scenario, at least in the short term, could be of the United Kingdom being forced to negotiate with the EU under the WTO general rules.

Regardless of the concrete terms of the future relationship that will be negotiated, EU law will continue to have some effect in the UK. For example, UK companies doing business in the EU will continue to comply with EU technical standards or competition rules. Thus, even after leaving the EU the autonomy of the British legislator will still be conditioned in several areas by the need to ensure the continuity of the close relationship of the British economy with European companies and investors.

Nevertheless, the options that will be taken in the forthcoming negotiations will have a profound impact on the relations of European citizens and businesses with the UK and the British market in many areas, from financial services to rules on insolvency, intellectual property, employment or environment. It is therefore very important to continue to follow closely developments in the coming months.

9 Speech *"The government's negotiation objectives for exiting the EU", cit.*

European Commission publishes decisions related to local public support measures that do not constitute State aid

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When a Member State grants aid in any form by favoring certain undertakings, sectors or activities, it has to notify the European Commission regarding the aid in so far as it threatens competition or affects trade between Member States. Such State aid is considered unlawful by the Treaty, but it may be approved by the Commission in certain circumstances, after being notified by the respective Member State. Under this procedure, the European Commission ruled in five cases on the compatibility of local public support measures in Spain, Germany and Portugal regarding EU State aid rules (hereinafter, the "decisions").

The aid granted by the Portuguese State[10] concerned a subsidy of 80% of the eligible costs of a project for the construction by the charitable institution *Santa Casa da Misericórdia de Tomar* (*SCMT*) of an assisted living facility for the elderly with a capacity for 60 residents.

In the decisions on the aid granted by the Spanish State, the Commission analyzed two public support measures for regional languages –Basque and Valencian[11]. In both cases, the Spanish State intended to grant financial support to local media publishing in their respective regional language.

The aid granted by the German State[12] related to financial support to (i) the construction of several sports facilities at the complex "Sportcamp Nordbayern" in the region of Bavaria to be used predominantly by schools, non-profit sports clubs and for social or educational activities, and (ii) the renovation and modernization of infrastructure in the port of Föhr island (with only 8.000 inhabitants) which is almost exclusively used to deliver supplies to the island by ferry service to and from the German mainland.

The decisions confirmed that a Member State may grant, without prior permission by the Commission, certain public support measures, to the extent that such measures do not affect the trade between Member States. The decisions follow a set of seven decisions published in 2015 that already provided guidance on what types of local public support do not need to be notified to the Commission.

In its Notion of Aid Notice of May 2016, the Commission had already clarified that a public support measure does not, in principle, affect the trade between Member States when:

- The measure has impact only on a limited area within a Member State;
- It is unlikely to attract customers from other Member States; and
- It could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.

10 See Case SA.38920, Alleged State aid to Santa Casa de Misericordia de Tomar (SCMT), 9 August 2016.

11 See Case SA.45512, Alleged State aid to the promotion of Valencian in the media, 1 August 2016 and Case SA.44942, Alleged State aid to the local media publishing in Basque, 4 August 2016.

12 See Case SA. 44692, Alleged State aid to the investment in the Port of *Föhr*, 20 Julho 2016 and Case SA. 43983, Alleged State aid to the *BLSV Sportcamp Nordbayern*, 9 August 2016.

The decisions confirmed that a Member State may grant, without the previous consent of the Commission, certain public support measures to the extent that such measures do not affect trade between Member States. Insofar as they rely on a stricter interpretation of the concept of intra-Union trade, the Commission's decisions will result in a higher number of cases potentially falling under this rule. However, the decisions still have to be confirmed by EU Courts, the case law of which has followed a broader interpretation of this concept.

In the decisions, the Commission began by explaining that it is not required to demonstrate the actual effect of the aid on competition and on trade, but that such effect cannot be merely hypothetical or presumed. Therefore, an analysis of the foreseeable and actual effects of the aid on intra-Union trade has to be made.

In its analysis of the above-mentioned measures, the Commission pointed out some factors that favored a conclusion on marginal effects on intra-Union trade:

• The services provided by the entities at stake were purely local and were only available within a restricted geographical area;

• The number of beneficiaries was limited;

• The services provided were not particularly attractive for citizens from other Member States;

•The services were provided in the respective local languages and the external communications of those entities had local scope only;

• The services generated low revenue (and thus would be unlikely that these activities would attract significant investment from other Member States).

This position of the Commission, in particular, the stricter approach adopted in relation to the concept of intra-Union trade, increases legal certainty for Member States and undertakings in this field, reducing the resources needed for the implementation of aid and the red tape for its approval. However, such approach still has to be confirmed by EU Courts, the case law of which has followed a broader interpretation of this concept. The decision related to the alleged state aid to SCMT is under appeal before the TGUE, which promises to be an important judgment in this area.

EU Court of Justice Advocate-General deems that Intel's appeal, in case C-413P, against a 1,06 billion euro fine should be upheld

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Dzhamil Oda

The European Commission (*Commission*) by decision of 13 May 2009[13] (*Decision*), applied a 1.06 billion euro fine to US microchip manufacturer Intel, for having allegedly abused its dominant position in the market for x862 central processing units (*CPUsx86*), in breach of Article 102 of the Treaty on the Functioning of the European Union (*TFEU*).

Per Commission's standing, Intel abused its dominant position on the worldwide market for CPUsx86 from October 2002 to December 2007, by implementing a strategy aimed at excluding a competitor, Advanced Micro Devices Inc. (*AMD*), from the market. The Commission considered that Intel held a dominant position on the grounds that it had a market share of roughly 70% or more, and that it was extremely difficult for competitors to enter the market and to expand as a result of the unrecoverable nature of investments to be made in research and development, intellectual property and production facilities. In accordance with the decision, the abuse was characterised by several measures adopted by Intel *vis-à-vis* its own customers (computer manufacturers) and a European retailer of microelectronic devices. Accordingly, Intel granted rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) on the condition that they purchased from Intel all, or almost all, of their CPUsx86. Similarly, Intel supposedly awarded payments to the European retailer of microelectronic devices, which were conditioned on the latter selling exclusively computers containing Intel's CPUsx86. According to the Commission, such rebates and payments induced the loyalty of the four manufacturers and of the retailer, and thus significantly diminished the ability of Intel's competitors to compete on the merits of their CPUs.

Intel brought an action against the Commission's decision before the General Court of the European Union (*GCEU*) (case T-286/09), seeking the annulment of the sanctionatory decision or, subsidiarily, a reduction of the applied fine.

Intel appealed said ruling to the Court of Justice of the European Union (*CJEU*) raising several grounds for judicial review – case C-413/14P, pending. The Advocate General delivered on 20 October 2016 a non-binding opinion on the merits of Intel´s appeal.

Concerning the first ground of appeal, the Advocate General underlined in its opinion that the GCEU found that the rebates granted by Intel to Dell, HP, NEC and Lenovo are *exclusivity rebates* and, because of such classification, did not consider it necessary to consider the *capability* of such rebates to restrict competition. The Advocate General recalled the principle arising from the CJEU's jurisprudence concerning the presumptive abusiveness of *loyalty rebates*, but noted that in practice the CJEU has consistently taken into account *"all the circumstances"* when determining

13 A summary of the decision can be accessed in the EU Official Journal C 227, dated 22 September 2009, p. 13.

whether the impugned conduct amounts to abusive conduct. The Advocate General sustained that the GCEU erred in finding that *exclusivity rebates* constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominant position. Further, the Advocate General sustained that the GCEU erred in law in its alternative assessment of *capability* of the conduct by failing to establish, on the basis of all the circumstances, that the rebates and payments offered by Intel had, in all likelihood, an anti-competitive exclusionary effect.

As regards the second ground of appeal, the Advocate General recalled that the GCEU considered sufficient to make a global assessment of the part of the market which was excluded on *average* during the 2002 to 2007 period. On that basis, the court *a quo* deemed irrelevant that the market coverage was considerably smaller during the years 2006 and 2007. Per the Advocate General's standing, in following such approach, the GCEU discontinued the criterion of *"sufficient market coverage"* and therefore failed to ascertain that the conduct at stake was capable of restricting competition in 2006 and 2007. If it had not failed to do so, it would have had to establish that such a small tied market share is inconclusive for the purposes of establishing a restriction of competition, which cannot be remedied by applying the concept of a *"single and continuous infringement"*. The Advocate General therefore suggested that Intel's second ground of appeal should be upheld.

As regards the third ground of appeal, the Advocate General argued that no autonomous category of "*exclusivity rebates*" existed. However, even if the CJEU would disagree with this interpretation, the Advocate General maintained that this ground of appeal should be upheld on the basis that *"exclusivity rebates"* would be conditional upon the customer purchasing *"all or most"* of its requirements from the dominant undertaking, which is not satisfied, from his standpoint, in the assessed case, as HP and Lenovo could still purchase significant quantities of CPUsx86 from AMD.

Observing the fourth ground of appeal, the Advocate General recalled that EU legislation required the Commission to record interviews to ensure that undertakings suspected of infringing EU competition rules can organise their defence, and EU courts could review whether the Commission exercised its powers within the law. Consequently, in his standing, the GCEU erred in law in ruling that the Commission was not in breach of EU law by failing to organise and record a meeting as required under the applicable *due process of law* rules. The Advocate General further stated that such a procedural irregularity could not be remedied by the Commission *a posteriori*, via a *note* included in the file, as such *note* did not record the substance of the interview that the Commission had with an executive of a manufacturing company. The Advocate General, as such, deemed that Intel's fourth ground of appeal should also be upheld.

Assessing the fifth ground of appeal and the *theme* whether the Commission had jurisdiction under international law to bring proceedings against Intel for its anti-competitive conduct, the Advocate General was not convinced that Intel's alleged abuse could be considered to have been implemented in the European Economic Area (*EEA*). In his perspective, the GCEU failed to assess whether the anti-competitive effects stemming from certain agreements between Intel and Lenovo had the capacity to produce any *immediate, substantial and foreseeable* anticompetitive effect in the EEA and therefore the GCEU erred in applying the "*qualified*" effect criterion to dismiss Intel's arguments regarding the Commission's lack of jurisdiction.

In a nutshell, the Advocate General argued that the GCEU's confirmatory ruling should be set aside and the case referred back to the court *a quo* to examine all the circumstances of the case and the actual or potential effect of Intel's conduct on competition in the market.

In any event, one must take into account that the opinion of the Advocate General is not binding on the CJEU. The duty of the Advocate General, pursuant to Article 252, § 2, TFEU, consists exclusively in proposing to the CJEU, acting with complete impartiality and independence, reasoned submissions on cases which, in accordance with the CJEU's statute, require his involvement.

One must now wait to verify if this reasoned, non-binding, opinion of the Advocate-General, that proposes a material and more effect-based approach on supposedly abusive conduct, linked inter alia *to discounts granted by an undertaking in a dominant position – in discontinuation of a mere formal and a per se fulfillment of the requirements regarding Article 102 TFEU under the current judicial acquis – is adopted by the CJEU.*

First "margin squeeze" – a win for the Portuguese Competition Authority

Luís do Nascimento Ferreira

Leonor Bettencourt Nunes

Introduction

The Portuguese Competition Authority (*PCA*) has recently seen a decision finding the infringement of competition rules by abuse of a dominant position as a result of a margin squeeze upheld by the Portuguese specialized Court of Competition, Regulation and Supervision (*TCRS*). The ruling was adopted on October 20, 2016, and will soon be published on the website of the PCA.

The case refers to the markets for the sale of commercial data of pharmacies as well as market studies based on that data, in which the PCA considered there had been an abuse of dominant position involving the National Association of Pharmacies (ANF) as well as three other entities within the same group, notably Farminveste and Farminveste – Investimentos, both active in the sale of the commercial data of pharmacies and HMR – Health Market Research, in charge of the execution of market studies.

The PCA initiated an in-depth investigation into these markets following a complaint by IMS Health, a competitor in the downstream market, which reported that the prices practiced by the ANF group in the sale of commercial data combined with the prices charged for the market studies rendered it impossible, even for an equally efficient market player, to cover its costs for the sale of market studies.

In its infringement decision of 2015, the PCA found that these entities engaged in margin squeeze practices from 2010 to 2013, leading to the exclusion from the market for the provision of market studies and thus, ultimately, harming consumers, in this case, the pharmaceutical laboratories. The PCA further noted that this was serious exclusionary conduct contrary to both the Portuguese Competition Act and the Treaty on the Functioning of the European Union and, therefore, imposed fines amounting to EUR 10.34 million on the ANF group.

On appeal, the TCRS generally upheld the findings of the PCA but decided to decrease the fines imposed to a total amount of EUR 6.89 million, having taken into consideration the markets affected by the abusive practices.

Comment

This case constitutes, undoubtedly, an important record for the PCA. As can be verified in recent years and is demonstrated by statistics of the PCA's 2015 Activity Report, the authority has been trying to consolidate its decisional practice in the antitrust field by presenting a better response time to cases and delivering, in general, more detailed investigations and solid decisions.

In the past, the PCA saw its high-profile decisions of abuse of dominance being reversed by the courts and for a long time these unilateral conducts were not targeted anew. The recent case against ANF is the first where a margin squeeze issue arose and the second case of the abuse of dominant position to be upheld by a court, considering that in 2013 the PCA also fined Sport TV € 3.7 million for abusing its dominant position in the market of premium sports channels (both the TCRS and the Lisbon Court of Appeal later confirmed the decision and reduced the penalty to € 2.7 million).

Finally, it should also be noted that the establishment of the TCRS in 2012 has endowed Portuguese jurisdiction with a specialized court for these matters and thus provided a better judicial response both in terms of time for the handling of cases as well as in the quality of the rulings adopted.

Constitutional Tribunal divided over constitutionality of non-suspensive effect of judicial challenges to fining decisions of the Competition Authority

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Nuno Igreja Matos

Introduction

Under the current Competition Act (Law No. 19/2012 of 18 May), judicial challenges to decisions of the Competition Authority do not, as a general rule[14], have suspensive effect (Article 84 § 4[15]). An addressee of a decision imposing a fine or another sanction (fining decision) must therefore in principle pay the fine even if he is challenging the decision before the Competition Tribunal[16]. The Competition Tribunal may only suspend the effects of a fining decision, if (*i*) the addressee so requests when lodging the judicial challenge, (*ii*) enforcement of the decision would cause the addressee «considerable loss», and (*iii*) the addressee provides security «in substitution» (*e.g.*, a bank guarantee) within a time limit prescribed by that Tribunal (Article 84 § 5).

In this regard, the current Competition Act reverses the general rule applicable under the previous Competition Act (Law No. 18/2003 of 11 June), according to which judicial challenges to fining decisions had suspensive effect (Article 50 § 1 of the previous Competition Act), and also departs from the general regimes for administrative and criminal offences as well as from several sector-specific regulatory regimes.

This amendment was intended to serve as a disincentive to the lodging of unfounded and purely dilatory judicial appeals. In the wider context of the recast of the Competition Act, which also led to the introduction of the possibility of judicial *reformatio in peius*, empowering the Competition Tribunal to increase the fines imposed by the Competition Authority (Article 88 § 1), the legislator also aimed at reinforcing effectiveness and swiftness of the application and enforcement of the competition rules by rendering them more autonomous from the general regimes for criminal and administrative offences and approximating the procedural mechanisms to those foreseen in EU law[17], as agreed to by Portugal in its Economic and Financial Assistance Programme.

However, in particular given the often punitive magnitude of the fines imposed under the Competition Act, these amendments have been criticised for infringing fundamental rights of the addressees of fining decisions, in particular the presumption of innocence (Article 32 § 2 of the Constitution) and the right to access to courts and to effective judicial protection (Articles 20 § 1, 268 § 4 CPR).

In two recent judgments, the Constitutional Tribunal pronounced itself on this question for the first time. However, whereas the Tribunal's Third Chamber, in judgment No. 376/2016 of 8 June 2016, considered Article 84 § 4, 5 to be in line with the fundamental rights invoked, the Tribunal's First Chamber, in judgment No. 674/2016 of 13 December 2016, took the opposite view.

14 The only exception to this rule is provided for decisions imposing structural remedies considered indispensable to terminate restrictive practices or their effects, in light of their often irreversible nature.

15 Articles without reference are those of the current Competition Act.

16 The Competition Tribunal (Tribunal da Concorrência, Regulação e Supervisão) is the competent (first instance) court for all challenges to decisions of the Competition Authority (Article 84 § 3).

17 Article 278 of the Treaty on the Functioning of the European Union (TFEU), Article 31 of Council Regulation (EC) 1/2003.

Background Of The Cases

Both judgments have their origin in decisions by which the Competition Authority had imposed fines on car manufacturers for the provision of incomplete information in response to a request for information[18], which constitutes an administrative offence in terms of Articles 68 § 1 h/i. The addressees of the decisions lodged actions for annulment before the Competition Tribunal and requested the attribution of suspensive effect, submitting that Article 84 §§ 4, 5 infringed their fundamental rights. In the alternative, they offered the provision of security for payment of the fine as per Article 84 § 5.

In both cases, the Competition Tribunal concluded that Article 84 §§ 4, 5 violated fundamental rights, in particular the right to access to court and to effective judicial protection, because it did not allow for any discretionary judicial attribution of suspensive effect and because any attribution of suspensive effect was dependent on the provision of security, irrespective of a possible insufficiency of the financial resources of the addressee for that purpose. As a consequence, the Competition Tribunal allowed the claimants' requests, refused to apply Article 84 §§ 4, 5 and suspended the effects of the contested decisions, pending judgment, based on the general regime for administrative offences, *i.e.*, without requiring the claimants to provide security.

In both cases, the Public Prosecutor appealed to the Constitutional Tribunal.

Judgment No. 376/2016 of the Third Chamber of 8 June 2016

In its judgment of 8 June 2016, the Third Chamber of the Constitutional Tribunal concluded that Article 84 §§ 4, 5 did not infringe the fundamental rights invoked, in particular the right to access to courts and to effective judicial protection[19], because:

• The right to effective judicial protection did not translate into a constitutional requirement that legal actions against decisions imposing administrative sanctions must have suspensive effect; the legislator had a wide margin of discretion in designing the procedure for access to courts, the exercise of which could only be reviewed for the creation of excessive difficulties and for material inequities;

• The utilisation of that margin of discretion in Article 84 § 4 in favour of the general rule that judicial challenges to fining decisions do not have suspensive effect was neither unjustified nor unreasonable, since it furthered the public interest in effective competition rules by discouraging from the lodging of unfounded and purely dilatory judicial appeals, which would compromise the defence of this interest; and

18 INC/2015/1 (Peugeot Portugal Automóveis) and INC/2015/2 (Ford Lusitana). The requests for information had been issued in two of a series of investigations of the Competition Authority, for suspected infringements of Article 9 of the Competition Act and Article 101 TFEU, into agreements between car manufacturers and their licensed sales agents and/or repair shops pursuant to which consumers could not avail themselves of the manufacturer guarantee if they had maintained and/or repaired the vehicle outside the network of licensed repair shops. All investigations were closed following submission by the addressees of commitments to terminate the practice investigated.

19 The following provides only a summary of the essential considerations of the Constitutional Tribunal regarding the fundamental right on which its analysis was focussed.

• The possibility, foreseen in Article 84 § 5, to suspend the effects of a fining decision which enforcement would cause the addressee «considerable loss», against provision of security in the form and amount considered by the judge to be adequate in the case at hand, served as a «relief valve» which withdrew rigidity and automaticity from the system, as it allowed for a balancing between individual and public interests and mitigated the risks of an effective infringement of the right to judicial protection (if the decision is annulled) without compromising the effectiveness of the fine (if the decision is upheld).

As a result, the Third Chamber allowed the Public Prosecutor's appeal and ordered the Competition Tribunal to amend its order in accordance with the judgment.

Judgment No. 674/2016 of the First Chamber of 13 December 2016

In contrast, in its judgment of 13 December 2016, the First Chamber of the Constitutional Tribunal concluded that Article 84 §§ 4, 5 infringed fundamental rights, in particular the right to access to courts and to effective judicial protection[20], because:

• Article 84 §§ 4, 5 required for any attribution of suspensive effect that the application of the fine would cause the addressee «considerable loss» and that the addressee provides security «in substitution» which, in essence, meant that, before challenging the fining decision, the addressee was obliged to pay (at least part of) the fine and to incur (at least part of) the considerable loss; it therefore encroached on the addressee's right to access to courts and to effective judicial protection;

• This encroachment was disproportionate and therefore violated the fundamental rights at stake: while it was adequate to achieve the aim pursued (effective competition rules), as it discouraged from the lodging of unfounded and purely dilatory legal actions, it was not indispensable to achieve this aim, given, first, the deterring effect already resulting from the possibility of *reformatio in peius* and, second, the availability of other less restrictive and as effective means;

• In particular, while Article 84 §§ 4, 5 did not allow the judge to dispense with the addressee's obligation to provide security, nor leave the judge any discretion regarding the amount of the security, as it had to correspond to the amount of the fine imposed, a system which did not feature this rigidity and automaticity but left the judge a margin of discretion would be less restrictive;

• Even if one could affirm the necessity of the encroachment, it would still be disproportionate in the strict sense (excessive), in particular as it did not leave the judge any room to take into account

20 The following provides only a summary of the essential considerations of the Constitutional Tribunal regarding the fundamental right on which its analysis was focussed.

a possible insufficiency of the addressee's financial resources for the provision of security, as a result of which legal actions by those addressees could never be attributed any suspensive effect.

As a result, the First Chamber dismissed the Public Prosecutor's appeal and upheld the order of the Competition Tribunal.

Comment

The judgment of 13 December 2016, in which the First Chamber of the Constitutional Tribunal found Article 84 §§ 4, 5 to be unconstitutional, is to be welcomed and is an important contrast to the judgment of the Third Chamber of 8 June 2016.

A system which, as a rule, allows for the enforcement of potentially drastic fines prior to conclusion of a judicial review of the fining decision, and which allows for suspension of those effects only if enforcement of the fine would cause the addressee "considerable loss" and if the addressee provides security, irrespective of the sufficiency of his financial resources, excessively encroaches on the presumption of innocence and the right to effective judicial protection, in particular if considered together with the possibility of *reformatio in peius*.

What is more, the legislative motivation to discourage from the lodging of unfounded and purely dilatory appeals does not appear to be a valid justification in the first place, as it would arguably only do so, if empirical evidence indeed suggested that a significant share of appeals against fining decisions actually featured those characteristics. However, quite to the contrary, recent years have rather seen a considerable number of high-profile fining decisions annulled, or the fines reduced, by the courts. Moreover, experience from other Member States with a similar system of judicial review of fining decisions (*e.g.*, Germany) seems to suggest that a suspensive effect of judicial challenges does not impair the effectiveness of the sanctions imposed.

The judgment of 13 December 2016 deserves applause not only for its conclusions but also for its in-depth proportionality assessment of Article 84 §§ 4, 5 which contrasts with the rather superficial analysis carried out in the judgment of 8 June 2016. For, although sanctions for the infringement of competition rules and their enforcement must undoubtedly be effective, and although the legislator disposes of a wide margin of discretion in designing procedural rules for access to judicial review, he must be subject to utmost scrutiny when, in doing so, encroaches on fundamental rights.

It is interesting to note in this regard that the opposing conclusions of the Third Chamber and First Chamber appear to be largely based on a very different interpretation of Article 84 § 5. While the Third Chamber understood that this provision left it to the judge to decide which form and amount of security would be most adequate in the concrete case and enabled him to balance individual and public interests (thus serving as a «relief valve»), the First Chamber considered that the provision was rigid and automatic, not leaving the judge any discretion (*e.g.*, regarding the amount of security, which had to correspond to the fine imposed), except for the time-limit for provision of the security. In any case, even based on the interpretation of the Third Chamber, Article 84 § 5 would still not seem to allow for the attribution of suspensive effect, if enforcement of the fine would not cause the addressee «considerable loss» or, irrespective of that question, if the addressee does not provide any security, even if a *prima facie* illegality of the fining decision can be established.

However, the judgment of 13 December 2016 is not yet final. Given that its conclusions regarding the constitutionality of Article 84 §§ 4, 5 contradict those of the judgment of 8 June 2016, it would in principle be subject to mandatory appeal by the Public Prosecutor to the Plenum of the Constitutional Tribunal (Article 79 D § 1 of Law No. 28/82), which is composed of all 13 judges. For the reasons set out above, the judgment of 13 December 2016 merits to be upheld. The fact that the judgment of 8 June 2016 was supported by all 5 deciding judges, whilst the judgment of 13 December 2016 was the result of a 3-to-2 majority decision, does not necessarily indicate an undesirable outcome, given that 3 of the 5 judges supporting the judgment of 8 June 2016 have been replaced in the meantime, following expiry of their respective terms.

The judgment of 13 December 2016, in which the First Chamber of the Constitutional Tribunal found Article 84 §§ 4, 5 to be unconstitutional, is to be welcomed and is an important contrast to the judgment of the Third Chamber of 8 June 2016

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Brazilian Antitrust Authority issues new rules for collaborative agreements

The Administrative Council for Economic Defence (CADE) has recently defined new rules addressing the so-called "collaborative agreements" between companies, that should be submitted for prior approval by the Brazilian antitrust authority, if they produce effects (or at least potential effects) in Brazil, and if the groups involved in the agreements meet the revenue threshold set forth in the Brazilian antitrust law and regulations.

In force since November 24, 2016, CADE's Resolution No. 17/2016 brings further clarity to the concept of "collaborative agreements" and provides for the following requirements for an agreement to be considered a "collaborative agreement": (*i*) term of two or more years; (*ii*) establishment of a joint enterprise with the purpose of developing an economic activity (*i.e.*, the acquisition or offer of goods or services with profit purposes); (*iii*) sharing of risks and results of the economic activity to be developed under the agreement; and (*iv*) the parties or their respective economic groups are competitors in the market related to the agreement.

Agreements with a term of less than two years will only be subject to mandatory filing with CADE if the two-year period is achieved or exceeded by means of a renewal or an extension of the original agreement. In this case, the agreements should be submitted to CADE prior their renewal or extension and their effectiveness are then subject to CADE's clearance.

These new rules represent a step forward in comparison with the former rules, as they leave aside the previous requirements based on market shares, which caused some legal uncertainty - especially in cases where there were no precedents regarding the definition of the relevant market or market data available in order to calculate such market shares.
Above all, the new rules limit the types of agreements that are subject to mandato-

The new rules limit the types of agreements that are subject to mandatory antitrust filing in Brazil, excluding the obligation to submit ordinary commercial agreements that merely result in supply or distribution relationships between the parties

ry antitrust filing in Brazil, excluding the obligation to submit ordinary commercial agreements that merely result in supply or distribution relationships between the parties. Such vertical agreements do not create any type of association or partnership, and often they are not relevant from an antitrust standpoint.

So far, CADE has reviewed Resolution No. 17/2016 in one single occasion, in the context of a consultation brought by Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG, which aimed at reviewing whether an international port-to-port transportation slot charter agreement (the "Slot Charter Agreement") was subject to mandatory filing with CADE.

While reviewing the case, CADE pointed out that, by setting the requirement of establishment of a joint enterprise, Resolution No. 17/2016 made collaborative agreements similar to contractual joint ventures. In that specific situation, however, the Slot Charter Agreement did not establish a joint enterprise or the sharing of risks and results. CADE took the following factors into account during its review: the parties and their respective economic groups would continue to independently provide their cargo and container shipping services, each party would be responsible for loading and handling fees for their own containers; and the parties would not have access to or exchange any sensitive information.

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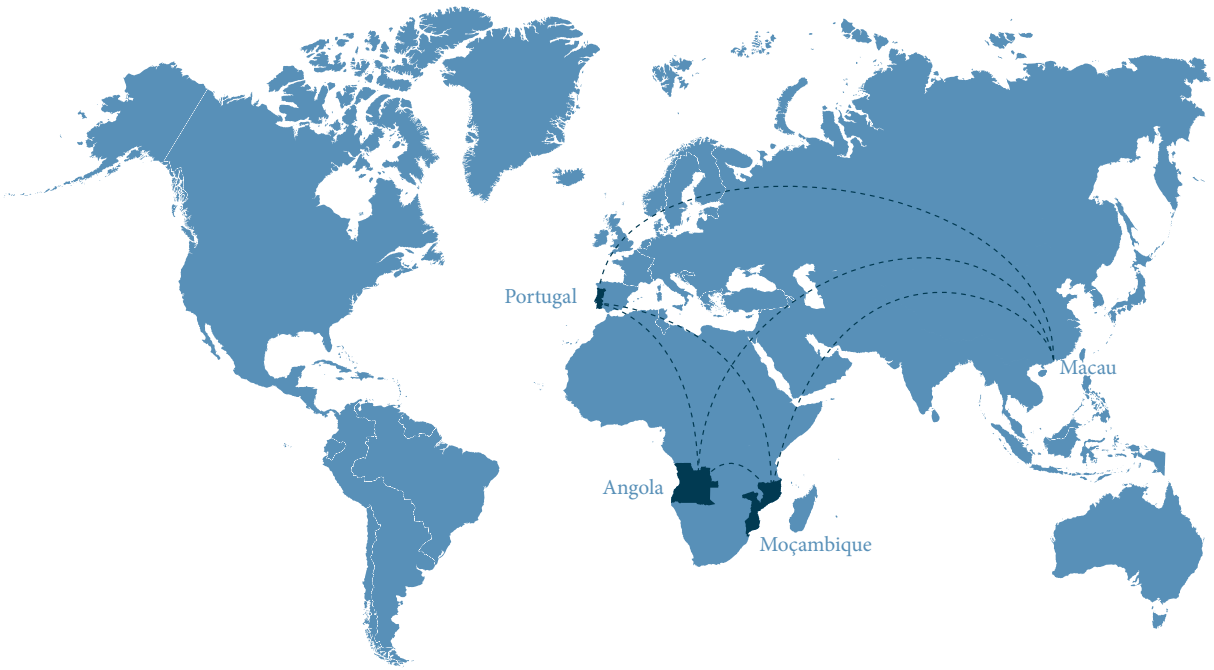

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