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Court upholds fine for information-sharing agreement on prices[1]

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Summary

In December 2008 the Portuguese Competition Authority fined the Association of Bakers of Lisbon (the Association) €1.18 million for an alleged restrictive practice consisting of an agreement to share information on retail prices for bread. On June 25, 2010 the Lisbon Court of Commerce confirmed the decision and dismissed the Association's appeal.[2]

Court of Commerce decision

Evoking EU case law, the court considered that up-to-date individual price lists are commercially sensitive information; therefore, their exchange is likely to infringe competition rules, as it normally enables competing companies to predict each other's future price behaviour.

The court rejected the parties' arguments that information on prices was requested for internal use and for the compilation of statistics, as it found insufficient evidence to support such claims. On the contrary, the court concluded that the Association collected and shared information with the sole purpose of controlling the movement of prices, as referred to in the communications' justifications. The court also established that within the companies which regularly replied to such communications, in particular those represented on the Association's statutory bodies, the exchange of confidential information coincided with the alignment and coordination of the companies' pricing behaviour.

THE COURT CONSIDERED THAT UP-TO-DATE INDIVIDUAL PRICE LISTS ARE COMMERCIALLY SENSITIVE INFORMATION; THEREFORE, THEIR EXCHANGE IS LIKELY TO INFRINGE COMPETITION RULES, AS IT NORMALLY ENABLES COMPETING COMPANIES TO PREDICT EACH OTHER'S FUTURE PRICE BEHAVIOUR.

It was found that the individual exchange of information constituted an agreement which restricted competition by object, as prohibited by Article 4 of the Competition Act (in terms similar to those of Article 101 of the Treaty on the Functioning of the European Union).

In determining the amount of the fine, the aggregate turnover of the 14 members of the association (ie, €17.6 million) who participated in the Association's statutory bodies was considered, since the Authority identified these members as engaged in the restrictive behaviour. Finally it is worth mentioning that these 14 undertakings are jointly and severally liable for the payment of the fine.[3]

Comment

In this case, it was the information exchange system as a whole that was considered anti-competitive, rather than the possible existence of a cartel.

In terms of economic analysis as supporting evidence, the court confirmed the Authority's view that the Association's members that chose to reply to the communications had similar prices, since "the average price in the period under analysis (i.e., 2002 to 2005), excluding the outliers, ranged from €0.09 to €0.11, and in each year the annual increase was approximately 11%".

However, in the absence of additional evidence, it is in the authors' view hardly convincing to state that price differences of around 20% (i.e., from €0.09 to €0.11) between associates correspond to analogous prices and parallel behaviour in the relevant market.

In the absence of additional supporting evidence, it is valid to question the apparent presumption that members of an association are involved in prohibited behaviour merely because they are represented on an association's statutory bodies.

IN THE ABSENCE OF ADDITIONAL SUPPORTING EVIDENCE, IT IS VALID TO QUESTION THE APPARENT PRESUMPTION THAT MEMBERS OF AN ASSOCIATION ARE INVOLVED IN PROHIBITED BEHAVIOUR MERELY BECAUSE THEY ARE REPRESENTED ON AN ASSOCIATION'S STATUTORY BODIES.

The identification of the offending parties that had participated in the anti-competitive behaviour was crucial, as it influenced: the calculation of the relevant turnover; the size of the fine; and the nature of liability (as the offending parties were jointly and severally liable for payment of the fine).

Moreover, the fine imposed by the authority and upheld by the court seems somewhat disproportionate, as it failed, in particular, to take account of the fact that:

- the focus was not on establishing a hardcore cartel, but on uncovering the illicit exchange of sensitive and confidential information on prices;
- with limited exceptions, most of the information in question related to current prices, not future prices; and
- the Association represented only 200 bakeries (out of a national total of 7,000).

The court's decision may be appealed to the competent appellate court, which is the court of final appeal (except in the event of an appeal to the Constitutional Court). If appealed, the ruling will be suspended. ■

[1] This article was published in the International Law Office (ILO) in September 9 2010.
[2] See press release: http://www.concorrencia.pt/download/Nota_a_Comunicacao_Social_AIPL.pdf.
[3] Article 47(4).

Individual commitments offered by companies under proceedings concerning anti-competitive practices: developments in European and National law

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On June 29, 2010, the European Court of Justice ("ECJ") issued a judgement concerning an appeal lodged by the Commission (C-441/07 P), from a Court of First Instance ("CFI") judgement, Alrosa/ Commission (T-170/06), which had dismissed the Commission Decision 2006/520/ EC (Process COMP/B-2/38.381).

In this Decision, the Commission considered that the commitments offered by De Beers were mandatory - to bring to an end its purchases of rough diamonds from Alrosa - pursuant to article 9 (1) of Regulation No. 1/2003, which states that "*where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings*".

The CFI (now General Court) considered that the Commission had not taken into account, in circumstances such as those of the case, Alrosa's right to be heard on the individual commitments proposed by De Beers. The ECJ now dismissed this judgement on the basis that the individual commitments offered by De Beers do not interfere with Alrosa's position. In this regard, the Court decided that article 9 (1) of Regulation No. 1/2003 provides the Commission with a large degree of discretion to make a certain commitment proposal binding or non binding, even if that commitment may affect third parties that did not participate in the process.

Regarding national proceedings, unlike merger control procedures, Portuguese Competition Law does not specify whether or not the Portuguese Competition Authority ("PCA") may terminate administrative penalty proceedings through the imposition of measures intended to annul the effects of anti-competitive practices.

> The lack of a specific legal provision regarding the imposition of commitments has not prevented the PCA from accepting the commitments offered by the companies enrolled in administrative penalty proceedings.

However, in some cases, the lack of a specific legal provision regarding the imposition of commitments has not prevented the PCA from accepting the commitments offered by the companies enrolled in administrative penalty proceedings, and from terminating the proceeding, similarly to what happens in the context of investigations conducted by the European Commission.

The major difference between the PCA's commitment decisions and those of the Commission relates to the consequences deriving from the breach of those commitments. In the European context, as these type of decisions are foreseen in the law, the Commission may impose penalties of up to 10% of turnover upon those companies that breach a binding commitment under article 9 (article 23 (2), c), of Regulation No. 1/2003). At the national level, and taking into account the principle that penalties should be predetermined by law, if the PCA acknowledges that a company has breached a binding commitment imposed by a decision that brought the proceedings to an end, the PCA is not allowed to apply penalties to the commitment violation itself. However, the PCA may reopen the procedure and apply the proper penalty to the anti-competitive practice that caused the proceeding.

Presently, in Portugal, the PCA brought proceedings to an end in at least three cases[1], based on the view that the goals pursued by this regulatory entity, regarding the establishment, protection and promotion of competitive markets, would be fully achieved with the imposition of the commitments.

The previous PCA Board publicly proposed the stipulation of similar powers, i.e. allowing the PCA to bring proceedings concerning anti-competitive practices to an end through the imposition of certain commitments; where these commitments are accepted by the company, the PCA may terminate the proceeding under the condition these commitments are complied with[2]. This would be a significant amendment to Portuguese Competition Law, bringing it into harmony with European law and into accordance with the PCA's recent practice, a view to which the new PCA Board also seems to subscribe[3]. ■

> The major difference between the PCA's commitment decisions and those of the Commission relates to the consequences deriving from the breach of those commitments.

[1] See Press Release no. 16/2007, no. 13/2008 and no. 20/2009, in http://www.concorrencia.pt/en/Press.asp).
[2] See paragraph 5 of the summary of some proposals of amendments to the Law no. 18/2003, in http://www.concorrencia.pt/download/7-AdC-Propostas_Alteracao_Lei_da_Concorrencia.pdf.
[3] See paragraph 2.3, of the speech made on the occasion of the 1st. Competition Law Conference between Portugal and Spain, in http://www.concorrencia.pt/download/2010-07-02_1a_Conferência_Luso-Espanhola_Discurso_Presidente_AdC.pdf.

Competition Authority examines the Postal Sector

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Introduction

From its establishment in 1520 and up until end of the 1990s the Portuguese public postal service operated as a State-protected monopoly.

Following Directives 97/67/EC, 2002/39/EC and 2008/6/EC, and respective national implementing legislation, the national postal market has, since then, been subject to gradual and controlled liberalization.

Currently the incumbent player still holds a legal monopoly. However its monopoly of certain specific universal postal services shall cease on December 31 2010: (a) postal items, including addressed advertising, whose price is two and a half times below the public tariff price of a postal item of first category, as long as its weight is below 50 g; (b) registered mail with declared value, including judicial notifications, within the price and weight limits provided above; (c) issuance and sale of stamps and other postal values; and (d) placement in public places of mail boxes for the collection of postal items.

Given this legal framework, and in particular the impact of liberalization at the end of the current year, the Portuguese Competition Authority (*PCA*) released on July 16, 2010 a study highlighting the potential competition law issues that may arise in this sector.

Main findings

Regarding antitrust conducts, the *PCA* identifies a series of conducts that can be adopted by incumbent operators still holding a dominant position in the postal sector, which may allow them to act autonomously from competitors, clients and suppliers. Among such potential illegal behaviours by dominant postal companies, the *PCA* identifies:

(a) cross-subsidization between reserved and non-reserved activities, by leveraging their activity in the latter through the allocation of costs to the former;
(b) predatory pricing policies (below the variable costs) in non-reserved postal service activities, with the intent of excluding competitors from these services;
(c) margin squeeze practices in vertically integrated markets, by establishing artificial high prices at the wholesale level with the aim of pushing competitors out of the market;
(d) excessive pricing, by establishing prices well above their costs, in services which can not be easily replicated by competitors;
(e) unjustified rebates, notably exclusionary rebates;
(f) price and quality discrimination, leading to better commercial and quality conditions to companies of the incumbent economic group in detriment of competing players; and
(g) tying, notably through the obligation of the postal client acquiring, cumulatively, reserved and non-reserved postal services.

The PCA also set out an extensive qualitative explanation of the main findings in public antitrust enforcement proceedings handled by the European Commission in the postal sector, *inter alia*, in cases UPS *vs Deutsche Post* (COMP/35.141), *British Post Office vs. Deutsche Post II* (COMP/36.915) and *Hays vs. La Poste Belge* (COMP/37.859); as well as in merger cases – The Post Office/TPG/SPPL (M.1915) and Posten AB /Post Danmark/S (M.5152). In terms of EU national competition authorities' enforcement decisions in dominant position cases, the report focus its review upon a significant number of decisions adopted in Denmark, Germany, Spain, Italy and Hungary against *Post Danmark, Deustche Post, Correos de España, Post Italiane* and *Magyar Posta*, respectively.

According to the study, the sole cartel procedure conducted to date by EU national competition authorities was handled by the Hungarian competition authority against *Magyar Laptterjeszto* and *Magyar Posta*.

Most of the cases reviewed related to discriminatory commercial conducts by incumbent players (quantity and exclusionary rebates), predatory and excessive pricing, margin squeeze, refusal to access and tying. In this context, the PCA envisages an increase of public enforcement in the postal sector as a result of the total liberalization of postal services, which shall occur by December 31, 2010 in Portugal.

Proposed Measures

In terms of material measures applicable to the Portuguese postal sector, the PCA provides the following recommendations:

- the postal service should be assured, whenever deemed possible, by market mechanisms, including tender procedures, in regions in which such formula is viable;
- the selection procedure of the universal postal services provider shall be transparent and construed to allow the participation of the highest possible number of qualified entities to provide such services;
- access to the elements of the postal network infrastructure, by all economic agents competing with the incumbent, must be ensured in transparent and non-discriminatory terms, likewise access to the elements regarding the interoperability of postal service grids;
- the national VAT rules should be altered to ensure a level playing field between economic agents, without market distortions, as the incumbent is the only economic agent exempt from VAT, when providing activities that can be apprehended as part of the universal postal service. ■

Comment

The authority's study aims to enhance a level playing field in the sector, highlighting conducts that can be considered illegal from a competition law perspective and identifying measures that can be implemented by the competent public authorities to foster competition in the postal sector. A careful balance of interests, however, needs to be achieved in implementing both the PCA's recommendations as well as the final liberalization package of the universal postal service, as one of the key characteristics of this service is the promotion of effective social, economic and territorial cohesion.

The *AstraZeneca* Judgement: warning against "misleading" conduct by dominant companies with regulatory authorities

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On 1 July 2010 the EU General Court handed down its long-awaited judgement in *AstraZeneca v Commission*[1]. The court essentially upholds the Commission's decision which had fined AstraZeneca for misusing regulatory procedures, at the time seen as a novel category of abuse of dominant position under EU competition law. The judgement is likely to have major consequences in the future for competition enforcement in the pharmaceuticals and other regulated sectors.

The Commission's Decision

In June 2005 the Commission adopted a decision imposing upon AstraZeneca a fine of € 60 million for two separate abuses of a dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU), formerly Article 82 of the EC Treaty.

The first abuse concerned misleading representations by AstraZeneca to patent attorneys, national courts and patent offices in seven EEA Member States with a view to obtaining supplementary protection certificates (SPCs) for its medicine Losec (a leading anti-ulcer drug). SPCs extend the basic patent protection a maximum of 5 years to take into account the period of time between the filing of a patent application and the time a company can bring a pharmaceutical product into the market. The Commission found that AstraZeneca had concealed from the authorities the date on which it had obtained its first market authorization, and that this enabled it to obtain supplementary protection for its product to which it was not entitled, thereby delaying generic entry.

AstraZeneca was also sanctioned for having selectively withdrawn Losec capsules from the market, replacing them with Losec tablets, and requesting de-registration of marketing authorizations for the capsules. At the time, in order for generic drugs to be granted a marketing authorization benefiting from a simplified procedure, EU law required that the market authorization of the reference medicinal product still be in force. The Commission considered that the de-registering of the Losec capsules' market authorization made the entry of generic medicinal products more time-consuming and more difficult, whilst it also prevented parallel imports from other Member States.

> MISLEADING INFORMATION TO AUTHORITIES "CONSTITUTES A PRACTICE FALLING OUTSIDE THE SCOPE OF COMPETITION ON THE MERITS".

The Judgement

AstraZeneca challenged the Commission's findings concerning relevant market definition, dominant position and each of the two abusive behaviours. The court upheld all these findings, with one partial exception: it found that the Commission failed to prove that the de-registrations of the marketing authorizations were capable of preventing parallel imports in two of the three Member States concerned. For this reason the fine was reduced to € 52.25 million.

With respect to the first abuse, the Court found that the submission of misleading information to authorities "constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition", and that such conduct is not in keeping with the special responsibility of dominant companies not to further impair competition. The Court also considered, *inter alia*, that no proof of bad faith or deliberate intention from AstraZeneca was necessary, insofar as the conduct is objectively misleading (considering the specific circumstances of the case), and that the Commission did not need to prove anti-competitive effects, being sufficient to show that the conduct was at least capable of successfully extending AstraZeneca's patent protection.

Regarding the second abuse, the Court acknowledged that the launch of Losec tablets (a follow-on product) does not raise concerns, since it is part of the normal competitive process, and that AstraZeneca also could not be reproached for withdrawing Losec capsules from the market, as this was not capable in itself of creating regulatory obstacles to the market entry of generics. However, the court held that, in the absence of grounds connected with the legitimate interests of a company or in the absence of objective justification, a dominant company cannot use regulatory procedures in such a way as to prevent or make more difficult the entry into the market of competitors. In particular, the Court found that the de-registration of the market authorizations for Losec capsules was not based in any way on the legitimate protection of AstraZeneca's investments and had been implemented solely to exclude competitors. ■

Comment

This judgement comes after the July 2009 final report of the Pharmaceuticals Sector Inquiry, where the Commission made clear that any practices by innovative companies that create artificial barriers to generic entry will come under very close anti-trust scrutiny[2]. Although the specific conduct at issue in AstraZeneca could not occur under today's regulatory framework, the Court's confirmation of the Commission's analysis makes it likely that the sector will continue to be monitored closely by the Commission.

However, the importance of this judgement extends beyond the pharmaceuticals sector to all sectors operating under some form of regulation. Dominant companies bear a "special responsibility" not to further impair competition in the market, and all types of conduct (even if not purely commercial or related to prices) that do not constitute "competition on merit" – a somewhat broad concept – may be considered abusive.

Dominant companies in all regulated sectors should therefore take care in their strategies and communications with regulatory authorities, since even formally lawful conduct within a given regulatory framework may be contrary to competition law, if found to be "misleading" and capable of excluding competitors.

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[1] Case T-321/05, *AstraZeneca v Commission*, available at www.curia.eu.
[2] Please see the MLGTS Briefing of 9 July 2009, "Increased Scrutiny: The Final Report on the Sector Inquiry into the Pharmaceutical Sector".

European Union sentenced to pay a compensation following an illegal merger block

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On June 9 2010 the European Court of Justice issued an order[1] condemning the European Union to pay Schneider Electric an amount of € 50,000 to compensate the losses incurred by Schneider as a result of the Commission's decision to prohibit a concentration involving the proposed acquisition of Legrand by Schneider. Both French companies are active in the production and sale of electronic equipment[2].

This court order brings to an end the long journey this case has travelled over the last 10 years. However, more than the order itself, what is really worth stressing is the importance of this case in underlining the principles and criteria for the establishment of the EU's non-contractual liability and for the assessment of damages in merger blocks.

Summary of facts

In October 2001 the European Commission opposed the acquisition of Legrand by Schneider, alleging that the transaction would create a dominant position as a result of which effective competition would be significantly impeded in various national markets.

Schneider appealed from this decision to the General Court (former Court of First Instance)[3], which annulled the Commission's decision on two grounds: *(i)* errors of analysis and of assessment in relation to the impact of the transaction, given that the Commission overestimated the economic power of the entity resulting from the concentration; *(ii)* violation of the notifying party's defence rights, since in the statement of objections that precedes the final decision and allows the parties to address the Commission's objections, the Commission did not deal with sufficient clarity and precision with one of the competition problems that had been cited as one of the grounds for prohibition of the transaction.

Some time after, Schneider brought before the General Court a liability action against the Community (now, the Union) seeking to obtain compensation for the damages suffered as a consequence of the illegality of the prohibition decision that had been declared by the same court[4]. In the first instance, Schneider was partially successful and the court postponed to a later stage its decision regarding the specific amount to be awarded to Schneider.

However, the Commission appealed from this judgement to the Court of Justice, which limited the type of damages to be rendered by the Community, maintaining nonetheless the obligation to pay a compensation that, as mentioned above, was set at € 50,000.

Criteria for determining liability and assessing damages: the "Schneider doctrine" v. the "Airtours doctrine"

The Schneider case focuses on the issue of the EU's non-contractual liability and on the method for evaluation of losses arising from the prohibition of mergers[5]. For the EU's non-contractual liability and obligation to compensate to arise, the following conditions must be met: the unlawful behaviour of its institutions or agents, the existence of a damage and a causal link between the conduct and the damage.

The assessment of the last two conditions implies a factual analysis that depends largely on the particularities of each case. The essential idea is that there can only be compensation where there is an actual damage and that damage is a direct and certain consequence of the illegal behaviour attributable to the EU.

However, the most interesting aspect of the Schneider case lies in the evaluation of the first condition mentioned. According to that condition, when the unlawfulness of a legal measure is at stake, that unlawfulness, in order to be capable of causing the Union to incur non-contractual liability, must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. This is the case if an institution or agent manifestly and gravely disregards the limits of its discretion. The less discretion the EU exercises in a given matter, the more responsibility it bears.

The Schneider case concerns the illegality of a decision that prohibited a concentration. The illegality was based on two grounds: error of analysis and of assessment regarding the competitive impact of the concentration on the relevant markets and violation of the notifying party's rights of defence.

From this standpoint, the Schneider case is different from the "Airtours case", in which the General Court addressed the EU's liability and the eventual obligation to compensate the injured parties due to a Commission's blocking decision that was annulled solely on the basis of errors of analysis and errors of assessment[6]. ■

The main lesson to be drawn from these two cases is that errors of assessment committed in areas of wide discretion, from a technical, economical and legal point of view – such as that of merger control – do not constitute per se a sufficiently serious breach of EU Law, although the Court recognizes that the rules that bind the Commission to authorize a concentration that does not have anti-competitive effects are rules that confer rights to individuals in the sense mentioned above. However a breach of defence rights amounts in principle to a manifest and grave disregard for the limits of the EU institutions' discretion, capable of activating the EU's non-contractual liability.

The main reason for this difference is the margin of discretion that the EU exercises. When a given institution has only a considerably reduced, or even non-existent, degree of discretion, the mere infringement of EU Law may be sufficient to establish the existence of a sufficiently serious breach. The same applies where the infringing institution or agent makes an abusive application of the relevant substantive or procedural rules.

In contrast, the concept of a sufficiently serious breach of EU Law does not cover errors or mistakes that, despite their gravity or cumulative effect, are a consequence of the application of complex rules, which are subject to a considerable degree of latitude and impose on the institution concerned and their agents objective constraints in terms of investigation.

According to the court, accepting a different position, by equating any type of unlawful behaviour with a sufficiently serious breach capable of generating non-contractual liability, would risk compromising or at least reducing the capacity of the Commission to function as a competition regulator.

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[1] Case C-440/07 P *Commission / Schneider Electric*.
[2] Case COMP/M.2283 *Schneider / Legrand*.
[3] Case T-310/01 *Schneider Electric / Commission*.
[4] Case T-351/03 *Schneider Electric / Commission*.
[5] According to Article 340, § 2 of the Treaty on the Functioning of the European Union (former Article 288, § 2 of the Treaty establishing the European Community), in the case of non-contractual liability the Union shall make good any damage caused by its institutions or by its agents in the performance of their duties. Thus, the passive legal capacity in these actions and the obligation to compensate losses rests in the EU (previously, in the Community), although its representation in court belongs to the infringing institution or agent.
[6] Cases T-342/99 *Airtours / Commission* and T-212/03 *MyTravel /Commission*.

Liability of parent companies in a cartel case: the General Court judgement trioplast Industrier AB v Commission

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Introduction

On September 13, 2010, the General Court of the European Union ("***Court***") delivered a relevant judgement[1] concerning the liability of parent companies in a cartel case.

Trioplast Industrier AB ("***applicant***") challenged the European Commission's ("***EC***") decision that imposed a fine, totalling € 17.85 million, for participation in anti-competitive conduct in the market for industrial sacks, in breach of Article 81 EC [now Article 101 of the Treaty on the Functioning of the European Union] and Regulation (EC) 1/2003.

Trioplast Industrier AB is a Swedish undertaking and the parent company of the Trioplast Group, which also includes Trioplast Wittenheim SA[2]. The latter was owned by three different companies: St. Gobain, FLS and Trioplast Industrier.

The Commission Decision

In November 2005, the EC adopted a final Decision[3] concluding that between January 1982 and June 2002 there had been a cartel operating in the market for plastic industrial sacks used to package upstream products - including raw materials, fertilisers, polymers, construction materials, agricultural and horticultural products and animal feed - in Belgium, Germany, Spain, France, Luxembourg and in the Netherlands.
The cartel consisted, namely, in the concerted fixing of prices and sales quotas and in the allocation of tender contracts. Thus, the EC imposed a total fine of € 17.85 million on Trioplast Wittenheim for its participation in the cartel; in addition to that amount, the EC held the applicant jointly and severally liable for € 7.73 million, and FLS Plast and its parent company FLSmidth jointly and severally liable for € 15.30 million.

> As the successive parent companies had never formed an economic entity together, the sum paid by the applicant should not exceed the share of its joint and several liability.

The General Court judgement

In the judgement, the Court underlines that the amount recovered from the applicant had to be contingent on the amount recovered from FLS Plast and FLSmidth, concluding that the applicant was unable to identify, from the EC's Decision, the exact amount of the fine it had to pay.

Furthermore, the Court states that as the successive parent companies had never formed an economic entity together, the sum paid by the applicant should not exceed the share of its joint and several liability. Accordingly, that share should correspond to the portion of the amount attributed to the applicant in relation to the total of the amounts up to which the parent companies have, respectively, been held jointly and severally liable for the payment of the fine imposed on Trioplast Wittenheim.

The Court verified that the EC failed to specify the share applicable to the applicant and that under the principle of legal certainty the applicant should know, without doubt, the exact amount of the fine it must pay in respect of the period for which it is held jointly liable for the infringement. Thus, the Court concluded that the contested decision violated both the principle of legal certainty and the principle of individuality of penalties and sanctions.

> An undertaking should only be penalised for acts imputed to it individually.

In this context, the Court annulled the EC's Decision on that specific matter, reducing to € 2.73 million the fine that should be the basis for the EC to determine the applicant's share of the joint and several liability regarding the payment of the fine imposed on Trioplast Wittenheim.

Comments

The present judgement constitutes a relevant contribution to the clarification of the boundaries concerning the liability of the parent companies in a cartel case.

The Court establishes that when an infringement has been committed by several undertakings, the gravity of the participation of each of them must be examined in order to determine whether there are any aggravating or attenuating circumstances relating to them. In this context, the Court applies to the present case the general principle of legal certainty and the principle that penalties must be adequate to the offence, so that an undertaking should only be penalised for acts imputed to it individually. Furthermore, as the Court provides in its case law, these principles are applicable in any administrative procedure that may lead to the imposition of sanctions under European Union competition law. ■

[1] Case T-40/06, not published.
[2] Trioplast Wittenheim SA also challenged the Commission Decision before the General Court. This judgement was delivered on the same date – Case T-26/06, not published.
[3] Case COMP/F/38.524 - Decision C (2005) 4634 final.

The Akzo case-law: the EU standard of protection of written communications between *lawyers* and their clients

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INTERNAL COMPANY COMMUNICATIONS WITH IN-HOUSE LAWYERS ARE NOT COVERED BY LEGAL PROFESSIONAL PRIVILEGE IN EUROPEAN COMMISSION COMPETITION LAW INVESTIGATIONS.

On 14 September 2010 the European Court of Justice (ECJ) issued its much anticipated ruling in case *Akzo and Akcros v Commission*, where it confirmed that internal company communications with in-house lawyers are not covered by legal professional privilege in European Commission competition law investigations[1].

At the crux of this ruling is a dispute that occurred during a surprise inspection (*dawn raid*) carried out by European Commission officials, upon the UK premises of Akzo Nobel Chemicals Ltd. (Akzo) and Akcros Chemicals Ltd. (Akcros). In particular, the Commission officials copied several documents, including two e-mails exchanged between Akcros' general manager and Akzo's coordinator for competition law, who is enrolled as an *Advocaat* of the Netherlands Bar and, at the time, was a member of Akzo's legal department and was therefore an employee of the company on a permanent basis.

These two e-mails were considered by the parties[2] to be covered by the protection of confidentiality of communications between lawyers and their clients (legal professional privilege) but the Commission and now the ECJ have denied such protection.

The ECJ refers to its case law from the beginning of the 1980s in *AM&S Europe v Commission*[3], according to which confidentiality of written communications between lawyers and clients are protected at Community level if two cumulative conditions are met: *(i)* the exchange with the lawyer must be connected to the client's rights of defense and, *(ii)* the exchange must emanate from "independent lawyers", that is to say lawyers who are not bound to the client by a relationship of employment.

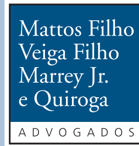
Accordingly, the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

On the contrary, the Portuguese courts have recognized that internal communications with in-house lawyers benefit from legal privilege in competition law investigations, and that EU case law on legal professional privilege is not applicable to proceedings under national law.

For further developments on this issue, please see the October 2010 edition of the Morais Leitão, Galvão Teles, Soares da Silva e Associados Newsletter. ■

THE REQUIREMENT OF INDEPENDENCE MEANS THE ABSENCE OF ANY EMPLOYMENT RELATIONSHIP BETWEEN THE LAWYER AND HIS CLIENT, SO THAT LEGAL PROFESSIONAL PRIVILEGE DOES NOT COVER EXCHANGES WITHIN A COMPANY OR GROUP WITH IN-HOUSE LAWYERS.

[1] Case C-550/07 P, not yet reported.
[2] The proceedings counted with interventions on the part of the following associations: the Council of the Bar and Law Societies of the European Union (CCBE), the General Council of the Netherlands Bar (ARNOVA), the European Company Lawyers Association (ECLA), the American Corporate Counsel Association – European Chapter (ACCA) and the International Bar Association (IBA), as well as the following Member States: Ireland, the Netherlands and the United Kingdom.
[3] Judgement of 18 May 1982, *AM & S v. Commission*, Case 155/79, ECR 1982 p. 1575.



SPECIAL CONTRIBUTION MATTOS FILHO ADVOGADOS

Decision of the Superior Court of Justice: conflict of jurisdiction between Brazilian Central Bank (BACEN) and Brazilian Council for Economic Defense (CADE)

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On August 25, Brazil's Superior Court of Justice decided by majority that the Brazilian Central Bank (BACEN) has the exclusive competence to judge concentration acts (mergers, acquisitions and transactions in general) involving institutions that are members of the National Financial System. The decision represents an important development in the discussions concerning the conflict of jurisdiction between BACEN and CADE (*Conselho Administrativo da Defesa Econômica*) and also indicates the trend that from now on transactions involving financial institutions should be judged by BACEN.

The decision has already had an impact upon Appeal # 1.094.218/DF in respect of the acquisition of the control of Banco de Crédito Nacional S.A. by Bradesco S.A. This was the first case in which the Superior Court of Justice ruled upon a transaction involving a purchase between financial institutions.

Minister Eliana Calmon (reporting judge) and Ministers Humberto Martins, Mauro Campbell Marques and Benedito Gonçalves voted for the exclusive competence of BACEN. Ministers Castro Meira and Herman Benjamin voted against the majority. Ministers Luiz Fux and Denise Arruda did not vote. ■

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