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European Commission opens an investigation into the Portuguese short term export credit trade insurance scheme under the European Union State aid rules

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The Directorate General of Competition through press release IP/10/1395, 27.10.2010, gave public notice to the fact that it has opened a formal investigation under the State aid rules of the Treaty on the Functioning of the European Union (***Treaty***) into the Portuguese short term export credit trade insurance scheme, established by national authorities in the context of the current financial crisis.

In January, 2009, Portugal implemented an insurance scheme applicable to export credit and domestic trade, offering top-up coverage to companies already partially insured by a private insurer. The additional credit limit offered by the State represents up to 100% of the amount already covered by a private insurer. The price charged by the State for the additional coverage is fixed at 60% of the rate charged by the private insurer. The European Commission is going to assess if the Portuguese scheme is in conformity with the TEMPORARY UNION FRAMEWORK FOR STATE AID MEASURES TO SUPPORT ACCESS TO FINANCE IN THE CURRENT FINANCIAL AND ECONOMIC CRISIS[1], or if, *inter alia*, the scheme is compatible with Article 107(3b) of the Treaty, which states that it may be considered compatible with the internal market "aid to (…) to remedy a serious disturbance in the economy of a Member State".

The main focus of the investigation is to verify whether the pricing of the scheme which offers coverage for export credit and domestic transactions at below market prices is justified.

For a more detailed review of this case, please *see* the Morais Leitão Galvão Teles, Soares da Silva & Associados, briefing of 4 November 2010, specifically related to this topic, available on www.mlgts.pt. ■

[1] Consolidated version published in the EU Official Journal C 83, p. 1 *et seq.*, dated 7.4.2009.

ECJ confirms € 12.6 million fine for Deutsche Telekom (margin squeeze)

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The EU Court of Justice (ECJ) has confirmed in a judgment dated 14.10.2010 that Deutsche Telekom is to pay a fine of € 12.6 million pursuant to a Commission decision of May, 2003.

Deutsche Telekom was fined for abusing its dominant position in the markets for wholesale and retail access to its fixed network between 1998 and 2001 by charging wholesale prices for access to the local loop that were higher than the fixed line subscription paid by its retail clients. In a second stage as of 2002 although the wholesale fee for access to the network became lower than the retail monthly subscription fee, the difference remained insufficient to cover Deutsche Telekom's own costs for providing services to end users.

This recent judgment of the ECJ has validated some principles and standards related to analysing abuse of dominance in the form of a *margin squeeze*, namely in regulated sectors, as is the case of electronic communications.

The ECJ has confirmed, for instance, that *ex ante* intervention by the sector's regulatory authority in establishing the dominant undertaking's prices does not preclude the latter's liability for unlawful conduct, provided such regulatory intervention does not eliminate the scope to change its prices. In this case the ECJ held that Deutsche Telekom *"had scope to adjust its retail prices for end-user access services"* (par. 85) and, thus, the margin squeeze was attributable to it.

On the other hand, regarding the calculation method that was followed, the ECJ confirmed the adequacy of the as-efficient-competitor test which takes into account only the own cost structure of the vertically integrated dominant undertaking (and not its competitors' costs). In this regard, the ECJ pointed out that the as-efficient-competitor test *"is also consistent with the general principle of legal certainty in so far as the account taken of the costs of the dominant undertaking allows that undertaking (…) to assess the lawfulness of its own conduct. While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are."* (par. 202).

This judgment has contributed to stabilize the criteria for analyzing margin squeeze situations and, as such, should make it more straightforward to apply article 102 TFEU to similar cases in the future. ■

Portuguese Competition Authority examines the commercial relations between large retail groups and their suppliers

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Introduction

In October, 2010, the Portuguese Competition Authority (PCA) issued its final report on the commercial relations between grocery retailers and their suppliers[2], which includes a set of recommendations addressed to both public and private entities (see box).

The 700-page comprehensive study undertakes a detailed characterization of the production, procurement and (food-based) retailing markets, focusing on the activities of so-called "Large Retail Groups" ("LRG") currently in operation in Portugal: Aldi, Auchan, Carrefour (Minipreço), El Corte Inglés, E. Leclerc, ITMI, Jerónimo Martins, Modelo Continente and the Schwarz Group (Lidl).

The initiative is not without parallel in the wider European context where concerns over the functioning of retail markets, in particular of food-based retailing, have motivated several political initiatives (at the EU level) as well as prompted investigations of alleged restrictive practices and sector-specific studies (at the national level).

Main Issues

The most positive aspect of the report is the recognition that food retailing in Portugal is a pro-competitive market. In line with this finding no signs of concern were detected in the traditional areas of application of competition law - individual or collective abuse of dominance and restrictive agreements or practices – nor in relation to "abuse of economic dependence", a specific feature of some competition legislation, amongst which is the Portuguese one.

The thorough quantitative assessment of the procurement markets has not revealed any widespread buyer power of LRGs in relation to their suppliers (with some exceptions). Nonetheless, LRGs are expected to gain in the years ahead a countervailing buyer power in relation to suppliers' seller power, namely in those sectors where LRGS act as "gatekeepers" for the access of their suppliers' branded labels to the final consumer.

Despite the globally favourable diagnosis as to the level of competition in the market, the report puts forward a set of new issues. In fact, the PCA raised concerns over the existence of an imbalance between the position of LRGs and their suppliers (in favour of the former) when negotiating and concluding agreements. This imbalance is apparent in four specific areas:

- The unilateral imposition of contractual conditions, by recourse to a contracting model based upon general terms and conditions of the LRGs ;
- Discounts and other benefits granted to the LRGs;
- Contract penalties for suppliers' breach and,
- Payment terms

A relevant part of the PCA's final recommendations seeks to address the above-mentioned imbalance. Hence, there is a recommendation that self-regulation be promoted (*via* a "Code of Conduct") and used to address a set of (previously identified) issues, a suggestion of possible new legislative measures and a proposal for a more active enforcement of existing law (for further details on other recommendations, see box).

Comment

The analysis of the PCA's report and final recommendations gives rise to some perplexities.

The existing imbalance between the negotiation position of LRGs and their suppliers – which plays a key role in the PCA's conclusions – is only mildly substantiated from a legal point of view and seems partly contradicted by the economic analysis showing that there is not, at present, a widespread countervailing buyer power of LRGs in relation to their suppliers.

On the other hand, it should be noted that an important part of the imbalance issues identified are relevant – in the PCA's own words – from *an ethical-commercial* perspective or a *private (contract) law* perspective, but not in terms of competition law. This calls for caution in the implementation of the corresponding measures as a risk exists that excessive regulation of the content of agreements or excessive legislative intervention may turn out to have an adverse effect on the *"promotion of a competition policy"* intended by the PCA.

Finally, there seems to be some lack of fine-tuning between some recommendations and the underlying substantive analysis, which makes it difficult to understand the purpose and reach of the PCA's recommendation – this is the case, for example, regarding the suggestion that the Government adopt measures aimed at promoting small/medium size units in local markets, which seems at odds with the report's indication that competition between LRGs at the local level is working well.

Overall, the PCA's report is an important contribution in terms of characterisation of the retail sector (and of the upstream production activities) as well as in terms of providing a relevant framework for the assessment of some of the problems and challenges in the near future. Its conclusions and recommendations should be carefully assessed by all market players affected.

Still, doubts arise as to the practical implementation of those recommendations and as to the necessity and proportionality of some of them, which makes a debate on this issue all the more necessary. ■

Main Recommendations (summary):

- **Reinstatement of the 1997 CIP/APED Code of Fair Trade Practices, or implementation of a new code to cover in particular the following: dispute resolution, institution of an *Ombudsman*, guidelines for standard contracts, non-applicability of retroactive penalties, shelf-space management, payment terms;**
- **Regulation of contentious trade practices (not covered by existing legislation);**
- **Creation of a price monitoring entity dealing with the collection, treatment and dissemination of statistical information on prices along the food supply chain.**

Additional Recommendations (non-exhaustive summary):

- **Renewed importance should be given to the inspection and application of legislation on (individual) unfair trade practices and on payment deadlines;**
- **The Government should consider measures that encourage the creation of small/medium-sized firms in local markets (focused on food-based retailing) and the protection of products bearing designations of origin and/or geographical indications;**
- **Analysis of the impact on consumer welfare of *"look alike"* and *"copycat"* products, to be undertaken by an independent consultant and financed by the most representative associations of retailers and suppliers ;**
- **Monitoring and control of *"look-alike"* and *"copycat"* products in the context of the legislation on disloyal trade practices, and/or industrial property, so as to avoid situations of unfair competition of LRGs towards their suppliers of branded products;**
- **Priority in the transposition of the next directive on payment terms for commercial transactions.**

[2] *Final Report on Commercial Relations Between the Large Retail Groups and their Suppliers,* abridged Engflish version available at http://www.concorrencia.pt/download/AdC_Relatorio_Final_Distribuicao_Fornecedores_Outubro_2010_en.pdf

ECJ judgment concerning the goodwill indemnity payable to self-employed commercial agents

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A self-employed commercial agent cannot be deprived of his goodwill indemnity where the principal establishes a default on the part of that agent which occurred after notice of termination of the contract was given but before the contract expired.

On October 28, 2010, the European Court of Justice ('ECJ') issued a preliminary ruling (Judgment C-203/09[3]) concerning the interpretation of article 18 (a) of Council Directive 86/653/EEC of 18 December 1986[4] on the coordination of the laws of the Member States relating to self-employed commercial agents ('the Directive').

In this case, Autohof Weidensdorf GmbH ('AHW') asked Volvo Car Germany GmbH ('Volvo Car') for a goodwill indemnity, after the latter terminated the dealership agreement before its end. Nevertheless, Volvo Car didn't grant the goodwill indemnity because it verified afterwards that AHW had violated a bunch of contractual obligations that would have justified the termination of the contract on the grounds of a default attributable to AHW.

In particular, the question was raised as to whether Article 18 (a) of the Directive is to be interpreted as meaning that it precludes a self-employed commercial agent from being deprived of his goodwill indemnity where the principal establishes a default on the part of that agent which occurred after notice of termination of the contract was given but before the contract expires.

Pursuant to the Directive, the right to an indemnity or compensation demands the existence of a direct cause between the default attributable to the commercial agent and the decision taken by the principal in terminating the contract. When, on the contrary, the principal just acknowledges the commercial agent's default after the contracts expires, it is not allowable to terminate the contract on the grounds of default anymore. However, and considering the fact that the payment of an indemnity is equitable having regard to all the circumstances, the agent's behaviour shall be taken into account in the indemnity's calculation.

Since ECJ's decisions on preliminary rulings hold *de facto* precedent in what regards the interpretation of European rules, the analysis made by this jurisdictional entity reveals special importance when applying Decree-Law nr. 178/86 of July, 3, that implemented the Directive into national law.

Article 33 of Decree-law nr. 178/86 states that the goodwill indemnity consists in compensation due to the commercial agent, after the termination of the contract, by the benefits the principal keeps owning with the customers acquired or expanded by the commercial agent. However, the law determines that goodwill indemnity is not payable if the contract has terminated on "reasons attributable to the commercial agent" (article 33(3) of Decree-Law nr. 178/86).

Since the provisions governing commercial agents are applied by analogy to dealership agreements, it is possible, in thesis, to sustain that a dealer holds the right to this type of indemnity, if it is verified that the dealer has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers.

Following the reasoning of the EJC in this judgment, article 33(3) of Decree-Law nr. 178/86 shall be interpreted as meaning that, in circumstances such as the case, it precludes a self-employed commercial agent from being deprived of his goodwill indemnity where the principal establishes a default on the part of that agent which occurred after notice of termination of the contract was given but before the contract expired and which was such as to justify immediate termination of the contract in question. ■

[3] Judgment available at http://curia.europa.eu
[4] This article states that *"the indemnity or compensation referred to in Article 17 shall not be payable: (a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law."*

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SPECIAL CONTRIBUTION MATTOS FILHO

CADE's public consultation # 08/2010 Settlement Agreements

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The Administrative Council for Economic Defense – CADE has put under public consultation new rules on settlement agreements. The proposal aims to encourage and increase the number of companies settling agreements by facilitating negotiations with CADE and suppressing certain previous formal requirements of the initial request, such as the need to describe in detail future commitments to be assumed by companies or individuals (e.g., compliance programs and cooperation in the investigation) and, most importantly, the need to present a value proposal for payment in the quality of pecuniary contribution. Moreover, the strict 60-day term for negotiations has been made more flexible by the possibility of suspending this term at the discretion of the reporting commissioner.

Below is a comparative table between the current rules on settlement agreements and the proposed new rules:

Settlement Agreements	Current Rules	Proposed New Rules
Proceeding	**Omissive.**	**The request for settlement agreement will constitute an autonomous proceeding.**
Requirements for the proposal of settlement agreements	**Specification of obligations to stop the investigated conduct Presentation of a value proposal for payment in the quality of pecuniary contribution Adoption of compliance program Information on gross revenues of the company (if applicable)**	**No requirements.**
Effect of the desistance of the settlement agreement	**Omissive.**	**In case of desistance, there is no possibility of re-presenting a new request for settlement agreement. The proceeding shall be dismissed by a dispatch from the reporting commissioner.**
Reports from CADE's Negotiation Commission .	**The Commission shall present reports on the status of the negotiation whenever the reporting commissioner asks for it. The Commission shall present a final report on the acceptance or rejection of the proposed agreements.**	**There are no rules on the issuance of reports by the Commission.**
Suspension of negotiation-60-day term	**Omissive.**	**Permitted upon the discretion of the reporting commissioner for further diligences.**
Necessity of the party to the settlement agreement to attend the execution of the agreement.	**It is part of the proceeding to sign settlement agreements.**	**No need for the party to sign the agreements.**

We support CADE's initiative on facilitating settlement agreements. Contributions to CADE's public consultation # 08/2010 shall be submitted to the e-mail address consulta082010@cade.gov.br until December 24, 2010. ■

Brazilian Senate approves Bill # 06/2009 restructuring the Brazilian System for Competition Defense with amendments

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On December 1, 2010, the Brazilian Senate approved with amendments Bill # 06/2009 (the "Bill"), which will substitute the current Brazilian antitrust law, establishing mandatory prior notification of merger cases and which will restructure the Brazilian system for economic defense. Note that the Senate's proposed amendments may be modified, since the Bill will return to the House of Representatives, which shall accept or dismiss the amendments approved by the Senate. After this second review by the House of Representatives, the Bill will be subjected to Presidential review for approval or veto. We highlight the following amendments proposed by the Senate:

- Reduction of the amount for fines for anticompetitive behavior:
  - (i) fines for companies: ranging from 0.1% to 20% of the gross annual revenues of the company (and group of companies) active in the field of activity in which the infringement occurred (currently fines for anticompetitive behavior range from 1% to 30% of the gross annual revenues of the company or group of companies fined);
  - (ii) fines for individuals: ranging from 1% to 20% of the fine imposed on the company or group of companies (currently fines for individuals range from 10% to 50% of the fine imposed on the company or group of companies)

- Suppression of the sub-item by which the imposition of territorial exclusivity for distribution of goods and rendering of services shall be expressly regarded as a possible violation of economic order (this sub-item does not exist in the current law. It was included in the Bill by the House of Representatives).

- Change in the threshold triggering the duty to notify: Whenever a given transaction entails economic concentration, notification is mandatory should it involve at least, on the one hand, companies or economic groups with annual gross revenues in Brazil of R$ 1,000,000,000.00 or more (one billion Reais) and, on the other hand, companies or economic groups with annual gross revenues in Brazil of R$ 40,000,000.00 or more (forty million Reais). Currently the duty to notify is triggered whenever a transaction entails economic concentration, should it involve companies or economic groups with 20% of the market share of a relevant market, or if any of the participants has posted annual gross revenues in Brazil equivalent to at least R$ 400,000,000.00 (four hundred million Reais).

- Incorporation of joint ventures, special purpose vehicles and consortiums aiming to participate in public bidding processes or in specific ventures limited to a certain period will no longer be subject to notification (currently transactions likewise are subjected to mandatory notification).

- Reduction of the term for clearance of transactions to 120 days, permitted extensions of up to 60 days by means of a request of the parties or, alternatively, up to 90 days by CADE's decision (currently, regular review process takes 120 days. Nonetheless, all deadlines provided for in the law are interrupted whenever any of the agencies requests additional information, either from the companies involved in the transaction or from third parties. Requests for additional information are common. For this reason, completion of a merger review usually takes three to four months under the fasttrack proceeding and around six months under the regular proceeding).

- Suppression of the rule by which settlement agreements shall be filed only once. ■