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Court of Justice confirms that a proposed Gibraltar corporate tax system constitutes a State aid scheme incompatible with the internal market

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In the judgment rendered on 15 November 2011, the Court of Justice declared that the General Court erred in law in declaring that the proposed tax reform does not confer a *selective advantage* to *offshore* companies

The United Kingdom notified in 2002 the European Commission of the Government of Gibraltar's proposed reform of corporate tax. The reform included the repeal of the former tax system and the imposition of three taxes applicable to all Gibraltar companies, namely a company registration fee, a payroll tax and a *business property occupation tax* ("***BPOT***"), with a cap on liability to payroll tax and BPOT of 15% of a company's profits.

The European Commission, in 2004, through Commission Decision 2005/261/EC (OJ 2005 L 85, p. 1), decided that the proposals notified for the reform of the system of corporate taxation in Gibraltar constituted a scheme of State aid; incompatible with the internal market and accordingly that such proposals could not be implemented.

The European Commission considered that specific aspects of the proposed tax reform were *de facto selective*. In a nutshell: *(i)* the requirement that a company must make a profit before it becomes liable to payroll tax and BPOT, since that requirement would favour companies which make no profit; *(ii)* the cap limiting liability to payroll tax and BPOT to 15% of profits, since that cap would favour companies which, for the tax year in question, have profits that are low in relation to their number of employees and their occupation of business property; and *(iii)* the payroll tax and BPOT, since those two taxes would inherently favour offshore companies which have no real physical presence in Gibraltar and which as a consequence do not incur corporate tax.

In the Decision the Commission also states that the proposed reform was regionally selective since it provided for a system under which companies in Gibraltar would be taxed, in general, at a lower rate than those in the United Kingdom.

On 18 December 2008, ruling upon appeals submitted by the Government of Gibraltar and the United Kingdom, the General Court annulled the Commission Decision – *see* judgment in joined cases T-211/04 and T-215/04. In its ruling, the General Court held *inter alia* that the Commission had not followed an adequate method of analysis as regards the material selectivity of the proposed tax reform. According to the General Court, the Commission, in order to sustain that the proposed tax system was *selective*, should have demonstrated that certain of its elements constituted derogations from Gibraltar's common tax regime. For this purpose, the Commission was not entitled to regard general tax measures as being selective pursuant to their *material effects*, as it had occurred in the decision. In addition, the Court considered that the reference for assessing the proposed tax reform selectivity corresponded exclusively to Gibraltar territory, and not the United Kingdom's territorial limits.

Following the referred ruling of the General Court, the European Commission

and Spain submitted an appeal to the Court of Justice in order to have the General Court's judgment dismissed – see joined cases C-106/09P and C-107/09P.

In the judgment rendered on 15 November 2011, the Court of Justice declared that the General Court erred in law in declaring that the proposed tax reform does not confer a *selective advantage* to *offshore* companies.

The Court of Justice in the ruling states that a different tax burden resulting from the application of a *general* tax regime is not sufficient on its own to establish the selectivity of taxation. Notwithstanding, it holds that such *selectivity* exists where, as in the case of the proposed Gibraltar tax reform, the criteria for assessment which are adopted by a tax system are such as to characterise the recipient undertakings, by virtue of the *properties* which are specific to them, as a *privileged category* of companies.

In this context, the Court of Justice finds that a particular feature of Gibraltar's tax regime is a combination of the payroll tax and BPOT as the sole bases of assessment, resulting in taxation according to the number of employees and the size of the business premises occupied. However, due to the absence of other bases of assessment, combining those two bases of assessment (which are founded on criteria that are in themselves of a *general* nature) excludes *a priori* any taxation of offshore companies, since they have no employees and also do not occupy business property. Those criteria therefore discriminate between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar.

Consequently, the Court concludes in the judgment that the fact that offshore companies are not taxed in Gibraltar is not a random consequence of the regime at issue, but the inevitable consequence of the fact that both corporate taxes (in particular, their bases of assessment) are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, avoid taxation. Thus, the fact that offshore companies avoid taxation precisely on account of the specific features characteristic of that group of companies gives reason to conclude that they enjoy *selective* advantages.

Since the proposed tax reform is materially selective in that it grants selective advantages to offshore companies, the Court considers that it is not relevant to examine whether the proposed reform is also territorially selective.

Thus, the Court of Justice set aside the judgment of the General Court and uphold the decision of the Commission, which determined that the proposed Gibraltar tax reform constitutes a State aid scheme incompatible with the internal market. ■

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ECJ judgment analyses what rules apply to a cartel with effects within a Member State prior to its accession

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A ruling by the European Court of Justice (Grand Chamber) of 14 February 2012, in a referral for a preliminary ruling by a Czech court[1], has decided that national competition rules may apply to anticompetitive practices with effects in a Member State prior to its accession to the European Union (EU). This, despite the fact that the same infringement (a worldwide cartel between European and Japanese companies) was also punished, under Article 101 of the Treaty (TFEU), by the European Commission.

The case refers to a cartel in gas insulated switchgear to which the Commission imposed fines totalling EUR 750 million in 2007[2].

The Commission initiated proceedings in April 2006 and adopted a final decision in January 2007. Meanwhile, the Czech competition authority initiated proceedings in August 2006 and came to a final decision in April 2007, also fining some of the undertakings already targeted by the Commission. However, the national authority only considered the cartel's effects in the territory of the Czech Republic prior to 1 May 2004, date of its accession to the EU.

Some of the undertakings affected by this second decision challenged the fines applied by the Czech authority arguing that its powers were barred (as the Commission had initiated proceedings first) and that its decision did not comply with the *ne bis in idem* principle, as they were fined once again for an infringement which the Commission had already punished (although not on exactly the same terms).

> Rules of a substantive nature cannot apply retroactively «irrespective of whether such application might produce favourable or unfavourable effects for the persons concerned»

On these questions, the Court of Justice began by clarifying that Article 101 of the TFEU, as well as Article 3 (1) of Regulation (EC) No 1/2003 (both rules of a substantive nature), cannot apply retroactively «*irrespective of whether such application might produce favourable or unfavourable effects for the persons concerned*» (par. 50). As such, these provisions do not apply to a cartel whose effects in the territory of a Member State occur prior to its accession to the EU.

As for the delimitation of competition powers between the national authorities and the Commission, the ECJ confirmed that initiation of proceedings by the Commission results in the national authorities losing their power to apply, vis-à-vis the same conduct, not only Article 101 TFEU but also national competition law (Article 11 (6) of Regulation (EC) No 1/2003). However, the Court considered that that circumstance does not «*permanently and definitively* [remove] *the national competition authorities' power to apply national legislation on competition matters*» and that said power «*is restored once the proceeding initiated by the Commission is concluded*» (paragraphs 79/80). Consequently, it held that, in this case, the Czech competition authority had the power to apply its national law to the cartel's anticompetitive effects within its territory *prior* to accession to the EU.

Lastly, the Court denied that the coexistence of two decisions to impose fines implied a violation of the *ne bis in idem* principle given, *inter alia*, that the facts covered by either decision were not identical (both as to the affected territory and the relevant timeframe). The European Commission only covered the cartel's effects within the European Community and the European Economic Area, and did not take account, in calculating the fines, the Member States that acceded to the Union on 1 May 2004. The Czech authority, in contrast, only fined the cartel's effects occurring within its territory before that date and, to that extent, there was no overlap between both decisions.

This distinction between the facts underlying either decision appears somewhat artificial, however, given that, as to its geographic scope, the Commission qualified the infringement as a worldwide cartel and, as to the relevant timeframe, it concluded that a continuous infringement had taken place which only ceased on 11 May 2004 (after the Czech Republic's accession to the European Union). ■

[1] Case C-17/10 – Toshiba Corporation et al. v. Urad pro ochranu hospodarske souteze.
[2] Case COMP/F/38.899 – C(2006) final, of 24.01.2007.

European Commission Blocks Deutsche Börse/NYSE Euronext Merger

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On 1 February 2012 the European Commission blocked the envisaged merger between Deutsche Börse and NYSE Eurnonext (which *inter alia* operates the Euronext Lisbon exchange), a transaction which would have created the world's largest financial exchange. After a 7-month in-depth investigation, the Commission concluded the transaction would create a dominant position in the market of European financial derivatives traded globally on exchanges, and that the remedies offered by the parties were not adequate to remedy the Commission's competition concerns.

Concentrations have been prohibited only in rare cases. In more than 2,000 transactions cleared since the EU Merger Regulation came into force in 2004, this is only the third concentration blocked by the Commission (the other two operations were *Ryanair/Air Lingus*, in 2007, and *Olympic Airlines/Aegean Airways*, in 2011).

Relevant market: derivatives traded on exchanges vs. "over-the-counter"

The Commission's concerns focused on the derivatives area, where the parties' subsidiaries Eurex and Liffe are active. Derivatives are financial instruments whose value is derived from an underlying asset, such as interest rates or equities, and that are used by companies and financial institutions to manage financial risk (for instance fluctuations in interest rates, exchange rates, stock quotes, etc.) and as investment products for institutional and retail investors.

The case evolved mainly around the question of how to define the relevant market, and in particular whether European derivatives traded on exchanges (exchange-traded derivatives or "ETD") belong to the same market as derivatives traded over-the-counter ("OTC"). Deutsche Börse and Euronext argued that ETD and OTC derivatives competed between themselves and should be included in the same product market. The Commission concluded otherwise, taking into account each product's different characteristics and intended use. ETD are fully standardized contracts in all their legal and economic terms (which are drafted by the exchange) and are of a relatively small size (approximately Euro 100,000 per trade), whereas OTC derivatives are customized bilateral contracts, usually negotiated on a case-by-case basis, and concern much larger values (around Euro € 200,000,000 per trade). The costs associated to OTC transactions are also far higher than those of exchange trades (up to eight times, according to a Deutsche Börse paper), and there is a significant number of clients which cannot and would not trade OTC and for which an exchange is the only option.

Elimination of competition between Deutsche Börse and NYSE Euronext

With the relevant market being limited to ETDs, post-transaction the parties would have a position nearing monopoly, with a combined share of around 90%. The Commission also concluded the parties were each other's closest competitors, and that the elimination of reciprocal competitive pressure would result in significant impediments to competition in the market, harming the users of derivatives and the European economy as a whole. In contrast, if the relevant market were to include also OTC derivatives, the parties' combined market share (around 16%) would have not been significant.

The Commission found that other exchanges operating at the global level, in particular Chicago Mercantile Exchange ("CME"), had only a marginal presence in the trade of European derivatives, and therefore did not exercise sufficient pressure on the parties in the relevant market. Any new competitor would also face difficulties in entering the market due to the high barriers to entry and to Eurex and Liffe's vertical integration (by combining exchanges and clearing houses). Finally, the efficiencies claimed by the parties were not, according to the Commission, sufficient to outweigh the harm to competition resulting from the transaction.

Remedies offered were insufficient to address concerns

Deutsche Börse and NYSE Euronext presented three remedies proposals, which in their final version consisted of the divestiture of a part of Liffe's European single stock derivatives business, access to the merged entity's clearing house for materially "new" interest rate, bond and equity index derivatives contracts, and a license to Eurex's interest rate derivatives trading software. However, after testing the commitments with competitors and clients, the Commission concluded that the remedies package was insufficient in scope, difficult to implement and unlikely to be effective in practice, and thereby could not restore the competition lost as a result of the merger. ■

Next chapters

Although the parties announced they abandoned the plans for the merger, Deutsche Börse recently confirmed it will appeal to the EU General Court, since it considers "several aspects of the ruling are faulty". By contrast, NYSE Euronext already stated that it would not pursue an appeal of the decision.

The appeal will probably contest the decisions' market definition, as the segmentation made by the Commission may constitute an unwelcome precedent for any expansion plans Deutsche Börse may have in the future. The annulment of the decision will not be an easy task however, since the European courts recognize the Commission a wide margin of appreciation regarding complex economic analyses, which means that, in order to be successful, Deutsche Börse will have to demonstrate that the decision is vitiated by one or more manifest errors of assessment. ■

The protection of information delivered under "leniency" after the "Pfleiderer" judgment

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A company that has been affected by the operation of a cartel can seek compensation from damages suffered with the national courts. However, the secretive nature of cartels and their (often) sophisticated means of operation render it difficult to invoke and prove all relevant aspects of the case.

Whenever such damage claim is presented subsequent to a sanctioning decision of a competition authority ("follow-on claims") the claimant has a particular interest in having as much information as possible on the previously-sanctioned infringement, in particular by accessing the authority's file. Frequently however, those files contain self-incriminatory information delivered by the cartel members to the referred authority under a leniency program (which allows them to benefit from full or partial exemption from fines provided they admit participation in the infringement and fully cooperate with the investigating authority, for example, by offering evidence or relevant information on the cartel). In such cases the interest of the injured part to access as much information as possible to substantiate its request for redress against cartel member may be conflicting with the interest in assuring the operation of trustworthy and effective leniency programmes, which rely on the cooperation between cartel members and the investigating authority.

In *Pfleiderer*[1] the discussion was, in short, whether or not a potential claimant should have access to the leniency requests and other information voluntarily delivered by the leniency applicants, in order to prepare /support a claim for damages against the cartel members.

The German court requested a preliminary ruling from the Court of Justice of the European Union (the Court) with a purpose of clarifying if a decision granting access to said information would be compatible with EU law, in particular taking into account the rules of Regulation (EU) n.º 1/2003 on the cooperation and information exchange between the European Commission and national competition authorities regarding an investigation and, on the other hand, the effectiveness of the prohibition laid down in art. 101.º of the TFEU (the legal basis for prohibiting cartels as well as other restrictive agreements).

In its analysis, the Court began by acknowledging that neither the provisions of the Treaty nor of Regulation n.º 1/2003[2] lay down common (harmonised) rules on the issue of leniency programmes or on the access to documentation delivered by leniency applicants. Even though a model leniency programme designed to achieve harmonisation of some elements of national leniency programmes has been adopted within the European Competition Network, it has no binding effect on the courts of the Members States.

Hence, in the absence of binding regulation under EU law on the subject, it is for Member States to establish and apply rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures. It must also be assured that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in a way as to make it practically impossible or excessively difficult to obtain compensation.

In its reply to the question address by the referring court the Court further clarified that **the provisions of EU law on cartels do not preclude a person who has been adversely affected by an infringement of EU competition law and is seeking redress from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement**.

However, **the courts of the Member States should determine the conditions under which such access must be permitted or refused on the basis of their national law and by adequately weighing, on a case by case basis and taking into account all the relevant factors of the case, the interests protected by EU law.** ■

Comment

With its judgment, the Court adopted a position of neutrality regarding the issue of balancing the interests of private enforcement and the interests of public enforcement (both of which are protected by EU law) and refused to establish a hierarchy between them, in the abstract.
In the (German) case that originated the preliminary ruling, the referring court decided to refuse the access by the potential claimant to the leniency request and leniency-related documents (in favour of the position of the German competition authority).

In practice, however, the judgment of the Court allows national courts a wide discretion of interpretation and implementation of its premises. This may perpetuate the uncertainties on how to handle the matter of access to leniency documents and emphasise the differences in regimes between amongst Member-states.

The European Commission has announced, in the meanwhile the inclusion in its work programme for 2012 of a legislative proposal seeking to clarify the interrelation of private actions with pubic enforcement by the Commission and national competition authorities, in particular as regards the protection of leniency programmes (this means that legislation may be the way to supersede some of the risks presented by the solution envisaged with this judgment).

[1] Case C-360/09, judgement of the Court dated 14.06.2011.
[2] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [currently articles 101 and 102].

Lifting the curtain slightly on the new Competition Act[1]

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On 22 March 2012 after one of the most publicly participated hearings on legal matters that ever took place in Portugal, the Parliament approved the new Competition Act (the 'Act').

The idea to revise the existing law was considered for some time, at least since 2008, but it was not until 2011 that it became one of the Government's top priorities. In the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU), entered into by the Portuguese Government, the European Commission, the European Central Bank and the International Monetary Fund on 17 May 2011, the revision of the current law was elected as one of the structural benchmarks of the financial assistance plan.

The main intentions behind the idea were to **make the law as autonomous as possible from administrative and criminal law and more harmonized with the EU competition framework**. In particular the MoU sets forth the following objectives: *(i)* **simplify the law**, separating clearly the rules on competition enforcement procedures from the rules on criminal procedures with a view to ensure effective enforcement of competition law; *(ii)* **rationalise the conditions that determine the opening of investigations**, allowing the Competition Authority to make an assessment of the relevance of the claims submitted; *(iii)* establish the necessary procedures for a **greater alignment between Portuguese law on merger control and the EU Merger Regulation**, namely with regard to the criteria for mandatory filing; *(iv)* ensure **more clarity and legal certainty in the application of administrative procedural law in merger control**; and *(v)* **evaluate the appeal process and adjust** it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.

The Act contains several improvements with regard to the existing law. However, there are reasons to fear that the new legal regime may very well fall short of the proposed objectives and raise a number of other questions.

As regards objective *(i)*, it should be recognized that the **creation of a specific competition enforcement procedure with its own rules and with indicative timelines for the conclusion of investigations** is a major step forward in terms of legal certainty. The problem, though, is that, whilst instituting a special procedure for antitrust cases allegedly distinct from that of criminal matters, many antitrust matters continue to be subsidiarily governed, although it is far from clear to what extent, by the Portuguese general regime on misdemeanours and the Act awards to the Authority prerogatives which are typically of a criminal nature without due regard to the rights of defence of undertakings and individuals.

For instance, objective *(i)* is centred on simplifying the law by separating the rules on competition enforcement from those on criminal procedures, but the explanatory statement of the Act provides that there is an intention to safeguard the fundamental principles resulting from the applicable sanctioning legal framework, namely, the general regime on misdemeanours. This is reinforced by several provisions in the Act, according to which the rules on administrative offences apply subsidiarily to antitrust investigations and appeals. And somewhere in the middle, the Act contains both rules that are deviations from the general principles applicable to misdemeanours in Portugal (*e.g.*, the unlimited jurisdiction of the competent courts to review antitrust decisions adopted by the Authority, the fact that the appeal does not suspend the effects of the decision, and the prerogative of the Authority to undertake further investigations and diligences after the issuance of the statement of objections and the exercise of the defence rights by the defendants) and rules that are only used in criminal offences and sometimes only in the most serious ones (*e.g.*, the Authority's power to conduct searches at home premises and at the offices of lawyers and doctors).

> There are reasons to fear that the new legal regime may very well fall short of the proposed objectives and raise a number of other questions

As to objective *(ii)* of the revision of the current law, essentially, in accordance with the Act, **the Authority is no longer bound by the principle of legality in the opening, investigation and sanctioning of antitrust infringements**, but instead is allowed to rank differently the priorities in the exercise of its mission. The problem with the opportunity principle is the difficulty to strike a balance between the interest of flexibility in the allocation of resources, on the one hand, and the safeguard of defence rights of complainants and defendants, on the other.

The solutions proposed on the Act aim at combining these two purposes, but it is the application of the principle itself to a national competition authority that raises many doubts. It is easy to understand why the European Commission has to work on an opportunity basis and if it refuses to accept a complaint, the plaintiff may always resort to national competition agencies. This is why it is difficult for a lawyer to accept that these agencies may decide which cases to take right from the beginning solely on the basis of priorities of a different nature or of the information put forth by the plaintiff on its own motion.
The fact that, according to the Act, the decisions of the Authority refusing a

[1] A similar version of this article was published in the International Law Office Competition Newsletter of 1 March 2012, prior to the approval of the new Act.

Time and, more importantly, the use that will be made of the new Act will determine to what extent the new Act will be up to the proposed expectations and objectives

complaint are subject to judicial scrutiny is not decisive, if, in the first moment, the choice of priorities by the Authority is not itself challengeable. Another potential issue is how exactly the Authority will be able to refuse to open an infringement procedure at the outset, for example, because there is a low probability to prove an infringement or the investigative measures required are too extensive, as is expressly provided in the Act. How is the Authority capable of discerning this without previously investigating? And if indeed it needs to investigate at least at a minimum to decide not to proceed, the fact is that all investigative measures of this nature should be conducted in the framework of a formal infringement procedure, so that companies and individuals are afforded the necessary right of defence.

Regarding objectives *(iii)* and *(iv)*, dealing with merger control, there are relevant innovations in the Act, such as the elimination of a deadline to submit the filing, the adjustments made in the turnover thresholds in order to adapt them to a new economic reality and the creation, in phase 2 of the proceedings, of a mechanism close to the EU statement of objections.

Conversely, other aspects continue to be specificities of the Portuguese merger control regime, which may generate uncertainties for parties involved in transactions subject to notification. **The main concern, in our view, is the difficulty to predict how long the investigation may take**, given that any information request made by the Authority stops the clock and there is no limit to the number and length of time suspensions.

Finally, objective *(v)* of the new Act is about the appeal process, but **we do not envisage how the proposed amendments increase fairness and efficiency in terms of due process**. The idea itself that there was ever a need to amend the current law to achieve this goal and deter undertakings from challenging the Authority's decisions in antitrust cases is, in our opinion, misleading. The presumption of innocence and the right to a fair trial are both basic universal principles in democratic societies. Facts also show that in a significant number of antitrust appeals Portuguese courts decide in favour of the appellant and end up quashing, in whole or in part, the Authority's decisions either on procedural or substantive grounds. This confirms the need to continue keeping effective judicial scrutiny on the Authority's activity in this field.

The most critical aspect of the Act in this context is for us the fact that appeals in antitrust cases no longer suspend the effects of the Authority's decisions except in what concerns structural remedies. This goes against all deep-rooted beliefs in both criminal and misdemeanour proceedings and raises serious doubts from a constitutional point of view. Additionally, for the reasons explained in the preceding paragraph, this measure is not even justified from a competition policy viewpoint.

To conclude, the initiative to revise the competition regime was considered a structural benchmark of the financial assistance plan granted to Portugal as a means to foster the speed and effectiveness of the enforcement of competition rules, and thus boost the competitive position of the Portuguese economy. Time and, more importantly, the use that will be made of the new Act will determine to what extent the new Act will be up to these expectations and objectives.

It is also worth remembering that the **competition legal framework is only one among several tools capable of contributing to effective enforcement of competition law**. As important as the law in books, is the law in action. It is totally incomprehensible that the MoU sets forth specific targets to improve the necessary independence of the national regulatory authorities (including nomination practices, responsibilities, scope of operation, powers of intervention and the respective mechanisms of coordination with the Competition Authority) and, with respect to the Competition Authority, there is only a commitment on the part of the Government to afford it with sufficient and stable financial means to guarantee its effective and sustained operation, with no reference to the strengthening of independence. Hopefully, this aspect will be considered in the context of the undergoing revision of the legal framework of national regulators. ■

The beginning of a busy year for CNC: Endesa is fined for abuse of its dominant position as electricity distributor

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Following to a complaint presented by the National Federation of Employers of Electrical and Telecommunications of Spain (*Federación Nacional de Empresarios de Instalaciones Eléctricas y Telecomunicaciones de España* - "FENIE"), the Spanish competition authority (*Comisión Nacional de Competencia* – "CNC") has condemned *Endesa Distribución Eléctrica S.A.* for two offences of abuse of a dominant position and applied two fines of 14,967,960 and 8,158,000, respectively.

As referred to in CNC press release, both offences relate to the electrical installations market which includes the carrying out of the necessary works (connection, hook-up, extensions, etc) to connect the distribution grid to the reception facilities of the end users. Spanish rules and regulations distinguish between installation activities which are reserved to the distributors of electricity from those activities that may be freely developed in a competitive environment by licensed companies.

In the case of the first offence, Endesa was found to have taken advantage of its position in the distribution market to distort competition in the related market for electrical installations, in which it also operates, by means of abusive use of information on supply applications (using the identity of the customer who needed an installation and all the technical details of the point of supply), to which it had privileged access due to its condition of electricity distributor, in order to offer to carry out the electrical installation work for the largest customers in this market, thus *cherry-picking* the largest and more profitable customers.

This practice rendered more difficult for the rest of the operators present in the installations market to compete with Endesa in its distribution areas for the most attractive part of the market in a situation of minimum equality of conditions. CNC has applied a fine of €14,967,960 on Endesa for this offence.

This is not the first time that competition authorities have imposed fines for conduct of this kind. In 2011 the distributors in the E.ON, Gas Natural, Fenosa and Hidrocantábrico groups were fined for similar conduct, as was Endesa itself in 2006 for similar conduct on the island of Mallorca (this condemnatory decision was confirmed by the Supreme Court on February 2011).

With respect to the second offence, the CNC considered that Endesa had abused its dominant position by charging customers for carrying out linking and connection works for the installation of electricity. Spanish law provides that such works must be done by the distributor at its own cost, and no charge can be imposed upon consumers. However, according to CNC, over a specific period of time, Endesa charged customers for this work which has been considered an exploitative abuse. For this offence, CNC imposed a fine of €8,158,000 on Endesa.

Comment

From the information publically available, **2011 was a busy year for CNC as several proceedings for restrictive practices and abuse of dominant position have been concluded, and the authority imposed fines totaling more than €97 million**.

Among those proceedings, we highlight the Spanish Association of Fluid Pump Manufacturers cartel *(Asociación Española de Fabricantes de Bombas de Fluidos* or "AEFBF") in which CNC condemned the AEFBF along with 19 manufacturers and distributors of fluid pumps, in a total of €18 million, for engaging in anti-competitive practices. In the second half of 2011, the CNC imposed fines totaling €16.3 million in the maritime transportation sector for price-fixing and fines of €47 million in the civil construction sector for bid rigging. In November, the CNC concluded proceedings against companies in the asphalt sector opened following inspections into the corporate headquarters in 2009, and imposed fines totaling €16 million on twelve undertakings for fixing prices in asphalt and related products.

Further in 2012, the CNC imposed a fine of approximately €2 million on *Transmediterránea,* and its subsidiary, *Europa Ferrys*, for obstructing a surprise inspection during which the companies allegedly failed to make information and senior-level personnel readily available.

The first quarter has not ended yet and CNC has already adopted 8 condemnatory decisions for restrictive practices and abuse of dominant position, anticipating an active year of 2012. Although many of these decisions refer to proceedings initiated in 2009/2010, **when compared with other national competition authorities, the number of proceedings concluded by CNC displays the effort and hard work continuously developed by this competition authority in defense of competition and consumers' welfare.** The **policies of transparency and due access to decisions followed by CNC are amongst international best practices**.

Albeit the politic and economic turmoil Spain in facing, the intense activity in 2011 and the prelude of 2012 do not display any reduction of CNC control and scrutiny on undertakings and their compliance with competition rules. CNC clearly understands the role of competition to a sustainable economic growth. ■

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The new structure of the Brazilian Antitrust Authorities

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The new Brazilian Competition Law will provide deep and important changes in the structure of the Brazilian Antitrust Authorities

Published on December 1, 2011, the new Brazilian Competition Law (Law No. 11,259) will provide deep and important changes in the procedures of analysis of economic concentrations, in the penalties applicable in cases of infringement of competition and in the very structure of the Brazilian Antitrust Authorities.

Currently, the Brazilian Antitrust Authorities comprise three agencies: the Secretariat of Economic Monitoring of the Ministry of Finance ("Seae", in Portuguese) focuses in the analysis of the merger reviews; the Secretariat of Economic Law of the Ministry of Justice ("SDE", in Portuguese) is responsible for conducting investigations for infringements against the economic order; and the Administrative Council for Economic Defense ("Cade", in Portuguese) decides the different cases.

The new Brazilian Competition Law shall unify the functions of judgment and investigation on Cade, which will be comprised of the Administrative Tribunal for Economic Defense, the General Superintendence, and the Department of Economic Studies. The SDE shall be extinct and the role of the Seae shall be limited to the promotion of competition in other government agencies.

The Administrative Tribunal shall be composed of seven members, a President and six Commissioners, and will function similar to that of the current Plenary Council of Cade, who decides the existence of infringements against the economic order and appreciates acts of economic concentration. The Department of Economic Studies will be responsible for developing studies and economic advice to support Cade's decisions.

The main structural novelty is certainly the establishment of the General Superintendence, which shall be composed of a General Superintendent, two Assistant Superintendents and General Coordinators of Antitrust Analysis. The General Superintendent shall be appointed by the President and approved by the Senate for a two-year term, with the possibility of renewal for the same period. The Assistant Superintendents and General Coordinators shall be chosen by the General Superintendent himself.
The General Superintendence shall take over many of the functions of investigation and prosecution that are now assigned to SDE, in

addition to receiving new and more extensive powers to conduct administrative proceedings. Thus, it will play a central role not only in investigating violations, but also in assessing acts of economic concentration.

Indeed, the General Superintendent shall be responsible for initiating and conducting investigations related to infringements, adopt preventive measures intended to cease anti-competitive practices, negotiate and enter into leniency agreements, among other measures aimed at preventing and prosecuting infringements against the economic order.

In merger review, it will be up to the General Superintendence the initial analysis of operations submitted to CADE. At first the General Superintendence shall determine whether the submitted transaction, depending on its complexity, shall be considered under summary procedure or if it shall be subject to further examination. After examining the operation, either by summary procedure or in complete procedure, it will up be to the Superintendence to approve without restrictions the transactions with less potential harm to competition. If, however, the Superintendence concludes that restrictions should be imposed on the transaction, or even that it should be rejected, the Superintendence should challenge the transaction before the Administrative Tribunal. In short, it will be up to the General Superintendence to approve transactions without restrictions, and to the Administrative Tribunal to decide on the imposition of restrictions, or the rejection of the transaction.

The efficiency and agility of the analysis undertaken by the authorities, particularly by the General Superintendence, will be essential to ensure the success of the new pre-merger control regime in Brazil. We believe that the General Superintendence shall approve transactions with no potential harm to competition in approximately 30 days, conducting a more detailed analysis only of transaction that really entail risks to competition.

The premerger review regime, and the imposition of deadlines for operations analysis by the Brazilian Antitrust Authorities requires urgent activities of the General Superintendence, which need to focus its examination on the most relevant transactions to the markets and the competition. To this end, it is essential that the new Cade is endowed with a sufficient number of trained professionals to meet the demand created by the new Brazilian Competition Law. However, so far no measures have been taken to ensure that the Cade has the structure required. We hope it shall not take long. ■

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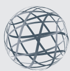

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