



EU AND
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LAW

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The European Commission may bring damages actions before national courts against companies previously fined in cartel cases

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In a recent judgment (C-199/11, *Otis et al.*, 6.11.2012), the European Court of Justice (ECJ) confirmed the European Commission's ability to ask for damages, before the national courts of the Member States, against companies which infringed EU competition law and were previously fined by the Commission under its investigative powers.

In 2007 the Commission imposed fines totalling more than €992 million on the Otis, Kone, Schindler and ThyssenKrupp groups for their participation in cartels in the elevators and escalators markets of several Member States – at the time, the largest fines ever imposed in a single case. The EU General Court confirmed the Commission's decision in 2011, and the ECJ has already dismissed further appeals against the General Court's judgements (other appeals are still pending).

The EU institutions were themselves customers of the companies concerned, regarding the installation and maintenance of elevators and escalators in EU buildings. As such, the Commission (representing the European Union) initiated, in parallel, legal proceedings before the Brussels Commercial Court in 2008, asking more than € 7 million in damages for losses suffered in Belgium and Luxembourg, claiming that prices paid by EU institutions were higher than the market price as a result of the cartel.

THIS CASE EVIDENCES
 THE GROWING IMPORTANCE
 OF FUNDAMENTAL RIGHTS ISSUES
 IN EU COMPETITION LAW CASES

Probably further to the parties' arguments, which alleged that the Commission is "judge and party in its own cause", the national court referred a number of questions to the ECJ for a preliminary ruling. The main issue was whether the Charter of Fundamental Rights of the EU precluded the Commission from bringing a damages action regarding conduct which had been found to constitute an infringement by an earlier Commission decision.

The ECJ recognises at the outset that the fundamental rights of the parties, as safeguarded, *inter alia*, by the Charter, must be observed, in particular the right of access to a tribunal and the principle of equality of arms (which are elements of the right to effective judicial protection, enshrined in the Charter).

Although under EU law a previous Commission decision finding an infringement is binding on national courts, the initiation of damages action by the Commission does not breach the right of access to a tribunal. According to the Court, EU law provides for a system of full judicial review of Commission competition decisions by the EU courts, which affords all the safeguards required by the Charter of Fundamental Rights. Besides, national courts retain the exclusive competence to assess whether there is loss and a direct causal link between that conduct and the loss sustained.

The Court also ruled that the Commission's conduct was not contrary to the principle of equality of arms. The aim of this principle is to ensure a balance between the parties to proceedings, thereby guaranteeing that

any document submitted to the court may be examined and challenged by any party to the proceedings. EU law prohibits the Commission from using information collected in the course of a competition investigation for purposes other than those of the investigation. In addition, the information gathered by the Commission during the infringement procedure (information which the companies claimed had not been brought to their knowledge) was not provided to the national court by the Commission, and the Court was satisfied with the assurance that the Commission relied only on the information available in the non-confidential version of the infringement decision within the damages case.

The Commission's eagerness to pursue the parties to the 'elevators cartel' for damages before the national courts should be seen in the context of its longstanding efforts to promote private competition enforcement in the EU Member States, where damages actions by injured parties for competition law infringements are still relatively uncommon, in contrast to the existing situation, for instance, in the USA.

On the other hand, this case evidences the growing importance of fundamental rights issues in EU competition law cases. Considering, *inter alia*, the future accession of the EU into the European Convention of Human Rights, it remains to be seen whether the administrative system of EU competition law enforcement, currently in place (which is confirmed by the existing body of EU case law), will not be forced to evolve in the coming years, in particular by the rulings of the European Court of Human Rights. ■

Portuguese Competition Authority imposes unusual fine for non-authorized concentration

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Like the EU system, the Portuguese merger control regime is based on an *ex ante* assessment system, whereby a concentration that meets the relevant thresholds (of turnover and/or market share) is subject to prior mandatory notification and (safe for exceptional circumstances not dealt with hereunder) cannot be implemented without the necessary clearance. Non-compliance with this requirement is subject to a potentially heavy fine (up to 10% of the previous year's turnover) and other financial penalties, and the underlying transaction is considered by law to be deprived of legal effect. The PCA is entitled to initiate *ex officio* investigations regarding non-notified concentrations and to order the parties to present (late) notifications.

Over the past 10 years, the filing of notifications triggered by *ex officio* proceedings has been a common feature of the Portuguese competition landscape. In contrast, the imposition of fines for failure to notify has remained rare: the last reported fines for failure to notify were issued in 2003/2004 and concerned breaches of the notification duties arising from the 1993 Competition Act (in force until June 2003). The fines applied have ranged from €1,000 to €75,000.

In this context, the PCA's recent decision to fine the National Pharmacy Association ("ANF") and two subsidiaries a total of €149,278.79 for implementing a concentration without the necessary prior authorisation is of interest and may indicate a shift from the approach endorsed so far (which privileged the detection and remedying of breaches over their sanctioning).

The concentration dated back to 2008 and concerned the indirect acquisition of control over publicly listed Glintt

(previously named ParaRede) by the ANF Group via its subsidiary Farminveste – Investimentos, Participações e Gestão, SA by way of the merger of Farminveste's subsidiary Consiste into ParaRede/Glintt. Even though, post-merger, Farminveste did not gain the majority of share capital and voting rights in Glintt (in absolute terms), the PCA considered – pursuant to information and clarifications provided by the parties – that Farminveste enjoyed sole control over the Glintt, in particular in light of:

- Farminveste's high percentage of share capital and voting rights (respectively, 49.73% and 49.83%) when compared to all remaining qualified stakeholdings in Glintt (less than 3%);
- the fact that the majority of the members appointed to the board of directors were linked to the ANF Group; and
- the board's powers to vote on strategic matters.

Following an *ex officio* investigation by the PCA, Farminveste notified the transaction in November 2009 and it was cleared by the authority in May 2010.

However, in early 2012 the PCA decided to initiate an administrative offence procedure against ANF and its subsidiaries for breach of the duty not to implement a transaction without the necessary preliminary authorisation. This procedure ended in the imposition of a fine of €149,278.79. In its public announcement of the fining decision, the PCA disclosed having applied a percentage of 0,05% over turnover for each company involved, and clarified that the absence of any irreparable damage to competition stemming from the concentration had also been considered in its assessment.

It is possible that ANF's recidivist behaviour played a role in the PCA's decision to bring forward the administrative offence procedure. Indeed, this was not the first time the ANF had failed to file a preliminary notification with the PCA: in 2005, the acquisition of joint control over Alliance Healthcare was only notified *ex-post* following an *ex-officio* proceeding (resulting in Case 80/2005). In addition, in 2010 Glintt itself was subject to an *ex officio* notification procedure for two concentrations which it had failed to notify, one of which occurred in November 2008 – a time when Glintt appeared to have already been under the control of Farminveste.

The PCA's decision comes at a time when – following the entering in force of the new Competition Act in July 2012 – its powers to detect and punish non-notified concentrations have been somewhat reduced, with *ex officio* proceedings now being limited to concentrations that occurred in the preceding five years. However, this change has not resulted in a relaxation of the PCA's enforcement powers, as this decision shows.

The punishment of parties to a transaction for implementing the transaction without the necessary authorisation – albeit uncommon – signals the PCA's intent to strictly enforce compliance with merger control rules. This is also apparent from the content of the PCA's own announcement, which stresses the economic relevance of an *ex-ante* assessment of concentrations and qualifies the breach of the rule on suspension of the concentration (before final clearance is obtained) as a serious infringement of competition law and its punishment as a priority of action for the PCA. ■



European Commission applies a € 1.47 billion cartel fine in the cathode ray tubes market

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THE TWO CRT CARTELS ARE AMONG THE MOST ORGANIZED THAT THE COMMISSION HAS INVESTIGATED

The European Commission, in case COMP 39.347¹, has recently sanctioned LG Electronics, Philips, Samsung SDI, Chungwa, Panasonic, Toshiba, MTPD (a Panasonic subsidiary) and Technicolor a total of € 1,470,515,000.00 for participating, between 1996 and 2006, in either one or both of two distinct cartels which were active worldwide in the sector of cathode ray tubes. One cartel operated in the colour picture ray tubes used for televisions and the other anti-competitive alliance was active in the colour display ray tubes used in computer monitors. According to the European Commission, cathode ray tubes (*CRT*) account for 50% to 70% of the total price of a screen.

For almost ten years these companies carried out, in accordance with the European Commission findings, “all the worst kinds of anti-competitive behaviour that are strictly forbidden to companies doing business in Europe”, including price fixing, markets sharing, customer allocation, capacity and output coordination and exchanges of commercial sensitive information. The Chungwa company received full immunity from the applicable fines under the European Commission 2006 Leniency Notice (*see* OJ C 298, 8.12.2006) for the two cartels, as it was first to reveal their existence to the European Commission services.

Other involved companies also gained fine reductions taking into account their active

cooperation in the investigation under the Commission’s leniency programme.

The Commission started its investigation with unannounced inspections in November 2007 at the premises of manufacturers of cathode ray tubes. A Statement of Objections was adopted in November 2009, so that companies could reply to the Statement of Objections, setting out all facts known to them, which they deem relevant to their defence against the objections raised by the Commission. A supplementary Statement of Objections concerning corporate liability was adopted by the Commission in June 2012 against two of the companies.

The two CRT cartels are among the most organized that the Commission has investigated. The cartelists held several top management meetings for the design of the orientations for the two cartels and the preparation and implementation were carried out through lower level meetings. Commission states that these meetings usually started with a review of demand, production, sales and capacity in the main sales areas, including Europe, and ended with the discussion of prices, including for individual customers, which resulted in a direct impact on customers in the European Economic Area, ultimately harming final customers.

The cartelists meetings were held in several locations in various countries and cities, including Taiwan, South Korea, Japan,

¹ See IP/12/1317, dated 05.12.2012.

Malaysia, Indonesia, Thailand, Hong-Kong, Amsterdam, Budapest, Glasgow, Paris and Rome.

Thus, based on the documentation gathered during the investigation, the Commission considers that the involved companies were well aware they were infringing antitrust law (Article 101 of the Treaty on the Functioning of the European Union) and the participants were therefore taking precautions to avoid being in possession of anticompetitive documents. “Producers need to avoid price competition through controlling their production capacity”, “Everybody is requested to keep it as secret as it would be serious damage if it is open to customers or the European Commission”, or “Please dispose the document after reading it”, were part of the expressions employed in several documents recording the cartels discussions accessed by the Commission during the investigation.

In respect of the fines applied to the Companies, these were set in accordance with the Commission’s 2006 Guidelines on fines, therefore taking into account (i) the wrongdoers sales of the products concerned in the European Economic Area, (ii) the very serious nature of the infringement, (iii) its geographic dimension scope, (iv) its de facto implementation, and (v) its duration.

If Chungwa had not received full immunity, the applicable fines would have been

€8,385,000.00 for the TV tubes cartel and €8,594,000.00 for the computer monitor tubes cartel. Other companies, such as Samsung SDI, Philips and Technicolor saw their fines reduced from 10 % to 40% for their cooperation under the Commission’s leniency programme, such reductions also reflect the time of their cooperation and the extent to which the evidence they disclosed assisted the Commission to prove the cartelists conducts.

The Commission imposed the following fines: (i) Samsung SDI, €150,842,000.00; (ii) Philips, €313,356,000.00; (iii) LG Electronics, €295,597,000.00; (iv) Philips and LG Electronics, jointly €391,940,000.00; (v) Technicolor, €38,631,000.00; (v) Panasonic, € 157,478,000.00; (vi) Toshiba, €28,048,000.00; (vii) Panasonic, Toshiba and MTPD, jointly € 86,738,000.00; and (viii) Panasonic and MTPD, jointly € 7,885,000.00.

Prior to this decision, which imposed a fine in the total amount of €1.47 billion, the Commission’s biggest antitrust penalty had been a 1.38 billion euro fine imposed on the participants in the car glass cartel in 2008 – see case COMP 39.125 “Carglass”¹, with Decision of 12 November 2008. In accordance with the latest developments, Panasonic already made a statement that it “*will seek a fair judgment*”², thus opening a door to a judicial review of the Commission’s decision before the European Union General Court. ■

THE 1.47 BILLION EURO FINE, APPLIED BY THE EUROPEAN COMMISSION TO THE MEMBERS OF THE TWO CATHODE RAY TUBES CARTELS, IS A STRONG AND CLEAR SIGN TO MULTINATIONAL ECONOMIC AGENTS THAT CARTELS ARE NOT TOLERATED IN THE EUROPEAN UNION JURISDICTION AND THAT ANTITRUST LAWS ARE STRICTLY ENFORCED.

¹ Information available at <http://ec.europa.eu/competition/cartels/cases/cases.html>.

² See Reuters “Panasonic to appeal EU ruling on cathode-ray tube cartel”, at <http://www.reuters.com/article/2012/12/21/panasonic-cartel-appeal-idUSL4N09V29X20121221>.



The ECJ's *Expedia* judgment – no *de minimis* defence available for restrictions by object

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THE SAFETY DERIVED FROM THE
DE MINIMIS NOTICE IS LIMITED,
FROM NOW ON, TO AGREEMENTS
WITH ANTICOMPETITIVE EFFECTS

On 13 December 2012, the European Court of Justice (ECJ) issued a preliminary ruling that will make it simpler to enforce, and punish, anti-competitive behaviour under Article 101 TFEU, increasing the risks of infringement for small companies.

This case (Case C-226/11) concerned the creation of a joint venture between the French state railway company (SNCF) and the tour operator Expedia to expand the sale of train tickets and travel over the internet. The French Competition Authority found this agreement to be an infringement of Article 101(1) TFEU and, on appeal from this decision, Expedia claimed that the parties' market shares had been overestimated and did not exceed the thresholds set out in the Commission's *de minimis* Notice¹.

The referring court asked the ECJ if Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 should be interpreted as preventing a national competition authority from punishing anti-competitive agreements if, despite the fact that they may affect trade between Member States, they involve undertakings whose individual and aggregate market shares fall below the thresholds of the *de minimis* Notice (10% for horizontal agreements and 15% for vertical agreements).

The ECJ made two important clarifications.

First, it emphasised that the *de minimis* Notice is not binding for national competition authorities or courts but

merely imposes a limit on the Commission's discretion when handling infringements of Article 101(1) TFEU. In addition, the Court stated that when assessing if a restriction of competition is *appreciable*, the national competition authorities may take into account the market share thresholds of the *de minimis* Notice but are not required to do so as those thresholds are only one of the relevant factors to be analysed «*by reference to the actual circumstances of the agreement*».

Secondly, and more importantly, the ECJ held that «*...an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature, and independently of any concrete effect that it may have, an appreciable restriction on competition*» (par. 37).

This means that, following this judgment, any agreements having an anti-competitive object will be deemed to constitute a material (appreciable) restriction of competition and, therefore, they will constitute an infringement of Article 101(1) TFEU no matter how small the market share of the companies involved. The safety derived from the *de minimis* Notice is therefore limited, from now on, to agreements with anti-competitive effects.

This development should prompt smaller market players to carefully review existing contracts in order to make sure they contain no clauses that could be deemed to have an anticompetitive object as they will no longer have any possibility to hide behind their diminutive size to escape fines under Article 101(1) TFEU. ■

¹ Commission Notice on agreements of minor importance which do not appreciably restrict competition (2001/C 368/07).

New legal leniency programme in Portugal

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Introduction

In a time when there has been large discussion in Portugal around the leniency programme in competition law cases conducted by the Portuguese Competition Authority (“PCA”), we deem it could be appropriate to briefly recall here its main components.

Prior to the entry into force of the current competition act, approved by Law No. 19/2012, of 8 May, the legal framework for granting immunity and reduction from fines in proceedings concerning the infringement of competition rules was governed by Law No. 39/2006, of 25 August. This law was in the meantime repealed by the competition act, which sets out the competition law regime in Portugal and rules on leniency as well (Articles 75 to 82 of the existing act).

We shall now examine some of the distinctive features of the Portuguese leniency programme, comparing them with the outline and fragilities of the previous regime.

Some characteristics of the national leniency programme

Objective scope

One of the distinguishing aspects of the leniency programme enacted by Law No. 39/2006 was its objective scope. Contrary to the leniency programmes of the European Commission and the European Competition Network, which apply only to cartel infringements, the national legislature was more ambitious and extended the objective scope of leniency to any competition distortive agreements and concerted practices, regardless of their horizontal or vertical nature and the type of infraction concerned.

However, practice has shown that leniency is essentially sought in cartel cases, the only ones so far (and even so there are only 2¹) in

which the programme was used in Portugal so far. Hence, under the competition act the objective scope of leniency was substantially narrowed down so as to cover only cartel-type behavior, *i.e.* agreements and concerted practices between competitors that are aimed at coordinating their competitive behaviour on the market and/or influencing relevant competition parameters, such as prices and other trading conditions, production or sales quotas or market sharing. The rationale for this restriction is simple: cartels are among the most serious breaches of competition law and those that, by their very secret nature, are more difficult to detect and investigate.

Subjective scope

In this field, the changes brought about by the competition act had the purpose of aligning the subjective component of the leniency programme with the scope of liability provided by law. To this end, eligibility for immunity and reduction of fines is extended to all entities that are called upon to answer in case of infringement. This means that, together with undertakings and members of the respective boards, benefits are also available to individuals responsible for the direction or supervision of areas of activity where an infringement has occurred.

A rule remains in force according to which individuals benefit automatically from a lenient treatment award to the respective company (provided the former cooperate with the PCA), although this is not necessarily true in reverse; if individuals apply for leniency on a personal basis, immunity and reduction will only benefit the applicant. This was what happened, for instance, in the mentioned ‘catering cartel’.

Types of lenient categories

This was one of the areas that was deeply revised by the competition act. Under the previous regime, there were four leniency categories: (i) full immunity, reserved to

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¹ We are referring to the alleged catering cartel prosecuted in December 2009 (http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200924.aspx?lst=1&Cat=2009) and the alleged cartel on commercial prints and forms prosecuted in December 2012 (http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201216.aspx).



ELIMINATING SPECIAL
REDUCTIONS ABOVE 50%
AND ADDITIONAL REDUCTIONS
OF FINES ('LENIENCY PLUS')
ARE LESS POSITIVE OPTIONS

'first-in' situations in which the applicant provided the PCA with information and evidence of an infringement before the PCA had initiated an investigation relating thereto; (ii) special reduction of a fine above 50%, granted also in 'first in' situations, but in this case the elements brought forward were so at a time when the PCA had already started the proceedings but had not yet issued a statement of objections; (iii) special reduction of a fine up to 50%, available when an applicant came in second in the same situation as that mentioned in the preceding category; and (iv) additional reduction of a fine (or 'leniency plus'), applicable to entities that have applied for leniency in respect of a given infringement and provided the PCA with information and evidence on another infringement in relation to which they would also apply for leniency.

The new leniency programme is closer to the existing programmes at European level, although, in our view, not all amendments may be seen as improvements.

Thus, full immunity now depends upon usefulness of the elements conveyed to the PCA by the first applicant, with a view to substantiate a decision to conduct searches and seizures or to find an infringement, even if an administrative proceeding is already pending.

Categories pertaining to reduction of fines are no longer limited to the first two applicants. The relevant criterion is now that of significant added value accrued by information and evidences, and the specific amounts of reduction are staggered according to the order in which leniency applications are lodged: a reduction of 30-50% to the first entity providing significant added value; 20-30% to the second entity; and up to 20% to the subsequent entities. For leniency requests presented after the statement of objections is served, these thresholds are reduced by half.

As a complement to the requirements attached to each of these categories,

applicants must also meet with common conditions, such as cooperate fully and continuously with the PCA and bring the infringement to an end.

The broadening of the scope of beneficiaries and the less consideration given to the procedural stage of the proceeding in which the leniency application is submitted are positive factors that enhance the useful effect of cooperating with the PCA. Conversely, we believe eliminating special reductions above 50% and additional reductions of fines are less positive options.

Procedure

The procedure for submitting and handling leniency applications was considerably reviewed when compared to the previous regime, which was particularly inflexible. Applications may now be lodged both in written and in oral form and the means of deliver were also widened. An important innovation is the introduction of a marker system, allowing the applicants to know beforehand their position in the leniency chain.

New rules were also introduced on the sensitive issue of confidentiality of the leniency application and related documents and access thereto by the defendants and third parties, very much in line with the decisional practice of the European Commission and the recent case law by EU courts.

Final remarks

Competition law in Portugal holds today a leniency programme that may be said to be broadly coherent and balanced, and theoretically able to enhance cooperation between companies, individuals and the PCA. This is, however, one of the most controversial and complex instruments to investigate infringements in this field. Its useful effect depends to a large extent from a delicate balance between the several risks at stake (*v.g.* risk of liability and recidivism), together with the practical challenge of its implementation in countries, such as Portugal, with a reduced economic fabric. ■

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SPECIAL CONTRIBUTION MATTOS FILHO

CADE defines position on Resale Price Maintenance (RPM)

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CADE's recent cases indicate that price fixing and resale price fixing will be treated with greater rigor by the Brazilian antitrust authority. On January 30, 2013, CADE ruled, by majority decision, that SKF do Brasil Ltda., a company that mainly acts in the manufacturing of bearings, seals and other products, had violated the law for fixing minimum resale prices at the wholesale level and imposed a fine equivalent to 1% of the company's revenues. This decision represents a milestone in CADE's position on RPM issues and indicates that, going forward, defendants must prove actual gains in economic efficiency to counter a claim of illegal conduct.

This administrative proceeding was initiated upon the basis of a representation of the consumer protection agency PROCON of São Paulo based upon documents received anonymously, which had been prepared by

SKF for imposing minimum resale prices upon its distributors. Documents received by CADE determined minimum mark-ups that should be observed in the resale of various products manufactured by SKF, and established monitoring mechanisms and penalties for distributors that undercut such prices.

The trial began in 2009, when CADE's former Commissioner Cesar Mattos found that the conduct did not generate anticompetitive effects and voted to dismiss the case. Subsequently, there were successive requests made by other justices until justice Vinicius Marques de Carvalho, who is the current President of CADE's tribunal, voted for conviction, concluding that it would be up to the company to provide proof of economic efficiency gains arising from price fixing, which had not been provided. The vote of the Commissioner Vinicius Carvalho was accompanied by those of Commissioners

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OF ILLEGALITY

Ricardo Ruiz, Marcos Paulo Verissimo, and Eduardo Pontual Ribeiro, as well as Fernando de Magalhães Furlan, who was President of CADE at the time.

CADE's tribunal held that it is sufficient for the antitrust authorities to prove that the conduct occurred, since it is for the accused to refute the presumption of illegality of the practice by demonstrating a lack of competitive harm, or by demonstrating that the benefits generated by the practice (i.e., efficiencies) are greater than the potential harm to competition. The lack of competitive harm can be demonstrated by proving the impossibility of unilateral or coordinated exercise of market power. With respect to the efficiencies, one must show that (i) they are specific to the transaction, i.e., cannot

be achieved by less drastic means, (ii) they outweigh the potential harm to competition generated by the conduct, and (iii) they are shared with consumers, not being fully absorbed by the company.

Similar rulings were issued in two trials that occurred on February 20, 2013, involving the Associação Brasileira de Agências de Viagens do Rio de Janeiro – ABAV and the Associação dos Produtores de Derivados de Calcário – APDC. Confirming the increased scrutiny by CADE of price fixing and resale price fixing, the President of CADE stated during the trial session, “[i]f you fix prices, there is a significant chance that such practice will be punished by Cade. There is no argument here that the fixing of output prices was suggestive or short-lived or that it was not applied.” ■



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