MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS
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Security of energy supply as a derogation from EU law: *Castelnou Energia v. Commission*

Carlos Botelho Moniz / Pedro de Gouveia e Melo
cmoniz@mlgts.pt / pgmelo@mlgts.pt

Introduction

In recent years the security of the energy supply has been a growing concern for both the European Union (EU) and several Member States, especially those more dependent on imports from third countries to meet their energy needs, which may be affected by an uncertain international political context. However, the European Commission and the European Courts have always been very reluctant to endorse national measures to safeguard the security of supply derogating from EU law, in particular those rules relating to freedom of movement within the European internal market and State aid.

The recent General Court judgment in case *Castelnou v. Commission*[1], concerning a Spanish measure to support electricity production from "indigenous" coal, is an interesting example in this context. In this case, a measure characterized as State aid and potentially restrictive of the freedom of movement of goods and the right of establishment was declared compatible with EU law because it concerned a service of general economic interest (SGEI) for safeguarding the security of electricity supply. On the other hand, the Court clarified that when a State aid measure does not pursue an environmental objective, the Commission is not required to take into account EU law provisions on environmental protection[2].

The Aid Measure to Power Plants using "Spanish" Coal

In 2010 the Spanish Government notified to the European Commission under the State aid rules a measure establishing a mechanism of "preferred dispatch" of electricity produced by ten power plants using "indigenous" coal (i.e. of Spanish origin). The measure provided that such electricity should be purchased in the daily wholesale electricity market preferably to that produced by power plants using imported coal, fuel oil and natural gas. The power plants in question were required to produce certain amounts of electricity from indigenous coal, whose price is higher than imported coal, and benefited from a compensation equivalent to the difference between their additional production costs and the price of the sale of electricity in the daily wholesale market. This measure, which was to be in force from 2010 to 2014, was financed by a fund controlled by the Spanish State, and had an estimated cost of € 400 million per year.

Following an eventful review procedure – in which several electrical companies and a sector association, environmental organizations, Spanish local authorities and MEPs all spoke against the measure – the Commission concluded that the notified national regime constituted State aid pursuant to Article 107 TFEU, but was compatible with EU law, because the obligations imposed on the beneficiaries were related to the operation of a service of general economic interest under Article 106(2) TFEU, and were necessary to ensure the security of the electricity supply[3].

Castelnou Energía, one of the intervening entities in the procedure before the Commission, appealed against the approval decision (in which it was supported by Greenpeace Spain), invoking several errors in the Commission's assessment. The appeal was, however, rejected by the General Court, which upheld the contested decision in its entirety.

Protection of Security of Supply as Justification for Services of General Economic Interest (SGEI)

For the Spanish Government, the support scheme was necessary to ensure that between 2010 and 2014 a sufficient reserve of production capacity existed to meet periods of peak demand when meteorological conditions were not favourable for the production of electricity from renewable sources (which in 2013 represented 52% of the total generation capacity in Spain[4]). The availability of "indigenous" coal power plants strengthened the security of energy supply in Spain, as the remaining fossil energy sources for electricity generation (coal and natural gas) were imported. On the other hand, in the absence of the support scheme these power plants would likely be closed, due to the higher costs of "indigenous" coal.

According to case-law, Member States have "wide discretion" in determining the nature and object of a SGEI. Although the exact discretion allowed to Member States has fluctuated over time depending on the circumstances of the case, the Spanish measure at issue found support in the Second Electricity Directive, under which Member States could provide that, *for reasons of security of supply, priority is given to the dispatch of generating installations using indigenous primary energy sources*[5]. For this reason, and having reviewed in detail the arguments of the Spanish Government and the other

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[1] Judgement of 3.12.2014, case T-57/11.
[2] On national measures to safeguard security of energy supply found incompatible with EU law see judgments of the European Court of Justice of 11.11.2010, case C-543/08, *Comissão v. Portugal* (special rights over EDP) e 10.11.2011, proc. C-212/09, *Comissão v. Portugal* (special rights over GALP), as well as the case-law referred to therein on previous cases.
[3] Commission Decision C(2010)4499, of 29.09.2010, case N 178/2010 – *Spain. Public Service compensation linked to a preferential dispatch mechanism for indigenous coal power plants.*
[4] Red Electrica de España, *The Spanish Electricity System Preliminary Report 2013*, p. 7.
[5] See Article 11(4) of Directive 2003/54/EC, of 26.06.2003 (OJ L 176, of 15.07.2003, p. 37), a provision which was maintained by Article 15(4) of Directive 2009/72/EC, of 13.07.2009 (OJ L 211, of 14.8.009, p. 55), presently in force.

interested parties, both the Commission and, on appeal, the General Court acknowledged that the risks to the security of the electricity supply could justify the imposition of the SGEI obligations, and the corresponding compensation, to the plants concerned.

The Court also confirmed that the Commission had not committed a manifest error in concluding for the proportionality of the Spanish scheme. Recalling that, in the field of SGEI, the control of proportionality is limited to verifying that the measure in question is *appropriate* to achieve its objective, and, on the other hand, is not *excessive*, the Court examined in any case the detailed arguments put forward by Castelnou Energía, which were nevertheless considered unfounded.

In particular, with regard to possible distortions in the import of natural gas and coal markets caused by the support scheme, the Court considered (following the Commission) that such distortions were inherent to the concept of State aid and were not manifestly excessive regarding the objective pursued. In this regard, and recalling previous case-law on SGEI, the Court stated that the burden of proof cannot be so extensive as to require the Member State to go even further and prove *that no other conceivable measure, which by definition would be hypothetical, could enable those tasks under the same conditions*.

Internal market: free movement of goods and right of establishment

Invoking an ancient line of case-law on the relation between State aid and free movement of goods provisions, the Commission and the Court avoided concluding that the Spanish scheme also constituted a measure having an equivalent effect to a quantitative restriction on imports prohibited by Article 34 TFEU, notwithstanding that it openly promotes national coal production and harms imports. One cannot help considering this view as somewhat intriguing, given the extremely broad notion of measure having an equivalent effect to a quantitative restriction resulting from the general case law of the Court of Justice further to the *Dassonville* judgment (which covers all measures that *directly or indirectly, actually or potentially*, could have a negative effect on imports from other Member States).

In any case, the Court held, citing the *Campus Oil* case law, that the security of the electricity supply constitutes a reason of public security within the meaning of Article 36 TFEU, which can justify a measure restricting the free movement of goods (as well as the right of establishment), provided that the measure respects the principle of proportionality, which the Court found to be the case.

The Non-applicability of European Legislation on Environmental Protection

Castelnou Energy also held that the adoption of the support scheme in question violated several EU law rules on the protection of the environment. The Court, however, concluded that the Commission was not required to analyse the support scheme under EU environment law, as the national measure did not pursue an environmental objective.

On the other hand, the Court also recalled that the Commission, although bound to ensure overall consistency in the application of EU law, is only required to consider in the assessment of a State aid measure the compliance with other European rules pertaining to the internal market. However, since the "European internal market" is defined in the Treaties as "an area without frontiers in which the free movement of goods, persons, services and capital is ensured", State aid that may have negative effects on the environment is not in itself contrary to the creation and existence of the internal market.

In any event, the Court analysed (and rejected) Castelnou's argument that the measure violated the EU Directive on greenhouse gas emission allowance trading, because although the support scheme for power plants using "indigenous" coal could lead to the increase in CO2 emissions from these plants, it would not result in an overall increase in CO2 emissions in Spain.

Conclusion

Although not openly referred to by the Court, the political and social implications of this case were not negligible, not only due to the strong opposition raised from several quarters in Spain, but also because the scheme was essential for the maintenance of the Spanish coal mining industry.

It is therefore not surprising that the Commission and the Court, while formally declaring the limitations inherent to the review of the options made by Member States under the SGEI, have carried out a detailed examination of the arguments presented by both the Spanish Government and by the intervening entities opposed to the measure.

The favourable review, in any event, was greatly facilitated by the fact that the European legislator itself had enshrined in the directives harmonizing the electricity sector the right for Member States to give preference to part of their electricity production from indigenous energy sources, in order to safeguard the security of energy supply. Without such an express provision, one may wonder if the "wide margin" of the Spanish State in this field would not have been more closely scrutinized, and the case could perhaps have had a different conclusion. ■

[6] Directive 2003/87/CE, of 13.10.2003 (OJ L 275, p. 32).

The Court of Justice rejects accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Eduardo Maia Cadete / Dzhamil Oda
maiacadete@mlgts.pt / d.oda@mlgts.pt

The Draft Agreement on the Accession (Accession Agreement) of the European Union (*EU*) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR*) was rejected by the Court of Justice of the European Union (*CJEU*) *via* its Opinion no. 2/13, 18 December 2014[1].

The Agreement on the Accession refers to the decision of the Council, 4 June 2010, which authorised the opening of negotiations by the European Commission regarding the EU accession to the ECHR. On 5 April 2013, the said negotiations led to an agreement between the negotiators on the accession instruments, and in such context on 4 July 2013 the European Commission requested an opinion from the CJEU, pursuant to Article 218(11) of the Treaty on the Functioning of the European Union (*TFEU*)[2], regarding the compatibility of the Accession Agreement with the Treaties.

The CJEU in its opinion, after recalling that the absence of a legal basis for the accession of the Union to the ECHR was surpassed by Article 6(2) of the Treaty on European Union (*TEU*)[3], as amended by the Lisbon Treaty, identifies several legal reasons which, under its reasoning, invalidate the Accession Agreement.

First, the Accession Agreement to the ECHR would cause the EU to be subject to external supervision, thus the EU and its institutions, including the CJEU and its respective rulings, would be subject to supervision mechanisms foreseen in the European Convention. In this framework the CJEU considers that the Accession Agreement would hinder the autonomy of the EU's legal order and would cause the CJEU to be bound *via* international law to rulings of the European Court for Human Rights (*ECtHR*), while the reverse does not happen (ECtHR subject to CJEU's judicial decisions). In this regard the CJEU states that "it should not be possible for the ECtHR to call into question the Court's [ECJ] findings in relation to the scope *ratione materiae* of EU law for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU" (para. 186).

The CJEU also highlights, grounded on the principle of legitimate expectations, that "[i] n so far as the ECHR would, in requiring the EU and the Member States be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States; accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law" (para. 194).

Also based on the ECHR rules (Protocol no. 16) which authorise the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on issues related to the interpretation or application of rights and freedoms guaranteed by the ECHR, the CJEU found that such requests could affect the autonomy and the efficiency of the preliminary ruling procedure foreseen in Article 267 TFEU, which confers on the CJEU the competence to rule on the interpretation of the Treaties and the validity and interpretation of the acts adopted by EU institutions or bodies.

Based on Article 344 TFEU ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein") the CJEU states, cumulatively, that the ACCESSION AGREEMENT does not foresee that the ECHR rules are not applicable to disputes between Member States and the latter and the Union, considering that it "still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under (…) the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law" (para. 207), which, according to the CJEU, breaches the referred Treaty rule.

The mechanism to act against Member States and/or the EU before the ECtHR is also subject to criticism by the CJEU, as this supervision, in terms of procedural legitimacy, would be made by the ECtHR, and the Strasbourg court "would be required to assess the rules of EU law governing the division

[1] Available at http://curia.europa.eu.
[2] Which states: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."
[3] Para. (2) of this Article states that: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU" (para. 224). In accordance with the CJEU, such supervision would be "liable to interfere with the division of powers between the EU and its Member States" (para. 225).

The CJEU also considers that it is within its sphere of competence to "provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law" (para. 246). In other words, the CJEU found that the interpretation of the secondary legislation cannot be made ultimately by the ECtHR – as the competence for adopting the last jurisdictional decision belongs to CJEU (the *competenz-competenz*).

The CJEU also highlights, as a final argument to *rule out* the validity of the Accession Agreement, based on the TEU rules on Common Foreign and Security Policy (*CFSP*), that the TEU confers on the EU court limited judicial review powers – in particular the competence to rule on the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council (in accordance with Article 275 TFEU), as there are acts adopted under the CFSP which, pursuant to the Treaties, fall outside CJEU' judicial control. However, as a result of the Accession Agreement, and in the opinion of the CJEU, "the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights" (para. 254), thus conferring competence for judicial review to "a non-EU body" (para. 255). According to CJEU, such a situation is not admissible, because the Luxembourg court considers that "jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU" (para. 256). Thus, for the above summarised reasons, the CJEU found that the Accession Agreement is not compatible with the TEU and the TFEU.

This binding opinion adopted by the CJEU, under Article 218(11) TFEU, puts an end to the aspirations of 28 Member States, and consequently of 500 million citizens, regarding the EU's accession to the ECHR, leading the EU and its institutions, including the judiciary, to be immune to the scrutiny of the ECtHR.

Thus, it now remains to be known whether the CJEU's opinion (i) does not create insurmountable barriers to the EU's accession to the ECHR, considering the interpretation adopted by the CJEU on the Treaties' rules, which potentially can only be surpassed through a lengthy and complex process of amendments to the EU Treaties by Member States (intergovernmental conferences and ratification by each Member State); and (ii) if the tight sieve established by the CJEU and the large number of reservations that should be provided by the EU to accede to the ECHR – and if those are accepted by the members of the Council of Europe, which comprises several countries that are not part of the EU – it would not deplete the ECtHR's supervisory powers in the context of the review of actions and omissions of the EU to the detriment of the ECHR and of the seminal jurisprudence of the ECtHR on individual rights and freedoms. ■

Jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court wich is outside the institutional and judicial framework of the EU

The *Akzo Nobel/European Commission*[1] Decision: Confidentiality And Publicity

Gonçalo Machado Borges / Miguel Cortes Martins
gmb@mlgts.pt / mcmartins@mlgts.pt

At the beginning of 2015, the General Court of the European Union ("GCEU" or the "Court") dismissed the application for the annulment of a European Commission decision rejecting a request for confidential treatment submitted by Akzo Nobel and other companies that participated in an infringement of competition law.

This decision is of particular importance since it is the first time that the GCEU provides guidelines regarding the balance between the publication of public versions of cartel decisions and the protection of professional secrets.

The decision concerned the publication of a more detailed (i.e., disclosing more information), non-confidential version of the final judgment, notwithstanding that a first version had been already published. The companies opposed the publication since it seriously harmed their interests, given that the more detailed version would contain a large amount of information provided under a leniency application related to a cartel.

Regardless of maintaining the sources of the information as confidential, the Commission took the view that there was no justification to extend that confidentiality to the information itself. Faced with the rejection of their request for confidential treatment, the companies in question argued before the GCEU that there had been a breach of the duty of confidentiality and afrustration of their legitimate expectations.

Firstly, they claimed that the new publication breaches the duty of confidentiality, since the information was voluntarily given by the applicants to the Commission under a leniency application, thus being protected against its disclosure.

Secondly, the applicants claimed that the contested decision, by authorizing the publication of a non-confidential version containing information voluntarily provided under a leniency application, frustrated their legitimate expectations, since they were assured that such information would remain confidential. In addition, a non-confidential version of the judgment had already been published.

To counter the first argument, the Court stated three conditions that must be met in order to protect confidentiality: (i) the information is known only to a limited number of persons; (ii) the disclosure of that information is liable to cause serious harm to the person who has provided it or to third parties; and (iii) the interests liable to be harmed by disclosure are, objectively, worthy of protection. The Court deemed the first two conditions proved, having stated, regarding the third, that "**the interest of an undertaking which the Commission has fined for breach of competition law in the non-disclosure to the public of details of the offending conduct of which it is accused does not, in principle, merit any particular protection**". The Court made this statement when confronted with public interest in knowing the reasons for any Commission action, the interest of economic operators in knowing which behaviours are punished, and the interest of persons harmed by the infringement so that they may assert their rights (notably, to be compensated for their losses) against the undertakings punished. The Court added that the publication by the Commission of a non-confidential version of its decisions containing information that was voluntarily submitted to it under the leniency programme **cannot be considered to be used for a reason other than that for which the information was obtained**.

Regarding the second argument, the Court concluded that, although the previous administrative practice may have created expectations for the companies, they could not have any legitimate expectation that such practice would be maintained. Therefore, the mere fact that the Commission published an initial non-confidential version of the decision and that it did not describe that version as provisional could not have given the applicants any precise assurance that a more detailed non-confidential version would not be published later. Thus, since the Commission did not make any specific commitment not to publish a non-confidential version containing more information, the applicants cannot claim the frustration of their expectations.

This decision reinforces the wide margin of appreciation given to the Commission regarding the publication of its decisions, and shows that the information provided by companies in leniency applications should not be automatically deemed confidential. Therefore, the range of such protection will always have to be balanced with the legitimate interest in the disclosure of the facts constituting the infringement. ■

[1] Case T-345/12 – *Akzo Nobel NV & Others/European Commission*

Fine of €2,5 Million imposed for negligent access to inbox and email "diversion" during inspection of the European Commission

Inês Gouveia
igouveia@mlgts.pt

Introduction

By a judgement dated November 2014 issued in case T 272/12, the General Court of the European Union ("the Court") confirmed the sanctioning of Energetický a průmyslový holding a.s. («EPH») and of its subsidiary EP Investment Advisors s.r.o. ("EPIA") – Czech companies with activities in the energy sector – with a fine of €2,5 million because, during an unannounced inspection of the European Commission ("Commission"), access was granted to a blocked email account and the messages addressed to a *mailbox* under investigation were automatically retained in the server. This conduct was considered as a refusal by the companies investigated to submit to an inspection, a practice that is sanctioned in Regulation (EC) n.º 1/2003 of the Council of 16.12.2002 ("Regulation").

The facts

During a surprise inspection carried out on the premises of EPH and EPIA, the Commission's inspectors ordered the person responsible for the companies' IT department to block the email accounts of four persons holdings key positions within the companies. Some hours after the block one of those key-persons – working at home – realized he could not access his email account and reported the problem to an employee of the IT Department, who changed the password in order to allow him to access his e-mail account again.

On the second day of the inspection the legal representative of the company, also subject to the email block, ordered the IT Department that the emails destined to his email account be retained on the server instead of being transferred to his *mailbox*.

In March 2012 following an investigation of the facts described above, the Commission adopted an infringement decision in which it concluded that the companies had committed an infringement of refusal to submit to an inspection and sanctioned them to a total fine of €2,5 million.

The appeal

On appeal, the companies contested the legal assessment of the above-referred conduct, claiming, in particular, that the Commission could not conclude infringement without previously demonstrating that the messages (unduly) accessed had been manipulated or eliminated. They further claimed that the Commission should have taken into account that the retained emails, even though not having reached the mailbox under investigation, remained available in the companies' server, where the Commission's inspectors could have consulted them.

The appellants also argued that the conduct of the IT technician responsible could not be attributed to them because the former was an employee of an independent company and was not, as such, authorised to act for the applicants.

The Court fully rejected these arguments. Following closely its previous case-law, the Court recalled that the measures adopted by the inspectors had the purpose of securing exclusive access to the email accounts during the inspection; in this context, **it was enough for the Commission to prove that access had been granted – even if negligently - to the data of a blocked email account**. In the case at hand, not only was the Commission able to produce proof thereof on the basis of documents but such proof was undisputed by the appellants.

The companies contested the legal assessment of the conduct, claiming that the Commission could not conclude infringement without previously demonstrating that the messages (unduly) accessed had been manipulated or eliminated

THE DETERRING EFFECT OF FINES IS PARTICULARLY RELEVANT WHEN ELECTRONIC FILES ARE AT STAKE AS THEY ARE MUCH EASIER AND QUICKER TO MANIPULATE AND CONCEAL, EVEN IN THE PRESENCE OF INSPECTORS

Hence, **the Court considered it irrelevant for a finding of infringement to prove whether or not the data had been manipulated or eliminated and it did not accept that certain technical characteristics of electronic data - such as their resistance to destruction and their automatic copying – would ensure, as argued by the appellants, their integrity and permanent availability**.

On the other hand, it results from the case law of the European Union on cooperation duties in case of an investigation, that **the companies were, in the present case, bound by an obligation to make available to the inspectors, in the respective inboxes, the email messages of those being investigated, just as it had been expressly requested. Such obligation was breached with the intentional diversion of incoming emails to the server.**

In this context – the Court clarified – **it is irrelevant that the messages remained available in the company's server and the Commission's inspectors had no obligation to previously ascertain such availability, before concluding that an infringement had occurred.**

In what concerns the conduct of the person responsible to the IT department, the Court found it sufficient that the person at stake had, from the beginning of the inspection, been indicated by the legal representative of the companies investigated as the responsible person for IT. The fact that the members of the IT department were remunerated by a different legal entity and rendered their services on a temporary basis did not preclude, in the Court's reasoning, their acting for and under the direction of the appellants.

One final relevant point to note is that **the Court stressed the deterring effect of fines is particularly relevant when electronic files are at stake as they are much easier and quicker to manipulate and conceal, even in the presence of inspectors, which – the Court notes - poses particular difficulties for the effectiveness of an inspection.**

Final remarks

From the moment a company is notified of an inspection decision, it must adopt all measures necessary to implement the instructions received from the inspectors and see to that the persons authorised to act for the company (even if they are not its own employees) do not render said implementation more difficult.

On the other hand and as results from the above, the assessment of whether or not a company has complied with its cooperation duties in the context of a surprise inspection must be done in strictly objective terms.

It is therefore crucial for companies under investigation to be able to assure, top to bottom within an organization, full compliance with its cooperation duties, which requires appropriate monitoring and control in the course of an inspection. Compliance with said duties can be further enhanced by other measures, whether preventive - in particular, though adequate training and preparation of a company's employees for the event of an inspection - or reactive measures - through immediate reporting to investigating authorities of any incident that occurred in the course of an inspection as well as through close cooperation in its remedying. ■

Commission discloses overview of State aid to European banks

Luís do Nascimento Ferreira
lnferreira@mlgts.pt

Introduction

The European Commission published in February 2015 a brief summarising the key financial data concerning State aid awarded by Member States to their financial institutions during the outbreak of the economic and financial crisis[1].

The figures are fairly impressive. It is estimated that between 2007 and 2014 a total of 22 Member States provided € 671 billion in capital and loans and € 1,288 billion in guarantees in favour of their respective credit institutions. In this period the Commission issued more than 450 restructuring or resolution decisions concerning 112 banks with EU presence – roughly 30% of the entire European banking system. In a few countries, such as Portugal, more than 50% of the national financial system received State support. Among the 112 aided banks, 56 were restructured, 33 were wound down in an orderly manner, 14 were deemed viable without further need of restructuring, and 9 were still pending a decision on their restructuring plans as of December 2014.

The Commission takes the view that the measures adopted as a reaction to the crisis are showing positive results which translate into an improvement in risk, solvency and liquidity ratios, which are also confirmed by the recent stress tests undertaken by the ECB. However, the Commission also acknowledges that restructuring plans require a degree of phasing-in and thus the math should only be done at the end of such adjustment programmes.

The two moments of the crisis

The Commission's approach in State aid matters towards ailing banks has evolved.

With the purpose of addressing the systemic economic and financial crisis that the EU faced from 2007 onwards by means of a coordinated action, the Commission provided guidance in support of the financial sector spelling out the conditions for access to State aid. It did so by adjusting the existing legal framework to the new reality.

In the first stage – that may be set between 2008 and 2012 – financial stability was the overarching objective that drove the need to set up soft law instruments in order to put banks in distress on more solid footing in the long run, if necessary, through public resources. During this period, countries were encouraged with the Commission's backing to deploy large amounts of State aid so as to ensure adequate levels of solvency and liquidity in their credit institutions and prevent spill-over effects for the remaining financial market.

With a view to operationalise such public support, in this first phase the Commission allowed Member States to conduct an analysis on the shortfall of capital or liquidity that they planned to meet in the banks active in their countries and to proceed with public investment on the basis of capitalisation plans essentially discussed and approved at the national level. According to the scheme that was in force at the time, it was only after public support was granted that the Commission and the Member States engaged in thorough conversations concerning the extent of the restructuring measures required to accomplish *(i)* the viability of aided banks, *(ii)* the respective contribution to the capitalisation and restructuring efforts and *(iii)* the limitation of competition distortions arising from the public aid.

This model set the path to the recapitalisation scheme for credit institutions in Portugal enacted by Law No. 63-A/2008, 24 November.

After this first stage, where the use of public investment tools allowed Member States to ensure comfortable levels of resilience in their banking industry, in 2013 the European Commission deeply revised access rules to public resources by ailing credit institutions.

> The Commission issued more than 450 restructuring or resolution decisions concerning 112 banks with EU presence – roughly 30% of the entire European banking system

Whilst in first moment actions put in place to deal with the crisis aimed essentially at easing concerns brought by the turmoil in the financial markets and the crisis of sovereign debts, from 2013 onwards the Commission considered that the financial sector faced further challenges stemming from fragile and uneven economic recovery processes and public and private deleveraging with repercussions in terms of banking assets quality and accessing term funding.

In view of the Member States' need to reduce and consolidate public and private debt, the Commission significantly strengthened in 2013 the minimum requirements in terms of the burden sharing of restructuring costs on the part of supported institutions, their shareholders, and subordinated creditors.

In practice, this means that after 2013, and as a general rule, Member States, prior to conceding aid to a bank in distress (either in the form of capital or impaired asset measures), should preferably exhaust all alternative measures to generate funds for the target institution and ensure that capital holders and holders of subordinated debt contribute as much as possible with their own resources.

[1] http://ec.europa.eu/competition/publications/csb/csb2015_001_en.pdf.

Hence, the Commission now deems, as a general principle, that there is less need for structural measures granted on the basis of a preliminary assessment of a bank's financial situation. Conversely, it now favours an anticipation of the in-depth discussion and the approval of banks' restructuring plans and the remedies attached thereto to a moment preceding the award of State aid.

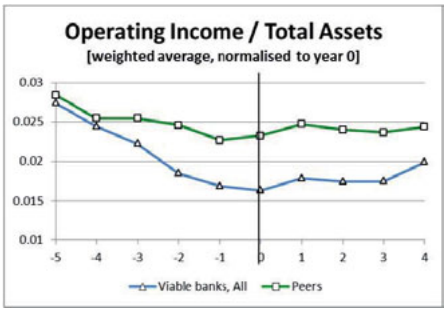
The Commission's main conclusions

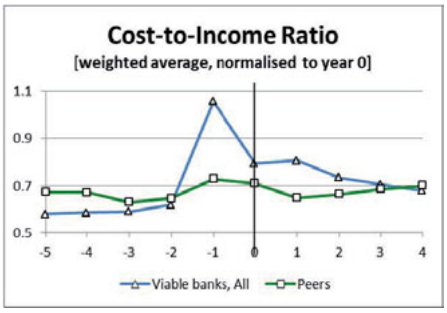
The assessment made in the Commission's brief is only based on the results of the State aid policy concerning banks that were considered viable, thus excluding banks that were orderly wound down and that represent a significant share (c. 30%) of the aided banks during the crisis.

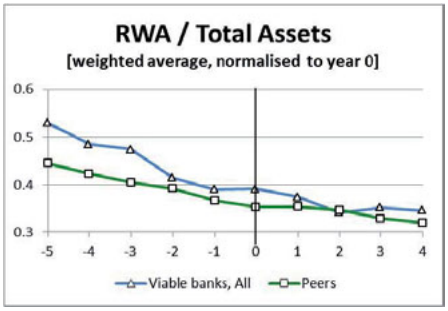
To this end, a bank's viability is roughly assessed as the possibility to return to sustainable profitability within a 5-year time frame without further support from the State. This concept of viability also presumes that during the restructuring period burden sharing measures are put in place by the aid recipient, its shareholders and subordinated creditors, together with commitments able to limit competition distortions flowing from the aid (that may be structural, behavioural or both).

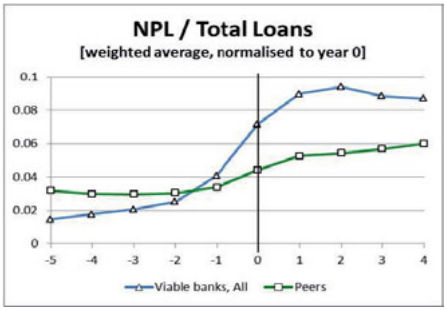
In this balance exercise the Commission sought to assess the performance of supported banks before and after the award of the aid vis-à-vis that of the competitors that did not benefit from aid, taking account of key financial indicators relating to developments in operative and risk management, overall profitability, capital ratios, and funding positions. It follows from this comparison that there is a confluence between supported banks in the post-aid period and the levels achieved by unaided peers. This trend towards an increasing approximation becomes more visible as restructuring plans are implemented through time.

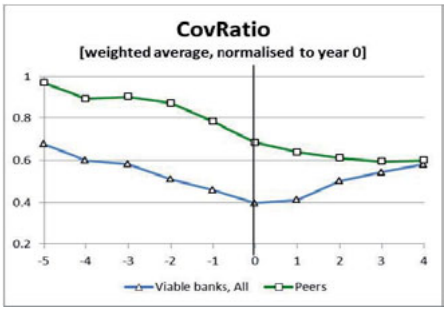
The following graphics illustrate what was just mentioned[2]: ■

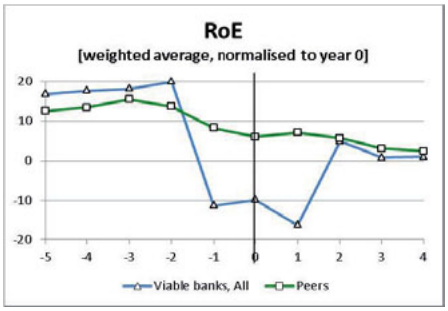


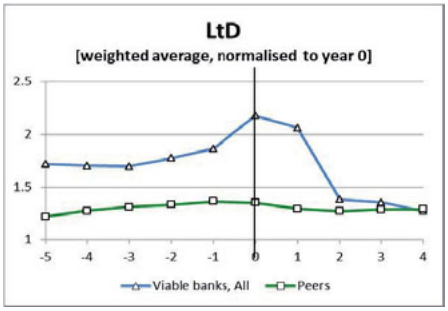


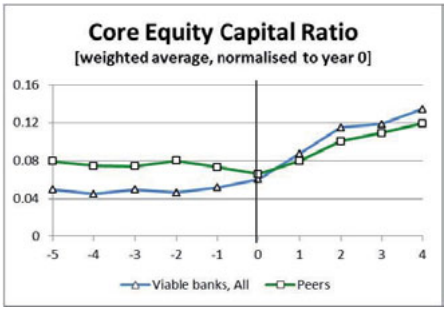












Source: European Commission, *State aid to European banks: returning to viability | Competition State aid brief*, February 2015

[2] The "year zero" represents the moment when the aid was awarded; "RWA" means *risk-weighted assets*; "NPLs" means *non-performing loans*; "RoE" means *return on equity*; and "LtD" means *loans-to-deposits*.

MATTOS FILHO > Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

SPECIAL CONTRIBUTION MATTOS FILHO ADVOGADOS

New regulation concerning CADE´S advisory opinion process

www.mattosfilho.com.br

On March 17, 2015, the Administrative Counsel for Economic Defense in Brazil (CADE) issued Resolution No. 12, stipulating the process for requesting CADE´s advisory opinions. Law No. 12.529/11 previously governed this matter and established CADE´s Tribunal advisory jurisdiction, but further legislation regarding the procedure to request such opinions was expected.

CADE´s advisory services constitute a significant channel of communication between the antitrust authority and business and industry groups. It allows businesses to request the agency's clarification of its rules on the application of antitrust laws to specific situations involving transactions or conducts potentially harmful to competition. Likewise, it allows CADE to work with businesses at their request and expand its variety of precedents in several proposed activities and arrangements.

Despite the importance of CADE´s advisory services, businesses, by in large, have not made use of these services in recent years. Before the Resolution it was not clear how long it would take to obtain an answer from CADE regarding its binding effect. CADE did not have a time requirement to issue an answer before the Resolution was enacted. As a result, businesses preferred to request CADE´s approval on their corporate transactions instead of making use of CADE advisory services. In addition, the lack of legal provision on the biding effect of these answers before the Resolution created insecurity among its applicants.

The Resolution seeks to solve these issues and requires CADE to issue an answer within 120 days. It also makes these answers enforceable on the parties for five years. It stipulates the parties who may request an advisory opinion: (i) parties who are directly involved in the transaction or conduct, and (ii) agencies or associations that represent industry sectors and demonstrate interest of more than one associate on the topic subject to the request. Moreover, the application for an opinion with CADE in its advisory capacity must concern (i) CADE´s rules on corporate control in connection with a specific transaction or actual situation; (ii) a question of whether the applicant´s actions, agreements,

corporate strategies or conducts of any kind, already initiated, or if not initiated, already planned, is harmful to competition.

It must also include (i) identification of applicant´s and other parties involved; (ii) statement describing the subject of the requested opinion, including a complete and extensive description of the relevant facts; (iii) supporting information that the applicant believes to be material to the review by CADE; (iv) identification of the provisions of law and CADE´s precedent under which the request arises; (v) proof of the parties legitimate interest in the opinion; and (vi) proof that the same or substantially the same course of action is not under investigation, under any other pending administrative proceeding, or a proceeding already decided by CADE.

The application must be submitted to the President of the Tribunal of CADE. One of the Plenary's Commissioners will be assigned to review the case. The Commissioner will rely on the applicant´s information, CADE's precedents, and other reliable sources to issue his opinion.

CADE´s answer binds the parties and CADE for 5 years within the limits of the facts provided by the applicant. CADE may decide to review its answer if supervening facts arise, and it may order the applicant to cease its conduct in case of public interest. In these circumstances, CADE may solely review its interpretation of a certain fact or conduct, but it may not retroactively impose a penalty on the applicant after an answer is issued.

In the event CADE deems the applicant´s conduct already initiated to be illegal, it must convert the application for an advisory answer into an investigation to verify the occurrence of violation of the economic order, as set forth in the Brazilian legislation. Depending on the result of its review of an application and its previous opinions, CADE opinions may become persuasive precedent in subsequent cases.

The Resolution seeks to ensure the balance between legal certainty to the parties and decision-making certainty to CADE. By limiting the cases when these advisory opinions will be admitted to include only specific cases, and by requiring the applicant to provide a precise description of facts and submission of ancillary documents to support its request, CADE will have sufficient information to issue a justified answer. Moreover, the binding nature of the answer allows applicants to safely proceed with their conduct. The non-retroactivity of the answer guarantees that applicants will not be penalized by a subsequent change of CADE's interpretation of a certain fact or conduct already subject of an advisory opinion. ■