Morais Leitão, Galvão Teles, Soares da Silva
& Associados
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Rebates by dominant firms: when they are abusive?

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

Granting discounts and rebates to customers is commonplace in a market economy. In the European Union, however, rebate schemes implemented by dominant companies (dominance concerns can arise from market shares between 40-50%) have traditionally been the subject of a restrictive case-law by the European courts as regards their compatibility with Article 102 TFEU, which prohibits the abuse of a dominant position.

In the recent and long-awaited Post Danmark II judgment[1], the European Court of Justice generally confirmed its previous case law, which has been criticized for a formalistic approach detached from the economic reality. The judgment is nevertheless welcome for clarifying the criteria for applying Article 102 TFEU to discount schemes practiced by dominant companies and attempting (somewhat timidly) to move towards an analysis based on the effects of the conduct of companies in the market.

The facts

The judgment results from a referral for preliminary ruling from the Danish commercial court in relation to a scheme of retroactive rebates implemented by Post Danmark (the operator of the universal postal service in Denmark) for direct advertising bulk mail, which had been declared contrary Article 102 TFEU by the Danish competition authority.

The discounts at stake ranged from 6% to 16% and depended on the customer reaching certain targets (in terms of number of issued letters or delivery charges value) during the reference period of one year. At the end of the year, Post Danmark adjusted the price initially paid by the customers, taking into account the volumes actually shipped. The rebates were applied to all customers of Post Danmark, regardless of whether distribution took place in areas not covered by other operators.

Criteria for determining the abusive nature of rebate schemes

The first question posed by the Danish court concerned the criteria for analysing under Article 102 TFEU a scheme of conditional rebates as implemented by Post Danmark. Clarifying previous case-law, the judgment identifies three categories of rebates, to which different criteria apply:

– **Quantity rebates**, which are linked solely to the volume of purchases from the supplier in a certain individual order, are admissible, to the extent that they correspond to savings achieved by the dominant undertaking;
– **Loyalty rebates**, granted to customers who commit to purchase all or most of their requirements from the dominant company, are considered unfair, unless it can be objectively justified by the dominant undertaking (demonstration virtually impossible or very difficult).
– **Other rebates** not included in the previous two categories, in particular **conditional rebates**, granted to the client for achieving certain purchasing targets over a given period, should be assessed taking into account all relevant circumstances to determine whether the rebate is likely to have an anti-competitive foreclosure effect, by restricting or impeding access to the market by other competitors or restricting the buyer's freedom to choose his sources of supply.

With respect to the third category (in which the rebates at issue were included), the Court confirmed the existing case law, according to which the criteria and rules governing the grant of the rebate should be analysed, as well as the extent of the dominant position and the particular conditions of competition in the relevant market (such as regulatory barriers).

In this context, the Court concluded that rebates operated by Post Danmark tended to make it more difficult for customers to obtain supplies from competing undertakings, producing an anti-competitive exclusionary effect. Applying previous case-law on the criteria and rules governing the rebates, the Court considered that:

– The **rebates at issue were retroactive** (the rebate applied to all correspondence sent over the reference period) and not progressive (where the rebate is granted only to products purchased exceeding the threshold initially estimated). This made the contractual obligations of customers of the dominant undertaking and the pressure exerted on them to be "particularly strong";
– The **reference period of one year was a "relatively long period"**, which has the inherent effect of increasing the pressure on the buyer to reach the purchase volume required to obtain the rebate, or to avoid suffering the expected loss for the entire the reference period.

Turning to the analysis of the dominant position and the specific competitive conditions of the market (which nevertheless suggests a closer analysis of the likely effects of the practice on competition in the market), the Court noted that Post Danmark had a 95% share the market, which was characterized by high entry barriers, including regulatory constraints and significant economies of scale. The company also enjoyed structural advantages, notably resulting from the legal monopoly of the universal postal service, which covered 70% of the distributed mail, and a unique geographical coverage that encompassed the entire Danish territory.

On the other hand, questioned about the fact that the rebates concern most of the customers on the market, the Court held that this circumstance in itself does not constitute evidence of an abusive conduct, although it can be a useful indication of the importance of this practice and its impact on the market, a*s it may bear out the likelihood of an anti-competitive exclusionary effect.*

Finally, the Court recalled that, despite the exclusionary effect, Post Danmark could

[1] Judgment of 6 October 2015, *Post Danmark A/S c. Konkurrencerådet (Post Danmark II)*, case C-23/14.

provide an **objective justification** for its conduct, in particular by demonstrating that the exclusionary effect could be counterbalanced, or even outweighed, by efficiency gains which could also benefit the consumer (this demonstration, however, is very difficult in practice).

The use of the "as-efficient competitor test"

The Court was also asked about the relevance of the "as-efficient competitor" test in the assessment of a rebate scheme under Article 102 TFEU.

This test, which has been used by case-law for price-based abusive conduct (predatory pricing, selective prices or margin squeeze), aims to determine whether the prices are predatory, that is, whether they are likely to exclude a competitor as efficient as the dominant company. For this purpose, the prices charged by the dominant company are compared with the variable costs borne by that company (or an equivalent measure).

The application of this test to discounts schemes is widely supported by scholars and commentators, and the test was adopted by the European Commission in its 2009 Guidance Communication on enforcement priorities in applying Article 102 TFEU to exclusionary conduct[2].

The Court did not exclude the recourse to the "as-efficient competitor" test to ascertain whether a rebate scheme is abusive. According to the Court, this test should be considered "an instrument among others", but it does not constitute a *necessary condition* for finding an abusive rebate.

The Court, however, rejected the application of the "as-efficient competitor" test in the specific circumstances of *Post Danmark II*, finding that it had no relevance in view of the structure and characteristics of the relevant market, which made virtually impossible the existence of a competing as efficient as Post Danmark: the Danish postal incumbent had a very high market share and enjoyed structural advantages not replicable by other competitors as a result of legal monopoly it enjoyed in respect of 70% of the relevant market.

Likelihood and magnitude of the exclusionary effect

The Court reaffirmed the earlier case-law according to which it is not necessary that the competition authorities demonstrate a concrete exclusionary effect. At any rate, the judgment clarified that only behaviours *likely to have an actual or probable anti-competitive foreclosure effect* are covered by Article 102 TFEU, which is in line with the Commission's 2009 Communication.

As regards the serious or appreciable nature of the exclusionary effect, the Court refused to fix a threshold below which the behaviour of dominant companies do not have an appreciable effect (*de minimis*), which is in contrast to established practice under Article 101 TFEU, where it is assumed that agreements and practices among undertakings with minor market positions and do not involve serious restrictions do not produce an appreciable effect on competition. According to the Court, the structure of the market is already weakened by the presence of a dominant undertaking, so that any further weakening of that structure is liable to constitute an abuse of a dominant position. The judgment also recalled in this context the particular responsibility of a dominant undertaking not to undermine, through their behaviour, competition in the relevant market, i.e., not to engage in abusive behaviour in the light of Article 102 TFEU.

Conclusion

While indicating the need to demonstrate the likelihood of anti-competitive exclusionary effect and a detailed analysis of the characteristics of the relevant market for determining the existence of an abusive discount, the *Post Danmark II* judgment represents a line of continuity with the previous restrictive law the Court of Justice on standardised discount schemes (those applicable to all customers of the dominant undertaking), maintaining a mistrust over retroactive rebates and "relatively long" reference periods.

In this respect, the judgment is in sharp contrast with *Post Danmark I*, which covered selective discounts (granted to specific customers of the dominant firm)[3], and in which the Court had recognized that Article 102 is not intended to ensure the permanence on the market of competitors less efficient than the dominant company.

The Court did not exclude the "as-efficient competitor" test in the assessment of rebates schemes under Article 102 TFEU, and the European Commission is itself bound to apply such criteria in accordance with its 2009 Communication, which remains fully applicable. However, as the Court pointed out, the Commission's guidance is not binding on competition authorities and national courts, and therefore uncertainty remains as to the application of Article 102 TFEU (and its national equivalents) to the rebates schemes operated by dominant companiess. ■

[2] 2009/C45/02.
[3] Judgment of 27 March 2012, *Post Danmark A/S v. Konkurrencerådet*, case C-209/10.

Individual Trade Practices: *enough is enough*

Joaquim Vieira Peres / Gonçalo Pereira Rosas
vieira.peres@mlgts.pt / grosas@mlgts.pt

The Individual Trade Practices rules become applicable to all worldwide purchases, sales and services provided by companies established in Portugal

On the 8th of October 2015, with the Decree-Law no. 220/2015 approved, the first amendment to the Individual Trade Practices regime was enacted, which, in turn, had been fully reformulated by the Decree-Law no. 166/2013. The changes brought by this amendment relate mainly to (i) the scope of the Decree-Law and, once again, to (ii) the concept of effective purchase price for resale at loss.

I. Changes in the objective scope of the Individual Trade Practices regime

The Decree-Law no. 220/2015 extended the scope of these rules to purchases and sales of goods and provision of services with origin or destination in a country outside the EU or the EEA. Moreover, it now considers null and void all contracts that infringe Articles 4 and 7 of the Decree-Law, regardless of whether they are subject to Portuguese law. The Individual Trade Practices rules thus become applicable to all worldwide purchases, sales and services provided by companies established in Portugal.

These changes apparently aim to eliminate discrimination (which was already hard to understand) created by the previous Decree-Law regarding the location of purchases or provision of services, i.e. it intends to apply the same rules to the supply of goods and services which origin or destination is in the EEA or outside of it. However, this early (within less than two years from the Decree-Law no. 166/2013's approval) and unexpected (preceding the impact assessment that should be made, as provided by this Decree-Law) change obviously creates major disruptions in Portuguese companies involved in international trade, given the insecurity that it produces in trade between economic operators.

It should be noted that, based on the rules now revoked, companies have taken strategic options to shift their external sources or delivery channels and have adapted their transaction procedures (administrative, accounting and commercial). These rules affect, in most cases, complex procurement systems involving non-resident operators with no availability, interest or economic justification to adapt their own procurement or sales systems to the specific features of the Portuguese law.

II. The concept of the effective purchase price in resale at loss

However, these disturbances are clearly relegated to a second plan by the main amendment made in Article 5(2) of the Decree-Law, which forbids resale at loss. As it is known, this is the central issue of this Law, as it is showed by its practical application. In what concerns the Individual Trade Practices regime, the prohibition of resale at loss is the object of the vast majority of inspections made by the competent supervising authority (ASAE) and the exclusive area of litigation before such authority and the courts.

It should be recalled that, after the Individual Trade Practices regime came into force, the Portuguese Supreme Court delivered a major decision on resale at loss, more specifically on

the determination of the effective purchase price (Judgment of the Supreme Court No. 9/2014), bringing a remarkable increase of legal certainty to the issue of which discounts are relevant for this purpose.

However, the legislator considered now appropriate to improve the aforementioned Article 5(2) by adding new "clarifications".

These "clarifications" are deeply unfortunate in their formulation and in their harmonization with the other paragraphs of Article 5. In fact, the amendments make the application of the said Article virtually impossible, since they completely subvert its inner logic, apparently (or involuntarily?) replacing a set of indisputably cumulative criteria for an enumeration that is now literally alternative.

We foresee thus a new wave of litigation between the ASAE and the "usual suspects", i.e. the big retail businesses, considering the fines provided by the law and the obvious difficulties in applying to criminal-like law interpretation methods usually available in other areas of law to address the shortcomings derived from a clumsy piece of legislation.

If the Individual Trade Practices regime was already characterized by gathering several serious technical deficiencies, this change certainly intensified its faults: Article 5(2) will certainly raise the same kind of questions and uncertainties that led Article 5(5) (which relates to the determination of resale price in case of certain deferred rebates) to be completely deprived of its effects.

Moreover it is strange that this latter paragraph has also been modified only in a minor very specific detail, instead of trying to solve its initial deficiency: it is still impossible to understand how to calculate the resale price to the consumer in the frequent case of discounts rebatable on subsequent transactions.

III. Final comment

The variation of the legislator's intentions - in such a short period of time and without any prior discussion of the consequences and impact of these changes - creates, in this case, huge transaction costs that could be avoided, since it requires that procurement systems need to be adapted again in order to apply the new changes (at least those that can be reasonably understood), keeping thus a relevant degree of uncertainty for companies in negotiations with their trading partners.

Furthermore, due to the poor wording of the Law (or due to our inability to interpret it in a meaningful manner) it is impossible to assess the substantive merit of the changes made since, unfortunately, it is not possible to understand its scope, basis or its purpose.

As in a traditional Portuguese folk song...

"for better, it's fine, it's fine,
for worse, enough is enough" ■

If the Individual Trade Practices regime was already characterized by gathering several serious technical deficiencies, this change certainly intensified its faults

EU Court of Justice provides guidance on the interplay between leniency applications before the Commission and National Competition Authorities

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

The EU Court of Justice (***Court***), in case *DHL Express S.r.l. et al. v. Autoritá Garante della Concorrenza e del Mercato et al.*, by a judgement rendered on 20 January 2016[1], ruled on the relation between the EU and Member-States' leniency programmes.

The background of this case concerns the separate leniency applications on antitrust breaches submitted in 2007 and 2008 before the European Commission and the Autoritá Garante della Concorrenza e del Mercato (Italian authority responsible for competition compliance and enforcement of market rules, the "***AGCM***") by Italian companies DHL Express, DHL Global Forwarding, Agility Logistic and Schenker.

The Court of Justice's ruling has relevant implications on the coordination of leniency procedures related to the breach of competition rules across EU Member States to the extent that it highlights the importance of paying particular attention to national leniency rules applicable in each affected Member-State and the necessary diligence and strict synchronization between leniency applications lodged before the European Commission and national competition authorities

On 15 June 2011 the AGCM found that the referred companies had participated in a cartel in the international freight forwarding sector affecting operations to and from Italy. While the Italian authority fined the DHL group companies and Agility Logistic (the fines were subsequently reduced as a result of the leniency applications submitted by these companies), Schenker was not fined by the AGCM, because the authority considered that this company was the first company to have applied for immunity from fines in Italy on 12 September 2007 and therefore benefited from the applicable Italian rules on leniency.

DHL appealed the AGCM decision before the Italian courts, reasoning that the competition authority should have taken into account its leniency application submitted by the DHL group companies before the European Commission on 5 June 2007 prior to the application lodged by Schenker before the AGCM.

Based on this factual framework, the Court in the January 2016 judgment recalls that the European Competition Network adopted in 2006 at the European level a Model Leniency Programme. Furthermore, the court highlights that in 2007 AGCM had also adopted in Italy a similar model providing for a summary leniency application. In this context the Court states, clarifying its previous jurisprudence on this legal matter[2], that instruments adopted in the framework of ECN are not binding on national competition authorities, irrespective of the judicial or administrative nature of those authorities.

The Court also finds that there is no legal link between the application for immunity submitted to the European Commission and the summary application submitted to a national competition authority in respect of the same restrictive conduct. As such, the Court considers that where the summary application submitted to a national competition authority has a more limited material scope than the application for immunity submitted to the European Commission, that national authority is not required to contact the Commission in order to obtain information for the purpose and results of the leniency procedure triggered at the European level.

Further, the CJEU also clarifies that EU law does not preclude a national leniency regime which allows the acceptance of a summary application for immunity from an undertaking which submitted to the Commission in parallel not an application for full immunity, but rather a mere application for reduction of the potential applicable fine. Therefore, in line with the Court's reasoning, national law must allow the possibility for an undertaking which was not the first to submit an application for immunity to the Commission and which, accordingly, was eligible before the Commission only for a reduction of a fine to submit a summary application for full immunity to a national competition authority.

In practical terms this judgement has relevant implications on the coordination by companies of leniency procedures related to breach of competition rules across EU Member-States. Indeed, pursuant to this ruling, particular attention is required to the national leniency rules applicable in each affected Member-State when preparing leniency applications to be submitted to the European Commission. Such cautiousness is materially important in order to mitigate and safeguard the risk of not obtaining immunity, or reduction of fines at the national level. ■

[1] Accessed and available at curia.europa.eu.
[2] In particular CJEU judgements of 14 June 2011, in case C-360/09 – *Pfleiderer*, and of 5 June 2014, in case C-557/12 – *Kone e o.*, both accessed and available at curia.europa.eu

Case C-505/14 Klausner Holz – The principle of effectiveness of EU law in State Aid

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

On November 11, 2015, the European Court of Justice ('Court of Justice' 'ECJ') was confronted with a request for a preliminary ruling from the *Landgericht Münster,* Regional Court of Münster, regarding the interpretation of Articles 107 TFEU and 108 TFEU and the principle of effectiveness. The request was made in proceedings between *Klausner Holz Niedersachsen GmbH* ('*Klausner Holz*') and *Land Nordrhein-Westfalen* ('*Land*') concerning a failure by *Land* to execute agreements concluded with *Klausner Holz* to supply wood.

At the core of this dispute is a wood supply agreement, under which *Land* undertook to sell to *Klausner Holz* fixed quantities of wood at predetermined prices depending on the size and quality of the wood and not to make other sales at prices lower than those set in the agreement. A 'framework sales contract' was also concluded which supplemented the agreement previously concluded by both parties.

Between 2007 and 2008 there were significant mishaps in the execution of the agreement, because the purchase amounts of wood provided by *Land* were never filled, while at the same time *Klausner Holz* faced financial difficulties, at times involving late payments. Thus, in August 2009 *Land* rescinded the 'framework sales contract' and ceased to supply wood to *Klausner Holz* on the terms set out in the agreements.

Confronted with the contract's termination, *Klausner Holz* brought an action to *Landgericht Münster* which held that the contracts at issue remained in force. This judgment was also confirmed by the appeal court. Following these judgements, *Klausner Holz* brought an action against *Land* before the *Landgericht Münster*, seeking the payment of damages in respect of the failure to supply wood, the supply of the missing amounts of wood, and information concerning the financial conditions of the agreements concluded between the five largest purchasers of wood and *Land* in the period of 2010 to 2013. For its part, *Land* raised the argument before the referring court that EU law precludes the execution of the contracts at issue since they constitute 'State aid' within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU.

Although the *Landgericht Münster* reached the conclusion that the agreements concluded between *Klausner Holz* and the *Land* constituted State aid, it also regarded itself as prevented from drawing on the consequences of the breach of the third sentence of Article 108(3) TFEU because of the declaratory judgment of the court of appeal which held that the contracts at issue remained in force which is *res judicata*. In those circumstances, the *Landgericht Münster* referred to the ECJ the following question: '*In civil proceedings concerning the performance of a civil-law contract granting aid, does EU law, in particular Articles 107 TFEU and 108 TFEU (or Articles 87 TEC and 88 TEC) and the principle of effectiveness, require that a final declaratory judgment under civil law which has been delivered in the same case and which confirms that the civil-law contract remains in force, without any consideration of the law on aid, be disregarded if under national law the performance of the contract cannot otherwise be prevented*?'

A national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is *res judicata*, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness

The Court of Justice began by recalling that '*National courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of the third sentence of Article 108(3) TFEU*'. Therefore, the Court of Justice considered that the *Landgericht Münster* acted correctly in identifying the violation to the above mentioned provision, while at the same time it did not forget the *res judicata* force of the appeal court's judgement that confirmed the validity of the agreements concluded between *Klausner Holz* and the *Land*.

On the other hand, the ECJ highlighted that EU law does not always require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a breach of EU law by the decision at issue. In this matter, although the principle of the procedural autonomy of the Member States takes prevalence, the rules governing the *res judicata* principle should not '*be less favourable than those governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)*'.

Trying to further define the scope of the principle of effectiveness, the ECJ argues that an interpretation of national law as the one made in the present case '*can have the consequence, in particular, that effects are attributed to the decision of a national court […] which frustrate the application of EU law, in that they make it impossible for the national courts to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU*'. Therefore, continues the Court of Justice, '(…) *both the State authorities and the recipients of State aid would be able to circumvent the prohibition laid down in the third sentence of Article 108(3) TFEU by obtaining, without relying on EU law on State aid, a declaratory judgment whose effect would enable them definitively to continue to implement the aid in question over a number of years*'.

The ECJ thus concludes that '*a national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is res judicata, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness*'.

From this case it is possible to gather relevant guidelines for the construction of the balance between the principle of legal certainty in the form of the *res judicata* principle and the principle of effectiveness of EU law. The Court of Justice, although respecting the natural procedural autonomy of Member States, is of the opinion that the rules defining the finality of a decision and its projection on national law cannot have as a consequence the full disregard and infringement of the rights and guarantees conferred by EU law. ■

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Geo-blocking in the EU – Commission publishes initial findings

Inês Gouveia
igouveia@mlgts.pt

Introduction

In the context of the EU e-commerce sector inquiry launched by the European Commission ("the Commission") in May 2015, the latter has recently made public its initial findings on the prevalence of geo-blocking which prevents consumers from freely purchasing and accessing online consumer goods/digital content across the EU.

"Geo-blocking", "geo-filtering" and their occurrence in the EU

"Geo-blocking" refers to practices whereby online providers prevent a user from accessing and purchasing consumer goods/digital content offered on their websites because of the user's location in a Member State is different from that of the provider. Geo-blocking may occur by limiting access to websites available only to a user in the territory of the provider, automatic re-routing into a website intended to serve the user's territory, refusal to deliver goods/services or to accept payments from a user in another Member State.
For online digital content, geo-blocking may also consist of preventing a user from accessing online digital content services which he has subscribed in one Member State or to play digital content previously downloaded in one Member State, whenever the user travels to another Member State.

Whenever access to products/services is not limited on the basis of location but different prices or different conditions are applied depending on the location of the user, the practice is called "geo-filtering".

Data collected by the Commission regarding e-commerce for consumer goods shows that 38% of the retailers gather information regarding the location of their users with the purpose of engaging in geo-blocking. This percentage is 43% for marketplaces and 34% for price comparison tools.

In respect of geo-filtering only 25% of respondents charge different prices or practice different conditions due to a client's location.

In what concerns online content, 68% of respondents state they geo-block users located in other Member States. The most commonly used "tool" for verifying location is the IP address of users.

Approach from a competition law perspective

The Commission's findings highlight the need to differentiate between *geo-blocking/geo-filtering* based on unilateral business decisions of retailers not to sell cross-border from *geo-blocking/geo-filtering* adopted in the context of an agreement or practice between the provider/reseller of the content/goods and a third partly (usually, its supplier). Indeed, an undertaking's unilateral business decision only comes within the scope of EU competition law if the undertaking is dominant. *Geo-blocking/geo-filtering* based on an agreement between supplier and distributor may be found anti-competitive and be subject to prohibition and sanctioning if it can be established that it has an anti-competitive object (or effect) and that it does not generate pro-competitive effects sufficient to satisfy the legal requirements for an exemption.

THE MAJORITY OF *GEO-BLOCKING* IN THE SALE OF CONSUMER GOODS RESULTS FROM A UNILATERAL DECISION BY THE RETAILER NOT TO EXPAND ITS BUSINESS OUTSIDE ITS TERRITORY

The data gathered indicates that the majority of geo-blocking in the sale of consumer goods results from a unilateral decision by the retailer not to expand its business outside its territory. The same goes for geo-filtering. Only 12% of respondents state that they face contractual restrictions directly or indirectly imposing geo-blocking for at least one category of products sold. The most common form of geo-blocking in this case is refusal to deliver into another Member State and the category of goods in which geo-blocking seems prevalent is "clothing, shoes and accessories".

Some of the contractual restrictions identified by the Commission in this context – limiting sales territories in non-exclusive distribution, restricting passive sales in exclusive distribution, and territorial limitations in sales to end users by

THE COMMISSION'S COMMITMENT TO ADDITIONAL ANALYSIS OF SOME MORE SERIOUS TERRITORIAL RESTRICTIONS MAY RESULT IN THE OPENING OF INVESTIGATIONS FOR RESTRICTIVE PRACTICES IN THE NEAR FUTURE

authorized distributors in selective distribution – were found serious enough to warrant additional assessment by the Commission in order to check whether any follow up enforcement action is required to ensure compliance with competition law.

As for digital content 59% of respondents engage in geo-blocking based on contract provisions, in particular, in the context of licensing agreements (in which geo-blocking is a requirement by the licensor).

Film content, sports events and TV series are the content categories with the highest percentage of geo-blocking requirements on average in the EU even though differences between Member States can be quite significant. It should be noted that the analysis and conclusions of the inquiry do not cover film content provided via pay-TV services as the latter are currently subject to an investigation for suspicion of restrictive practices in relation to pay-TV services made available in the UK and Ireland.

Final remarks

The Commission's initial finding shows that geo-blocking (in particular in the area of consumer goods) is mostly associated with unilateral business decisions not to expand, often due to the higher costs of supplying cross-border. In this regard the Commission has set as its key-priority to address unjustified barriers to cross-border e-commerce, and it will do so with legislative actions adopted as part of its Digital Single Market Strategy. Further legislative proposals are expected for May this year.

Competition rules can be a relevant tool in tackling geo-blocking/geo-filtering practices, however, unilaterally geo-blocking is likely to be scrutinized only when carried out by a dominant company (in order to identify and sanction any possible abusive behaviour), and geo-blocking based on agreements between independent undertakings must be subject to a case-by-case analysis in order to assess whether such agreements have as object (or effect) a restriction of competition and to check whether there are efficiencies that may justify an exemption to the prohibition rule.

Finally, the Commission's commitment to additional analysis of some more serious territorial restrictions may result in the opening of investigations for restrictive practices in the near future. ■

European Commission presents energy security package

Luís do Nascimento Ferreira
Leonor Bettencourt Nunes
lnferreira@mlgts.pt / lbnunes@mlgts.pt

1. Introduction

Within the Framework Strategy for a Resilient Energy Union, one of the major political priorities of the Juncker Presidency, the European Commission submitted on 16 February 2016 its energy security package, a great leap towards the deepening of a single market for energy and the preparation of the Union for the global energy transition.

The envisaged goal of the package, and also one of the main goals of the Energy Union, is to safeguard the energy supply at a European level, thus assuring a greater degree of autonomy and resilience of the European Union with regards to any potential disruptions of the sources of supply of natural gas. The achievement of this goal has currently gained greater relevance in view of several political tensions at the boarders of the European Union, which may lead once again to gas supply disruptions as occurred during the gas crises of 2006 and 2009.

Taking this into consideration, the package presented comprises several measures aiming towards sustainable energy development by strengthening the commitment with regards to renewable energy sources and thus increasing overall energy production at the European level, as well as by ensuring greater diversity in the sources, suppliers, and supply ways.

In order to endow the European Union with a market for safe, sustainable, and competitive energy, the European Commission's proposals included a Security of Gas Supply Regulation, a Decision on Intergovernmental Agreements in energy, a Liquefied natural gas (LNG) and gas storage Strategy and a Heating and Cooling Strategy, which we shall briefly analyse below.

2. Security of Gas Supply Regulation[1]

This Regulation intends to introduce a more efficient approach for the prevention of gas supply disruptions and moderation of their potential effects. First of all, it aims to shift the previous national-based approach to a region-wide approach to supply security and reinforce cooperation with third countries which constitute the contracting parties of the Energy Community.[2]

Moreover, it introduces a new solidarity principle through which the neighbouring Member-States shall be responsible to ensure energy supply to residences and essential services (such as hospitals and security services) in case of an energy crisis affecting another Member-State of the Union.

Finally, the Commission grants itself a more meaningful role by establishing a review process for energy security measures to be implemented by the Member-States as well as undertakings active in the natural gas sector.

3. Decision on Intergovernmental Agreements in Energy[3]

In order to reinforce its role with regards to energy security and the implementation of the Energy Union, the Commission decided to

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[1] Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, COM/2016/052, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0052;

[2] The Energy Community is an international organisation dealing with energy policy. The organisation was established by an international treaty in October 2005 in Athens, Greece. The Treaty entered into force in July 2006. The Treaty establishing the Energy Community brings together the European Union, on one hand, and countries from the South East Europe and Black Sea region. The key aim of the organisation is to extend the EU internal energy market to South East Europe and beyond on the basis of a legally binding framework. More information available at: https://www.energy-community.org/portal/page/portal/ENC_HOME.

[3] Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0053.

The package is still in the form of a series of proposals which require implementation through legislation at the EU level

submit to an *ex ante* compatibility check any and all intergovernmental agreements to be entered into by EU Member States, which may hold relevance to the issue of supply security. This assessment shall refer to compatibility with regards to competition rules and the single energy market and shall be binding upon the Member States.

4. Liquefied Natural Gas (LNG) and Gas Storage Strategy[4]

In line with the aim to diversify energy sources and blur disparities at a regional level, the Commission also presented a strategy for LNG. Despite being the world's greatest gas importer, the availability of this energy source in the EU is not homogenous throughout the EU territory and this is an essential factor to ensure a real single market for energy. Under the Commission's Strategy, efforts shall be undertaken in order to *i)* build the necessary infrastructure to ensure a wide-spread access to the LNG markets by all Member-States of the European Union either directly or through neighbouring Member-States; *ii)* use the existing storage infrastructures and resources more efficiently; and *iii)* identify international partners to promote free and transparent global LNG markets.

5. Heating and Cooling Strategy[5]

The Heating and Cooling Strategy, which refers to the energy expended in these processes in buildings and industries, is likely the proposal which shall have a more direct impact at the level of private entities. In general this strategy intends to render energy expenditure in heating and cooling more efficient, considering that these processes account for approximately 50% of energy consumption in the European Union and are still mainly based on fossil energy sources.

The Commission thus proposes several measures for an increase in efficiency and decrease of waste in heating and cooling, namely: *i)* the promotion and simplification of building renovation procedures, increasing the use of energy efficient models and promoting the sharing of the costs of the energy requalification of buildings between owners and tenants; *ii)* the increase use of renewable sources, particularly by granting financial incentives to the implementation of sustainable solutions under the program Horizon 2020; *iii)* the reuse of heating and cooling waste generated by industrial processes, for instance, by the creating of direct feeds to district heating systems; and *iv)* the promotion of a larger involvement and awareness of consumers and the industry with regards to sustainable energy.

6. Final remarks

The package presented by the Commission is still in the form of a series of proposals which require implementation through legislation at the EU level. Nevertheless, it is safe to state that the presentation of this package already constitutes a significant leap towards the implementation of one of the key political priorities set forth by the European Commission – the strengthening of the Energy Union –, which leaves us keenly awaiting the upcoming legislative developments. ■

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an EU Strategy for Liquefied Natural Gas And Gas Storage, COM(2016) 49, available at https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v10-1.pdf

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an EU Strategy for Heating and Cooling, COM(2016) 51, available at: https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v14.pdf.

Court of Justice limits the Commission's investigatory powers in antitrust proceedings, quashes excessive and insufficiently reasoned request for information

Philipp Melcher
pmelcher@mlgts.pt

Introduction

On 10 March 2016 the European Court of Justice ("ECJ") handed down landmark judgements in four parallel cases ("Judgments")[1] in which it ruled that the General Court ("GC") had at first instance[2] misinterpreted Articles 296 TFEU and 18 (3) of Implementing Regulation No 1/2003 ("IR")[3] when finding that the contested formal requests for information ("contested RFIs") issued by the European Commission ("Commission") in a cartel investigation contained an adequate statement of reasons. For the first time imposing clear legal limits on the Commission's powers to investigate suspected infringements of antitrust rules by means of formal RFIs, the ECJ overturned the judgments of the GC and annulled the contested RFIs.

Background

Under Article 18 (3) IR, the Commission may, when investigating suspected infringements of antitrust rules, request undertakings *by way of decision* to provide all necessary information. These so-called *formal RFIs* (as opposed to *simple RFIs* pursuant to Article 18 (2) IR) oblige addressees to provide complete, correct and non-misleading information within the time-limit determined by the Commission, failure of which may result in the imposition of periodic penalty payments of up to 5% of the average daily turnover in the preceding business year per day and/or fines of up to 1% of the total turnover in the preceding business year (Articles 23 (1) (b), 24 (1) (d) IR).

The present case concerned a cartel investigation (AT.39520 – *Cement and related products*) which the Commission had initiated *ex officio*, *i.e.*, by its own motion, without having been informed of alleged anticompetitive practices by a leniency applicant. It had carried out inspections (dawn-raids) in 2008 and 2009, issued a number of (simple) RFIs in 2009 and 2010 and opened a formal (in-depth) investigation against certain cement manufacturers in December 2010 ("opening decision").

In March 2011 the Commission adopted the *contested RFIs* by decisions pursuant to Article 18 (3) IR in which it requested these manufacturers to respond to an *extremely extensive questionnaire* comprising between 78 and 94 pages and 11 sets of numerous questions, requiring the submission of a vast amount of detailed and very diverse types of information, such as the quantity and costs of CO2 emissions of production plants, statistics regarding building permits, VAT numbers of its customers, the means of transport and distance travelled for shipments of the goods sold, the type of packaging used, the transport and insurance costs for those shipments, the technology and fuel used in production facilities, and the costs of their repair and maintenance.

The Commission stated in the RFIs that it investigated *suspected infringements of Article 101 TFEU* which it described as "*restrictions on trade flows in the European Economic Area (EEA), including restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price coordination and related anti-competitive practices in the cement market and related product markets*" and explained that "*additional information is also required in order to assess the compatibility of the practices under investigation […] by having full knowledge of the facts and their exact economic context is sought in [the questionnaire]*".

The claims of respondents that the RFIs were insufficiently reasoned, leaving them completely in the dark as to the specific infringements they were suspected of by the Commission, were dismissed by the GC at first instance. On appeal, however, the ECJ concluded that the GC had wrongly interpreted Articles 296 TFEU and 18 (3) IR in finding that the statement of reasons of the RFIs was adequate, and, setting aside the judgments of the GC, also quashed the contested RFIs.

Judgments of the ECJ

The ECJ stated that the necessary elements of the statement of reasons for the RFIs, as required by Article 296 TFEU, were defined in Article 18 IR. Article 18 (1) IR entitled the Commission to require the disclosure *only* of *information* which may be *necessary to investigate suspected infringements of antitrust rules*. Article 18 (3) IR required the Commission to *state the purpose of the RFI*, which related to the obligation of the Commission to indicate the *subject of the investigation* and thus to *identify the suspected infringement of antitrust rules*. The ECJ followed and stressed that, in order to enable the Courts and the respondents to assess whether information requested in the RFIs is in fact necessary for the purpose of the investigation, the RFI had to *disclose, clearly and unequivocally, the suspected infringement* of antitrust rules.[4]

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[1] ECJ, Judgments of 10 March 2016, in Cases C-247/14 P, *HeidelbergCement/Commission*, C-248/14 P, *SchwenkZement/Commission*, C-267/14 P, *BuzziUnicem/Commission* and C-268/14 P, *Italmobiliare/Commission* and the Opinions of Advocate-General *Wahl* of 15 October 2015.
[2] GC, Judgments of 14 March 2014 in Cases T-297/11, *BuzziUnicem/Commission*, T-302/11, *HeidelbergCement/Commission*, T-305/11, *Italmobiliare/Commission* and T-306/11, *SchwenkZement/Commission*.
[3] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.
[4] E.g. Case C-247/14 P, *HeidelbergCement/Commission*, paras. 17-27.

Assessing the contested RFIs in light of these principles, the ECJ considered that the *description of the suspected infringement* was *excessively succinct, vague and generic*, in particular when compared to the vast amount, detail and diversityof the information requested. The ECJ concluded that this description did not make it possible to determine with sufficient precision either the products to which the investigation relates or the suspicions of infringement justifying the adoption of the contested RFIs.[5]

The ECJ admitted that the contested RFIs had to be assessed in the light not only of their wording but also of their *nature* and the *context in which they were issued*, including the *opening decision*. However, it considered the description of the suspected infringements in the opening decision to be *similarly succinct, vague and generic*. Moreover, whilst acknowledging the *investigative nature of RFIs* which, by their very nature, are taken when the Commission does not yet have complete and precise information about the suspected infringement, the ECJ stressed that the *contested RFIs had been adopted at an advanced stage of the proceeding* – more than two years after the first inspections, following receipt of responses by undertakings to a number of RFIs and following the opening of formal proceedings – at which the Commission should have already had information allowing it to describe the suspected infringement in a more precise way.[6]

Comments

The ECJ imposed for the first time clear legal limits on the Commission's powers to investigate suspected infringements of antitrust rules by means of formal RFIs. By requiring a clear and unequivocal disclosure of the suspected infringement, including in terms of the geographical scope and the products concerned, the ECJ tightened the requirements for the statements of reasons of formal RFIs, even though the exact degree of these requirements may depend to some extent on the stage of the proceeding at which the RFIs are issued.

The Judgments make clear that the powers conferred upon the Commission in Article 18 (3) IR do not allow it to engage in "fishing expeditions", *i.e.*, to request information on a speculative basis without having any concrete indicia for an infringement[7], or to rely on RFIs to get disproportionate - and likely irrelevant - amounts of information. They also strengthen the ability of respondents and their antitrust counsel to assess the scope of their duty to provide the requested information and of the correlated risk of imposition of potentially hefty pecuniary sanctions in case of a breach of that duty and of their rights of defence, e.g., to refuse to provide requested and potentially self-incriminatory information which is not necessary for the investigation of the suspected infringement and, overall, to devise an appropriate defence strategy.

And even though the RFI in the present case is certainly an extreme example, its annulment shows that the challenge of an RFI before the Courts can be an option worth considering, in particular since information submitted in response to an RFI which is subsequently annulled by the Courts should in principle not be eligible to serve as evidence for the finding of an infringement of antitrust rules.[8] In the present case, however, this issue will not arise, as the Commission did not find sufficient grounds to support the initial suspicion of cartel arrangements and closed the investigation in July 2015 without a finding of an infringement. ■

[5] E.g. Case C-247/14 P, *HeidelbergCement/Commission*, paras. 27-31.
[6] E.g. Case C-247/14 P, *HeidelbergCement/Commission*, paras. 32-39.
[7] Indeed, the all-encompassing scope and nature of the information requested in the contested decisions appeared to serve the Commission to map the addressees' complete revenue and cost structures, to analyse them by econometric methods (comparing them with those of other companies active in the cement industry) and to detect possible infringements only on the basis of the results of this analysis.
[8] This is established in the case-law of the Courts for the use of information gathered by the Commission in the course of an inspection where the inspection decision is subsequently annulled. See, for example,ECJ, Judgment of 22 October 2002, Case C-94/00, Roquette Frères, para. 49 and the case-law cited.

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

SPECIAL CONTRIBUTION MATTOS FILHO ADVOGADOS

Brazil's Antitrust Authority rejects carve-out agreements

www.mattosfilho.com.br

The Brazilian Antitrust authority – the Administrative Council for Economic Defense ("CADE") - has recently given an important guidance for companies willing to close global deals in Brazil: carve-out agreements will not be accepted in order to mitigate or exclude gun jumping penalties. This approach was determined while reviewing a global merger transaction involving Cisco Systems Inc. ("Cisco") and Technicolor S/A ("Technicolor").

On September 4, 2015, Cisco and Technicolor submitted the acquisition of Cisco's subsidiary based in the US by Technicolor for CADE's clearance. The merger was also filed in Canada, USA, Colombia, the Netherlands and Ukraine. The transaction was still under CADE's review when, on November 20, 2015, Cisco and Technicolor made the closing public by means of a press release.

According to Article 88, §§3 and 4 of Law 12.529/2011 ("the Brazilian Antitrust Law"), parties cannot consummate a transaction without CADE's prior approval. Failure to comply with this standstill obligation is known as "gun jumping", which may occur through: (i) the exchange of sensitive information between the parties, (ii) contractual clauses that eliminate the competitive state between the parties and (iii) adoption of conduct before or pending CADE's review that consummates the merger in part or as a whole. Gun jumping exposes the parties involved to fines, an investigation into their behavior prior

CARVE-OUT AGREEMENTS WILL NOT BE ACCEPTED IN ORDER TO MITIGATE OR EXCLUDE GUN JUMPING PENALTIES

to obtaining clearance, potential remedies, and having the transaction declared null and void. Applicable fines for gun jumping in Brazil range from R$60,000 to R$60 million (roughly US$15,000 to US$15 million).

In order to avoid being punished for gun jumping, Cisco and Technicolor presented a carve-out agreement – a mechanism that aims at preserving all pre-existent competitive conditions in a certain jurisdiction, as to allow for the merging abroad before the relevant antitrust authority of such jurisdiction clears the transaction and thus exempts the parties from incurring in gun jumping. According to CADE the carve-out agreement presented by Cisco and Technicolor could not preserve the pre-existing competitive conditions between them. Despite excluding assets and contracts in Brazil, the parties exchanged sensitive information such as technology, IP rights, and marketing strategy documents among others. In addition, the Brazilian market would still be affected since the offering of services and products involved in the transaction was made through exports to Brazil. Cisco and Technicolor admitted to gun jumping and were ordered to pay a fine of R$30 million (approximately US$7.5 million).

Up until now the use of carve-out agreements had not been an object of review by CADE. In its ruling CADE signaled that carve-out agreements similar to the one presented by Cisco and Technicolor, that is, which aim at isolating Brazil of global merger effects in order to allow parties to merge abroad while the transaction is under CADE's review, will not be admitted. In cases such as this, parties may close a transaction abroad without clearance only by means of a derogation mechanism set forth in CADE's Internal Rules, which requires: (i) that there is no irreparable harm to competition resulting from the derogation, (ii) that the situation may be reverted in case CADE concludes that the transaction harms competition, and (iii) a demonstration that the target company would face serious financial losses in the absence of the derogation.

CADE also noted that the majority of the antitrust authorities worldwide, such as the ones from the US, Canada, European Union and Germany, do not accept carve-out agreements as means of excluding or mitigating gun jumping penalties, due to concerns about its effectiveness (especially when it comes to avoiding the exchange of sensitive information between competitors) and the difficulty in monitoring the transaction's implementation.

The Brazilian antitrust law does not have specific provisions about carve-outs, so the question as to whether other carve-out mechanisms are still available remains open and will be left to see in cases yet to be reviewed. ■