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Pandora's medicine box? The European Commission's Preliminary Report on the inquiry into the pharmaceutical sector

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The Preliminary Report on the European Commission's Inquiry into the Pharmaceutical Sector, published on 28 November 2008 ("Report")[1], sheds new light on the sometimes difficult relationship between intellectual property rights (especially patents) and competition law. Focusing on *identifying obstacles to market entry for generic companies caused by practices of originator companies*, the Report observes that innovative companies used a "variety of methods" to delay or block the entry of generic companies in order to protect their revenues streams, suggesting that a number of practices currently considered as standard by companies to protect their IP rights may be challenged under competition rules.

The Inquiry

Since 2004, Regulation (EC) 1/2003 empowers the Commission to initiate inquiries into specific sectors of the economy where competition may be restricted. These inquiries are not meant (in principle at least) to identify wrongdoing by individual companies, but rather to identify perceived market malfunctions. Further to previous inquiries into sectors such as energy, banking and insurance, this inquiry was initiated in January 2008, after the Commission conducted, for the first time in this context, surprise inspections ("dawn raids") upon the premises of several pharmaceuticals companies. Further dawn raids were conducted a few days before the Report was published.

The Report

The 426-page long Report is based on the extensive information collected by the Commission (both from information requests and from dawn raids) and concludes that a number of difficulties are encountered by companies manufacturing generics in entering the market once a patent protecting a medicine has expired.

The Report suggests that delayed generic entry is caused by a "toolbox" of instruments used by innovators to extend the breadth and duration of their patent protection:

- The filing of numerous patents for the same drug (forming so-called "patent clusters"), in order to prolong the lifetime of the original patent.
- The initiation of patent infringement proceedings, including preliminary injunctions, often in several Member States across the EU with respect to the same medicine.
- Patent opposition procedures and related appeals before patent offices.
- Settlements between innovative and generic companies to resolve patent litigation, where payments are said to be made in order to delay generic entry.
- Litigation against regulatory authorities granting market authorisation ("MA") and pricing/ /reimbursement status to generics.
- Marketing and promotion activities aimed at doctors and pharmacists, raising questions as to the quality of generics, as well as attempts to influence distributors and active pharmaceutical ingredient producers.
- Launching second generation (follow-on) products immediately before the original patent is set to expire, followed by the withdrawal of the first-generation product.
- Increase of direct-to-pharmacy (DTP) distribution, which could lead to less competition at the wholesale level and would make it more difficult for generic companies to enter the market.

The Report also finds that the regulatory framework of the pharmaceutical sector has a number of shortcomings, and advocates (with the support of both innovators and generics) the creation of a Community patent and a unified patent judiciary as a solution to eliminate the causes of a number of the identified delays in generic entry, such as administrative delays in granting marketing authorisation, the inherent uncertainty of patent litigation in national courts and the alleged doubtful validity of many patents granted by the European Patent Office.

References to Portugal

The Report specifically looks at the litigation against pricing authorities in Portugal as "a special case", in that most claims are based on patent infringement only. (According to the Commission, patent infringement is not a criterion to be considered under EU law by the authorities when approving prices or granting reimbursement status). The inquiry observed in this context that the price approval procedure was suspended when innovative companies launched legal proceedings against decisions granting MAs based on alleged patent violation.

The Commission also suggested during the public presentation of the Report that infringement proceedings could be initiated against those Member States whose authorities take into account, in the framework of market authorisation and pricing procedures, other criteria than those provided by EU legislation (such as patent infringement). It should nevertheless be noted that this remains only the Commission's opinion, since the European Court of Justice has not ruled on this matter. ■

Comment

Whilst the Report acknowledges that enforcing patent rights is generally legitimate, it also courts controversy by stating that a number of practices may be "problematic" from a competition law perspective, especially after Commissioner Kroes ended her speech in the public presentation by saying that "we have picked up the trail of the scent, and now we are following the leads".

This suggests that the Commission may consider challenging the innovator companies' right to apply for patents representing an improvement on previous patents and to promote the qualities of their products, as well as the right in certain circumstances to defend their patents from infringement by third parties (which in a number of Member States, such as Portugal, is a criminal offence). This could be controversial, and the Commission will probably prefer to take on only cases where there is "smoking gun" evidence of anti-competitive intent. It is also likely that there will be increased pressure for the adoption of the Community patent, a project which has been discussed for over 30 years.

The public consultation on the preliminary report closed at the end of January 2009, and the final report is due to be published in the Spring/Summer of this year.

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[1] The Preliminary Report is available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf.

Ryanair / Aer Lingus: acquisitions of minority shareholdings and stand-still commitment - CFI refuses to act against one-sided "harassment"

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On March 18, 2008, the President of the Court of First Instance ("CFI") handed down an important and significant order in Case T-411/07 ("Aer Lingus v. Commission", currently pending) which clarified that the European Commission's power to review transactions under the European Merger Control Regulation ("ECMR") is limited to situations that entail a change of control. Mere acquisitions of minority shareholdings that do not confer control are not, therefore, subject to the European merger control regime.

The President of the CFI rejected Aer Lingus' application for interim measures (see articles 243 of the Treaty establishing the European Community ("EC") and 104 no. 2 of the Rules of Procedure of the CFI), which were intended to (i) prevent Ryanair from exercising the voting rights attached or derived from the shares held in Aer Lingus;
(ii) force Ryanair to vest the shares in question in a trustee; and
(iii) forbid Ryanair from further increasing its shareholding in Aer Lingus.

Ryanair's acquisitions of the shares of the Irish flag carrier (and rival) Aer Lingus date back to 2006, when the Irish Government privatized the latter. On October 23 of the same year, Ryanair launched a hostile public bid for the entire Aer Lingus share capital (in which Ryanair already held 19.16%), and for that purpose notified this concentration to the Commission under article 4 of the ECMR.

On November 23, 2006, while the notification procedure was still pending, Ryanair acquired additional shares, up to an amount of 25.17%. On June 27, 2007, the Commission adopted a decision prohibiting the proposed take over. Ryanair decided to appeal this decision to the CFI seeking its annulment (Case T-342/07 "Ryanair v. Commission", currently pending).

Following the Commission's prohibition decision, Ryanair continued to purchase shares in Aer Lingus (bringing its total shareholding up to 29.4%). This led the latter, on August 17, 2007, to ask the Commission to adopt interim measures with the purpose of forcing Ryanair to divest its minority interest in Aer Lingus.

However, on October 11, 2007, the Commission refused Aer Lingus' application, concluding that **it was not within its powers to order such a divesture, since the concentration had not been implemented and Ryanair shares did not grant it any type of control - neither de jure nor de facto - over Aer Lingus, within the terms of article 3, no. 2 of the ECMR.**

Subsequently, Aer Lingus lodged an action for annulment against that decision before the CFI claiming that the Commission had wrongly interpreted the expression *"has been implemented"*, in article 8 no. 4 and 5 of the ECMR, and that it should mean *"every action or step followed by the notifying party in order to implement the concentration"*; at the same time, Aer Lingus filed a request for interim measures deemed necessary to guarantee the full effectiveness of the definitive future decision, in particular to prevent Ryanair from exercising its minority voting rights.

The CFI, in its order of March 18, 2008, rejected this last application, considering that Aer Lingus had failed both to demonstrate the existence of a *prima facie* case and to prove that the interim measures were necessary to avoid serious and irreparable harm. The Commission, on the contrary, had managed to establish that the interim measures could have some negative impact on Ryanair's interests and rights, as an Aer Lingus shareholder.

Therefore, the CFI considered that the Commission, under the ECMR, only has powers to react against acts executing a non-authorized concentration when a change of control has taken place, this meaning that the Commission has no means - at least, under the ECMR - to avoid acquisitions of minority shareholdings (even if by competitors) when these do not lead to a change in control of the target company.

Despite the fact that interim measures are without prejudice to the outcome of the main proceedings, it seems quite reasonable to expect that the CFI will not uphold the applicant's claims in the main decision.

"The CFI considered that the Commission, under the ECMR, only has powers to react against acts executing a non-authorized concentration when a change of control has taken place."

This is a matter of crucial importance, particularly in the area of M&A, since it is not at all clear to what extent an acquirer can intervene in the target company (in terms of payment of the price, access to sensitive information for the purpose of due diligence, management restrictions in the target company, appointment of decision making bodies, among others) without failing to comply with the obligation of suspending the concentration until the Commission's final clearance has been given.

The level of uncertainty regarding this matter increased when, at the end of 2008, it was made public that the Commission had dawn-raided the offices of a target company, during the merger control procedure, with the aim of establishing whether the stand-still obligation was being complied with.

Meanwhile, and following the CFI order, Ryanair launched a new hostile public bid over Aer Lingus, and notified this second concentration to the Commission on January 8, 2009.

However, (i) the fact that the Irish Government - which holds about 25% of the share capital of Aer Lingus - stated that it woud not accept the proposal of €1.40 per share, (ii) the high probability that the operation would not be successful given the lack of support among Aer Lingus shareholders, and (iii) Ryanair's unwillingness to once again go through the long and uncertain phase II of the merger control procedure, have led Ryanair to abandon the public offer. ■

The *Cartesio* case - support for the real seat doctrine and a step back on companies' freedom of establishment

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Amongst European Union countries two different theories co-exist regarding the connecting factor of a company to the law of a Member State. Some follow the *"legal seat doctrine"* - the law applicable to the company is the law under which the company is registered, regardless of where its central management is located. Others however opt for the more problematic *"real seat doctrine"* - whereby companies must comply with the full requirements of company law applicable in the State where they have their effective seat.

Over the last decades, the European Court of Justice ("ECJ") became a prominent force in the promotion of company mobility, through the adoption of a series of well known decisions in cases where the application of the *real seat doctrine* seemed to restrict companies' freedom of establishment. The case law, however, does not follow a clear and consistent line.

In the *Daily Mail (27.09.88)* case, the ECJ was asked about the compatibility with articles 43 and 48 of the Treaty on Freedom of Establishment of the UK Income and Corporation Taxes Act, which prohibited companies resident in the UK from ceasing to be resident without the consent of the Treasury. The ECJ reasoned that as companies are "creatures of national law" and UK law only required the Treasury's consent when companies sought to transfer their central management out of the UK while maintaining their status as UK companies, the law did not constitute a restriction on the fundamental freedom.

"THE LONG-AWAITED DECISION ON THE *CARTESIO* CASE HAS FINALLY BEEN ADOPTED BY THE EUROPEAN COURT OF JUSTICE. IT CONSTITUTES A LANDMARK ON THE RATHER ROCKY ROAD OF THE CASE LAW ON COMPANIES' FREEDOM OF ESTABLISHMENT, BUT NOT NECESSARILY A POSITIVE ONE."

But in the *Centros (09.03.99)* case, the ECJ considered as contrary to the Treaty the refusal of the Danish Department of Trade to register a branch of a company incorporated in the UK, when the shareholders intended to carry out their main activity through the Danish branch, thus avoiding the national rules on minimal capital.

Similarly, in its *Inspire Art (30.09.03)* decision, the ECJ held that articles 43 and 48 preclude national legislation from imposing on a branch of a company incorporated in accordance with the law of another Member State certain conditions provided for in domestic law, relating namely to minimum capital and directors' liability. Furthermore it was also held that the fact that the company carries out its activities exclusively in the place where the branch is established does not preclude it from evoking the freedom of establishment, except when the existence of an abuse is established on a case-by-case basis.

In *Überseering (05.11.02)*, the ECJ also considered the German refusal to recognize the legal capacity of a company incorporated under Dutch law, on the grounds that it had moved its central administration to Germany, to be a negation of the freedom of establishment.

These latter three cases were seen by many as signifying the ECJ's rejection of the application of the *real seat doctrine*, since the ECJ did not seem to allow Member States to reject the recognition of companies incorporated in one Member State but having their central administration in another.

Then along comes *Cartesio*. The facts of the case are quite straightforward. *Cartesio* is a limited partnership constituted in accordance with Hungarian law and registered in Baja (Hungary). The company submitted an application to the Commercial Court to transfer its headquarters to Italy, while maintaining its legal status as a Hungarian Company. The Commercial Court rejected the request - stating that according to Hungarian norms *Cartesio* would have to be first dissolved and then reconstituted under Italian law.

"MEMBER STATES' POWER TO DEFINE THE CONNECTING FACTOR INCLUDES THE POSSIBILITY OF NOT ALLOWING A COMPANY TO TRANSFER ITS REAL SEAT TO ANOTHER MEMBER STATE WHILE MAINTAINING ITS STATUS AS A COMPANY GOVERNED BY THE LAW OF THE MEMBER STATE OF INCORPORATION."

The Advocate-General, Poiares Maduro, pointing out case law's "contradictory signals", affirmed that, despite *Inspire Art* and *Centros*, it is not always possible to rely successfully on the right of establishment in order to set up a company in another Member State for the sole purpose of circumventing one's national rules.

According to the Advocate-General, although Member States are free to choose between the *real seat* or *legal seat* doctrine, the exercise of the freedom of establishment requires some recognition and coordination between these two different systems. This leads the Advocate-General to the conclusion that Member States are not entirely free to determine the "life and death" of companies and although it might be acceptable for a Member State to impose certain conditions before a company transfers its operational headquarters to another State, laws which require the dissolution of the company, are *"an outright negation of the freedom of establishment"*.

The ECJ did not follow the Advocate-General's opinion. For the ECJ, Member States' power to define the connecting factor includes the possibility of not allowing a company to transfer its real seat to another Member State while maintaining its status as a company governed by the law of the Member State of incorporation. Thus the ECJ was of the opinion that, in this case, articles 43 and 48 of the Treaty do not preclude national legislation such as the Hungarian legislation in question.■

State aid to Financial Institutions: the Portuguese case

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The Portuguese Guarantee Scheme - NN 60/2008

Similarly to that which has occurred in other Member States, and in order to benefit from the application of the European Commission's Communication on the application of State aid rules to measures taken in relation to financial institutions[1] confronting the systemic financial crisis, as of October 13, 2008 ("Communication"), the Portuguese Government has notified and perceived the approval of the Portuguese Guarantee Scheme for all eligible credit institutions registered in Portugal. The purpose of this scheme is to soothe and reinforce the Portuguese banking market, and it is known as *"Concessão extraordinária de garantias pessoais pelo Estado, para o reforço da estabilidade financeira e da disponibilização de liquidez nos mercados financeiros"* [2].

"The Commission considers that the notified Portuguese Guarantee Scheme is compatible with EC Treaty."

The Commission bases its legal reasoning upon Article 87 (3) (b) of the Treaty establishing the European Community, and its purpose is to ensure that each EU Member State's aid schemes do not distort competition between financial institutions operating in the common market or have spill over effects in other EU Member States.

The Commission considers that the notified Portuguese Guarantee Scheme is compatible with Article 87 (3) (b) EC and with the general objectives of the Treaty, which implies compliance with the conditions of *appropriateness*, *necessity* and *proportionality*, in line with the Communication.

The referred legal provision of the EC Treaty allows State aid *to remedy a serious disturbance in the economy of a Member State*. Its exceptional application is based on a case-by-case approach, with emphasis on the distinction between illiquid but otherwise fundamentally sound financial institutions and those whose problems are caused by their own inefficiency or excessive risk taking.

The Portuguese financial scheme aimed at recovering the financial market encompasses a total budget of €20 billion and provides State guarantees for financing agreements and the issuance of non-subordinated short and medium-term debt of solvent credit institutions incorporated in Portugal. Under this scheme guarantees may be granted until December 31, 2009. Furthermore, these guarantees will be available for financial instruments with a minimum maturity of three months and a maximum maturity of three years, or exceptionally five years if duly justified by the Bank of Portugal. In any case, if the guarantee is activated due to default on the part of the institution, the State can decide to convert, under certain circumstances, its rights as a creditor into preferential shares (*see* Law no. 60-A/2008, of October 20[3], and Decree Order no. 1219 - A/2008 of October, 23[4]).

In this context, the Portuguese Government, represented by the Secretary of State for Treasury and Finance has issued guarantees to a range of Portuguese financial institutions, as follows:

- On November 27, 2008 - Bond issued up to €2 billion to Caixa Geral de Depósitos, S.A. with 3 year maturity (*see* Decision no. 30830-A/2008),
- On December 4, 2008 - State guarantee to the debt issue of Banco Espírito Santo S.A. regarding bond of principal and interest up to €1.5 billion, with 3 year maturity (*see* Decision no. 31179/2008),
- On December 12, 2008 - State guarantee to Banco Comercial Português, S.A. regarding bond of principal and interest, with 3 year maturity, up to €1.5 billion (*see* Decision no. 31835-A/2008),
- On January 9, 2009 - State guarantee to Banco Internacional do Funchal, S.A. regarding bond of principal and interest, with 1 year maturity, up to €50 million (*see* Decision no. 651/2009).

"Portugal has already used instruments for structural intervention in the financial sector (as recapitalisation or even nationalisation of specific financial institutions)."

Other Measures to support the Portuguese Financial Sector

In addition to the aforementioned aid measures, which include mechanisms for the protection of third party rights (such as deposit guarantees and the extension of liquidity facilities), and similarly to that which has occurred in other Member States, Portugal has already used instruments for structural intervention in the financial sector (as recapitalisation or even nationalisation of specific financial institutions). It is public knowledge that the Commission is assessing measures concerning the nationalisation of Banco Português de Negócios (*see* Law no. 62-A/2008, of November 11) and the recapitalisation scheme to financial institutions by the Portuguese State. Furthermore, measures related with Banco Privado Português, S.A. are also being assessed. The precise nature of these measures has not been made public. ■

[1] Published on OJ 2008/C 270/02. [2] The Commission's decision is available at http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-60-08-WLWL-en-17.12.2008.pdf. [3] See Official Gazette ("OG") no. 203, Series I, Supplement of 2008-10-20. [4] See OG no. 206, Series I, Supplement of 2008-10-23.

The Portuguese Competition Authority suspends "myZONcard" promotional campaign

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Legal framework

The European Commission and the respective national Competition Authorities of EU Member States have the power to adopt interim or provisional measures in applying articles 81 and 82 of the Treaty establishing the European Community.

The legal basis for this can be found in Article 5 of Council Regulation (EC) No. 1/2003, December, 16 ("Regulation 1/2003"), as follows: *"The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: (…) - ordering interim measures (…)".*

Article 27 of Law 18/2003, June, 11 ("Competition Act") - modelled on Article 8 of Regulation 1/2003 - stipulates the conditions that must concur in order for interim measures to be granted: "1 - *Whenever an investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third party interests*[1]*, the Authority may, at any moment in the investigation or evidence-taking, preventively order the immediate suspension of the practice or take any other provisional measures that are necessary to immediately re-establish the competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings (…)".*

"The PCA has now temporarily suspended a promotional campaign, entitled "myZONCard" according to which subscribers to ZON's pay-tv service (TV Cabo) would be offered free tickets to movies showing in cinemas managed by ZON."

The imposition of interim measures to maintain pre-existing competitive conditions pending completion of an investigation seeks to ensure the useful effect of the Portuguese Competition Authority's final decision. Furthermore, interim measures are conservatory and temporary by nature, meaning this type of measure must be kept within limits (which are also temporal limits) and not exceed that which is strictly necessary to remedy a specific situation.

Up until January 2009, the Portuguese Competition Authority ("PCA") had never exercised its powers under Article 27.

ZON's dominant position and the myZONcard promotional campaign

As reported in its press Statement 1/2009, the PCA considers that no fundamental changes have occurred in the markets for motion picture release and exhibition since its detailed review of these markets in the context of Sonaecom's takeover bid for Portugal Telecom, in 2006 (case 8/2006 - Sonaecom/PT). Accordingly, the PCA has summarily restated its opinion that ZON Multimédia ("ZON") holds a dominant position in these markets, both at a national level and in 8 specified districts, including Lisbon and Oporto.

In its 2006 decision on the above merger, the PCA had estimated that, in 2005, ZON held a nationwide share of 47% of the motion picture exhibition market, both in terms of tickets sold and revenue.

The PCA has now temporarily suspended a promotional campaign, entitled "*myZONCard*" according to which subscribers to ZON's pay-tv service (TV Cabo) would be offered free tickets to movies showing in cinemas managed by ZON.

"Up until January 2009, the Portuguese Competition Authority ("PCA") had never exercised its powers under Article 27."

According to its financial statements for the 1st semester of 2008, ZON's portfolio extended at the time to 206 cinemas in total.

The imposition of a suspension order by the PCA

In its decision to impose the provisional suspension of this promotional campaign, the PCA has concluded that it constitutes a *prima facie* infringement of Article 6 of the Competition Act, verifying the fulfilment of the *fumus boni juris* condition[2].

Additionally, the PCA stressed that the *periculum in mora* condition was also met, as the precautionary suspension measure was urgent[3] to re-establish pre-existing competitive conditions and reduce the risk of anti-competitive effects. In fact, the PCA considered that the *myZONCard* campaign posed an imminent and serious risk of irreparable damage to individuals/consumers and to the public interest.

In this context, the PCA emphasised that these anti-competitive effects could affect *"ZON's present and potential competitors and, directly or indirectly, consumers themselves"* and that this might occur *"not only through the direct exclusion from the market of the undertakings at present competing with ZON but also through the creation of barriers to the entry and expansion of other competitors in the market, by means of a loyalty system for ZON/TV Cabo clients…".*

In accordance with articles 50 (3) of the Competition Act, and 55 (2) of Decree-Law no 433/82, of 27 October, the provisional measures decision by the PCA may be appealed to the competent commercial court (although the order is not suspended in the event of an appeal). ■

[1] Unlike this provision, Article 8 of Regulation 1/2003 only mentions damage to competition (and not to third parties). [2] The Court of First Instance ("CFI") requires "the probability of a priori infringement" or a summario cognitio. Please see, in this context, the CFI's Order of January, 21, 2004, "FNSEA and others v. Commission", case T-245/03R, regarding the alleged violation of article 81 of the EC Treaty. [3] In case "Mars/Langnese-Iglo and Schoeller Lebensmittel" (CFI Order of June, 16, 1992, joined cases T-24/92R and T-28/92), the European Commission imposed interim measures following a complaint by this company, which alleged that its access to the German market for single-item ice-cream was illegally barred. The urgency of this case was mainly related to the seasonal nature of the product concerned (ice creams).

The European Court of Justice declares that a pharmaceutical company abuses its dominant position if it refuses to meet ordinary orders in attempt to prevent parallel exports

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The Greek subsidiary of GlaxoSmithKline, a pharmaceuticals research and manufacturing company, imports, warehouses and distributes pharmaceutical products of GlaxoSmithKline. As such, it holds the marketing authorisation in Greece for several prescription-only medicines.

In November 2000, the Greek subsidiary, alleging a shortage of medicines for which it denied responsibility, stopped meeting the orders of the Greek wholesalers who buy the medicines in question for distribution in Greece and export to other Member States. The Greek subsidiary itself began to distribute the medicines to Greek hospitals and pharmacies. Subsequently it resumed supply to the wholesalers, albeit with limited quantities of the medicinal products.

The Greek wholesalers, allegedly harmed by the conduct of the subsidiary of GlaxoSmithKline, submitted various judicial claims in the First Instance Court of Athens, subsequently appraised by the Athens Court of Appeal, which later made a referral to the European Court of Justice ("ECJ") requesting the interpretation of article 82 of the Treaty establishing the European Community ("EC") in light of the apparent refusal to supply on the part of the Greek subsidiary. This request resulted in the judgement of September 16, 2008, *Greek wholesalers vs. GlaxoSmithKline* - joined cases C-468/06 to C-478/06 - available at curia.europa.eu.

In its September 2008 ruling, the ECJ recalls, firstly, that any abuse by a company of its dominant position is incompatible with the common market, in so far as it may affect trade between Member States. Such conduct may, in particular, consist in limiting production, markets or technical development to the detriment of consumers.

The Court found that, in this case, by refusing to meet the Greek wholesalers' orders, the Greek subsidiary aims to limit de facto parallel exports by those wholesalers to the markets of other Member States where the retail prices of the medicines are higher. In this context, the ECJ went on to consider whether, in the pharmaceutical sector, there are particular, objective, reasons that might, generally, justify a refusal to meet orders.

From this legal standpoint, the ECJ highlights that parallel exports of medicinal products from a Member State where prices are low to other Member States where the prices are higher opens up, in principle, an alternative source of supply to consumers of the medicines in those latter States, offering lower prices than those applied in the same market by the pharmaceutical companies. Therefore, the ECJ determined that it cannot be argued that the parallel exports are of only minimal benefit to final consumers.

The ECJ then reviewed the possible affects of State regulation of prices of medicines in assessing whether the refusal to supply is an abuse, observing that the control exercised by Member States over retail prices or the reimbursement of medicines does not entirely remove the prices of those products from the law of supply and demand. Moreover, although the degree of price regulation in the pharmaceuticals sector cannot therefore preclude the Community rules on competition from applying, nonetheless in the case of Member States with a system of price regulation State intervention is one of the factors liable to create opportunities for parallel trade. In addition, as stated by the ECJ, the Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceutical company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level. It follows that, according to the ECJ, even if the degree of regulation regarding the price of medicines cannot prevent a refusal by a pharmaceuticals company in a dominant position to meet orders sent to it by wholesalers involved in parallel exports from constituting an abuse, such a company must nevertheless be in a position to take steps that are reasonable and in proportion

"Whether orders by pharmaceutical wholesalers are ordinary must be ascertained in the light of the needs of the national market in question and previous trading relations between the pharmaceutical company and wholesalers."

to the need to protect its own commercial interests. In order to assess whether those steps are reasonable and proportionate, it must be ascertained whether the orders of medicines by wholesalers are of an extraordinary nature.

This situation can occur, pursuant to the ECJ reasoning, when in a given Member State, certain wholesalers order from the producer medicines in quantities that are out of all proportion to those previously acquired by the same wholesalers to meet the needs of the market in that Member State.

Notwithstanding, the ECJ observes that, in cases where parallel trade would effectively lead to a shortage of medicines in a given national market, it would not be for the companies holding a dominant position but for the national authorities to resolve the situation, by taking appropriate and proportionate steps; notwithstanding that a producer of pharmaceutical products must be in a position to protect its own commercial interests if it is confronted with orders that are out of the ordinary in terms of quantity, as provided in the previous paragraph.

In conclusion, the European Court of Justice interprets article 82 EC as providing that a company occupying a dominant position, in a given relevant market for medicinal products, which, in order to put an end to parallel exports, refuses to meet *ordinary* orders by wholesalers, abuses its dominant position.

New European Commission notice on remedies in merger cases

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The European Commission ("Commission") published on 22 October 2008 its new notice on remedies acceptable within EC merger control proceedings ("Notice")[1]. At the same time the Commission also amended Regulation (EC) 802/2004 ("Implementing Regulation") implementing Council Regulation (EC) 139/2004 ("Merger Regulation")[2], including a new "Form RM" on information to be provided by parties wishing to submit remedies proposals to the Commission.

"Remedies"

Also termed *commitments*, remedies are modifications to concentrations proposed by the parties to a notified merger in order to eliminate the competition concerns identified by the Commission. The submission of remedies is crucial in problematic cases, as the Commission is forced to prohibit a concentration if it concludes that the merger is likely to significantly impede competition in one or more markets.

The purpose of the Notice, which replaces the 2001 remedies notice[3], is to provide guidance on the commitments that may be accepted by the Commission and on the specific requirements for their submission and implementation. The Notice codifies the experience recently acquired by the Commission in assessing and implementing remedies and reflects recent case law from the Community courts, as well as the new 2004 Merger Regulation. Although the Commission notices are only applicable to concentrations having community dimension, they also constitute useful guidance to national competition authorities, such as the Portuguese *Autoridade da Concorrência*.

Acceptable remedies

As a general rule, commitments have to: eliminate competition concerns entirely; be comprehensive and effective from all points of view; and be capable of being implemented effectively within a short period of time. For this reason, the Notice confirms the Commission's preference for structural commitments, i.e., the divestiture of a viable and stand-alone business. In particular, the Notice sets out in great detail the rules on the scope of the business to be divested, as well as the criteria to identify a suitable purchaser (which until now were only contained in the Commission's Model Text for Divestiture Commitments[4]), including cases where it is necessary to propose an *up-front buyer* before implementing the merger or where the parties must enter into a binding agreement with a buyer before the Commission's approval is secured *(fix-it-first remedy)*.

The Commission also stresses that commitments not involving divestitures (such as the granting of access to key infrastructure, technology and essential inputs, as well as the change of long-term exclusive contracts) will only be accepted in circumstances where they are at least equivalent in their effects to a divestiture, which is the Commission's benchmark. In contrast, behavioural commitments, such as promises by the parties to abstain from certain commercial behaviour, will only exceptionally, and in specific circumstances, be accepted - such as in respect of competition concerns arising in conglomerate structures.

Assessment of commitments by the Commission

Although it is for the parties to put forward sufficient commitments to eliminate the competition concerns (insofar as the Commission is not in a position to impose unilaterally any conditions which are not based on the parties' commitments), the Notice clarifies that, further to the CFI's judgment in *EDP vs. Commission*[5], it is for the Commission to establish whether or not a concentration, as modified by commitments validly submitted, would lead to a significant impediment of effective competition. Thus the burden of proof for a prohibition or authorisation, which rests upon the Commission, is not altered by the submission of commitments, in contrast to that which was suggested by the wording of the previous 2001 notice.

Procedural rules

When submitting commitments (which should follow the existing Model Text for Divestiture Commitments), the parties should from now on also make available to the Commission the information and documents required by the new Form RS. Pursuant to this form the parties should provide detailed information about the object of the commitments offered and terms/conditions for their implementation, as well as information showing that the commitments offered remove the competition concerns the Commission has identified, in particular if the proposed commitments are not divestitures.

The Notice also sets out detailed guidance on the merging parties' obligations during the implementation of the commitments, especially regarding the assurance that the business to be divested remains viable. In this context parties will be required, *inter alia*, to: allow potential purchasers to carry out due diligence; submit periodic reports to the Commission on the progress of the divestiture process; and to appoint a hold-separate manager who will be responsible for the management of the business and the implementation of hold-separate and ring-fencing obligations during the divestiture process.

Finally, up to now the role and the appointment of independent trustees to monitor the correct implementation of the commitments were mentioned only in the Commission's Model Text for Divestiture Commitments. The new amendments to the Implementing Regulation clarify that the commitments offered by the merging parties may include the appointment of one or more trustees at the parties' own expense, and the Notice sets out in detail the role of the monitoring trustee, emphasising that the trustee should be the Commission's "eyes and ears" in ensuring that the commitments are correctly implemented. In the case of divestiture commitments, the Notice also expressly requires the parties to propose the appointment of a divestiture trustee, who is to be given an exclusive mandate to dispose of the business to be divested in the event that the undertakings concerned are unable to find a suitable purchaser within the agreed timeframe. ■

[1] OJ C 267, of 22.10.2008, p.1. [2] See Commission Regulation (EC) 1033/2008 of 20 October 2008 amending Commission Regulation 802/2004 of 7 April 2004 implementing Council Regulation, OJ L 279, of 22.10.2008, p.3. [3] Commission Notice on Remedies Acceptable under Council Regulation (EEC) n.º 4064/89 and Commission Regulation (EC) n.º 447/98, OJ C 68, of 2.3.2001, p.3. [4] *Model Text for Divestitures Commitments*, disponível em www.europa.int. [5] Judgment of the CFI in case T-87/05, *EDP vs. Commission*, [2005] ECR II-3745.

The European Commission imposes record fine upon car glass cartel. 2008 Cartel condemnations in review

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The European Commission ("Commission") brought 2008 to a close by imposing a record fine of €1,383,896,000 on a cartel in the car glass market, which involved the three main European players - Saint-Gobain, Asahi e Pilkington - and the Belgium company Soliver. The four glass producers, in total controlling approximately 90% of the glass used in the EEA in new cars and original branded replacement glass, were found to have engaged in illegal behaviour between 1998 and the beginning of 2003. The illegal behaviour involved discussing prices, sharing markets, allocating customers and exchanging sensitive commercial information on the basis of meetings and contacts between them.

The Commission's investigation (dating back to 2005) was initiated following an anonymous tip-off and included surprise inspections at the sites of several car glass producers in Europe. Asahi Glass Co presented a Leniency application and cooperated with the Commission by providing evidence that helped the investigation. This resulted in a 50% reduction in the fine imposed at the end of the process. In turn, Saint-Gobain France - the French subsidiary of the worldwide glass manufacturer - was sanctioned with fine in the amount of €896 million, a new *record* for the highest individual fine ever imposed in a cartel case[1].

A review of the year 2008 shows that the Commission has maintained a proactive policy of investigation and severe punishment of anti-competitive practices. In the area of cartels seven condemnations involving a total of 37 companies[2] were issued and the total amount of fines imposed reached €2,200 million. This sum represents a decrease in comparison to 2007 (€3,300 million). Nevertheless we have undoubtedly seen a marked trend in recent years towards very significant growth in the level of fines imposed in cartel cases: in the 4-year period from 2005 to 2009 the total amount of fines imposed (€8,271 million[3]) represented an increase of almost 150% compared with the previous 4-period of 2000-2004 (€3,207 million[4]). The chart below summarizes all cartel decisions issued in 2008.

> "The Commission has maintained a proactive policy of investigation and severe punishment of anti-competitive practices. In the area of cartels seven condemnations involving a total of 37 companies' were issued and the total amount of fines imposed reached €2,200 million."

In the cases of five out of seven of the cartels condemned, the Commission's investigations were triggered by the Leniency applications of cartel participants. In the two remaining cases at least one of the participants applied for Leniency and cooperated with the Commission at a later stage. This corroborates the idea that the Leniency Program is an important mechanism for uncovering and investigating cartels and that the trade-offs involved (reduction or immunity from fines) for investigated companies are highly valued by them.

On the other hand, fines imposed by the Commission already follow the (new) guidelines on the method of setting fines, adopted in 2006[5]. These guidelines are significantly more accurate and potentially more severe than the previous guidelines.

To cite an example, the aggravation permitted in the cases of recidivism can reach 100% of the base amount of each individual fine[6]. Thus, the Commission imposed on Saint-Gobain (*Car Glass*) and ENI (*Paraffin Wax*) an increase of 60% and on Arkema (*Sodium Chlorate*) an increase of 90% on the base amount of the fine.

Fines imposed by the Commission during recent years have reached truly "spectacular" levels, a feature of competition enforcement that is not without controversy. Some authors interpret this as a trend towards the "criminalisation" of EU competition law.

Unlike the USA and some EU Member States (such as the UK and Ireland) where participating in a cartel can be sanctioned with imprisonment, breaches of EU competition rules are administrative breaches and thus subject to pecuniary sanctions only. In an area regarded as a top priority by EU competition policy, the imposition of heavy sanctions for cartel participants has been one of the instruments used by the Commission to enhance the deterrent effect. ■

European Commission's cartel condemnations (2008)

Sector/Market	Total fine	Company with highest individual fine	Highest individual fine
Car glass	€1,300,000,000	Saint Gobain	€896,000,000
Bananas*	€60,300,000	Dole	€45,600,000
Paraffin Wax*	€676,011,400	Sasol	€318,200,000
Aluminium Fluoride*	€4,970,000	Société des Industries Chimiques du Fluor	€1,700,000
Sodium Chlorate*	€79,070,000	Arkema/Elf Aquitaine	€59,020,000
International Removal Services	€32,755,500	Ziegler	€9,200,000
Synthetic Rubber*	€34,230,000	Bayer	€28,870,000

*Investigation triggered by Leniency application

[1] See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685&guiLanguage=en. [2] Figure calculated considering separate economic groups only. [3] This amount included the fine of €131,510,000 million imposed by the European Commission on 30.01.2009 on a cartel in the marine hose market. [4] Amount after correction by court judgment. [5] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation Nº 1/2003, OJEU C 210, pp. 2-5. [6] Whereas the previous guidelines did not prescribe any particular increase, the Commission's practice pointed to 50%.

The New European Energy Policy - Part I

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Much has been said about energy policy in Europe over the last few months, but the recent political and legislative trends in this field have not received the coverage and attention they deserve in Portugal. Given the number of new features and their importance it is not an exaggeration to state that a new European Energy Policy has been born.

The genesis of this new policy dates back to 10 January 2007 when the European Commission addressed the European Council and Parliament and delivered its Communication: "An Energy Policy for Europe"[1]. Underlying this Communication was the objective of securing a broad commitment to a low energy consumption economy in the European Union, based on more secure, more competitive and more sustainable energy.

Since then the new energy policy has centred and revolved around essentially three areas: *(i)* the so-called third liberalisation package for the internal market of electricity and gas; *(ii)* the Second Strategic Energy Review; and *(iii)* the proposals for combating climate change. In the present Newsletter we will focus our attention on the first area and will deal with the other two in the next edition.

Following the legislative initiatives of 1996/1998[2] and 2003[3] on 19 September 2007 the European Commission adopted the soon-to-be the third liberalisation package for an internal energy market, which includes two Directives and three Regulations[4].

The main goal of this proposal is to make fully effective the opening up of national markets for electricity and natural gas, moving towards a true internal EU energy market.

Among the set of 6 measures designed to further this initiative[5] we will focus on one: the effective unbundling of generation and supply, on the one hand, and energy transmission, on the other. Ever since the third legislative package saw the light of day the Commission has always referred to **ownership unbundling of transmission networks** as the most effective tool with which to promote investments in infrastructure in a non-discriminatory way.

> "The political road is full of twists and turns and the Council of the European Union ended up forcing a third option for effective unbundling at transmission level, the so-called super functional unbundling"

Bearing in mind the implications and repercussions that such a measure would have in countries such as Germany and France, where two of the largest European energy groups have their own transmission networks, the Commission offered as a second best option an alternative known as "**independent system operator**" (ISO), which would enable vertically integrated companies to retain the ownership of their network assets as long as the management of such networks would be awarded to an ISO - an entity entirely separate from the owner[6].

The Commission then seemed convinced that only one or other of these two options would enable an effective unbundling of generation and supply *vis-à-vis* grid activities. The Commission stated that «*there does not appear to be any alternative to the options proposed if we are to ensure the full independence of the* [transmission system operators][7]» .

However the political road is full of twists and turns. The Council of the European Union (*i.e.*, the Member States) ended up forcing through a third option for effective unbundling, the so-called "**independent transmission operator**" (ITO). The ITO model avoids dismantling and de-characterizing an important segment of some European energy groups and corresponds to a "super functional unbundling" according to which transmission system operators may remain part of integrated companies, albeit subject to detailed rules on autonomy, independence and investments.

Another hot topic under the Commission's initial proposal that was substantially reshaped in the "hands of the Council" refers to the **third country safeguard clause**.

The Commission's original proposal included safeguards to effective unbundling, applicable both to EU and non-EU companies. As a result, generation or supply companies active anywhere in or outside the EU will not be able to acquire or operate a transmission system in any Member State, and *vice-versa*[8].

In a case where the acquirer came from a third country, or was itself a third country, the Commission provided for an additional protection requirement: the acquisition of control over EU energy transmission grids would only be possible in the light of an international agreement entered into for that purpose by the European Union and the third country concerned.

This prerequisite was eliminated by the Council. Accordingly, Member States will only have to ensure compliance with any of the three unbundling options and guarantee that the acquisition of control by the third country investor will not put at risk the security of energy supply. In the new procedure, the Commission's authorisation is no longer required, although Member States undertake to consult the Commission beforehand and to take the "utmost account" of its opinion. ■

> The final position of the European Parliament on the "modified" version of the third package is expected soon, as is its approval by that institution and the Council in the course of 2009.

[1] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0001:FIN:EN:PDF. [2] Directive 96/92/EC, 19.12.1996, concerning common rules for the internal market of electricity, and Directive 98/30/EC, 22.06.1998, concerning common rules for the internal market of natural gas. [3] Directive 2003/54/EC, 26.06.2003, which repealed Directive 96/92/EC, and Directive 2003/55/EC, 26.06.2003, which repealed Directive 2003/55/EC. [4] The two Directives are amendment proposals to the current Directives 2003/54/EC and 2003/55/EC, concerning common rules for the internal market of electricity and natural gas, respectively. The Regulations concern the establishment of a European Agency for the Cooperation of Energy Regulators, the conditions for access to the network for cross-border exchanges in electricity and the conditions for access to the natural gas transmission networks. The documents composing the package are available at http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm. [5] Namely: *(i)* effective separation of transmission networks' ownership and management from the remaining activities within the energy sector; *(ii)* further powers and enhanced independence of the national energy regulators; *(iii)* establishment of an independent mechanism for cooperation among national regulators (the Agency for the Cooperation of Energy Regulators); *(iv)* improved coordination between transmission system operators in matters relating to grid operation and security and cross-border trade; *(v)* greater transparency and better functioning of the retail market; *(vi)* increased regional cooperation between Member States to ensure greater security of supply. [6] It should be mentioned that Portugal is a somewhat indifferent to the controversy surrounding effective unbundling since it has already carried out an effective separation of its electricity and natural gas transmission networks. [7] See Explanatory Memoranda to the proposals for amendment of Directive 2003/54/EC, p. 6 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0528:FIN:EN:PDF), and Directive 2003/55/EC, p. 6 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0529:FIN:EN:PDF). [8] This restriction, known as level playing field, is the result of a wide discussion within the Council and represents an important political achievement for those countries, such as Portugal, that have carried out an effective unbundling of their transmission networks. Those countries may now, in certain circumstances, prevent the acquisition of their energy assets when the buyer has not completed an effective separation of its transmission grids.

The exchange of information between competitors. The Portuguese Competition Authority fines the Bakers' Association of Lisbon

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The increasing importance of the role played by industry associations and other informal platforms for cooperation between competitors raises concerns as to the compatibility with anti-trust rules of systems set up for collecting, treating and publishing information on the economic sector they represent, their associates and the economic activity they develop.

Traditionally, the European Commission ("Commission") has viewed the exchange of information between competitors as a practice which may fall within the scope of application of article 81 of the Treaty establishing the European Community ("EC"), although this article does not list exchange of information among the (non-exhaustive) list of restrictions contained in its first paragraph. The existing understanding on information exchange is derived exclusively from the European Commission's interpretation and enforcement of the wording of article 81 EC and the review of such practice by the European courts.

The Commission's first policy statement on this issue dates back to the 1968 Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises[1]. The Notice establishes the principle that an exchange of information between competitors may fall within the scope of application of Article 81 EC Treaty whenever *"[A]greements whose sole purpose is the joint procurement of information which the various enterprises need to determine their future market behaviour freely and independently, or the use by each of the enterprises of a joint body"*, have as their object or effect the restriction of competition.

Subsequently, in 1977, after a series of decisions on cases concerning exchange of information, and in line with the European Court of Justice ("ECJ") judgement on the *Suiker Unie* case[2] the European Commission set out three key criteria to follow when reviewing arrangements on the exchange of information[3].

Firstly, the Commission's analysis focuses on the relevant market structure, in order to determine its characteristics and degree of concentration, as these factors are likely to affect the probability that information exchanges might generate incentives to coordinated behaviour between competitors.

The importance, from a competition law perspective, of schemes set up to exchange information between competitors rests in particular upon the nature and the scope of the information concerned (e.g. information on prices, quantities produced and sold, market shares, and strategies). Careful deliberation must be given to the likelihood that such information could indeed be used by the recipient to coordinate market strategies, rather than to compete more fiercely - distinguishing harmful from harmless information.

Finally, the Commission considers whether the exchange of information between competitors increases the transparency of the market in such a way that buyers may no longer benefit from *"secret competition"* between the sellers in oligopolistic markets and can no longer fight against price rigidity.

Aside from the undeniable importance of the criteria established by the Commission to assess the exchange of information, neither the above-mentioned Notice nor the policy statement from 1977 draws a distinction between the exchanges of information as (i) an infringement of article 81 EC *per se*[4] and (ii) ancillary to other antitrust infringements. However, such distinction clearly appears in the practice of the Commission, where early cases on exchange of information are exclusively reviewed as ancillary practices to other restraints of competition, followed by cases where systems for information exchange are reviewed independently of any other collusive practice caught by article 81 EC[5].

At a national level, the exchange of information between competitors is not listed as a practice falling within the scope of application of Article 4 of Law no. 18/2003, of 11 June ("Competition Act"). Nevertheless, the general prohibition contained in article 4 (1), on agreements and concerted practices between competitors, which have as their object or effect the restriction of competition, seems to allow an interpretation of article 81 EC in line with the one followed by Commission and community courts.

Based on the information contained in the press release published by the Portuguese Competition Authority ("PCA") on December 2008, it is plausible that such understanding on the interpretation of Article 4 in relation to exchange of information is shared by the authority. In fact, according to the press release, the PCA has fined the Bakers' Association of Lisbon ("AIPL") for having infringed Article 4 of the Competition Act, apparently on the basis of information exchanged on bread pricing.

The press release does not clearly describe the facts and arguments on which the condemnatory decision was based upon. Notwithstanding should the exchange of information be regarded by the PCA as an infringement *per se* capable to trigger the application of articles 4 and 43, it is of utmost importance to understand the views and arguments put forward by the authority. In the absence of formal guidelines on exchange for information, PCA practice is vital to help companies and sector associations establish parameters consistent with the law.

Moreover, it is essential to understand how the PCA interprets Article 4 in conjunction with the principle of legality in face of the legislative technique used in this article. Instead of setting out an exhaustive list of prohibited behaviours, Article 4 uses a wording *("in particular those which")* that *leaves the door open* for behaviours other than the ones expressly referred to therein to be included. Considering the *quasi* penal nature of the offences in question this needs to be carefully reviewed in light of Penal Law[6]. ■

[1]Official Journal C 075 , 29/07/1968 p. 0003 - 0006. [2]Judgment of the Court of 16 December 1975, Coöperatieve Vereniging Suiker Unie UA and others v Commission, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECR1975 p. 01663. [3]Cfr. VII Report on Competition Policy, 1997. [4]The first decision in which the Commission prohibited an exchange of information based on a restriction of competition regardless of other illegal practices was adopted in case IV/31.128 - Fatty Acid, in 1981. In this case, the Commission assessed a system set out to exchange information on statistics on fatty acid production, stock and shipments, as the result of an "agreement concluded between, and subsequently implemented by, the three major producers in a market in recession, and based on an exchange of confidential information on the one hand about traditional market positions and on the other hand providing a means of monitoring their future performance, has inherent restrictive effects upon competition although these may not be measurable or even apparent to an observer of the market unaware of the existence of such an agreement." (paragraph 45). The Commission concluded that the agreement to exchange information and the implementation of the agreement until the end of 1982 constituted an infringement of Article 81(1) EC Treaty. [5]In 2007, the European Commission published draft guidelines on the application of Article 81 of the EC to maritime transport services that sets out the principles that the Commission will follow when assessing horizontal agreements on information exchanges between competitors in liner shipping. Although the draft guidelines are specific to maritime sector, they settle the Commission's practice and community case-law in one document, which also provides important guidance for reviewing similar agreements in other economic sectors. [7]As referred by Augusto Silva Dias concerning Article 132 of the Portuguese Penal Code, the compatibility of legal "blank provisions" with the principle of legality relies on a reasonable linkage between the judge and the law i.e., the judge is only allowed to include in the general provision circumstances that, although not expressly listed, correspond to the structure, sense and standard example provided in the law.

Commission's Guidance on the application of article 82 EC to exclusionary conduct

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On 3 December 2008, the European Commission ("Commission") adopted a Communication on its enforcement priorities in applying article 82 of the Treaty establishing the European Community ("EC") to abusive exclusionary conduct by dominant undertakings[1] ("Guidelines").

These Guidelines are the culmination of 3 years of internal and external reflection following on from publication of the Commission's staff discussion paper on the application of article 82 EC to exclusionary abuses by dominant undertakings of December 2005[2].

"THE GUIDELINES ARE TO BE WELCOMED SINCE THEY APPEAR TO INTRODUCE AN IMPORTANT ELEMENT OF LEGAL CERTAINTY."

The Guidelines intend to set out an economic and *effects-based approach* to exclusionary conduct under EC competition law and to provide comprehensive guidance on how the Commission uses its approach to establish enforcement priorities under article 82 EC in relation to the referred exclusionary conduct. With the adoption of an effects-based approach the Commission seems to be determined to draw a distinction between *competition on the basis of merit* (which should be promoted), from competition that is liable to lead to anti-competitive foreclosure and is thus likely to harm consumers.

The Guidelines set out the analytical framework that the Commission will employ when assessing common forms of exclusionary conduct, such as *exclusive dealing, conditional and multi-product rebates, tying and bundling, predatory practices, refusal to supply* and *margin squeeze*[3].

This document sets out the general methodology that the Commission will follow when assessing whether or not an undertaking is in a *dominant position* and its degree of market power.

The assessment of whether a company holds a dominant position is the first step in the application of article 82 EC.

In assessing dominance the Commission will take into account, besides the company's market share, the competitive structure of the market, and in particular *(i)* constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors), *(ii)* constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry) and *(iii)* constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power). A soft safe harbor is created by stating that dominance is not likely if the market share of the company in question is below 40%.

The Guidelines then describe the general framework that the Commission will apply to assess whether to pursue a particular conduct as a priority. The Commission must show how the allegedly abusive conduct of the dominant undertaking is likely to restrict competition and thereby harm consumers. The dominant company may, however, rebut the Commission's finding of a likely negative effect by showing that its conduct is to likely ***create efficiencies*** which overall leave the consumers better off. Hence the Commission seems to be prepared to examine claims put forward by a dominant company **that its conduct is justified on efficiency grounds**.

This framework is subsequently detailed to the specific forms of exclusionary abuses abovementioned.

According to the Commission, the main principles of the effects-based approach to article 82 EC are the following: *(i)* fair and undistorted competition is the best way to make markets work better with inherent benefits for business and consumers; *(ii)* the focus of the Commission's enforcement policy should be on protecting consumers and on protecting the process of competition; *(iii)* the Commission does not need to establish that the dominant undertaking's

"THE GUIDELINES INTEND TO SET OUT AN ECONOMIC AND EFFECTS-BASED APPROACH TO EXCLUSIONARY CONDUCT UNDER EC COMPETITION LAW."

conduct actually harmed competition, rather that there is convincing evidence that harm is probable; and *(iv)* since the focus of the Commission's enforcement policy is on the likely effects of a dominant undertaking's conduct on consumers, the Commission will examine claims put forward by dominant undertakings that their conduct is justified on efficiency grounds - as is already the case under article 81 EC and for merger control.

It should also be noticed that the guidelines are imbued with economical and econometrical concepts, which may introduce some complexity in the (self) assessment of the undertakings' conducts. However the Guidelines are to be welcomed since they appear to introduce an important element of legal certainty and seem to depart from a previous *formalistic* and *presumptive* approach taken by the Commission, which tendentiously presumed systematic anti-competitive effects in any *exclusionary conduct*, underestimating their eventual pro-competitive effects.

The Commission's approach to the assessment of exclusionary conduct under EC Law seems to have taken a step towards closer convergence with the approach to unilateral conduct followed, *inter alia*, by the US. As a matter of fact, the US Department of Justice recently published a report on the assessment of single-company conduct under Section 2 of the Sherman Act. Despite this phenomenon of convergence, also assisted by the improvement in transatlantic cooperation between antitrust agencies, there are still differences on a number of issues such as the way to balance the pro-and anti-competitive effects of a conduct, the role of market shares in assessing dominance and the assessment of pricing conduct. ■

[1]0J C45, 24.02.2009. [2]According to public information, during its internal review the Commission also discussed exploitative conduct (e.g.: charging excessively high prices or price discrimination between customers). However, the focus of its work thus far has been on exclusionary conduct since the Commission's priorities seem to be to prevent market distortion (*ex ante* action) rather than to act once market distortion is verified (*ex posi* action). [3]These types of conducts are perceived as aiming to exclude actual competitors from expanding or potential competitors from entering a given market, thereby depriving customers of more choice, innovative goods or services and/or lower prices.

Supreme Court of Justice clarifies deadline to appeal

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The Supreme Court of Justice in its uniformizing decision n.º 1/2009 4 December 2008, declared that there is a 10-day deadline in misdemeanour cases, both in relation to appeals to the Court of Appeal and replies, pursuant to article 74 (1) (4) and article 41 of the General Regime for Administrative Offences. This judgment clarifies the meaning of the referred legal provisions, as there was strong divergence in both the doctrine and the jurisprudence with respect to the applicable deadline. Furthermore, this decision is of paramount importance for competition law cases, in which the Portuguese Competition Authority imposes fines on companies involved in anti-competitive practices, since the General Regime for Administrative Offences constitutes the subsidiary regime for the Competition Act (Law n.º 18/2003, 11 June). The decision, issued by the Supreme Court of Justice, is available in the Official Journal: DR 1.ª Série, n.º 11, 16.01.2009, pp. 389 and ff.. ■

Commission sends statement of objections to Microsoft for tying Internet Explorer to Windows (alleged abuse of a dominant position)

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The European Commission ("Commission") has confirmed that it sent a Statement of Objections ("SO") to Microsoft on 15 January 2009 (see MEMO/09/15, available on the Commission's website). The SO establishes the Commission's preliminary view that Microsoft's tying of its web browser Internet Explorer to its dominant client PC operating system Windows infringes the provisions on abuse of a dominant position (article 82 of the Treaty establishing the European Community).

In the SO, the Commission sets out evidence and outlines its preliminary conclusion that Microsoft's tying of Internet Explorer to the Windows operating system harms competition between web browsers, undermines product innovation and ultimately reduces consumer choice.

The SO is founded on the legal and economic principles established in the judgment of the Court of First Instance of 17 September 2007 (case T-201/04), in which the Court of First Instance upheld the Commission's decision of March 2004 (see IP/04/382), finding that Microsoft had abused its dominant position in the PC operating system market by tying Windows Media Player to its Windows PC operating system (see MEMO/07/359).

> "Microsoft's tying of Internet Explorer to the Windows operating system harms competition between web browsers."

The evidence collected during the course of the investigation leads the Commission to believe that the tying of Internet Explorer with Windows, which makes Internet Explorer available on 90% of the world's PCs, distorts competition on the merits between competing web browsers. The Commission is concerned that through the tying, Microsoft shields Internet Explorer from competition with other browsers.

After Microsoft's reply to the SO and if the preliminary views expressed in the SO are confirmed, the Commission may impose a fine on Microsoft, require the company to cease the abuse and impose a remedy that would restore genuine consumer choice and enable competition on the merits. ■

LEX MUNDI
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Morais Leitão, Galvão Teles, Soares da Silva hosts Lex Mundi annual regional meeting on Antitrust, Competition and Trade Practice in Lisbon

Morais Leitão, Galvão Teles, Soares da Silva & Associados, R.L, as member firm of Lex Mundi, hosted in its Lisbon offices on February 13 2009, the annual Lex Mundi European regional meeting on Antitrust, Competition and Trade Practice, in which several Competition Law issues were debated. The meeting brought together Competition Law experts from several European Union jurisdictions, namely Austria, Belgium, Czech Republic, Denmark, Greece, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Slovak Republic, Spain and Switzerland.

The firm was represented by partners Carlos Botelho Moniz and Joaquim Vieira Peres and Senior Associates Margarida Rosado da Fonseca, Gonçalo Machado Borges and Eduardo Maia Cadete.

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Partner Carlos Botelho Moniz and Senior Associate Gonçalo Machado Borges ensured a Portuguese presence in the December 2008 edition of Lex Mundi's InsideCounsel Magazine. They submitted an article on the Portuguese pre-merger notification procedure. Fifteen Lex Mundi European member firms participated in this edition and their overviews may be found at http://www.lexmundi.com/images/lexmundi/PDF/InsideCounsel/InsideCounsel_Europe_Dec2008.pdf.

MLGTS is the sole Portuguese member of Lex Mundi, the world's leading association of independent law firms, with more than 21,000 lawyers in 160 firms, combining 560 offices in 100 countries.

Mattos Filho Veiga Filho Marrey Jr. e Quiroga ADVOGADOS

PARTNERSHIP MLGTS / MATTOS FILHO

It is with great pleasure that we inaugurate a new section in this edition, where we will periodically highlight the most relevant topics of Competition Law in Brazil.

This section will be compiled by the leading Brazilian law firm Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados. We are grateful for their contributions, which we feel sure will certainly be greatly appreciated by our readers, regardless of their nationalities.

This initiative takes place in the context of the strategic partnership entered into by MLGTS and Mattos Filho Advogados in late 2006 in the areas of Corporate Law, M&A and Capital Markets, which has been extending to other areas, such as European Union and Competition Law. This partnership has allowed both firms to continue to render optimum cross-border legal services to their clients in an increasingly globalised market, assisting public and private entities in some of the most relevant transactions in Portugal and Brazil. We expect this publication to contribute to a growing approach between Brazilian and Portuguese Law.

2008 Overview of the Brazilian system of Economic Defense

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In 2008, the Brazilian System of Economic Defense (SBDC) adopted some measures to improve the work that has been performed by the Brazilian competition authorities. In the present structure, the SBDC is formed by: the Administrative Council for Economic Defense (CADE), an independent agency that assesses concentration acts and infractions against the economic order; the Secretariat of Economic Control (SEAE), responsible for the economic analysis of the processes; and the Secretariat of Economic Law (SDE), which investigates antitrust infractions and scrutinizes concentration acts.

In 2008, the three departments acted with efficiency, transparency and celerity. We should emphasize the good work carried out by SEAE, which helped to consolidate the development of the system, providing valuable technical support in the detailed analysis of the relevant markets in concentration acts. CADE improved its information system and communication with the public, especially through the Internet, by making process data and case law available to everybody, not only to the lawyers. With the adoption of the summary procedure, the joint analysis and the creation of binding judicial precedents, the time spent upon process analysis was reduced and many cases were collectively judged.

CADE has also reinforced its international presence (OCDE, ICN and others), executed cooperation partnerships with other countries (Portugal, Russia and Canada) and invested in training courses and technical expertise. The great challenge, however, is still to defend its decisions in the Courts. According to the Brazilian Federal Constitution (article 5, XXXV), administrative decisions are subject to review by the Judiciary. Courts are being used to overturn the unfavourable decisions of CADE. By confirming or reformulating CADE's decisions the Judiciary can help to consolidate the antitrust case law.

However, the slowness of judicial proceedings is the main obstacle to the use of this important tool. It takes on average 10 years to conclude such law suits (transit in rem judicatam). Companies are using this remedy to call into question the restrictions imposed by CADE. In 2007, for instance, CADE was involved in 460 law suits, the largest number since the Competition Law was enacted in 1994.

The anti-cartel policy initiated by SDE has been constantly updated and improved. In 2008, four important measures were adopted: (1) the authorities held specific meetings with the main law firms located in the United States and Europe, with the purpose of encouraging their clients involved in cartels to assist with investigations in Brazil; (2) information about cartels was published and distributed in the main Brazilian airports to inform and motivate the population to denounce cartel practices; (3) preventive actions with local authorities were taken, to warn them about cartels in public bids; and, (4) investigations were focused on trade associations and on the so-called "popular cartels" (formed by small-size companies).

If we take into consideration the difficulties of the system, the Brazilian authorities are doing an outstanding job. Besides investigations of infractions against the economic order, SDE also carries out the legal examination of concentration acts. Approximately twenty professionals are responsible for conducting cartel investigations in the whole country. From January to October 2008, SDE carried out 57 search and seizure orders and 32 people were temporarily arrested because of collusion accusations. To convey an idea of the amount of work performed by SDE, from January to October 2008 in the region of 120 administrative proceedings and 530 concentration acts were sent to CADE for judgment.

SDE has bolstered its cartel fighting capacity by signing partnership agreements (Canada and Chile), entering into technical assistance interchange (Chile, Norway, Egypt and Poland) and joining forums for debate (OCDE, UNCTAD and ICN). Finally, it is important to mention the progress of the Bill No. 3937/04, which will modify the SBDC. On December 17, 2008, the House of Representatives approved the aforementioned Bill. The key changes propose a new structure for the system, the obligation of prior filings for concentration acts, new procedures, new thresholds for the filing and new penalties. The Bill is expected to be sent to the Senate this year, in order to be definitively approved by the end of 2009. ■

Contribution Mattos Filho Advogados (Cont.)

On November 7 and 8, 2008, the **14th International Conference of Competition Defense** took place in the city of Campos do Jordão, State of São Paulo, Brazil. Promoted by the Brazilian Institute of Competition, Consume and International Commerce Studies (IBRAC), the event counted with the presence of the Brazilian competition authorities, as well as Brazilian and foreigner lawyers, economists and entrepreneurs. MLGTS was represented by partner Carlos Botelho Moniz, who made a presentation upon the topic "Repression to the Abuse of Dominant Position, Unilateral Conducts and Exclusion Practices". In the other panels discussions a hypothetical case of joint venture was analysed and topics addressed included "The limits of Intellectual Property in the Antitrust Analysis" and "Competition and Industrial Policy". The conferences organized by IBRAC are an important meeting between the Brazilian antitrust authorities and the professionals that work in this law field. The main purpose of these conferences is to encourage people to contribute with their experiences and to promote sophisticated debates about relevant subjects in competition law.

Since December 2007 Brazilian competition law has allowed companies that are under cartel investigation to enter into agreements with the antitrust authorities in the course of the process. They are called Termination Agreements (TCC). Prior to that date, they could only be executed by companies involved in other infractions against the economic order, except cartels. Through the TCC, the economic agent under investigation agrees to terminate the infraction, to pay a financial indemnity, to cooperate with the authorities in the investigation process and, depending on the TCC terms, to recognize the infraction and guilt in the cartel formation. Although the execution of the TCC is proposed by the company under investigation, CADE has discretionary powers to enter into the TCC and negotiate its terms and conditions. By the end of 2007 and in 2008, TCCs were executed with the refrigeration, packing and cement industries accused of cartels. From the latter, the pecuniary contribution of R$ 43 million was the highest ever paid.■

Competition Law Seminar MLGTS / Mattos Filho

In the context of the strategic partnership entered into by MLGTS and Mattos Filho Advogados, the firms jointly organised a seminar in São Paulo, Brazil, in November 2008, concerning the impact of competition law for businesses in Europe and in Brazil. The seminar was hosted at the head office of Mattos Filho in São Paulo with the participation of lawyers from both firms.

MLGTS was represented by partners Carlos Botelho Moniz and Joaquim Vieira Peres, who dealt, respectively, with *"Investigation and control of restrictive practices in European Law" and "Merger Control Procedure in European Competition Law".*

Mattos Filho Advogados was represented by partner Lauro Neto and lawyer Patrícia Avigni, who focused on the importance of regulated competition for the dynamic of companies and on the main features of merger control procedures and restrictive practices procedures in Brazil. ■

14Th International Seminar

on Competition Policy, Brazil 2008

MLGTS, represented by partners Carlos Botelho Moniz and Joaquim Vieira Peres, was invited to participate at the 14th International Seminar on Competition Policy promoted by IBRAC - Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade, which took place on the 7th and 8th of November 2008, at Campos do Jordão, Brazil. ■

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