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SPECIAL CONTRIBUTION: MATTOS FILHO ADVOGADOS

NEWS IN BRIEF

The exception to the reimbursement of unlawful aid - Lesson to be learnt from the CFI's Judgement in *BCA v. Commission*

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The Court of First Instance of the European Communities (CFI) delivered a judgement on September 10, 2009 in case T-75/03 - *Banco Comercial dos Açores v. Commission* that touches upon several important legal questions.

Decision 2003/442/EC of 11 December 2002 of the European Commission (Commission) established that the part of the scheme adapting the Portuguese national tax system to the specific characteristics of the Autonomous Region of the Azores, which reduces the rates of income and corporation tax, though a "state aid", is compatible with the common market except when it applies to financial institutions and intra-group activities. The Commission ordered the reimbursement of the unlawful aid[1].

"The novelty in the BCA case concerns the legal question of whether this type of situation, where "aid" is granted automatically, constitutes an exception to the rule on the Commission's competence."

Banco Comercial dos Açores ("BCA"), an Azores-based credit institution, brought an action to annul the said decision before the CFI, in the quality of recipient of the unlawful aid, which had been automatically applied. BCA was later notified by the national tax authorities that it was required to reimburse the amounts unduly received (with interest). Decree No 2/99/A, of 20 January 1999, adopted by the regional legislative assembly of the Azores, establishes the applicability of the reduction of income and corporation tax to all economic agents, whether natural or legal persons, insofar as they are subject to these taxes. In practice, the tax reduction is automatically applied and does not depend on any manifestation of will from the recipients.

The first legal question that has arisen in this appeal concerns the scope of application of the concept of "territorial selectivity" for the purposes of assessing the existence of a state aid measure. This question, in connection with this same regional legislative decree, was analyzed by the Court of Justice of the European Communities (ECJ) in case C-88/03, *Portuguese Republic v. Commission* and was arguably settled in its groundbreaking judgement of September, 6 2006.

In the present case, the CFI refers to the ECJ's judgement. However, the novelty in the BCA case concerns the legal question of whether this type of situation, where "aid" is granted automatically, constitutes an exception to the rule on the Commission's competence to order the reimbursement of the allegedly unlawful aid (Articles 87 and 88 EC and Regulation (EC) 859/1999, of March 22 1999[2]).

BCA argued that, given the specificities of this type of aid and the application of the principles of legal certainty and legitimate expectations, which are part of the general principles of Community law, inapplicability of the Commission's competence was justifiable.

However, the CFI recalled that the Commission's decision not to order reimbursement of unlawful aid when it is contrary to general principles of EC law constitutes an exception, as provided for in the said Regulation.

Moreover, given the mandatory nature of the Commission's scrutiny of state aid under Article 88 EC, recipients have a twofold obligation: on the one hand, they may only, in principle, allege legitimate expectations on the lawfulness of the aid when the same was lawfully granted and, on the other hand, diligent individuals should normally ascertain for themselves that the administrative proceeding of scrutiny of the measure was duly respected.

In the present case, the (infra)state aid measure was notified late to the Commission and was

"The CFI considered that the circumstances in which the aid was adopted, through a measure of a legislative nature, did not alter the obligation to reimburse the same aid, insofar as the latter has been considered unlawful."

implemented before it had been authorized by the latter. Furthermore, the ECJ's jurisprudence has considered that the recovery of unlawful state aid is the "logical consequence of the declaration of unlawfulness" (paragraph 126 of the CFI's judgment).

In view of this, the CFI considered that the circumstances in which the aid was adopted, through a measure of a legislative nature, did not alter the obligation to reimburse the same aid, insofar as the latter has been considered unlawful.

The CFI's understanding of the scope of this exception thus seems very restrictive. One may reflect on the practical effect in the present case of the CFI's very positive jurisprudential development of the notion of "direct and individual interest" for the purposes of assessing *locus standi* in the light of Article 230(4) EC, concerning state aid measures of a general nature, in line with the ECJ's understanding in case *Italy and Sardegnia Lines v. Commission* (judgement of October, 19 2000, cases C-15/98 and C-105/99) - the third legal question which was analyzed in this case.

In practice, in the aftermath of the CFI's judgement the sole procedural step to be taken by taxpayers such as BCA seems to be an action for damages against the Portuguese State in the national courts; ultimately raising the issue of the unconstitutional nature of measures imposing the retroactive payment of taxes. ■

[1] OJ 2003 L 150, p. 52. [2] OJ 1999 L 83, p. 1.

Commission imposes record fine for failure to notify a concentration

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The case

According to the EC Regulation on the control of concentrations between undertakings, the Commission may impose fines of up to 10% of the aggregate turnover of the undertakings in a concentration if they infringe the "standstill obligation", *i.e.*, if they fail to notify a concentration with a Community dimension to the Commission before its implementation.

In June this year the Commission imposed a historic fine of €20 million on Electrabel, a Belgian electricity producer and retailer, member of the Suez group, for acquiring another electricity producer - Compagnie Nationale du Rhône (CNR) - without having received prior authorization.

The facts of the case are interesting. In March 2008, Electrabel notified its acquisition of control of CNR to the Commission. Although Electrabel did not hold the majority of the capital or of the voting rights, a number of circumstances conferred *de facto* control over CNR. Namely, Electrabel was by far the largest shareholder of CNR, holding close to 50% of the shares, which together with the wide dispersion of the remaining shareholders and past attendance rates gave CNR a constant majority at shareholders' meetings. Electrabel also enjoyed an absolute majority on CNR's Executive Board, enabling it to affect strategic decisions. It was moreover the sole industrial shareholder.

In April, the Commission cleared the acquisition unconditionally but decided not to define the precise date on which Electrabel had acquired control of CNR and to carry on the investigation of this issue.

The Commission came to the conclusion that Electrabel had acquired control of CNR more than four years before proceeding with its notification. More precisely, the Commission found that Electrabel has been controlling CNR since December 2003, when it acquired the shares held by EDF and became the largest shareholder, which together with the facts mentioned above, conferred *de facto* control. The Commission therefore decided to impose a €20 million fine on Electrabel.

> "The case demonstrates that even when the failure to notify was due to negligence it will nonetheless be considered a serious violation."

The Commission has justified the record-breaking fine with reference to the seriousness of the infringement and its long duration. It furthermore felt that Electrabel should be familiar with EU merger control rules[1] and should thus have notified the acquisition back in 2003. Although Electrabel's approach in notifying the concentration to the Commission acted as a mitigating factor, such behaviour does not confer immunity from fines.

Lessons to be learnt

Companies involved in mergers and acquisitions should draw two important conclusions from the Electrabel case:

- Even if the concentration does not raise any competition concerns, failure to notify constitutes a serious infringement of EU law because it goes against a basic principle of the Merger Regulation, which is to ensure prior control of concentrations with a community dimension. The case constitutes a clear signal from the Commission, showing that it will not tolerate this type of infringement
- Companies involved in any kind of merger or acquisition or any similar transaction should carefully analyze whether it does not lead to *de facto* control, even if for the parties it seems like a mere acquisition of a minority shareholding. It should be noted that, in the past, shareholdings of less than 20% have been found to confer the possibility of exercising decisive influence, hence control[2].

Furthermore, the case demonstrates that even when the failure to notify was due to negligence it will nonetheless be considered a serious violation. To make matters worse, it should be noted that an undertaking may acquire control over another undertaking (or part of another undertaking) without engaging in active behaviour, in other words control can be acquired through passive behaviour.[3]

In Portugal

Under Portuguese Competition Law, failure to observe the stand-still obligation in mergers with a national dimension may also be sanctioned with fines of up to 10% of the turnover of each of the undertakings involved in the transaction.

In recent years there have been no public decisions on fines imposed by the Portuguese Competition Authority for failure to comply with the stand-still obligation (the last examples date back to 2003 and were based on the previous law).

Nonetheless the Portuguese Authority has made it known that in 2007 alone it initiated seven proceedings for failure to respect the legal time limit to notify a merger. The outcome of these proceedings is still unknown. ■

[1] Electrabel and Suez, at the time of the notification, had already filed together six notifications under EU merger control rules. [2] Decision CCIE/GTE, 25 September 1992, case M.258. [3] As an example see Decision RTL/M6, 12 March 2004, case M. 3330, where RTL was found to have passively acquired control, even though it did not acquire additional shares and even though it did not hold more than 50% of the shares, because Suez, with whom RTL exercised joint control over M6, sold its shares and these became widely dispersed.

Court of Justice rules that Member States may *ex officio* reduce or freeze medicinal product prices

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A EEC Directive 89/105 is designed to ensure the transparency of national measures regulating the prices of medicinal products for human use and their inclusion in Member States' national health systems.

In Italy, during 2005 and 2006, the *National Medicines Agency* (NMA), the entity responsible for monitoring the consumption of medicinal products and pharmaceutical expenditure incurred by the *Italian National Health Service* (NHS), adopted *ex officio* certain measures aimed at reducing the prices of medicinal products in order to ensure compliance with the upper limit of pharmaceutical expenditure borne by the NHS.

Menarini and other pharmaceutical companies, which market medicinal products, the costs of which are wholly paid by the NHS, sued the Ministry of Health and NMA in respect of aforesaid measures before the Italian administrative courts. National courts referred the lawsuit to the European Court of Justice, to enquire whether the Italian system for pricing medicinal products was in conformity with EEC Directive 89/105.

In its judgement of April 4, 2009, in case C-352/07[1], the Court of Justice highlighted that Community law does not detract from Member States' powers to organize their social security systems and to adopt, specifically, provisions intended to govern the consumption of pharmaceutical products in the interests of the financial stability of national healthcare schemes.

Thus the European Court decided that a Member State may adopt general measures with the purpose of reducing the prices of all or of a certain categories of medicinal products, even if the adoption of those measures is not preceded by a freeze on those prices.

> "Community law does not detract from Member States' powers to organize their social security systems and to adopt, specifically, provisions intended to govern the consumption of pharmaceutical products."

However, in the event of a price freeze imposed on medicinal products, the Member State must undertake to review, at least once a year, whether macro-economic conditions justify a continuation of the price freeze. Such a review is, under the terms of the Directive and according to the Court, a minimum requirement. In accordance with the results of such review process, a Member State may decide to maintain a freeze on the prices of medicinal products or to adopt measures increasing or reducing the medicinal products' prices. The Court of Justice decided that as long as such minimum condition is met, measures reducing prices may be adopted more than once a year and for several years by Member States.

The Court also declared that the Directive does not preclude national measures controlling medicinal product prices from being adopted on the basis of predicted expenditure, provided that the estimates are based on objective and verifiable data. In accordance with the judicial ruling, a contrary interpretation would constitute interference in the organization by the Member States of their domestic social security policies and would affect their policies for pricing medicinal products to an unacceptable degree - beyond that which is necessary to ensure transparency in light of the Directive's goals. Furthermore, the Court confirmed that, in the absence of any indication in the Directive as to the types of expenditure which Member States may take into account in order to continue a price freeze or to increase or reduce medicinal product prices, it is up to the Member State to determine the criteria on the basis of which the macro-economic conditions are reviewed.

Lastly, the Court of Justice stated that if, in exceptional cases and for particular reasons, a pharmaceutical company - which holds a marketing authorization for a medicinal product that is affected by a measure freezing or reducing medicinal product prices - requests a derogation from the price imposed pursuant to such measure, it must duly specify the particular reasons that justify the application of the derogation. In this context it is up to the respective Member State to ensure that a sound decision is adopted in response to any such request.

In a nutshell, this case, pursuant to Community law, confirms that Member States enjoy wide discretionary vis-à-vis the adoption of national measures to determine the price of medicines provided in national healthcare systems, including freezing and reducing medicinal product prices. ■

[1] Available at http://curia.europa.eu.

First antitrust fines in the energy sector: E.On and GDF Suez fined €553 million each for sharing gas markets

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On 8 July 2009 the European Commission imposed on GDF Suez and E.On Ruhrgas fines totaling €1.1 billion by agreeing not to supply gas transported through the jointly-owned MEGAL pipeline in the other company's home market, in breach of Article 81 of the EC Treaty[1]. This is one of the several Commission investigations initiated further to the Energy Sector Inquiry, and the first in which the Commission imposed fines on the companies involved.

The E.On/GDF case

E.On Ruhrgas and GDF Suez, two of the largest players in the European gas industry, are currently the leading suppliers of natural gas in Germany and France, respectively.

In 1975 Ruhrgas, now part of the E.On group, and Gaz de France (which merged with Suez in 2008) decided jointly to build the MEGAL pipeline, in order to transport gas across Southern Germany between the German-Czech and German-Austrian borders to the east and the French-German border to the west. At the time, both companies explicitly agreed in two letters that they would not sell gas transported over the MEGAL pipeline in each other's home markets. Although in 1975 there was no competition in the French and German gas markets - Gaz de France enjoyed a legal monopoly over natural gas (which ended in August 2000), and Ruhrgas' supply area in Germany was protected from competition through a "*demarcation agreements system*" with other German suppliers, until such agreements became illegal in April 1998 - the Commission claims that the parties continued to enforce the agreement after the gas markets in both countries were opened to competition in August 2000 by EC Directive 98/30/EC, despite being aware that after that date the 1975 letters violated competition law.

Although E.On and GDF Suez argued that the letters had long been considered "null and void", the Commission established that until September 2005 the companies met on a regular basis at various levels to discuss the implementation of the agreement and monitor each other's actions.

The very high fines were motivated by the large size of the two groups, the anti-competitive purpose of the market-sharing agreement and the seriousness of this infringement to the EU internal market. The Commission set equal fines for E.On Ruhrgas and GDF Suez, given their equal stake in the MEGAL pipeline and the gas volumes transported over the pipeline.

Fines vs. Remedies

In contrast to other recent energy sector cases, the Commission chose to close the E.On/GDF Suez investigation by imposing substantial fines on the companies.

Indeed in October 2007 the Commission accepted Distrigas' commitments in order to close an investigation into its allegedly abusive long-term gas supply contracts with major customers[2]; in February 2009, it accepted commitments from E.On concerning allegations of abuse of dominant position in the German electricity wholesale and balancing markets[3]; in March 2009 remedies from RWE were accepted in relation to an alleged abuse of dominance investigation into the German gas transport market[4]; and, curiously, on 8 July 2009 even GDF Suez itself submitted a major reduction in its long-term reservations of gas import capacity into France, in order to address the Commission's concerns regarding the alleged foreclosure of access to gas import capacities in France. The Commission's decision making the commitments legally binding is likely to be adopted in the near future, as the two-month deadline for third parties' comments recently lapsed[5].

Comment

The Commission's practice thus far indicates that it is more willing to accept commitments (without imposing fines) in Article 82 dominance cases rather than in Article 81 agreements cases. Agreements between competitors, especially on issues such as market partitioning or price-fixing, are considered particularly serious by EC competition law, and heavy fines are seen as important deterrents for future illicit behaviour.

In addition, the substantial structural commitments extracted by the Commission from the allegedly dominant companies (significantly, E.On will divest part of its production capacity and its electricity transport network in Germany, and RWE will divest its German gas transmission network) address the main shortcomings identified in the Energy Sector Inquiry, namely market concentration and vertical integration of the dominant players[6]. In cartel cases a formal infringement decision may also assist injured third parties in claiming damages before national courts in "follow-on" actions, as the Commission's decision (if not overturned on appeal) constitutes proof that the illegal conduct took place.

Finally, the fines imposed in the E.On/GDF case - the second largest fines ever imposed on individual companies[7]- show that the Commission is determined to enforce the competition rules in the energy sector, in particular in the areas where the Sector Inquiry identified competition malfunctions. As there are a number of additional investigations in the pipeline (in March this year the Commission confirmed having sent Eni a statement of objections concerning alleged violations of Article 82 in the operation of the Italian natural gas transmission network[8]), it is likely that the serious antitrust scrutiny of the energy sector will continue in the foreseeable future. ■

[1]See IP/09/1009. [2]Decision of 11.10.2007, OJ 2008 C 9/9. [3]Decision of 26.11.2008, OJ 2009 C 36/8. [4]Decision of 18.03.2009, COMP/39.402. [5]IP/09/1097. [6]Communication of 10.01.2007, COM (2006) 851 final. [7]Only the €896 million fine imposed in 2008 on Saint Gobain was higher (IP/08/1685, of 12.11.2008). [8]MEMO/09/120, of 19.03.2009.

ECJ examines (twice) compatibility with EC law of the restrictions imposed on the ownership and operation of retail pharmacies

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On May 19, 2009, the European Court of Justice (ECJ) issued its first decision on the compatibility with EC law of national measures that ban non-pharmacists from owning and operating retail pharmacies - judgements *Commission v. Italy* (Case C-531/06) and *Apothekerkammer des Saarlandes and others* (joined Cases C-171/07 and C-172/07).

The ECJ determined that national legislation, such as the relevant Italian and German legislation, which gives pharmacists the exclusive right to own and to operate retail pharmacies, is not necessarily incompatible with the EC Treaty. This guideline was also expressed in the opinion of Advocate General Yves Bot, from December, 16 2008.

The ECJ recognized that national measures conferring the ownership and the operation of retail pharmacies upon pharmacists alone constitutes a restriction to the freedom of establishment and the free movement of capital (articles 43 e 56 of EC Treaty). However, the ECJ accepts that this restriction can be justified on grounds of the protection of public health, namely with the aim of ensuring that the provision of medicinal products at a retail level is reliable and of good quality.

The exclusion of non-pharmacists was considered appropriate by the ECJ given the specific character of medicinal products and the adverse consequences that could arise for public health from a disordered distribution. Moreover, the ECJ considered that pharmacists develop their activity not with a purely economic objective, but also from a professional viewpoint: «*his* [the pharmacist] *private interest connected with the making of a profit is thus tempered by his training, by his professional experience and by the responsibility which he owes, given that any breach of the rules of law or professional conduct undermines not only the value of his investment but also his own professional existence*». (see § 61, case 531/06). The ECJ found that this restriction was proportional, because other national measures intended to assure the pharmacists' professional independence would not protect public health as effectively as legislation excluding non-pharmacists. In the Court's opinion, pharmacists uniquely benefit from the independence and impartiality required in the retail provision of medicinal products.

It is worth noting that the ECJ stated itself that national legal provisions should only be regarded as appropriate for securing a given objective if they genuinely reflect a concern to attain that objective «*in a consistent and systematic manner*» (see § 66, case 531/06, and § 42 of joined cases 171/07 e 172/07).

In case 531/06 the ECJ indicated that the Commission had not shown sufficient evidence or expounded arguments on whose basis the court would be able to conclude that the Italian legislation was inconsistent with other national rules, «*such as the rule which permits a person to become a member of a distribution undertaking and a member of a company entrusted with the operation of a municipal pharmacy provided that he does not hold in the distribution undertaking a position entailing decision making and control.*». (see § 104).

It will be interesting to observe the impact that these judgements may have in the infringement proceeding actually pending against Portugal concerning the national law in force on the ownership and operation of retail pharmacies[1].

In fact in Portugal the legislator abolished the privileged position of pharmacists in the access to ownership of pharmacies, without deeming it necessary to protect public health through a monopoly, as in the Italian and German law analyzed in the judgements. Decree-Law no 307/2007, from August 21, provides that any individual or legal person can own up to four pharmacies in Portugal (article 15, no 1). However that Decree-Law stipulates at the same time restrictions concerning the right to own or exercise, directly or indirectly, the ownership, operation or management of pharmacies, namely by pharmaceutical wholesale companies (article 16).

> "It will be interesting to observe the impact that these judgements may have in the infringement proceeding actually pending against Portugal."

Despite this restriction imposed on wholesalers, the remaining provisions of Portuguese law do not impede the opposite scenario, that is, the possibility for retail pharmacies to own pharmaceutical wholesale companies, which is quite usual in practice owing to the existence of cooperatives of pharmacies.

The references made by the ECJ in the cases indicated above concerning the need for consistency in the national measures restricting the Treaty's fundamental freedoms seem to have left some leeway for a different approach in those cases where asymmetries, as in Portugal[2], exist in the Member States' legislation. It is possible that in these cases the ECJ could reach a different conclusion than the one adopted in the judgements referred to above. ■

[1] See European Commission press release IP/08/1352, from 18.09.2009, available in http://europa.eu/rapid/. [2]This asymmetry was therefore signaled by the Competition Authority in its Recommendation nr. 1/2006 regarding the pharmaceutical sector, available in http://www.concorrencia.pt/Download/recomendacao2006_01.pdf.

SPECIAL CONTRIBUTION: MATTOS FILHO ADVOGADOS

Industrial Policy in the Brazilian Software Industry

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The Brazilian System of Economic Defence has recently judged a concentration act that became an important precedent in Brazilian's antitrust case law. In the second semester of 2008, Totvs S.A. acquired the competitor Datasul S.A., thereby becoming one of the leading Enterprise Application Software (EAS) companies in Brazil.

This is an important case because the Brazilian antitrust authorities, and especially the Report Counselor, made an in-depth analysis of the competition pattern of the software industry in Brazil, in the context of the industrial policy that is being applied to this sector.

Owing to the fact that the software industry is considered as strategic for national development, the Brazilian government has adopted an innovative industrial policy for this sector, offering several incentives to the companies, such as tax exemptions, loans, joint research etc. In the context of the aforementioned transaction, the Administrative Council for Economic Defence (CADE) analyzed whether there would be a real conflict between industrial policy and the defence of competition.

The Report Counselor observed that private national companies have developed by meeting the specific demands of the domestic productive structure, and have consolidated their presence in markets not initially served by foreign companies.

Since the presence of Brazilian companies is stronger in segments with low barriers to entry, where a dispersive tendency prevails with a large number of companies, the way to achieve high levels of technological density involves incentives to corporate concentrations, with this factor being a central element of the present industrial policy in Brazil. The governmental incentives created within the scope of the "Productive Development Policy" encourage growth in the sector via the expansion and consolidation of existing companies rather than through the emergence of new entrants.

This could seem paradoxical, given that the whole Brazilian System of Economic Defence is grounded upon a neoclassic foundation whose purpose is to avoid the arrival or the abuse of market power, by means of controlling concentration acts and preventing and repressing infractions against the economic order.

In Brazil there was no antitrust policy during the period in which the government opted for the adoption of developing industrial policies, and vice versa. Today, the necessity to compete on a global basis has forced Brazil to give priority to industrial policy and the challenge of the authorities is to conciliate both policies harmoniously.

The participation of Totvs and Datasul in the incentives programme of the Brazilian government to the software industry was determinant to the antitrust analysis of the case. Notwithstanding, the authorities fully analyzed the competitive dynamics of the sector and the relevant markets involved, reinforcing many important references.

In the area of product analysis, they recognized that software has a non-material nature; it interacts with the operation of material assets and can be reproduced without limits. Software was considered an "information asset", with the specificity of using knowledge (human capital) as the main input.

Despite the recognized difficulty in precisely defining the products' relevant markets (EAS in general or segmented by applications), the levels of concentration justified all steps of the antitrust analysis. The Report Counselor noted that successive innovations are the most efficient form of protecting intellectual property, but may also represent a barrier to entry. However, the longevity of software companies depends crucially on their capacity to innovate.

The main competitive strategies in the Brazilian market of EAS software were identified as quality, product innovation flow and the operational costs that make the sector populated by efficient and dynamic companies. As software is a homogeneous product and there is no price transparency, the authorities have concluded that market conditions are not favourable to coordinated effects, tacit or explicit.

The approval without restrictions of the concentration act made between Totvs and Datasul represented a landmark in CADE's case law, since it discussed the reflexes of the governmental industrial policy in the competitive dynamics of an important sector of the economy. Traditionally, industrial policy and antitrust policy have always been seen as antagonistic in Brazil, but now there is a clear sign that both of them may coexist in favour of Brazilian society. ■

Events to commemorate the second National anti-cartel day

On October 8 this year Brazil celebrated the second annual "National Anti-Cartel Day" with a series of initiatives. Books with information about cartel crime, damage to consumers and how to denounce such infractions were distributed in Brazilian airports. The purpose of this campaign is to attract new cartel informers and to make the Brazilian population aware of the importance of fighting this practice.

The first Congress of National Anti-Cartel Strategy took place, with the participation of the President Luiz Inácio Lula da Silva, the Minister of Justice Tarso Genro and members of the Competition General Board of the European Commission and the Department of Justice of the United States of America (DOJ). During the event, a cooperation agreement was signed with the European Union for the exchange of experiences and a greater degree of integration in the struggle against cartels. Brazil already has similar agreements with the United States, Portugal, Russia, Chile and Argentina. ■

Plaintiffs' status in Community infringement procedures

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On September 2009 the European Court of First Instance (CFI) issued an Order closing the proceedings in case T-186/08, *Liga para a Protecção da Natureza (LPN) v. Commission*. This case dealt with the procedural status of individual plaintiffs in the framework of Community infringement procedures opened by the European Commission against Member States in the light of Article 226 EC.

The Portuguese Republic also participated in this case in support of the Commission's position, since the applicant was seeking to annul the Commission's decision that closed the infringement procedure initiated against Portugal on the construction of the Baixo Sabor dam, a project developed by EDP.

By means of a reasoned Order, the CFI considered that the action was manifestly inadmissible and dismissed the appeal without opening the oral stage and going to the substance of the case. The Court has set out important aspects concerning the procedural rights and guarantees of individuals participating in these procedures.

First of all, the Court confirmed that the Commission enjoys a discretionary and non-contestable power in the context of infringement cases. It may not be forced to initiate such procedures or to take a stand in a given direction. This means that individuals are not entitled to challenge a decision by the Commission not to act against a Member State.

On the other hand, the position of a complainant in an infringement procedure differs substantially from that of a complainant in, for example, a competition case. While in this last situation individuals are entitled to procedural rights that may be scrutinized by the courts, in an infringement procedure those individuals do not hold procedural guarantees under Community law; there is merely a commitment by the Commission to consult the plaintiffs at some of the key stages of the pre-litigation phase of the proceedings.

Finally, it was also ruled that, since the Commission is not bound to commence infringement proceedings, its decision not to institute such proceedings may not, under any circumstance, be regarded as an illegal behaviour likely to give rise to non-contractual liability on the part of the Community and to an eventual obligation to indemnify under Article 288, § 2 EC. ■

Non-published proposal for a Private antitrust enforcement directive

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Although not yet available in the public domain, the European Commission has issued a Proposal for a Council Directive on rules governing actions for damages for infringements of Articles 81 and 82 EC (Draft Directive). This document, leaked out in the typical Commission manner, follows the recommendations set out in the White Paper.

The Commission has acknowledged the absence of private enforcement in most of the Member States and the harmful costs to society of antitrust infringements. Therefore, the aim of the future Directive is to ensure "that all victims are in a position to obtain full compensation of the damage caused by an infringement of the EC competition rules".

The Draft Directive contemplates, amongst others, the following suggestions: collective redress mechanisms through group and representative actions, rules on disclosure of evidence held by the opposing party or by a third party ordered by a judge, passing-on of overcharges by the defendant, conferring a binding effect on final infringement decisions by national competition authorities or by a review court, and rules on fault and limitation periods. ■

Commission's new proposals relating to vertical agreements

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The European Commission published, on July 28 2009, its proposal for a revised Block Exemption Regulation and Guidelines on supply and distribution agreements (vertical restraints), for comments. The Commission Block Exemption Regulation N° 2790/1999 ensures that supply and distribution agreements that comply with its provisions benefit from an exemption from the EC Treaty's ban on restrictive business practices (Article 81(1). The current Block Exemption Regulation on vertical restraints expires in May 2010.

Amongst other innovations, the proposed revised Regulation excludes from the Block Exemption any agreement where either the market share of the seller or buyer exceeds 30%.

As concerns internet sales, the Commission provides new examples of restrictions that, if imposed on the distributors, would render the Block Exemption inapplicable. Some of the examples are:

(i) requiring a (exclusive) distributor to prevent customers located in another (exclusive) territory from viewing its website or requiring the distributor to put on its website automatic re-routing of customers to the manufacturer's or other (exclusive) distributors' websites; and

(ii) requiring a (exclusive) distributor to terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory. ■

Portuguese Competition Authority fines Portugal Telecom and ZON for abuse of dominant position (broadband access markets)

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Following an investigation which began in late 2003, prompted by complaints from several operators, the Portuguese Competition Authority recently concluded that, between 2002 and 2003 various companies within the Portugal Telecom (PT) and ZON groups abused their dominant position in the national broadband access markets.

At the time of the alleged abuses all these undertakings were a part of the PT group, which was the sole existing supplier of wholesale broadband access. PT also held a clearly dominant position in the retail broadband market, which translated into market shares of 70.7% in 2002 and 77.7% in 2003[1].

According to the Competition Authority, the defendant companies implemented different types of abusive practices (falling within headings a), c) and e), of Article 4(1) of the Competition Act), in each case related to the coordination, between 22 May 2002 and 30 June 2003, of the wholesale pricing system chosen for the Rede ADSL PT bitstream offer, with the prices made available in several retail broadband access offers (SAPO and Netcabo tariff plans).

Based on the coordination of both these sets of (wholesale and retail) prices, the PT and ZON group companies allegedly committed the following abuses:

(i) Margin squeeze (by setting the wholesale and retail broadband access prices in an artificial and unfair manner, so as to prevent an equally efficient operator from making a profit):

(ii) Introducing a discriminatory discount scheme in the Rede ADSL PT wholesale offer, to the detriment of competing operators;

(iii) Limiting production, distribution, technical development and investment in broadband access services in Portugal.

These practices apparently led to a decrease in the alternative operators' market shares, from 36% (before the alleged infringing behaviour) to 19%, whilst PT benefited, during the same period, from a growth rate in the number of new broadband access clients of 193%.

The undertakings involved were fined an overall amount of €53 million (45,016 million for the companies belonging to PT and 8,046 million for the ZON group subsidiaries). ■

[1] See press statement n.º 16/2009 from the Competition Authority, dated 2 September 2009.

Commissioner Neelie Kroes signs Memorandum of Understanding with Brazil

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On October 8 2009 a Memorandum of Understanding was signed between the European Commission and Brazil in order to increase cooperation between the European Commission's Directorate General for Competition and the Brazilian competition authorities. According to the available information the Memorandum of Understanding provides a framework for administrative cooperation, dialogue and exchanges between the Commission's competition department and Brazil's competition authorities. ■

MLGTS Associate Mónica Pinto Candeias concluded with the final classification of 18 her Master of Laws in the University of Lisbon Law School. The dissertation concerns "*Merger control in oligopolistic markets in the energy sector: a light in the end of the tunnel*". Mónica Pinto Candeias is a member of the European and competition law department. ■

MLGTS associate Alberto Saavedra was awarded a distinction in the LLM-Master of Laws at UCL-University College London (University of London). The topic of his dissertation was entitled "*The interaction between the leniency programme and private actions for damages*". Alberto Saavedra works with the firm's European and competition law department. ■

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