MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS

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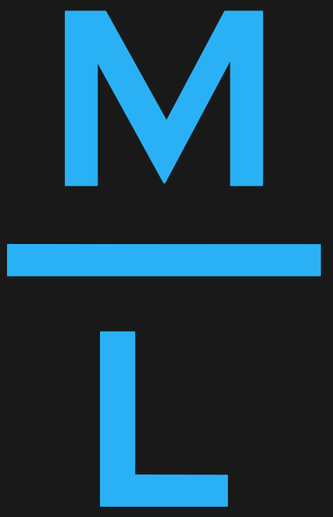
NEWSLETTER
EU AND COMPETITION LAW



no. 29, December 2018 / January 2019

ISSN 1647-272

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MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA
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The EU Framework for the Screening of Foreign Direct Investment

The European Union (EU) framework for the screening of Foreign Direct Investment (FDI) will soon enter into force and enable Member States under certain conditions to block FDI in companies or assets considered of strategic importance, on grounds of security or public order. The framework can be expected to lead to an increase in regulatory hurdles for FDI in potentially critical sectors of the EU and is therefore undoubtedly an important and relevant piece of legislation, especially for foreign investors and for owners of relevant assets in the EU.

Go to > 01.

European Commission confirms that the extension of motorways concession agreements constitutes State aid

The Italian motorway investment plans and the respective concessions extensions, albeit approved by the European Commission, were subject to in-depth scrutiny under State aid rules and led to material changes in the contractual provisions of the concession agreements aimed at avoiding financial overcompensation of the concessionaires. The Commission in the State aid procedure also assessed the compatibility of the measures at stake with the provisions of Directive 2014/23/EU on the award of concession contracts.

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The Portuguese Constitutional Court and the (un)constitutionality of the non-suspensive effect of appeals of the Portuguese Competition Authority decisions

The Portuguese Constitutional Court considered that the rule stemming from Art. 84(5) of Law no. 19/2012 is unconstitutional. Pursuant to said rule judicial appeals lodged against Portuguese Competition Authority's decisions applying fines may only be conferred suspensive effect when the implementation of the decision causes considerable damage to the defendant and the defendant provides a collateral to substitute the fine.

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Discriminatory prices *vis-à-vis* trade partners under the *MEO* Case

The decision of the Court of Justice of the European Union in the *MEO* case is of undeniable importance, as it clarifies the circumstances under which a dominant firm that applies discriminatory price conditions to its trade partners might be found abusing its dominant position (under Article 102 TFEU).

Go to > 04.

Bauer judgment: right to paid annual leave enshrined in the Charter of Fundamental Rights of the EU can be invoked in a worker/private employer context

In its recent *Bauer* judgment, the Court of Justice of the European Union established that the right to paid annual leave enshrined in the Charter of Fundamental Rights of the European Union can be invoked in a worker / private employer context (horizontal direct effect). In *Bauer*, the CJ took a firm position in view of attributing, in the future, horizontal direct effect to other provisions of the Charter, a constitutional development of great relevance with concrete practical implications.

Go to > 05.

In the land of (para) criminality The European Court of Human Rights confirms the criminal nature of a fine for obstruction of a dawn raid conducted by a competition authority

The European Court of Human Rights recently concluded that a fine of EUR 105 000 imposed by a competition authority following the obstruction of a surprise inspection (dawn raid) has a criminal nature and is therefore covered by Article 6 of the European Convention on Human Rights, which enshrines the right to a fair trial.

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THE EU FRAMEWORK FOR THE SCREENING OF FOREIGN DIRECT INVESTMENT

PHILIPP MELCHER
MIGUEL MOTA DELGADO

On 20 November 2018, the European Parliament and the Council have reached a political agreement[1] on the proposal of the Commission[2] for the first comprehensive European Union (EU) framework for the screening of Foreign Direct Investment (FDI). It can now be expected to enter into force soon.

The framework is a response to growing concerns of several EU Member States (MS) about foreign investors, notably state-owned enterprises, taking over EU companies with key assets for strategic reasons and about EU investors' often not enjoying the same rights to invest in the country from which the foreign investment originates.

The term "FDI screening mechanism" (FDISM) essentially refers to a law allowing a public authority to assess, authorise, prohibit or unwind FDI in companies, assets or sectors considered of strategic importance, on grounds of security or public order. Several MS already have FDISM in place, albeit significantly differing in design and scope.

Based on the Commission proposal, the framework:

- Enables (but does not require) MS to maintain or adopt FDISM (other than those already allowed or required under existing EU legislation, for example, in the energy sector) and provides legal certainty for those MS, in view of the EU's exclusive competence for the regulation of FDI (which otherwise excludes any MS legislation);
- Defines certain basic requirements that FDISM of MS must fulfil (in terms of, for example, transparency, legal certainty, non-discrimination, protection of confidential information, access to judicial review) without, however, harmonising their design and scope;
- Provides for an indicative list of factors which may be taken into account in the screening of FDI, including effects on critical assets (critical infrastructure, technologies, inputs/raw materials, information) and influence exercised on the foreign investor by the government of a third country, including through funding; and
- Establishes a mechanism for close and systematic information and cooperation between MS and the Commission in relation to FDISM and FDI undergoing screening, also with a view to increase transparency in this regard.

The framework does not (yet) establish a FDISM at EU level. While the Commission is competent to assess relevant FDI, it can only issue advisory opinions to the MS concerned. Although its opinions must be taken into account, in particular where the FDI is likely to affect projects or programmes of Union interest (*e.g.*, Galileo, Copernicus, Horizon 2020/Key Enabling Technologies, Trans-European Networks), the MS has the final say.

Even though, for now, the framework is only an enabling regulation which largely recognises the autonomy of MS to protect (or not) their critical assets against FDI in line with their national strategic interests, it can nonetheless be expected to lead to an increase in regulatory hurdles for FDI in strategically important sectors of the EU. It is therefore undoubtedly an important and relevant piece of legislation, especially for foreign investors and for owners of potentially critical assets in the EU.

[1] Press releases of the Commission and the Council available here and here.

[2] Available here.

EUROPEAN COMMISSION CONFIRMS THAT THE EXTENSION OF MOTORWAYS CONCESSION AGREEMENTS CONSTITUTES STATE AID

EDUARDO MAIA CADETE

The European Commission (EC) approved[1] under EU State aid rules two Italian motorways investment plans. The Italian motorway network covers circa 6 800 kilometres and is managed by public and private operators. The latter manage about 5 800 kilometres of the network under concession agreements. By means of the concession, the public authority entrusts a private operator with the execution of works and the subsequent provision and management of services on the constructed highway. The entrustment involves the transfer to the concessionaire of the relevant construction and operational risk.

Under the current Italian framework there are several different tariff systems aimed at ensuring the financial equilibrium of the concessions. The funding is normally based on a financial plan under which the expected revenues (toll tariffs or other additional revenues) rebalance the investment costs and remunerate the concessionaire invested capital. Hence, there is a direct relation between the investment and the toll tariffs that consumers pay to use the motorways.

The notified Italian motorway investment plans, subject to the EC's State aid scrutiny, allows the modernization of the Italian motorway network (additional lanes, new tollbooths, widening existing bridges, new overpasses, anti-noise barriers) and is specifically related to two operators: Autostrade per Italia (ASPI) and Societá Iniziative Autostradali e Servizi (SIAS). The respective investment plans are based on the extension of the concerned motorway concessions, thereby allowing the recoupment of the investment costs over a longer life period whilst simultaneously keeping the toll tariffs at a socially sustainable level. Absent the prolongation of the concessions, the toll tariff increases would reach, for ASPI, 46% and for the SIAS concession an average of 58%.

In the adopted decision the EC confirms that the prolongation of the concession agreements implies the attribution of an extended exclusive right to collect toll revenues by the concessionaire concerned. As such, per EC's standing, the Member State, owner of the infrastructure, renounces to directly collect the toll revenues during said extension, period during which it could keep the assets in State hands and exploit them commercially. Therefore, in the EC's assessment, such time extension amounts to a waiving of State resources to the benefit of the private operators. Further, as the concessionaires, in what regards the extension of the concessions, were not chosen by way of a public tender, the EC also considered that the measures should be apprehended as entailing an economic advantage in the exclusive benefit of the motorway operator.

Moreover, the Italian measures were assessed and validated by the EC under the Services of General Economic Interest (SGEI) rules, specifically Article 106(2) TFEU and the EC's SGEI Communication,[2] as the investments to be executed in the motorways were deemed necessary in order to implement a series of objectives, ranging from improving mobility and shortening the duration of travelling on key routes on the Italian network, to limiting structural traffic congestion. Further, the concerned services were considered as key infrastructure components integrated into the Trans-European network, thereby contributing at European, regional and local level to economic, social and territorial cohesion.

[1] Joined cases SA.49335 and SA.49336, with public version of the Decision available here.

[2] See Commission Communication of 11 January 2012 on a European Union framework for State aid in the form of public service compensation.

THE PORTUGUESE CONSTITUTIONAL COURT AND THE (UN)CONSTITUTIONALITY OF THE NON-SUSPENSIVE EFFECT OF APPEALS OF THE PORTUGUESE COMPETITION AUTHORITY DECISIONS

GONÇALO MACHADO BORGES
DZHAMIL ODA

The Portuguese Constitutional Court (PCC), in its recent Judgment of 2 October 2018, considered that the rule stemming from Art. 84(5) of the Portuguese Competition Law (PCL) is unconstitutional. Pursuant to said rule judicial appeals lodged against Portuguese Competition Authority's decisions applying fines may only be conferred suspensive effect when the implementation of the decision causes considerable damage to the defendant and the defendant provides a collateral to substitute the fine.

Said PCC's judgment was adopted following an appeal of a decision of the Portuguese Court for Competition, Regulation and Supervision which also considered the rule as unconstitutional.

This is an issue that has been discussed in the judicial courts and in the PCC itself, focusing on the competition legal framework and the energy sector sanctions' regime (ESSR), and has already given room for divergent decisions.

In the context of ESSR this issue was "solved" by the PCC in a judgment adopted by the court in a plenary session. The PCC considered that the ESSR rule that is similar to Art. 84(5) PCL is in conformity with the Portuguese Constitution (Judgment 123/2018).

In what regards the competition legal framework, the PCC considered the rule not unconstitutional in its Judgment 376/2016 and unconstitutional in its Judgment 674/2016. The Public Prosecutor appealed to the PCC's plenary on the grounds of conflicting judgments. The PCC rejected such appeal noting that the two judgments assessed two distinct normative dimensions of the rule at stake (Judgment 281/2017).

In its Judgment of 2 October 2018, the PCC based its decision on the grounds of Judgment 674/2016, having concluded that the solution of not unconstitutionality adopted in the context of the ESSR should not be applied to the competition legal framework because it focused on a different normative object and was based on specificities pertaining the energy market and the legal functions exercised by the Portuguese Regulator for Energy Services.

Hence, the PCC concluded that the rule stemming from Art. 84(5) PCL is unconstitutional for infringing the principles of the right to effective judicial protection, proportionality and presumption of innocence in misdemeanor procedure.

DISCRIMINATORY PRICES *VIS-À-VIS* TRADE PARTNERS UNDER THE *MEO* CASE

MARIANA MARTINS PEREIRA

The Court of Justice of the European Union (CJ) judgment in *Meo - Serviços de Comunicações e Multimédia*[1] clarifies the criteria for a dominant undertaking's discriminatory pricing policy *vis-à-vis* trade partners be considered to violate Article 102 (2)(c) of the Treaty on the Functioning of the European Union (TFEU).[2]

In 2014, MEO lodged a complaint before the Portuguese Competition Authority (PCA), claiming that GDA[3] had imposed different tariffs on the various pay-TV operators, therefore discriminating MEO. Yet, the PCA decided not to take further action, considering that the tariff differentiation had no restrictive effect on MEO's competitive position. The latter appealed to the Portuguese Competition, Regulation and Supervision Court, the referring court.

The referred questions, as well as the CJ's analysis, were mainly focused on the notion of "competitive disadvantage" (Article 102 (2)(c) TFEU): does a mere discriminatory pricing policy suffice, or must this tariff differentiation also have a disruptive impact on the competitive position of the discriminated undertaking?

The CJ started by restating that the undertaking whose competitive position is affected can either be a direct competitor of the dominant undertaking or a trade partner.[4] However, a "mere immediate disadvantage" deriving from the application of different tariffs to equivalent services does not necessarily mean that competition is distorted or capable of being so.[5] The dominant undertaking's discriminatory behavior must be such as to lead to a distortion of competition between those business partners.[6]

After laying down the test, the CJ gave some guidance to national courts on how to ascertain whether such a distortion of competition is at stake. One should consider, among other things, the undertaking's dominant position, it's negotiating power, the conditions, duration and amounts of the tariffs charged and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners.[7]

Considering the circumstances of the case at stake, the CJ found that, since MEO and one of its competitors are GDA's main clients, they may have a considerable negotiating power in relation to the latter.

The CJ also mentioned the reduced impact of the alleged excessive tariffs on MEO's total costs and profits, in the context of its service for retail offerings for subscription television access.[8] Finally, it stated that, where the differentiation only concerns the downstream market, the undertaking has no interest, in principle, in excluding one of its trade partners from the downstream market.

To sum up, after *MEO*, dominant undertakings may risk a violation of article 102 TFEU only if they pursue a discriminatory pricing policy with regard to trade partners that distorts competition between the latter.

[1] Judgment of 18 April 2018, *Meo - Serviços de Comunicações e Multimédia*, C-525/16, EU:C:2018:270 (*MEO*).

[2] See also Article 11 (2) (c) of the Portuguese Competition Law, which replicates the European rule.

[3] Portuguese Cooperative for the Management of the Rights of Performing Artists.

[4] See §§ 24 and 25 of the judgment.

[5] See § 26.

[6] See § 27.

[7] See § 31.

[8] See § 34.

BAUER JUDGMENT: RIGHT TO PAID ANNUAL LEAVE ENSHRINED IN THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU CAN BE INVOKED IN A WORKER / PRIVATE EMPLOYER CONTEXT

MIGUEL MOTA DELGADO

In the very recent *Bauer*[1] judgement, the Grand Chamber of the Court of Justice of the European Union (CJ) established that the right to paid annual leave can be invoked by a worker against its "private" employer (horizontal direct effect).

In one of the two disputes underlying this judgment, a widow asked to its late husband's (private) employer an allowance in the amount of EUR 3 702,72 corresponding to the 32 days of outstanding paid annual leave which her husband had not taken at the time of his death.

According to the national (German) law, the right to paid annual leave is lost in the event of the worker's death. However, the Working Time Directive[2] (Directive) precludes national law which, like German law, determines that such right is lost in the event of the worker's death.[3] In other words, the Directive was not correctly transposed.

Since the legal act in question is a Directive, its provisions could not be invoked by a private party against another private party.[4] In this judgment, the CJ also concluded to be impossible to provide a harmonious interpretation of the national law *vis-à-vis* the Directive.

The solution found was to attribute horizontal direct effect to Article 31(2) of the Charter of Fundamental Rights of the European Union (Charter) in the part where it enshrines the right to paid annual leave.

The reasoning underpinning this interpretation contains a number of criteria to consider, namely *a)* the status of the relevant right as an "essential principle of EU social law";[5] *b)* the writing of this right in "mandatory terms";[6] and *c)* the "mandatory and unconditional in nature [of the existence of the right], […] not needing to be given concrete expression by the provisions of EU or national law".[7]

Considering that the right to paid annual leave is not the only right in the Charter to meet these criteria[8], in *Bauer* the CJ takes a firm position in view of attributing, in the future, horizontal direct effect to other provisions of the Charter, a constitutional development of great relevance with concrete practical implications.

In the field of labour law, for instance, with the *Bauer* judgment, an analysis of the relevant secondary law is no longer sufficient to comprehend the whole of the framework regulating private parties' labour relations. Indeed, in some cases, the lawyer must assess *i)* if the Charter is applicable and *ii)* what substantive impact such application might have.

1 Judgment of 6 November 2018, *Bauer*, C-569/16 and C-570/16, EU:C:2018:871.

2 Directive 2003/88/EC of the European Parliament and of the Council, of 4 November, concerning certain aspects of the organisation of working time, OJ L 299.

3 Judgement of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755.

4 Judgement of 26 February 1986, *Marshall*, C-152/84, EU:C:1986:84.

5 *Bauer*, § 80.

6 *Bauer*, § 84.

7 *Bauer*, § 85.

8 Consider, for instance, the other rights enshrined in Article 31(2) of the Charter such as the right to limitation of maximum working hours or the right to daily and weekly rest periods.

IN THE LAND OF (PARA) CRIMINALITY THE EUROPEAN COURT OF HUMAN RIGHTS CONFIRMS THE CRIMINAL NATURE OF A FINE FOR OBSTRUCTION OF A DAWN RAID CONDUCTED BY A COMPETITION AUTHORITY

PEDRO DE GOUVEIA E MELO
INÊS NEVES

The *Pro Plus v. Slovenia* Case

The facts of the *Pro Plus v. Slovenia*[1] case concern a dawn raid held on the morning of 11 August 2011 by the Slovenian competition authority at the premises of Pro Plus, the owner of the main Slovenian television station, following complaints from two competing stations on suspicion of abuse of dominant position.

The Pro Plus staff who received the authority officials refused to be served of the inspection decision and did not allow the proceedings to begin without instructions from the company's management (who was absent), which led inspectors to leave the premises, returning afterwards accompanied by the police. Almost two hours following the initial entry of the inspectors, the inspection finally began after the company director arrived and affirmed its full cooperation with the authority. In February 2012, a fine of EUR 105 000 was imposed on Pro Plus for obstructing the investigative activity of the authority.

On appeal, Slovenia's Supreme Court rejected Pro Plus's request for an oral hearing and for witness testimony. The company therefore made a complaint to the European Court of Human Rights (ECtHR) on the grounds of a breach of Article 6 of the European Convention on Human Rights (Convention), which enshrines the right to a fair trial in criminal proceedings.

While the penalties laid down in Slovenian competition law are formally administrative (and not criminal) sanctions, and are enforced by an administrative authority, the ECtHR established the application of Article 6 of the Convention to the case.

According to the case-law of the ECtHR, the legal classification of a measure under national law is only one of three factors used to determine the existence of a "criminal charge" in the light of Article 6. The Court also needs to consider "the very nature of the measure and the nature and degree of severity of the 'penalty'". In this case, the ECtHR considered, first, that the rule aimed at ensuring the effective exercise of public authority powers, in the general interest of society, which was also protected by the criminal code in Slovenia. In addition, the Court also noted that both the amount of the fine imposed and the maximum fine the applicant risked incurring in (EUR 500 000) were significant and the imposition of the penalty more than six months after the inspection had occurred confirmed its punitive and dissuasive purpose.

For these reasons, the Court held that Article 6 of the Convention was applicable, which required a full judicial control of the authority's decision, including an examination of the facts (and not just the applicable law). As the Slovene Supreme Court, the only court to intervene in the case, had refused to review the facts submitted by the company and to hear the witnesses relevant for establishing the relevant evidence, the ECtHR declared that the fundamental right to a fair and equitable process had been infringed and condemned the Slovenian State to the payment of a compensation and expenses to Pro Plus of EUR
62 500.

Comment

The *Pro Plus v. Slovenia* case brings a renewed contribute by alerting lawmakers and national courts to the irrelevance of the formal qualification of penalties for anti-competitive conduct, when they are potentially high and have an essentially punitive intent – which is the case in Portugal as in most other EU Member States.

The ECtHR had already confirmed in 2011, in the *Menarini* judgment,[2] that a fine of EUR 6 million for breaching the Italian competition law substantive rules on cartels constituted a criminal penalty for the purposes of Article 6 of the

... continue reading >

[1] Judgment of the ECtHR (Fourth Chamber), of 23 October 2018, *Produkcija Plus Storitveno Podjetje D.O.O. v. Slovenia*, proc. 47072/15.

[2] Judgment of the ECHR (Second Chamber) of 27 September 2011, *Menarini Diagnostics S.R.L. v. Italy*, complaint 43509/08, analysed in our Newsletter of December 2011 (page 4).

Convention, notwithstanding its being characterized by national law as having an administrative nature. With the *Pro Plus* ruling this case-law becomes applicable to virtually any penalty imposed by an administrative authority for competition law violations, even when only procedural rules are at stake (such as those requiring full cooperation during dawn raids) and the fines imposed are relatively limited (in the case of Pro Plus, "only" EUR 105 000).

This means that, irrespective of the characterization of penalties as administrative, compliance with Article 6 of the Convention makes fully applicable to proceedings before administrative authorities — such as the Competition Authority in Portugal — a set of essential principles, including the rights of defense, but, above all, the right to a judicial appeal by an independent court exercising full control, including the review of the facts and evidence, without any limitation.

The *Pro Plus* decision is also an important reminder for companies to consider the convenience of implementing, notably in their compliance programs, internal dawn-raids procedures, including the clear assignment of responsibilities to all relevant employees (in particular those at the reception or front office), in order to exclude the risk of possible obstruction charges as well fines that, both for the European Commission and the Competition Authority, may reach 1% of the annual turnover of the company concerned.

MORAIS LEITÃO
LEGAL CIRCLE

members of MORAIS LEITÃO LEGAL CIRCLE

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

ALC
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ADVOGADOS

MdME
LAWYERS

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

LISBOA
Rua Castilho, 165
1070-050 Lisboa
T +351 213 817 400
F +351 213 817 499
mlgtslisboa@mlgts.pt

PORTO
Avenida da Boavista, 3265 – 4.2
Edifício Oceanvs
4100-137 Porto
T +351 226 166 950 - 226 052 380
F +351 226 163 810 - 226 052 399
mlgtsporto@mlgts.pt

FUNCHAL
Av. Arriaga, n.º 73, 1.º, Sala 113
Edifício Marina Club
9000-060 Funchal – Portugal
T +351 291 200 040
F +351 291 200 049
mlgtsmadeira@mlgts.pt

mlgts.pt

ALC ADVOGADOS

LUANDA
Masuika Office Plaza
Edifício MKO A, Piso 5, Escritório A/B
Talatona, Município de Belas
Luanda – Angola
T +244 926 877 476/8/9
T +244 926 877 481
geral@alcadvogados.com

alcadvogados.com

HRA ADVOGADOS

MAPUTO
Avenida Marginal, 141, Torres Rani
Torre de Escritórios, 8.º piso
Maputo – Moçambique
T +258 21 344000
F +258 21 344099
geral@hrlegalcircle.com

hrlegalcircle.com

MdME LAWYERS

MACAU
Avenida da Praia Grande, 409
China Law Building
21/F and 23/F A-B, Macau
T +853 2833 3332
F +853 2833 3331
mdme@mdme.com.mo

mdme.com.mo

HONG KONG
25F Golden Centre
188 Des Voeux Road
Central, Hong Kong
T +852 3619 1180
F +853 2833 3331
mdme@mdme.com.mo

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