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European Commission applies colossal 110 million euros fine to Facebook for allegedly providing misleading information on the WhatsApp merger review file

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The EU Merger Regulation[1] procedural rules oblige companies in a merger investigation to provide correct information that is not misleading as this is essential for the European Commission ("Commission") to review mergers in a timely and effective manner. This obligation applies, regardless of whether the information has an impact on the ultimate outcome of the merger assessment.

According to the Commission,[2] when Facebook Inc (Facebook) notified the acquisition of WhatsApp Inc. (WhatsApp) in August 2014 (case M.7217),[3] authorised in October 2014, it informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. According to the Commission's findings, Facebook stated this both in the notification form and in a reply to a request for information from the Commission services. Further, as per the Commission's assessment, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

Hence the Commission found that, contrary to Facebook's statements during the 2014 merger review process, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook staff were aware of such a possibility.

In light of the foregoing the Commission applied in May 2017 a 110 million euros fine, albeit with no impact on the merits of the Commission's 2014 decision to authorise the Facebook/WhatsApp transaction under the EU Merger Regulation as, according to the Commission, the 2014 clearance decision was based on a number of elements going beyond automated user matching. The Commission at the time also carried out an "even if" assessment that assumed user matching as a possibility. As such, the Commission considered that the incorrect or misleading information provided by Facebook did not have an adverse impact on the outcome of the non-opposition decision.

According to Article 14(1) of the EU Merger Regulation, the Commission can impose fines of up to 1% of the aggregated turnover of companies that intentionally or negligently provide incorrect or misleading information to the Commission.

This case marks a new era in the exercise of the enforcement powers provided by the EU Merger Regulation by DG COMP, as this is the first case since the inception of the EU Merger Regulation (in 2004) that a sanction is applied for the alleged disclo-

1 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings. OJ L 24, 29.01.2004, pp. 1-22.

2 Press release dated 18 May 2017.

3 Decision can be accessed at http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

sure of inaccurate or misleading information on a merger review file.

The fine imposed is also colossal and potentially disproportionate if one takes into account the fact that, as recognised by the Commission, the information at stake had no material impact on its assessment of the transaction on the merits. Still, the deterrence effect of the applied fine, potentially with spill-over effects for enforcement by national competition authorities in merger cases, is straightforward: to provide an unambiguous message to companies that all diligence should be applied in assessing the accuracy of information provided to the Commission in merger control procedures or, if not, they will effectively run the risk of heavy fines and, potentially, the reopening of the merger review process.

This case marks a new era in the exercise of the enforcement powers provided by the EU Merger Regulation by DG COMP, as this is the first case since the inception of the EU Merger Regulation (in 2004) that a sanction is applied for the alleged disclosure of inaccurate or misleading information on a merger review file. The fine imposed is, however, colossal and potentially disproportionate if one takes into account the fact that, as recognised by the Commission, the information at stake had no material impact on its assessment of the transaction on the merits

Liability of parent companies for infringement of EU competition rules by their subsidiaries: limitation period for applying sanctions and the (wide) interpretation of the EU Court of Justice

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Introduction

The Court of Justice of the European Union (CJEU), in judgment of 27 April 2017, *Akzo Nobel and Others v. Commission*, EU:C:2017:314, C-516/15 P ("judgment"),[4] ruled on the liability of parent companies in relation to competition law infringements committed by their subsidiaries, notably about the limitation period regarding the European Commission's ("Commission") power to impose penalties on parent companies in case such power is time-barred in relation to their subsidiaries.

Background to the case

On 11 November 2009 the Commission[5] adopted a decision pursuant to which it considered that certain companies from the Akzo Nobel group – notably Akzo Nobel (the group's parent company), Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV and Akcros Chemicals – infringed Article 101 of the Treaty on the Functioning of the European Union (TFEU) (previously, Article 81 EC) and Article 53 of the Agreement on the European Economic Area (EEA) by participating in two sets of anticompetitive agreements and concerted practices relating, first, to the tin stabilisers sector and, secondly, to the epoxidised soybean oil and esters sector ("Decision").

Pursuant to the Decision, the Commission split the participation of Akzo Nobel, Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV and Akcros Chemicals in the infringements into three separate infringement periods: *(i)* before 28.06.1993 – Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, 100% owned, indirectly, by Akzo Nobel, participated directly in the infringements; *(ii)* between 28.06.1993 and 02.10.1998 – the infringements were committed by the Akcros Chemicals partnership, which had centralised the heat stabilisers production and sales activities of the Akzo group and did not have a legal personality in its own right; and *(iii)* between 02.10.1998 and 22.03.2000 – the infringements were committed by Akcros Chemicals, which had absorbed the business of the Akcros Chemicals partnership. Akzo Nobel, as the ultimate group's parent company, was held liable for the entire infringement period, from 24.02.1987 until 22.03.2000.

The companies involved appealed the Decision before the General Court (GC) arguing, *inter alia*, that the Commission had infringed limitation period rules contained in Article 25(1)(b) of Regulation (EC) No. 1/2003,[6] notably because: *(i)* the Commission's power to apply sanctions to Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV was time-barred from 28.06.1998, taking into account that

4 Judgment accessed and available at curia.europa.eu.

5 Comission Decision C(2009)8682, of 11 November 2009, COMP/38589.

6 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L 1 of 4 January 2003.

those companies ceased their participation in any infringement on 28.06.1993; and *(ii)* both these companies, and Akzo Nobel as the parent company, may not be held liable for infringements committed during that time-period.

The GC annulled the decision[7] in respect of the fines imposed on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV for the first infringement period because the limitation period had expired, and dismissed the action as to the remainder. The GC judgment was appealed to the CJEU, notably in so far as it held that liability for the fines originally imposed on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV for their participation in the infringements could still be attributed to Akzo Nobel after the annulment of those fines by the GC on the basis of the statute of limitations.

The CJEU judgment

The CJEU dismissed the appeal, basing its judgment on the following grounds:

(i) The court recalled that the term "undertaking" must be understood as designating an economic unit and, in that context, took into due consideration that when a parent company is held liable for conduct committed by its subsidiaries it is personally fined for an infringement of EU competition rules which is attributed directly to it, due to decisive influence which it exercised over the subsidiary and through which it was able to determine the subsidiary's conduct on the market;

(ii) According to the CJEU, in a situation where no factor individually reflects the conduct for which the parent company is held liable, the reduction in the amount of the fine imposed on the subsidiary jointly and severally with its parent company must, in principle, where the necessary procedural requirements are satisfied, be extended to the parent company;

(iii) The Commission's power to impose penalties can be time-barred *vis-à-vis* the subsidiary but not the parent company, even though the parent company's liability may be entirely based on the unlawful conduct of that subsidiary;

(iv) The unlawful actions taken by Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV during the first infringement period (before 28.06.1993) were attributed to Akzo Nobel and this parent company was thus held individually liable for ac-

7 Judgment of 15 July 2015, Akzo Nobel and Akcros Chemicals v Commission, T-485/11, EU:T:2015:517, accessed and available at curia.europa.eu.

tions contrary to EU competition rules which it was itself deemed to have taken during that period. Cumulatively, Akzo Nobel also participated in unlawful conduct during the second and third infringement periods, until March 2000;

(v) On the one hand, Akzo Nobel is deemed personally responsible and joint and severally liable for the unlawful conduct committed during the first infringement period, as it formed an economic unit with the other subsidiaries;

(vi) On the other hand, factors specific to the parent company may justify assessing the parent company's liability and that of its subsidiary differently, even if the liability of the former is based exclusively on the unlawful conduct of the latter.

In light of the above assumptions, the CJEU decided that the Commission's power to impose penalties on Akzo Nobel regarding the first infringement period was not time-barred as the unlawful conduct committed by the latter exceeded that time-period and ceased only in March 2000. Hence, the CJEU considered that Akzo Nobel must be held liable regarding all the infringement periods regardless of the fact that the Commission's power to sanction its subsidiaries was already time-barred in relation to the first infringement period.

The CJEU's position in this judgment allows for a wide interpretation of parent companies' liability for infringements committed by their subsidiaries, with consequences in terms of the moment the limitation period (for the Commission's power to address decisions and apply fines to parent companies) starts and expires, notably when the possibility of applying penalties to subsidiaries is already time-barred.

The judgment of the EU Court of Justice in the Akzo Nobel case widens the possibility of holding parent companies liable for EU competition rule infringements committed by their subsidiaries by allowing the Commission to fine parent companies in cases where such power is already time-barred in relation to their subsidiaries

Some recent trends in the crossroad between privacy and competition law

Luís do Nascimento Ferreira

Introduction

Antitrust investigations entail, by their very nature, a certain tension between the different and sometimes competing interests involved, in particular the public duty to investigate infringements and the respect for private life. Both the European Convention on Human Rights ("Convention") and the Charter of Fundamental Rights of the European Union ("Charter") acknowledge that everyone has the right to respect for his or her private life and home. But that is not all. As the digital age evolves quickly, there is a specific privacy feature that is becoming more and more relevant these days, not only as a communication link for individuals and companies, but also as an investigation tool for competition authorities: the notion of "correspondence."

At least from a literal standpoint, Article 8 of the Convention and Article 7 of the Charter place the protection of correspondence, on the one hand, and the respect for private life and home, on the other, on an equal footing. A series of rulings rendered by the European Court of Human Rights (ECHR), including the recent *Bărbulescu* judgment issued in September 2017, help clarify how traditional and modern-day communications are protected against unlawful intrusions by public and private bodies.

Case law of the ECHR

The starting point for this debate is Article 8(2) of the Convention, which does not exist in the equivalent Article 7 of the Charter. According to said provision, "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The ECHR was called upon to deal with Article 8 on a number of occasions and under different and sometimes extreme scenarios, ranging from the monitoring of email, telephone or internet use[8] to video surveillance.[9] Most of these cases concern relationships between individuals and their employers. However, many others tackled by the ECHR address directly the search and seizure, by public authorities (including competition agencies), of documents in different formats at companies' premises in the light of Article 8.[10]

In a nutshell, there are three main takeaways from these judgments.

8 Judgments in cases 61496/08 *Bărbulescu v. Romania*, 05.09.2017; 39315/06 *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, 22.11.2012; 62617/00 *Copland v. the United Kingdom*, 03.04.2007; 54934/00 *Weber and Saravia v. Germany*, 29.06.2006; and 20605/92 *Halford v. the United Kingdom*, 25.06.1997. See also pending application No. 588/13 *Libert v. France*.

9 Judgment in case 420/07 *Köpke v. Germany*, 05.10.2010. There is also an important case pending: application No. 70838/13 *Antović and Mirković v. Montenegro*.

10 Judgments in cases 63629/10 and 60567/10 *Vinci Construction et GTM Génie Civil et Services c. France*, 02.04.2015; 74336/01 *Wieser and Bicos Beteiligungen GmbH v. Austria*, 16.10.2007; 50882/99 *Petri Sallinen and Others v. Finland*, 27.09.2005; 41604/98 *Buck v. Germany*, 28.04.2005; 33400/96 *Ernst et Autres c. Belgique*, 15.07.2003; and 37971/97 *Société Colas Est and Others v. France*, 16.04.2002.

First, the notion of "home" in Article 8 of the Convention encompasses not only a private individual's home, but also the office of a company or, in general, a business premise.

Second, all communications made by a person, be it at a private home or at the workplace, and regardless of their professional or personal nature and of their format (physical or electronic), are covered by the concept of "correspondence".

Third, the search and seizure of communications, notably carried out by a public entity, constitutes an interference with the right to respect for the envisaged person's "home" and "correspondence" as guaranteed by Article 8 of the Convention.

But why and how is this relevant for competition law proceedings?

There is an overriding principle of EU law, according to which all evidence in all legal proceedings conducted by Member States or EU institutions, obviously including competition probes, must be consistent with the fundamental rights of the scrutinised parties[11].

Hence, EU law cannot accept evidence obtained in disregard of the procedure laid down for gathering it and designed to protect the fundamental rights of the persons concerned. The use of that procedure is, therefore, regarded as an essential procedural requirement within the meaning of Article 263(2) TFEU and, according to settled case-law, the infringement of an essential procedural requirement affects the validity of the defective act, irrespective of whether it caused harm to the disputing party.[12]

In matters of fundamental rights it should also be recalled that, pursuant to the first subparagraph of Article 6(1) TEU, the Charter has the same legal value as the Treaties. Moreover, Article 52(3) of the Charter states that, in so far as the Charter contains rights that correspond to those guaranteed by the Convention, their meaning and scope are to be the same as those laid down by the Convention. EU courts have confirmed that the meaning and scope of the guaranteed rights are to be determined not only by reference to the text of the Convention, but also by reference to the case law of the ECHR.[13]

In the specific case of the right to respect for private life, home and correspondence, the ECJ has expressed on a number of occasions that "it is clear that the said Article 7 [of the Charter] contains rights corresponding to those guaranteed by Article 8(1) of the [Convention]. Article 7 of the Charter must therefore be given the same

11 See, *inter alia*, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation/Council and Commission*, in joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, §§ 281-284 and case law cited therein, accessed and available at curia.europa.eu.

12 Judgment of 6 April 2000, *Commission/ICI*, C-286/95 P, EU:C:2000:188, §§ 42-52, accessed and available at curia.europa.eu.

13 Judgment of 22 December 2000, *DEB*, C-279/09, EU:C:2010:811, § 35, accessed and available at curia.europa.eu.

meaning and the same scope as Article 8(1) of the [Convention], as interpreted by the case-law of the European Court of Human Rights".[14]

In practical terms, this means that, since the apprehension of communications constitutes, in the ECHR's view, an interference with the exercise of the right guaranteed by Article 8(1) of the Convention, it also amounts to a restriction of the corresponding right provided for in Article 7 of the Charter. Additionally, this also means that the conditions under which such interference needs to be conducted in order to become lawful are those expressed in Article 8(2) of the Convention, as applied by the ECHR.

In making this assessment, the ECHR typically undertakes a threefold check to confirm whether the interference: *(i)* was in accordance with the law; *(ii)* pursued a legitimate aim; and *(iii)* was proportionate to the aim pursued.

These requirements need to be analysed on a case-by-case basis, but even the fulfilment of the first and foremost condition – pertaining to the existence of a legal basis authorising the interference to take place – may raise more doubts than it might appear.

In Portugal, for instance, the competition act (Law No. 19/2012, of 8 May) does not have a legal provision enabling the Authority to apprehend correspondence as such; it is only allowed to seize documents regardless of their support. For several years under the previous competition law (enacted in 2003), both the Authority and Portuguese courts considered that a letter or an email that had been previously opened by the addressee should not qualify as a communication, but rather as a document. However, this reasoning has become far more questionable, especially since the approval of the law on cybercrime (Law No. 109/2009, of 15 September).

This particular piece of legislation implements in the Portuguese legal order Council Framework Decision 2005/222/JHA, of 24 February 2005, on attacks against information systems and adjusts national law to the Council of Europe's Convention on Cybercrime. The scope of Law No. 109/2009 is therefore far reaching and it actually contains, according to Articles 1 and 11 thereof, the general legal framework applicable to the collection of digital evidence in Portugal. In particular, Article 17 of Law No. 19/2009 is very clear in stating that the apprehension of electronic messages is only possible under

14 See to, that effect, judgment of 5 October 2010, *McB.*, C-400/10 PPU, EU:C:2010:811, § 53 and judgment of 15 November 2011, *Dereci and others*, C-256-11, EU:C:2011:734, § 70, accessed and available at curia.europa.eu.

the terms allowed to the apprehension of correspondence (irrespective of whether those messages were accessed by the original recipient or remain unread at the time of the search).

Consequently, at the current stage emails are covered by the privilege of correspondence awarded directly by the Portuguese Constitution and may only be seized if there is a legal provision permitting it and if the apprehension is ordered by a judge. Neither of these requirements exists in the national competition act, which renders it difficult to reconcile the exercise of a typical investigatory power held by a competition authority with the right to respect for privacy under the Convention and the Charter, as interpreted by the ECHR and EU courts.

Ceci n'est pas une concentration: ECJ's *Austria Asphalt* decision

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If two undertakings decide to incorporate a joint venture, jointly controlled by them, this operation should only be filed before the European Commission ("Commission") if that joint venture performs on a lasting basis all the functions of an autonomous economic entity (*i.e.,* if it is a full-function joint venture). But what if those undertakings simply decide to convert an existing company, solely controlled by one of them, into a joint venture? Is it required that the new joint venture (previously only a subsidiary controlled by one of the undertakings) perform on a lasting basis all the functions of an autonomous economic entity? This was the question the European Court of Justice (ECJ) had to reply to in its decision in the *Austria Asphalt* case.[15]

The facts of the case are as follows: Austria Asphalt, a company of the Strabag Group, intended to acquire 50% of the capital of a company wholly owned (and therefore exclusively controlled) by Teerag Asdag, a company of the Porr Group. As a result of the transaction, Austria Asphalt and Teerag Asdag would exercise joint control over the target company (through the creation of a vehicle company). Since most of the target company's production would be allocated to its parent companies, the new joint venture would not have an autonomous presence on the market and thus would not constitute a full function joint venture.

The transaction was notified to the Austrian Federal Competition Authority and subsequently referred to the Austrian Competition Court, which considered that the notified transaction fulfilled the criteria of the European Merger Control Regulation (EMCR), set forth in Article 3 (1) (b) of Regulation No. 139/2004. Consequently, it could not be examined under Austrian law (see Article 21 (2) of Regulation No. 139/2004). For its part, Austria Asphalt argued that in acquiring joint control over an already existing undertaking, the "full exercise" criterion would also need to be verified. Hence, the transaction should not be filed before the Commission. The Austrian Supreme Court referred the matter to the ECJ.

The ECJ recognized that the wording of Article 3 of the EMCR does not in itself answer the question. It is thus necessary to interpret the Regulation on the basis both of its purpose and of its general structure (§§ 18-20).

According to the ECJ, the "regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State" (§ 21). The same idea is referred to in Recital 20 of Regulation No. 139/2004.

Following the conclusions of Advocate General Kokott, the ECJ acknowledged

15 Decision of 7 September 2017, *Austria Asphalt GmbH & Co. OG v. Bundeskartellanwalt*, C-248/16, EU:C:2017:643, accessed and available at curia.europa.eu.

that the EMCR does not draw any distinction in its recitals between a newly created joint venture and the acquisition of sole control over an existing company (§ 23). According to the ECJ, this lack of distinction is justified by the fact that, "[a]lthough the creation of a joint venture must be assessed by the Commission as regards its effects on the structure of the market, the realization of such effects depends on the actual emergence of a joint venture into the market, that is to say, of an undertaking performing on a lasting basis all the functions of an autonomous economic entity" (§ 24).

The Commission disagreed with this reasoning:[16] the "full function" criterion should only be relevant in case of the creation of joint ventures. Thus, the simple conversion of an existing company into a joint venture jointly controlled by two companies constitutes an operation that should be notified to the Commission (if the relevant thresholds are met), and it is irrelevant that, for example, most of the sales of that target company are made to its parent companies. This opinion is consistent with the §§ 91-92 of the Commission Consolidated Jurisdictional Notice.

In its decision, the ECJ made clear that only concentrations with a real impact on market structure (*i.e.,* involving companies with an autonomous presence on the market) are covered by EMCR. This does not mean, as the ECJ and the Advocate General have pointed out, that non full-function target companies are outside the scrutiny of the competition authorities — Articles 101 and 102 TFEU still apply to these (cooperative) joint venture companies.

This is an important decision that clarifies an important jurisdictional issue of the EMCR.

However, by stating that the *ex-ante* control set in the EMCR only applies to transactions which may affect the structure of the market - as in the case of the creation of a joint venture that performs all the functions of an autonomous economic entity on a lasting basis - one could ask whether, for consistency reasons, that criterion should also be applied to acquisitions of sole control as well. After all, if the target company (resulting from such an acquisition) does not perform on a lasting basis all the functions of an autonomous economic entity, will there be a real change to the structure of the market?

16 See Commission's official position, clarified in the conclusions of Advocate General Juliane Kokott, of 27 April 2017. DG COMP presented a different position regarding the one from the Commission in this process (agreeing with the ECJ), leading the Advocate General to criticize the lack of a similar Commission's decision, particularly in a theme as important as this.

THE ECJ'S *COTY* RULING: WHEN MAY A SUPPLIER PREVENT AN AUTHORIZED DISTRIBUTOR FROM SELLING ITS PRODUCTS THROUGH A THIRD-PARTY ONLINE PLATFORM?

INÊS GOUVEIA

GONÇALO ROSAS

In this December 2017 judgment, the European Court of Justice (ECJ) established that a supplier of luxury cosmetics distributing its products *via* a selective distribution system ("SDS") is entitled to prevent its distributors from reselling online through third party platforms.

The facts

Coty is a supplier of luxury cosmetics selling certain brands under an SDS with which it seeks to maintain the luxury image of those brands. Coty wished to amend its distribution agreements by allowing its authorized retailers to offer and sell their products online, provided that the internet sales activity was conducted through an "electronic shop window" of the authorized store and the luxury character of the products was preserved and, at the same time, by precluding authorized distributors from selling in a discernible manner though third-party platforms. One of the practical effects of such an amendment would be the exclusion of online sales though third party platforms such as Amazon.

Selective retail distributor Parfümerie Akzente refused to sign the amendment, which led Coty to seek in Court an order prohibiting the distributor from selling Coty's products via the platform "amazon.de". The Frankfurt Regional Court dismissed that action on the grounds that the contractual clause at issue was a restriction of competition contrary to Article 101 (1) TFEU. On appeal, the Frankfurt Higher Regional Court referred the issue to the ECJ.

The ECJ's assessment

The ECJ began by dealing with the question of whether or not a selective distribution system for luxury goods, which is designed, primarily, to preserve the luxury image of those goods, is compatible with Article 101(1) TFEU.

For the ECJ, such a system is compatible with Article 101(1) TFEU provided that: *(i)* resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion; *(ii)* the characteristics of the product in question require such a network in order to preserve its quality and ensure its proper use; and, finally, that *(iii)* the criteria laid down do not go beyond what is necessary (conditions which are well established in the case law ever since the ECJ's judgment in *Metro*).

In what concerns the issue of whether the clause at stake – preventing authorized distributors from using, in a discernible manner, third-party platforms for the online sale of the contract goods – contravenes Article 101(1) TFEU, the ECJ considered that a clause designed to preserve the luxury image of the goods in the

context of an SDS which is, in itself, justified by the need to preserve the luxury image of the products concerned is lawful provided that the criteria referred to above are met.

The ECJ also found that the prohibition imposed by Coty is appropriate for preserving the luxury image of those goods in particular taking into account that:

(i) It guarantees that, in the context of electronic commerce, those goods will be exclusively associated with the authorized distributors;

(ii) It enables the supplier to check that the goods are sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.

In addition to the above, the prohibition at issue was considered not to go beyond what is necessary for the attainment of the objective pursued – the preservation of a luxury image for the goods – taking into consideration, in particular, that the clause at issue does not contain and absolute prohibition imposed on authorized distributors to sell the contract goods online (but merely limits internet sales via third party platforms that operate in a discernible manner towards consumers).

On the other hand, even if the prohibition at issue were considered to restrict competition within the meaning of Article 101(1) TFEU, it might still benefit from an exemption under Regulation N.o 330/2010 (the Vertical Block Exemption Regulation, hereinafter "VBER"), which in practice amounts to a presumption of legality of the agreement.

Indeed, the Court considered that the clause at stake did not restrict the customers to whom authorized distributors can sell the luxury goods at issue (prohibited under Article 4(b) of the VBER nor the authorized distributors' passive sales to end users (prohibited under Article 4(c) of the VBER), both of which are hardcore restrictions that prevent a distribution agreement from benefiting from the exemption. In order to reach that finding, the ECJ took into account, in particular, the fact that the clause did not prohibit the use of the internet as a means of marketing the contacts goods (as occurred in the *Pierre Fabre* case) and also that the limitation introduced by the clause does not affect a specific group of customers, which means that the distributors bound by such obligation do not lose access to clients or to a specific market.

Comment

The judgment brings about an important clarification on how authorized distributors can, in the context of an SDS, sell online. The judgment is also expected to put an end to some controversy generated with the interpretation and implementation of the Court's findings in *Pierre Fabre*.

Under the latter, it became clear that an absolute ban on sales via the Internet constitutes a hardcore restriction of competition, but doubts remained as to how far a company could go to protect the prestigious image of its brands.

In *Coty*, the Court clarified that certain limitations to online sales applied in the context of an SDS system the purpose of which is to preserve de luxury image of the products distributed are permitted and may even escape the prohibition of Article 101(1) TFEU though under strict criteria.

The fact that the nature of the products concerned and the characteristics of the SDS played a relevant role in the ECJ's assessment raises the question of whether a similar conclusion could be drawn if the products involved did not require, by their nature, an SDS system or if the SDS system in place were not purely qualitative. In practical terms, however, the relevance of this question may be limited.

Indeed, in its important to bear in mind that the ECJ also considered that the limitation imposed by Coty did not constitute a hardcore restriction for the purposes of both Article 4(b) and 4(c) of the VBER, which means that the exemption conferred by the VBER should be able apply to the different types of distribution agreements covered by the VBER even in the presence of a such a clause. The VBER, in turn, covers selective distribution regardless of whether it is qualitative or quantitative and regardless of whether the products at stake require by their nature selective distribution; it also cover non-selective distribution, provided that in any case the market shares of the parties to the agreement do not exceed the 30% threshold.

Companies should be alerted to the need for a careful legal review the content of their distribution agreements, in order to check if all relevant criteria are complied with and if their agreements allow for a coherent application of requirements in the context of offline and online distribution.

Back to the future?
The European Court of Justice's decision on the Intel appeal

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Introduction

In May 2009, the European Commission ("Commission") concluded that Intel had abused its dominant position on the market for x86 central processing units (CPUs), by implementing a strategy aimed at excluding from the market its only real competitor, Advanced Micro Devices (AMD), and imposed a fine of 1.06 billion euros, the then largest fine issued to a company in a EU antitrust case.

The conduct by Intel which the Commission found to be abusive consisted of: *(i)* granting rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) on the condition that they purchased from Intel all, or almost all, of their x86 CPUs; *(ii)* awarding payments to retailer Media-Saturn, which were conditioned on the latter selling exclusively computers containing Intel's x86 CPUs; and *(iii)* making payments to three computer manufacturers (HP, Acer and Lenovo), on the condition that they postponed or cancelled the launch of products with AMD CPUs.

The decision was appealed by Intel to the EU General Court, which in June 2014 confirmed the Commission's decision and dismissed the appeal. Intel then appealed the General Court's judgment to the European Court of Justice (ECJ). In October 2016, Advocate-general Wahl delivered his opinion on the appeal and recommended that the ECJ should set aside the General Court's judgment, *inter alia*, for having failed to analyse the effects on competition of the rebates offered by Intel.

In its much awaited judgment of 6 September 2017,[17] the European Court of Justice agreed with the Advocate-General and annulled the General Court's decision, referring the case back to the lower court. The ECJ's judgment brings further clarity to the existing case-law on rebates, an area where companies with a dominant position have long faced considerable uncertainty.

Clarification of the law on loyalty rebates

Under existing case law (which is not questioned by the *Intel* judgment), in an abuse of dominance assessment under Article 102 TFEU three categories of rebates can be identified:

- Quantity rebates, which are linked solely to the volume of purchases from the supplier in a certain individual order, are admissible, to the extent that they correspond to savings achieved by the dominant undertaking;

17 Judgment of 6 September 2017, *Intel Corporation Inc. v Commission*, C-413/14 P, EU:C:2017:632, accessed and available at curia.europa.eu.

- Exclusivity or loyalty rebates, granted to customers who commit to purchase all or most of their requirements from the dominant company, are presumed abusive, unless it can be objectively justified by the dominant undertaking;

- Other rebates not included in the previous two categories, in particular conditional rebates, granted to the client for achieving certain purchasing targets over a given period, should be assessed taking into account all relevant circumstances to determine whether the rebate is capable of having an anti-competitive foreclosure effect, by restricting or impeding access to the market by other competitors or restricting the buyer's freedom to choose his sources of supply.

The rebates offered by Intel were found to be "loyalty" rebates, since they were granted on the condition that clients purchased from Intel all, or "almost all" (80% to 95%) of their x86 CPUs. The General Court (invoking the existing case law of the ECJ) confirmed the Commission's line of argument that loyalty rebates granted by a dominant were, by their very nature, capable of restricting competition, an analysis of all the circumstances of the case to establish an anticompetitive effect and, in particular, an as efficient competitor test ("AEC test") were not necessary.

However, on appeal the ECJ noted that the Commission had nevertheless carried out an in-depth examination of the circumstances of the case in its decision, which led it to conclude that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of foreclosing such a competitor. The ECJ further observed that the AEC test had played an "important role" in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors, and that, for that reason, the General Court was required to examine all of Intel's arguments concerning that test, which the General Court failed to do.

More importantly, the ECJ clarified that, in cases where the dominant company submits, during the administrative procedure before the Commission, evidence that its conduct was not capable of restricting competition, and, in particular, of producing the alleged foreclosure effects, the Commission is required to analyse all the relevant circumstances of the case, notably the extent of the dominant position, the share of the market covered, the conditions, duration and amount of the rebates granted, as well as a possible existence of a aiming to exclude competitors.

The ECJ also noted that the analysis of the capacity to foreclose is relevant for assessing whether the rebates may be objectively justified, such as where exclusionary effects are outweighed by efficiencies which also benefit the consumer.

Comment

The *Intel* judgment does not change the principle established in long-settled case law (going back to the 1979 *Hoffmann-La Roche* decision) whereby loyalty rebates are "presumed" capable of restricting competition and therefore abusive. But it provides a helpful clarification that companies under investigation can "rebut" that presumption, meaning that, when the defendant companies produce supporting evidence, the Commission must analyse seriously any arguments that the rebates are not "capable" of having a restrictive effect on competition.

The ruling therefore points to a more effects based economic approach when assessing exclusivity rebates, already foreseen in the Commission's 2008 Guidance Paper on enforcement priorities for Article 102, which is welcome.

As for the fine imposed on Intel, while the General Court's judgment was annulled (the ECJ dismissed other arguments brought by the company on territorial jurisdiction and procedural irregularities), this does not end the *Intel* saga, since the case is heading back to the General Court for its examination of whether, in the light of the arguments put forward by *Intel*, the rebates were capable of restricting competition.

Another issue left open by the *Intel* decision also is the meaning of the term "capability" (to restrict competition), which is given particular emphasis in the judgment, and which AG Wahl considers that cannot merely mean a «[h]ypothetical or theoretical possibility», but an assessment of «[w]hether, in all likelihood, the impugned conduct has an anticompetitive effect». The General Court decision will therefore be awaited with impatience.

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Brazilian antitrust authority clears the acquisition of Time Warner by AT&T with conditions

On October 18, the Brazilian Administrative Council for Economic Defense ("CADE") cleared the proposed acquisition of Time Warner Inc. ("TW") by AT&T Inc. ("AT&T") subject to conditions.

Time Warner Group operates in Brazil through the licensing of channels for pay-TV providers and the licensing of programming content. AT&T Group, by its turn, is active in Brazil through SKY, a provider of pay-TV satellite services. Therefore, the transaction would result in a vertical integration between TW's activities, a content producer, licensing and programming agent, and AT&T's, a packaging and distribution agent for subscribers through SKY.

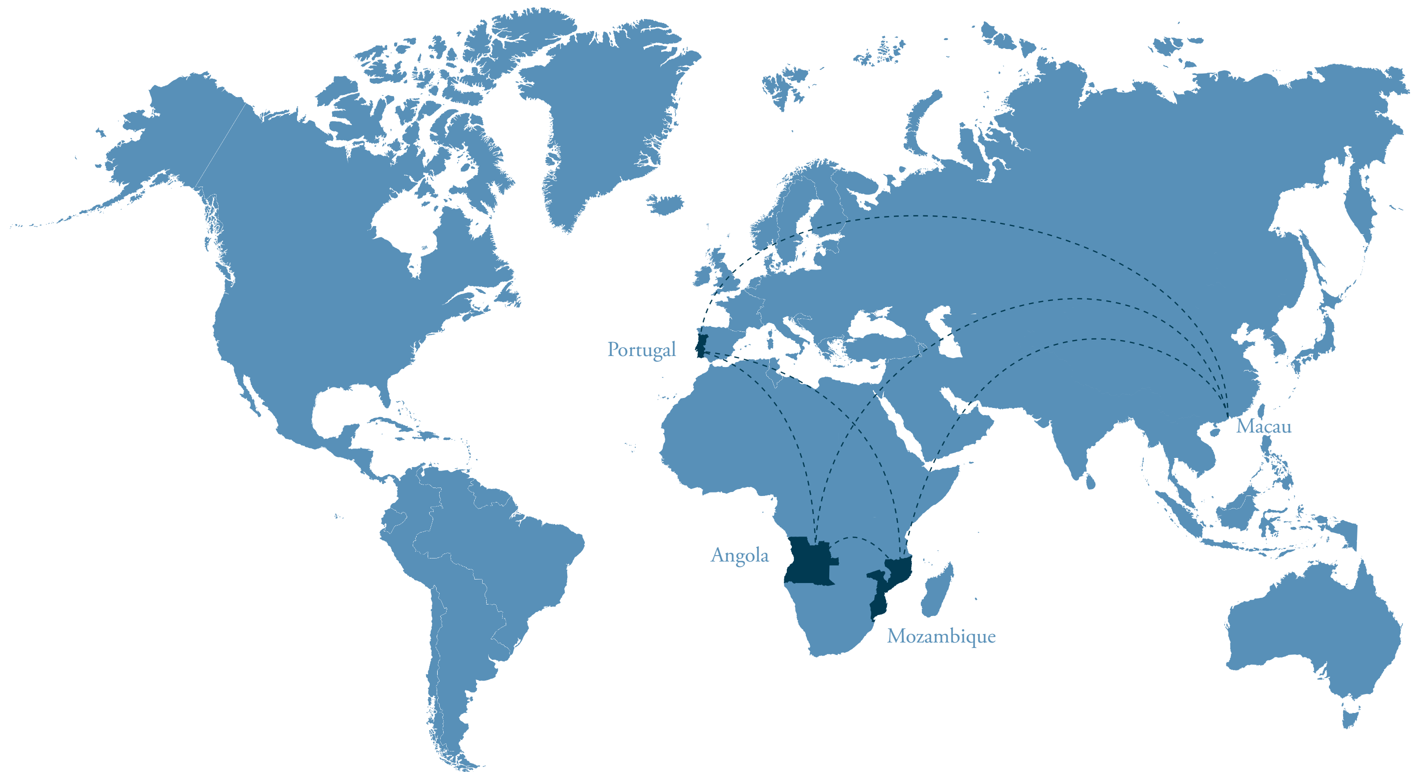
In accordance with CADE's analysis, the transaction raised competitive concerns related to a possible market foreclosure. In CADE's opinion, SKY would have incentives not to hire channels from programmers other than TW. In turn, TW would have the ability to make its content accessible to SKY only, which could harm SKY's competitors given the importance of TW's channels, which include CNN, TNT, HBO and Cartoon Network. CADE has also expressed concerns about the possibility of price discrimination in the licensing of channels and of restrictions on rival programmers' access to pay-TV packages. In summary, CADE had the opinion that, once integrated, SKY and TW would have the capacity and the incentives to increase their rivals' costs and, in the worst case scenario, foreclose their access to the market.

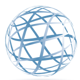
CADE acknowledged that the television industry has a tendency to concentration because of its structure: companies choose integration strategies in order to obtain greater power, gains in scale and scope, to enter new markets, and to lower transaction costs. Despite the benefits reaped by economic agents through such strategies, the control of more than one segment of the production chain by the same agent may pose a harm to the end user, e.g. making it difficult to access a product or reducing its quality.

The case sheds light on the importance of complementarity between regulation and competition in certain economy sectors. In this respect, the Reporting Commissioner has indicated that CADE's role would be limited to dealing with competitive concerns related to the transaction, while it would be up to the regulatory agencies to ensure the provision of the service to all users, to control prices and to monitor other regulatory aspects. Both the Brazilian Film Agency ("ANCINE"),

which regulates and supervises the programming and packaging activities, and the National Telecommunication Agency Telecom Regulator ("ANATEL"), which regulates distribution, have been active in CADE's review process. Despite acting on two different fronts, competition and regulation must ensure certain harmony in their efforts for the benefit of the values protected by each one and, at the end of the day, at the service of the society in which they operate.

With this in mind, the solution settled by CADE and the parties was an agreement with mechanisms to discourage anticompetitive behaviors. Among these mechanisms, there is the maintenance of SKY Brasil and the TW channel programmers as separate, autonomous legal entities, and the prohibition of exchanging competitively sensitive information between them; the offering by the TW channel programmers of all the programming channels licensed to SKY to non-affiliated pay-TV packers and providers of pay-TV services; and SKY Brasil's commitment not to refuse to transmit or impede transmission to providers of programming channels not affiliated with AT&T. The agreement provide that such commitments will last for five years.





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