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EU AND  
COMPETITION LAW

# Court of First Instance annuls European Commission decision that found state aids granted to Portuguese television broadcaster RTP compatible with the common market

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The Portuguese private television broadcaster SIC - Sociedade Independente de Comunicação, S.A. (SIC), by application lodged on December 31, 2003, brought an annulment action before the Court of First Instance of the European Communities against the European Commission. The applicant claimed that the Court should annul the Commission Decision of October 15, 2003, “*Regarding ad hoc measures implemented by Portugal for RTP*” (Decision).<sup>1</sup>

This decision deals essentially with ad hoc measures adopted by the Portuguese government in favour of the public Portuguese broadcaster RTP - Radiotevisão Portuguesa (RTP) in the period between **1992 and 1998** in an amount that exceeds **339 million euros**, which corresponds to increases in RTP’s share capital (233.4 million euros), a subordinated loan granted by the Portuguese Public Debt Stabilisation Fund (99.8 million euros) and rescheduling of debt due to the national social security system into 120 instalments and a waiver of interest and fines for late payment (over 6 million euros).

“THE EUROPEAN COMMISSION SUSTAINS IN THE DECISION, APPEALED BY SIC, THAT THESE FUNDING MEASURES ADOPTED BY THE PORTUGUESE GOVERNMENT IN FAVOUR OF RTP BENEFIT FROM THE EXEMPTION ON THE BAN OF STATE AID FOR COMPANIES ENTRUSTED WITH A SERVICE OF GENERAL ECONOMIC INTEREST, AS PROVIDED IN ARTICLE 86(2) EC.”

The European Commission sustains in the Decision, appealed by SIC, that these funding measures adopted by the Portuguese Government in favour of RTP benefit from the exemption on the ban of state aid for companies entrusted with a service of general economic interest, as provided in Article 86(2) EC. From the Commission’s perspective, these amounts transferred by the Portuguese Government to RTP are proportionate and do not overcompensate the net costs of the public service mission entrusted to the public television broadcaster RTP.

In its appeal SIC stressed that effective mechanisms were not in place in the period 1992 to 1998 to ensure successful monitoring of the fulfilment of RTP’s public service obligations, pursuant namely to RTP’s Concession Contracts for Public Service Television signed in 1993 and 1996.

The Concession Contracts provide that the costs reported by RTP regarding the execution of the television broadcasting public service must be subject to an annual external audit with the specific purpose of verifying the costs incurred by RTP with the public broadcasting service, and thereby ensuring an independent monitoring of RTP’s activities.

However, as recognized by the Court in the ruling, those external audits were not systematically executed. Therefore it is impossible to assess if the funds granted to RTP by the Portuguese Government were adequate and proportionate in light of the costs incurred by the television broadcaster with the public service remit.

Therefore, the Court finds in the judgment:

“255. (...) the Commission failed to place itself in a position in which it had information which was sufficiently reliable available to it to determine the public services actually supplied [by RTP] and the costs [by RTP] actually incurred in supplying them. In the absence of such information, the Commission was unable to proceed subsequently to a meaningful verification of the proportionality of the costs of the public services [of RTP] and was unable to make a valid finding that there had been no overcompensation [by the Portuguese Government] of the public service costs.”

For this reason, the Court annulled Article 1 of the Commission’s Decision, as it considered that there were no reliable guarantees that the net costs of the public service tasks entrusted to RTP had not been overcompensated.

In addition, the Court also partially annulled Article 2 of the Decision, as it ruled that the unlimited exemption provided to RTP by the Portuguese Government, from payment of any charges and fees to all registration departments and to all authorities and public bodies in respect of any act of inscription, registration or annotation, constitutes state aid - in opposition to the legal perspective sustained by Commission in the Decision.

“IN THIS CONTEXT, IT IS PARTICULARLY RELEVANT THAT THE JUDGMENT RECOGNIZES THE INEXISTENCE OF EXTERNAL INDEPENDENT AUDITS OF RTP’S PUBLIC SERVICE REMIT AND THAT, IN THE ABSENCE OF SUCH INFORMATION, THE COMMISSION IS UNABLE TO PROCEED SUBSEQUENTLY TO A MEANINGFUL VERIFICATION OF THE PROPORTIONALITY OF THE COSTS OF THE PUBLIC SERVICES.”

An appeal, limited to points of law only, may be brought before the Court of Justice against this judgment, within two months of its notification to the Commission’s services.

If the appeal is not lodged, or if the Court of Justice upholds the ruling from the Court of First Instance, the European Commission shall be obliged to adopt a new decision, in accordance with the judgment provided by the Court of First Instance.

In this context, it is particularly relevant that the judgment recognizes the inexistence of external independent audits of RTP’s public service remit and that, in the absence of such information, the Commission is unable to proceed subsequently to a meaningful verification of the proportionality of the costs of the public services and is unable to make a valid finding that there is no overcompensation of the public service costs. ■

In the end the European Commission may be obliged to confirm the unlawfulness of these state measures and request that the Portuguese authorities recover the aids granted to RTP in the amount of 339 million euros, including interest at an appropriate rate.

<sup>1</sup>See judgment of the Court of First Instance, «SIC / European Commission», June 26, 2008, case T-442/03, regarding funding measures granted by the Portuguese Republic in favour of the public service broadcaster RTP (available at <http://curia.europa.eu>).

# Revisiting public contracts: is it safe to keep them in house?

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**C**on April 12, 2008, the Commission published an “interpretative communication on public procurement and concessions to institutionalized public-private partnerships (PPP)”<sup>1</sup> consolidating the general principles applicable to public contracts and concessions.

In a related development, on June 4, 2008, the opinion of Advocate General Verica Tistintjak became public with reference to Process C-324/07 (Coditel Brabant), a decision upon which is pending in the European Court of Justice (ECJ), pursuant to a preliminary ruling ordered by the “Conseil d’État” (Belgium)<sup>2</sup> regarding the interpretation and application of public contracts and concessions rules.

The relevant preliminary question is whether it is mandatory, according to the applicable rules, to call for a tendering procedure when a municipality (“Commune d’Uccle”) intends to transfer the operation of its cable television network to an entity which results from an exclusive inter-municipal cooperative – an entity which the former is a member of – and which has no private capital participations.

“THE PARTICIPATION, EVEN AS A MINORITY, OF A PRIVATE UNDERTAKING IN THE CAPITAL OF A COMPANY IN WHICH THE CONTRACTING ENTITY IN QUESTION IS ALSO A PARTICIPANT, EXCLUDES, IN ANY EVENT, THE POSSIBILITY OF AN IN-HOUSE RELATIONSHIP BETWEEN THE CONTRACTING ENTITY AND THAT COMPANY.”

One should bear in mind that pursuant to “Teckal” case-law (C- 107/98), subsequently developed and applied to community and national law in the domain of public contracts or public service concessions, the rule that dictates the launch of a public tender does not apply to internal tasks carried out by public bodies - the so called “in-house procurement”.

“IS IT MANDATORY, ACCORDING TO THE APPLICABLE RULES, TO CALL FOR A TENDERING PROCEDURE WHEN A MUNICIPALITY (“COMMUNE D’UCCLE”) INTENDS TO TRANSFER THE OPERATION OF ITS CABLE TELEVISION NETWORK TO AN ENTITY WHICH RESULTS FROM AN EXCLUSIVE INTER-MUNICIPAL COOPERATIVE - AN ENTITY WHICH THE FORMER IS A MEMBER OF - AND WHICH HAS NO PRIVATE CAPITAL PARTICIPATIONS?”

According to the conditions laid down by such case-law, there is no need for a tendering procedure - even if the co-contractor is a different legal entity from the contracting entity - when the (i) public authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and (ii) that person carries out the essential part of its activities with the controlling authority.

Thus, in this context, the Commission's interpretative communication follows ECJ case-law by setting forth that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting entity in question is also a participant, excludes, in any event, the possibility of an in-house relationship between the contracting entity and that company.

Therefore, in the “Coditel Brabant” case the ECJ would be expected to confirm the understanding defended in the opinion of the Advocate-General. It appears that “in- house” procurement should be pondered because (i) the cooperative is composed exclusively of municipalities and associations of municipalities (or public collectivities), with no private capital intervention; (ii) the municipality of Uccle exercises over the cooperative society control similar to that exercised over its own departments, and (iii) the cooperative performs the essential activities for its associates. ■



<sup>1</sup>OJ C 91/02 <sup>2</sup>National proceedings were brought by Coditel Brabant - the Belgian company of TV distribution - against the municipality of Uccle, the cooperative Société Intercommunale pour la Diffusion de la Télévision (Brutélé) and the region of Bruxelles-Capitale. The plaintiff intended to acquire the network in a tendering procedure that was launched for that purpose by the municipality. However, the municipality decided to cancel the sale and to associate itself with the inter-municipal cooperative Brutélé, integrating therein its own cable television network.



# Court of First Instance condemns consultancy firm for complicity in cartel

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**C**on July 8, 2008 the Court of First Instance of the European Communities (Court) delivered an important judgment concerning the interpretation of the concepts of agreement and undertaking as provided for in Article 81 (1) EC. The judgment was delivered in case T-99/04, AC-Treuhand AG v. Commission, and dismissed the appeal brought by the Swiss consultancy firm *Treuhand* against the Commission's decision 2005/349/EC of 10 December 2003, which had concluded that the former, together with three producers of organic peroxides (chemicals used in the plastics and rubber industry) had formed and implemented a cartel on the European market, thereby infringing competition rules.

“THE COURT CONSIDERED THAT TREUHAND HAD, INTER ALIA, STORED AND CONCEALED ON ITS PREMISES CERTAIN SECRET DOCUMENTS RELATING TO THE CARTEL, COLLECTED AND TREATED CERTAIN INFORMATION CONCERNING THE COMMERCIAL ACTIVITY OF THE THREE ORGANIC PEROXIDE PRODUCERS (HAVING COMMUNICATED TO THEM THE DATA THUS TREATED) AND COMPLETED LOGISTICAL AND CLERICAL-ADMINISTRATIVE TASKS ASSOCIATED WITH THE ORGANIZATION OF MEETINGS BETWEEN THOSE PRODUCERS

The Court considered that *Treuhand* had, inter alia, stored and concealed on its premises certain secret documents relating to the cartel, collected and treated certain information concerning the commercial activity of the three organic peroxide producers (having communicated to them the data thus treated) and completed logistical and

clerical-administrative tasks associated with the organization of meetings between those producers, such as the reservation of rooms and the reimbursement of their representatives' travel expenses. The Commission imposed a total amount of fines of 70 million euros upon the producers of organic peroxides and imposed a symbolic fine of 1,000 euros upon *Treuhand*, given the Commission's new policy when tackling cartels. The latter amount was not contested by the undertaking.

In the first plea (of five), *Treuhand* alleged infringement of the right of defence and of the right to a fair hearing by the Commission. *Treuhand* alleged that the Commission had failed to inform it, very early on in the investigation procedure, of the nature of and the reasons for the accusation made against it. Even though the Court has recognized that the Commission is required to inform the undertaking concerned when the first measure is taken in respect of an undertaking - including in requests for information under Article 11 of Regulation No 17 (by referring, inter alia, to the subject matter and purpose of the investigation underway) - and that the Commission committed an irregularity, the latter was not capable of actually compromising the applicant's rights of defence in the procedure in question.

Particularly relevant is the assessment by the Court of the second plea presented by the appellant, in which it claimed that it could not be held liable pursuant to article 81 (1) EC, since it was not a contracting party in the cartel.

The Court undertook a literal, contextual and teleological interpretation of Article 81 (1) EC and concluded that the term 'agreement' is merely another way of indicating coordinated/collusive conduct which is restrictive of competition, or a cartel in the wider sense, in which at least two distinct undertakings participate after expressing their joint intention of conducting themselves on the market in a specific way. The Court stated that the relevant market where the undertaking that is the 'perpetrator' of the restriction of competition is active is not required to be exactly the same market as the one where that restriction is deemed to materialize.

“THE COURT CONSIDERED THAT THE OBJECTIVE CONDITION FOR THE ATTRIBUTION OF VARIOUS ANTI-COMPETITIVE ACTS CONSTITUTING THE CARTEL AS A WHOLE TO THE UNDERTAKING CONCERNED IS SATISFIED WHERE THAT UNDERTAKING HAS CONTRIBUTED TO ITS IMPLEMENTATION, EVEN IN A SUBSIDIARY, ACCESSORY OR PASSIVE ROLE”

As to the conditions in which the participation of an undertaking in a cartel constitutes an infringement of Article 81(1) EC, the Court considered that the objective condition for the attribution of various anti competitive acts constituting the cartel as a whole to the undertaking concerned is satisfied where that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role and that the subjective condition is satisfied by the manifestation of intention by the participating undertaking, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel.

Moreover the Court concluded that there was a sufficiently definite and decisive causal link between that activity of the appellant and the restriction of competition in the organic peroxide market. Furthermore, the Court found that, in the light of all the objective circumstances characterizing the applicant's participation, the applicant acted in full knowledge of the facts and intentionally when it made its professional expertise and infrastructure available to the cartel, in order to benefit from it, at least indirectly, in the course of implementing the individual agency agreements which linked it to the three organic peroxide producers. ■

# European Commission: Report on Competition Policy 2007

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**C**on 16 June 2008 the Commission adopted its annual Report on Competition Policy for 2007<sup>1</sup>, which provides an overview of the main developments in the field.

Regarding agreements between undertakings (article 81 ECT), the Report emphasizes the priority given to the investigation and sanctioning of hard-core cartels, with European or worldwide scope. In 2007 the Commission issued final decisions in eight cartel cases, fining 41 undertakings in an overall amount of EUR 3.334 million. The *Elevators and Escalators* case<sup>2</sup> saw the highest fines ever imposed for a cartel to date (EUR 992 million), as well as the highest fine for an individual company (EUR 477 million).

“THE COMMISSION’S LENIENCY PROGRAMME HAS PROVED A MAJOR WEAPON IN THE INVESTIGATION AND PUNISHMENT OF CARTELS.”

In the context of the enforcement of article 82 ECT, the seminal decision is the Commission’s July 2007 decision sanctioning Telefónica - the Spanish incumbent telecoms operator - with a fine of EUR 151 million for abuse of a dominant position (margin squeeze between wholesale and retail prices in the market for broadband access services)<sup>3</sup>.

In respect of merger control, the Report mentions several developments in the course of 2007. As regards guidance on applying Community rules in this context, the Commission adopted a Consolidated Jurisdictional Notice under Council Regulation (EC) no. 139/2004 on the control of concentrations between undertakings<sup>4</sup> - replacing the four previous Notices, from 1998, on the subject - and, towards the end of the year, a set of Guidelines on the assessment of non-horizontal mergers.

As for specific transactions, although the Commission received 402 notifications in 2007, only one transaction was prohibited: the horizontal merger involving the proposed takeover by Ryanair of Aer Lingus, which would have combined the two leading airlines operating from Ireland<sup>5</sup>. In the communications sector, the acquisition of sole control, by SFR, over the broadband access, pay-tv and fixed telephony business of Télé2 France<sup>6</sup> also warrants a mention (the Commission approved the concentration subject to conditions to ensure effective competition in the French pay-tv market).

The Report also highlights the Commission’s decision to the effect that the imposition of obligations by the Spanish energy regulator (CNE) regarding the acquisition of joint control over Endesa by Enel and Acciona (already cleared previously by the Commission<sup>7</sup>), constituted a breach of Article 21 of the EC Merger Regulation.

Regarding State aid, the Report mentions, among other aspects, the Commission’s consultation on a draft General Block Exemption Regulation aimed at simplifying and consolidating the existing block exemptions<sup>8</sup>, as well as the progress made towards a swifter and more effective execution of decisions ordering recovery of illegal aid. In respect of regulated electricity tariffs, the Commission indicates that, in certain Member States (Italy, Spain and France) said tariffs could amount to State aid to large and medium-sized electricity consuming companies.

“IN 2007, COMPETITION POLICY CONTINUED TO IMPROVE THE FUNCTIONING OF MARKETS WHILST PROTECTING CONSUMERS AND COMPANIES FROM ANTICOMPETITIVE CONDUCT.”

“REGARDING STATE AID, THE REPORT MENTIONS, AMONG OTHER ASPECTS, THE COMMISSION’S CONSULTATION ON A DRAFT GENERAL BLOCK EXEMPTION REGULATION AIMED AT SIMPLIFYING AND CONSOLIDATING THE EXISTING BLOCK EXEMPTIONS.”

The Report further reviews sector developments in several fields of economic activity - including energy, financial services and electronic communications - noting the conclusion of various sector inquiries pursuant to Article 17 of Regulation (EC) no. 1/2003. The sector inquiry to the European gas and electricity markets acknowledged enduring high levels of market concentration and vertical integration and was followed by a Commission proposal for the adoption of various directives and regulations (proposal for a third liberalization package<sup>9</sup>). The final Report on the sector inquiry into European retail banking markets was also published, pointing to a conclusion that these markets remain fragmented along national lines.

In the electronic communications sector, two issues, among others, are emphasized: the adoption of a Regulation on international roaming services on mobile networks (Regulation (EC) no. 717/2007, of 27/6/2007) - which set a retail price cap for calls made or received abroad (Eurotariff) - and the new Commission Recommendation on relevant markets for the purposes of *ex ante* regulation (Commission Recommendation 2007/879/EC, dated 17.12.2007). ■

<sup>1</sup>Report on Competition Policy 2007, available at [http://ec.europa.eu/comm/competition/annual\\_reports/](http://ec.europa.eu/comm/competition/annual_reports/). <sup>2</sup>Case COMP/E-1/38.823 - PO/Elevators and Escalators. <sup>3</sup>Case COMP/38.784 - Wanadoo España v.s. Telefónica. <sup>4</sup>Available at [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_jn.html](http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html). <sup>5</sup>Decision adopted on 27.6.2007 in Case COMP/M.4439 - Ryanair/Aer Lingus. <sup>6</sup>Case COMP/M.4504 - SFR/Télé2 France. <sup>7</sup>Decision adopted on 5.7.2007 in Case COMP/M.4685 - Enel/Acciona/Endesa. <sup>8</sup>The final regulation was published recently: Commission Regulation (EC) no. 800/2008, OJ no. L 214 of 9.8.2008. <sup>9</sup>Available at [http://ec.europa.eu/energy/electricity/package\\_2007/index\\_en.htm](http://ec.europa.eu/energy/electricity/package_2007/index_en.htm).



# European Commission Establishes Settlement Procedure for Cartels

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The European Commission approved on 30 June 2008 a new settlement procedure for cartel cases, which allows companies under investigation to acknowledge their participation in a cartel in exchange for a 10% reduction in the fine imposed by the Commission. “Cartels” - agreements between two or more competing companies which have as their object or effect the restriction of competition through practices such as price fixing or market partitioning - are prohibited by Article 81 of the EC Treaty and companies involved are liable for fines of up to 10% of the annual turnover of the whole economic group<sup>1</sup>.

“THE NEW PROCEDURE AIMS AT SIMPLIFYING THE PROCEEDINGS BEFORE THE COMMISSION AND AT REDUCING THE NUMBER OF JUDICIAL APPEALS. THIS PROCEDURE ALSO COMPLEMENTS THE “LENIENCY PROGRAM”, AND A GIVEN COMPANY CAN BE REWARDED UNDER BOTH PROGRAMS.”

The new procedure, which is contained in the implementing regulation detailing the Commission's investigative powers and in a specific interpretative notice<sup>2</sup>, aims at simplifying the proceedings before the Commission and at reducing the number of judicial appeals, thereby improving the effectiveness of the Commission's enforcement measures. This procedure also complements the “Leniency Program” under which companies can obtain full immunity from, or a significant reduction in, fines if they voluntarily produce evidence to trigger or advance the Commission's investigation. A given company can be rewarded under both programs if the

cooperation provided qualifies under the applicable Commission notices<sup>3</sup>.

## THE PROCEDURE

The Commission may explore the parties' willingness to engage in settlement discussions in any cartel case it deems to be relevant. The Commission will usually contact the parties after analysing the evidence collected during the investigation when it is in a position to draft a statement of objections. For this reason, the settlement process is not an investigative tool (as is the Leniency Program), but rather a way to close cartel cases more quickly through admissions from the parties under investigation.

If the parties express interest in engaging in settlement discussions, the Commission will initiate bilateral contacts with the settlement candidates, in which the envisaged objections and the potential fine is discussed.

Following these discussions if the parties are willing to accept the Commission's position, they must submit a formal request to settle, acknowledging their liability for the infringement, indicating the maximum amount of the fine which they would accept and confirming that their rights of defence have been respected.

The Commission will subsequently draft a simplified statement of objections, and settling parties will be given a deadline of at least two weeks to confirm that the content of its settlement proposals is reflected in the statement of objections. The Commission may then issue a simplified infringement decision, rewarding the cooperation of the settling parties with a 10% reduction in the fine to be imposed<sup>4</sup>.

The Commission retains a broad margin of discretion during the procedure to initiate or to discontinue settlement discussions, as well as to reflect or not in the statement of objections any settlement proposal or, even if it does so, to depart from its “preliminary position” and not endorse the parties' proposal as long as the parties are allowed to exercise their rights of defence.

“THE SETTLEMENT PROCESS IS NOT AN INVESTIGATIVE TOOL (AS IS THE LENIENCY PROGRAM), BUT RATHER A WAY TO CLOSE CARTEL CASES MORE QUICKLY THROUGH ADMISSIONS FROM THE PARTIES UNDER INVESTIGATION.”

Confession of the infraction may entail serious negative consequences for the parties, insofar as settlement submissions may be used in follow-on private litigation brought by the alleged victims of the cartel. Therefore, in order to assure that sufficient incentives to settle are available, documents on the settlement discussions are not in principle accessible to third parties and the settlement submission may be orally presented to the Commission if so requested by the parties. ■

## COMMENT

The development of a settlement program for cartel participants is a welcome step to the extent that it simplifies the administrative procedure and may contribute to improving the most effective use of the Commission's resources. However, the effectiveness of the new program is not guaranteed: during settlement discussions companies do not have a precise indication of the fine that the Commission is likely to impose, and the latter has considerable discretion to accept or reject a settlement submission. On the other hand, bearing in mind the additional judicial exposure for companies admitting to involvement in a cartel, a reduction of merely 10% in the fine to be imposed might not provide enough of an incentive for the companies to engage in settlement negotiations.

<sup>1</sup>See Article 23 of Council Regulation (CE) No. 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1. <sup>2</sup>See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, p. 3, and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases OJ C 167, 2.7.2008, p. 1. <sup>3</sup>See Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p.17. <sup>4</sup>Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.09.2006, p. 2.

# Court of Justice declares that the recovery of stranded costs in the electricity sector in the Netherlands may violate EC law

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**C**on July 17 2008 the European Court of Justice (ECJ or Court) issued an important judgment that concentrates on the difficult balance between the implementation of the internal market for electricity and the measures aiming at recovering the costs incurred by electricity companies before the opening of the markets<sup>1</sup>. These costs are normally called “non recoverable costs” or “stranded costs”, due to the fact that the amounts involved are not recoverable in a market open to competition.

The judgment concerns a preliminary ruling referred to the ECJ by a Netherlands court in the course of a national proceeding between an electricity distributor, Essent Netwerk Noord B.V. (**Essent**) whose share capital at the time was fully held by public bodies, and one of its industrial customers, Aluminium Delfzijl B.V. (**Aldel**).

Thus, at a time when the liberalization of the sector concerned had yet to be completed, Dutch electricity producers made a number of long-term investments partially required by public authorities in connection with energy and environmental policies. As liberalization was imminent<sup>2</sup>, the national legislation authorized the recovery of those stranded costs by means of a payment to be made by the distribution companies to the generators<sup>3</sup>. This payment was to be financed through an increase in the electricity tariffs that the distribution grid operators charged to certain categories of customers, expressed in a surcharge on the amounts of electricity distributed to the customers' installations<sup>4</sup>.

“FOLLOWING SETTLED CASE-LAW, THE COURT ASSESSED WHETHER OR NOT THOSE RESTRICTIONS WERE JUSTIFIED BY REASONS LAID DOWN IN ARTICLE 58 OF THE EC TREATY OR BY OVERRIDING REASONS IN THE PUBLIC INTEREST.”

The dispute in the main proceedings involves an action brought by Essent against Aldel, as a result of the amounts of electricity that the first distributed to the latter during part of the period in reference, for which it intended to charge the mentioned supplemental tariff. Aldel contested the payment of the sum destined to amortize the stranded costs and claimed that this legal system was incompatible with Community law. In those circumstances the national court decided to question the Court on the compatibility of this system with three sets of Community rules: free movement of goods, tax provisions and State aids<sup>5</sup>.

“THE COURT POINTS OUT THAT FUNDAMENTAL RIGHTS (FREE MOVEMENT OF CAPITAL AND ESTABLISHMENT) MAY BE RESTRICTED BY NATIONAL MEASURES.”

The first two sets of rules concern essentially the same matter of law. Articles 25 EC and 90 EC, which lay down, respectively, a prohibition on customs duties and charges having an equivalent effect and on discriminatory internal taxation, complement each other in pursuing the objective of prohibiting any national fiscal measure that is capable of discriminating against products originating in or destined for other Member States.

In this particular case the ECJ sustained, consistently with the opinion of the Advocate General, that in case the disputed surcharge is levied both on the electricity generated in the Netherlands and on that imported from other Member States<sup>6</sup>, the imposition of that surcharge is contrary to Articles 25 EC and 90 EC, because the revenue derived thereof is intended to benefit the national producers of electricity alone.

In our opinion the Court has rightly pointed out that the essential in this case was the “destination of the amount imposed” and not the “structure

“FROM A STATE AID VIEWPOINT, WE THINK THE COURT SHOULD HAVE GONE FURTHER INTO THIS COMPLEX QUESTION, CONSIDERING WHETHER THE SUPPLEMENT IN QUESTION INVOLVED THE USE OF “STATE RESOURCES” FOR THE PURPOSES OF ARTICLE 87 EC.”

and method of collection”. In fact, even where the surcharge could be said to be formally neutral, i.e., applied indiscriminately to domestic and imported electricity, the breach of EC law derives from the exclusive allocation of surcharge revenues to producers established in the Netherlands.

From a State aid viewpoint, we think the Court should have gone further into this complex question, considering whether the supplement in question involved the use of “State resources” for the purposes of Article 87 EC, although we recognize that the outcome of the Court's solution is in line with previous Community case law<sup>7</sup>.

Basically the Court concluded that the surcharge collected by Essent from Aldel, the revenue from which was destined to be subsequently delivered to the national electricity producers, involved the transfer of State resources, given that Essent was a public undertaking and the amounts concerned were under public control and therefore available to the national authorities.

The Court, however, left leeway for the national court to decide whether the amounts concerned confer an effective advantage on the national producers or if, on the contrary, they only represent compensation for the services provided by these undertakings in order to discharge public service obligations. ■

<sup>1</sup>Case C-206/06, *Essent Netwerk and o.*, available at <http://curia.eu>. <sup>2</sup>As a result of the approval of Directive 96/92/EC of the European Parliament and of the Council, 19.12.1996, concerning common rules for the internal market in electricity. <sup>3</sup>In the annual amount of NLG 400,000,000 between 1997 and 2000. <sup>4</sup>The legislation concerned is the Electricity Act of 1989 and 1998 (*Elektriciteitswet*) and the transitory law on the electricity generating sector of 2000 (*Overgangswet Elektriciteitsproductiesector*). <sup>5</sup>The relevant provisions are respectively Articles 25, 90 and 87 of the Treaty establishing the European Community. <sup>6</sup>Any finding that the surcharge is unlawful in light of the EC provisions at issue relates exclusively to the sums levied on imported electricity. <sup>7</sup>From this perspective the opinion of the Advocate General Paolo Mengozzi delivered at the hearing of 24 January 2008 is more representative of the “state of the art” in this matter.



# Court declares Spanish restrictions on energy mergers contrary to Community Law

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The National Energy Commission (NEC) was created in 1998 and is the regulatory body responsible for Spain's energy system. The goals of the NEC include ensuring both the existence of effective competition in Spain's energy system and its transparent functioning for the benefit of all agents and consumers.

Along with these objectives, since 2006, the NEC is also responsible for authorising the acquisition of certain shareholdings in undertakings which carry on regulated activities in the energy sector and similarly acquisitions of assets necessary to carry on such activities. This system of prior authorisation has been applied by Spain in particular to E.ON's public takeover offer for Endesa and to Acciona's and Enel's bid for Endesa.

“THIS SYSTEM OF PRIOR AUTHORISATION HAS BEEN APPLIED BY SPAIN IN PARTICULAR TO E.ON'S PUBLIC TAKEOVER OFFER FOR ENDESA AND TO ACCIONA'S AND ENEL'S BID FOR ENDESA.”

Having ordered Spain to withdraw such condition as it violates EU laws, notably articles 56 and 43 of the EU Treaty - free movement of capital and free movement of establishment - the European Commission decided to bring infringement proceedings before the European Court of Justice in April 2007.

In the Judgement of July 17<sup>1</sup>, the Court ruled that the Spain's system of prior authorisation of acquisitions in the energy sector was contrary to EU law as it limits fundamental rights. Firstly, the system constitutes a restriction on the free movement of capital insofar as it impedes investors, others than those established in Spain, from acquiring shareholdings in Spanish undertakings operating

“THE MERE ACQUISITION OF SHAREHOLDINGS IN UNDERTAKINGS WHICH CARRY ON REGULATED ACTIVITIES IN THE ENERGY SECTOR AND THE MERE ACQUISITION OF ASSETS NECESSARY TO CARRY ON THOSE ACTIVITIES CANNOT BE CONSIDERED IN THEMSELVES AS A GENUINE AND SUFFICIENT THREAT TO THE SECURITY OF SUPPLY.”

in the energy sector. This system, the ECJ concludes, is liable to prevent or to limit the acquisition of shareholdings in those undertakings. In addition, the system restricts the freedom of establishment. Following settled case-law, the Court assessed whether or not those restrictions were justified by reasons laid down in article 58 of the EC Treaty or by overriding reasons in the public interest, such as public safety, and within the limits of Treaty, i.e., securing the attainment of the objective pursued and being proportionate to that objective.

Referring to settled case-law, the Court points out that fundamental rights (free movement of capital and establishment) may be restricted by national measures justified on grounds related to public safety to the extent that there are no Community harmonising measures to ensure protection of that interest. Regarding the security of energy supply, the Court considers that harmonisation process is not complete and it recognises that the objective of guaranteeing the security of energy supply may constitute a public safety reason.

However, to be lawful, the restriction is required to attain the objective pursued and to be proportionate. In addressing these points, the Court states that public safety may be invoked only if there is a

genuine and sufficiently serious threat to a fundamental interest of society. Moreover, the mere acquisition of shareholdings in undertakings which carry on regulated activities in the energy sector and the mere acquisition of assets necessary to carry on those activities cannot be considered in themselves as a genuine and sufficient threat to the security of supply. On the other hand, as referred to by the European Commission, the regime of prior authorization is not suitable for securing the attainment of the objective sought by the Spanish law; the security of energy supply.

The Court concludes that the system of prior authorisation is not proportionate to the objective of ensuring security of energy supply as it does not limit the NEC's power to refuse the acquisition of shareholdings or assets, nor to subject them to certain conditions, solely to secure energy supply. On the contrary, the system allows the NEC to take into account other objectives of energy policy than security of energy supply.

Finally, and following previous case-law, the Court notes that a system of prior authorisation must be based on criteria which are objective, non-discriminatory and available in advance to the undertakings concerned. In addition, all persons affected by such measures must have legal remedies available to them. In the present case, given that the provisions which empower the NCE to refuse authorisation or to impose conditions are drafted in general and imprecise terms, the Court considers that the discretion given to the NCE renders difficult for courts to review, thus entailing a risk of discrimination. The ruling was welcomed by Internal Market Commissioner Charlie McCreevy as confirmation of the “consistent line that special rights have no place in the internal market”<sup>2</sup>. It also gives a clear signal to other Member States that the European Commission has firm intentions to abolish restrictions to the free movement of capital and/or establishment, notably in such sensitive area as the energy sector in which the creation of a single market has suffered several setbacks and delays. ■

<sup>1</sup>Case 207/07, Commission v. Spain. <sup>2</sup>In Reuters, available at <http://uk.reuters.com/article/oilRpt/idUKL1755909420080717?sp=true>.



# Never ending story? - Sony/BMG saga continues

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The European Court of Justice (ECJ)<sup>1</sup> has set aside a judgment of the Court of First Instance (CFI)<sup>2</sup> which annulled the European Commission's (Commission) decision<sup>3</sup> clearing unconditionally a proposed concentration by which Sony Corporation of America (Sony) and Bertelsmann AG (Bertelsmann) acquired joint control of the joint venture company Sony BMG.

## BACKGROUND TO THE CASE

### *The Commission's Decision*

On 9 January 2004 Sony and Bertelsmann submitted a filing to the Commission in which the two companies proposed the creation of a joint venture, combining their global recorded music businesses. On 24 May 2004 the Commission sent a statement of objections to the parties, in which it provisionally concluded that the concentration was incompatible with Community Law, since it would, *inter alia*, strengthen a collective dominant position, (i.e., enhance the ability to impose higher prices) in the recorded music market.

"THE COMMISSION, DUE TO THE COMPLEXITY OF THE ACTIVITIES PERFORMED BY THE PLAYERS INVOLVED IN THE MERGER, DECIDED TO OPEN AN IN-DEPTH MARKET INVESTIGATION."

After hearing the parties, the Commission adopted a "fundamental U-turn" position and cleared the concentration without conditions or obligations (Decision). The Commission observed that the absence of a collective dominant position could be inferred from (i) the heterogeneity of the product concerned, (ii) the lack of transparency of the market and (iii) the absence of retaliatory measures among competitors.

The Independent Music Publishers and Labels Association (Impala), an international association of independent music production, appealed to the CFI seeking an annulment of the Decision.

### *The CFI's judgment*

The CFI annulled the Commission's decision, considering that it was vitiated by manifest errors of assessment and was insufficiently reasoned. It held that the Commission failed to demonstrate both the absence of a pre-existing collective dominance and the creation or strengthening of such position as a result of the concentration. It is worth noting the CFI's obiter dictum, suggesting that the *Airtours* test for collective dominance<sup>4</sup> may "*be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position*"<sup>5</sup>.

The CFI further pointed out that the Commission superficially examined the creation of a post-merger collective dominance and could not have correctly relied on past information such as the absence of evidence that previous retaliatory measures had been used nor on the lack of transparency of the market to conclude that such position would not arise as a result of the concentration.

As a consequence of this ruling two parallel procedures occurred: (i) complying with the judgment, the concentration was re-notified to the Commission, re-assessed under current market circumstances and cleared once again<sup>6</sup>; (ii) Sony and Bertelsmann also brought an action before the ECJ seeking the annulment of the CFI's judgment.

### THE ECJ'S RULING

Contrary to the Opinion of Advocate General Kokott<sup>7</sup>, the ECJ set aside the judgment of the CFI without, however, giving a ruling itself and referred the case back to the CFI.

The ECJ criticised the CFI's judgment on a

"REGARDING THE HORIZONTAL EFFECTS, THE DECISION RECOGNIZES THAT DOUBLECLICK IS NOT ACTIVE IN THE MARKET FOR THE PROVISION OF ONLINE SPACE."

certain number of points, and considered that it had committed errors of law, identified as follows:

- (i) Treatment of certain conclusions of the statement of objections as settled, whereas this document is procedural and preparatory<sup>8</sup>.
- (ii) Improper consideration of documents submitted by Impala on a confidential basis, since the Commission itself could not have used them for the purposes of adopting the decision, by reason of their confidential nature.
- (iii) Misconstruction of the legal criteria applicable to a collective dominant position arising from tacit coordination. The ECJ held that the assessment of the relevant criteria in that regard, including the transparency of the market in question, should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a *hypothetical tacit coordination* as a basis.

Finally it should be noted that the ECJ confirmed that there is no general presumption that concentrations are compatible with the common market. Accordingly, the Commission does not benefit from different standards of proof when approving or prohibiting a merger. Furthermore, the ECJ clarifies that a decision may be annulled on the grounds of inadequate reasoning of the Commission. ■

### CONCLUSION

The success of Sony/BMG is not yet definitive: first, the ECJ has not ruled upon the case itself and instead referred it to the CFI for re-assessment; second, Impala appealed against the second decision of the Commission. Furthermore, following the ECJ's ruling, the Commission received on 8 August a filing by which Bertelsmann is selling its stake in Sony BMG to Sony<sup>9</sup>. The Commission cleared this transaction on 15 September. Sony BMG is, therefore, fully owned by the Sony Group.

<sup>1</sup>Case C- 413/06 - *Bertelsmann and Sony Corporation of America v. Impala*, judgment of 10 July 2008, nyr. <sup>2</sup>Case T- 464/04 - *Impala v. Commission*, judgment of 13 July 2006, [2006] ECR II-2289. <sup>3</sup>Commission Decision C (2004) 2815 of July 2004 (Case No COMP/M.3333 - Sony/BMG). <sup>4</sup>Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585. The three conditions that must be met if there is to be a finding of collective dominance are: (i) given the characteristics of the relevant market, each member of the oligopoly must know how the other members are behaving in order to be able to adopt the same policy; (ii) members of the oligopoly must be deterred over time from departing from the policy thus adopted; (iii) policy must be able to withstand challenges from other competitors, potential competitors or customers. <sup>5</sup>Case T- 464/04 *Impala v. Commission*, cited above, paragraph 251. <sup>6</sup>Commission's Decision C (2007) 4507 of 3 October 2007 of 3 October 2007, (Case No COMP/M.3333 - Sony/BMG). This second decision was subject to appeal to the CFI by Impala - Case T-229/08 *Impala v. Commission*. <sup>7</sup>Opinion of Advocate General Kokott in Case C-413/06, delivered on 13 December 2007, who proposed that the ECJ should uphold the judgment of the CFI. "The ECJ clarifies that "the Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon objections or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned. The Commission is not obliged to explain any differences with respect to its provisional assessments set out in the statement of objections. Notwithstanding, the CFI is not necessarily precluded from using the statement of objections in order to interpret a decision of the Commission, particularly as regards (...) the correctness, completeness and reliability of the factual material." Case C- 413/06 - *Bertelsmann and Sony Corporation of America v. Impala*, cited above, paragraphs. 63, 64, 69, 73. <sup>8</sup>Case COMP/M.5272 - Sony/Sony BMG. According to public information Sony BMG will be renamed *Sony Music Entertainment*.



## European Commission approves one of the biggest Mergers ever in the Internet Industry

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In March 11, 2008, the European Commission cleared<sup>1</sup>, under the provisions of the EC Merger Regulation, the USD 3.1 billion takeover of DoubleClick Inc. (**DoubleClick**) by Google Inc. (**Google**). This concentration resulted from the acquisition of all the shares of Click Holding Corp. (parent company of DoubleClick) by Google. The Commission, after a phase II investigation, considered the merger compatible with the common market.

**Google** operates the world's most popular internet search engine, which provides search mechanisms for end users free of charge and also offers online advertising space on websites as well as on affiliated websites (as a publisher and as an intermediary with its advertisement network - Ad Sense). The main competitors in search advertising are Yahoo! and Microsoft. In addition, the company started, recently, to provide video content through the acquisition of YouTube.

**DoubleClick** is a global player in selling advertisement servings, management and reporting technology to website publishers and to advertisers and agencies.

Hence, the Commission assessed the overall online advertising market within the European Economic Area (EEA) and the market for the provision of display advertisement serving technology for advertisers and publishers to be at least EEA wide in scope.

The Commission, due to the complexity of the activities performed by the players involved in the merger, decided to open an in-depth market investigation. In the phase II investigation its competitive assessment centred on two issues: the horizontal effects and the non-horizontal effects of the merger.

Regarding the **horizontal effects**, the Decision recognizes that DoubleClick is not active in the market for the provision of online space and nor does Google provide advertisement serving tools on a stand-alone basis. Furthermore, the Commission considers that even if DoubleClick remains an autonomous entity and becomes a potential competitor in the intermediation market, the merger does not affect this market, as the presence of a number of players would continue to assure competition in the online intermediation advertising services market. Based on these arguments, the Decision establishes that both companies do not exercise considerable competitive constraints.

In relation to the **non-horizontal effects of the merger**, and specifically in what regards the non-horizontal relationships between the parties, the major competitive issues resulted: (i) from DoubleClick's market position in advertisement serving, and the effect that Google's control over DoubleClick's tools could have in terms of the cost-effect of advertisement serving for other intermediaries; (ii) from Google's market position

in search advertising and/or online advertisement intermediation services, where this company could allegedly have forced purchasers of search advertisement space or intermediation to also acquire DoubleClick's tools; and (iii) from the apparent foreclosure effect caused by DoubleClick and Google's assets, in particular the databases that both companies have and could develop on customer online behaviour.

Attending to all these questions, the Commission concluded that the publishers and advertisers/advertisements networks - customers - may choose from a number of credible and financially strong vertically integrated competitors, such as, for instance, Microsoft, Yahoo! or AOL. The strong market position of Google in search advertising and/or online ad intermediation services was not considered relevant and it was found that it was not possible to assess if the merged entity would be able to impose contractual changes on its customers and subsequently permit the cross use of their databases in the future. ■

In conclusion, the EU Commission decided that the two relevant markets - online advertising intermediation and advertisement serving - would not suffer any major competitive constraints from the merger. Consequently the transaction was approved.

## Jacques Delors prize 2008 awarded to lawyer from MLGTS European Union and Competition Law team

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Mariana de Sousa Alvim was recently awarded a prize for outstanding academic research in the area of European Union Studies by the Jacques Delors Centre, sponsored by the Portuguese Central Bank and by the Calouste Gulbenkian Foundation. The prize was awarded for the academic study "The interim judicial protection of private parties within EC Law" and was conferred in a ceremony, chaired by the Portuguese Secretary of State for European Affairs, held at the Palácio das Necessidades in Lisbon, on June 30, 2008. ■



Mariana de Sousa Alvim

<sup>1</sup>See [http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4731\\_20080311\\_20682\\_en.pdf](http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf) (10.09.2008).

## Competition Authority imposes a fine of EUR 2.1 million upon PT Comunicações for Abuse of a Dominant Position

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**C**On September 1, 2008, the Competition Authority Council announced that it had imposed a fine of EUR 2.1 million on PT Comunicações for breach of Article 6 (1) and (2) and Article 4 (1) c) and e) of the Law on Competition (Law n.º 18/2003 of 11 June) and Article 82 of the Treaty establishing the European Community. The abuse of a dominant position by PT Comunicações consisted in the definition and application of a system of discounts on the prices of leased lines charged by this company between the period March 2003 to March 2004<sup>1</sup>.

The calculation of the fine took into account as attenuating circumstances the duration of the abuse, which ceased after a year, and the previous non-opposition of "ICP-ANACOM", the regulator, supervisor and representative of the communications sector in Portugal, to the implementation of the referred system of discounts. As an aggravating circumstance the fine reflected the appreciable effect of the abusive practice on trade between Member States. ■

## Change to appeal court structure in competition matters

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**T**his past August, a new legal structure of court organization and operation was approved (Law n.º 52/2008 of 28 August), bringing about important changes to Portuguese competition law rules concerning appeals against decisions in competition law matters.

The modifications are based on a decentralized system of jurisdiction whereby the (specialized) commercial sections of the lower courts are given the power - previously conferred only upon the Lisbon Commercial Court - to hear appeals of

decisions issued by the Portuguese Competition Authority in sanctioning proceedings and in administrative proceedings as well as appeals against (extraordinary) ministerial decisions approving a concentration.

Taking into consideration the experimental regime adopted for the application of Law n.º 52/2008, the modifications referred to above shall enter in force on 2 January 2009 but shall apply only to selected districts during an experimental period lasting until 31 August 2010. ■

## European Commission adopts a new Communication on State aid for railway undertakings

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**T**he European Commission Communication on State aid for railway undertakings has now been published in the EU Official Journal of July 22, 2008. These guidelines set out the interpretation of Articles 73 and 87 EC in relation to the public funding of European railway operators.

"THIS INITIATIVE IS ADOPTED IN THE CONTEXT OF THE LEGISLATIVE PROCESS OF OPENING UP RAILWAY TRANSPORT TO COMPETITION."

This initiative is adopted in the context of the legislative process of opening up railway transport to competition. The guidelines are also part of the framework of the modernisation of State aid policy as implemented by the Commission's Action Plan on State Aid of June 7, 2005 [see "Less and better targeted State aid: a road map for State aid reform 2005-2009", SEC (2005)795].

Through the adoption of these guidelines, the Commission aims to recognise, from within a balanced perspective, the specific features of railway transport, whilst at the same time moving the sector towards convergence with the general State aid rules applicable to all economic sectors opened up to competition in the European common market. ■

## Draft form for notification of concentrations is submitted to public consultation

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**C**On May, 15 2008 the Competition Authority launched a public consultation on the proposed amendment to the notification form of concentrations (enclosed to Regulation 2/E/2003, of the Council of the Authority). This is a welcome development as the specificities of the Portuguese legal framework concerning merger control would benefit from enhanced clarification of the information required in the Form and the striking of a careful balance

between the need to provide thorough information and the burden imposed on the notifying parties: the time-limit for submitting the notification is 7 working days and one of the two alternative criteria that result in mandatory notification is the 30% market share threshold, which gives rise to legal uncertainty in many cases. The proposed draft has the advantage of improving systematization of the required information but the disadvantage of widening the scope and complexity of that same information. ■

"THE PROPOSED DRAFT HAS THE ADVANTAGE OF IMPROVING SYSTEMATIZATION OF THE REQUIRED INFORMATION BUT THE DISADVANTAGE OF WIDENING THE SCOPE AND COMPLEXITY OF THAT SAME INFORMATION."

<sup>1</sup>See Press Release n.º 15/2008 (only available in Portuguese) \_ Autoridade da Concorrência condena a PT Comunicações por Abuso de Posição Dominante: [http://www.concorrencia.pt/download/comunicado2008\\_15.pdf](http://www.concorrencia.pt/download/comunicado2008_15.pdf).

## Portuguese Competition Authority investigates diesel and gasoline retail markets

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The Portuguese Minister of Economy and Innovation requested from the Portuguese Competition Authority (PCA) on April 30, 2008, pursuant to Article 6(2) of the Competition Authority's Statutes, a thorough assessment of the successive price increases of diesel and gasoline at fuel stations in Portugal since the beginning of 2008. The inquiry should ascertain whether fuel retail prices breached Competition Law rules. In this context, on June 3, the PCA submitted its in-depth study to the Government and the PCA's Chairman attended a parliamentary hearing where he directly informed the Members of the Parliament of the main conclusions of the investigation.

"THE PCA HAS REQUESTED THAT THOSE COMPANIES ACTIVE IN THE DIESEL AND GASOLINE RETAIL MARKETS SHOULD PROVIDE ADDITIONAL INFORMATION PURSUANT TO THE DIFFERENT STAGES OF THE VERTICAL CHAIN."

In brief, the PCA concluded that there is no substantial evidence to prove or sustain the existence of concerted practices or abusive pricing schemes between the oil

companies in breach of Articles 81 and 82 EC, respectively, or the corresponding national provisions [Articles 4(1) and 6 of the Portuguese Competition Act].

Following the in-depth study the PCA has requested that those companies active in the diesel and gasoline retail markets should provide additional information pursuant to the different stages of the vertical chain from the production/import to the retail of liquid and gaseous fuel. This data is to be provided on a monthly basis by the companies to the Authority, starting on September 30, and will allow the PCA to implement a thorough control of the diesel and gasoline markets in Portugal. ■

## MLGTS lawyers contribute to the XXIII FIDE Congress

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Partner Carlos Botelho Moniz and senior associate Margarida Rosado da Fonseca were the authors of the Portuguese report on "The Modernisation of the European Competition Law - First Experiences with Regulation 1/2003". This is one of the three general themes that were discussed at the XXIII FIDE Congress,

held in Linz between May 28 and May 31 2008, under the patronage of the Federal President of the Republic of Austria, Heinz Fischer.

The International Federation for European Law ("FIDE") is the umbrella organization for all the national Associations for European Law of the

EU Member States (APDE is the Portuguese one). The preparation of the biannual congresses requires the previous drafting by selected academics, jurists and representatives of the Member States, of national reports on EU law subjects that are considered particularly important by FIDE. ■

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