MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS
SOCIEDADE DE
ADVOGADOS

NEWSLETTER

ISSN 1647-272
No 6
MARCH 2010

EU AND COMPETITION LAW

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Smooth tasting coffee merger. First decision on negative sole control

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Transaction

On 30 October 2009 the Council of the Portuguese Competition Authority (henceforth "Authority") decided not to oppose a merger on the grounds that it was not liable to create or reinforce a dominant position that could result in significant barriers to effective competition in the *national market for the production and distribution of roasted coffees*. The merger operation consisted in the acquisition by "*Unicer - Bebidas de Portugal*" of negative sole control of *NewCoffee II*, a company whose corporate purpose is centred upon the management of shareholdings in other companies, in particular companies operating in the coffee sector (the production and marketing of coffees and associated products).[1]

"The decision carries considerable weight for the Authority's decisional practice *acquis* as it is the first merger case where it has considered the concept of negative sole control."

Negative sole control

The concentration consisted in the acquisition of a minority shareholding of between 30% and 40% in NewCoffee II. *In casu*, the notifying company also had a right of veto on issues such as special voting rights in the decisions taken in the shareholders' meeting and the appointment of the board of directors, which went beyond the right of veto normally accorded to minority shareholders.

Accordingly, this company would benefit from a similar degree of influence as an individual shareholder which jointly controls an undertaking, *i.e.*, the power to veto the adoption of strategic decisions. However, and contrary to the situation in a jointly controlled company, none of the remaining shareholders enjoyed the same level of influence and the notifying party did not necessarily have to cooperate with any other shareholders in order to determine the strategic behaviour of NewCoffee II.

The Authority also considered that, since the acquirer could produce a deadlock situation, this shareholder would acquire "decisive influence" within the meaning of Article 8 (1) and (3) of the Portuguese Competition Act (Law n.º 18/2003, 11 June). Finally, the Authority concluded that the notifying party is the only shareholder which possessed the power to block strategic decisions in the target company by virtue of veto rights enshrined in the shareholders agreement, which were considered sufficient to qualify this situation as negative sole control. ■

"The change from negative to positive sole control does not imply a modification of control for the purpose of merger control proceedings."

Comment

The decision carries considerable weight for the Authority's decisional practice *acquis* as it is the first merger case where it has considered the concept of "negative sole control". Furthermore, the decision is, in theory, significant for companies who are in a similar position as the notifying party in this transaction in case any of these companies decides to reinforce its shareholding position in the respective target company. In the event that any such company becomes the solely controlling undertaking that enjoys the power to determine the strategic commercial decisions of the other undertaking (for example, by acquiring the majority of voting rights), there will not be any change of control and a notification to the Authority will not be required. In other words, the change from negative to positive sole control does not imply a modification of control for the purpose of merger control proceedings. The Authority's reasoning is also consistent with the European Commission's "*Consolidated Jurisdictional Notice on the Control of Concentrations between Undertakings*" as in both cases (negative and positive) the control is always exclusive.

[1] A press release on this concentration "Case CCENT No 39/2009 - Unicer/ NewCoffee II" is available at http://www.concorrencia.pt/en/Content.asp?Processo=644&ProTree=2&ID=1796.

Portuguese Competition Authority fines catering cartel[1]

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On December 30 2009 the Competition Authority imposed fines totalling ¤14.7 million on five companies for allegedly operating a price-fixing cartel in the market for the operation and management of catering services at canteens, refectories and corporate restaurants. The companies involved - Trivalor, Eurest, Uniself, ICA/Nordigal and Sodexo - are the largest operators in this sector in Portugal. Their individual fines ranged from €357,000 to €6.8 million.

This is both the first case in which the 2006 Leniency Statute has been applied and the first time that board members and managers have been fined in addition to their infringing companies.

Facts

According to the information available, the companies entered into an agreement to fix prices for bids in open competitions or invitations to tender, implementing a "system guaranteeing that each undertaking would retain its customers". The companies agreed to grant the incumbent contract holder the right of first refusal in order to divide the market amongst themselves. The Authority found that the agreement, which was nationwide and lasted from 1998 to 2007, included compensation payments to each company not awarded a contract. It also enabled the incumbent to trigger a new tendering procedure if it was dissatisfied with the price offered by the client, knowing that its competitors would collaborate by presenting higher-priced proposals.

Entities harmed by the alleged cartel may sue the infringing companies for damages in national courts

The Authority also condemned the defendants for carrying out a prohibited exchange of sensitive information, which resulted in an appreciable restriction of competition in the market. This infraction was not punished separately, but was combined with the agreement in a single offence.

This is both the first case in which the 2006 Leniency Statute has been applied and the first time that board members and managers have been fined in addition to their infringing companies

However, the Authority considered the exchange of information to be particularly serious, as it amounted to a cooperation mechanism which replaced the normal uncertainty of market conditions.

First Application of Leniency Statute

In at least one previous case the Authority has rewarded companies for their cooperation in providing relevant evidence by significantly reducing fines under general procedural rules. However, this is the first known case initiated by a leniency application under the statute. It is also the first time that full immunity has been granted to an individual applicant.

Under the statute, full immunity can be granted only in 'first in' situations, where an undertaking or person involved in an infringement comes forward before an investigation is initiated and provides sufficient evidence to prove the existence of an infringement under the Competition Act. Reductions in fines are available to undertakings and persons providing significant value-added evidence after the opening of an investigation.

This investigation is believed to have been initiated in response to a complaint submitted by a present or former manager of Eurest. As the applicant received full immunity, and as Eurest was the only company whose managers were not fined, it is assumed that the Authority was contacted before it became aware of the infraction and that the information and evidence provided were crucial to the case. It can also be inferred that the application was made on a personal basis, not on behalf of the company, as Eurest received the second-highest fine.

First Conviction of Individuals

The Authority has never before fined an individual. The entry into force of the Act in 2003 made managers of infringing undertakings potentially liable to substantial fines - in theory, up to half of the fine imposed on the undertaking - if they were aware (or should have been aware) of the infraction and failed to take immediate and adequate measures to stop it.

The Authority stated that its main objective in imposing fines (totalling €20,000) on managers of Trivalor, Uniself, Ica and Sodexo was to emphasize that companies must be operated according to competition law and managers must actively prevent infringing conduct. This statement suggests that competition law rules may be more vigorously enforced with regard to individuals in the future. ■

Appeals and Damages Actions

The Authority's decision may be appealed to the competent commerce court. An appeal suspends the effect of the ruling and may be further appealed to the competent appeals court, which rules as a court of final appeal (without prejudice to a possible appeal to the Constitutional Court). If the parties choose to challenge the decision, as they are likely to do, a final decision may still be several years away.

Regardless of the appeals process, clients harmed by the alleged cartel may sue the infringing companies for damages resulting from the illegal conduct in question. The primary claimants would probably be public and private entities, such as hospitals, schools, prisons and petrol station operators, which contracted with participating companies for catering services in the period during which the infraction took place.

Recent press reports indicate that the government is considering whether to sue the infringing companies for damages to the state finances resulting from the price-fixing agreement. If it does so, the catering cartel case may become a landmark in yet another respect.

[1]This article was published in the International Law Office newsletter in January 21, 2010.

European Union Developments: the Lisbon Treaty in perspective

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"The Treaty promotes and upholds the EU's values, giving the Charter of Fundamental Rights of the European Union binding legal force."

"It provides the European Union with modern institutions and optimised working methods to tackle, both efficiently and effectively, today's challenges in today's world."

The Treaty of Lisbon ("***Treaty***"), after years of political negotiation, entered into force on 1 December 2009. It provides the European Union ("***EU***") with modern institutions and optimised working methods to tackle, both efficiently and effectively, today's challenges in today's world. The Treaty incorporates most of the improvements of the former draft Treaty establishing a Constitution for Europe into the two existing treaties: the Treaty on the European Union ("***TEU***") and the Treaty establishing the European Community, which has been renamed the Treaty on the Functioning of the European Union ("***TFEU***").

Via this Treaty, the European Union now has legal personality[1] and assumes the competences previously conferred to the European Community. EU action is also facilitated by the abolition of the existing separate policy areas - also known as "pillars" - that characterised the former institutional structure with regard to police and judicial co-operation in criminal matters.

The Treaty promotes and upholds the EU's values, giving the Charter of Fundamental Rights of the European Union, as adapted at Strasbourg, binding legal force[2]. In addition, it states that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms[3]. Furthermore, it now states expressly that EU law has primacy over the law of Member States[4].

From an institutional perspective, the Treaty strengthens the role and competences of the European Parliament and European Commission, reviews the qualified majority voting system in the Council and establishes the lightweight co-decisional inter-institutional legislative procedure as the common mechanism. In the Common Foreign and Security Policy ("***CFSP***") sphere the principle of the unanimity voting system is, as a general rule, maintained[5].

The jurisdiction of the Court of Justice of the European Union is also enlarged, notably in the field of Justice and Home Affairs. The Court of First Instance is renamed the General Court of the European Union. Furthermore, the national Parliaments have a strengthened role in the application of the principles of subsidiarity and proportionality, as they have the power to have a say at a very early stage, before a legislative proposal is considered in detail by the European Parliament and by the Council. The Treaty also clarifies the division of powers between the European Union and Member States[6].

Furthermore, it creates the High Representative for Foreign Affairs and Security Policy that conducts the CFSP, which shall have a central role in EU's external relations as well as in the context of the foreign and security policy of the Union.

Finally, the Treaty establishes the possibility for a Member State to withdraw from the EU, in accordance with its own constitutional requirements[7].

The treaty also creates a permanent post of President of the European Council that is appointed by the European Council for a two and a half year period, without prejudice to the powers granted to the High Representative of the Union for Foreign Affairs and Security Policy the President of the EU Council ensures the external representation of the EU on issues concerning its common foreign and security policy[8]. ■

Conclusion

The Treaty of Lisbon represents a step towards an even more democratic and transparent Europe, with:

- **a strengthened role for the European Parliament;**
- **simplified voting rules in the legislative procedure;**
- **promotion of the Union's values;**
- **the introduction of the Charter of Fundamental Rights into European primary law;**
- **new solidarity mechanisms between Member States; and**
- **better protection of European citizens.**

[1]See Article 47 of the TEU. [2]See Article 6,§1 of the TEU and Declaration no. 1. [3]See Article 6,§2 of the TEU. [4]See Declaration no.17 of the Treaty. [5]See Article 24 of the TEU. [6]See Part I, Title I, of the TFEU [7]See Article 50(1) TEU. [8]See Article 15 of the TEU.

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Tecnhical Cooperation Agreement - Portugal / Brazil

On January 14, 2010, the Brazilian System of Economic Defense and the Competition Authority of Portugal renewed the Technical Cooperation Agreement executed in 2005, confirming both countries' intention to develop projects of common economic interest.

The recent agreement was signed during the opening ceremony of the III Lisbon Conference of Competition Law and Economy, promoted by the Competition Authority of Portugal. Brazil was represented by the Secretary of Economic Law of the Ministry of Justice, members of the Administrative Council for Economic Defense and the Secretariat of Economic Control and by the ambassador of Brazil in Portugal, Celso Marcos Vieira de Souza.

Portugal and Brazil agreed to make their respective decisions and technical notes available to each other, render qualified technical assistance, consult on a reciprocal basis, organize events, seminars and lectures and coordinate actions before other international departments. The authorities also decided to exchange data concerning developments relating to markets, economic sectors and decision practices.

The Technical Cooperation Agreement has been seen as a positive initiative on the part of both the Portuguese and Brazilian authorities to reinforce historical bonds, exchange and development between countries. However, the application of the partnership must necessarily respect the legal principles of juridical systems and international legislation in order to benefit common policies of economic optimization.

Among the new initiatives adopted by the authorities are mutual consultations, exchanges of information and the *initiative of communicating the existence of activities that may be anticompetitive in their respective jurisdictions*. It is implied that circumstantial evidence of anticompetitive practices may be transmitted between authorities.

It is not clear if the use of the word "information" in the context of the Agreement should be interpreted in a broad sense, comprising not only oral or written communication between authorities, but also material and electronic documents of all kinds and all types of content. The idea is probably to put into practice total interchange, with no caveats, in order to achieve the partnership's purpose.

The Agreement does not directly consider the hypothesis of refusal by one authority to cooperate with the other, but alludes to this possibility by establishing that either party will not be obliged to provide information to the other, if this is forbidden by law or incompatible with its "relevant interests". There therefore appears to be an element of discretion in this cooperation.

There is also the obligation to safeguard the confidentiality of information provided, with disclosure of the information exchanged under the partnership to third parties being strictly forbidden. However, there are no provisions restricting the use that one authority can make of the information received from the other. This issue is extremely sensitive and worth reflecting upon.

In Brazil, so-called "*lent evidence*" is a theme of constant debate. It namely consists of transferring the evidence from one process to another. To do so validly, some requirements must be necessarily fulfilled, with reference to the Federal Constitution and the *due process of law*: (i) the processes must be in the same jurisdiction (civil or criminal); (ii) the "*lent evidence*" must have arisen in a process with the same parties, or at least with the party against whom the evidence will be used; and (iii) the parties must be given prior notice of the evidence.

The majority of Brazilian jurists believe that it is not possible "to borrow" evidence produced abroad, because foreign jurisdictional agencies do not make up part of the Brazilian jurisdiction. Nevertheless, evidence can be gathered in a foreign country if it is impossible to gather it in Brazil (for instance, the hearing of witnesses and inspections of assets located outside of Brazilian territory). Therefore, the transference of evidence between Brazil and foreign countries must have a specific justification.

The cooperation between global competition authorities is laudable. The way in which partnerships are put into practice will determine the success of the interchange.

In addition, the Agreement also seeks to promote efforts to increase the Competition Lusitanian Network, comprising Portugal, Brazil, Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and East Timor. ■

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ISSN 1647-2721

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