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NEWS IN BRIEF

The Competition Authority's Final Report on the Portuguese Fuel Sector

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On 21 April 2009 the Portuguese Competition Authority ("Authority") published its final report on the in-depth investigation into the fuel sector in Portugal ("Report") that it initiated in July 2008[1]. The 500 page long report concludes that there is no evidence that the significant fuel price increases and oscillations that occurred throughout 2008 involved business conduct contrary to competition law. However, the Report also found serious structural barriers to the functioning of the fuel sector in Portugal, and submits a number of recommendations which, if implemented, are likely to increase competition in this sector.

The Investigation

The Authority's recent intervention in the fuel sector was initiated in April, 2008[2], when it was asked by the Economy Minister to investigate whether the successive increases of retail motor fuel prices were in keeping with the "rules of the market and fair competition". The Authority presented the requested report on 2 June 2008, and concluded that it was not able to find evidence of a concerted practice or of unilateral excessive pricing conduct in breach of competition law.

In September, 2008, further to reports in the media and to appeals from the Government to investigate an alleged disparity between decreases in international oil prices and the subsequent decreases in fuel prices in Portugal, the Authority announced that it was carrying out an "in-depth analysis" into the fuel sector. This analysis resulted in the Report, which focuses on the most representative liquid and gaseous fuels in Portugal: IO95 gasoline, unmarked diesel and Liquefied Petroleum Gas (LPG)[3].

Main Conclusions of the Report

Barriers to access and expansion of import and storage infrastructures. The Report concludes that there are "serious constraints" for third parties to access the infrastructure indispensable to import refined products from refineries abroad, the only alternative to the products refined in Portugal (both national refineries are owned by the Galp Group, which thereby supplies all its competitors), such as maritime oil terminals, import depots adjacent to terminals and secondary (coastal and hub) depots, in particular the Aveiras storage plant.

These infrastructures are held solely by integrated oil companies - and especially by Galp, who owns all but one of the maritime terminals capable of receiving imports and between 55% and 80% of the import and secondary storage capacity; in addition, the expansion of the capacity and construction of new facilities faces considerable environmental, zoning and financial obstacles; and lastly, the legislation envisaged since 2006, which will create a regulated system for third-party access in transparent and non-discriminatory terms, has not yet been adopted.

Limited competition in the non-retail and retail fuel markets. According to the Report, there are "entry and expansion constraints" at both levels of commerce. At the retail level (service stations), and although non-integrated retailers and supermarket chains already represent about 20% of motor fuel sales in Portugal, the Authority observes that the four integrated oil companies active in Portugal (Galp, BP, Repsol and Cepsa) "tend to adopt parallel behaviour" in terms of prices, which is attributed to several structural factors, such as product homogeneity, the concentrated structure of the market, a dispersed and inelastic demand, transparent market conditions, stable and frequent relationships between oil companies on several levels (through joint ventures, supply agreements, swap agreements) and the above-mentioned access barriers to infrastructure.

The Report also concludes that the independent operators merely follow a "passive strategy, following the market leader". Moreover, even if supermarket chains have an aggressive pricing policy in their service stations, their limited national footprint in terms of sales, and the fact that some chains have agreements with integrated oil companies to give customers cross discounts on each other's activities, tend to reduce their influence over the pricing policy of the oil companies.

No evidence of concerted pricing practices. The main objective of the "in-depth analysis" was to investigate the asymmetries in the adjustment of retail prices vis-à-vis international oil prices, which according to the Authority led "public opinion to suggest the existence of anticompetitive practices in the fuel sector". Although stating that average retail prices before taxes in 2008 adjusted completely to the variations of the international reference prices (*Platts*), the Authority acknowledged the existence of an asymmetry of one week (the adjustment to an increase in prices tended to occur one week earlier than the adjustment to a decrease in prices). However, the Report found that this economic phenomenon was observed in seven other European countries, and that it did not amount to a violation of competition law.

Throughout the report, the Authority recognised the widespread existence of "parallel behaviour, by integrated oil companies and by independent retailers alike". However, the Report excludes that, on its own, this parallelism constitutes evidence of a horizontal price-fixing concerted practice (prohibited by competition law rules), since "product homogeneity and market transparency result in all operators having complete knowledge of the relevant prices in real time". For that reason, the Report concludes that parallel pricing behaviour analysed resulted from "the intelligent [and unilateral] adaptation by each company to the conditions of the market", conduct which is allowed by competition law.

Recommendations

To remedy the competition constraints identified in the Report, the Authority submits a number of recommendations[4], specifically in order to:

– **Guarantee third-party access to existing infrastructure,** in particular the Sines-Aveiras pipeline, to the import depots next to the Leça and Sines refineries and to the "hub" depot of the Aveiras Storage Plant; in this context, the implementation of detailed rules concerning transparent and non-discriminatory access to these facilities, pursuant to the fuel framework law (Decree-Law 31/2006), assumes particular importance;

– **Expand import capacity,** through the expansion of the maritime terminal in the port of Aveiro and the construction of adjoining import depots, and through the concession within the port of Sines of an area suitable for import depots, connected to the maritime terminal and to the Sines-Aveiras pipeline; in both cases the Authority recommends that capacity should not be attributed to Galp, as "dominant operator";

– **Intensify competition in retail markets,** through the granting of incentives to the installation of service stations next to supermarkets; speeding up the licensing of new stations; ensuring that in a given motorway there is more than one operator present; enforcing the rules on price display in service stations, to improve customer choice;

– **Minimize the transparency of market conditions.** To this effect, the Authority recommends that integrated oil companies "review their commercial practices" with service station operators, so that prices to retailers do not entail "de facto fixed and minimum retail pricing policies", and reminds the sector of the prohibition of "the definition and announcement of reference prices by integrated oil companies and sectoral associations, which are neither necessary nor desirable in a liberalised market".

Comment

The Report constitutes a significant effort by the Authority to define the main constraints to effective competition in the Portuguese fuel sector, and to make recommendations on the appropriate remedies. However, many of the measures suggested involve politically-sensitive decisions, which may prevent or delay their implementation. In any event, the fuel sector will probably continue to be under close scrutiny from the Authority in the future: while presenting the Report before the Parliament, the Authority's President stated that if there are indications of concerted practices or other infractions of competition law, the Authority will not refrain from intervening. ■

[1] The Report and all Authority documents cited in this article are available at www.concorrencia.pt/Publicacoes/Autoridade.asp. [2] Since 2004 (when the administrative prices on motor fuels were abolished), the Authority has been following closely the fuel sector in Portugal (see for instance Recommendation No. 3/2004 and the newsletters published quarterly on the evolution of fuel prices). [3] The Report was preceded by a preliminary report published on 16.12.2008. [4] Some of the recommendations were already made in Recommendation 3/2004, but have yet to be completely implemented.

Review of the insurance block exemption regulation

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Within the context of the ongoing review of Regulation (EC) n.º 358/2003 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (hereinafter referred to as "Regulation") the European Commission made public, in March this year, its preliminary conclusions as to the future of the regulation, which are part of a report presented to the European Parliament and the Council and which have also served as basis for a public hearing.

According to the preliminary conclusions, **only two out of the four types of agreements exempted by the current Regulation are likely to continue to benefit from an exemption**, namely:

a) agreements on **joint calculations, tables and studies;**
b) agreements on **common coverage of certain types of risks (pools).**

"ONLY TWO OUT OF THE FOUR TYPES OF AGREEMENTS EXEMPTED BY THE CURRENT REGULATION ARE LIKELY TO CONTINUE TO BENEFIT FROM AN EXEMPTION."

It is recognised that these two types of agreements concern or solve issues that are specific to the insurance sector and that the adoption of specific legal instruments should be adequate to enhance the necessary cooperation in this sector with regard to those issues.

The first type of agreement facilitates risk assessment and calculation, which is a key element in the pricing of insurance products. These agreements can increase the number of insurers potentially capable of covering a given risk, thus increasing access to the market and competition.

Notwithstanding, there is still no final decision on how a review of the Regulation on this issue will occur, and in particular whether the structure or drafting of the current exemption will be amended and whether a renewal of the exemption will be total or partial.

As for the second type of agreement (pools), the Commission recognises that, for certain types of risks (eg: nuclear, environmental and terrorism risks), risk sharing is crucial in order to ensure a full and effective coverage of all those risks. In the absence of those mechanisms, insurers might be reluctant or incapable to provide, individually, said coverage.

According to the Commission, a potential renewal of this exemption is likely to be accompanied by a significantly redrafting of its terms and conditions (eg: the rules on calculation of the relevant market shares), in order to ensure consistency with the enforcement of competition rules in other areas and to take on board comments received during the review.

In relation to the other two types of agreements currently covered by the Regulation - agreements on standard policy conditions and models on profits and agreements on security devices (technical specifications and compliance assessment procedures on such devices) - the conclusions of the Commission indicate that **there should be no need to renew the Regulation and thus the current proposal is that these agreements should no longer come within the scope of the Regulation.**

If the final conclusions of the Commission confirm this preliminary finding, this should not be seen as recognition that these agreements are not *a priori* able to generate pro-competitive effects in the markets at stake. A decision not to renew the exemption conferred by the Regulation

"LEGALITY OR ILLEGALITY OF AGREEMENT OUTSIDE THE REGULATION SHOULD BE BASED ON A SELF-ASSESSMENT OF THE EFFECTS OF THE AGREEMENT, ON THE MARKET TO BE CARRIED OUT BY THE PARTIES."

is associated with a different idea: according to the Commission, these types of agreements are not specific to the insurance sector (rather, they relate to issues that also arise in other areas of economic activity) and cooperation in these domains does not depend on the existence of a regulation that is specific to the insurance sector.

Therefore, the Commission suggests that these agreements should be removed from the scope of application of the Regulation and treated under the general rules of European competition law.

Withdrawing the benefit of exemption from these agreements does not render them automatically illegal. Legality or illegality should be based on a *self-assessment* of the effects of the agreement, on the market to be carried out by the parties thereto and on the basis of the Commission's previous guidance on the subject.

Finally, the review process revealed that several insurers interpret or apply the regulation in a deficient or incorrect manner: insurers tend to consider the mere existence of the Regulation as a guarantee of legality of the agreements without promoting a full legal analysis as to their compatibility with the Regulation or by wrongfully considering that they are covered by its provisions. In our view, this finding should recommend the adoption of guidelines by the Commission, in particular with regards to the interpretation and application of the relevant rules.

The Commission's final conclusions are now

Alert to undertakings: the new form to file concentrations to the Authority is already in force

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Last March 23 the new form for notification of concentrations entered into force ("Form"), as approved by Regulation Nr. 120/2009, of 26 February, of the Council of the Competition Authority ("Authority"). Ten months earlier the Authority had launched a public consultation on the draft Form and several suggestions that were transmitted by stakeholders during the public consultation have been introduced in the Form.

This is a document of the utmost importance, as it concerns all undertakings that participate in a concentration and on which information must be submitted to the Authority. Furthermore, given the criteria provided for in the Competition Act ("Act") which create the obligation of prior notification of concentrations, the scope of concentrations subject to prior notification is much wider than one may consider at a first glance. In reality, it is sufficient that one of the following criteria is fulfilled: *(i)* the post-merger market share is at least 30% in the relevant market(s) and/or *(ii)* the combined turnover of the participating undertakings is more than 150 million euros, as long they achieve at least 2 million euros individually.

It is worth noting that the scope of application of both the criteria has been contested, as they apply to many concentrations that may not raise relevant competition issues and the first criteria, in particular, applies to concentrations whereby there is a mere transfer of ownership.

The fact that the Act provides for the obligation to notify a concentration containing the information required in the Form within a 7-day time limit from the triggering event is also of the utmost importance. And save for the very exceptional circumstances provided in the Act, the concentrations may only be implemented once the non-opposition decision is adopted by the Authority. Consequently, besides the obligation to file a concentration in many situations when it is questionable whether it needs to be scrutinized by the Authority, the effort involved for the undertakings in collecting and processing the information required in the Form is the more onerous as the timeframe for notifying is very limited. It must be noted that the timeframe for assessment by the Authority is initiated only when the notification is considered complete.

Given the need for the notifying undertaking(s) to prepare and present the Form in the most complete and accurate manner within the short time limit imposed by the Act it is strongly advisable for undertakings whose business strategy encompasses the participation in a concentration to familiarize themselves as soon as possible with the new Form, so as to minimize the above-mentioned effort.

In reality, modifications introduced by the Form are important and relate to both substantive and formal features of the notification procedure.

On the one hand, it is worth highlighting the improvements concerning systematization and clarification of the information required. For instance, there is now a table of legal concepts (the interpretation of which until now required recourse to the EC legislation and decisions of the European Commission on merger control). Equally positive is the Authority's effort to dematerialize the procedure. In fact, the Form already allows for the possibility of its submission (together with its annexes in given formats) via electronic means and the precise terms are to be implemented by the Authority. The paper format of the same Form is to be presented within a 3-day period from the date of submission via electronic means, with undeniable advantages, given the dimensions of the documentation usually submitted in this context.

"This is a document of the utmost importance, as it concerns all undertakings that participate in a concentration."

"The balance between the advantages and disadvantages of the modifications introduced by the Form will depend to a large extent on the future interpretation to be made by the Authority."

On the other hand, the Form introduces an important increase in the quantity and complexity of the information required. And notwithstanding the Authority's declaration of intention to increase flexibility in the requirements of information provided in the Form on the basis of case-by-case specificities (given the degree of complexity of each concentration), this does not seem to be sufficiently detailed for undertakings. This may contribute to notifying undertakings feeling some legal uncertainty regarding non-mandatory information, as this will depend on a case-by-case basis.

It thus seems possible to argue that the balance between the advantages and disadvantages of the modifications introduced by the Form will depend to a large extent on the future interpretation to be made by the Authority of the Form's requirements. It would thus be most desirable for the Authority to publish guidelines on this matter as soon as possible.

Turbo boost on the adoption of State aid decisions - The Commission's new simplification package

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"The state aid Simplification Package will benefit business by facilitating faster state aid decisions notably through earlier and better cooperation between Member States and the Commission. In adopting the Best Practices Code and Simplified Procedure Notice, the Commission has delivered on its promise to modernize and simplify state aid procedures, as set out in the State Aid Action Plan."

Competition Commissioner
Neelie Kroes (April 29th, 2009)

Back in 2005 the European Commission ("Commission") adopted the **State Aid Action Plan** which enacted a five-year reform plan of State aid policy to endorse growth, jobs and cohesion, based on the principle of "less and better targeted State aid". Notwithstanding, and as acknowledged by the Commission's itself, state aid control procedures still frequently suffer from an excessive length and lack of predictability, rendering them inadequate for the needs of modern businesses in Europe. Currently, the average duration of a preliminary investigation phase amounts to 6 months, and may last 20 months if the Commission opens a formal investigation of the aid injection.

The state aid simplification package is not intended to apply to the measures notified by Member States in the context of the global financial crisis, for which specific procedures were established in order to allow the Commission to react swiftly to those state aid measures.

Best Practices Code

The Best Practices Code is based on a mutual commitment of the Commission and Member States to increase the quality of notifications and mutual discipline. Therefore, this Code establishes guidelines for a wide range of situations:

- The Commission should offer pre-notification contacts on a more regular basis, in order to enhance the quality and comprehensiveness of notifications, in particular in cases where there are novelties or specific features which would justify informal prior discussions with the Commission services; and the Member States are invited to answer more swiftly and fully case-related requests made by the Commission.

- The Commission and the Member States should mutually agree on a form of structured cooperation, based on a joint planning and understanding of the likely course of the investigation and in particular, concerning the duration, transparency and predictability of the referred procedures.

"The Best Practices Code and the Simplified Procedure largely pursue overlapping objectives of increasing the predictability and efficiency of state aid procedures. The notices are two different but complementary instruments."

Simplified Procedure

This Notice sets out an easier procedure under which the Commission, in close cooperation with a specific Member State, aims to assess within an accelerated time-frame certain types of State aid support measures, which only require the Commission to verify that the measure is in accordance with objective rules and practices without exercising any discretionary powers. In reality, the distinction between straightforward and complex cases has been a useful tool in other Commission procedures, such as merger control procedures in which time is of the essence, and this has served as inspiration for the state aid ones.

"The state aid simplification package is not intended to apply to the measures notified by Member States in the context of the global financial crisis, for which specific procedures were established in order to allow the Commission to react swiftly to those state aid measures."

The Best Practices Code and the Simplified Procedure largely pursue overlapping objectives of increasing the predictability and efficiency of state aid procedures. The notices are two different but complementary instruments.

It goes without saying that this Commission's initiative is much welcomed but its efficiency will depend on its case-by-case approach and also on the Member States' individual efforts to contribute to a speedier procedure. ■

Commission Recommendation on termination rates with potential impact of €4 billion for communications industry by 2012

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In the 7th of May 2009, the European Commission adopted a Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (the "Recommendation"), subsequently published in the Official Journal on May 20th.[1]

Voice call termination is the wholesale service that enables calls originated on a given network to be terminated and delivered to a location (fixed networks) or subscriber (mobile networks) of the called network.

Having assessed more than 850 draft measures notified to it by national regulatory authorities ("NRAs"), the Commission found that inconsistencies in the regulatory treatment of voice call termination rates (fixed and mobile) still exist across Member States. According to the Commission, this creates competitive distortions, such as transfers between fixed and mobile markets and consumers and, in cases of asymmetric market shares, significant payments from smaller to larger operators. The Commission also noted that mobile termination rates remain high compared to termination rates for fixed voice calls which tends to lead to high retail prices for making calls and lower usage, with the ensuing detriment to consumer welfare.

In order to promote competition and achieve the objectives set out in Article 8(2) of Directive 2002/21/EC (the Framework Directive) - such as ensuring that users derive the maximum benefit in terms of choice, price and service quality and that there are no distortions or restrictions to competition -, as well as reinforcing the consistency of regulatory measures across Member States, the Commission has made clear that "…*regulated termination rates should be brought down to the costs of an efficient operator as soon as possible*" (recital (8)).

The Recommendation highlights that the main concern of regulators in this context should be excessive pricing since high (wholesale) termination prices are ultimately recovered through higher (retail) prices for calls by end users. It also confirms that the Commission considers cost orientation to be the most appropriate form of intervention and proposes a specific methodology to be applied by NRAs.

The Commission recommends, *inter alia*, that:

- NRAs should set symmetric termination rates based on the costs incurred by an efficient operator.
- Evaluation of efficient costs should be based on current costs, using a bottom-up modelling approach based on long-run incremental costs (LRIC).
- Only those costs that would be avoided if a wholesale voice call termination service was no longer provided to third parties should be allocated to the regulated termination services (for which purpose non-traffic-related costs should be disregarded).
- Any deviation from a single efficient cost level should be justified by objective cost differences, which are outside the control of the operators concerned (the Commission gives the example of uneven spectrum assignments as an exogenous factor resulting in per-unit-cost differences between mobile operators).

> "The main concern of regulators in this context should be excessive pricing since high (wholesale) termination prices are ultimately recovered through higher (retail) prices."

In addition, an Annex to the Recommendation sets out a specific set of principles for the calculation of wholesale termination rates, both in fixed and in mobile networks. These principles include criteria for determination of the *appropriate efficient scale* of the modelled operator. For mobile operators, the Commission recommends setting the minimum efficient scale at a market share of 20%. For fixed networks, definition of the single efficient scale should take into account the need to promote efficient entry but also that, in certain conditions, smaller operators can produce at low unit costs in smaller geographic areas.

> "NRAs should ensure that termination rates are implemented at a cost-efficient and symmetric level, by 31 December 2012."

The Recommendation concedes that *new entrants in mobile markets* may be subject to higher per-unit incremental costs before reaching the minimum efficient scale. If this can be demonstrated, and if it is determined that there are impediments at the retail level to market entry and expansion, NRAs may allow those higher costs to be recouped, through regulated termination rates, during a transitional period not exceeding 4 years after market entry.

The main conclusion of the Recommendation is that NRAs should ensure that termination rates are implemented at a cost-efficient and symmetric level, by 31 December 2012 (barring exceptional circumstances), subject to any objective cost differences due to external factors or associated with new entry in the mobile sector.

The Recommendation shows a continued willingness on the Commission's part to intervene in the regulation of (fixed and mobile) termination rates.

Although the Recommendation is not binding, NRAs must take the utmost account of the principles and methodologies proposed by the Commission, in accordance with Article 19(1) of the Framework Directive, and may not deviate from its terms without providing due reasoning.

According to estimates set out in a Commission Staff Working document which accompanied the Recommendation - focusing on its implications for industry, competition and consumers - the proposed approach may, over the period 2009-2012, imply a potential reduction in cash flows/profits for the mobile industry of €4 billion. This is estimated to be offset by the corresponding benefits for fixed sector operators and consumers, with additional profits and consumer surplus, respectively, of approximately €2 billion in each case. ■

[1] OJ L124/67 (2009/396/EC).

Comments on the 2009 European Commission's review of the 2001 broadcasting communication

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Since 1998 publicly funded broadcasting is the third most subsidised industry in Europe, receiving, according to public information, more aid than the agricultural and fisheries sector. In the EU 27, State aid to broadcasting is estimated as being worth at least €22 billion per year.

The objective of Commission's consultation, conducted between March 7 and May 8, 2009, was to gather information from stakeholders on a revised draft for a new Commission Communication which sets out the Commission's practice in applying the EC State aid rules to State funding of public service broadcasters. The new text ("***2009 Communication***")[1] will update the existing 2001 broadcasting communication[2].

The Communication, which was available for consultation until May 8, 2009, continues to provide Member States with wide discretionary powers in the definition and compensation of public service broadcasting remits. This legal *status quo* may entail, in our opinion, negative aspects for private television broadcasters and to consumers (the latter as taxpayers).

First, pursuant to the 2009 Communication, it continues to be almost unfeasible for private television broadcasters to question the public measures granted to public broadcasters, as all costs of a state company can fall under a public service remit. Under this umbrella, public broadcasters have a markedly increased tendency to migrate to new distribution platforms, for example, mobile telephones and the internet, becoming in many cases, publicly funded online newspaper and magazine publishers in direct competition with private web-based services.

In addition, public television broadcasters bid directly with private broadcasters in the acquisition of the television rights to important sporting events in all disciplines of sport, irrespective of the national or international character of the event and in the acquisition of prime entertainment series and other relevant events, having always as a *sponsor* the Member State, which sooner or later will cover all costs of the public service broadcaster with the acquisition of those premium contents. Thus, public broadcasters do not have to care about the acquisition costs of television contents and can therefore provide the highest bid for any given content to detriment of private broadcasters and distorting the real value of programmes rights.

Based on these premium contents, public television broadcasters are able to achieve high viewing figures and reach an identifiable audience, which is a special target for certain important advertisers. Hence, due to the inexistence of a level playing field in the acquisition of programmes' rights, public broadcasters can leverage their share audience based on those programmes and consequently obtain higher audiences and generally higher revenues in the advertising market, at the expenses of the revenues of private companies.

Furthermore, as public television broadcasters do not have to worry about maximizing the acquired rights, they may refuse to sub-licence to private broadcasters, for instance purchased sports rights that they do not intend to broadcast to the detriment of consumers (*see* Court of First Instance judgement of 8.10.2002, "SIC v. Commission", case T-300/00, at § 72).

In addition, the thirst of public broadcasters in acquiring television programme rights can entail negative inefficiencies for consumers: the acquired television contents may sometimes, due to the lack of television time available to the public broadcaster, never be viewed by spectators, particularly if there are time limitation periods associated with the acquired television contents[3].

Public broadcasters may also produce audiovisual contents without worrying about costs or profits and sell those audiovisual rights in cross border markets in direct competition with private producers of audiovisual contents. They can also inflate the cost of producing audiovisual contents, by poaching talent from private broadcasters to produce programmes.

Public service broadcasters can, moreover, inflate the market value of television employees (e.g. television anchors and hosts), as they can at any given moment in time propose higher salaries to television professionals of competing broadcasters, without having to take into account commercial or economic performance (as the Member State sooner or later will pay those costs). In addition, they can also adopt predatory pricing for advertising space, as revenues are not a critical issue for these television broadcasters.

As to icing on the cake, the European Commission sometimes does not appear to adopt "diligent and impartial investigations" in State aid cases (*see* case T-448/03, § 254).

In the *SIC* case, for instance, in which a private television broadcaster has lodged since 1993, several complaints before the Commission against State aid measures granted by the Portuguese State to the public television broadcaster RTP. The measures, which were not notified to the Commission are still partially under assessment. The *SIC* complaints have led to three actions for failure to act against the Commission (*see* case T-231/95 and joined cases T-297/01 and T-298/01), and to the annulment by the Court of First Instance of two Commission decisions, which considered the measures granted to RTP compatible with the EC Treaty (*see* cases T-46/97 and T-442/03).

The referred *SIC* case is still ongoing as the European Commission, pursuant to Article 233 EC, has not yet executed the ruling of the Court in case T-442/03, which partially annulled a Commission decision on state aid measures granted to the Portuguese public broadcaster. In this specific administrative procedure, the Commission is taking more than 16 years to assess State aid measures granted to a public television broadcaster since 1993.

Unfortunately this is not an isolated example. In 1998, six years after the case was filed, the Court condemned the Commission for failure to adopt a decision based on two complaints by Spanish broadcaster *Telecinco* in 1992 and 1993 (see case T-95/96). One year later, in 1999, six years after the complaint was first filed, the Court also condemned the Commission for failure to act on a complaint by private French broadcaster *TF1* submitted in 1993 (*see* case T-17/96, confirmed by ruling of the Court of Justice in joined cases C- 302/99 P and C-308/99 P).

The EU legal standing on State aid to the public television broadcasting sector recognizes the inexistence of a level playing field between public and private television broadcasters and acknowledges that public broadcasters are not de facto subject to competition law in the State aid field. As a general rule they benefit, from a certified always-honoured blank check endorsed by Member States and validated by the European Commission for their public service remit. ■

A way to leave this systemic pattern of blank checks endorsed by Member States to public service broadcasters, systematically validated by the European Commission, to the detriment of a level playing field in the market, could be for the Commission, in the final version of the 2009 Communication, to adopt a stronger stance on the fulfilment of the requirements of Article 86(2) EC, notably in light of the 2008 SIC ruling (case T-442/03,) in which the Court stated that the European Commission is responsible for verifying the de facto effectiveness of national external and independent audit mechanisms of public service broadcasters funding.

[1]Available at ec.europa.eu/competition. [2]See OJ 2001 C 320, p.5. [3]See, for example, Audit no. 8/2002, of the Portuguese Court of Auditors to the Portuguese public service broadcaster, p. 114, in which it is stated that the Portuguese public television broadcaster spent €5,5 million in acquiring programmes that were never exhibited (www.tcontas.pt).

The New European Energy Policy - Part II

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In the previous edition of this newsletter we wrote about the founding and evolution of the New European Energy Policy, which we considered revolved around essentially three areas: *(i)* the third liberalisation package for the internal market of electricity and gas; *(ii)* the Second Strategic Energy Review; and *(iii)* the proposals for combating climate change.

We had then the opportunity to look at the first area and shall now briefly examine the remaining two. In relation to the first area it should be mentioned that, in the meantime, the final version of the third legislative package was endorsed by the European Parliament and the Council and should published in the Official Journal during the month of August.

Second Strategic Energy Review

After launching, in March 2006, its first Strategic Review of the Energy Policy, the European Commission brought forward in November 2008 the Second Strategic Review, thus responding to the request submitted to it by the European Council of March 2007 that defined three underlying objectives of the EU's new energy policy: sustainability, competitiveness and security of supply.

The Second Strategic Review is composed of a number of measures, both medium term (up to 2020) and long term (2020-2050), which are designed to tackle those three objectives.

The *medium term* proposals are contained in the "EU Energy Security and Solidarity Action Plan", which focuses on:

(i) promotion of infrastructures considered essential to the EU's energy needs, with particular emphasis on natural gas, where a number of Member States rely on a single supplier for 100% of their needs;

"The European Council of March 2007 that defined three underlying objectives of the EU&s new energy policy: sustainability, competitiveness and security of supply."

(ii) greater focus on energy in the EU's international relations, notably its trade policy and agreements, partnerships, cooperation and association agreements and political dialogues;

(iii) revision of the EU legislation on strategic oil stocks and the Directive on the security of gas supply to improve oil and gas stocks and crisis response mechanisms;

(iv) definition of an Energy Efficiency Action Plan, in line with the commitment taken by the European Council of March 2007 to achieve a 20% improvement in energy efficiency by 2020;

(v) making better use of Europe's indigenous energy reserves in terms of cost-effective and environmentally-compatible parameters. A particular role is here played by the development of renewable energies (seen as Europe's greatest potential source of indigenous energy), more efficient coal plants and an increase in extraction of indigenous reserves of oil, gas, oil shale and peat. The Commission has also challenged Member--States to develop a common legislative framework with respect to nuclear power plants and the management of nuclear waste.

Regarding *long term* measures, it cannot be said that the Second Strategic Review provides for concrete proposals. Nevertheless some important steps have been taken towards identifying the challenges likely to be faced between 2020 and 2050.

In particular, the Commission has committed itself to propose in 2010 a policy agenda for 2030 and a common vision for 2050, in which it will deal with *(i)* carbon-free electricity generation, *(ii)* ending oil dependence in transport, *(iii)* construction of low energy and positive power buildings (i.e., net energy producers), *(iv)* installation of smart electricity grids and even *(v)* an eventual global agreement on high-efficiency, low-carbon energy systems.

We look forward to the debate on this ambitious agenda, which will be equally demanding in terms of technological shifts and political will.

Fighting climate change

The package to fight climate change, also known as the "20 20 by 2020" strategy, was put forth by the European Commission in January 2008 and rests on two key ideas: reduce by 20% greenhouse gas emissions in EU and increase the share of renewable energies in EU energy consumption to 20% by 2020.

"We look forward to the debate on this ambitious agenda, which will be equally demanding in terms of technological shifts and political will."

There is a third component that is sometimes attributed to this initiative, although it is not formally integrated within the package to fight climate change. That is the goal of reducing energy consumption by 20% by 2020, which was first set out by the Conclusions of the European Council of March 2007 and afterwards reinforced by the Second Strategic Review.

The targets of the package for climate change along with that on energy efficiency are normally referred to as the "20-20-20" strategy.

The legislative package to fight climate change was approved by the Council in April this year, resulting in the adoption of six legislative acts whose entry into force is expected shortly. The following new rules are worth mentioning:

(i) generation of energy from renewable sources, with the setting for the first time of mandatory national targets for each country;

(ii) emissions trading system for greenhouse gases, with the increasing substitution of the current permits national allocation plans by auction systems (mandatory in the case of power producers);

(iii) emissions from new passenger cars, with the introduction of legally-binding standards as of 2012; and

(iv) the first regulatory framework for the geological capture and storage of carbon dioxide. ■

The European Commission imposes fine of €1.06 bn on Intel for abuse of dominant position

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"Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years. Such a serious and sustained violation of the EU's antitrust rules cannot be tolerated."

Neelie Kroes[1]

Following almost a decade of investigations, the European Commission ("EC") has condemned Intel Corporation ("Intel"), on May 13, 2009, for violating EC Treaty rules on the abuse of dominant market position (Article 82), and imposed a record fine of over one billion euro[2].

During the investigations, the EC sent two Statements of Objections ("SO") to Intel, on 26th July 2007 and 17th July 2008. Both SOs outlined the Commission's preliminary view that Intel engaged in illegal anticompetitive practices to exclude competitors, in particular Advance Micro Devices Inc ("AMD") from the worldwide market for computer chips called x86 Central Processing Units ("CPU"), in which Intel had a dominant position of at least 70%. According to the EC investigation, the illegal practices were conducted between October 2002 and December 2007.

"NOTWITHSTANDING SOME DIFFICULTIES DURING THE INVESTIGATIONS IN GATHERING THE REQUIRED PROOFS OF SUCH BEHAVIOURS, AS SOME OF THESE PRACTICES WERE NOT TO BE FOUND IN INTEL'S OFFICIAL CONTRACTS, THE COMMISSION WAS ABLE TO GATHER A BROAD RANGE OF EVIDENCE FROM INTERNAL DOCUMENTS AND E-MAILS DEMONSTRATING INTEL'S ILLEGAL CONDUCT, PARTICULARLY DURING THE COURSE OF RAIDS."

In the first SO, the EC outlined its preliminary conclusion that Intel had engaged in three types of abuse. Whilst each one individually could be considered to constitute an abuse of a dominant position in its own right, in conjunction they reinforce each other and represent parts of a single overall anti-competitive strategy aimed at eliminating competition.

According to the SO, firstly Intel provided substantial rebates to various original equipment manufactures, which were conditional on them obtaining all or the great majority of their CPU components from Intel. In addition, and in a number of instances, the EC found that Intel made payments in order to induce a manufacturer to either delay or cancel the launch of a product line incorporating an AMD-based CPU. Finally, the EC found, in the context of bids against AMD-based products for strategic customers in the server segment of the market, that Intel offered CPUs on average below cost.

The EC carried out investigations which included raids with officials from the German competition authority (*Bundeskartellamt*) on Intel Corp's Munich offices, Germany's Media Markt-Saturn and British electric goods retailer DGS International Inc., which owns Dixons and Currys stores.

Later, the EC sent a Supplementary Statement of Objections (SSO) to Intel reinforcing the Commission's preliminary view that Intel had engaged in illegal anti-competitive practices as part of an overall plan to exclude competitors.

Following investigations, the EC confirmed some of Intel's anti-competitive behaviours described in both SOs, and found that Intel had abused its dominant position in the x86 market, between October 2002 and December 2007. The Commission found that Intel engaged in two specific forms of illegal practices.

Firstly, Intel gave, wholly or partially, hidden rebates to computer manufacturers on the condition that they bought all, or almost all, their x86 CPUs from Intel. Although rebates can lead to lower prices for consumers, rebates that are conditional on buying less of a rival's products, or not buying them at all, are abusive according to settled case-law of Community Courts, and are therefore prohibited under article 82 EC (unless the dominant company can put forward specific reasons to justify those rebates). The EC does not object to rebates *per se*, but only to the conditions Intel attached to those rebates.

According to the Commission, Intel structured its pricing policy to ensure that computer manufacturers who opted to buy CPUs from other companies consequently would lose the rebate (or a large part of it) as Intel provided rebates in relation to the quantities bought by the manufacturers.

In addition, Intel made payments to major retailer Media Saturn Holding on condition that it exclusively sold Intel-based personal computers in all countries in which Media Saturn Holding is active.

Secondly, the EC concluded that Intel also interfered directly in the relations between computer manufacturers and AMD. Intel awarded computer manufacturers payments - unrelated to purchases from Intel - on condition that these manufacturers postponed or cancelled the launch of specific AMD-based products and/or put restrictions on the distribution of specific AMD-based products. By doing so, Intel prevented products for which there was a consumer demand from coming to the market.

Notwithstanding some difficulties during the investigations in gathering the required proofs of such behaviours, as some of these practices were not to be found in Intel's official contracts, the Commission was able to gather a broad range of evidence from internal documents and e-mails demonstrating Intel's illegal conduct, particularly during the course of raids.

The imposition of such a heavy fine is an important sign for companies that the European Commission, and national authorities, will not slow down on their work against anti-competitive practices and will not go easy on companies that do no comply with competition rules, regardless of the financial and economic crisis. It is therefore of the utmost importance for companies to continue their work in implementing competition compliance programmes and to review, whenever necessary, their policies accordingly. ■

[1]Neelie Kroes speech at the press conference held in Brussels on May 13, 2009. [2]The following article is based mostly on press releases from the European Commission, as the non-confidential version of the decision is not yet available.

The *Kattner Stahlbau* Judgment and the concept of undertaking

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OBJECT

The present reference for a preliminary ruling[1] of the European Court of Justice ("***ECJ***") was completed in the context of proceedings brought by *Kattner Stahlbau GmbH* ("***Kattner***"), a German Private Limited Company active in steel construction and in the manufacture of staircases and balconies, against *Maschinenbau- und Metall-Berufsgenossenschaft* ("***MMB***"), an Employers' Liability Insurance Association in the mechanical engineering and metal sector.

Briefly, MMB informed Kattner that under the provisions of the German Code of Social Law, MMB was the competent provider of insurance against accidents at work and occupational diseases. Therefore, Kattner was registered *ex officio* as a member of MMB.

"THE CONCEPT OF UNDERTAKING COVERS ANY ENTITY ENGAGED IN AN ECONOMIC ACTIVITY IRRESPECTIVE OF ITS LEGAL STATUS AND THE WAY IT IS FINANCED."

However, Kattner decided to subscribe private insurance against the relevant risks and gave notice to MMB of the cancellation of its compulsory affiliation. Subsequently, MMB informed Kattner that since it was the competent provider of insurance against accidents at work and occupational diseases, the cancellation of the affiliation was legally impossible and Kattner's request was denied.

In this context, Kattner submitted a plea before the Leipzig Social Court which was dismissed, and later on the company brought an appeal before the Higher Social Court of the Land of Saxony, sustaining that the compulsory affiliation to MMB, in respect of statutory insurance against accidents at work and occupational diseases, infringed Articles 82 EC and 86 EC. The Higher Social Court deemed necessary to submit before the ECJ the following question for a preliminary ruling: ***"Is MMB an undertaking within the meaning of Articles 81 EC and 82 EC?"***

THE CONCEPT OF UNDERTAKING

The ECJ in the Kattner Stahlbau judgment recalls that the competition law concept of an undertaking is broader than the corporate concept, including all the economic entities that *"consist of a unitary organization of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis"*. Thus, according to a consistent Community case-law the concept of undertaking covers any entity engaged in an economic activity irrespective of its legal status and the way it is financed. In the Kattner case, the ECJ recognizes that the employers' liability insurance association is a public law body that is responsible for the management of the German social security system and fulfils a social function. However, the Court also underlines that a social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity. Hence, the ECJ observes that it should be examined whether that scheme can be regarded as applying the principle of solidarity and to what extent is it subject to supervision by the State, given that these factors can preclude an activity from being regarded as economic.

THE PRINCIPLE OF SOLIDARITY

In this context, the ECJ appraises whether a social security scheme applies the principle of solidarity through the assessment of the levels of contributions paid and the benefits received. Thus, if the benefits received by the persons covered by the referred scheme depend directly on the contributions paid by them, or on their behalf, the Court concludes that the solidarity principle is not fulfilled.

Advocate General Mazák in the Opinion delivered in the present Case deems that: "*(…) in the case of a social security scheme which provides insurance against the risks of accidents at work and occupational diseases, that scheme must, in my view, demonstrate redistributive elements which exceed that of private insurance cover*". Accordingly, the absence of a direct link between the contributions paid and the benefits granted entails solidarity between better paid workers and those workers who, given their low earnings, would be deprived of social cover if such a link existed.

"IF THE BENEFITS RECEIVED BY THE PERSONS COVERED BY THE REFERRED SCHEME DEPEND DIRECTLY ON THE CONTRIBUTIONS PAID BY THEM, THE COURT CONCLUDES THAT THE SOLIDARITY PRINCIPLE IS NOT FULFILLED."

At length, under the statutory insurance scheme at stake the amount of contributions and the amount of benefits are considered by the Court to apply the principle of solidarity which requires that *(i)* benefits are not strictly proportionate to contributions and, *(ii)* benefits are subject to State control.

DECISION

In these circumstances the Court of Justice concluded that: ***"Articles 81 EC and 82 EC should be interpreted to the effect that a body such as the employers' liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme which applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify".***

[1] Judgment of 05.03.2009, Kattner Stahlbau, case -350/07.

The new Commission notice on the enforcement of State aid law by national courts

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"National Courts can play a vital role in the enforcement of the state aid rules and the Commission is determined to give them its utmost support. The rights of companies confronted with illegal aid to competitors must be adequately protected at national level."

Neelie Kroes

On 25 February 2009, the European Commission ("Commission") issued its notice on the enforcement of State aid by national courts ("Notice")[1].

The aim of this Notice is to clarify for national courts and potential claimants the remedies available at national level in the event of a breach of State aid rules and to provide guidance on the practical application of these rules. It also seeks to strengthen the Commission's support for national courts.

The Notice provides a description of the role of the Commission and national courts regarding state aid enforcement as defined by the community case law as well as guidance for national courts on: (i) protecting individual rights, (ii) recovering illegal aid from the beneficiary and (iii) the conditions under which interim measures may be ordered.

"THE NOTICE PROVIDES A DESCRIPTION OF THE ROLE OF THE COMMISSION AND NATIONAL COURTS REGARDING STATE AID ENFORCEMENT AS DEFINED BY THE COMMUNITY CASE LAW AS WELL AS GUIDANCE FOR NATIONAL COURTS ON: (I) PROTECTING INDIVIDUAL RIGHTS, (II) RECOVERING ILLEGAL AID FROM THE BENEFICIARY AND (III) THE CONDITIONS UNDER WHICH INTERIM MEASURES MAY BE ORDERED."

On the one hand, the main role of the Commission is to examine the compatibility of proposed aid measures with the common market, based on the criteria laid down in article 87(2) and (3) EC.

This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the Community courts. National courts do not have the power to declare a State aid measure compatible with Article 87(2) or (3) EC.

On the other hand, the role of the national courts depends on the aid measure at stake and whether this has been duly notified and approved by the Commission:

- National courts are often asked to intervene in cases where a Member State authority has granted aid without respecting the Standstill Obligation. This situation can arise either because the aid was not notified at all, or because the authority implemented it before the Commission's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid.

- National courts also play an important role in the enforcement of recovery decisions following the Commission's conclusion that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover the incompatible aid from the beneficiary. The involvement of national courts in such cases usually arises from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities.

It also introduces two voluntary consultation mechanisms: on the one hand, **national courts may ask the Commission for information in its possession**. This may include the request for copies of existing Commission decisions (if not already published), economic analysis, market studies, information on whether a procedure regarding a particular aid measure is pending before the Commission, whether a certain aid measure has been duly notified in accordance with Article 88(3) EC, whether the Commission has initiated a formal investigation, and whether the Commission has already taken a decision. In the absence of a decision, the national court may ask the Commission to clarify when this is likely to be adopted.

On the other hand, **national courts may ask the Commission for an opinion on the application of state aid rules**. Possible subject matter for Commission opinions include, *inter alia*: the qualification of a certain measure as State aid within the meaning of article 87 EC and, if so, how the exact aid amount is to be calculated; whether a certain aid measure meets a certain requirement of a Block Exemption; whether a certain aid measure falls under a specific aid scheme which has been notified and approved by the Commission; whether exceptional circumstances exist which would prevent the national court from ordering full recovery under Community law; where the national court is required to order the recovery of interest, it can ask the Commission for assistance as regards the interest calculation and the interest rate to be applied; the legal prerequisites for damages claims under community law and issues concerning the calculation of the damage incurred.

"NATIONAL COURTS MAY ASK THE COMMISSION FOR INFORMATION IN ITS POSSESSION."

The Notice also provides guidance on the protection of confidential information requested by national courts since the Commission must respect its duty of professional secrecy and safeguard of its own functioning and independence. These contacts should be established in a practical and user friendly way, by means of a single contact point for all state aid related questions. ■

[1] OJ C 85/01, 09.04.2009. The Notice replaces the 1995 Commission's Cooperation Notice (OJ C 312, 23.11.1995) which aimed predominantly at cooperation between the Commission and National Courts, thus having a narrower scope.

The fight against bribery in public procurement through the OECD's recent guidelines

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In March this year the Organization for Economic Cooperation and Development ("OECD") published a paper proposing measures or general guidelines intended for its Member States fighting bid rigging in public procurement* - the "Guidelines for fighting bid rigging in public procurement" [1].

Bid rigging can be achieved in many ways. Its main purpose is to raise the value of the winner's bid in order to share the additional profits from the final price decided on among the "conspirators". This profit can be disguised by sub-contracting the competitors that submitted the "losing bids" or by signing supply agreements with those who submitted the "winning bid" or by financial compensation through fake invoices.

Regarding public procurement among Member States, the OECD has introduced in the last decade several initiatives regarding the cartels on public procurement[2]. In spite of the fact that in each Member State competition law forbids these practices, (in Austria, Germany and Italy these practices are subject to criminal law), the OECD recognizes that the mechanisms of prevention, detection and punishment should be improved.

Consequently, the OECD drew up two checklists:

– in the first one, the OECD proposes that Member States design the tendering procedure in a way that minimizes the risks of bid rigging, by selecting beforehand the information needed to launch the tender, by defining the conditions that avoid predictability, by electing carefully the adjudication criteria and by subjecting the tendering staff to real bid rigging tests;

– secondly, the OECD supports methods that indicate public entities' practice of bid rigging in the tendering procedure through alerts, the perception of the main features of the businesses, the price offered, the documents presented, the statements or suspicious behavior of the competitors, as well as the steps that the public entities should take into account in case of signs of collusion.

> "In Portugal, and in other States, it is expected that in most cases the condemnations should be facilitated by the existence of a Leniency policy."

By collating the experience of more than 30 jurisdictions, the OECD Guidelines are one more important aid to the public authorities in cracking the development of cartels or other types of collusion in public procurement, in setting the best practices that should be followed in identifying those markets where corruption might appear and in suggesting special precautions that should be adopted, in the phase of designing as well as when public procurement is occurring.

In Portugal, and in other States, it is expected that in most cases the condemnations should be facilitated by the existence of a Leniency policy, which serves as an incentive to one or more cartel members to refer the others and thereby benefit from a significant fine reduction that would be potentially applicable (see Law nr. 39/2006, August 25). Furthermore, the additional provision of some supplementary sanctions to forbid offenders from participating in the public procurement of certain public contracts temporarily is a prominent example of an adequate sanction that could reinforce the fight against bribery in public procurement (see article 45 nr. 1 b) Law nr. 18/2003 of December 11)[3]. ■

> "The additional provision of some supplementary sanctions is a prominent example of an adequate sanction that could reinforce the fight against bribery in public procurement."

*A number of companies agree on a common course of action to implement a certain concession or public contract in better conditions than would be created if those same companies acted as true competitors. In particular, this type of bid rigging can occur in different ways:

– The competitors agree that one of them should submit a non-competitive bid that is too high to be accepted or contains unacceptable terms for the public authority (cover bidding);

– The competitors refrain from bidding or withdraw the winner's bid (bid suppression);

– The competitors agree that one takes the turn of being the winning bidder (bid rotation); or

– The competitors agree to submit offers only in specific geographic areas (market allocation).

[1]For more information see: http://www.oecd.org/dataoecd/27/19/42340158.pdf. [2]See, for instance, several documents at www.oecd.org/competition/bidrigging [3]The sanction is in the legal restraints to present the tenders and grouping tender, determined in article 55, f), and in the "statement model" that is provided in the Appendix I of the Public Procedure Code.

5 years of Regulation 1/2003 revisited. Is there room for improvement?

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When Regulation 1/2003 came into force, it introduced major changes and reformed dramatically the procedure of enforcement of Articles 81 and 82. Having now been applied for over five years, the Commission has decided to publish a report on the functioning of the Regulation.

One of the major changes introduced by Regulation 1/2003 was the abolishment of the centralized practice of notifying business agreements to the Commission and the empowerment of national competition authorities and national courts to apply articles 81 and 82 EC in full. Furthermore, agreements which satisfy the conditions of 81 (3) EC became directly valid and enforceable, with no prior decision being required to that effect.

In the Commission's view the transition from the old centralized system to the new one was rather smooth in practice. The direct application of article 81 (3) seems to have created no major problems and it is widely welcome by stakeholders.

This change reduced the Commission's workload and enabled it to take a more pro-active approach in the application of articles 81 and 82 EC. For instance it made possible the use of Commission's resources in organizing large-scale inquiries into important sectors of the EU economy.

> "When Regulation 1/2003 came into force, it introduced major changes and reformed dramatically the procedure of enforcement of Articles 81 and 82."

Regulation 1/2003 has also reinforced and clarified the Commission's investigation powers. Since then the Commission has regularly used the power to seal and the power to ask questions during inspections of business premises. However the Commission is worried that the absence of penalties for false or misleading replies may be a disincentive to the provision of accurate and complete answers.

Another change - brought about by Regulation 1/2003 and which is highly esteemed by the Commission - refers to the possibility for undertakings to offer commitments to bring infringements to an end, along with the power of the Commission to make those commitments binding and enforceable upon them. The Commission considers that such a possibility, by enhancing administrative efficiency and effectiveness, has added considerable value in comparison with the old Regulation. The Commission has made no use of its power to impose structural remedies but it has accepted structural changes as commitments. The Commission has also made no use of the possibility to declare articles 81 or 82 EC inapplicable to a specific situation.

The Commission regards fines as one of the most efficient weapons in the fight against cartels. It therefore comes as no surprise that it considers as a great improvement the substantial increase in the ceilings for penalty payments for failure to comply with a Commission decision. However, the report highlights that the procedure of imposing periodical penalty payments can be excessively lengthy and cumbersome.

By regulating for the first time the relationship between Articles 81 and 82 EC and national competition laws, Regulation 1/2003 has played an important role in the creation of a level playing field. Namely, the fact that national competition authorities are obliged to apply EC antitrust rules has led to a significant increase in the number of enforcement cases of articles 81 and 82. Nonetheless, business and legal entities criticize the Regulation's diverging standards regarding the application of the two articles, i.e. national rules may not prohibit agreements that do not restrict competition within the meaning of article 81 but Member States remain free to prohibit and sanction unilateral behaviour that would not fall under article 82. These diverging standards

> "The Commission regards fines as one of the most efficient weapons in the fight against cartels."

are held responsible for fragmenting global or European business strategies.

Another innovation brought by Regulation 1/2003 was the crucial role entrusted to national competition authorities in the application of EC Competition rules. Cooperation mechanisms and the way EC competition rules are being applied within the ECN seems to satisfy both the Commission and the stakeholders. The number of enforcement cases has vastly increased and there has been a significant degree of voluntary convergence of MS's laws. However, the Commission points out that there are still important divergences in the MS's enforcement systems and that this aspect should be further examined.

Regarding the interaction with national courts, Regulation 1/2003 provides the possibility for the Commission and national competition authorities to submit observations to the national courts on issues relating to the application of Article 81 or 82 of the Treaty. This tool is used frequently by several competition authorities. The Commission, however, only made use of this tool in two cases where there was an imminent threat to the coherent application of EC rules.

Finally, the report tackles the issue of interface with third country enforcement. During the period under analysis issues of information disclosure from the Commission's file in a third jurisdiction arose. The Commission is aware that the disclosure of information voluntarily submitted during investigations may seriously undermine the effectiveness of antitrust enforcement and that the legal rules regarding this matter should be clarified and reinforced. ■

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Cade and the non-compete clauses

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Non-compete clauses have been a constant issue in the Administrative Council for Economic Defense - CADE, and also the focus of heated discussions between antitrust lawyers and CADE's officials.

Non-compete clauses are generally used in joint venture transactions and in mergers and acquisitions. In joint ventures, they prevent the prejudicial parallel transactions of the partners, by ensuring that the parties' efforts shall be concentrated on the transaction which is the object of the operation and not on competitors' businesses. In acquisitions, they protect investment, since they guarantee to the buyer a certain period in which it can perform in the market without direct competition with the sellers, which is necessary for capital amortization.

The scope and general lines of non-compete clauses vary from case to case, in accordance with the kind of operation and the business involved. However, in general, they are limited in time and location, according to the convenience of the parties.

However, CADE's case law has limited the non-compete clauses to a maximum period of 5 years dating from the possible exit of the seller or partner of the business, and has restricted the territorial range to the relevant geographic market which is defined by CADE for the transaction.

Let us consider an agreement under which the sellers have agreed not to compete with the business during a 10-year period throughout the Brazilian territory. CADE, upon analyzing the transaction, has identified only a certain region or state of Brazil as the relevant geographic market (and not the entire Brazilian territory) and, on merits, approved the transaction without restrictions, since it did not identify any prejudicial competition arising from the transaction. In this case, even if the concentration act has been unconditionally approved, the non-compete clause must be modified. That is, the parties must execute an amendment to the agreement, modifying the non-compete clause in order to limit its duration period to 5 years and its territorial range to the Brazilian region or state, as defined by CADE.

It is arguable whether CADE has legitimacy to impose restrictions upon transactions in which CADE itself understood no damage to competition would arise. The question is: would CADE be extrapolating its competence, which relates exclusively to the promotion and protection of the competition environment? May CADE invade the private contractual environment when there are no competition interests to be protected? Why prevent the validity of an accessory clause if the contract has been approved as a whole? Would CADE be regulating or even invading the competence of the ordinary legislator by imposing restrictions to these clauses?

The free enterprise and free competition principles instituted by the Brazilian Constitution of 1988 establish that the Government must intervene as little as possible in economic activity, such intervention being lawful only for the purpose of fighting *"abuse of the economic power aiming at domain over the market, elimination of competition and arbitrary increase of profits"*. (article 170).

In this sense, it would be the duty of the antitrust authorities to intervene in concentration acts which are potentially damaging to the economic order, as well as to restrain acts which are proven to result in competition infractions, the intervention of CADE being prohibited within the scope of private companies for the purpose of regulating such companies, and creating rules and conditions for their operation in the market.

The main argument of the defenders of such thesis is that the intervention would not be justifiable, since after an extensive analysis of the transaction's documents and of its effects on the relevant market, the authorities concluded the transaction could be approved. In approving the most (the concentration), the least (non-compete clause), for coherence, must be approved as well.

Thus, only in those cases in which the non-competition clause results, or might result, in abuse of market power or in any violation whatsoever, should CADE have the power-duty to impose the change thereof.

Another criticism that is often levied against the standardized parameters adopted by CADE is that such restrictions imposed on the non-compete clause counteract the freely expressed intentions of the parties, without strong reasons related to the public order or justifications for such intervention.

Finally, it is also questionable whether the burden of proof to demonstrate if the effects of the non-compete clause would or not be harmful to competition, belongs to CADE or to the parties.

The matter is controversial and far from achieving any consensus. It is our understanding that CADE should not interfere in private negotiations, except in cases of abuse of economic power, as established in the Brazilian Constitution. By pre-defining the parameters for validity and scope of the non-compete clauses, regardless of justifications in each case analyzed, CADE would be moving beyond its competence. The fact is that the non-compete clauses, which are an important negotiation tool accepted by the market, have been restricted by CADE's jurisprudence. The contracting parties must analyze carefully the risks of CADE's restrictions when negotiating and stipulating non-compete clauses which are not in strict compliance with the jurisprudence of the Brazilian antitrust authority, even when the transaction itself does not produce competition risks. ■

Brazil entered an international network of cartel-prevention

Brazil has entered an international network of cartel-prevention which should increase the operations of search and seizure of documents in branches of multinational companies in Brazil.

The main offices involved in these operations in Europe and United States are at risk of being investigated by the Brazilian Federal Police. Operations to search for cartel documents and evidence must occur simultaneously in all countries to ensure that a multinational newly affected by an operation in the United States, for example, does not have time to destroy evidence which confirms the extension of the cartel to Europe and Brazil. ■

New update: the judgment *Coditel Brabant* (Case C-324/07)

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In the Second Edition of this Newsletter we highlighted the Advocate general Verica Trstenjak's opinion regarding Case C-324/07 (*Coditel Brabant SA v. Commune d'Uccle, Région de Bruxelles Capitale*), which was pending in the European Court of Justice ("ECJ"). In that opinion it was questioned whether the municipality of *Uccle* needed to submit a public service contract to a tendering procedure stating that the municipality intended to fulfill an in-house relationship with a inter-municipal cooperative of television distribution, the *Brutélé* (with exclusively public capital).

The Judgment of the ECJ on November 13 2008, followed the Advocate general's opinion in deciding that the control exercised by the municipality over the *Brutélé* was similar to that exercised over its own departments and the cooperative performed essential activities for the municipality. However, it would be more accurate to say that neither the Advocate general nor the ECJ settled on this second condition, because the Belgium national court stated for reference that the *Brutélé* carried out the essential part of its activities with its associates (nr. 27).

Without introducing any innovative issue, this Judgment is relevant in consolidating ECJ's previous understanding that, since the Judgment Teckal (C-107/98), have been implementing the condition of the similar control. The ECJ, following the Judgments *Carbotermo* (C-340/04) and *Asemfo* (C-295/05), admitted, if there were any doubts, that when several public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised jointly (nr. 50).

In this context, it was decisive that the *Brutélé's* decisions were taken by the public authorities' delegates, who were associates, and who enjoyed the widest powers of exercising a determinant influence upon the strategic objectives as well upon the important decisions of the company through deliberations, even if taken by a majority (nrs. 34, 35, 54).

Competition Authority's Report on wholesale electricity prices in Portugal

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The Competition Authority concluded in May this year a Report which focused on the formation of wholesale prices for electric energy in Portugal during the second semester of 2007, a period which corresponded to the first 6 months of operation of the Iberian electricity market (mercado ibérico da electricidade, MIBEL). The main purpose of this Report was to identify eventual price differences in the generation and wholesale supply of electricity in Portugal and Spain and to examine the eventual factors contributing to such differences.

The Authority has identified price differences in electricity in both countries, which accounted for daily averages of over 23% in the Portuguese territory during the period analysed. This figure results from a price difference of about 31% between Portugal and Spain caused by interconnection bottlenecks, with those prices being identical in the absence of congestions. During the period concerned, there were congestions in the import capacity from Spain to Portugal more than 80% of the time, thus triggering the mechanism known as market splitting.

Some structural and cyclical factors were identified as having contributed to these differentials. Amongst the former there is essentially the different supply structure in the two countries (both in terms of generation mix and levels of concentration). As cyclical factors the Authority mentioned as examples in Portugal the low levels of inflows in hydroelectric reservoirs due to the lack of water resources and the programmed and incidental downtimes that occurred in some coal and gas-powered plants.

The Authority made some recommendations for the progressive integration of MIBEL, such as the entry of new generation capacity in Portugal with a best cost-efficiency ratio, the elimination of supply tariffs for non-vulnerable customers and the improvement of the mechanisms for the acquisition of energy in the market by the supplier of last resort.

Taking into consideration the period upon which the Report's assessment focused, the Authority recognizes that some of the conclusions provided therein lost some of their actuality immediately in 2008, when the congestion levels and the price differences were lower than in the second semester 2007.

Investigation in the gymnasium and health club market dismissed

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Following the 2008 National Budget Law (Law n.º 67-A/2007 of 31 December), which clarified the applicability of the reduced VAT rate (5%) to physical and sporting activities, the Portuguese Competition Authority investigated whether the failure to pass this reduced rate to consumers (and hence a reduction in the prices charged) by gymnasiums and health clubs could be the result of concerted action among economic operators, prohibited by Article 4 of Law n.º 18/2003 of 11 June.

The investigation was thorough, involving 34 undertakings and an association of undertakings. Over 50 enquiries were carried out, including with several entities such as the State Secretariat for Youth and Sport, the Portuguese Institute for Sport, the Directorate General for Consumer Affairs and the Authority for Food Safety and Economic Surveillance. The information obtained covers the period between 2000 and 2008 and clearly describes the behaviour of these companies, especially with regard to the relevant tax changes registered in this period.

On this basis, the Competition Authority Council decided in March 2009 to discontinue the investigation, as it has concluded that there is no evidence of anti-competitive practices that may be imputed to the undertakings involved in this case. On the contrary, the Authority concluded that the behaviour of the companies reflected a rational adaptation of economic agents confronted with changes in the operating conditions of the market in which they do business, which is not prohibited by the rules safeguarding competition.

The press release is available in English at: http://www.concorrencia.pt/download/pressrelease2009_03.pdf

European Commission adapts nature of monitoring of 2004 Microsoft Decision

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In its Decision of 24 March 2004 the Commission found that Microsoft had infringed Article 82 of the Treaty by refusing to supply interoperability information and by tying Windows Media Player with Windows (see IP/04/382). As a result, it imposed a fine and remedies aimed at bringing to an end the abuses in question.

"The European Commission has now, in March 2009, adapted the nature of the technical assistance it receives to facilitate its monitoring of Microsoft's compliance with the Commission's 2004 Microsoft Decision."

The 2004 Decision provided for the establishment of a suitable mechanism to assist the Commission in monitoring Microsoft's compliance, including a monitoring trustee who had to be independent from Microsoft.

On 7 June 2004, Microsoft lodged an application for the annulment of the 2004 Decision with the Court of First Instance (CFI). The judgment of the CFI of 17 September 2007 in Case T-201/04 partially annulled the 2004 Decision, in particular insofar as it provided that all the costs associated with the appointment of the monitoring trustee, including his remuneration, should be borne by Microsoft and dismissed the remainder of Microsoft's application for annulment of this Decision.

The European Commission has now, in March 2009, adapted the nature of the technical assistance it receives to facilitate its monitoring of Microsoft's compliance with the Commission's 2004 Microsoft Decision (see IP/04/382 and MEMO/04/70). In light of changes in Microsoft's behaviour, the increased opportunity for third parties to exercise their rights directly before national courts, and experience gained, the Commission no longer requires a full time monitoring trustee to assess Microsoft's compliance. In future, the Commission intends to rely on the ad hoc assistance of technical consultants.

"The Commission no longer requires a full time monitoring trustee to assess Microsoft's compliance. In future, the Commission intends to rely on the ad hoc assistance of technical consultants."

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