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SOCIEDADE DE ADVOGADOS

NEWSLETTER

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EU AND COMPETITION LAW

"BOTH AREAS OF LAW HAVE ASSUMED GROWING IMPORTANCE IN RECENT YEARS, IN TERMS OF CORPORATE DYNAMICS AND ECONOMIC LIFE IN GENERAL."

Foreword

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We are pleased to present the inaugural edition of our Newsletter dedicated to the disclosure and analysis of developments and issues relating to European Union and Competition Law.

Both areas of law have assumed growing importance in recent years, in terms of corporate dynamics and economic life in general. In these areas Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS) has secured, from the very beginning, its position as a firm of reference, both nationally and internationally.

The interpretation and application of these two areas of law requires, on the one hand, actuality and breadth of knowledge, given the multiplicity of legal systems and sources of law applicable, with particular emphasis on the case law of community courts, and, on the other hand, careful and well-judged deliberation, given the complex allocation of jurisdiction between national competition authorities and the European Commission in many of the most significant fields.

These are, in summary, the main reasons for the creation of this Newsletter; a tri-annual publication that is particularly directed to our clients and other readers who, for the most varied reasons, may be interested in our analysis of the subjects provided herein.

The content of this bulletin has been prepared by the MLGTS European Union and Competition Law team, composed of fifteen members, drawing upon a range of different ages and experiences, established in our offices in Lisbon and Porto.

This team's experience encompasses, amongst other areas, horizontal and vertical agreements and practices, abuses of dominant position, services of general economic interest, and State aids and the control of concentrations, in cases brought before the European Commission, the Portuguese Competition Authority, community courts and national courts. The team also has significant experience in various aspects of European Law (particularly focused on the internal market rules and the structural funds), as well as in the representation of clients before the European Court of Human Rights.

Along with the professional experience of this team, each member is committed to ongoing development via interaction with the respective scientific and social communities, which can be seen from the fact that several members of the team teach in Universities, have undertaken PhDs, LLMs, postgraduate and secondment programmes, participate regularly in relevant conferences and symposiums in Portugal and abroad, and are contributors to various publications, national and international, in the area of European Union and Competition Law.

This Newsletter is a challenge that we have jointly decided to embrace. We hope that the selection of themes, along with their treatment in a necessarily concise way, will prove to be interesting and useful for our readership. We would welcome your comments and suggestions for future editions. ■

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New Antitrust regulation approved by Real Decreto n.º 261/2008, of February, 22

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A substantial reform of the Spanish Competition policy occurred with the enactment of Law 15/2007, of July 3, for the Defence of Competition (**Competition Act**), which replaces Law 16/1989, of July 17, as well as with the new implementing regulations. The above-mentioned reform served a dual purpose: on the one hand, it aimed to improve the effectiveness of procedures, and on the other hand it intended to align the Spanish legal system, in the defence of competition, with EC legislation; improving the provisions regarding antitrust practices, in accordance with the amendments introduced at a Community level by Council Regulation 1/2003.

Real Decreto 261/2008, adopted by the Council of Ministers on February 22, and published on February 27, approves the Implementing Regulation (**Implementing Regulation**) that entered into force on February 28.

"THE IMPLEMENTING REGULATION IS THE KEY TO THE INTRODUCTION OF A LENIENCY POLICY."

The Implementing Regulation is the key to the introduction of a *leniency policy* given that the Competition Act states that the leniency regime is not to enter into force until the Implementing Regulation is effective.

Furthermore, the Implementing Regulation puts into practice, as we will consider in detail below: (i) the *de minimis* legal exemption for restrictive practices and abuses of dominant position; and (ii) the simplified form for the filing of concentrations.

LENIENCY PROGRAM

The Implementing Regulation provides a set of guidelines on the procedure to be followed regarding leniency applications[2]. Thus, undertakings participating in cartels that wish to apply for immunity or reduction of the applicable fines should address a request to the Cartel Unit, which forms part of the Investigation Directorate of the National Competition Commission (**NCC**)[3].

"THE SPANISH LENIENCY POLICY IS CLEARLY INSPIRED BY THE LENIENCY POLICY ENFORCED BY THE EUROPEAN COMMISSION AS AN INSTRUMENT TO COMBAT CARTELS.."

The Spanish leniency policy is clearly inspired by the leniency policy enforced by the European Commission as an instrument to combat cartels. Hence the granting of leniency is subject to an ongoing cooperation with the NCC, namely through the disclosure of all available information and evidence.

The Implementing Regulation provides - under the leniency program developed by the European Competition Network - for simplified requests that can be filed before the Investigation Directorate of the NCC, in cases where the undertaking has filed (or will file) a request for a fine exemption before the European Commission, in view of the fact that the behaviour in question seems to affect at least three Member States. There is also a more sophisticated form that requires a detailed description of the facts of the cartel, in which the applicant has to demonstrate the evidence of the cartel.

Both applications are treated as confidential and are examined according to the order of reception. The outcome regarding the *exemption/reduction* of fines is communicated to the applicant undertaking at the end of the administrative procedure[4].

"THE NEW FULL NOTIFICATION FORM REQUESTS FAR MORE INFORMATION THAN ITS PREDECESSOR."

Finally, the Implementing Regulation increases the powers of inspection, allowing the NCC to carry out inspections of premises, land, incomes, transport and the private residences of executives and other personnel. Furthermore, it introduces cooperation mechanisms with the competition authorities of the Autonomous Communities, as well as with the European Commission and with the national competition authorities of other Member States.

DE MINIMIS LEGAL EXEMPTION FOR RESTRICTIVE PRACTICES AND ABUSES OF DOMINANT POSITION

The Spanish Competition Act establishes a *de minimis* legal exemption for restrictive practices and abuses of dominant position which, due to their minor importance [5], are not capable of appreciably affecting competition. In fact this regime - which is strongly inspired by the rules established in the European Commission Notice on agreements of minor importance - had been requested by economic and legal operators.

Although abuses are in principle included within the parameters of the *de minimis* exemption, there does not seem to be much scope for the application of this rule to abusive behaviour as the 10% market share is one of the criteria to be considered in this respect. Furthermore, the Implementing Regulation establishes that the *de minimis* regime does not apply to agreements containing *hardcore* restrictions, such as fixing prices when selling the products to third parties, or limiting the output or sales.

SIMPLIFIED FORM FOR THE FILING OF CONCENTRATIONS

The Implementing Regulation provides a simplified form for those concentrations with no limited horizontal/vertical overlap between the activities of the undertakings concerned, as well for those cases when the parties to the concentration do not hold a joint market share of more than 15% in the same product or service in Spain, or in a distinct geographic market within that territory. The new full notification form requests far more information than its predecessor, following the European Commission's *Form CO* used for concentrations with a Community dimension.

Finally, both forms require internal reports and presentations on the proposed merger addressed to the company's managing bodies, as well as cooperation agreements entered into with competitors, regarding the markets affected by the concentration.

The main innovation regarding Competition Community Law is that the Regulation does not consider non-competition agreements with durations of more than five years as a *de minimis exemption*.

FINAL REMARKS

The Implementing Regulation has the merit of putting into practice, following the EC Competition Law framework, a complete *leniency program*, as well as a *de minimis* legal exemption for restrictive practices, and, furthermore, a simplified form for the filing of concentrations. In fact, some of the most important features of the new Spanish Antitrust Law came into force with the referred Regulation.

Nevertheless, the Regulation implements some original features, and helps to strengthen the application of Competition Law in Spain, whilst also clarifying the functions of the CNC in this context. ■

[2]The Implementation Regulation provides a form to be attached to leniency applications, as well as the address and contact details of the National Competition Commission for leniency purposes. According to the guidelines, applicants may ask for guidance from the recently created National Competition Commission special unit for leniency purposes, nominated the Cartels and Leniency Unit. [3]According to the NCN, on the first day of the implementing regulation existence, six requests for leniency were filed. [4]According to the Spanish Competition Act, the first undertaking to evidence the existence of the cartel will benefit from an exemption from the payment of any fine that may have been imposed. Further, if the undertaking does not fulfil the requirements set out in article 65 of the Spanish Competition Act, it may benefit from a reduction of between 20 to 50 percent, from the total amount of the fine, depending on the degree of evidence brought to the Authority. [5]Notice 2001/C 368/07, published in the Official Journal of the European Communities, C 368, of 22.12.2001, p.13.

Legal Professional Privilege limits Portuguese antitrust Authority inquiry powers

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The Portuguese Competition Authority, acting under Article 17 of the Portuguese Competition Act (Law no. 18/2003), carried out a dawn raid on a certain company's premises. During the raid the authority's inspectors seized a large number of documents from the office of the company's in-house lawyer.

In this context, the paramount question at stake is whether it is appropriate, within the fight against restrictive practices, to allow the Portuguese Competition Authority to surpass the client/lawyer legal privilege enshrined in the Portuguese legal system, gaining access to evidence of the alleged antitrust conduct, which could be found in the office of the company's in-house lawyer?

The European Courts have decided affirmatively. In the AM&S case (C-155/79) and in the Akzo case (T-125/03 and T-253/03) the court distinguishes independent lawyers from in-house lawyers, stressing that the latter are bound to their clients under a relationship of employment, which affects their independence, autonomy and the application of professional statutory rules. Accordingly, they do not benefit from legal privilege.

At the national level, the Lisbon Commerce Court, in January 2008, grounded on the Portuguese Lawyers Act, adopted a ruling that protects in-house lawyers' legal privilege within the context of the Portuguese antitrust authority's dawn raids.

This judicial decision sustains that the Lawyers Act does not, by any means, differentiate legally or statutorily between independent and in-house lawyers, and moreover that the Competition Authority's infringement procedures must comply with national law.

Consonant with this decision, we also stress that Article 22, of Regulation no. 1/2003, on the implementation of Articles 81 and 82 of the EC Treaty, provides that "the officials of the competition authorities of the Member States who are responsible for conducting these inspections, as well as those authorized or appointed by them, shall exercise their powers in accordance with their national law", which assures the application of the principle of subsidiarity to antitrust proceedings by national antitrust authorities.

The Lisbon Court also considered that the authority's inspectors, by entering into the company's in-house counsel office, acted in violation of the Lawyers Act and of the Portuguese Penal Code, as both protect legal privilege. This ruling, which confirms a prior non-binding legal opinion issued by the Portuguese Lawyers Association (Opinion no. E-07/07), represents an unequivocal statement by the judiciary on the need to safeguard the legal professional privilege of in-house lawyers.

In conclusion, professional privilege is a *conditio sine qua non* for the legal practice developed by independent and in-house lawyers as well as for companies that seek legal advice. The Portuguese Competition Authority, within national antitrust proceedings, cannot override or disregard this principle of public order. ■

Lisbon Commerce Court annuls fines imposed upon milling companies

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On February 12, 2008, the Lisbon Commerce Court (LCC) granted an appeal brought by several milling companies against the fines imposed, in September 2005, by the Portuguese Competition Authority (PCA). The fines, in the overall amount of approximately 9 million euros, related to an infringement procedure for alleged concerted practices concerning price lists for the sale of flour. The case dated from January 2004.

The LCC ruling was grounded, in particular, on the invalidity of a "Complementary Statement of Objections" drawn up by the PCA on a date (December 2004) after the defendants had submitted their defence and observations on an initial statement of objections. With this Complementary Statement of Objections, the PCA used replies by the defendants and documents already contained in the file before the initial statement of objections to «invoke different facts» and «revise all the legal appraisal» in the light of those facts. Instead of a single infringement, occurring at a specific moment in time (December 2003), the defendant undertakings were made to defend themselves against six alleged infringements between 2000 and mid-2004, some of which were already covered by limitation periods (although they were subsequently qualified as a "continued infringement").

> "THE DEFENDANT UNDERTAKINGS WERE MADE TO DEFEND THEMSELVES AGAINST SIX ALLEGED INFRINGEMENTS BETWEEN 2000 AND MID-2004."

The LCC held that recourse to a Complementary Statement of Objections, «covering a wider period of time and with some important facts that were already known to the PCA prior to its initial Statement of Objections», violates the constitutional right to a fair and equitable procedure, based on equality of arms and a substantively effective defence (art. 20º, 4, of the Constitution of the Portuguese Republic). Consequently, the above-mentioned complementary statement of objections was held to be null and void and the case was referred back to the PCA. ■

Community Guidelines on State Aid for Environmental Protection – Aid for renewable energy sources

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On 23 January this year, the European Commission approved the new Guidelines on State Aid for Environmental Protection (**Guidelines**)[6]. This article aims to provide a brief description of the essential and innovative aspects of these Guidelines, particularly concerning aid for renewable energy sources.

In order to provide guidance to Member States on the specific conditions to grant State aid, the European Commission has adopted industry-specific or "sectoral" rules defining its approach to State aid in particular industries, thereby increasing legal certainty and the transparency of its decision-making. Guidelines on state aid for environmental protection, which are now in their third edition, are part of this modernization process[7].

"THE EUROPEAN COMMISSION HAS ADOPTED INDUSTRY-SPECIFIC OR "SECTORAL" RULES DEFINING ITS APPROACH TO STATE AID IN PARTICULAR INDUSTRIES."

The current level of environmental protection is not considered to be sufficiently high and the European Union believes that a more rigorous level of protection is required. Efforts must therefore be made to achieve this step-up. From an institutional point of view, the Guidelines seem to provide the required framework for the attainment of the objectives established by the spring 2007 European Council[8], which called on Member States and EU institutions to pursue actions to develop a sustainable integrated European climate and energy policy.

With regard to aid for environmental protection, the Guidelines underpin that aid may be justified

"TWO TYPES OF AID IN FAVOUR OF RENEWABLE ENERGIES MAY BE AVAILABLE: INVESTMENT AID AND OPERATING AID."

if the cost of production of renewable energy is higher than the cost of production based on less environmentally friendly sources, despite the fact that, due to technological developments in the field of renewable energy, the cost difference has decreased over recent years, thus reducing the need for aid.

Two types of aid in favour of renewable energies may be available: *investment aid* and *operating aid*. Regarding environmental investment aid, the Guidelines have considerably increased aid intensity[9], when a comparison is made with the 2001 guidelines. The aid intensity granted to large companies rose from 40% to 60% of the eligible investment costs, and, where the investment aid is to be given to SMEs, the aid intensity rose from 50-60% to 70-80%.

Whenever the investment aid is granted following a genuinely competitive bidding process, the Guidelines introduced the possibility to award aid intensity up to 100%. The eligible costs for renewable energy are limited to the extra

"THE CURRENT LEVEL OF ENVIRONMENTAL PROTECTION IS NOT CONSIDERED TO BE SUFFICIENTLY HIGH AND THE EUROPEAN UNION BELIEVES THAT A MORE RIGOROUS LEVEL OF PROTECTION IS REQUIRED."

investment costs borne by the beneficiary compared with a conventional power plant or a conventional heating system with the same capacity in terms of the effective production of energy[10].

As to operating aid for the production of renewable energy, Member States may grant aid as follows: (i) to compensate for the difference between the cost of producing energy from renewable sources and the market price of the

"THE AID INTENSITY GRANTED TO LARGE COMPANIES ROSE FROM 40% TO 60% OF THE ELIGIBLE INVESTMENT COSTS."

form of energy concerned[11]; (ii) by using market mechanisms such as green certificates or tenders, allowing all renewable energy producers to benefit indirectly from guaranteed demand for their energy, at a price above the market price for conventional power[12]; and (iii) aid that is gradually reduced, and the intensity of which must not exceed 100% of the extra costs in the first year but rather must have fallen in a linear fashion to zero by the end of the fifth year. In the case of aid that does not decrease gradually, the aid intensity must not exceed 50% of the extra costs[13].

In summary, the new Guidelines constitute an important instrument within State aid and Energy policy for Europe[14], recognizing that, under some conditions, State aid can correct market failures, and simultaneously help to promote environmentally sustainable development.

However, the higher the amount of aid and its individual beneficiaries, the higher the risk of competition being distorted and the markets being affected as a result of State aid. ■

[6]Published in the Official Journal of the European Union, C 82, of April 1 2008, pp. 1. [7]The EC adopted the first guidelines on State aid for environmental protection in 1994 (O.J. C 72, 10.03.1994, pp. 3) and, after prescribing the extending of time limits twice, the guidelines were replaced in 2001 (O.J. C 37 of 03.02.2001). These Guidelines replace the Community guidelines on State aid for environmental protection that came into force in 2001. [8]European Council meeting of 8 and 9 March. The Presidency Conclusions of the European Council are available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/93135.pdf. [9]Aid intensity means the gross aid amount expressed as a percentage of the eligible costs. [10]See Guidelines parag. 105. [11]See Guidelines parag. 109. This aid mechanism may be granted until the depreciation of extra investments for environmental protection. [12]See Guidelines parag. 110. These market mechanisms may be authorised by the Commission if (i) Member States can show that support is essential to ensure the viability of the renewable energy sources concerned, (ii) the aid does not in the aggregate result in overcompensation and (iii) the aid does not dissuade renewable energy producers from becoming more competitive. The Commission may authorise such aid systems for a period of ten years. [13]See Guidelines parag. 111. [14]Please see "State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009", COM(2005) 107 final.

Financial penalty imposed on Portugal for not complying with Judgement of the European Court of Justice

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In its judgement of 10 January 2008[15], the Court of Justice of the European Communities ("Court") ordered the Portuguese State to pay a penalty payment of nearly 20,000 euros per day for failing to comply with a 2004 judgement,[16] which had declared that Portugal had infringed the provisions of Directive 89/665/CEE on the judicial review of contracting authorities' decisions awarding public contracts[17]. This was the first time Portugal was found not to have complied with the case-law of the Court, and only the seventh time that such a financial penalty was imposed on a Member State.[18]

Under Article 228(1) of the Treaty establishing the European Community ("EC Treaty"), a Member State is required to take the necessary measures to comply with a judgement of the Court identifying the infringement of a rule of EC law. In case of continuing non-compliance, the Commission can, having requested compliance on the part of the Member State (during an administrative phase), bring a second infringement action before the Court pursuant to Article 228(2) and propose that the Court imposes a lump sum or a penalty payment to be paid by the Member State in order to induce it to put an end to the breach of its obligations (in exceptional circumstances, both a penalty and a lump sum may be imposed[19]).

In a case whose origins go back to September 1995, the European Commission, which as "Guardian of the Treaties" ensures the application of EC law, brought an infringement action against Portugal under Article 226 of the EC Treaty in June 2003. The Commission claimed that by maintaining in force Decree-Law 48.051, of 21 November 1967, on the extra-contractual civil liability of public bodies, Portugal breached Article 2 of Directive 89/665/CEE, which foresaw the awarding of damages for any violation by a contracting authority of EC law provisions relating to the conferring of public contracts, insofar as the Decree-Law made the possibility of awarding damages conditional upon the proof that the illegal act was adopted in fault or fraud.

> "This was the first time Portugal was found not to have complied with the case law of the Court."

The Court agreed with the Commission and decided on 14 October 2004 that, by demanding proof of fault or fraud of the contracting authorities, Portuguese law did not offer an adequate judicial system. The Court therefore declared that Portugal had failed to fulfil its obligations under the Directive.

> "Doubts remain as to whether the Commission will consider that Law 67/2007 fully complies with the 2004 judgement."

In February 2006, after becoming aware that Decree-Law 48.051 was still in force, and having given Portugal the opportunity to comply with the judgement, the Commission decided to bring the second infringement action, proposing that the Court should impose on Portugal a penalty payment of 21,450 euros per day of delay in complying with the judgement. On 10 January 2008, the Court recognised Portugal's failure to adopt the measures necessary to comply with the judgement. Doubts remain as to whether the Commission will consider that Law 67/2007 fully complies with the 2004 judgement (which should take into account the duration of the infringement, its degree of seriousness and the ability of the Member State to pay), and reduced the penalty payment to 19,392 euros, to be paid daily until the day on which the judgement was complied with.

> "This judgement reminds Member States, in particular Portugal, of the need to comply promptly with the case law of the Court, or otherwise face the threat of heavy financial penalties."

Decree-Law 48.051 has since been repealed by Law 67/2007 of 31 December on the extra-contractual civil liability of the State and other public bodies. Doubts nevertheless remain as to whether the Commission will consider that Law 67/2007 fully complies with the 2004 judgement. The new law provides for the awarding of damages only when "light fault" (which is presumed) or "fault of the services" can be attributed to the contracting authority (see Articles 7 and 10). Since the Commission (following the case-law of the Court) argued in the first infringement case that national law should provide for damages for an illegal State action under EU law regardless of fault, it is uncertain whether it will consider that the 2004 judgement has been complied with.

This judgement reminds Member States, in particular Portugal, of the need to comply promptly with the case-law of the Court, or otherwise face the threat of heavy financial penalties, especially when the Commission is showing a marked disposition towards using this procedure more frequently in order to ensure the proper application of EC law. There are presently several other "double infringement" cases under Article 228(2) pending, including at least one against Portugal.[20] ■

[15]Case C-60/03, Commission v Portugal. All judgements are available at www.curia.europa.eu. [16]Judgement of 14 October 2003, in case C-275/03, Commission v Portugal. [17]Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33. [18]See cases C-387/97, Commission v Greece (4.07.2000); C-278/01, Commission v Spain (23.11.2003); C-304/02, Commission v France (12.07.2005); C-177/04, Commission v France (14.3.2006); C-119/04, Commission v Italy (18.07.2006); and C-503/04, Commission v Germany (18.07.2006). [19]The penalty is calculated according to the Commission Notice on the Application of Article 228 of EC Treaty, SEC(2005)1658. [20]See action brought on 9.10.2007 by the Commission in case C-458/07, Commission v Portugal (OJ C 297, of 8.12.2007, p. 29).

Conditions of Hypermarket Merger Preserve Choice of Retailer and Retail Format*

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TRANSACTION

On December 27 2007 the Competition Authority approved the acquisition of Carrefour Portugal SA by Sonae Distribuição SGPS S.A.. The acquisition was subject to certain conditions and remedies (Case 51/2007 - SONAE/CARREFOUR). The transaction involved the acquisition of twelve Carrefour hypermarkets, thirteen licences to open new hypermarkets and eight petrol stations. The transaction involved sixteen local retail markets for consumer goods.

MARKET DEFINITION

In defining the relevant market, the authority followed the European Commission guidelines and made the necessary adjustments to account for specific features of the Portuguese economy. After distinguishing between traditional specialized stores and whole-range retail chains (i.e., hypermarkets, supermarkets and discount stores), the authority debated whether a narrower market definition would be more appropriate, given that all of the acquired assets were hypermarkets. The authority's preference for defining relevant markets from a demand perspective meant that attention focused on the characteristics that affect demand behaviour, namely:

- The outlet features that drive consumers' decisions on where to shop;
- households' capacity to switch from hypermarkets to supermarkets or discount stores; and
- the capacity of the three formats to meet different household needs (termed "shopping missions").

Sonae submitted economic evidence and studies to support the view that hypermarkets, supermarkets and discount stores belong to the same product market, notwithstanding certain differences in the range and nature of products supplied by hypermarkets and discount stores. Econometric analysis has shown that firms which carry out retail activity in any of the three distribution formats are competing with each other.

"THE TRANSACTION INVOLVED SIXTEEN LOCAL RETAIL MARKETS FOR CONSUMER GOODS."

"THIS WAS THE FIRST TIME THAT THE AUTHORITY IMPOSED STRUCTURAL REMEDIES FOLLOWING A FIRST-PHASE INVESTIGATION."

Sonae also demonstrated that a broader market definition was consistent with the views of the European Commission and other national competition authorities. The authority accepted Sonae's arguments and defined the relevant product market as the market for daily consumer goods, including hypermarkets, supermarkets and discounters.

On the question of geographic scope, the authority considered that elements of competition exist at national and local levels in the industry. The local scope of the market was defined by large catchment areas within a radius of 30 minutes of travelling time due to the fact that the transaction mainly involved the acquisition of hypermarkets, which have a strong capacity to attract consumers. Furthermore, as the overlapping catchment areas of Carrefour's hypermarket outlets created a chain of substitution, the geographic scope of some of the relevant markets was enlarged in order to group together several local markets.

COMMENT

This is the first time that the authority has imposed structural remedies following a first-phase investigation, which reflects its increasing efficiency in dealing with strict timetables when analyzing complex cases. The assessment was a challenging procedure in which economic studies were thoroughly discussed and third parties, such as competitors and suppliers, intervened.
The transaction, notified on August 2007, was decided upon after five months of extensive analysis -an excellent achievement for the authority in terms of the concentration's procedural duration.

The structural and behavioural remedies ultimately imposed as conditions of clearance are designed to ensure that (i) local dominant positions are not created, and (ii) consumers retain their capacity to choose not only between different retailers, but also between different formats of grocery retailing (i.e., discount stores, supermarkets and hypermarkets). ■

" THE AUTHORITY ACCEPTED SONAE'S ARGUMENTS AND DEFINED THE RELEVANT PRODUCT MARKET AS THE MARKET FOR DAY-TO-DAY CONSUMER GOODS, INCLUDING HYPERMARKETS, SUPERMARKETS AND DISCOUNTERS ."

REMEDIES

The authority focused on an analysis of six local markets for food retail in which it considered that there was a risk of a dominant position being created or reinforced, resulting in a significant impediment to competition.

In order to address the authority's objections to the proposed transaction, Sonae must:

- sell two previously owned supermarkets (or two Carrefour hypermarkets), as well as one of Carrefour's licences to open a new hypermarket;
- not exceed 50,000 square metres of food retailing space in one of the relevant markets within three years of the acquisition being authorized;
- not acquire licences to open new retail outlets in some of the analyzed markets for a year after the authority's decision; and
- reduce the food-retailing area of its controlled outlets in several local markets or convert food-retailing areas into non-food retailing outlets (and not reconvert them).

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ECJ condemns Spain in the context of the energy sector regulation

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On March 6, 2008, the European Court of Justice issued a judgement C-196/07 regarding an infringement procedure, which condemned Spain for the obligations that the Comisión Nacional de Energia ("CNE") had imposed on E.ON A.G. for the public bid submitted to Endesa S.A. on February 21, 2006, which was cleared by the European Commission on April 24, 2006.

The Commission decided that Spain had failed to withdraw certain illegal conditions under Art. 21.º of the EU Merger Regulation. Furthermore, the Commission decided that the amendments introduced by the Spanish Minister of Industry, Tourism and Trade to the conditions imposed by the CNE were also incompatible with the EU law. Despite the fact that the merger operation was unsuccessful, and thus the Spanish infringement effectively ended, the Commission has deemed it appropriate to appeal to the European Court, asking it to pronounce on the Spanish non-compliance under community law. ■

> "The Commission decided that Spain had failed to withdraw certain illegal conditions under Art. 21.º of the EU Merger Regulation."

Microsoft faces penalty of €899 million

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The European Commission has imposed a penalty payment of €899 million on Microsoft for the company's failure to comply with certain obligations imposed in the Commission's condemnatory decision of March 2004. Based on the Commission's finding, in 2004, that Microsoft had abused its dominant position, the latter was required to disclose, on reasonable non-discriminatory terms, complete and accurate interoperability information allowing competing workgroup servers to inter-operate with Windows PCs and servers. The European Commission's recent investigation revealed that the system put in place by Microsoft for that purpose, and which was in force until October 2007, amounted to unreasonable pricing. The Commission's findings of unreasonable pricing were based on the fact that a very large part of the information provided lacked innovation as well as on Microsoft's prices exceeding the market valuation of similar inter-operability technology. Inter-operability information is regarded as essential in order to guarantee competition and innovation in the market for work group server operating systems.

Microsoft has publicly announced its intention to appeal to the European Court of First Instance seeking the annulment of the European Commission's condemnatory decision. ■

Amendment to Article 45 of the Portuguese Competition Act

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The Portuguese Government, in Decree-Law no. 18/2008, January 29, 2008, which approves the new Portuguese Public Procurement Code, also amended Article 45 of the Portuguese Competition Act.

> "The loss of the right to bid in tenders has a maximum period of two years."

The new wording of Article 45 of the Act, regarding accessory penalties in case of antitrust practices, establishes that companies may now be deprived, for a period of up to two years, of the right to participate in procedures whose object is public works contracts, public works concession, public services concession, hire-purchase of goods and the acquisition of services, as well as procedures regarding the attribution of licences or permits, when the conduct which constitutes the misdemeanour, sanctioned with a fine, has occurred during or due to the relevant procedure.

This penalty can be applied jointly with the accessory penalty already enshrined in the Portuguese Competition Act, which requires publication of the final decision adopted by the Portuguese Competition Authority in the Portuguese official gazette ("Diário da República") or in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographic market in which the illegal conduct took place. ■

European Commission commences new infringement procedure against Spain

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On January 31 the European Commission commenced an infringement procedure against Spain for not lifting conditions imposed by the Comisión Nacional de Energia ("CNE"), following the public joint bid submitted to Endesa S.A. by Enel S.P.A and Acciona S.A. on March 26, 2007, which was cleared by the Commission on December 5, 2007. The Commission decided that the CNE´s conditions, imposed under the Royal Decree-Law 4/2006, as amended by the Spanish Minister of Industry, Tourism and Trade, breached Article 21.º of the EU Merger Regulation, the freedom of establishment and free movement of capital (Articles 43.º and 56.º of the EC Treaty) and, in part, the free movement of goods (Articles 28.º and 29.º of the EC Treaty).

The case law established in case C-196/07 shall now be acknowledged by the Court of Justice in condemning Spain for not lifting the illegal conditions imposed by CNE. ■

European Commission investigates the pharmaceutical sector

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The European Commission launched, in the beginning of 2008, an inquiry into competition in the pharmaceutical sector. Inspections have been conducted at the premises of a number of innovative and generic pharmaceuticals companies in Europe.

The inquiry is a response to indications that competition in the pharmaceuticals markets in Europe may not be functioning properly: allegedly fewer new medicines are being brought to market, and the entry of generic medicines sometimes appear to be delayed. In particular, the inquiry will examine whether agreements between pharmaceutical companies, such as settlements in patent disputes, may infringe the prohibition of Article 81 of the EC Treaty on restrictive business practices.

"THE EUROPEAN COMMISSION WILL ALSO ASSESS WHETHER COMPANIES HAVE CREATED ARTIFICIAL BARRIERS TO ENTRY IN THE MARKET."

It will also assess whether companies may have created artificial barriers to entry in the market (through the misuse of patent rights, vexatious litigation or other means) and whether such practices may infringe the EC Treaty ban on abuses of dominant positions, as provided in Article 82. ■

Illegal state aid in the aviation sector

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Ryanair has lodged five actions before the CFI against the European Commission, seeking a declaration of failure to act by the latter, pursuant to competition complaints presented by Ryanair in 2005 and 2006, which were followed by the presentation in July and August 2007 of formal requests to act.

The complaints concerned alleged illegal state aid granted to competing airline carriers by Greece, Italy, France and Germany. The alleged aid consisted of a range of measures, such as favourable airport charges, fuel cost reductions, waiver of credit collection and reservation of exclusive location, amongst others. An alternative allegation of abuse of dominant position by the airports involved was also made by Ryanair (an exception being made for the complaint against Greece), in case the actions that were the object of the complaint could not be attributed to the state, but rather, to the independent conduct of the airports involved. ■

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