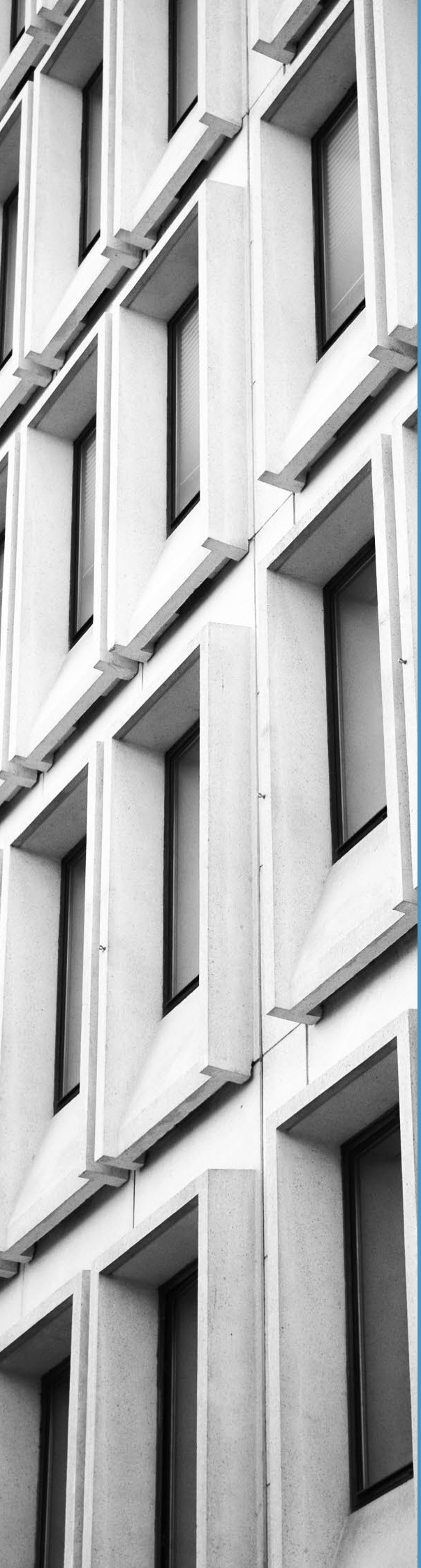

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A Union founded on the rule of law: judicial independence as a constitutional principle of the European Union

Carlos Botelho Moniz

On 27 February 2018, in Case No. C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*[1], the Court of Justice of the European Union (CJEU) handed down a judgment of very significant consequences and implications which transcend the circumstances of the actual case.

As some commentators have already stated, this judgment is not as much about the temporary salary reduction for Portuguese judges as part of the financial assistance programme designed to remedy the excessive deficit of the Portuguese state, but about the judicial system reform measures adopted in recent years in countries such as Hungary and Poland and their appraisal in the light of the fundamental principle of the rule of law.

It should be recalled in any event that this case at the Portuguese Supreme Administrative Court (SAC) involved the Trade Union of Portuguese Judges (ASJP), representing the judges of the Court of Auditors (*Tribunal de Contas*), bringing a special administrative action seeking the annulment of administrative measures affecting these judges' salaries for the month of October 2014 and the months thereafter that had been adopted under Law No. 75/2014, of 12 September, which established mechanisms for the temporary reduction of public sector salaries in Portugal within the context of the financial assistance programme agreed in 2011 between Portugal, the European Union, the European Central Bank and the International Monetary Fund. Apart from the annulment of the measures in question, it also claimed repayment of the sums withheld, plus default interest at the statutory rate, and the acknowledgement of the right of the interested parties to receive their remuneration in full.

As a ground for its claim, the ASJP contended that the salary-reduction measures infringed the principle of judicial independence enshrined not only in the Portuguese Constitution but also in European Union law, particularly in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights of the European Union (Charter).

In its request for a preliminary ruling, the SAC indicated that the measures in question are based on the Portuguese Republic's obligation to reduce its excessive deficit, in accordance with EU law, and where adopted in the framework of the financial assistance programme for Portugal approved by the European Union. It stressed however that the margin of appreciation for defining budgetary policy, within that context, that must be recognised to public authorities does not relieve them of their obligation to respect the general principles of EU law, including that of judicial independence, which applies to EU courts and to the courts of the Member States, since

[1] Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses c. Tribunal de Contas*, C-64/16, EU:C:2018:117.

effective judicial protection of the rights deriving from the EU legal order is ensured primarily by the national courts in conformity with the second subparagraph of Article 19(1) TEU.

However, according to the SAC, to the extent that the effectiveness of judicial protection is conditional on respect for the guarantees of impartiality and independence of the courts, which in turn stems from the status of their judges, including their salary, the objective of the question submitted to the CJEU was whether the principle of judicial independence, stemming from the provisions of the TEU and the Charter referred to above, must be interpreted as being opposed to salary-reduction measures such as those to which the judiciary were subjected in Portugal unilaterally imposed on an ongoing basis by the other sovereign powers/bodies (the legislative and executive branches).

The CJEU reply to the question submitted to it – confirming the compatibility of the measures adopted in Portugal with EU law – can hardly be considered surprising since it ruled in this vein after finding that the salary-reduction measures which affected the judiciary were adopted with a view to correcting the excessive deficit of the Portuguese State and within the context of an EU financial assistance programme, that these measures were limited in range, temporary in nature (indeed by the time the judgment was delivered, they had already been terminated) and general in character, applying not only to the judiciary but to all holders of public office and of legislative, executive and judicial powers in general, as well as to civil servants and all public sector workers. Thus, the CJEU was able to conclude that the measures in question did not target the judiciary in particular but were instead part of the general budgetary measures for correcting financial imbalances in Portugal, in particular, with regard to the state budget deficit, and could not therefore be considered to undercut the independence of the judiciary.

This reply is not surprising but what is especially relevant and innovative in the CJEU judgment is the reasoning underlying the determination of its own jurisdiction and the reach attributed by the Court to the principle of judicial independence, as stemming from Article 19 TEU.

Although the approval of the concrete measures for temporary reduction of public sector salaries in Portugal did not stem from a specific compromise approved by the EU or undertaken by the Portuguese government within the framework of the financial assistance programme, the CJEU considered it sufficient, in order to establish a relevant connection with the European Union legal order and thus to establish its own jurisdiction, that the legislation in question had been approved by the Portuguese authorities with a view

to correcting the excessive deficit detected and declared by the EU institutions in accordance with the Treaty on the Functioning of the European Union (TFEU).

This enabled it to rule out any classification of the facts as a "purely internal situation" (in which case the SAC would have to decide on the legality of the contested measures exclusively in the light of national constitutional principles and rules) and which also led the CJEU to dismiss the plea raised by the Commission as to the inadmissibility of the referral, taking the view that – though summarised – the SAC's explanations as to the importance, for the decision on the merits, of the EU law provisions for which interpretation was requested, were sufficient for the CJEU to understand the reasons that led the national court to request their interpretation. This was the procedural context that enabled the CJEU to focus its attention on the second subparagraph of Article 19(1) TEU and extract wide-ranging consequences from that subparagraph.

To interpret this provision – whereby "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" – the CJEU employed a systematic approach. Firstly, it combined its text with that of Articles 2 and 4 of the same Treaty and, secondly, underscored the difference in wording from Article 51(1) of the Charter.

Actually, as to this latter aspect, while Article 51(1) establishes that the Charter is addressed to the Member States "… only when they are implementing Union law" – which means that the fundamental rights enshrined in the Charter, specifically the right to judicial protection provided for in Article 47, can only be invoked against the Member States when concrete EU law provisions are being applied by the national authorities – the second subparagraph of Article 19(1) TEU imposes, very broadly, on the Member States, the duty to institute in their internal legal order avenues which ensure effective judicial protection "… in the fields covered by Union law".

This distinction leads the CJEU to put aside the importance of Article 47 of the Charter for the solution of the case at hand – at least implicitly, since explanations about this matter are somewhat sparse in the judgment – and to focus exclusively on the second subparagraph of Article 19(1) TEU.

The reach of this provision is examined in the light of Article 2, which enshrines the values on which the EU is founded, specifically those of the rule of law, and of Article 4(3) on the principle of sincere cooperation.

This leads the CJEU to consider that the requirement to enshrine effective legal protection, as a general principle of EU

law based on the common constitutional traditions of the Member States, is inherent to the values of the rule of law and imposed not only on the EU and its institutions, specifically with regard to the terms on which its judicial system is arranged and structured, but also on the Member States "… in the fields covered by Union law".

It follows that, in combination with the Article 4(3) principle of sincere cooperation – which, among other duties, imposes on Member States the duty to take "… any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties …" – that in shaping the necessary remedies to ensure effective legal protection at national level in the fields covered by EU law, under the second subparagraph of Article 19(1) TEU, Member States have the obligation to guarantee respect for the requirements of the rule of law, beginning with the independence of the judiciary.

And this is all the more important since the national courts or tribunals are the "ordinary courts" of EU law, charged with guaranteeing the application of the same in the legal orders of each Member State, in cooperation with the CJEU through the preliminary ruling referral enshrined in Article 267 TFEU.

And for a court or other tribunal to be classified as a national court or tribunal, for the purposes of Article 267 TFEU, it must satisfy all the guarantees associated with effective legal protection, to wit: *(i)* basis in law; *(ii)* permanent character; (iii) binding force; *(iv)* adversarial nature of the proceedings; *(v)* application of rules of law; and *(vi)* independence.

In turn, the independence requirements, which apply on the same terms to the EU courts and to the courts of the Member States, imply, apart from guarantees as to their members not being removed, that the court or tribunal in question performs its functions wholly autonomously, without being subject to any hierarchical constraint or subordinate to anyone or anybody and without receiving orders or instructions from any source. The CJEU goes on to stress that the receipt by the members of courts or tribunals of a level of remuneration commensurate with the importance of the functions they perform also constitutes an essential guarantee for judicial independence.

The CJEU thus articulates very clearly and in a wide-ranging manner the obligations arising to the Member States from the duty to establish "… remedies sufficient to ensure effective legal protection in the fields covered by Union law", as enshrined in the second subparagraph of Article 19(1) TEU, in combination with Articles 2 and 4 thereof.

Accordingly, without prejudice to the policy control mechanism provided for in

Article 7 TEU regarding respect for the values stated in Article 2, specifically the rule of law, this ruling marks a turning point with wide-ranging effect at constitutional level, since it launches the bases for possible judicial control, under the terms of the infringement action provided for in Articles 258 and 259 TEU, over compliance with the duties of the Members States under the second subparagraph of Article 19(1) TEU to provide remedies in the national legal order which ensure effective legal protection in the fields covered by EU law.

As nowadays EU law, to a greater or lesser extent depending on the scope of the powers which the Treaties attribute to its institutions, touches on practically all fields of action of public authorities, it flows from this CJEU judgment that the European Commission and the Member States have indeed a very powerful judicial oversight instrument available to them regarding any conduct of a Member State which may breach the duties imposed by the above-mentioned second subparagraph of Article 19(1) TEU to provide remedies for effective legal protection in its internal legal order, including the essential guarantees for judicial independence.

The "face-off" between the Commission, Poland and Hungary over controversial reform measures in their judicial systems, which are queried by the Commission, may therefore see new dramatic developments in the light of the procedural perspectives that have now opened up.

Mind the gap: the risks of jumping the gun

Joaquim Vieira Peres

The Altice/PT/Meo Group recently made the news due to the European Commission's Decision to fine its shareholder Altice NV for about EUR 125 million for allegedly violating the standstill obligation related to the acquisition of exclusive control over PT Portugal/Meo.

While a non-confidential version of the European Commission's Decision that allows for a grounded analysis of the details of the facts in question has not yet been published, we can only comment on the subject of the standstill obligation and its infringement: gun jumping.

This competition law "slang" term is meant to encompass a broad set of events related to the early acquisition of control of other target-undertakings or assets, in concentrations that are subject to prior non-opposition or authorization procedures by national or European regulatory authorities.

According to the standstill obligation, which is more or less similar at the international level, the concentration cannot be implemented or completed before being duly notified and authorized.

The rule is clear but, as usual in this field of law, the devil is in the details.

It is indubitable that the prohibition covers completing the transfer of ownership of shares or of tangible or intangible assets (the typical effects of completing an acquisition), as well as taking over corporate positions in the target or exercising voting rights in those same bodies.

However there are other behaviors where judging lawfulness/unlawfulness is prone to much more uncertainty.

One such example is the access to commercially sensitive data (and relevant in terms of competition law) given to the acquirer during due diligence processes, which might take place before the conclusion of the acquisition agreement or afterwards, in order, for example, to establish the consideration for the transaction.

Likewise, the analysis of the economic value that can be generated with the operation (the synergies or economies of cost, scope or scale) as well as the preparation of the transition of control to the new partner or shareholder (and the understanding of the respective costs and contingencies) will always entail the provision of "sensitive" data.

On the other hand, the very existence of a competition law authorization procedure generates a hiatus between the moment when an agreement is reached between the acquirer and the seller (or between participants in a fusion) regarding the design or perimeter of the transaction and its respective consideration, and the moment when, after the authorization, the operation can finally be completed (the completion).

This *hiatus* (or gap) – which can be more or less lengthy depending on the complexity of the substantive or procedural analysis of the concentration in question, but, in any case, will last at least a month and may easily reach an year – will, due to the nature of things, necessarily lead to, at the moment of closing, the acquired/ /merged *quid* being different from what it was at the moment of the signing (at the execution).

And one should not exclude the possibility that, according to that "evolution", be it positive or negative, the buyer may lose interest in buying (at all or for the agreed price, even if subject to review) or the seller may lose interest in selling (in the agreed conditions).

A hypothetical restart of the due diligence process and a renegotiation of the consideration (or of the allocation risks to each of the parties) is completely inefficient and is a disincentive to any merger: during this interim period, the target company tends to lose value, not least due to the lack of a strategic and tactical decision-making capacity. As it is usually said, the seller has already sold but the buyer has yet to buy.

Thus, it is a legitimate interest of both the buyer and the seller to ensure that, at the end of that gap, the target undertaking maintains its characteristics (among which its market presence and performance but also its exposure to the various risks, whether inherent to its activity or "pathological"), even if that may represent a temporary limitation of its freedom to act or its decision-making autonomy (therefore a potential restriction of competition).

The extreme solution of terminating the executed agreement, releasing both parties from the completion of the agreed transaction is obviously not an adequate solution, due to the losses that it will entail to all the parties.

With this in mind, legal practice has developed and established a series of procedures meant to handle this insurmountable point of tension: *(i)* contractual clauses that prohibit or subject some of the target's decisions to the consent of the acquirer (interim covenants), namely in regard to strategic options outside the ordinary course of business or any other decisions that significantly affect the target's value; *(ii)* mechanisms for the review of the consideration after completion (sometimes associated with the retention of part of the price) for the assessment or subsequent confirmation of certain accounting realities or contingencies; *(iii)* very detailed and complex confidentiality agreements; *(iv)* "ring-fencing" of the accessible sensitive information; *(v)* formation of closed groups (far from key-positions with market impact) of agents to access and handle critical information ("clean teams"), but also "vendors' due diligences", among others.

But the strict delimitation of "safe" and "risky" zones of these behaviors was never the object of imperative rules, guidelines or directives (soft law), nor has it been explored by academic theory or judicial decisions.

It is therefore of utmost concern if the European Commission decides to reinforce the "deterrent" element of its sanction, through a "moralizing" or "exemplary" punishment, in an area filled with doubt and grey areas. This will only be accurately assessed once the concrete facts are known and it is possible to evaluate the level of fault in the specific behaviors concerned.

Until then, mind the gap, it is up to the undertakings involved in merger and acquisition processes to reinforce their care with subjecting operations to merger control, regarding the necessity of submitting notifications for authorization, the scope of the sensitive information shared and the early interference of the buyer in the target's decisions.

European Commission approves State aid scheme for solar panels in rented residential buildings in Germany

Eduardo Maia Cadete

(i) Introduction

The European Commission approved under EU State aid rules, in case SA.48327[2], the German scheme granting public support to landlords planning to install solar panels on the roof of apartment buildings. The electricity produced with these solar panels – per installation, with a capacity of less than 100 kW and with a limit of 500 Mw per year – is intended to supply the tenants of the buildings with electricity. The scheme budget is estimated at EUR 4 million per annum.

(ii) Aid scheme environmental rationale

The scheme allows tenants to actively participate in Germany's transition to a low carbon, environmentally sustainable energy supply, in line with the European Union environmental objectives, and aims at ensuring that the share of renewable electricity supplied to German final customers rises to 40-45% by 2025, to 55-60% by 2035 and to 80% by 2050.

In this setting, German authorities further explained to the European Commission that for renewable electricity, without the financial support, the landlords would not install solar panels on rented buildings to supply electricity to their tenants because such investment would be either loss making or yield such a poor return that the investment would not worth the administrative and organizational burden that such projects imply. Henceforth, the aid measure makes the projects sufficiently attractive (in most parts of Germany) as the rate of return obtained with the support is in many cases higher than the rate of return obtained for injection of the electricity produced into the national grid.

(iii) Beneficiaries

The beneficiaries of the approved measure are producers of electricity from solar installations with a maximum installed capacity of 100 kW. The installation concerned must be located in a residential building and the support is granted only for electricity that: *(a)* is supplied to a final customer; *(b)* is consumed in the building in which the electricity is produced or in residential or secondary buildings that are in the immediate vicinity of the building in which the installation is located – for this purpose, residential buildings were defined in the scheme as buildings that are used at least 40% (of their surface) for residential purposes; and *(c)* does not circulate though the public grid.

(iv) Reasoning of the funding measure

The financial support is paid to the beneficiaries as a premium calculated as the difference between the *reference value* applicable when the installation enters into operation and 8.5 cents/kWh. This premium is only granted on the electricity produced by the photovoltaic installa-

[2] Public version of the Decision published on 8 February 2018, accessed at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_48327 [consulted on 29 May 2018].

tion and consumed by the tenants. Excess electricity produced by the installation, not consumed by the tenants, and consequently injected into the national grid remains eligible for support for electricity injected into the grid under an autonomous aid scheme previously approved by the Commission[3].

The decision specifies the "reference value" for subsidised solar installations entering into operation, based on 2017 data, as follows:

	Up to 10 kWp	Above 10 kWp and up to 40 kWp	Above 40 kWp and up to 100 kWp
Reference value (cent/kWh)	0,122	0,1187	0,161
Deduction value (cent)	0,085	0,085	0,085
Subsidy (cent)	0,037	0,037	0,211

To have the aid scheme approved by the Commission, German authorities also had to exhaustively describe the economics of the financial support and submitted an extensive study on the subject, under which the decision to invest into a solar installation on rented buildings depends on: *(a)* the costs of the installation (investment and maintenance), the costs of the adaptation of the network needed to connect the PV installation to the electricity system of the building, the cost of installing the metering equipment and the costs of managing the electricity contract with the tenant and the costs of supplying the tenant with electricity from the grid for the part of his consumption that is not covered by the solar installation; *(b)* the revenues that the landlord can obtain from supplying the electricity to his tenants. Albeit, such revenues will depend on both the quantity of electricity sold, the extent to which the electricity produced from the installation is consumed by the tenants and the price per kWh that can be agreed between the landlord and the tenant. In general, the tenant will conclude a contract with the landlord for the supply of electricity only if the price is not higher than the best offer that can be obtained from an electricity supplier on a market basis; *(c)* the revenues that the landlord can obtain from injecting unconsumed electricity into the grid; and *(d)* the level of national surcharges imposed on electricity supplied to the tenant.

The decision includes an in-depth economic review of the data disclosed by German authorities on the themes described above. In this context, the authorities further provided to the European Commission a simplified calculation of the project costs and revenues for a typical household (consumption of 2.500 kWh/year, 60% of the consumption covered by the

[3] The initial support scheme for the promotion of the production of renewable electricity has been approved by the Commission by decision of 23 July 2014 in State aid file SA.38632 (2014/N) – *Germany – EEG 2014 – Reform of the Renewable Energy Law* and by decision of 20 December 2016 in State aid file SA.45461 (2016/N) – *Germany – EEG 2017 – Reform of the Renewable Energy Law*.

solar installation and the rest needs to be covered by the grid), as follows:

Revenues from the sale of the electricity to the tenant (23.26 € cents/kWh – estimated average retail price in Germany, excl. VAT)	+582 EUR/year
Levelised costs of electricity produced from the solar installation (12.18 € cents/kWh)	-183 EUR/year
EEG surcharge	-103 EUR/year
Metering, administration, distribution	-100 EUR/year
Electricity needed from the grid (23 € cents/kWh)	-230 EUR/year
Total without subsidy	-34 EUR/year
Subsidy (3.6 € cents/kWh)	+54 EUR/year
Total with subsidy	20 EUR/year

The financial support is granted to beneficiaries for a period of 20 years, which corresponds to the depreciation period of the installation. The support is funded via a surcharge on electricity paid by network operators and certain categories of consumers.

(v) Validation of the aid scheme

The Commission assessed and approved the scheme under Article 107(3)(c) Treaty on the Functioning of the European Union ('aid to facilitate the development of certain economic activities …, where such aid does not adversely affect trading conditions to an extent contrary to the common interest') taking into account the 2014 *Energy and Environmental State aid Guidelines*[4], specifically the section on *Aid to energy from renewable sources*. As such, the Commission under an extensive and detailed reasoning considered that the following cumulative conditions were met by the aid scheme: *(a)* contribution to a well-defined objective of common interest, as the aid measure aims at an objective of common interest; *(b)* need for State intervention, as the measure is targeted towards a situation where aid can bring about a material improvement that the market alone cannot deliver, by remedying a well-defined market failure; *(c)* appropriateness of the aid measure, the aid measure is an appropriate policy instrument to address an objective of common interest of the European Union; *(d)* incentive effect, the aid changes the behaviour of the entity concerned in such a way that it engages in additional activity which it would not carry out without the aid or which it would carry out in a restricted or different manner; *(e)* proportionality of the aid, the aid amount is limited to the minimum needed to incentivise the additional investment or activity in the area concerned; *(f)* avoidance of undue negative effects on competition and trade between Member States, as the negative effects of the aid measure are sufficiently limited, so that the overall balance of the measure is positive; and *(g)* transparency

[4] Published in the EU Official Journal, C 200, 28.6.2014, pp. 1–55.

of aid, as Member States, the Commission, economic operators, and the public, have easy access to all relevant acts and to pertinent information about the aid awarded under the approved scheme.

The methodical German state aid scheme approved by the Commission has as beneficiaries producers of electricity from solar installations located in rented residential buildings with a maximum installed capacity of 100 kW, with a cap of 500 Mw per year. Moreover, the requirements of the scheme, imply that the photovoltaic installations concerned must be located in a residential building; the support is granted only for electricity that is supplied to a final customer, acting as a tenant the energy is consumed in the building in which the electricity is produced or in residential or secondary buildings that are in the immediate vicinity of the building in which the installation is located; and the produced electricity does not circulate through the public grid.

Important reminder to the public sector – ECJ reconfirms applicability of State aid rules to transactions between State-Owned Undertakings

Philipp Melcher

Judgment of 18 May 2017, *Fondul Proprietatae*, C-150/16, EU:C:2017:388

The case concerned two Romanian undertakings engaged in the production of electricity, Eletrocentrale (ELC) and Oltenia (OLT). ELC was wholly-owned, OLT majority-owned, by the Romanian State. The remaining shares in OLT were owned by Fondul, a private investment fund. ELC was (apparently) in financial difficulties and unable to repay a loan which had been granted to it by OLT. ELC therefore offered to OLT the transfer of one of its power plants in lieu of repayment, which OLT accepted by resolution of its shareholders meeting, *i.e.*, with the votes of the majority shareholder, the Romanian State. Fondul, the outvoted minority shareholder, claimed that the power plant was unprofitable and that its transfer in lieu of repayment of the loan only benefited ELC which, free from the burden of the loan and the power plant, did not have to file for insolvency and exit the market. Based on these submissions, Fondul requested a national court to declare the resolution of OLT's shareholders meeting invalid. The national court stayed proceedings and asked the European Court of Justice (ECJ) for preliminary ruling, pursuant to Article 267 Treaty on the Functioning of the European Union (TFEU), as to whether and under which conditions the contested resolution constituted State aid within the meaning of Article 107(1) TFEU which was subject to the notification and standstill obligation in Article 108(3) TFEU.

In its judgment, the ECJ reiterated that, in order for the resolution to constitute State aid within the meaning of Article 107(1) TFEU, it must be attributable to the State, confer a selective economic advantage on an undertaking which is financed from State resources and be liable to distort competition and to affect trade between Member States. The ECJ concluded that, if all of these conditions were met and the resolution therefore qualified as State aid, it should have been implemented only if and once having been notified to and approved by the European Commission (COM), in accordance with Article 108(3) TFEU.

The *Fondul* judgment (re)confirms that the prohibition of State aid in Article 107(1) TFEU also applies to transactions between State-owned undertakings. This finding already results from the following two considerations: First, as required by the ownership neutrality principle in Article 345 TFEU, Article 107(1) TFEU applies irrespectively of whether the recipient undertaking is in public or private ownership. Second, the requirement that, in order for there to be State aid, the advantage conferred on the recipient undertaking must be granted through State resources, is also met if the advantage is not financed from the State budget but from other resources controlled by the State, such as the resources of State-owned or otherwise State-controlled undertakings (**public undertakings**).

A Member State may therefore grant State aid within the meaning of Article 107(1) TFEU to a public undertaking through another public undertaking. Consequently, any transaction – concerning, for example, the purchase, sale or transfer of goods or the provision of services, capital or financing – between public undertakings – including, in principle, group-internal transactions between parent and subsidiary or between subsidiaries of the same parent – may involve State aid within the meaning of Article 107(1) TFEU.

Even though these findings already follow from the abovementioned principles and from previous judgments, in particular from the landmark ruling in the *Stardust Marine case*[5], their reconfirmation in the *Fondul* judgment is nevertheless very important. As State aid-related judgments and decisions concerning transactions between public undertakings are rare, there is sometimes a lesser awareness, on the part of public undertakings, of possible State aid-related implications of their mutual commercial relationships. Such awareness is, however, crucial, given the possible consequences of an infringement of the State aid rules.

The granting of State aid in violation of Article 108(3) TFEU, *i.e.*, without prior COM approval[6], renders the underlying legal acts (in the case of transactions: the underlying contract(s)) invalid *ex tunc* and obliges national courts, upon application by an interested party (for example, a competitor), to draw all consequences from the invalidity and to order the State to recover the aid (including interest) from the recipient undertaking[7]. If, for example, in the *Fondul* case, the transfer of the power plant in lieu of repayment of the loan involved State aid for ELC, the resolution of OLT's shareholders meeting, and thus the transfer of the plant and the extinguishment of ELC's debt, might be null and void. In such a case, ELC might be insolvent, and might have already been insolvent at the time of the resolution (given its apparent financial difficulties), as a result of which OLT might have to (partly or fully) write off the claim for repayment of the loan. Such a scenario might also lead to consequences for the directors of the insolvent aid recipient. Under the insolvency laws of some jurisdictions, it is a criminal offence for directors of a company considered insolvent by law not to file for insolvency, and directors are personally liable for payments by the company from the moment it is considered insolvent.

In light of the above, the *Fondul* judgment is a reminder of the importance for public undertakings to verify compliance with State aid rules also in respect of transactions with other public undertakings. This requires, first and foremost, an analysis as to whether the transaction concerned involves State aid, which is not the case, for example, if the decision of the public

5 Judgement of 16 May 2002, *France v Commission (Stardust Marine)*, Case C-482/99, EU:C:2002:294.

6 I.e., where the aid has not been individually approved by the Commission and does not fulfil the requirements of any of the general exemptions from Article 108(3) TFEU, such as de *minimis* regulations or block-exemption regulations.

7 Judgement of 12 February 2008, *CELF and ministre de la Culture and de la Communication*, Case C-199/06, EU:C:2008:79.

undertaking to enter into the transaction is not attributable to (*i.e.*, not influenced by) the State (but a pure management decision) or if a private operator in a similar situation to that of the State would have entered into the transaction on essentially the same terms and conditions (private market operator principle)[8]. This analysis is more complex in the case of transactions between public undertakings than in the case of transactions between public and private undertakings, because transactions between public undertakings may involve State aid for either party. In the *Fondul* case, the transfer of the power plant in lieu of repayment of the loan may theoretically constitute State aid in favour of OLT, instead of State aid in favour of ELC, for example if the value of the power plant significantly exceeded the loan amount.

Competitors of public undertakings, on the other hand, may be motivated by the *Fondul* judgment to monitor the market also for any undue benefits granted to their public competitors from entities of the same group or from other public undertakings, as *Fondul* reconfirmed that they can avail themselves of the "sharp sword" of Article 108(3) TFEU also in this context.

Any transaction – concerning, for example, the purchase, sale or transfer of goods or the provision of services, capital or financing – between public undertakings – including, in principle, group-internal transactions between parent and subsidiary or between subsidiaries of the same parent – may involve State aid within the meaning of Article 107(1) TFEU. Transactions between public undertakings may involve State aid for either party.

A violation of Article 108(3) TFEU renders the transaction agreements invalid ex tunc and obliges national courts, upon application by a competitor, to draw all consequences from the invalidity and to order the State to recover the aid (including interest) from the recipient undertaking. In certain circumstances, the invalidity of the transaction agreements may lead to insolvency of the recipient undertaking and, in such a case, to criminal and civil liability of its directors.

The Fondul judgment is a reminder to public undertakings of the importance to verify compliance with State aid rules also in respect of transactions with other public undertakings and a reconfirmation to competitors of public undertakings of the availability of the "sharp sword" of Article 108(3) TFEU also in this context.

[8] If the presence of State aid cannot be excluded, it is necessary to assess in a second step whether the aid is subject to the notification and standstill obligation in Article 108(3) TFEU.

Gasorba judgment: a back-door way in to double jeopardy?

Luís do Nascimento Ferreira

Introduction

In late 2017[9], the Court of Justice ("CJ" or "Court") assessed whether the courts of the Member States may declare an agreement void for breaching EU rules that prohibit agreements restricting competition, when the Commission has previously closed an antitrust investigation concerning that agreement on the basis of commitments imposed on the undertakings at stake and without establishing the existence of an infringement to such rules.

It is worth mentioning at the outset that the Court took an affirmative answer and the conclusion reached, although it was set out in a broad, concise and apparently harmless way, may cast substantial doubts and concerns.

Summary of the case and of the judgment

The case was referred to the CJ for a preliminary ruling by the Spanish *Tribunal Supremo* in the context of a dispute between Gasorba, S.L. ("Gasorba") and Repsol Comercial de Productos Petrolíferos, S.A. (Repsol) concerning an agreement for the operation of a petrol service station in the Alicante province. Under the agreement, Gasorba, in its capacity as lessee and distributor, was required to use Repsol as its sole supplier for a period of 25 years, and Repsol periodically communicated to Gasorba the maximum retail selling prices of fuel and permitted the latter to apply discounts provided they were covered by its own commission and thus without impacting on Repsol's revenues.

The Commission initiated a proceeding under Article 101 Treaty on the Functioning of the European Union (TFEU) against Repsol and found that that the long-term supply agreement raised concerns as to its compatibility with that provision given that it might create a significant foreclosure effect on the Spanish retail fuel market.

To address the Commission's concerns, Repsol committed inter alia to: *(i)* refrain in future from concluding long-term exclusivity agreements; *(ii)* abstain from interfering in the retail fuel price (without prejudice to the indication of maximum or recommended prices); *(iii)* offer the service station tenants with on-going contracts such as the one concerned financial incentives to early terminate their agreements; and *(iv)* refrain for a long period from acquiring independent service stations for which it did not yet act as a supplier.

These commitments were made binding to Repsol by a Commission decision of 2006 adopted under Article 9 of Regulation (EC) No. 1/2003[10].

Following this decision, Gasorba brought an action against Repsol before Spanish courts, seeking the annulment of the

[9] Judgment of 23 November 2017, *Gasorba and othores*, C-547/16, EU:C:2017:891.

[10] Case COMP/B-1/38.348 *Repsol* C.P.P.

agreement concerned and a compensation for damages on the ground that it was contrary to Article 101 TFEU. The case was dismissed by the first two judicial instances and then reached the *Tribunal Supremo*, which submitted two questions to the CJ essentially aiming to clarify if Article 16 of Regulation (EC) No. 1/2003 – laying down that, when ruling on agreements under Article 101 TFEU that were already the subject of a Commission decision, the courts of the Member States cannot take decisions running counter to the decision adopted by the Commission – precludes a national court from declaring an agreement null when the Commission has accepted beforehand commitments concerning that agreement and made them binding in a decision taken under Article 9 of the said regulation.

The Court first stated that Article 16 of Regulation (EC) No. 1/2003 has the purpose of ensuring a uniform application of EU competition law within the Union's scope, given that in a system of parallel and decentralised powers such as the one applying to antitrust matters, Article 101 TFEU (together with Article 102 TFEU, which bans abuses of a dominant position) is applied not only by the European Commission but also by the competition authorities and the courts of the Member States.

Notwithstanding the above, the Court's judgment gives more weight to the nature of the decision rendered by the Commission in respect of the agreement between Gasorba and Repsol since, in a decision pursuant to Article 9 of Regulation (EC) No. 1/2003, the Commission closes the investigation subject to the imposition of a number of commitments proposed by the company concerned and does not take a position on whether there was any infringement to Article 101 TFEU.

The CJ further emphasised that Article 9 decisions are taken to respond to the competition concerns identified by the Commission after a «mere preliminary assessment» of the case and thus cannot "certify" compliance with Article 101 TFEU. The Court also relied its interpretation in recitals 13 and 22 of Regulation (EC) No. 1/2003 in so far as they provide that commitment decisions do not affect the power of the courts and the competition authorities of the Member States to apply Articles 101 and 102 TFEU.

In this light, the Court declared that Article 16 of Regulation (EC) No. 1/2003 must be interpreted as meaning that a commitments decision concerning an agreement does not preclude national courts from examining whether the same agreement complies with competition provisions and, if necessary, declaring the agreement null and void pursuant to Article 101 TFEU.

Comment

In general terms the outcome of the decisional part of this case does not come as a surprise. However, it brings along a certain tension towards other rights with identical or superior strength, which the CJ should have identified and assessed to allow the national court to reach a thoughtful decision in the main proceedings and to deal with the doubts and concerns that the judgment necessarily triggers.

In our view the CJ was right to stress, as a starting point, that the ban on conflicting decisions imposed on national courts by Article 16 of Regulation (EC) No. 1/2003 whenever the Commission has previously issued a decision under Article 101 TFEU pursues the purpose of applying EU competition law effectively and uniformly. However, it remains to be said that in sanctioning proceedings this purpose cannot be isolated and deemed as an objective in itself. It needs to go hand in hand with a greater goal, which is to prevent a parallel system that leads to materially opposed decisions taken a little at a time to the detriment of defendants. Or, to put it in a broad and positive way: ensure compliance with the principle of legal certainty. The fact that the judgment does not even mention this aspect – let alone deal with it – is in our view open to criticism.

The need for criticism is reinforced because, although the decision-making part of the judgment is only focused on the powers that the national courts retain in respect of agreements earlier tackled by the Commission in a commitments decision, the CJ also referred to the possibility of national competition authorities later deciding on the legality of the same agreements for the purposes of Article 101 TFEU.

It is undisputed that a decision taken by the Commission under Article 9 of Regulation (EC) No. 1/2003 does not take a stand on whether the agreement infringes competition rules. However, we cannot agree with the Court when, in practice, it seems to suggest that a commitments decision is not subject to a firm and coherent reasoning as to the gravity of the agreement at hand. The wide sense in which the CJ frames the answers given to the Spanish court raises the question of knowing whether, in a situation such as the one reported, national courts and agencies might in theory freely decide on the illegality of the agreement concerned and on the associated penalties when the Commission abstained from doing both.

It should be kept in mind that the Commission is not only the first entity to deal with the competitive implications of the agreement. The fact that it takes the lead on the investigation means that at first the Commission and the national competition authorities agreed and decided together, in the framework of the European Competition Network, that the Commission was the better placed authority to

deal with the case. Additionally, according to the Commission's consolidated practice, typically commitment decisions are not available if the Commission finds that the nature of the infringement calls for the imposition of a fine. Hence, contrary to the Court's perception, any Article 9 decision is inevitably preceded by a substantive and sufficiently detailed analysis about the severity of the case.

If the Commission is the most suitable authority to act on an agreement for the purposes of Article 101 TFEU, and if after assessing such agreement it comes to the conclusion that it is not serious enough to justify the finding of an infringement and the imposition of a penalty, it does not seem that the prospect of decisions pointing to opposite directions coming from the two remaining entities potentially empowered to enforce that provision (national courts and competition authorities) is the best way to ensure the consistency that Article 16 of Regulation (EC) No. 1/2003 requires. If in fact the concern that drives the Court in this case is the uniform application of European competition law throughout the EU, it appears far more detrimental to that end if individuals that consider themselves harmed and unsatisfied with a commitments decision by the Commission fail to challenge it before the General Court through the appropriate action for annulment provided for in Article 263 TFEU, thus allowing the decision to crystallise and become *res judicata*, and are still allowed in the future to seek a distinct solution by means of an unrestricted involvement of the national courts and agencies.

The possibility of national competition authorities stepping-in at a later stage prompts an additional difficulty. This is so because, in order to obtain the closure of the case from the Commission, the undertaking involved in the agreement had certainly put forward commitments that are robust and targeted to meet that institution's concerns, which were then made binding by the Article 9 decision. If a company placed in this situation is later confronted with a new investigation carried out by a national competition authority envisaging the same agreement, the company will hardly have the possibility to produce further commitments capable of equally addressing the competition concerns this time raised by the national agency. And this inevitably leads to question if allowing a build-up and succession of investigations will not ultimately force a conviction.

In a nutshell, the case law stemming from the *Gasorba* judgment represents a dangerous step towards some variants of the *non bis in idem ban*, as it opens the door to the possibility of a duplication of proceedings that may give rise to opposing outcomes issued by different entities in distinct moments and having as their object the assessment of one and the same conduct under the same rules.

State aid in Sport: the Spanish football clubs' saga before the EU Courts

Dzhamil Oda

Introduction

The State aid saga related to several Spanish football clubs is still *alive* and ongoing. This story follows a set of cases which ended up with the European Commission (EC) ordering the Spanish State in 2016 to recover almost EUR 50 million in alleged unlawful State aid granted to several national football clubs (Real Madrid, FC Barcelona, Athletic Bilbao, Atletico Osasuna, Valencia, Hercules and Elche).

More than half of the amount – EUR 30.2 million – was to be recovered from Valencia, Hercules and Elche (case SA.36387). In the case of those clubs the alleged unlawful aid was related to loan guarantees granted to Valencia, Hercules and Elche by the *Instituto Valenciano de Finanzas* (Valencia Institute of Finance, "IVF"), a financial institution of the *Generalitat Valenziana* (regional government of Valencia). The EC considered that such aid gave those clubs an economic advantage over other clubs.

Interim measures before the EU General Court

Following the EC decision, which included a recovery order of the alleged unlawful aid granted to Valencia, Hercules and Elche, all the clubs appealed the decision before the General Court. In parallel, Valencia and Hercules requested the General Court interim measures to suspend the recovery of the alleged unlawful aid until the appeals of the EC decision were to be resolved (cases T-732/16 and T-766/16).

Both the clubs claimed that the immediate recovery of the aid would harm their financial situation.

Hercules added that such a recovery would lead to its liquidation, which in consequence would render impossible the club to participate in sport competitions, with consequences also to the organizers of those competitions and to other clubs participating the same. Further, it also claimed that the extinction of the club would generate social conflicts and economical losses to the region.

Valencia added that the immediate recovery of the alleged unlawful aid would highly and irreversibly modify its situation in the market of football clubs.

Both the requests were rejected by the General Court, as the court considered the parties failed to show that the recovery of the alleged unlawful aid would lead to irreparable harm and damage that would require interim measures.

The General Court first recalled that the requests must detail the circumstances and the facts that justify *prima facie* the urgent application of interim measures.

Regarding Hercules, the court noted that in order to assess the financial situation of an entity, one must look to the global resources of the entire group such entity is part of, including individuals that control the entity.

It also recalled that, in accordance with Hercules, the club invested in «quality players» which salaries exceeded its revenues and that the president of the club undertook before the La Liga to cover the deficit of Hercules with financial resources from private third-parties.

Hence, the General Court ruled that the club had enough means to face financial commitments exceeding its revenues, and also noted that since the club failed to provide information about its shareholders the General Court did not have enough information to assess its financial situation and therefore to assess the risk of financial harm and/or liquidation stemming from the immediate recovery of the alleged unlawful aid.

Regarding Valencia, the General Court considered that the club had a stable financial situation that allowed it to immediately to repay the aid at issue, including through credit lines made available by its majority shareholder. The court also mentioned that the impairment related to the repayment of the aid was reflected in the accounts of the club and Valencia has accounted for a provision to face such repayment.

Hence, the General Court ruled that Valencia failed to show that the immediate recovery would lead to serious and irreversible harm.

Coment

Sport is *de facto* special, accounting for millions of fans around the globe. But is not so special from a competition rules enforcement policy, including in the context of EU State aid rules, as this sector also falls under the application of such provisions.

In fact, taking into consideration the social relevance of sport, State authorities may be many times tempted to provide additional support to the sector. That is a really great and important purpose and not in itself illegal, provided that the relevant rules (which include competition provisions) are dully considered.

The EC had given and is still giving particular importance to the enforcement of competition rules in sport, notably on a State aid perspective, including aid to infrastructure and tax schemes, and direct and indirect support for sport's entities (emphasizing the importance of professional football clubs: «From the State aid point of view, there is a significant risk that football clubs will increasingly apply for financial help to the national, regional, or local public authorities in order to be able to continue playing professional football»;

see also the set of cases related to the application of State aid in football – SA.29769, SA.33754, SA.36387, SA.40168, SA.41613, SA.41614, SA.41617, among others).

Hence, particular care is required whenever public measures of financial or economic nature directed to sport are envisaged (which might include direct or indirect financial support, guarantees, tax or levies exemptions, transactions under non-market conditions, etc.), as such measures may potentially fall under EU State aid rules and, if illegal and not compatible with the internal market, be subject to recovery.

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Case C-637/17 – Preliminary ruling on the private enforcement Directive (Directive 2014/104/EU)

Gonçalo Machado Borges

Mariana Martins Pereira

Introduction

Directive 2014/104/EU, aiming at facilitating the right to seek compensation for damages deriving from violations of competition law, entered into force on 5 December 2014. Although the transposition period has expired on 27 December 2016, parliamentary draft legislation No. 599/XIII and legislative proposal No. 101/XIII, which aimed at implementing the Directive, were only approved by the Parliament on 20 April 2018. This late implementation raises important questions in terms of EU law.

On 27 May 2015, Cogeco Cable brought an action against Sport TV and its shareholders (NOS and Controlinveste), seeking compensation as a result of a violation of competition law committed by Sport TV. Such violation was declared by the Portuguese Competition Authority (*Autoridade da Concorrência*) on 14 June 2013 and upheld on appeal both by the Portuguese Competition Court (*Tribunal da Concorrência, Regulação e Supervisão*) and by the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*).

Within this lawsuit several questions on EU law were raised, especially concerning the compatibility between national and EU law provisions on the effects granted to final national decisions finding an infringement of competition law for the purposes of a private enforcement action (Article 623(1) of the Portuguese Civil Procedure Code and Article 9(1) of Directive 2014/104/EU); and the limitation period applicable to such action (article 498 (1) of the Portuguese Civil Code and Articles 10(2), (3) and (4) of the Directive). Indeed, applying the limitation period prescribed under Article 498(1) of the Portuguese Civil Code might mean that the applicant's claim is already time-barred.

It was within this framework that the Lisbon Court of First Instance ("*Tribunal Judicial da Comarca de Lisboa*") decided to stay the proceedings and refer to the Court of Justice ("ECJ") for a preliminary ruling.

Case C-637/17

As this is the first time the Court is being called upon to give a ruling on Directive 2014/104/EU, this can be a landmark judgment. Likewise, the questions posed are crucial for the national court to rule on the admissibility and the merits of the case.

The national court referred six questions to the ECJ, mainly related to the possibility of invoking Articles 9(1) and 10(2), (3) and (4) of the Directive before the former, although the transposition period had not expired yet by the time the lawsuit was brought and even if what is at stake is a dispute between individuals, therefore

touching upon the horizontal direct effect of directives. Other cornerstone principles of EU law shall also be pondered, such as the obligation of interpreting national law in conformity with EU law and the principle of procedural autonomy of the Member States, albeit in full respect of the principles of equivalence and effectiveness.

Regarding the first question, the ECJ was asked about the possibility for the applicant to invoke the relevant provisions of the Directive before the national court, albeit within the framework of a dispute between individuals. The fourth question, whose relevance is dependent on a positive answer being given to the first question, entails an assertion of whether the national provisions at stake shall be interpreted in conformity with Articles 9(1) and 10(2), (3) and (4) of the Directive, even if, once again, the lawsuit was brought while the transposition period was still pending. This question will likewise lead to a broader analysis of the obligations arising for the Member States and national courts after a directive's entry into force and before the transposition period comes to an end.

With the second and third questions, the referring court asks in essence whether the principles of equivalence and effectiveness, acting as limits to the Member States' procedural autonomy, might compromise the compatibility of the relevant national provisions with the general principles and rules of European Union law.

Finally, the last two questions (fifth and sixth) consist of the referring court's (welcomed) attempt to make sure that any eventual affirmative answer to any of the previous questions would not lead to a violation of the prohibition of retroactivity, prescribed inter alia under Article 22(1) of the Directive. Hence, the national court asks whether interpreting the national provisions in conformity with the Directive's relevant norms is in itself contrary to Article 22(1). If the ECJ considers that enacting such an interpretation is liable to contravene the prohibition of retroactivity, the referring court aims at clarifying whether the defendants in the main proceedings can invoke Article 22(1) and therefore temporarily limit the undesirable effects deriving from the interpretation of national law in conformity with other norms of the Directive.

In procedural terms, the parties in the main proceedings have already been given the opportunity to submit written observations, which are now in the process of being translated. The Court will then decide on the necessity of holding a hearing, as well as on the need for conclusions of the Advocate General (Article 59(2) of the Consolidated Version of the Rules of Procedure of the Court of Justice of 25 December 2012).

Increased risks of extradition for managers of companies involved in cartels: the *Pisciotti* judgment

Pedro Gouveia e Melo

Introduction

In the United States and a growing number of other countries, such as Great Britain, Denmark and Brazil, participation in a cartel constitutes a criminal offense punishable by imprisonment for the managers of the companies involved, in contrast to the situation in Portugal and in most of the Member States of the European Union, where cartels are typically administrative offences (although in Portugal managers may also be found individually liable and are subject to fines of up to 10% of their annual remuneration).

European (and Portuguese) managers are not exempt from risk, however: involvement in a cartel that also produces effects in a country where it is a crime, such as the United States, may entail the risk of extradition to that country (even if the unlawful conduct, such as meetings or other contacts, occurred outside that country, since in competition law jurisdiction is generally established through the "effects theory").

Further to the recent *Pisciotti* judgment of the Court of Justice[11], the risk of extradition has increased for European citizens traveling in other Member States of the European Union with extradition agreements in force with third countries, in particular with the United States.

The *Pisciotti* case

The US authorities began criminal proceedings in 2007 against Romano Pisciotti, an Italian national, for his participation in the marine hoses international cartel. An arrest warrant as issued in 2010 by a US court against Mr Pisciotti, who became wanted by the Interpol. In 2013, when travelling from Nigeria to Italy, he was detained by German federal police agents when his flight stopped in Frankfurt. On the basis of the EU-USA agreement on extradition, Pisciotti was extradited to the United States in 2014 (having been the first European citizen to be extradited to the US for breaches of competition law), where he later pleaded guilty and was sentenced to a term of imprisonment of two years and a fine.

After his release in 2015, Pisciotti brought an action for damages in the German courts against Germany on the grounds that it had breached EU law, and in particular the general principle of non-discrimination, by refusing to allow Pisciotti to benefit from the prohibition of extradition provided for in the German constitution for all German nationals. In the context of these proceedings, and facing doubts as to the interpretation of Union law, the *Landgericht Berlin* referred a request for a preliminary ruling to the Court of Justice.

[11] Judgment of 10 April 2018, *Romano Pisciotti c. Bundesrepublik Deutschland*, C-191/16, EU:C:2018:222.

The judgment of the Court of Justice

In its judgment of 10 April, the Court stated (contrary to the German Government's argument) that Mr Pisciotti's situation falls within the scope of European Union law, since he is a citizen European Union who, by stopping in Germany on its return journey from Nigeria, exercised his freedom of movement within the Union, established in Article 21 Treaty on the Functioning of the European Union (TFEU) and, in addition, the request for extradition was made under the Agreement between the EU and the United States on extradition. The fact that he was arrested when he was only in transit in Germany was not found relevant.

Secondly, with regard to the interpretation of the principle of non-discrimination laid down in Article 18 TFEU, the Court of Justice pointed out that the EU-USA extradition agreement allows, in principle, a Member State to reserve, on the basis of provisions of a bilateral agreement (such as the said extradition agreement) or in rules of their constitutional law, special treatment of their nationals, preventing their extradition.

The Court acknowledged that in this case Pisciotti had been placed in a situation of unequal treatment vis-a-vis a German national (who would not have been extradited under the provisions of the German constitution), which had resulted in a restriction on his freedom of movement.

However, according to settled case-law, restrictions on the fundamental freedoms guaranteed by the Treaty can be justified on grounds of legitimate interest, provided that they are proportionate to the objective pursued. According to the Court of Justice, the objective of avoiding the risk of impunity for persons who have committed an offense, which is part of the prevention and combating of crimes, has a legitimate character which can, in principle, justify such a restriction. In addition, the principle of proportionality is respected if the State assessing the request for extradition (in this case Germany) has previously given the competent authorities of the Member State of which the citizen is a national (in this case Italy) the possibility to request their surrender in the context of a European arrest warrant, and the latter Member State has not taken any action to that effect.

In the present case, the Italian consular authorities were informed of Pisciotti's situation before the extradition request was granted, but the Italian judicial authorities did not issue a European arrest warrant against him (probably because in Italy competition law infractions are typically punishable through administrative penalties, as is the case in Portugal). The Court therefore concluded that Article 18 TFEU should be interpreted as not objecting to the extradition of Mr Pisciotti to the United States.

Comment

The *Pisciotti* judgment applies only to the action for damages brought against Mr Pisciotti by Germany pending before the German courts.

However, the view taken by the Court (which decided in the Grand Chamber, reserved for the most complex and relevant cases) is of great importance, since it not only makes clear that Union law applies to a request for extradition to a third country where the citizen concerned exercises his freedom of movement, but also that the authorities of the Member States should exchange information with each other within the framework of the European arrest warrant, which takes precedence over the request of a third State.

In practice, the judgment reinforces the investigative powers of the United States authorities for breaches of US competition law committed by European citizens, who are subject to the risk of extradition on their travels through other Member States, provided that under the national law of those States the conduct in question is regarded as a criminal offense.

What if it were in Portugal?

Filipa Marques Júnior, Nuno Igreja Matos

As for the consequences of the *Pisciotti* judgment on the Portuguese legal framework, it should be noted that the Portuguese legislation and its solutions do not significantly differ from the German framework. In fact, we can also find in the Portuguese Constitution a provision concerning a fundamental right of the national citizens to not be subject to extradition (article 33(1)); besides, Portugal is also a part of a bilateral extradition convention with the United States, which complements the EU-USA extradition agreement; and, as a EU Member State, the European arrest warrant legislation is also applicable under Portuguese law.

In this context, the Court of Justice's decision also produces effects when applying Portuguese law, with two major consequences.

First, Portugal has a duty, when presented with an extradition request by a third State regarding a citizen from another European Member State, to inform the said Member State, in order to allow for the hypothetical presentation of an European arrest warrant. Only by complying with this duty — according to the *Pisciotti* decision — will the Portuguese State be recognizing and enforcing the

right to freedom of movement within the European Union, allowing for the requested citizen to also have the possibility to benefit, in his State, from an eventual extradition prohibition regarding national citizens.

Second, and following the *Pisciotti* decision, once that information is provided to the requested citizen's State, and if the authority of that State decides not to present an extradition request, then the requested State (Portugal) may accept the third State's extradition request without infringing the principle of non-discrimination of Article 18 TFEU.

Still concerning Portuguese law, it is important to point out that the extradition of a citizen to a third State (a non-EU State) will always depend on the existence of a provision that punishes the facts with imprisonment in both the requesting and requested States. Therefore, since the participation in a cartel is only considered, under Portuguese law, an administrative offence punishable with a fine, an extradition request based exclusively on such behaviour would not be accepted by the Portuguese authorities.

In light of the above, in its *Pisciotti* decision the Court of Justice takes a stand that, whilst safeguarding the right to freedom of movement as one of the main principles of EU Law – namely when such right is exercised by a EU citizen in a different Member State –, also values the unwanted risk of creating an area of criminal impunity and the need to promote cooperation with third States by allowing Member States to extradite a EU citizen from a different Member State when this nationality State does not present a request for the delivery of its citizen.

MATTOS FILHO > Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

To settle with CADE, Booking, Decolar and Expedia agree to waive contractual clause

On-line travel agencies Booking.com, Decolar.com and Expedia reached settlement agreements with the Brazilian Administrative Council of Economic Defense ("CADE") to suspend an investigation on the use of parity clauses in contracts with hotel chains for the use of their on-line sales platform.

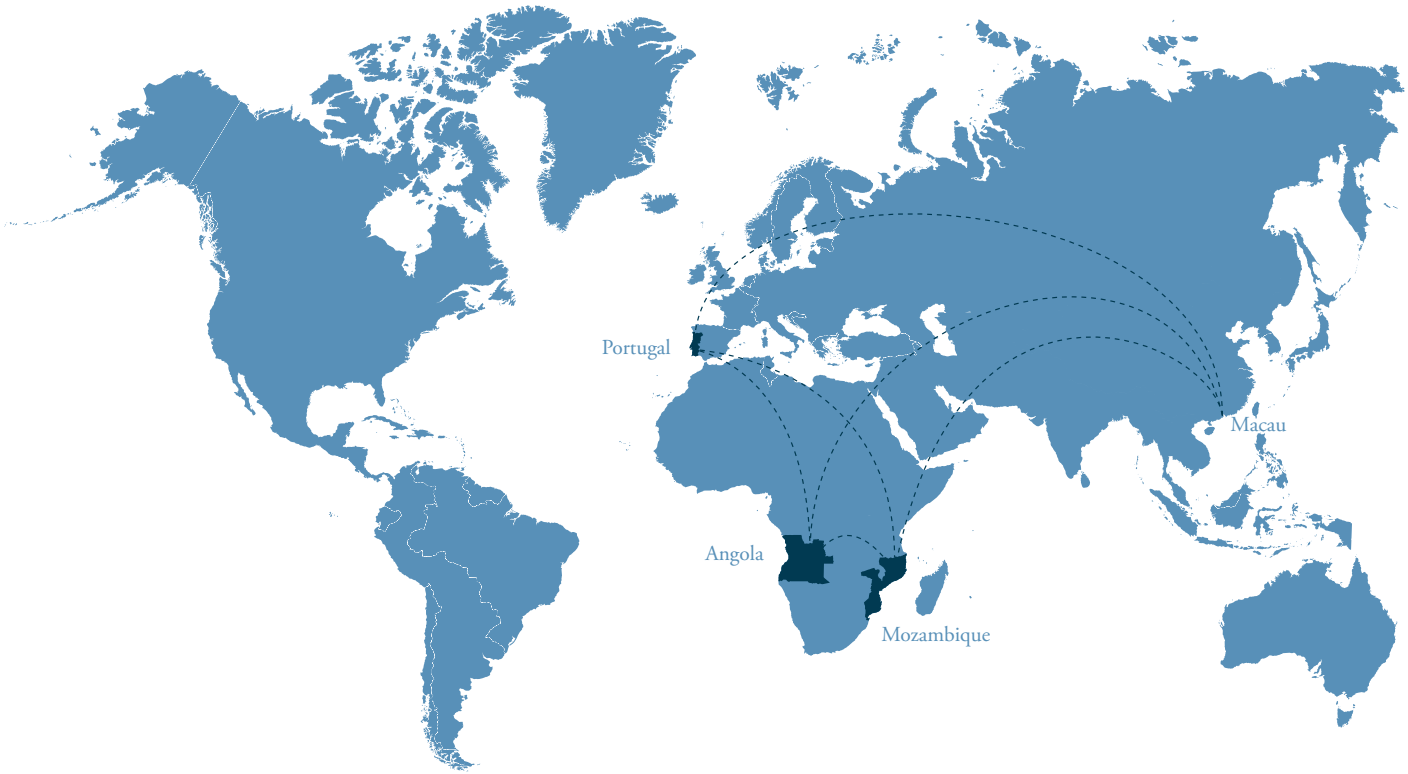
CADE opened the investigation in 2016, after a complaint was filed by the *Fórum de Operadores Hoteleiros do Brasil* ("FOHB"). At the time, FOHB accused Booking, Decolar and Expedia of illegally block hotels from offering better prices or conditions than those they offered in their websites (either through offers in the sales channels of their own hotels or in platforms of competing companies).

CADE considered that the imposition of broad parity clauses by Booking, Decolar and Expedia would limit the competition among travel agencies, regulating the final prices offered to consumers. These clauses would also prevent the entrance of new competitors into the market, since strategies focused on efficiency gains and reduction of costs would not result in lower prices and increase in market share.

Pursuant to the terms of the settlement agreements, Booking, Decolar and Expedia agreed to exclude broad parity clauses in contracts with hotels. These companies will no longer have the right to prohibit these establishments from offering better conditions on their own off-line sales channels (by telephone and in the hotel counter). They will also not be able to demand parity in relation to the prices charged by other on-line travel agencies.

However, CADE considered that demanding parity in the hotel's own websites is reasonable to reduce the so-called "free-rider effect" in the market for on-line hotel bookings (when hotel and guests are connected by the agencies' platform, but the negotiation takes place elsewhere). The adoption of these parity clauses, considered narrow in their scope, would represent a balance between the contractual parties' interests.

With this decision permitting the use of a narrow parity clause and denying its broad use, CADE followed the positions reached, on similar cases, by antitrust authorities in Italy, France and Sweden, in cooperation with the European Commission.



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