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RSCAS 2013/02
Robert Schuman Centre for Advanced Studies
European Networking and Training for National Competition
Enforcers (ENTRANCE)

European Networking and Training for National
Competition Enforcers (ENTRANCE 2011)
Selected Case Notes

Edited by Giorgio Monti and Pier Luigi Parcu

European University Institute

Robert Schuman Centre for Advanced Studies

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EUI Working Paper **RSCAS** 2013/02

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ISSN 1028-3625

© Edited by Giorgio Monti and Pier Luigi Parcu, 2013

Printed in Italy, February 2013

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu/RSCAS/Publications/

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European Networking and Training for National Competition Enforcers (ENTRANCE)

This series of working paper is published in the context of ENTRANCE, training for national judges in competition law. The training is organized by the RSCAS, with the financial support of DG Competition of the European Commission. In the context of the training program, selected judges from different EU Member States attend both online and residential training activities in Florence. Each year the training focusses on a different aspect of competition law enforcement relevant for the national judiciary.

Each working paper includes the case notes written by the national judges participating to one edition of ENTRANCE. In the context of the training activities, in fact, each participating judge is requested to summarize and to comment a national judgement related to the field of competition law. The working paper thus aims at increasing the understanding of the challenges faced by the national judiciary in enforcing national and EU competition in the context of the decentralized regime of competition law enforcement introduced by Reg. 1/2003.

Abstract

The working paper includes a collection of the case notes written by the national judges who attended the European Networking and Training for National Competition Enforcers (ENTRANCE 2011). The training program was organized by the RSCAS between September 2011 and June 2012 with the financial contribution of DG Competition of the European Commission. The case notes included in the working paper summarize judgements of the different EU Member States related to different aspects of competition law enforcement. The working paper thus aims at increasing the understanding of the challenges faced by the national judiciary in enforcing national and EU competition in the context of the decentralized regime of competition law enforcement introduced by Reg. 1/2003.

Keywords

Competition law; Art. 101 TFEU; Art. 102 TFEU; Reg. 1/2003; judicial training, national judges

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1. Introduction to the collective working paper

Giorgio Monti and Pier Luigi Parcu

Introduction

This working paper is based on the European Networking and Training for National Competition Enforcers (ENTRANCE 2011) training programme. The programme is organized by the European University Institute's Robert Schuman Centre for Advanced Studies, and financially supported by the European Commission's Directorate General for Competition. The purpose of this course is to help national judges refresh their knowledge of the fundamentals of EU competition law and learn to cope with the increasing public and private enforcement of national and EU competition law.

The reasons for this increase in competition law litigation in the EU Member States are not so much due to an increase in the number of infringements, but rather due a number of recent institutional reforms. Most importantly, Reg. 1/2003 requires national competition authorities to apply EU competition law to almost every case where the anticompetitive conduct at hand has or may have an effect on trade among Member States, and in so doing it should achieve results consistent with the jurisprudence of the European Courts.¹ Furthermore, national competition authorities across Europe have become increasingly active, and the public perception is that they are legitimate and independent agencies that can be relied upon to work in the public interest: this makes them more bold and eager to exercise their powers.² This trend has certainly been strengthened by the creation and the strong development of the European Competition Network (ECN) among Member State authorities. The Commission has also worked to make private enforcement more visible, and even if to date there has been no EU-wide legislation to facilitate private enforcement, there has been an increase in damages claims, which may be in part attributed to the Commission's consciousness-raising activities.³ These reforms have put national judges on the front line.⁴ Moreover, given that competition issues may arise from diverse legal settings, almost any judge in any court in Europe could be faced with a competition law argument, making it imperative for judges to be well prepared when these issues arise.

One of the aims of ENTRANCE 2011, in addition to providing 27 national judges with a comprehensive course on competition law with a special focus on damages claims, was to facilitate an exchange of views and information among national judges, allowing them to reflect on their peers' experience in handling competition law disputes. As a result, during this course's final meeting, each participant presented a judgment from their national courts, which was then discussed by other judges.

In the absence of a systematic collection of national jurisprudence, this random sample of case notes illustrates the range of issues that national courts are engaged with, and as will be seen from the summary below. While some of the cases presented appear to be basic applications of EU competition law to new countries, it is also evident that some national courts were called on to wrestle with complex issues that may require legislative action at both national and EU level, in particular when procedural aspects of competition law are concerned.

¹ See Articles 3, 11 and 16 of Regulation 1/2003 on the implementation of the rules of competition law laid down by Articles 101 and 102 of the Treaty [2003] OJ L1/1.

² S. Wilks and I. Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) West European Politics 148.

³ On the point, see the intervention of Vice President Almunia, Competition policy as a pan-European effort, European Competition Day, Nicosia, 2nd October 2012.

⁴ D. Gerard and K. Lenaerts 'Decentralisation of EC Competition Law Enforcement: Judges in the. Frontline' (2004) 27 World Competition 313.

Turning briefly to substantive issues it becomes apparent that the majority of the judgments address fairly well-established issues, for example hard-core cartels (tackled by the Lisbon Commercial Court, the Supreme Administrative Court of Bulgaria and the District Court of Vilnius, Lithuania), resale price maintenance agreements in scenarios where no exemption appears plausible (tackled in both judgments reported by the Romanian judges), abuse of dominance by well-established dominant firms e.g. price squeeze (noted by Judge Petrova), refusal to give access to airport premises (Judge Baran), and denial of access to the water market (Judge Stefanska).

However, as mentioned above, what is most striking when reviewing the case annotations are the procedural considerations and concerns that have been aired, which will now be discussed below.

Fundamental rights and powers of the National Competition Authorities (NCAs)

It is perhaps unsurprising that the question of whether national competition law procedures are compatible with the standards set by the European Convention on Human Rights is raised in new accession Member States. Judge Piebiak's annotation of the judgment of the Polish Supreme Court of 21 April 2011 asserts that, in a manner reminiscent of the recent *Menarini* judgment,⁵ high procedural safeguards are required when competition law sanctions are applied. At a time where several national competition authorities are reorganising their offices, this is a timely reminder to policymakers that any system must comply with fundamental rights.

Judge Gombos reports on a decision by the Hungarian NCA granting an individual exemption to a distribution agreement that fell outside the scope of the block exemption. Procedurally, the importance of this decision is that in the aftermath of the judgment in *Tele 2*, such exemption decisions may no longer be taken. It will be recalled that in *Tele 2* the Court of Justice of the European Union (CJEU) held that an NCA could not issue a decision stating that Art. 102 is not infringed, and that the decision-making powers for NCAs are limited to those found in Art. 5 of Reg. 1/2003.⁶ *Mutatis mutandis*, individual exemptions may not be issued. Of course this is something of an unfortunate result because, especially on the facts of the case involving a long term contract where the length of the contract reflected the commercial risk of the transaction, some *ex ante* guidance of the legality or not of this practice is essential for the smooth functioning of such transactions in the future.

Competition sanctions

Judge Kitsios' annotation of the judgment from the Athens Administrative Court of 15 September 2010 also demonstrates the role national judges must play in ensuring a national authority's compliance with fundamental rights. The judgment is also helpful in recalling the importance of effective deterrence, which in part may be achieved by ensuring that there is a separate penalty for each infringement. However, this approach would have to be applied carefully in cases where the competition authority identifies the same conduct as constituting two separate infringements: in these instances the precise calculation of the fine would have to be done in a way that avoids penalising an undertaking twice over. This is an issue that has not yet been addressed fully by fining guidelines but which may require some reflection for its practical relevance and for its importance in assuring the credibility of the enforcement apparatus. For instance, might it not be preferable to examine the effects of all the practices found to infringe competition law and impose an overall fine based on the effects, instead of the approach taken by the Greek court?

⁵ *Menarini Diagnostics v Italy*, judgment of the European Court of Human Rights of 27 September 2011.

⁶ Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o.*, *devenue Netia SA* Judgment of 3rd May 2011.

A further issue pertaining to fines was addressed by the Lisbon Commercial Court. This was an appeal against the national competition authority's decision to fine a professional association for price fixing, which in itself was unremarkable, but the calculation of the fine presented more problems, having decided that the practice was contrary to both national and EU competition law. In the absence of express statutory guidance at the time, the court held that the infringement of EU competition law constituted an aggravating circumstance. It may perhaps be preferable for the penalty to be calculated by considering the geographical scope of the anticompetitive effects. Judge Silva also notes another relevant matter, which is that the national court refused to review the decision of the NCA to bring this action in the first place, correctly limiting itself to the merits of the decision, and not interfering in the authority's policy choice in taking this particular claim, which in any event was consistent with the EU's continued concerns over restrictive practices among liberal professionals.

The relationship between national courts, NCAs and the EU Commission

Judge Cooke brought up the final judgment in the long running ice cream war saga that occupied the Irish courts, the Commission and the European Courts for over a decade. This perhaps points out one of the risks of increased private enforcement: when the legal or economic issues are unsettled, it can take such a long time for resolution that the fight might not be worth it. This certainly suggests that private enforcement is much easier as a follow-on action after a Commission or an NCA intervention in clear cut cases, but it is clearly more risky, lengthy and expensive in unsettled disputes and, of course, in stand-alone actions. Another instance of a lengthy litigation process is the damages claim by Mr Crehan against Courage, which began in the UK High Court in the late 1990s and was only resolved in 2006, with the judgment going against the claimant.⁷ Both of these cases remind us, as Judge Cooke rightly mentions in his case note, of the importance of national judges keeping a watchful eye over Commission decisions, for at times these may bind the national judge (see Art. 16 of Reg. 1/2003), or at least have some salience in a national dispute and be of persuasive value.

In striking contrast to the implications of the Masterfoods judgment, Judge Acacia brings to our attention two judgments of the Italian Court of Cassation. These are follow-on claims that result from the aftermath of the car insurance cartel, again a matter that has occupied the courts (including the CJEU) for some time. In these puzzling judgments the Court held that notwithstanding the finding of an infringement by the Italian competition authority, the court hearing a damages claim is entitled to evaluate any evidence and may well find that there had been no infringement. This result is shocking: it risks completely undermining the injured parties' possibility to secure a quick remedy in a follow-on action because it allows a defendant to re-litigate the whole issue again. The judgment might be correct insofar as Italian procedural law is concerned, but one may wonder if, in the aftermath of the judgment of the CJEU in VEBIC, this aspect of procedure might be challenged as contrary to EU Law. As Judge Acacia rightly notes, this judgment also undermines the effectiveness of the competition enforcement system, and so may be contrary to EU law for this basic reason.

Judge Maitrepierre explored the tricky terrain of vertical restraints and internet sales and in so doing reminds us of the mixed results a national court may obtain when seeking the assistance of the EU institutions. In this instance the French Competition Authority had obtained commitments from all but one cosmetics firm to amend their selective distribution agreements to allow for online sales. However Pierre Fabre stood firm – it refused to make a similar commitment and then appealed against the NCA's decision to condemn its distribution agreement. On appeal, the court was provided with a statement from the Commission acting as *amicus curia*, but not content with this the court raised several questions in a reference to the CJEU. However, with respect, it is not particularly clear to what extent the CJEU's answer aids the French court in this instance, bar perhaps the general scepticism at

⁷ The issue reached the High Court in 1998 and was finally resolved by the then House of Lords in 2006: *Inntrepreneur Pub Company (CPC) and others v. Crehan* [2006] UKHL 38.

the justifications proffered by Pierre Fabre.⁸ This procedure is of interest in showing the limits of both the Commission's *amicus curie* role and the role of the CJEU in an instance where the law is well settled. The real difficulty shown by this case is in applying the law to the facts, and this is a task for which only the national authority and court are suited, one which the more economic approach renders complex, but for which little is to be gained from the EU institutions, except in the "few" cases that the Commission decides to take up directly.

An often-repeated question is how a judge manages complex evidence. Two national procedures are worth noting. Judge Azzopardi's case note reveals an interesting procedure found in Maltese law: involving the competition authority in private litigation. The dispute at hand was a claim for damages for breach of contract (a contract stipulating that the defendant had to sell the complainant's products exclusively). The defendant counterclaimed that the contractual obligation infringed Maltese competition law, rendering the damages claim unsustainable. The judge referred the competition issue to the Maltese Competition Authority, whose opinion (that the agreement was not in breach of national competition law) it followed. This is an interesting procedure by which the expertise of the national competition authority is engaged in the context of civil litigation. It has the obvious drawback of prolonging the proceedings and of risking the integrity of the parties' rights by introducing another decision-maker but it has the advantage of streamlining public and private enforcement.

A second avenue is found in Belgium. Judge Van Iseghem's case note reveals that judges are empowered to appoint experts, in this case to work out whether the prices of the dominant player were excessive. Granted, the power is not unfettered: the complainant must have a good *prima facie* case that the offence has been committed. The advantage of this procedure is that the judge is better informed, however the drawbacks are obvious: procedures are rendered more costly. This may perhaps explain why many judges have found no reported case of damages actions in their national court dockets: absent an NCA decision that allows for a follow-on action, the costs of proving an infringement and the risk of failure in any such attempts are substantial.

Private litigation

Judge Rubio's annotation shows that parties are more willing to plead breach of competition laws as a defence against a damages claim. In this case note we read of the ups and downs of the application of competition law in distribution agreements between oil companies and retailers. The competition issues arose when the retailer was sued by the oil company for breach of the exclusivity obligations and counter-claimed that this obligation was anticompetitive. In this instance the Supreme Court agreed with the retailer, but declined to award damages as he had relied on this illegal agreement for several years. The judgment appears in line with the CJEU's case law but it seems that since it was handed down the Spanish Courts have decided to exclude the application of competition law to these agreements.

Judge Ponassi takes us to one of the first judgments relating to class actions in Italy, and it is perhaps unfortunate that one of the first times the recent Italian laws were tested in courts failed because of what appeared to be a simple error by the claimant, who identified the wrong defendant. The case was brought by the President of a consumer association against Microsoft, and it was based on consumer law, not competition law. The allegation was that a consumer purchasing a computer with pre-installed Microsoft software but wishing to use other software should be entitled to be compensated for the cost of buying the Microsoft software. The court noted that under the terms of the software licence, the contract was not between the claimant and Microsoft, but between the claimant and the manufacturer of the computer. The court was unwilling to rectify the claim. Importantly, as Judge Ponassi notes, the court also observed that a consumer could purchase computers without any

⁸ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, judgment of 13th October 2011.

pre-installed software, which makes the prospects of success in an competition claim against Microsoft very remote in this instance. The other class action noted in this collection also failed. Judge Georgev writes of a follow-on action with a class action, but 'but the class action was denied on a preliminary ruling that the representative of the class was not likely to be able to pay damages if the class lost. These two judgments point both to the teething problems that arise in the early years of class actions, and also to the importance of an EU-wide discussion on the best design of class action legislation.

Finally, on damages actions Judge Dühr brings to our attention an important judgment from the German Federal Court of 28 June 2011, which brings much needed clarity on claims by indirect purchasers and the thorny issue of the passing-on defence. The Court explains that indirect purchasers have standing to sue for damages, even if they bear the burden of proving a causal link between the cartel and their losses. In future litigation it will be important to observe how national courts go about demonstrating the connection between the cartel and the higher prices set by the cartel's direct purchasers. It might be argued that if there is a competitive market downstream of the cartel, that then it will be difficult for the direct purchaser to pass any overcharging on because it will risk losing sales. This is a matter where further judicial dialogue is warranted. On the passing-on defence the court explained that this defence exists and that the burden of proof is on the defendant cartel member to prove that the overcharge has been passed on, which might also prove to be a very difficult burden to discharge. One may wonder whether this judgment represents a pyrrhic victory: the principles are established as a matter of law, but it may well be very difficult for the indirect purchaser and the defendant to discharge the burden of proof allocated to them. In any case market analysis will play an important role in the definition of these cases, very likely leaving a certain space for the courts' recourse to economic expertise.

Competition and regulation

A number of the cases address abusive conduct in network industries, but most are standard competition actions. However Judge Saarmets writes about an *ex ante* monitoring of prices by the Estonian Competition Authority. In this case, the appeal court rejected the methodology for price regulation set by the authority. This case yields two interesting questions. The first concerns the appropriate role of appellate courts when reviewing the authority's application of law to facts: here the court was not deferential and applied its jurisdiction to the very merit of the case. Second, as Judge Saarmets notes, this was one of the first decisions of the newly constituted Estonian Competition Authority (which all the sector regulators merged into) and he suggests that the authority may have erred in focusing on consumer welfare at the expense of other regulatory goals.

Judge Ozerdag's note explores the issue of state-based anticompetitive effects. Here the government had licensed a new entrant in the retail telecommunications markets but had waived the licensing fee because the entrant would develop a new technology. This upset the two existing operators that had to pay a fee. The court agreed that the state's action was anticompetitive, placing the new entrant at a competitive advantage. It appears that this case was resolved by reference only to the law of Cyprus, but it is arguable that this was also a practice that affected trade between Member States, and so also requiring the application of EU competition law.

Competition law also overlaps with procurement legislation, as noted in Judge de Melo Marinho's review of a case where two subsidiaries of the same company put in two bids for a public procurement tender. The national court, following the case law of the CJEU, held that this was insufficient to raise a concern about collusion without evidence.⁹ As the learned judge notes, this is legally proper but practically it may be hard for the person issuing the tender to find out if there has been collusion, not

⁹ Case C-538/07 Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano [2009] ECR I-4219.

in the least because of the limited resources and powers that are available to purchasing authorities to carry out investigations to identify breaches of competition law. The real issue, however, appears to be more about the responsibility to apply competition law from the purchasing authority's perspective than on the application of competition law itself to these cases. Therefore, the cure here might be to modify the public procurement rules to prevent the risk of collusion, thus relying more on preventive rules than on unlikely and maybe poorly informed evaluations from authorities with different skills and missions.

Conclusions

There are three lessons that we can draw from this collection of cases, about the challenges for competition law enforcement and the tasks for those involved in educating national judges.

First, while there is a good degree of convergence when it comes to the interpretation of substantive law (indeed we frequently see references to the relevant jurisprudence of the European Courts), there is some divergence in national procedural law, which at times aids and at other times obstructs of effective enforcement. This divergence points to a gap in the European legislative process. In light of the recent judgment in *VEBIC*, the question arises to what extent national procedural law that hampers the effective enforcement of EU competition law might be challenged, either by the Commission or by national judges.

Second, more complex cases often call for the analysis of articulated market configurations and dynamic market scenarios. In these situations the Commission and NCAs, with their highly qualified staff, are generally better positioned than courts to conduct thorough investigations and make complex assessments of factual developments. Moreover, courts may and should acquire the help of technical and economic expertise when directly faced with complex market evaluations.

Third, the lesson for those providing training for judges: while basic principles appear to be well understood, parties and judges struggle with the application of the law to complex factual scenarios, especially with the relationship between competition law and regulation, and as noted above divergent procedures allow for different results. Judicial conversations on how to overcome these shared obstacles should form an essential part of any training course.

2. Procedural aspects of public enforcement of competition law

2.1 Lukasz Piebiak, Court of Warsaw, “Compliance by the Competition Authority with the ECHR” (POLAND)

Information about the ruling

- Name of the court of last instance: Supreme Court
- Name of the parties / case reference number: Case No III SK 45/10
- Date of the judgment: 21st April 2011

Facts

In the decision issued on 5th September 2008, the President of Office of the Competition and Consumer Protection (NCA) considered that Polkomtel S.A. (one of four leading mobile telecoms companies in Poland) presented in TV, shopping centres and on leaflets an advertisement suggesting that during a promotional period consumers could buy laptops with modems for 1 Polish Zloty (PLN) whereas the price of a computer was higher than 1 PLN. NCA found that this advertisement was misleading so it was an anti-consumer practice. Therefore, it fined Polkomtel in sum 848,981.47 PLN on the basis of Arts. 106 and 111 of the Competition and Consumer Protection Act (CCP). According to Art. 106 of the CCP, the maximum fine for an entrepreneur’s anti-competitive or anti-consumer behaviour is 10 % of its turnover during the previous year. According to Art. 111 of the CCP regarding the amount of the fine, the NCA (and later the court) must take into account the period of the violation, the intensity of the violation and whether or not it was a first violation. The eventual amount of the fine (848.981,47 PLN) was 0.01% of Polkomtel's turnover in 2007 (i.e. equivalent to 0.1% of overall possible fine that the NCA could impose).

Polkomtel S.A. appealed against the decision to the Competition and the Consumer Protection Court (Division of the Warsaw Regional Court), claiming that the advertisement was not misleading because a cautious consumer would not be misled. It should be obvious for any consumer who is not naive that 1 PLN was the cost of the modem and the price of laptop was higher (in fact it was a market price) and that price was paid in instalments together with bills for telecom services (voice, SMS, Internet). The definition of the average consumer was the main material issue of law in this case – whether or not this kind of consumer could be misled by Polkomtel’s advertisement.

According to the Polish system, the NCA in an administrative kind of procedure conducts the investigation against the entity suspected of anti-competitive or anti-consumer behaviour. In the end the NCA comes to a decision. If entity does not agree with it, it can be appealed to the Competition and Consumer Protection Court. It starts a civil procedure when there are two parties. The claimant is an entrepreneur appealing the decision and this appeal is the claim. The defendant is the NCA which is obliged to file in a period of two weeks a reply to this claim. Later the judgment of the Competition and the Consumer Protection Court can be appealed to the Court of Appeal in Warsaw. It is also possible to make a cassation claim to the Supreme Court in Warsaw against the judgment of Court of Appeal.

The Competition and the Consumer Protection Court ruled on 8th June 2008 in favour of the NCA stating that the advertisement was misleading because it was aimed at all consumers watching TV or shopping in shopping centres, and consumers in Poland as a whole are less cautious than other European consumers so they really might think that the entire price of the modem and computer was 1 PLN. In reasoning about the fine, it was explained that the fine was not excessive and damaging because it was only 0.01% of income and 0.1% of the maximum fine.

Polkomtel appealed against the judgment arguing that the court could not refuse to consider evidence because it was important to establish whether the model of the average consumer presented by the NCA was true or not. It also pointed out that the reasoning was defective (contrary to Art. 328 § 2 CPC – code of civil procedure) because there was no explanation as to why some of their objections were refused. Furthermore it argued that Art. 111 CCP was violated by the court because the amount of the claim was disproportionate with the alleged violation.

The Court of Appeal rejected Polkomtel's appeal, ruling on 25th March 2009 in favour of the NCA and stating that the appeal was unjustified. It explained in its reasoning that the average consumer model was properly established by the court of first instance and the fine of 0.1 % of the maximum was not excessive. It also pointed out that court of first instance could refuse to accept evidence presented by the claimant because the claimant wanted to prove that there was no complaint against this advertisement made by consumers because this evidence was not important for deciding the case.

Ruling of the Polish Supreme Court

Polkomtel filed a cassation claim in the Supreme Court arguing *inter alia* on the same points as in the prior appeal. The Supreme Court ruled on 21st April 2011, considering the cassation claim justifiable and overruling the judgment of the Court of Appeal, ordering Court of Appeal to hear the case again. It gave its reasoning as follows:

a) It was decided in former rulings of Supreme Court that in cases regarding appeals against the NRA (National Regulatory Authority) decisions to fine an entity, a higher level of protection of an entity's rights must be assured in order to ensure that the European Convention of Human Rights is effective in Poland, taking into consideration that the European Court of Human Rights (EHCtR) assumes that when an entity receives a monetary fine, the rules of court verification of that decision should meet the same criteria which must be met by the court ruling in a criminal case. This standard must be met to a greater extent if the court applies national regulations which implement European Union law. It was pointed out that this uniform jurisdiction in telecoms cases (judgment of 14th April 2010, III SK 1/2010) and energy sector cases (judgement of 1 June 2010, III SK 5/2010) also applies in competition and consumer protection cases;

b) by this judgment the Supreme Court decided that it does not matter if that the state authority and court have come to different conclusions (as a matter of fact in these three cases there were three different independent state bodies – for energy, for electronic communications and for competition and consumer protection) – if the decision about the fine is appealed and the case goes to a court, the court must take the European Convention of Human Rights into consideration, which as an international treaty is a part of Polish law, and includes the judgments of the European Court of Human Rights which interprets the Convention. It was underlined that for a long time in Poland the Convention standard has been taken into consideration by the Supreme and lower Courts, and this standard is also applicable in cases such as that at hand.

c) The Supreme Court pointed out that, according to the European Court of Human Rights and the uniform jurisdiction, high monetary fines imposed on entities by administrative bodies should be treated like penal sanctions. The Supreme Court referred to the case *Garryallou Aebe v. Greece* (93/1996/712/909; judgment of 24th September 1997).

d) The Supreme Court clearly stated that these fines are not penal sanctions according to Polish law but a court dealing with appeals against these fines is obliged to take into consideration the Convention standard which means that an entity receiving monetary fines must have the same rights in court proceedings as the accused in a criminal case. It means, *inter alia*, that if the legal basis for imposing a fine by an NRA or NCA was wrong, the court must overrule the decision imposing this fine. In other words, the court cannot reject the appeal even if the factual base of the case is the same and the NRA or NCA could have imposed a fine on another legal basis. That kind of interpretation is

in accordance with the European Convention of Human Rights and its interpretation by European Court of Human Rights and also guarantees that Polish court decisions will not be challenged in the European Court of Human Rights.

2.2 Dimitrios Kitsios, Court of First Instance of Grevena, “Cumulative Fines Imposed by the Competition Authority” (GREECE)

Information concerning the judgment:

- Name of the court of last instance: Administrative Court of Athens
- Name of the parties / case reference number: *G. Dritsas E.E.B.E v. Societe des Produits Nestle' SA and Nestle' Hellas AE*
- Date of the judgment: 15th September 2010

Facts

The case came about when a small company named Dritas (the complainant), dealing with the manufacturing and marketing of coffee in the Athens region of Athens, denounced the company (complainant), dealing with the manufacturing and marketing of coffee in the region of Athens, denounced the company «Nestle Hellas A.E. and the foreign multinational company «Societe des Produits Nestle SA (one of the largest global food companies), which operates in the same industry, for violation of national law no. 703/1977 (concerning provisions on competition law equivalent to Arts. 101-102 TFEU). The complainant claimed that, after Nestle expanded its power in Greece with the acquisition of the Greek company Loudmis SA (one of the biggest national companies in the coffee market), in 1992, it engaged in much anticompetitive conduct (abuse of dominance, anticompetitive agreements, rebates, parallel imports). Also, by refusing to sell its instant coffee, Nescafe Classic, to coffee traders unless they also bought 'Nestle's Greek coffee', it caused the elimination of all competitors (such as Dritsas) on the coffee market.

Decision of the Greek Competition Authority and ruling of the Athens Court of Appeal

The Hellenic Competition Authority/Commission (HCA) launched an investigation into the coffee product market and reached its final decision (no. 434/V/2009) on 12th February 2009. In defining the affected market, Nestle alleged that there was a single coffee market, including instant coffee, Greek coffee, filter coffee and espresso. The HCA did not agree, ruling that each of these constituted separate product markets and that the markets could be further segmented into retail and professional markets. To reinforce its analysis, the HCA referred to marketing studies (prepared on Nestle's behalf) that were discovered during a dawn raid at the company' s offices (on 21st June 2006) and that concluded that, although certain types of coffee might be considered mildly substitutable by consumers, they were imperfect substitutes because differentiating characteristics (primarily taste) determine the demand for these products. The HCA also stated that a 5 to 10 % price increase in one type of coffee did not result in a substantial number of consumers turning to another type. As far as the abuse of dominance was concerned, the HCA held that in the instant coffee retail market (represented by Nescafe Classic), Nestle held a share of around 86 to 87 % from 2000 to 2006 and in the business segment, Nestle held a share of between 78 % and 95 %. These high market shares were sufficient to establish a dominant position. On the other hand, Nestle's competitors held only a share of between 5 % and 7 %. In considering the specific episodes of abuse, the HCA stated that Nestle Hellas had abused its dominance in several ways in relation specifically to supermarket chains. It had, for example, imposed 'target discounts' and 'loyalty rebates' (*'loyalty rebates offer a reward, in the form of a rebate, free products, or lower prices, to customers that make sufficiently many purchases from a supplier'*) that, the HCA argued, foreclosed Nestle' s competitors from selling to supermarket chains. The HCA also condemned the existence of an 'English clause' (*'an "English clause" is a contractual provision requiring a buyer to report any better offer to his supplier and allowing him to accept such offer only when the supplier does not match it'*) that always allowed Nestle to match better offers made by

Nestle's competitors. The HCA noted that between 2002 and 2006, as a result of these practices, the supermarket turnover of Nestle's products improved without interruption, and that Nestle's market share in other types of coffee (namely Greek and filter coffee) also increased. The HCA indicated this as proof of the practices' anticompetitive effect. Apart from the violation of Art. 2 of Act 703/77 and Art. 102 TFEU, the HCA also found a violation of Art. 1 of Act 703/77 and Art. 101 TFEU. The HHC found that Nestle's behaviour also affected trade between Member States in preventing parallel imports by supermarket chains and restricting the ability of competitors from other Member States to enter the Greek market. As a result of all of these, a total fine of approximately 30 million € was imposed on Nestle for the competition law infringements, i.e. for prohibited agreements and its abuse of a dominant position.

An appeal of this decision was brought before the Administrative Court of Athens, which issued its decision (no. 2265/2010) on the 15th September 2010. The Court ratified all the assumptions of the HCA. In particular it refuted all Nestle's arguments concerning the legitimacy of the dawn raid investigation, by deeming it consistent with Art. 6 ECHR and the fundamental rights (e.g. right to no self-incrimination) under European law (Treaties and Reg. no. 1/2003). Yet, furthermore, it held that when a Competition Authority (such as HHC) examines more offences, the calculation of the fine imposed must be done separately for each of them. The comparison of the foregoing provisions of Art. 1 of Act 703/1977 (Art. 101 TFEU) and the provisions of Art. 2 of that Act (Art. 102 TFEU) indicate that each of them refers to different cases of distortion of free competition. Specifically, Art 1 refers to the prevention, reduction or distortion of competition agreements or concerted practices of undertakings, while Art 2 refers to the distortion of competition on the abuse of dominance by one or more undertakings in a particular market. Each of these provisions has its own requirements and application and therefore the breach (in terms of competition law) of one is not absorbed by the violation of another. Therefore, a fine should be calculated separately for infringements of Art. 101 and 102 of the TFEU.

After the Court issued its decision, the Greek Competition Authority complied with the Court's ruling, with its decision no. 510/2010, and imposed separate fines for each of the aforementioned violations of competition law.

Comment

Both the Greek Competition Authority (HCA) and the Administrative Court of Athens dealt with a wide range of fundamental competition law issues. First of all, the Court's ruling that in cases of multiple offences, the calculation of the fine imposed by a national competition authority must be done separately for each one of them, consists an essential principle of competition law interpretation, that allows the better evaluation of each instance of anticompetitive behaviour (both from a preventive and repressive point of view) and thus insures an effective balance between the offence and the amount of fine. Secondly, it is important that, in the case investigated, the HCA (with the approval of the Court) did not hesitate to carry out dawn raids in order to obtain the evidence it needed on the unlawful agreements and conducts. Finally, the Court's and the HCA's criteria on how to constitute the notion of 'separate markets' and 'abuse of dominant position' indicate its accordance with the principles of European competition law and also its consistence with the case law of the European Court of Justice (cases 322/81, 27/76, 85/76, 76/642 etc. of the CJEU).

3. Procedural aspects related to the private enforcement of competition law

3.1 John Cooke, Irish High Court, “Duty of Sincere Cooperation between the EU Commission and National Courts in Cases of Private Enforcement” (IRELAND)

Information concerning the judgment:

- Name of the court of last instance: Irish Supreme Court
- Name of the parties / case reference number: *Masterfoods Ltd t/a Mars Ireland v. HB Ice Cream Limited*
- Date of the judgment: 2009

Judicial proceedings in Ireland and in the European Union

As the timeline of the above list of case reports shows, the private enforcement battle over the abuse of dominance in ice cream markets in Europe between Masterfoods - manufacturer of the 'Mars Bar'- and HB Ice Cream Limited (a subsidiary of Unilever plc and later called Van den Bergh Foods) lasted for well over ten years – longer than the combined duration of Europe’s two 20th century World Wars. The list also illustrates the potential procedural complexity of private enforcement remedies and how an apparently simple private enforcement action can develop to create jurisdictional and constitutional issues requiring the deliberation of two national Courts and the involvement of the European Commission, the General Court and the Court of Justice of the EU before the issues are finally resolved by amicable compromise in the lowest national court where the saga began. This litigation also demonstrates how national courts and the European Union courts can reach opposing results by virtue of their different approaches to competition law and their different methods of analysis and reasoning even though they are applying the same law (i.e. Art. 102 TFEU) to the same facts and evidence.

HB Ice Cream Limited (HB) commenced business as a dairy, supplying milk in bottles to householders in Dublin many years ago. In the 1950s it pioneered the market in 'impulse ice cream' (iced lollipops and ice creams on a stick) which were mainly sold through small corner shops and kiosks. To overcome the financial and space constraints of shopkeepers, HB developed a very successful marketing strategy in which it provided the refrigerator cabinets to shopkeepers free of charge or at a very low rent on condition that only HB products were displayed. In due course, HB became the Irish subsidiary in a chain of similar undertakings belonging to Unilever which were market leaders in these products in many Member States.

In the late 1980s the US conglomerate Masterfoods sought to diversify into the ice cream market in Ireland as it did in Germany and other Member States. In Ireland (as in Germany) Masterfoods found itself faced with the effects of a strong market share held by Unilever subsidiaries in the main retail outlets. (See the cases T-7/93 Langnese-Iglo GmbH v EC Commission [1995] ECR II-1533 and T-9/93 Schöller v Commission [1995] ECR II-1611.) Although retailers were often willing to stock Unilever products as well, they had no room in many outlets to accommodate a second ice cream cabinet, and the HB cabinet was covered by the exclusivity clause. When Masterfoods persuaded some retailers to allow their products to be placed in the HB cabinets, HB commenced proceedings in Ireland seeking an injunction to restrain Masterfoods infringing their property rights in the cabinets and from inducing the retailers breaking the exclusivity clause in their contracts. Masterfoods counterclaimed that the exclusivity clause was unlawful as an abuse of HB’s dominant position in the market for the sale of impulse ice cream. Masterfoods also lodged a complaint with DG Competition. HB had a share of the relevant market which was never less than 80%.

The battle began in the Irish High Court in 1990 where HB successfully enjoined Masterfoods from putting their products into the HB cabinets upon the basis that HB's contractual and property rights were being infringed. At the end of a lengthy trial it was held in May 1992 that the enforcement of those rights did not constitute an abuse of a dominant position. Masterfoods then appealed to the Irish Supreme Court.

In the meantime the European Commission had investigated the complaint and concluded that the exclusivity clauses had the effect of excluding competition because of HB's widespread prevalence in the geographic market in question, such that only a small percentage of outlets were open to be contested by a competitor. The European Commission reached a compromise however, and accepted undertakings from HB to modify the contract terms and closed the file.

Following further complaints from Masterfoods, the European Commission reopened the complaint and issued a new statement of objections upon the grounds that the amended terms of the HB contracts had not removed the exclusionary effects. After a lengthy procedure, the Commission decided that Unilever's exclusivity clauses infringed Art.101 TFEU and that its inducements to shopkeepers not to stock competing products in the HB cabinets was an abuse of its dominant position and a violation of Art. 102 TFEU the opposite conclusion to that reached by the Irish High Court. It ordered Unilever to cease imposing the clauses but, because of the novelty of the issues, imposed no fine on Unilever.

Unilever appealed the Commission decision to the Court of First Instance (as it then was) and after another detailed procedure and hearing, that Court delivered judgment in October 2003, upholding the Commission decision (see case T-65/98 above, *Van den Bergh Foods Ltd v. European Commission*). That judgment was appealed by Unilever, but the appeal was rejected without hearing by order of the European Court of Justice in 2006. (By then the names had changed once more and the order is reported as case C-552/03P, above, *Unilever Bestfoods (Ireland) Ltd v Commission*).

Whilst the Commission and court proceedings in Luxembourg were ongoing, the Supreme Court in Ireland still had before it the appeal against the judgment of the High Court. Unsure as to the status of the private litigation judgment of the High Court as against a conflicting public enforcement administrative decision of the Commission, the Supreme Court decided to refer a series of questions to the European Court of Justice both as to whether it was obliged to postpone its appeal decision and as to substantive competition issues (see case C-344/98 above, *Masterfoods v HB Ice Cream Limited*). Briefly stated, the Court's procedural questions asked:

- a) Did the obligation of sincere cooperation in EC law require the national court to stay the appeal until the validity of the Commission decision had been finally decided in Luxembourg; and
- b) Did such an administrative decision of the Commission addressed to a private party (HB) prevent the latter enforcing a contrary judgment of a national court?
- c) In its judgment on the reference, the Court of Justice ruled that the national Court was obliged in these circumstances to defer to the administrative decision of the Commission in a competition matter. On that basis the Supreme Court postponed hearing the appeal from the High Court.

When the Court of Justice dismissed the appeal from the Court of First Instance, the Irish Supreme Court set aside the original judgment of the High Court in the private enforcement action and remitted the matter back to the High Court to enable that Court to assess the claim for damages made by Masterfoods for the losses it had incurred through being excluded from the market since 1990, by reason of the effect of the exclusionary clauses in the contracts between HB and the retailers. In 2009, shortly before the hearing on the damages claim was due to begin, the parties reached an amicable settlement.

Comment

Perhaps the most important aspect of this entire judicial saga is the light it throws upon the relationship between national courts and the European authorities in the context of private enforcement of the competition rules. National courts adjudicating upon private enforcement claims between undertakings under Art. 101 and 102 TFEU in exercise of their competence under Reg. 1/2003 are not fully autonomous. The obligations of sincere cooperation with the Commission and to ensure the uniformity of application of the competition rules means that the national judge must defer, not only to the judicial authority of the European Union in the Court of Justice, but also to the administrative jurisdiction of the European Commission even when dealing with issues of private enforcement in litigation between private parties where the national competition authority is not involved.

3.2 Ivana Acacia, Court of Messina, “The Value of a Decision of the Competition Authority in Cases of Private Enforcement” (ITALY)

Information concerning the judgment:

- Name of the court: Italian Supreme Court
- Name of the parties / case reference number: *A.N.C.L. v Inaz paghe s.r.l. and Ass.ne provinciale dei consulenti del lavoro di Treviso* (case n. 3640); *P.A. v AXA ASSICURAZIONI S.P.A* (case 19262)
- Date of the judgments: 13th February 2009; 22nd September 2011

Preamble

This case is about the link between the evidence collected by the National Competition Authority and the evidence in a civil trial regarding a compensation for damages caused by an anti-competitive agreement. This matter concerns the value of an Italian Competition National Authority (henceforth AGCM) decision in a private civil trial. The matter was considered by the “Corte di Cassazione” (the civil court of last instance) in two different cases: case n.3640/09, and recently in case n.19262/11. The basic assumption to obtain civil compensation for damages is the existence of an anticompetitive agreement.

The Art. 16 of Reg. n.1/2003 provides that: 'when national courts rule on agreements, decisions or practices under Art. 101 and 102 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings'. A similar arrangement does not exist for the AGCM decisions.

In the Italian state, if proceedings are pending before the Competition Authority, the courts are not required to suspend the process. Art. 295 of the National Italian Civil Procedure ascribes the power to suspend a trial only if a case pending in front of another judge is directly relevant to the case under examination. However, the requirement does not apply in the case under examination because the Competition Authority is not a judicial authority, but rather an administrative authority.

Recently, in relation to class actions, Art. 140 bis sixth paragraph of the 'Codice del Consumo' (Italian Consumer Code) introduced a 'voluntary suspension of the proceedings when the facts relevant to the pending decision are under investigation before a Competition Authority'. If the guarantor has adopted a decision, the court hearing the private enforcement case is not bound by the decision of AGCM.

Facts

In 2000, AGCM established in a measure the existence of an anti-competitive agreement among several insurance companies. One of the customers of the insurance companies participating in the cartel sued the company for damages. He based his request on the Art. 33 of the Italian competition law.

At first, under the common interpretation of the article mentioned above, the possibility to ask for legal compensation for damages was only limited to the competitors harmed by the cartel. However, this interpretation underwent a change and the Court of Cassation decided that the action for damages for breach of Art. 33 can also be made by indirect customers.

To prove the existence of an illegal agreement, the customer used the evidence collected by AGCM. The insurance company defended itself by denying the cartel's existence and by filing a document provided by the ISVAP (insurance sector authority). Specifically, the document provided records of all the economic losses faced by the insurance company itself from liability arising from car crashes. According to the company, the existence of economic losses is direct proof of the non-existence of the cartel. The issue that the Court of Cassation had to address is twofold.

First of all, the judge had to clarify if the AGCM files could be used as proof for the current investigation. Secondly, the court had to specify the files which the insurance company could use to counteract the investigation carried out by AGCM.

Judgments of the Italian Supreme Court

The Court's decision stated that in a legal case for damages caused by illegal agreements aiming to restrict competition, the Competition Authority's decisions were privileged evidence to prove the existence of a company's illegal behaviour.

However, the parties could also offer evidence to support or refute such a determination. These options available to the parties may lead the judge to different conclusions from those reached by AGCM. The national court has the jurisdiction to establish the actual existence of a competition offence autonomously and independently from the determination reached by the Competition Authority.

Comment

The court decision mentioned above is in contrast with the rules proposed by the White Paper Commission. These rules clearly state that the AGCM decisions are binding on the national judge when he or she is deciding a case.

The decision of the Supreme Court could be subjected to criticism. AGCM is an independent authority equipped with specific expertise and is best placed to ascertain the actual existence of an illegal anti-competitive agreement. The trial before AGCM follows specific rules to ensure that all parties involved have the possibility to intervene. It follows that all relevant information for assessing the possible infringement of Art. 101 TFEU should be given in this context. The Italian Supreme Court's ruling creates a state of uncertainty for consumers.

Theoretically, each court that has to determine the existence of a cartel could reach a different verdict based on the same facts. This situation could discourage consumers from taking legal action against companies that participate in anti-competitive agreements, even if AGCM has asserted that such illegal behaviour is illegal. It follows that the private enforcement, which is known as one of the main tools effective in fighting anti-competitive behaviour is weakened as a result. Accordingly, the position of the Italian Supreme Court harms the certainty and effectiveness of European law.

3.3 Paola Ponassi, Court of Appeal of Genova, “Class Actions in Competition Law” (ITALY)

Information concerning the judgment:

- Name of the court: Court of Milan
- Name of the parties / case reference number: ADUC- Associazione per i Diritti degli Utenti e dei Consumatori v. Microsoft S.r.l. Case number: RG. 4141/2011
- Date of the judgment: 20th October 2011.

Preamble

This concerns an ordinance issued by the Court of Milan on 20 October, 2011 that stated the inadmissibility of the class action started by the president of a consumer association towards Microsoft s.r.l.

This decision does not specifically deal with competition law issues. Nevertheless, it is interesting because it is one of the first applications of the Italian law that allows and regulates class actions. Class actions could play an important role in the increase of private enforcement in situations where the breach of competition rules results in damaging a whole group of consumers, especially when each consumer would not find it economical to sue for a individual small claim.

Italian law

Art. 140-bis of the Consumer Code (in the version modified by law number 99 of the year 2009) states that the 'homogeneous inviolable rights of the consumers and users' can be protected (in addition to the normal ways through a class action; for this purpose each member of the class can take legal action to obtain the assessment of responsibilities and obtain damages or a refund, and the other consumers who intend to exercise the same rights can join the class action without the need for a lawyer. The consumer/user can be represented by an association. According to this law, the class action can be used to protect various situations, among which are the following: a) the contractual rights of the consumers/users who are in an identical situation vis-a-vis the same entrepreneur (or company); b) the identical rights of the consumers of the same product vis-a-vis the same producer, even when the consumers do not have a direct contractual relationship with the producer; c) the identical rights of the consumers/users to obtain compensation for unfair commercial practices and anti-competitive behaviour.

In order to avoid an abuse of this form of private enforcement, the Italian law makers have ruled that the claim filed by the individual who intends to start a class action has to go through a preliminary admissibility procedure; only after the court says that the claim is admissible can the other individuals who are interested in participating in the class action join it.

The claim can be declared inadmissible for various reasons: when the action is evidently groundless; if it looks like there are no other individuals with identical rights (i.e. there is no class); if the person who filed the class action has a conflict of interest or if this person is not adequate for the role. If the claim is admissible, the court sets a deadline before which the people who have an identical right can opt in; if they do not, they are free to make individual claims (that can, under certain conditions, be added to the class action); in any case, they cannot file another collective redress.

Facts

An individual (president of a consumer association) bought a personal computer with a pre-installed Microsoft operating system; afterwards he said he was not interested in using that program (since he intended to install a different operating system) and asked Asustech (the computer's manufacturer), and subsequently Microsoft s.r.l., to refund the equivalent of the price of the installed program (about € 70); upon receiving no answer, he petitioned the judge in order to claim damages, as well to obtain the invalidation of the contractual clause contained in the OEM version of the Microsoft software license.

Of course, it is not by chance that the person who intended to start the class action was the president of a consumer association. In fact, the association had been preparing this class action for a long time, it had given publicity to it on its Internet site and had also filed a similar claim before another judicial authority. After obtaining a favourable decision (confirmed by the second instance judge), the association had promoted its class action initiative, in order to collect a large number of consumers' declarations that were shown to the Court of Milan in order to prove that there were many people who would be interested in opting in.

It may be interesting to note that on its Internet site the consumer association (named ADUC) published the text of a complaint addressed to the Directorate-General of the European Commission. In that document, it is alleged that Microsoft is abusing its dominant position and limiting competition through an aggressive commercial policy that is also adopted by the producers of personal computers (the so-called OEM: Original Equipment Manufacturers). In fact, according to ADUC, the consumer protection laws of many countries, both in the USA and European Union, grant the person who wants to use software the right to decide if they want to accept, or not, the conditions of the licence. Since these conditions are known only after the purchase (during the process of activating the software with a click on the acceptance of the conditions), the consumer should have the right to return the software and get his or her money back. But in practice, even if the licensing contract contains such a clause (in more or less explicit terms), it turns out to be very difficult to obtain the reimbursement, especially when the software has been pre-installed in the computer by the manufacturer. This is the complaint that ADUC made to the European Commission and the same that is illustrated in the claim before the Court of Milan.

Ruling of the Court of Milan

First of all, the Court ruled that there was no problem with the president of a consumer association of taking legal action (while the defendant claimed the opposite), since the complainant claimed he suffered personal damage and, thus, started the class action to protect his own rights – offering the possibility to any other consumer who had an identical right to opt in.

The Court also stated that the provision of Art. 140-bis of the Code of Consumers also allows the private enforcement of non-contractual obligations; in fact, Art. 140-bis refers either to contractual obligations, or to rights vis-a-vis the producers (regardless of the lack of a direct contractual relationship), or the right to cover damages caused by unfair business practices or anti-competitive behaviour.

Nevertheless, the Court noted that the defendant (Microsoft s.r.l.) questioned the legitimacy of the litigation against the company, so it was mandatory to determine whether the complainant had taken action against the right individual. In order to do so, the Court had to assess which entity was the appropriate defendant, according to the matter of the claim. The Court focused on the validity of the contractual provisions of the EULA (End User License Agreement) of the pre-installed operating system, belonging to Microsoft Corporation. According to this licence, the contract was stipulated to be between the licensee (i.e. the user/consumer) and the manufacturer of the computer, which distributed the personal computer together with the software. Retail software is a different case, where

the licence is granted to the user directly by the producer of the software. Therefore, in this case the manufacturer who sold the computer together with the pre-installed software is the licensor of that software *vis-a-vis* the buyer of the personal computer; so, if the buyer has any complaints, they have to be presented to the manufacturer of the personal computer who sold it with the pre-installed software. In conclusion, the Court declared that the complainant should summon not Microsoft s.r.l. but Asustech (i.e. the manufacturer of the personal computer) and added that Microsoft s.r.l. was not even the producer of the retail software retail (instead that was Microsoft Corporation).

The Court also noted that in any event the producers of personal computers are free to decide which operating system to install, as demonstrated by the presence on the market of personal computers without any pre-installed software or with pre-installed operating systems other than Windows.

The Court considered the possibility of authorising the claimant to extend his claim to Microsoft Corporation but decided not to do it. In fact the class action is not incompatible with the calling into question of other parties but, nevertheless, it is one thing to order the addition to an action of a third party (whose obligations are involved as well in that case), and another to correct a mistake that the complainant made in starting the litigation; the latter cannot be done, according to the general principles of the Italian civil procedure, as the Supreme Court has stated several times.

Comment

The matter of Microsoft's conduct in the market has been discussed in several cases worldwide, due to the fact that Microsoft has a very strong position in the market and is able to limit competition. However in this specific case, as mentioned above, the Court of Milan did not get to the point to examine the merit of the consumer's complaint about a possible abuse of dominant position or breach of competition law.

The decision of the Court of Milan was correct because the claim was addressed against the wrong defendant. Of course the decision could have been different if the action had been formulated in a different way. Given that the consumer association intended to file a lawsuit against Microsoft Corporation, maybe it should have formulated the same kind of complaint about a retail version of the licence contract. Alternatively, if it wanted to contest the legitimacy of the pre-installed software, it should have at least sued Microsoft Corporation (instead of Microsoft s.r.l.) together with the producer of the computer. Moreover, the previous case that is cited by ADUC concerns a lawsuit filed against the manufacturer of a computer and that may explain why the action in that case was sustained. Yet the reference – in the Court of Milan's decision – concerning the choice of buying personal computers with no pre-installed software may be interpreted as a warning that the Court has doubts about the possibility of the success of the claim even if it had been addressed against the computer's manufacturer.

Regarding the class action, it does look like an effective tool in the private enforcement of competition law, but some limitations are already clear: an important one is that only consumers/users have access to this juridical instrument, and so it will be difficult both for associations and companies or entrepreneurs to use it. Finally, it is very likely that the Italian courts will be kept busy interpreting the meaning of the expressions 'identical rights' and 'homogeneous rights', as well as assessing when the requirements for the person who intends to start a class action are met.

3.4 Andreas Dühr, District Court of Koblenz, “Passing-on Defence and Standing of the Indirect Purchaser in Cases of Private Enforcement of Competition Law” (GERMANY)

Information concerning the judgment:

- Name of the court of last instance: Federal Court of Justice of Germany (BGH)
- Name of the parties / case reference number: KZR 75/10, ORWI
- Date of the judgment: 28th June 2011

Abstract

The Cartel-Senate of the German Federal Court (*Bundesgerichtshof* BGH) has determined in a fundamental judgment of 28th June 2011, that not only may the direct customer require damages for competition violations from cartel members, but also customers in the distribution chain (indirect purchasers). For cartel participants the passing-on defence is permitted.

Facts

ORWI, the claimant, produced until its bankruptcy carbonless blanks and bought the carbonless paper needed for the production from wholesalers. The wholesalers bought the carbonless paper from some members of a cartel. One of the members of the cartel was Papierfabrik August Köhler AG, the defendant. The defendant was punished by the Commission in 2001 with a fine of more than €33 million. The appeal to the CJEU was rejected (C-322/07).

The claimant pleaded that it had to pay excessive prices to the wholesalers due to the unlawful cartel prices. He claimed damages from over €220,000.

The Defendant pleaded that an indirect purchaser cannot claim for compensation of damage and that no damage occurred to the claimant due to the passing-on of the prices.

Ruling of the Federal Court of Justice

The reasons of the judgment are primarily based on the following statements:

1) Indirect purchasers can sue the infringer: even indirect purchasers can claim damages for an competition violation, if there is a causal link between the cartel and the alleged financial loss. However, the causality of a cartel-induced price increase for the subsequent price increase of the direct purchaser cannot be assumed. So the claimant has to set out the circumstances and must give the facts that the prices increased due to the cartel agreement.

2) Admissibility of the passing-on defence: cartel members may object to the claim for damages, that the claimant has passed the cartel-driven price increase to its own clients (passing-on defence). This is to prevent the situation of a cartel participant having to pay for the same damage several times. This is also to avoid the situation that the direct purchaser, who probably suffered no economic harm, being unjustly enriched. The passing-on defence is based on the German concept of *Vorteilsausgleichung* (adjustment of profits). That means that the burden of proof for the passing-on falls on the cartel members. In addition, the cartel members have to demonstrate that the passing-on is not aligned with disadvantages for the purchaser, in particular a decline in demand.

The Federal Court of Justice points out that this judgment is in accordance with the new German law against restraints of competition (GWB).

Comment

The ORWI decision fits well into the development of national and European competition law. With regards to the indirect purchaser problem it is compatible with the CJEU decision in *Manfredi*. Indirect purchasers' claiming for damages has now found access to the 7th amendment of the German law against restraints of competition (GWB). Whether the passing-on defence is admissible or not was left open there and is now answered positively by the BGH. This is also compatible with the Commission Green Book KOM(2005) 672.

3.5 Joseph Azzopardi, Valletta Civil Court, “First Three Cases of Private Enforcement in Malta” (MALTA)

Information concerning the judgment:

- Name of the court: Valletta Civil Court
- Name of the parties / case reference number: *Spiteri vs Transport Authority; Lift Services Limited vs Cassar; Tessons Snack Food Limited vs Southend Limited*
- Date of the judgment: 2002, 2006, 2010

Cases of private enforcement of competition law in Malta

There seem to have only been three cases before the Maltese Courts relating to direct enforcement and in all the cases the infringement of competition rules has been raised as a plea and not as basis for the action itself.

In one case decided in 2010 (*Spiteri v. Transport Authority*) the Court did not actually decide the case on competition issues since the Competition Office held that the defendant authority had infringed competition rules when it refused a permit for the complainants to operate an open top bus service. It must be said that major opposition to the issue of the permit had come from the company which operated the regular bus service. However in the case at issue, the complainants were suing for damages but the Court held that in this respect the action was time-barred.

The second case was *Lift Services Limited v. Cassar nomine* and was decided in 2002; here the complainant company sued for breach of contract because it held that the defendants did not comply with a clause in the contract which restricted it to sell only to the complainant company a certain type of lift in relation to a massive project called Portomaso. Here the Court decided the case itself and held there was no breach of competition law. It held that the agreement was only between the parties in the sense that defendants were obliged not to quote for any other company except the complainants for that particular project. Thus it dismissed the plea. In this case according to the law prevailing at the time (and even now) the Court probably should have referred the case to the Competition Authority.

This was actually done in the third case, *Tessons Snack Food Limited v. Southend Limited*, decided by the Court of Magistrates in 2006. In this case, the complainant company sued for a refund of money given to the defendant company on the basis of a contract wherein the latter was obliged to sell exclusively ice cream products distributed by complainants. The complainants claimed the defendants had breached this contract and thus according to the same contract had to pay a penalty of about €7,000. Since the defendants pleaded that the contract breached competition rules (Art 5 of the prevailing law), the Court correctly referred the case to the Competition Authority (then called the Commission for Fair Trading). In a somewhat short decision, the Commission decided that there was no breach as pleaded. The Court proceeded to decide the case by upholding the complainant’s request – although reducing the penalty to €4200 since the contract was breached about midway through its performance (this is according to the Civil Code).

4. Horizontal Agreements by Professional Associations and Competitors

4.1 Maria de Fátima Reis Silva, Lisbon Commercial Court, “Minimum Tariffs Imposed by the Association of Veterinarian Doctors” (PORTUGAL)

Information concerning the judgment:

- Name of the court of last instance: Lisbon Commercial Court
- Name of the parties / case reference number: *Association of the Veterinarian Doctors v. Portuguese Competition Authority*
- Date of the judgment: 12th January 2006

Preamble

This is a court decision dated from January 2006 which has been chosen because it is an example of the application of competition law to an 'unusual' area: an association of liberal professionals, in this case veterinarian doctors.

This decision is one of three that the Portuguese National Competition Authority (NCA) has adopted, simultaneously applying fines to the professional associations of doctors, veterinarian doctors and dentists all for fixing prices through price lists. All the decisions were appealed and were confirmed in the court of first instance (Lisbon's Commercial Court), except for the fine amounts, in the court of second instance (Lisbon's Appeal Court) and one of them also by the Portuguese Constitutional Court.

Facts

In Portugal, only veterinarian doctors who are members of the veterinarian doctors' association are allowed to practice this profession. The practitioners from other EU Member States can practice in Portugal being considered members of the Associations for professional and disciplinary responsibility purposes.

The statute of the veterinarian doctors' association states that all the practitioners are obliged to respect the Veterinarian Deontological Code (VDC). The VDC, approved by the general assembly of the association, under the proposal of the professional and deontological council, states that veterinarians shall use the fees taking into account, among other factors, the price lists recommended by the National Veterinarian Doctors Union (the Union).

The Union has recommended price lists indicating minimal fees in the years of 1991, 1993 to 1996, 1998, 2000 and 2002 to 2004.

Meanwhile, in May 2004, the Professional Association of Veterinarian Doctors issued and sent to all the veterinarian doctors practising in a certain area of the country a circular letter defining the reference fees to be applied in the current year in that area of the Portuguese territory and reminding them that non-compliance with the price list constitutes a disciplinary infringement. This price list was never applied by any of the doctors involved (its adoption and the circular letter being one reason for the intervention of the NCA).

During the years of 2002 and 2003 several disciplinary proceedings were brought against veterinarian doctors on the grounds of unfair competition and specifically on the grounds of charging lower fees than those contained in the Union's price lists. None of these proceedings ended with a condemnation on these grounds.

The Portuguese NCA adopted a decision that condemned the Professional Association of Veterinarian Doctors to pay a fine (€ 75,935.00) and to change their Statutes and to publish the decision, finding this conduct to be an infringement of both national and Community law.

The Professional Association of Veterinarian Doctors appealed this decision challenging the imposition of a fine itself and arguing that only in February 2004 did the Commission adopt a report on competition in liberal professions and that the NCA was applying a new interpretation of the law retroactively. The defendant alleged that the VDC did not infringe competition law and that it had been adopted not being aware that it would infringe competition law and way before the Commission's Report.

Finally the defendant argued a series of doubts about the criteria used in fixing the amount of a fine.

Ruling of the court

The court of first instance confirmed the fact finding but in distinction to the NCA's decision found out that there had been no intent to maintain pricelists directly, but only intent to promote fair competition between the Association's members, namely using the mechanism of price lists and admitting that it would cause a restriction in competition.

The court analysed the application of the competition regime to liberal professionals and concluded that that regime was applicable because the veterinarians could be considered undertakings and the Professional Association an association of undertakings, quoting the *Wouters* ruling from the CJEU (C-309/99). Also all the other typical elements of the infringement were analysed and considered to be present, namely price fixing, affecting competition.

Deepening the defendant's arguments the court rejected the theory that a new interpretation of the law was being made and remembered not only previous Community case law but also previous national case law applying the competition regime to liberal professions. The 'genuine surprise' the defendant argued was analysed and evaluated in the amount of the fine.

The court recognised that had no power to review more than the concrete decision that had been adopted by the NCA. The NCA had a choice to declare the existence of the infringement and order the revocation of the offending rules and not apply a fine. The NCA chose to sanction the defendant. The Court analysed the legal framework and concluded that that initial decision was not reviewable – the NCA had that choice but not the court - which only reviews the concrete decisions that are adopted and not the decisions that could have been adopted.

The court also agreed with the NCA that there was not only an infringement of national law, but also of Community law. As the Portuguese law in force at the time did not provide for any sanction to infringements of Community law (and the sanctions stated in Reg. 1/2003 were to be applied by the Commission and not by the NCAs) the court considered the infringement of Art 101 TFEU as an aggravating circumstance.

Finally the court decided that the NCA had not departed from the right basis while calculating the fine: the Portuguese law states that the fine will take into account the total revenue of the undertakings or associations of undertakings and will be calculated up to a given percentage of that income; the NCA discovered the total revenue of all the veterinarian doctors in the country in the last year of the infringement and considered this as the basis (the defendant proposed as the basis the income of the concrete veterinarians that had approved the VDC and the circular letter, an argument that the court rejected preliminarily); the court reinforced that in this case the association was a formal professional association and that the fact of this being an infringement of Community law did not affect the application of internal procedural rules: the court fixed the basis in the context of the total revenue of the Association itself.

The court applied a fine of € 18,000.00, declared void the concrete rules of the Statute and VDC and also the circular letter, ordered the Association to cease at once the enforcement of any price list and also to publish the decision.

Comment

The decision (and also the other two decisions mentioned above) provided a clear statement of the application of competition law to liberal professions and non-traditional undertakings. In addition several points of law were clarified for the first time since Reg. 1/2003: the liaison between national and Community law in sanctioning an infringement of Community law; and the criteria for the calculation of the fine and the powers of the court when reviewing the NCAs' decisions, mainly its limitations in decisions that concerned more competition policy than its enforcement.

4.2 Elka Ermenkova, District Court of Blagoevgrad, “Price Fixing by the Association of Poultry Producers” (BULGARIA)

Information concerning the judgment:

- Name of the court of last instance: Supreme Administrative Court of Bulgaria
- Name of the parties / case reference number: case No. 3161/2011
- Date of the judgment: 8th September 2011

Facts

The Bulgarian Competition Authority opened case № 546/2007 pursuant to Art. 36, paragraph 1, item 3 of the Law on the Protection of Competition on the basis of a suspected violation of Art. 9, para. 1 of the Law on Protection of Competition (LPC) by the Union of Poultry Producers in Bulgaria (hereafter the Union) and 36 different enterprises. The suspected violations were - decisions taken by the Union and the enterprises in question, which had as their object or effect the restriction and distortion of competition and / or constituted concerted practices.

The Competition Authority concluded that between 2002 and 2007 there were many meetings between poultry and egg producers, and members of the Union. During these meetings, several anticompetitive decisions were taken such as defining minimal prices for poultry and eggs, the control of selling of produce for direct consumption (deliberate selling of a certain percentage of the eggs to an egg processing factory in order to maintain a certain amount of eggs on the market), etc.

In particular, the Competition Authority sanctioned the following behaviour:

- a) Creating favourable conditions and coordination between Union members, through the convening of meetings on the pricing policy (which was set with anti-competitive purposes), keeping the overall pricing of the Union as the industry standard, a decision on fixing minimum prices, the control of sales for direct consumption;
- b) Creating the organisation and administration of the implementation mechanism for agreements and / or concerted practices between producers/Union members by controlling the implementation of decisions taken and the collection of sensitive information from companies;
- c) Influencing the general price level in both chicken and egg markets, especially that for chicken, the through dissemination of specific recommendations, comments and forecasts;

The decision was published on 17th July 2008, then appealed before the Supreme Administrative Court of Bulgaria.

Ruling of the Supreme Administrative Court

On the factual side of this case it was found that the Union of Poultry Producers in Bulgaria as a professional organisation has organised meetings between its members with a clear pre-set anti-competitive purpose, namely the coordination and synchronisation of price behaviour in the chicken and egg markets.

The Union has created a committee on pricing policy. As far as the exchange of information and discussion about price have no place among direct competitors, the very creation of this committee already constituted a violation of Art. 9, paragraph 1, item 1 of the LPC.

Furthermore, in addition to this committee, the Union provided a forum of discussion of the prices of eggs and chicken which facilitated collusion among its members. To maintain price transparency, the Union organised regular meetings on pricing policy throughout the relevant period, and was especially active in the egg market. Thus, So the opportunities provided by the Union for the exchange of information between participants was a prerequisite for achieving coordination and consultation among them in determining their overall pricing and production. Moreover, achieving this coordination was a direct target of the Union's actions, according to the statements of its representatives: "It is imperative to ensure production in the country displays greater consistency among the firms on pricing and production."

This behaviour of the Union was objectively likely to lead to the restriction of competition between its members.

The Union's goals and anticompetitive actions were not only potentially able to restrict competition among its members. This anti-competitive purpose was achieved in practice by adopting a number of "recommendations for minimum prices" for eggs and chicken. These recommendations encompassed minimum prices of chicken meat, and eggs, below which Union members could not sell their produce.

Decisions by associations of undertakings which have as their object, directly or indirectly, fixing prices or other conditions on trading are the most serious infringement of competition law and lead to the most serious damage to the market. In practice it is accepted that making recommendations on behalf of trade associations, even when not formally binding on its members (especially when it comes to setting prices) fall within the scope of the prohibition of coordination, where recommendations have subsequently been observed.... This leads to a restriction of competition.

The Commission also determined penalties which were different for the different defendants, considering many factors, including their level of activity in the anticompetitive actions.

4.3 Carlos Manuel Gonçalves de Melo Marinho, Lisbon Appeal Court, “Concerted Practices in Public Procurement Tenders” (PORTUGAL)

Information concerning the judgment:

- Name of the court: Supreme Administrative Court of Portugal
- Name of the parties / case reference number: n. 17/2011
- Date of the judgment: 31st March 2011

Facts

The enterprises A. and B. – whose share capital which belonged entirely to C. – presented proposals in the context of an award of a public service contract put to tender by the Portuguese Institute of Employment and Professional Training (IEPT). The tender concerned the provision of catering and bar services.

This Institute rejected those proposals, considering that they violated the provisions of Art. 54, paragraph 2, of the Public Contract Code (PCC) and could break competition rules.

The aforementioned companies appealed that decision and the Courts of First and Second Instance ordered the Institute not to exclude their tenders and decreed that they should be evaluated in accordance with the criteria defined by the tender process and the request for tender rules and, if there were no other reasons for rejection, award the tender to Company A.

The IEPT appealed to the Supreme Administrative Court pointing to the fact that the share capital of the enterprises A... and B..., which presented different proposals for the tender, belonged entirely to Company C..., and whether this in itself was not a violation of the principles of equality and competition.

Case law of the European Court of Justice invoked by the Appellant

Judgment of the Court (Fourth Chamber) of 19 May 2009, *'Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano'* (Case C-538/07) on Interpretation of Art. 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, freedom of establishment and freedom to provide services, right of establishment, free movement of services and approximation of laws;

Case C-8/08 *'T-Mobile Netherlands BV and Others'* of 4 June 2009 on concept of ‘concerted practice’; causal connection between concerted action and the market conduct of undertakings; appraisal in accordance with the rules of national law; whether a single meeting is sufficient or whether concerted action on a regular basis over a long period is necessary. The Portuguese Supreme Administrative Court considered that the situation which was the object of the European judgment was different from that under analysis since there the European Court of Justice considered that a concerted action between enterprises in the telecommunications market situation existed, but that situation did not materialise here.

Defendant's argument

To establish the existence of a concerted practice between A... and B ..., the IEPT should have:

- a) Identified facts from which the existence of contacts between these two enterprises could exist that were oriented towards coordinating their actions in order to adopt behaviour capable of distorting competition rules;
- b) Established that they had acted in coordination envisaging the definition of proposals and prices to submit, or
- c) Discovered that they had assumed parallel conduct which translated into homogeneous proposals.

According to the defendant, the tendering authority would also have had to show the existence of causality between the alleged coordination between competitors and the parallel behaviour.

Ruling of the Court

The *Assitur* case contains a solution opposed to the contention of the Appellant since it states that: “Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure”.

In the present case, there was no strong evidence of the existence of acts, agreements, practices or information which may have distorted competition rules. The situation under analysis was different from that which was the object of the Court of Justice decision, since this concerned the concept of “*concerted practices*” and evaluated the effective causality connection between those practices and the concrete action of the specific enterprises in the market. In the European Case, the Court concluded that there were real concerted practices in the telecommunications market, which did not occur in the situation at hand. The Companies A... and B ... submitted proposals which were substantially autonomous and distinct. Those Companies, which were not bundled together for the tendering procedure were, according to Portuguese national law, independent legal persons with autonomous proposals. The PCC did not contemplate situations under which two companies which each are owned 100% by a third enterprise present themselves autonomously as bidders. Therefore, since each of the indicated competitors submitted only a proposal, there was no violation of the principle of equality.

The Supreme Administrative Court decided to confirm the second instance decision, judging the appeal totally unfounded.

Comment

The collective judgment described seems to respect Art. 101 TFEU, the Council Directive 92/50/EEC of 18 June 1992 (especially its Art. 29), the aforementioned Portuguese national rules and the principles that emerge from the invoked *Assitur* case.

Since it rejects presumptions of unlawful competition and calls for the need for effective proof of “the existence of acts, agreements, practices or information which may distort competition rules”, it seems more fair and adequate for the evaluation of reality and application of justice criteria to a concrete case.

Nevertheless, the thesis on which the decision was built encompasses the need for gathering evidence in a very difficult area of proof which can determine the existence of several situations constituting violations of the competition rules due to mere procedural and material limitations.

4.4 Ieva Gavelyte-Kalytiene, 2nd District Court of Vilnius, “Exchange of Information among Bidders” (LITHUANIA)

Information concerning the judgment:

Name of the court of last instance: Supreme Administrative Court

Name of the parties / case reference number: *Autoūkis, Autodina, Moller Auto v. Lithuania Competition Authority*

Date of the judgment: 18th April 2012

Abstract

The Competition Council of the Republic of Lithuania on 11th November 2010 adopted a resolution No. 2S-28 and acknowledged that by concerting their actions and prices in relation to quoting for public procurement tenders three undertakings (*Autoūkis, Autodina* and *Moller Auto*) had committed an infringement of the Law on Competition of the Republic of Lithuania. Vilnius Region Administrative Court left the resolution of the Competition Council as it stood. The Supreme Administrative Court of Lithuania reduced the fines imposed on the undertakings.

Facts

Three undertakings providing vehicle sale and lease services - public limited liability company *Autoūkis*, and private limited liability companies *Autodina* and *Moller Auto* - participated in six different public procurement procedures. The investigation was initiated *ex officio* by the Competition Council in October 2009 in response to the information communicated to it by the Police Department under the Ministry of the Interior regarding a suspicion about the cooperation between these competing companies in the preparation of commercial tenders for the public procurement of vehicle operation lease services and vehicles in 2008. The investigation provided evidence that the otherwise competing companies in submitting quotes for public procurement tenders had made prohibited agreements (concerted actions) concerning the participation in public tenders for the procurement of the vehicle operational lease services in certain regions (*Joniškis, Pasvalys, Raseiniai* and *Rokiškis*), and the public tender for the procurement of vehicles called by *UAB Rokiškio vandenys*. As the investigation established, during the period concerned the same employees of different companies – *L. Z.* on behalf of *AB Autoūkis*, *S. G.* – on behalf of *UAB Autodina*, and *V. Č.* on behalf of *UAB Moller Auto* - were drawing up commercial offers for the public tenders in which they participated. The persons concerned would discuss the process of the formulating these offers by electronic communications and exchange the commercial offers, and in addition an employee of one of the undertakings would prepare and wrap up the offers of all suppliers to be dispatched to the contracting authority.

Resolution No. 2S-28 of the Competition Council, adopted 11th November, 2010

On the basis of the material collected during the investigation the Competition Council arrived at the conclusion that the companies, while being competitors, had concluded a prohibited agreement since they coordinated their actions to submit commercial offers including the tender prices by designating the winner of the tender in advance. The Competition Council stated that actually *AB Autoūkis*, in the context of the public procurement, did not compete with *UAB Autodina* and *UAB Moller Auto* thus enabling *AB Autoūkis* to become the winner in all cases of the public procurement of the vehicle operating lease services. Furthermore, *V. Č.*, an employee of *UAB Moller Auto*, initiated a supporting

offer in relation to the public procurement of a vehicle and consequently the tender was awarded to *UAB Moller Auto*.

According to Art. 5(1) of the Law on Competition all agreements which have as their object the restriction of competition or which may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof, including agreements directly or indirectly to fix prices of certain goods or other conditions of purchase or sale. Basically the same provision is stated in Art. 101 TFEU. The Competition Council emphasised that anticompetitive agreements between competitors – i.e. a cartel – is the most damaging form of anticompetitive activity, whether it is an agreement on production volumes, prices, discounts, credit terms, customers, territories, or something else. Prohibited agreements can cause damage to the entire national economy as they eliminate the agreeing parties' initiative to use their limited resources efficiently. The Competition Council acknowledged that by concerting their actions and prices in relation to quoting for public procurement tenders, *AB Autoūkis*, *UAB Autodina* and *UAB Moller Auto* had committed an infringement of the Law on Competition. For this infringement of Art. 5 of the Law on Competition the companies were subjected to the following fines: *AB Autoūkis* – LTL 210 800 (€61 051.90), *UAB Autodina* – LTL 117 800 (€34 117.23) and *UAB Moller Auto* – LTL 1266500 (€366 803.75). The infringing companies were also obliged to cease infringing immediately if it was still in progress. When fixing the amount of the penalties upon *AB Autoūkis*, *UAB Autodina* and *UAB Moller Auto* for the infringement of Art. 5 of the Law on Competition, the Competition Council took into account the specifically detrimental character of the infringement committed – the cartel agreement. Since the undertakings participated in a different number of public procurement tenders in relation to which they concerted their offers (*UAB Autodina* – in three, *UAB Moller Auto* – five, and *AB Autoūkis* – six), the Competition Council concluded that the anticompetitive effect of their actions was also different, and so they were subject to different amounts of pecuniary sanctions. In addition, the competition authority considered circumstances mitigating the liability of *UAB Autodina* and *AB Autoūkis*, since the companies partly acknowledged the principal circumstances established by the Competition Council in the course of the investigation. It should be noted that in relation to imposing the fines the Competition Council was guided by the principles of objectivity and proportionality, and additionally considered the specific nature of the economic sector concerned, and the data and explanations submitted by the undertakings concerning their difficult financial position due to the significant drop in vehicle sales, and as a result reduced the final amounts of the fines by 20 percent.

Ruling of the Vilnius Region Administrative Court

The Vilnius Region Administrative Court investigated the complaints against the resolution of the Competition Council and took the decisions to leave the resolution as it stood and to reject the complaints. The Court took into consideration decisions of the Court of Justice of the EU and emphasised that each economic operator must determine independently the policy to be adopted regarding the market. Although the requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market (Judgment of the Court of 8th July 1999 in Case C-199/92, *P Hüls AG v Commission of the European Communities*). The Vilnius Region Administrative Court stated that in this case it was proved that the competitors disclosed the prices of their tender to each other before submitting tenders to the contracting organisations and coordinated their actions in participating in procurement procedures. The Court emphasised that it is not necessary to prove the intent of the parties to the agreement to restrict competition, thus in order to constitute an infringement it is enough to prove that the

undertakings performed actions prohibited under the Law on Competition. The Court concluded that competition law prohibits undertakings participating in procurement procedures to coordinate their actions concerning these procedures as such coordination restricts market -based competition. The Court concluded that such cooperation breached Art. 5 (1) of the Law on Competition.

Ruling of the Supreme Administrative Court of Lithuania

The Supreme Administrative Court of Lithuania investigated the complaints against these Vilnius Administrative Court decisions and decided to leave the decisions as they stood, but reduced the fines imposed on the undertakings.

5. Vertical Agreements

5.1 Agnès Maitrepierre, French Supreme Court, “Sales on the Internet and Distribution Agreements” (FRANCE)

Information concerning the judgment:

- Name of the court of last instance: Paris Court of Appeal / European Court of Justice
- Name of the parties / case reference number: *Pierre Dermo-Cosmétique SAS v. Président de l’Autorité de la concurrence and others*
- Date of the judgment: 13th October 2011

Facts

Pierre Fabre Dermo Cosmétique (‘PFDC’) is one of the companies in the Pierre Fabre group. It manufactures and markets cosmetics and personal care products and has several subsidiaries, including, *inter alia*, the Klorane, Ducray, Galénic and Avène laboratories, whose cosmetic and personal care products are sold under those brands mainly through pharmacists, on both the French and the European markets. In 2007, the Pierre Fabre group had 20% of the French market for those products.

The products in question are not classified as medicines and are, therefore, not covered by the pharmacists’ monopoly laid down by French law. However, distribution contracts for those products in respect of the Klorane, Ducray, Galénic and Avène brands stipulate that sales must be made exclusively in a physical space and in the presence of a qualified pharmacist. Those requirements exclude *de facto* all forms of selling via the Internet.

Decision of the French Competition Authority

By the decision of 27th June 2006, the *Autorité de la Concurrence* (French Competition Authority) opened an *ex officio* investigation of practices in the distribution sector for cosmetics and personal care products.

By the decision of 8th March 2007, the French Competition Authority approved and made binding the commitments proposed by the group of undertakings concerned, with the exception of Pierre Fabre Dermo Cosmétique, to amend their selective distribution contracts in order to enable the members of their networks to sell their products via the Internet, subject to certain conditions. The proceedings opened against Pierre Fabre Dermo Cosmétique followed their ordinary course.

During the administrative proceedings, Pierre Fabre Dermo Cosmétique explained that the products at issue, by their nature, required the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may in all circumstances request and obtain the personalised advice of a specialist, based on the direct observation of the customer’s skin, hair and scalp.

In view of the fact that there might be an effect on trade between the Member States, the French Competition Authority analysed the practice in question in light of the provisions of French competition law (Art. 420-1 of the French commercial code) and European Union law.

In October 2008, following an investigation, the French Competition Authority decided that owing to the *de facto* ban on all Internet sales, PFDC’s distribution agreements amounted to anti-competitive agreements contrary to both French law and European Union competition law.

Three points were examined:

- First of all, there is a restriction of competition by object: it is noted that the ban on Internet sales amounted to a limitation on the commercial freedom of Pierre Fabre Dermo Cosmétique's distributors by excluding a means of marketing its products. Moreover, that prohibition restricted the choice of consumers wishing to purchase online and ultimately prevented sales to final purchasers which are not located in the 'physical' trading area of the authorised distributor. Consequently, that limitation necessarily has the object of restricting competition, in addition to the limitation inherent in the manufacturer's very choice of a selective distribution system, which limits the number of distributors authorised to distribute the product and prevents distributors from selling the goods to non-authorised distributors.

- There is no possibility for a block exemption, on the ground of Reg. n. 2790/1999. Art. 2(1) of this Regulation provides:

'Pursuant to Art. 81(3) of the Treaty [now Art. 101(3) TFEU] and subject to the provisions of this Regulation, it is hereby declared that Art. 81(1) [now Art. 101(1) TFEU] shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements").

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Art. 81(1) [now Art. 101(1) TFEU] ("vertical restraints").'

Under Art. 3(1) of that Regulation "the exemption provided for in Art. 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services".

Art. 4 of this Regulation provides that the exemption to the prohibition laid down in Art. 101(1) TFEU is not to apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: [...] "(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment".

Since Pierre Fabre Dermo Cosmétique's market share is less than 30%, the French Authority examined whether the restrictive practice could benefit from the block exemption provided for in Reg. n. 2790/1999. Although the practice of prohibiting Internet selling is not expressly referred to in that Regulation, it is equivalent to a ban on active and passive sales. Consequently, the practice falls within Art. 4(c) of the regulation, which excludes restrictions on active or passive sales by members of a selective distribution system from the automatic block exemption. The ban on internet sales did not meet the conditions for the exception provided for in Art. 4(c) of Reg. 2790/1999, according to which those restrictions on sales are without prejudice to the possibility of prohibiting a member of the system from operating "out of an unauthorised place of establishment". The French Authority held that the Internet is not a place where goods are marketed, but an alternative means of selling which is used in the same way as direct selling in a shop or mail order selling by distributors in a network which have physical outlets.

There is no demonstration of an individual exemption: the Competition Authority noted that Pierre Fabre Dermo Cosmétique failed to demonstrate that it could benefit from an individual exemption pursuant to Art. 101 (3) TFEU and to Art. L. 420 4, paragraph 1, of the French commercial code.

The French Competition Authority thus concluded that the ban imposed by Pierre Fabre Dermo Cosmétique on its authorised distributors selling via the Internet amounts to a restriction on competition contrary to Art. 101 TFEU and Art. L. 420 1 of the French commercial code, and ordered

it to remove from its selective distribution contracts all terms that are equivalent to a ban on Internet sales of its cosmetics and personal care products and to make express provision in its contracts for an option for its distributors to use that method of distribution. Pierre Fabre Dermo Cosmétique was ordered to pay a fine of €17 000.

Proceedings before the Paris Court of Appeal

On 24th December 2008, Pierre Fabre Dermo Cosmétique brought an action for annulment and, in the alternative, for amendment of the contested decision before the *Cour d'Appel de Paris*.

At the same time Pierre Fabre Dermo Cosmétique requested the first president of the court to stay execution of the contested decision. In support of its action, Pierre Fabre Dermo Cosmétique claimed, primarily, that the contested decision was vitiated by an error of law in that it denied the contested practice the benefit of both the block exemption provided for in Reg. No 2790/1999 and the individual exemption provided for in Art. 101(3) TFEU.

On 18 February 2009, the first president of the Paris Court of Appeal ordered a stay of execution of the orders made by the Competition Authority against Pierre Fabre Dermo Cosmétique until the referring court had ruled on the merits of the action.

On 10 November 2009, the Paris Court of Appeal, after recalling the content of the written observations that the European Commission presented pursuant to Art. 15(3) of Reg. n. 1/2003, nevertheless noted that neither the Commission's guidelines nor its observations were binding on the national courts.

In those circumstances, the Paris Court of Appeal decided to stay the proceedings and refer several questions to the European Court for a preliminary ruling, seeking to ascertain:

- firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Art. 101(1) TFEU;
- secondly, whether a selective distribution contract containing such a clause – where it falls within the scope of Art. 101(1) TFEU – may benefit from the block exemption established by Reg. No 2790/1999 and;
- thirdly, whether, where the block exemption is inapplicable, the contract could nevertheless benefit from the exception provided for in Art. 101(3) TFEU.

Judgment of the European Court of Justice

In its judgment, on 13th October 2011, the European Court ruled:

- on the first issue, it recalled that in order to assess whether a contractual clause involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part. As regards agreements constituting a selective distribution system, the Court had already stated that such agreements necessarily affect competition in the common market. Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'. However, a selective distribution system is compatible with European Union law to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a distribution network in order to preserve the product's quality and ensure its proper use, and, finally, that the criteria laid down do not go beyond what is necessary. After recalling that it is for the referring court to examine whether a contractual clause which *de facto* prohibits all forms of Internet selling can be

justified by a legitimate aim, the Court provides the referring court for that purpose with guidance on the interpretation of European Union law to enable it to reach a decision.

Thus, the Court pointed out that, in light of the freedoms of movement, it had not accepted – as it already stated in the context of the sale of non-prescription medicines and contact lenses – arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, put forward to justify a ban on Internet sales. Similarly, the Court ruled that the need to maintain the prestigious image of PFDC's products is not a legitimate aim for restricting competition.

- on the second issue, as to whether a selective distribution contract may benefit from a block exemption, the Court recalled that the exemption did not apply to vertical agreements which had as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade. A contractual clause which *de facto* prohibited the Internet as a method of marketing at the very least had as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system. Consequently, the block exemption did not apply to that contract.

- However, on the third issue, such a contract may have benefited, on an individual basis, from the exception provided for in Art. 101(3) TFEU, if the referring court found that the conditions laid down in that provision were met.

It was then for the Paris Court of Appeal to dispose of the case in accordance with the Court's decision.

Comments

The most important aspect of this case is the light it throws upon the relationship between national competition law and European competition law and, in that context, the necessary relationship between national authorities or courts and European authorities (Commission and Court).

In view of the fact that there might be an effect on trade between the Member States, the French Competition Authority analysed the practice in question in light of the provisions of French competition law and European Union law. Both of those provisions have to be applied.

In addition, the efficiency of European competition law requires the application of national competition law in consistency with it: it is not possible to prohibit or allow, an agreement according to national competition law if it is not the same according to European competition law. According to the Reg. 1/2003, the national authorities have jurisdiction to decide an individual exemption. In that context, they have to be increasingly careful to follow a consistent approach between national competition law and European competition law. The written observations of the European Commission, on the basis of Art. 15§3 of the Reg. 1/2003, are useful, but sometimes it may be necessary to go further and ask the European Court for a preliminary ruling.

5.2 Ignacio Ulloa Rubio, Spanish Constitutional Court, “Price Fixing and Exclusive Distribution Agreements” (SPAIN)

Information concerning the judgment:

- Name of the court of last instance: Supreme Court
- Name of the parties / case reference number: case number 863/2009
- Date of the judgment: 4th December 2009

Background information

This case was based on a contract for fuel distribution (called *enrolment* or *flagging*) signed on 25th January 1993 between REPSOL.Co. and Mr. Rafael Petrol Station, in Navarre. Repsol sued the Petrol Station claiming that the agreement was an “agency” contract (including an exclusive-purchase clause) and that the Petrol Station had not fulfilled the exclusive obligations. The Petrol Station, in fact, had purchased fuel from other suppliers as well. Repsol claimed €267,755.35 as compensation. The respondent counterclaimed that the contract was void thus it was against Art. 101 TFEU (and Reg. n.1984/83 and 2790/1999) and Art. 6.3 of the Spanish Civil Code.

The Court of First Instance n.4 of Pamplona decided that the defendant was right, declaring that 'he was a retailer' (he paid in advance and took on risks) and that '*price fixing* existed'; therefore the contract was annulled for being against EC Competition Law. The Appeal Court of Navarre reviewed the judgment stating that on 11th July 2002 the respondent breached the contract of agency (under Art. 1 of the 1992 Spanish Law of Agency), although there was no right for compensation thus the damage was not proved. Both parties appealed on cassation (but only the defendant's appeal was accepted). Before the Supreme Court (SSC) the respondent (Mr. Rafael's Petrol Station) – despite the recent CJEU judgment in 11th September 2008 (C-279/06) on similar case regarding the Spanish Fuel Company *CEPSA*- was required to raise a pre-judicial question before the ECT, regarding what he considered a to be a 'vertical agreement'. The SSC refused (on 4th December 2009) to set out the pre-judicial question regarding the matter previously decided by CJEU and it was a matter for the “national judge”.

Ruling of the Court

The SSC first stated that the case was eligible for cassation regarding the matter and the amount of the claim. The question was subsequently raised as to whether the contract for distribution should be declared as *agency* (under Art. 1 Spanish Law of Agency) and whether it was against Art. 101 TFEU or could be exempted according to EC Regulations.

SSC quoted CJEU judgment 11th September 2008 (*CEPSA* case) which declared that a price-fixing clause could be voided, but this would not extend to nullifying to the rest of the contract, unless necessary (*when it produces effects against EU Competition Law*). Moreover the SSC said: 'Regardless of the name of the contract (agency or whatsoever) if the petrol station owner is an independent entrepreneur who purchased the goods, assumed the costs of transport, the liability for the merchandise, the financial costs and paid in advance, then he or she is an “independent economic operator” under EU Competition Law; notwithstanding that if he or she is considered as an agent, then only the price-fixing clauses (and not the exclusive clauses) should be annulled'. In addition SSC stated that 'if the contract is not genuinely one of agency, the price-fixing would always be invalid: no possible exemption would be applicable to any category of final price-fixing'.

Furthermore, *SSC* referred to the CJEU Judgment 2-4-2009 (Case *TOTAL*) when it said “pricing clauses” could be exempted [on the basis of Reg. EC 1984/83 (amended by Reg. EC 2790/99)] when they merely recommend a price and allow retailers to fix a final price freely, but never when they fix a minimum price, a compulsory distribution fee, or a maximum discount'. In addition 'it should be pondered if clauses - within the economic and juridical context - effectively impede or restrain competition, with regards to whether they decrease or discourage the establishment of foreign competitors'.

Hence, *SSC* effected the cassation - despite some mistaken allegations made by the defendants' lawyer - thus 'Mr. Rafael's business had to bear financial and commercial risks - merged with sales - and had to endure a fixed final price'. Regardless of whether it was an agency-contract under Spanish'92 Agency Law, 'Mr. Rafael had to assume significant risks related to sales (such as payments with the *REPSOL* credit card; payment in advance for goods, with arrears of interest after 9 days; previous warranties; risk of deposit; exclusive supply; etc.), which evidenced that he was not strictly an agent (neither an economic operator nor an auxiliary of *REPSOL*)'. Moreover, *SSC* analysed if Mr. Rafael could have sold products below the fixed price (if the agreement could be exempted under Reg. EC 1984/83), concluding that - if that was the case- then he should have bared the discount (deducting it from the fee). Therefore there was no real possibility for discount and consequently it weakened competition, for national or EU competitors.

In spite of the *effect utile* of EU Competition Law, the *SSC* refused Mr. Rafael's claim for compensation (based on the difference between the paid price and the minimum price offered by competitors), restraining the effects of the annulation to the specific contractual clause and not to the whole contract, for two reasons: *a*) the *lucrum cesans* had not been proved; and *b*) the *mala fides*: Mr. Rafael accepted the effectiveness of the contract for more than 9 years (from 1993 until 2002).

Finally, *SSC* charged the cost of the proceedings to *REPSOL* and ordered that the decision be notified to the *NCA*.

Comment

The case is a good example of application of EU Competition Law by Spanish Courts regarding Civil Law. The final decision by *SSC* can be placed into the category of the 'general doctrine' on price-fixing, showing abuse of dominance in a distribution network. The singularity is that *SSC* did not accept damages, despite their estimation.

This judgment may apparently seem substantive rather than procedural, but the fact that it was the last time that *SSC* accepted the primacy of EU Competition Law in Agency contracts, related to fuel distribution, makes it relevant. Since then, the *SSC* has progressively declared that *fuel companies are exempted*, and finally on October 2011 decided that these cases were not even eligible for cassation.

5.3 Catalina Ilea, Tribunal of Bucharest, “Resale Price Maintenance” (ROMANIA)

Information concerning the judgment:

- Name of the court of last instance: Appeal Court of Bucharest
- Name of the parties / case reference number: *SC Rosario SRL v. Romanian Competition Authority*
- Date of the judgment: 19th October 2010

Abstract

Through the Decision nr. 61/ 7th December 2009 the Competition Council (the Romanian National Competition Authority) held that there had been an infringement, by the claimant SC R. SRL., of the dispositions stated by the Law No. 21 of 10th April 1996 on competition, Art. 5, par. 1. R had concluded together with other 16 trading societies, an anti-competitive agreement having as its object the establishment of a minimum level for the sale-purchase price of white bread upon the breadstuff market in the department of Maramuresh; The Decision thereby established, on the ground of the dispositions of Art. 51 of the same normative act, the claimant's sanction by a fine of 94,814 lei.

Essentially, the Decision told that, on 7th February 2006, a General Assembly of the Maramuresh Association of enterprise owners in mill wheeling, breadstuff and flour like products was organised. From its summary, the Council had noticed that 17 trading societies had concerted themselves to establish a minimum level for the sale-purchase price of white bread (namely 1/9 lei/kg plus VAT).

Facts

Through the request registered on 11th January 2010, at the Registration Office of the Bucharest Appeal Court, the claimant SC R. SRL sued contradictorily the defendant Competition Council, requesting the annulment of Decision nr. 61/7th December 2009, issued by the defendant, and for its exemption from the obligation to pay the fine.

In the reasons for the request, the point was sustained that the agreement among the 17 trading societies on the occasion of the General Assembly of the Maramuresh Association, on 7th February 7th, 2006, did not constitute by its nature an anti-competitive agreement which would fulfil the requirement of Competition Law, which should situate it under the incidence of Art. 5 par 1 of the Law, consequently under the incidence of a sanction.

Thus, the claimant stated that the discussions carried on in the framework of the General Assembly did not present the nature of a concluded agreement among participating members; instead they were a simple briefing and consulting of the respective members about what would be the optimal conditions for the market on which they trade.

Among debated subjects was the growth in prices for technical utilities related to the market for bread production. This was the reason for which the participants in the General Assembly had proceeded to a cost price calculation for bread, in light of all the modifications to production costs. This previously mentioned calculation could in no way constitute, by itself, an infringement of Competition Law. In fact, exchange of information concerning prices was a natural activity for any trade association. Once they had calculated the cost price of bread, no further kind of agreement was adopted concerning the minimum sale-purchase price that might have been applied by the participating economical agents. They continued to be free in carrying on their activities and in

establishing their own prices, in total independence of each other. The summary included the final result of these discussions. This result was in accordance with the goals of the trade association.

The claimant also sustained that establishing the price of at 1.9 lei/kg should not represent, in view of its object, the fixing of a minimum sale-purchase price, but the determining of the level under which economical agents could consider that they would be working at a loss, in the matter of an effectively applied sale-purchase price. Yet, the economical agents who participated in the Assembly were fully free to choose their own the prices, suiting each one's trading policy.

Ruling of the Appeal Court of Bucharest

Through the decision issued on 19th October 2010, the Appeal Court of Bucharest rejected as lacking lawful grounds the request formulated by the claimant SC R. SRL.

The Court stated that, according to the Law nr. 21/1996 Art. 5 paragraph 1, any agreement or concerted practise which would have as an object or as an effect the restricting impeaching or distorting competition upon the Romanian market or upon a part of it is forbidden. This concerns in particular the kind of such practices which would aim, directly or indirectly, to maintain sale or purchase prices, fees, discounts, increases, as well as any other trading conditions.

Economic agents are therefore entitled to adjust their price according to the market's evolution, yet they must do this independently, and not via gatherings, with their competitors. Thus, the claimant R. SRL ought to have determined by itself the chosen sale-purchase price, according to its own production costs, if it should have considered this fact as imperative, due to the increase in prices for technical facilities, raw materials, salaries, etc.

The Court noted that the following precisions were made in the Assembly's summary: 'due to the debates in which other speakers also participated, the present Associates have - unanimously - agreed that the price of white bread should be updated to suit the price increase occurring due to the matter of technical facilities provided; Consequently, the respective new price might be situated at the minimum limit of 1.9 lei/kg white bread + VAT. The Associates do consider that this price should cover costs resulting from each one's up-to date financial analyses". The summary continued by stating: 'this minimum retail price ought to be communicated to the associates which were not able to attend this reunion', while 'regarding how this lowest retail price should be applied to white bread, the Assembly's recommendation was that, under the circumstance of a conflict of interests among Association members, this conflict ought to be solved within the Association's Assembly".

Taking into account the real costs incurred by each member and a reasonable profit margin, the establishing of a lowest level for the retail price of a kilo of white bread had as its object to increase the price of bread above the threshold which would have been normally established due to competition among the economic operators existing in the respective market. Due to their exposure in the General Assemblies and all the other respective gatherings of each of the firms, where each producer analysed retail prices and production costs adopted by each of the firms that were members of the respective Association, constituted practices which had facilitated the coordination of trading behaviour among the involved parties, which ultimately led to the accomplishment of the anti-competitive agreement in February 2006. On the occasion of the respective meeting, the economical operators in question did become aware of and aimed to prevent uncertainty concerning the competitors' future behaviour. They were in the position of taking into consideration, either straight or indirectly, the information obtained during these meetings and making use of it in determining their future market policies.

Agreements about price do represent some of the gravest infringements of competition law. The evidence presented consequently stated that the moral persons which had been previously sanctioned in virtue of the Competition Council's Decision were indeed aiming to establish a fixed minimum

price for bread, under the alleged motivation of the price increase for technical facilities, in respect of which the sale-purchase retail price ought have been modified.

The Court considered as legally necessary that each of the economical agents ought to determine independently, on its own, the policy it might intend to apply to a certain market, according to its own supported costs and to its intended profit, while fixing al price as low as possible according to the competitive restrictions. The claimant pointed out the circumstance that, upon the relevant market, there were currently various sale-purchase prices for bread. Yet this fact is irrelevant, regarding the fulfilling of conditions imposed by the Law 21/1996, Art. 5 par. 1, since the anti-competitive agreement was concluded regarding the lowest retail price, and not upon the hypothesis of an existing retail price.

The consultative nature of the debates carried on in the framework of the economic operators' assembly could neither be an advantage for the claimant in its argument, since the Assembly participants had the task of monitor their respective economic behaviour. This matter was also a cause for invalidating the claimant's line of argument about the necessity of adopting a common policy insofar as the functioning of trading activities might be concerned.

Comment

The case presented is of practical importance, which consists of the analysis it contained on the concept of anti-competitive agreements, since they are forbidden by the Law No. 21 of 10th April 1996 on competition in its Art 5 par. 1 letter a), as well as in the criteria chosen for the purpose of establishing if the agreement among the respective 17 trading societies on 7th February 2006 constituted a forbidden anti-competitive agreement.

The Law 21/1996 was adopted before 1st January 2007, the day when Romania became an EU's Member State. Yet the law's art 5 has similar content to that of art 101 par. 1 TFEU. The law's art 5 par. 1 letter a) prohibits any agreements between enterprises or concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the market. Those which directly or indirectly fix purchase or selling prices or any other trading conditions are especially considered.

This is the reason why the result of the interpretation given by the national court to the concept of anti-competitive agreements does indeed coincide with the sense given to it by EU law jurisprudence. Still, the deeds for which the claimant was fined happened before 1st January 2007. Moreover, the national court judge argued that, although the disposition of art 101 par. 1 TFEU was not directly applicable, the EU law jurisprudence on this matter did represent a referential element in interpreting the law's art 5.

Another important issue is constituted by the criteria considered by the national court when it has chosen to qualify the respective agreement as being anti-competitive. Thus, the issued sentence states that, in order to qualify a deed as being an anti-competitive agreement, the fact that the respective economic agents should have expressed their common intention to behave in the market in an *a priori* established way is enough. For an economic unit, its simple participation in a meeting discussing anti-competitive strategies is also enough to constitute its participation in an infringement of the law's dispositions.

In this respect, the possible objections raised, concerning the facts that the respective agreement might not have been compulsory for all parties, or that there would have been no means through which the strategies agreed upon during the respective meeting could have been imposed on those attending, or indeed that no sanctions had been established in the case that the strategies agreed upon by the respective competitors were not followed, are stated as irrelevant by the Romanian court.

5.4 Raluca Dinculescu, Tribunal of Bucharest, “Fixing/Recommending Retail Prices in Distribution Agreements” (ROMANIA)

Information concerning the judgment:

- Name of the court of last instance: Appeal Court of Bucharest
- Name of the parties / case reference number: S.C. Gabi SRL, S.C. Pappa Reale S.R.L. v. Romanian Competition Authority
- Date of the judgment: 27th May 2010

Summary of the case

Through the registered request, the claimants SC G. SRL and SC PR SRL asked the court, against the defendant Competition Council, to annul Decision nr. 224/19th December 2005, issued by the Competition Council, and thereby to be exempted from the payment of the fine contained in that decision.

According to the claimants, by this decision, the Competition Council had found that 27 trading societies (the supplier W. and 26 distributors, among which were the claimants) had infringed the dispositions of the Law nr. 21/1996 “the competition law”, Art. 5, par. 1 letter a), by concluding vertical agreements, having as their object the direct establishing (as well as indirectly, through discounts granted), in a concerted way, of the retail re-sale-purchase prices for W's products.

The Council thus found that the distributors chosen by W. Romania as part of its distribution network, and which purchased products from W. Romania for the purpose of retail sales, were economic agents in the sense given by the Law's Art. 5 par. 1, and that the contracts bilaterally concluded between W. Romania and its chosen distributors did represent vertical agreements among economic agents, in the sense given by the Law's Art. 5 par. 1.

These agreements had as their object the establishing of a common price for new retail sales, thereby restricting or distorting competition through the applied price, no matter the exact extent to which the respective agreements had or had not been effectively applied. A convenient price with which the distributing purchaser could resell the suppliers' products represented an obvious action restricting normal competition, which is expressly forbidden by the Law's Art. 5 par. 1.

Yet the claimants objected to the alleged anti-competitive nature of the deeds held against them, arguing that the actions of W. Romania, namely to establish, through the distribution contracts with each of its distributors, including the claimants, a maximum limit to the retail price for the new sale was not an anti-competitive act. From the interpretation given to the stipulation situated in Art. 3 of the distribution contracts, the conclusion was drawn up so that the distribution contracts did mention some retail sale prices that were recommended by the supplier (Wriggly Romania) for each of its separate products. The sentence: 'lies within the prices' limits' therefore undoubtedly referred to the highest price with which the products might be sold again by distributors. In other words, the argument was that, according to the fluctuations of supply and demand as well as to their own economical interests, the distributors were entitled to establish on their own the sale prices for the retail clients, yet under the recommendation that these prices ought not to exceed the maximum amount accepted by the supplier.

Through the objection formulated in the lawsuit, and by the procedural action taken during the debate upon the cause's essence, the defendant Competition Council opposed the acknowledgement of the lawsuit, stating that it would lack juridical grounds.

The defendant argued that Art. 5 par. 1 of the Competition Law was infringed through reaching an anti-competition agreement, consisting of the establishment of a fixed price for the distributors, with which they had to resell the W. products, and this was done in two ways: directly through the price clause (Art. 3 of the distribution contract), but also indirectly, through the so-called "Sales' Policy", adopted by all the distributors since March 2000. It decided the discounts that were to be applied by the distributors for each type of client (the retail clients; the network – type clients; the bulk – type centre clients; the supermarket type of clients; the bulk – type retail clients); how to allot clients for each of the distributors and the sanctions against distributors which did not respect this policy.

This "Sales' Policy" in fact represented an agreement between W the supplier, on one side, and its distributors, including the claimants, on the other side. Its basis is in the requests made to W the supplier in letters. It completes the contract frame created by the bilateral distribution contracts. Not respecting this policy was sanctioned through a reduction in the amount of merchandise delivered to the guilty distributor, or by the suspension of its quality of being a distributor. These sanctions were enforced not only until the beginning of 2000, as the claimants had sustained, but, as is stated in the respective documents' preamble, for the entire duration of the trading relationship between the supplier and each s distributor.

Of course, the supplier is entitled to recommend a sale-purchase price, and its choice to do so is not to be excluded. Yet, it has to take this action under the condition only that such a price should not represent a fixed or minimum sale price, reached due either to exerted pressures or incentives granted by one party to the contract.

When examining the complaint, the Court found that, firstly, it was imperative to analyse the distribution contracts concluded by the two claimants with the supplier W.

The distributor claimant SC G. SRL had concluded with the supplier W. a distribution contract for 12 months, from 1st March 2000 until 1st March 2001, and was extended successively through additional acts, until 31st December 2005. The distributor claimant SC P.R. had concluded with the supplier W a distribution contract for a period of 12 months, from 1st April 2001 to 1st March, 2002.

In both of these concluded distribution contracts, agreed by the claimants with the supplier W, for the respectively mentioned periods, the following clause was stipulated: "Art. 3: The price for which the supplier delivers to the distributor its products will be that recommended in Annex 2. The distributor is obliged to sell the W products at a price which should lie between the price limits recommended and accepted by the Supplier, prices stated in Annex 2.....".

From the formulation of this clause, there is no evidence of the fact that the recommended price mentioned would only be an indicative maximum price, since Annex 2 contained only one price for each of the products. The distributors, thus, had already considered it as a fixed price.

Moreover, the text refers to recommended price limits, and does not at all refer to a single upper limit, as the claimants had argued. In order to point out the real will of the supplier, accurately understood by the distributors, the word "recommended" is also employed about the price for which the supplier itself provides its products to the distributor. Alternatively, it is clear that the price for which the supplier had delivered its products to distributors was a fixed one, not a maximum one.

From the perspective of the Competition Law, Art. 5 par. 1 letter a), what is relevant is the question of the discounts that the distributors should use, according to the "Sales' Policy" which was faxed to all W.'s distributors on 13th March 2001. This document established the conditions these distributors should use regarding the market, namely – the discounts that they should grant – a set of operational procedures concerning the allocation of clients among the distributors.

This document stated that the supplier was willing to grant the following discounts: -0% for retail clients; 6% for network – type clients, for bulk sale centres, for important supermarkets; 8% for important bulk sale clients.

However W did not agree to grant an invoice discount larger than 8%, even for the highly important bulk sale clients.

For the case of certain clients, agreed upon by the W. representatives as well (ASM, RMM), it was possible to apply a supplementary bonus in correlation to the results of the respective clients. Yet such bonuses were only to be awarded for longer periods, three months or more, and only if the retail sale price was strictly respected.

W had always penalised non-compliance with the Sales' Policy, including the part regarding the discounts offered by the supplier. The claimant SC G. SRL itself came to be penalised for having offered W. products on the market with a 12% discount. The applied sanction consisted in the suspension of some bonuses deserved for the month before. A telex from 13th February 2002 warned all the distributors that this penalty was to be inflicted on some of them.

This imposed discount policy only penalised the eventual "elusion" by the distributors of the obligation to sell at the fixed price imposed by the supplier. It inhibited price competition and it sanctioned the distributors which, disobeying the discount policy by granting a larger discount than that agreed, sold at a lower price.

Thus there was no real option for the W. distributors to decrease the sale price (of course, one that would avoid them being exposed to the sanctions discussed above).

Of course, the supplier benefitted from the option to recommend a sale price, and this option was not excluded. However this was only according the condition that the recommended price should not be a fixed or a minimum one, reached to due to pressures exerted or incentives granted by any party. Alternatively the present case does not fulfil this hypothesis.

The Law nr. 21/1996 on competition, Art. 5, par. 1, letter a), states that: 'Any agreements, either expressed or tacit, among economical agents or among associations of economical agents, any decisions taken by associations of economic agents and any concerted practices which might have as effects or objectives restricting, impeding or distorting competition in the Romanian market or upon part of it are forbidden, especially those which aim at:

a) the concerted establishing, directly or indirectly, of sale or purchase prices, of fees, of discounts, of increases, or of whatever other trading conditions”.

Thus, the agreements concluded by the claimants with the supplier W, having as their – prohibited – objective the establishment of fixed prices through the behaviour indicated above, do by themselves constitute *per se* anti-competitive agreements. Therefore, it is no longer necessary, not just to bring further evidence demonstrating the concrete restrictive effects produced on the state of existing competition, but even that for such restrictive effects, they should have effectively occurred on the respective market.

The Competition Law, in its Art. 5 par. 1 letters a) – e), does mention examples of anti-competitive agreements. The practice of the CJEU is consistent in considering these examples as being traditionally equivalent to infringements by themselves of the respective interdiction. Thus these examples are not covered by categorical exceptions. Alternatively, there is only one possibility, and yet under extremely restrictive conditions, that agreements such the examples could remain valid. If the interested persons previously prove that their agreements do fulfil the requirements from paragraph 2, they could obtain an individual exemption.

Art. 5 of the Competition Law provides in its par. 1 the principle of forbidding collusive practices. Paragraphs 2-3 therefore contain the possibility of obtaining an individual exemption, if it has not already been obtained by falling into a categorical exception.

Thus, as it did not fall into a categorical exemptions, W ought to have requested, from the Competition Council, the granting of an individual exception.

According to paragraph 3, such an individual exemption is legally granted through the Council's Decision. This decision does not only have prospective effects. However, for the time intervals present in the case at hand, W had not previously requested and/or obtained such a Decision.

Consequently, in respect to the considerations discussed above, the Bucharest Appeal Court rejected the complaint formulated by the claimants against the Decision nr. 224 of 19th December 2005, issued by the Competition Council.

Comment

This is a classic case of vertical agreement between economic agents, agreements which are forbidden by the Treaty and also by Romanian Law.

One of the basic requirements for the existence of a functioning market economy, together with the freedom of movement for persons, goods, services and capital is represented by a competitive environment which should not be distorted. At the national or Union level, traders ought to be free to interact. No negative influences should be exerted by powerful economic agents that have privileged positions, by associations of economic agents or by the state itself. Within an efficient market economy respecting competition requirements means ensuring economic progress, defending consumers' interests and, within the respective economy its products and services would become competitive, not only among themselves, but also regarding the products from other markets.

The competitive environment might be negatively affected by anti-competitive activities, which might be the effect of agreements or concerted practices among economic agents. Among them, some powerful agents might abuse their dominant positions. The state might also, by itself, distort competition, by granting subsidies to some chosen economic agents. This would create, on the respective market, an advantageous situation for the chosen agents.

In view of the necessity of creating a competitive environment, the Constitution of Romania in its Art. 135, states that the Romanian economy is a market economy, founded upon free enterprise and competition. The state is also obliged to ensure the freedom of trade and to protect loyal competition. Consequently these principles are developed by the Competition Law 21/1996 and by the Law nr. 143/1999 on state aids. These Romanian laws, under the present circumstances, almost entirely adopt the EU *acquis* in the matters of competition and of the state aids, but the Romanian authorities are still obliged to apply these provisions correctly, since the European Union has developed an official interpretation, the letter and the spirit of which must be respected. This obligation is equally valid for judicial courts even before the date of accession. However, the actual level of economic reforms and the degree of the law's development in the functional economy create difficulties in effectively applying it in practice. An example would be the necessity for the state to grant aids for the sensitive parts of the economy. Though this principle is accepted at the Union level, it is still essential to respect competition law, accompanied by the correlative reducing of exceptions.

The dispositions of the Romanian Competition Law nr. 21/1996 as it was modified by the Government's Emergency Ordinance nr. 121/2003, are similar to Art. 101 TFEU. This text prohibits agreements, decisions and concerted practices which could have as their objects or effects the restricting competition in the entire Romanian market or in some parts of it. So, the national market is protected by national authorities which are established and competent to apply the respective provisions. Trading inside the Union as is stated by the four requirements of Art. 101, is still subject to some exceptions regarding anti-competitive practices in the framework of the general requirements of its freedom. The Romanian law develops the four requirements too, but in the limits established by the Treaty. However, the agreements or practices which the Treaty does except from the application of art 101 may still be ruled on by national Romanian law, which has its own exceptions.

The provisions of the Law nr. 21/1996 are not to be applied in the following cases:- if, for the economic agents or for the groups of economical agents in the budgetary year prior to the practices alleged as being anti-competitive, their turnover should not exceed the annual price ceiling established by the Romanian Competition Council; -if, for the horizontal agreements between economic operators, the market percentage for each party does not exceed 5% and if, for the vertical agreements of this type, the market percentage for each party not exceed 10%.

Art 5 of the Romanian law, like Art 101 TFEU might be drawn as a scheme composed of four essential concepts, gathered cumulatively: an agreement between economic agents which would affect the environment for competition and trading practices among Member States. (the last requirement is specific to both legislative schemes, but it is a necessary factor only in the case of the TFEU).

The Romanian legislation does not define the concept of *economic agent* or *enterprise*, but the European Commission and CJEU have done so. Thus, because it was important to ensure the largest application possible of competition regulations to the internal market for the purpose of instituting a climate of competition, the Court has acknowledged an extended definition for the concept of *economic agent*, which not be limited to a single legal entity; the only requirement about it should be the involvement of the respective entity in economic activities.

The concept of *agreement* does represent any agreement in written or oral form, between many (or even one) economic agents, regardless of whether it is legally executable. It is not necessary that the simple expression of the parties' will should constitute, according to Romanian national law, a valid contract or a compulsory one. Here, the same trend of establishing the largest definition possible can be noticed.

The Romanian Competition Law does state that whatever agreements or decisions which would be prohibited by the present law's art 5 and 6, as well as by the Treaty Arts. 101 and 102, thus any agreements, conventions or contract clauses related to an anti-competitive practice are rightfully annulled.

In the same law, Arts. 50-51 establish which anti-competitive agreements do constitute infringements. Its Art 59 states that these respective infringements are to be established and sanctioned by the Romanian Competition Council. It is able to do so through its competition inspectors, or in its Plenary Meetings.

5.5 Katalin Gombos, Court of Appeal of Szeged, “Exclusive Distribution Agreements Exempted under Art. 101(3) TFEU” (HUNGARY)

Information concerning the judgment:

- Name of the institution: Hungarian Competition Authority
- Name of the parties / case reference number: *Integris-Rendszerház Informatikai Szolgáltató Kft. v. Rába Group*
- Date of the judgment: 31st May 2005

Facts

The Rába Group, one of the largest Hungarian vehicle manufacturers consists of undertakings active in the commercial vehicle, undercarriage and spare part businesses. Its activity is mainly export-oriented, it is a supplier of many leading car and commercial vehicle manufacturers e.g. BMW, DaimlerChrysler, Caterpillar, Dana Corp., ArvinMeritor, John Deere & Co, MAN, Suzuki and ISUZU. Rába is among the largest independent undercarriage constructors in the world.

Integris was originally established by a member of the Rába Group for the provision of IT, other telecommunications, financial and accounting and investment services for the Group. At the beginning of 2003 the acquisition of Integris was put to tender. The winner was Magyar Telekom (now T-HOME HUNGARY), which submitted an offer envisaging the long term, cost efficient operation of Integris for the benefit of the Rába Group and it also took on the continuous development of Integris so as to enable it to provide the best offer available on the market on a long term basis. Integris remained active in the same business after the transaction was carried out.

Magyar Telekom, which controlled Integris was an indirect participant in the agreement. Magyar Telekom was the largest Hungarian fixed telecom undertaking and it is active in all segments of this industry. It owns the leading mobile phone company, and provides both broadband and narrowband Internet services. Magyar Telekom itself is owned by Deutsche Telekom.

However Magyar Telekom does not provide private (automatic) branch exchange services. Such agreements are concluded only as parts of integrated service contracts like that in question. Its share on this market is therefore negligible. Yet as regards other services provided by Integris, Magyar Telekom is also active on the market.

One of the relevant product markets is the market for IT. According to the established practice of the Hungarian courts it can be divided into the market for IT devices and that for IT services. The agreement primarily affected the latter market. This is a quickly developing market as new IT services become more and more indispensable for business in general. Many undertakings are present in the market and entry from one segment into the other is easy. The share of the undertakings affected by the agreement is below 10 per cent. The share of Integris itself is quite low within this overall share of Magyar Telekom.

The second relevant market is that of private (automatic) branch exchange services. Many competitors are present on this market too. Magyar Telekom's main competitors are Synergon, Albacomp, Hewlett-Packard and Siemens. The market share of the parties affected by the agreement was far above 15 per cent.

The third market affected by the agreement is the market for HR, financial and accounting services. HR does not constitute a separate segment as it is closely related to financial and accounting services. Integris's activity does not contain the provision of classic HR services, as it is mainly restricted to

wage accounting and the administration of social insurance payments. The market is saturated, the main competitors, owning 75-80% of the market are PricewaterhouseCoopers, Deloitte & Touche, Ernst & Young and KPMG. The share of Integris was surely below 5% and there were no other Magyar Telekom-owned firms active in this market.

The agreement on the provision of IT, other telecommunications, private (automatic) branch exchange, HR, financial and accounting services on an exclusive basis was concluded for nine years. It was agreed that the exclusivity of the provision of IT and other telecommunications services would be re-negotiated every three years and mutual consent would be required for its maintenance. It was also agreed that in the case of future need for certain supplementary and supportive services defined in an Annex to the agreement, Rába would have the obligation to make use of Integris' services. In relation to a third group of services as defined in another Annex, Rába was bound by the "Last Call Option" clause meaning that Integris has the option to provide the service under the best available conditions.

The agreement itself was concluded for a period of nine years. It can be cancelled by Rába with a 12 months' notice but only concerning the entire agreement, a separate cancellation of different services is not possible. Integris undertook not to apply ordinary cancellation during the validity of the agreement. For the case of an ordinary cancellation by Rába, a contractual penalty was stipulated.

The complainant - Informatika Ltd. - who is a competitor of Integris asked in its statement of claim to declare the Service Contract between the Rába Group and Integris null and void because the exclusivity provisions of the contract breached Section 11 of the Hungarian Competition Act (hereafter: HCA) as well as Art. 101 TFEU. The complainant – referred to Section 88/C of the HCA - sought compensation for damage which resulted from the void contract.

Defendants requested dismissal of the claim.

Hungarian Competition Law

According to Hungarian tort law, the complainant has to prove the occurrence of the conduct, its illegality, the occurrence and amount of the damages and the causal link between the conduct in question and the damages suffered. The legal test of tort liability also embraces the requirement of fault. The injured party may claim recovery for the loss suffered; the damages awarded cannot exceed the amount of the loss.

Hungarian law differentiates between three types of damages: depreciation in the property of the injured person (positive damages, *damnum emergens*), loss of profit (consequential damages, *lucrum cessans*) and costs devoted to the reduction or elimination of pecuniary or no pecuniary detriment (Section 355(1) and 355 (4) of the Hungarian Civil Code, hereafter: HCC). Section 88/C of the HCA, effective from 1st June 2009, provides a very remarkable presumption regarding hardcore cartels: in any civil law action against a member of a horizontal price-fixing, market-sharing or quota cartel under Section 11 of the HCA or Art. 101 TFEU, it is to be presumed (rebuttable) that the infringement raised the prices by 10 %.

Section 88/C of the HCA provides as follows: 'In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Art. 11 of this Act or Art. 101 TFEU, when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent.'

The discretion of the courts to assess the amount of damages in a case of doubt has two legal bases. Section 206(3) of the Hungarian Civil Proceeding Act (hereafter: HCPA) provides that if the amount of damages cannot be determined on the basis of the expert testimony or other evidence, the court determines it according to its discretion, considering all the circumstances of the case. Section 359(1)

of the HCC provides that if the entire amount of damages or part of it cannot be calculated precisely, the court can oblige the person liable for the damages to pay general compensation that is capable of completely indemnifying the injured person. Administrative penalties cannot be taken into account when calculating the amount of damages.

The passing-on defence is basically admissible in Hungarian law. The injured person is entitled to full compensation; nevertheless, the amount of recovery must not exceed the amount of damages suffered. Accordingly, those elements of the loss (price increases) that were not actually suffered by the injured person, because they were passed on to its customers, are not part of the actionable damage.

It is submitted that the most important hurdle is the uncertainties that relate to the calculation of damages. There is no established method of determining the amount of damages.

Decision of the Hungary Competition Authority

The decision established that the agreement qualified as an agreement restricting competition under Art. 101(3) due to the clauses on exclusivity and on the option of Integris to provide certain services under the best conditions available on the market.

Having considered the contract as an agreement relating to a complex but still unified service, it was established that though in the first and third relevant markets the parties market share did not exceed 15 per cent, on the second market it was above that level so it could not be considered as an agreement of minor importance.

The agreement is not covered by the vertical block exemption Reg. (EC) No 2790/1999 (BER). This is due to the fact that as the Commission notice also underline, agreements concluded for indefinite times or for periods exceeding 5 years are not covered by the BER. Though non-compete obligations are covered by the BER if renewal beyond five years requires the explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period, it was considered that this was not the case in the present agreement, as the contractual penalty stipulated for the termination of exclusivity was too burdensome.

In addition it was also established by the Competition Authority that the contract did not contain rules for a possible termination of exclusivity during the envisaged re-negotiation. This means that such a scenario was not foreseen by the parties in reality. Taking into account that such a termination would in fact result in a change in the person of the supplier, the termination of the exclusivity would be equal to the termination of the contract as a whole, as the contract did not allow the individual termination of the supply of the different services. The termination of exclusivity would therefore trigger the obligation of Rába to pay a contractual penalty to Integris as stipulated in the agreement. The amount of this penalty diminishes year by year but at the end of the third year it was still so high that it would clearly be a serious obstacle to exiting the agreement. The only viable possibility for the termination of the contract before its expiration occurred at the end of the sixth year when the level of the contractual penalty was already reduced and the exclusivity clause could also be re-negotiated. However by that time the agreement's duration would already have passed the five year term established in the BER. Therefore it is further upheld that the agreement did not fall within the exemption granted by the BER.

The Competition Authority considered that the conditions laid down in Art. 101(3) were fulfilled.

- a) *Contribution to the improvement of production or distribution of goods, promotion of technical or economic progress:* the contract ensures a long term, cost efficient operation of the relevant services. It also secures the continuous development of Integris to enable it to make the best offer available on the market. This is underlined by the fact that outsourcing is a generally applied solution for the provision of these services.

- b) *The consumers' fair share of the resulting benefit:* the Magyar Telekom Group won the tender for the provision of the services with the best offer. The Last Call Option constantly secures the highest available quality.
- c) *The indispensability of the restrictions:* the exclusivity is justified by the benefits of the uniform provision of these closely connected services and the unambiguous settlement of responsibilities. The contractual penalty, despite constituting a hindrance to the termination of the non-compete clause, is considered proportional to the advantages enjoyed by the Rába Group.
- d) *The lack of possibility for the elimination of competition:* taking into account the actual size of Integris and the relatively low importance of the agreement within the overall market there is no possibility for the exclusion of competition in respect of a substantial part of the products in question as the high market share in private branch exchange derives not from the significance of the agreement itself but from the market power of Magyar Telekom, the owner of Integris.

The analysis of the fulfilment of Art. 101(3) requires the investigation of the joint effect the present agreement has together with other agreements already concluded on the market. This analysis targeted only the market for private (automatic) branch exchange and other telecommunication services where the parties had a more considerable market share than on the two other relevant markets. Competitors submitted that on that market the conclusion of fixed term agreements was normal, mainly for 1-5 year periods. It was also clearly stated by the questioned firms that exclusivity was not common on the market. Only two similar agreements were concluded, namely between Siemens TraffiCOM and BKV (the public transport company of Budapest) and PanTel Technocom and MOL (the Hungarian oil company). In the views of the Court even the cumulative effect of these agreements is insignificant for the market.

The Competition Authority therefore rejected the complainant's claim. The Competition Authority considered that Section 88/C of the HCA was not relevant in this case.

6. Abuse of dominance in network industries

6.1 Dimitrina Petrova, Varna Regional Court, “Abuse of Dominance by Fair Organisers“ (BULGARIA)

Information concerning the judgment:

- Name of the court of last instance: Supreme Administrative Court
- Name of the parties / case reference number: case number 2455
- Date of the judgment: 23rd February 2009

Background information

The case is connected to the Plovdiv International Technical Fair, Bulgaria which takes place each year during September and October. The place where the International Fair and the exhibitions are held is a building called PLOVDIV INTERNATIONAL FAIR, where the defendant in the case had the majority owner rights of the property /the building/ and also possessed the joint stock company that had the right to organise and manage the fairs and the exhibitions for each event during the year that take place at the INTERNATIONAL FAIR PLOVDIV.

It has been proved during the investigation through the case that 'Plovdiv International Fair Plovdiv' AD had a market share of above 51 % on the so-called 'right to construction' in the building of the PLOVDIV INTERNATIONAL FAIR. It also has its own Tariff and General terms offered to external market players, whose terms and conditions are regulated partially only by the 'Plovdiv International Fair' AD.

Decision of the Bulgarian Competition Authority

In 2010 the Commissions on the Protection of Competition (CPC) initiated proceedings upon a request of the Association of Companies providing Fair and Exhibition Services-Bulgaria to establish an infringement of Art. 21 of the Law on the Protection of Competition (LPC) by 'Plovdiv International Fair Plovdiv' AD. In the request it has been pointed out that by Decision No 858/07 October 2008, which entered into force in July 2009, a pecuniary sanction was imposed on 'Plovdiv International Fair' AD for an infringement of Art. 18 (replaced) of LPC *manifested in an excluding price abuse taking the form of tightening the margin and imposing unfair trade conditions* and the termination of the infringement was ruled on. It has been pointed out that the defendant association has dishonestly used the circumstance that the appeals lodged with the Supreme Administrative Court prevent the entering into force of CPC Decision No 858/07 October 2008, as in the course of the proceedings in front of the Commissions on the Protection of Competition (CPC) and the Fair continuing collecting the higher amount of the so-called fee for the 'right to construction' amounting to €35 per square metre including VAT, and €25 per square metre excluding VAT.

In the course of investigation, the Commissions on the Protection of Competition (CPC) found that the company had taken advantage of its *dominant position* in providing the 'building of exhibition constructions' service, had increased the price of the service only in relation to rival companies and had preserved its package price for building exhibition constructions.

In its way 'Plovdiv International Fair' AD 'deprived the other participants on the market of the opportunity to make profit and had eliminated actual competition'.

By Decision 858/2008 the Commission on the Protection of Competition (CPC) established that by taking advantage of its *monopolistic position* in the market for access to the Fair billboards where the

'right to construction' and 'attesting a project' services were provided, 'Plovdiv International Fair' AD makes itself more favourable for providing the 'building of exhibition constructions' service at the Autumn International Technical Fair compared to the other participants in the Fair. The defendant Association established a considerably lower price for the 'building' service when 'Plovdiv International Fair Plovdiv' AD was implementing it compared to the prices offered by the external construction companies. The described conduct of Plovdiv International Fair AD was classified by the Commission on the Protection of Competition (CPC) as 'an abuse of dominant position in tightening the margin which leads to impossibility for the other participants in the market of building exhibition constructions to exert any type of competitive pressure on Plovdiv International Fair AD as a result of which the service is provided in lack of actual competition'. All of this leads to damaging the interest of consumers due to limiting their choice. The described conduct has been qualified as excluding financial abuse pursuant to Art. 18 of the LPC for which the Commission on the Protection of Competition (CPC) imposed a pecuniary sanction on 'Plovdiv International Fair' AD and ordered the infringing conduct to be terminated.

Judgment of the Supreme Administrative Court

The CPC Decision was upheld by Decision No 2455/ 23rd February 2009 of a three- member Chamber of the Supreme Administrative Court and Decision No 9255/9th July 2009 of a five-member Chamber of the Supreme Administrative Court.

In the course of investigation it was established that despite Decision No 858/2008 of the Commission on the Protection of Competition (CPC) and the court decisions of the Supreme Administrative Court, for the International Technical Fair taking place September and October 2009 'Plovdiv International Fair' AD was again collecting the higher fee for the 'right to construction' as the fees remained the same €36 per square metre excluding VAT, regardless of the location of the exhibition facilities, regardless of the difference in the fee that might have existed. The defendant association violated the prohibition established by the Commission on the Protection of Competition (CPC) decision not only by not reducing the size of the fees before the increase in 2007 but also by increasing them further.

By Ruling No 321/March 2010 the Commission on Protection of Competition (CPC) submitted to 'Plovdiv International Fair' AD a statement of objections for an alleged infringement of Art. 21 of the LPC manifested in a price squeeze in the terms of the ratio between the prices of the 'right to construction' and 'stand rent' services provided at the International Technical Fair in accordance with the General conditions and the Tariff for participation in the international fairs and exhibitions in Plovdiv, organised in the period August to October 2009 adopted by a decision of the Board of Directors of the 'Plovdiv International Fair Plovdiv' AD.

By Decision No 555/2010 the Commission on the Protection of Competition (CPC) imposed a pecuniary sanction on the Plovdiv International Fair AD to the amount of 219 630 BGN (€112 297).

6.2 Martin Baran, District Court of Prešov, “Access to Airport Essential Facility” (SLOVAKIA)

Information concerning the judgement:

- Name of the court of last instance: Slovakia Supreme Court
- Name of the parties / case reference number: *Milan Rastislav Stefanik airport Bratislava v. Slovakia Competition Authority*
- Date of the judgment: 16th February 2011

Facts

The company Two wings Ltd. conducts business in providing catering services for airline companies at three airports, Kosice, Poprad and Bratislava in Slovakia. Only M.R.Stefanik airport in Bratislava refused its access to the airport area for the security reasons. The MRS airport alleged that the complainant could provide their services for airline companies but the delivery of food and beverages at the boarding, ramp or handling areas in MRS airport could only be provided by its own catering service due to its responsibility for security in the airport and on the aeroplanes.. The complainant claimed, that it obtained an official licence issued by the Aviation Office of the Slovak Republic for providing support services in civil aviation which comprised the security checking of its employees. It meant that all security conditions for its activities were fulfilled and the two other airports in Slovakia had no objection to the provision of catering services in their areas.

The Antimonopoly Office of the Slovak Republic launched an investigation and fined M.R.Stefanik airport a fine of 3 000 000 Sk (in the former Slovak currency - approximately €100 000). The reasoning behind the decision issued on 30th November 2005 states that the behaviour of MRS airport was forbidden pursuant to Art. 8 par. 5 Act No. 136/2001 on the Protection of competition as an abuse of the dominant position in the relevant market of providing access to the landing area in Bratislava airport as unique facilities.

The Board of the Antimonopoly Office of the Slovak Republic dismissed an appeal from MRS airport within administrative proceedings on 21st April 2006 based on the same reasons.

Ruling of the Regional Court of Bratislava and of the Supreme Court

MRS airport (henceforth 'the complainant') filed a petition with the Regional Court in Bratislava to seek an annulment of the decision of the Antimonopoly Office of the Slovak Republic on the ground, that according to the capacity of the airport it is not right to force it to give access to other companies for ramp – handling services. The Court held in favour of the defendant and said in the reasoning behind the decision that there was no lawful reason for refusing access to the airport's unique facilities t for the company Two wings, if the company acts with the aim to provide consideration for another contractual party by providing catering services including the delivery of food and beverages on a board its planes (ramp – handling) and the complainant did not prove its assertion about an alleged security risk of the complainants' employees.

The Supreme Court of the Slovak Republic in its decision No. 2 Sžh 1/2009 dated 16th February 2011 upheld the judgement of the Regional Court in Bratislava. The Supreme Court emphasised that the security of the airport and measures adopted with this aim must not prevent economic competition among competitors in the relevant market.

Comment

The case regarding the airport services was interesting from the point of view of an ordinary passenger. No cases could be found regarding the quantification of damage in competition law or quantifying harm in actions for damages based on breaches of Art.101 or 102 TFEU. The decision of court shows how importance is placed on the essential mechanism of an effectively working market. This conclusion is clear, mainly taking into consideration the defence of the defendant established regarding the security matters in civil aviation. The mere declaration of this fact is no reason *per se* for abusing the dominant position in the relevant market.

6.3 Pol Van Iseghem, Commercial Courts of Ieper and Veurne, “Excessive Electricity Prices” (BELGIUM)

Information concerning the judgment:

- Name of the court of last instance: Brussels Court of Appeals
- Name of the parties / case reference number: *Nationale Maatschappij voor Belgische Spoorwegen v. ELECTRABEL*. Case number AR 2010/AR/3112
- Date of the judgment: 11th October 2011

Facts

The NMBS is the national railway company in Belgium. In operating the Belgian railways, it uses the infrastructure and energy provided by INFRABEL. INFRABEL launched an auction to buy this power on the liberalised energy market. As of 2005, the best price for traction-power was given by ELECTRABEL, a subsidiary of the French SUEZ group, and former monopolist in Belgium.

Emissions trading is a market-based approach used to control pollution by providing economic incentives for achieving reductions in the emissions of pollutants.

A central authority (usually a governmental body) sets a limit on the amount of a pollutant that may be emitted. The limit or cap is allocated or sold to firms in the form of emissions permits which represent the right to emit or discharge a specific volume of the specified pollutant. Companies are required to hold a number of permits (or *carbon credits*) equivalent to their emissions. The total number of permits cannot exceed the cap, limiting total emissions to that level. Firms that need to increase their emission permits must buy permits from those who require fewer permits.

This system was applied in Belgium as of 2005. The carbon permits were brought into account by ELECTRABEL to its industrial customers at a price of €6.88/MWh (2005-2007) and at €6.02/MWh in 2008, although ELECTRABEL did not have to pay for the permits itself...

Since the NMBS had to pay a higher price to INFRABEL, it claimed that ELECTRABEL abused its dominant position on the industrial market (70-80% of all industrial customers). ELECTRABEL asked for a price supplement which, in normal market conditions, would never have been paid. This supplement is estimated at €37 million, plus interest for the years 2005-2008. For the period 2009-2010, the claim has not yet been quantified.

The first decision

The first decision declared the claim of the NMBS to be not founded. It is accepted that ELECTRABEL had a dominant position on the industrial market, but it was not proven that ELECTRABEL abused this position. The price of the electricity the NMBS paid was not 'unreasonably' high, nor was it excessive in comparison with the economic value of the service rendered.

The national railway company used two studies of the CREG (government regulator for energy prices in Belgium) to prove that the gains were excessive, due to the fact that ELECTRABEL did not have to pay for the emission-permits it sold. The first instance judge did not accept this proof, because the NMBS did not show how these general reports on Belgian energy prices applied to its specific case. Furthermore, even the CREG admitted not having enough facts and figures to be able to draw evidentiary conclusions.

The complainant did not prove that it would have paid less without the price for the emission permits, because it paid an all-inclusive price.

When the NMBS asked for an expert designed by the court, this demand was also denied. In nominating such an expert, the Tribunal would have shifted the burden of proof from the NMBS to the expert. This would then happen on the basis of the NMBS's very poor motivation.

The arguments of both parties on appeal

The NMBS did not agree with this decision and appealed. The appeal was based on the fact that the first judge asked for too much proof. Moreover, there is no law that requires it to prove that prices are 'excessive': if the price is not reasonable in relation to the economic value of the service provided, its claim should be granted. It referred to different studies and even foreign competition authorities, to indicate that its view regarding an unfair price and unfair contract clauses was correct. It also insisted on wanting to appoint experts, which should investigate ELECTRABEL's accounts, data which ELECTRABEL did not want to reveal, not even to the CREG.

ELECTRABEL did not want any experts to be appointed. First of all because there was no proof of any fault on the part of ELECTRABEL. Secondly, such an investigating measure would be a 'fishing expedition': the main goals of such an investigation would be to inform the NMBS of facts of which it was not currently aware and who should prove it was right. Even if there would be an indication of fault, damage and causality between the two of them, it still was not necessary to appoint experts: even if they would dispose of all elements, it would not be possible to determine what influences the price of the electricity, because it is impossible to know how the energy has been produced (e.g. what mix of fuel, in which plant, with or without production of CO²)

The decision of the Court of Appeal

The decision of the court of appeal is a preliminary decision, deciding to appoint experts. This happens on a 'first sight' basis, and without prejudice for the further case: from the appointment itself, no further consequences can be drawn for the procedure to follow.

The alleged abuse of economic position brings with it a disturbance of the market, which implicates a breach of public order. When the NMBS would be able to prove its allegations, it would not only serve its private interest, but also the public interest. Therefore, the fact that the price was determined in a contract is not relevant for the decision.

The NMBS wanted to prove that ELECTRABEL, which had 70 to 80% of the big industrial customers market, asked an unfair price and continued to do so. The only 'certain' proof would be an investigation by the local competition authority or study reports from independent government institutions. However the local competition authority was not asked for an opinion, and the CREG did not get the necessary figures. With reference to Art. 102 TFEU, and to *Aalborg Portland A/S and Others v/ Commission of the European Communities*¹ the Court decided that if the NMBS made its case plausible, ELECTRABEL must give a good explanation.

After an analysis of the CREG's reports, the Court also took into consideration the warning of the Bundeskartellamt of 18th December 2006 towards some German energy producing companies. The complaints were similar: after installing the commerce in CO²-certificates, electricity prices for big industrial customers in Germany had risen considerably. The Bundeskartellamt came to the conclusion that there was no objective justification for the increase in price.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CJ0204:EN:HTML> last accessed on 27 December 2012.

Last but not least, the Court did not agree with ELECTRABEL's argument that its price was all inclusive, which could not be broken down into different segments, the CO² -certificate being one of them.

The final conclusion was that ELECTRABEL did not make any valuable arguments against the fact that it brought into account CO²-costs, when it did not pay for these itself. If it did not have a dominant market position, it would not be able to do this. Although it could bring into the debate the figures to prove its being right, it has not done so. So the Court appointed a group of experts with a very precise mission.

Comment

One general remark is that, despite a thorough search, it was very difficult and even impossible to find a judgment on the quantification of damages in competition cases. This proves that few complainants actually go to court. In both cases it was found (thanks to the help of some colleagues) that only 'big players' were involved. Class actions in Belgium and other Member States' legal systems is not very developed. Some even question whether the 'American' claim system is really desirable.²

On seeing the burden of proof that was asked from the NMBS by the first judge, one can understand that this kind of litigation does not occur very often. In the situation when the national competition authority did not conduct an investigation, or there is no credible report from an independent institution, initiating a legal procedure is not an obvious option. Not only proof of the fault, but also proof of the damage and the causal relation between the two of them appears to be almost insurmountable.

Luckily the Court of Appeal seems to be aware of these problems, and tackles the obstacle in a very elegant way by appointing experts in a preliminary decision, before pronouncing a substantive judgement.³ Does this mean that anyone can go to court and ask for experts who will go on a 'fishing expedition' for them? The answer to that question, referring to the motivation of the decision of the Court of Appeal, is certainly, and without a doubt, no.

So, not only a sound basis is needed to go to court, but again, by appointing experts, the cost of the litigation becomes a major issue,⁴ certainly not for a major market player, but an ordinary consumer. Even an association of consumers would be very courageous to begin a procedure of this kind, knowing what could be the financial consequences on losing the issue.⁵

Bearing this in mind, it seems that there should be some kind of European legislative initiative to lessen the burden of proof and do something about the cost of it. Until these fundamental problems are solved, courts only will have few 'high voltage' decisions to make...

² Ivan VEROUGHSTRAETE & Amaryllis BOSSUYT, "Damage actions for breach of the EC Competition rules", TBM-RCB, 2009,4, p. 19 n° 6.

³ On behalf of the First Instance judge, I must emphasize that the NMBS didn't ask for experts on a preliminary basis.

⁴ Observations of Ioannis Lianos, Faculty of Laws, UCL, Quantification of damages workshop, Brussels, 26th January 2010, http://comsmedia.elearning-fsr.net/file.php/12/materials/LIANOS_Observations_Quantification_Damages.pdf, p. 5

⁵ It is not totally impossible that not only the big industrial consumers, but also the ordinary consumers paid a lot for the CO² emission rights ELECTRABEL itself did not have to pay for (ELECTRABEL also holds 60% of the consumer market for Electricity in Belgium).

6.4 Ivan Georgeiv, Vidin District Court, “Unfair Contractual Conditions Imposed by the Electricity Distribution Company” (BULGARIA)

Information concerning the judgment:

- Name of the court of last instance: Supreme Administrative Court
- Name of the parties / case reference number: *CEZ Electro Bulgaria, AD CEZ Razpredelenie Bulgaria AD v. Bulgaria Competition Authority*
- Date of the judgment: 10th May 2010

Ruling of the Supreme Administrative Court¹

The Supreme Administrative Court² (SAC) upheld a Commission of the Protection of Competition³ (CPC) decision which established the abuse of dominant position by CEZ Electro Bulgaria AD (joint-stock company) and CEZ Razpredelenie Bulgaria AD and confirmed sanctions amounting to 150 000 and 100 000 BGN respectively (roughly €75 000 and €50 000).

The Court held that the actions of CEZ Electro Bulgaria AD in relation to collecting interest on the prognostic values for consumed electricity in a three-month reading was an infringement of Art. 18 of the *Law of Protection of the Competition (LPC)*⁴. The obligation for paying interest rate in the event of delayed payments has been envisaged in Art. 35 of the General Conditions of CEZ Electro Bulgaria. The consumers who do not fulfil their obligation to pay within the deadline the amount due for consumed electricity owe the supplier an indemnity for the delay amounting to the legal interest for each overdue day. At the same time after the introduction of the three-month reading, the bills for consumed electricity for the first two months are an estimate and do not reflect the exact amount and the actual amount due for the service. At the end of the three-month period the amount of the consumed electricity is established but not the consumption for each month. At the same time, Art. 35 of the General Conditions envisages interest in the event of a delayed payment of consumed

¹ The first instance decision in Bulgarian:

<http://www.sac.government.bg/court22.nsf/11a0bf82cd91b04dc2256626003ba920/b019287873aa9324c22575e700406978?OpenDocument> last accessed on 27 December 2012.

The second (last) instance decision in Bulgarian:

<http://www.sac.government.bg/court22.nsf/2ac9e8adcd0dabe6c2256ee700493d97/c3b36666f99dc298c2257708004701af?OpenDocument> Last accessed on 27 December 2012.

² Art. 125, para. 1 of the Constitution of the Republic of Bulgaria: 'The Supreme Administrative Court shall exercise supreme judicial oversight as to the precise and equal application of the law in administrative justice'.

³ The national competition authority.

⁴ “The following actions of undertakings enjoying a monopoly or dominant position, as well as the actions of two or more undertakings enjoying a joint dominant position that have as their object or effect the prevention, restriction or distortion of competition, and/or impairing consumers' interests, shall be prohibited, such as:

1. imposing directly or indirectly purchase or sale prices or other unfair trading conditions;
2. limiting production, trade and technical development to the prejudice of consumers;
3. applying different conditions to identical types of contracts with regard to certain partners, thereby placing them at a competitive disadvantage;
4. making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or conclusion of additional contracts which, by their nature or according to commercial usage have no connection with the subject of the main contract or the performance thereof;
5. unjustified termination of established long-term trade relations or unjustified refusal to conclude a contract when the possibilities for production or supply are available”.

electricity, this obligation sets as a condition a precisely calculated value of the actually-consumed electricity. On the basis of the analysis of the bills for consumed electricity it was established that in 100% of the cases a change was needed to the amount due, whether reducing or increasing it. The Court considered that to the benefit of consumers no opportunity had been envisaged for restoring in a proportional manner the size of the interest paid for delayed payments for the periods where no electric meter reading was carried out if it turned out that at the end of the three-month period the forecast amount was larger than the amount that is actually due. Thus for the specific infringement the Court adopted the sanction of the amount of 1500 000 BGN (about €75 000 €).

With regard to CEZ Razpredelenie Bulgaria AD the Court held that the company has committed an infringement of Art. 18, p. 2 of the LPC in assigning a follow-up check of electric meters of CEZ Laboratoris Bulgarij EOOD (limited liability company).

In this case it was established that the two undertakings belonged to the same economic group. The Court considered that, on the one hand, CEZ Razpredelenie had appointed a company belonging to the same economic group to conduct a follow-up check, i.e. the two companies were not economically independent which created an opportunity for exerting common control, influence and coordination of the conditions. Furthermore, the consumers did not have the chance to select the company of their choice to carry out the check of electric meters when they doubted that the readings of the meters were correct, and provided that they paid the expenses for the meter check. As a result, the company took advantage of its monopolistic position in the market for the 'share distribution' service and influenced the functionally related market on the follow-up check of electricity meters on its licensing territory through non-market mechanisms. The established percentage ratio of the checks assigned to CEZ Laboratoris Bulgaria AD and Emsis-6 EOOD were 72.5% to 27.5% in favour of the economically related company, which was also indicative of the anticompetitive orientation of the conduct of the company for electricity distribution. The conditions imposed on the relevant market restricted the access of other participants and should be considered as a restriction of trade. The act was qualified by the CPC as an abuse of a dominant position on the market of electricity distribution which was reflected on the functionally related market of a follow-up check of metering devices. The CPC imposed a pecuniary sanction on the infringer to the amount of 100 000 BGN (around €50_000).

Class Action Proceedings

Under Art. 365, p. 5 of the *Civil Procedure Code* (CPC), the district court, acting as a court of first instance, shall examine actions for a right or a legal relationship arising from or pertaining to cartel agreements, decisions and concerted practices, concentration of economic activities, unfair competition, and abuse of a monopoly position or of a dominant position.

After the final decision of the SAC, the Bulgarian Association of Consumers (BAC) commenced a class action before Sofia City Court (SCC) based on Art. 365, p. 5 CPC against CEZ Electro Bulgaria AD and CEZ Razpredelenie Bulgaria AD.

The SCC dismissed the case by order with the following arguments: a class action may be brought on behalf of persons who are harmed by the same infringement where, according to the nature of the infringement, the circle of said persons cannot be defined precisely but is identifiable. Any organisations responsible for the protection of injured persons may bring, on behalf of all injured persons, an action against the infringer for the establishment of the harmful act or omission, an action for the wrongfulness of said act or omission, and an action for the blame. However one of the most important conditions for class action proceedings under Art. 380, para 3 of the CPC is to present evidence of the capacity of the complainant to protect the harmed interest seriously and in good faith, as well as to incur the charges related to the conduct of the case, including the costs, attached to the statement of action. The court verifies *ex officio* the capacity of the person or persons who have brought the action to protect the harmed interest seriously and in good faith and to incur the charges

related to the conducting of the case, including the costs. So, the final decision of the court, based on the information of the financial solvency of the Association, was that BAC could not incur the charges of the defendant if the complainant lost the case.

It was the first and only attempt for a class action in Bulgaria and the case was closed before judgment on the merits of the dispute.

7. Interaction of Competition Law and Regulation in Network Industries

7.1 Virgo Saarmets, Tallinn Circuit Court, Energy Tariff Review by the Competition Authority (ESTONIA)

Information concerning the judgment:

- Name of the court of last instance: Supreme Court
- Name of the parties / case reference number: reference number 7-1-3-594-11
- Date of the judgment: 14th March 2012

Facts and background information

Fortum is an energy producer that generates and sells heat and power mainly in the Nordic and Baltic countries. In 2009 Fortum (through subsidiary AS Anne Soojus) founded a combined heat and power plant in Tartu, Estonia's second biggest city (approximately 100 000 inhabitants). The capacity of Tartu's combined heat and power plant is 25 MW for electricity and 50 MW for heat. The plant uses fluidised bed technology steam boiler and operates on local bio fuels (mainly woodchip). The plant produces district heating for more than 50% of Tartu's residents and the electricity is sold on the stock market. Total investment costs were €76.7 million, of which approximately €39.2 million was the cost of the steam boiler.

Estonia has established quite an unusual institutional regime of competition and market regulation. Before 1st January 2008 there were five different institutions: the Estonian Competition Authority, Railway Inspectorate, Energy Market Inspectorate, Technical Surveillance Inspectorate, and Communications Board. These institutions have since been merged into two authorities: the Estonian Competition Authority (competition authority and market regulator in specific sectors: water, energy and natural gas, telecommunications, railways) and the Technical Surveillance Authority (general surveillance authority in the field of electronic communications, railways and industrial safety). The reform was passed quickly after the appearance of the economic recession, and because of economic reasons (the draft law passed through parliamentary proceedings in less than two months in autumn 2007 and entered into force on 1st January 2008). According to the draft law, the merging of the functions of the competition authority and of the market regulators is certainly not common within the European Union, but nevertheless there are also no legal objections for combining these functions, bearing in mind the lack of competence in small institutions, and particularly in smaller Member States.

Proceedings before the National Competition Authority

Fortum (through its subsidiary AS Anne Soojus) filed an application for the approval of the Estonian Competition Authority (ECA) for the maximum price of heat to be sold within the Tartu district heating network area. ECA dismissed the application because of unreasonably high investment costs. ECA found that the requested maximum price of heat was not based on costs in the meaning of § 8 (3) of the District Heating Act (<http://www.legaltext.ee/text/en/X70045K2.htm>), since Fortum would not have made investments in such a volume only for heat production. ECA noted that in case of the combined production of heat and power, major economic and environmental effects would be linked to power production, not heat production (as heat is always a co-product of generating electricity). Therefore it was important that co-generation of heat and power did not harm the interests of heat consumers, and boiler house investment costs could not include those expenses that were not

inevitably necessary for heat production (which would have not been incurred without the aim to co-produce electricity).

There are different methods for the allocation of the cost for heat and electricity produced in a heat and power cogeneration plant (<http://www.konkurentsiamet.ee/file.php?18089>). In this case ECA used the so-called stand-alone cost method or the method of an alternative boiler house. The method of an alternative boiler house considers the cost and justified return for the heat and electricity produced in the cogeneration process separately from each other. The method assumes that the heat sold to consumers is produced separately from electricity production in a heat-only boiler house or in an alternative boiler house. In other words, customers should not pay more for the heat produced in the heat and power cogeneration process than for the heat produced in an alternative boiler house.

Fortum's application was based on investment costs of one 50 MW (for heat) combined steam boiler that used fluidised bed technology (suitable fuels: woodchips, sawdust, peat, even natural gas). ECA, however, used reference cost data of three heat-only water boilers (total capacity 50 MW for heat = 20 MW + 20 MW + 10 MW) that were grate fired (suitable fuel: woodchips only). According to the alternative boiler house, the price of heat would have been significantly lower (about 25%), mainly due to the differences in investment costs of alternative boiler types: €39.2 million for the fluidised bed combined steam boiler, and €17.7 million for the three heat-only grate fired water boilers. ECA agreed that a total of 50 MW additional heat production in the Tartu district heating area was necessary, but argued that the alternative solution (three heat-only boilers) would have been more practical, because of the decrease in heat consumption during the summer season (from April to October), and the possibility to keep only one boiler working (in the summer months 20 MW should be sufficient). ECA also stated that according to the Electricity Market Act, Fortum had the right to receive support for the electricity supplied and sold to the network, because it was generated from a renewable energy source in an efficient co-generation process. The maximum amount of support for the period of 12 years was a total of €89.5 million, which would cover all of Fortum's investment. Therefore, because of the continuing payment for supplied electricity, Fortum did not reduce heat production during the summer months. In fact, Fortum's co-generation plant operates at the present time exclusively on woodchips for maximising the benefits of electricity production.

Proceedings before the court of first instance

Fortum (AS Anne Soojus) filed an action with the Tallinn Administrative Court against the negative decision of the Estonian Competition Authority. Fortum considered that the applied maximum price was not unfair, and cost-based pricing could not be based on calculations that ignore the real factual situation. ECA had no right to force the producer to implement specific technological solutions through the approval of maximum prices. The approval of the maximum price must be based on the existing technological solution, except when its implementation was clearly unfounded. Yet Fortum already had one smaller heat-only plant in Tartu which used the fluidised bed technology (although combined with a water boiler). At the time, ECA accepted the need for an additional 50 MW of heat production, and the heat and power co-generation plant also used best available technology.

The Tallinn Administrative Court satisfied Fortum's complaint with the judgment of 19th May 2011, and annulled the decision of the ECA. The District Heating Act does not define the methodology for approving a maximum price of heat. The ECA used an alternative boiler house method, which assumed that the calculations must be based on a similar best available technology, and only such a boiler house can be regarded as a real alternative, which, in comparison to the existing co-generation plant, did not have significantly different technology, fuels, and other characteristics of the boiler. In this case, investment costs should have been calculated on the basis of one 50 MW (for heat) fluidised bed boiler.

Proceedings before the court of second instance

The Estonian Competition Authority filed an appeal against the judgment of the court of first instance, to withdraw the judgment fully and dismiss Fortum's complaint. The ECA is not related to the choices of the monopolistic operator. The fluidised bed steam boiler would be economically clearly unjustified for heat-only production. Steam boilers are good for generating electricity (and the co-generation of heat and power), but it does not make sense for heat production as such, because it is not possible to send high temperature and high pressure steam directly to the district heating network. In order to avoid cross-subsidising and ensure a justified price for heat it is necessary to allocate the cost of heat and electricity production in the co-generation process. It is important that heat production is treated equally with electricity production and that the application of co-generation is not damaging the interests of heat consumers. In other words, the allocation of cost for electricity and heat should be done in a way that ensures the equal treatment of both product lines and avoids cross-subsidising between areas of activity.

Fortum found that the ECA has relied solely on the fact that the grate-fired boiler is cheaper and did not take into account the fact that the fluidised bed boiler allowed the use of different fuels (woodchips vs. woodchips + peat + sawdust + natural gas), and generally it should be preferable to produce heat and power in a co-generation process. Investment costs are always the same, no matter how much heat and power will be produced during the summer months.

The Tallinn Circuit Court dismissed the appeal of the Estonian Competition Authority with the judgment of 10th November 2011 (No. 3-10-1829). The circuit court noted that the ECA as a national regulator must ensure that heat prices are cost-based, transparent and fair, because § 9 (4) of the District Heating Act allows the monopolistic operator to sell heat within the district heating network area at all prices that remain within the approved limits.

The circuit court held that the ECA did not adequately explain the choice of specific methodology for assessing justified investment costs (the alternative boiler house method). It is undisputed that steam boilers are efficient only for heat and power co-generation, and Fortum would have not built a heat-only production plant with a steam boiler. Heat-only production is economically sensible merely with a water boiler. Still, both fluidised bed and grate fired technologies may be used with the water boiler, and they are both modern technologies. Using the latest combustion equipment, both of the two alternative heating plants would follow the requirements of the best available technology.

The circuit court agreed with the final conclusion of the administrative court that when using the method of an alternative boiler house, the investment costs of the existing co-generation plant should be compared with the costs of an alternative heat-only plant, which uses as similar as possible, but heat-only production-oriented technology. A substantially different technical solution cannot be used as a real alternative, and could be justified only in exceptional cases, e.g. if there are circumstances in which it can be concluded that the use of existing technological solution was clearly inappropriate and contrary to the requirements for pricing and heat supply (obviously inefficient technological solution, unreasonably high capacity of the boiler, irrational use of fuels etc.).

In the present case, if the ECA considered it appropriate to use the method of an alternative boiler house, the authority should have assessed the investment costs in Fortum's application, based on the costs of building a heat-only production plant that uses the technology as close as possible to the technology that is used in Fortum's existing heat and power cogeneration plant, but is also efficient for heat-only production. This means that an alternative boiler house would have one fluidised bed water boiler with a capacity of 50 MW, and neither a steam boiler nor grate fired boiler. According to this solution, the investment costs of the heat-only plant would have been €19.8 to 32.9 million, which is lower than the €39.2 million that Fortum originally claimed, but somewhat higher than the €17.7 million that the ECA took into account.

In addition, the circuit court held that since the proceedings of the approval of the maximum price of heat should be based only on the costs of heat production, it is not appropriate to take into account the support that Fortum may receive under the Electricity Market Act for the electricity supplied and sold to the network, which is aimed exclusively at the production of electricity in a co-generation plant.

Proceedings before the Supreme Court

The Estonian Competition Authority filed an appeal in cassation proceedings, claiming that the circuit court judgment violated the interests of heat consumers. The Administrative Law Chamber of the Supreme Court of Estonia did not accept the Estonian Competition Authority's appeal in cassation with its ruling of 14th March 2012 No. 7-1-3-594-11, and therefore the judgment of the Tallinn Circuit Court entered into force on 14th March 2012.

Comments

It seems that ECA just did not want to accept the fact that there has been quite high governmental financial support to electricity production from local biofuels. In fact, the Ministry of Economic Affairs and Communications of Estonia has indeed been preparing a draft law to reduce these allowances significantly (up to 50%). Thus, governmental financial support for electricity production may really be too high, but according to the stand-alone cost method, it is clearly irrelevant when deciding the approval for the maximum price of heat to be sold within a district heating network area. In addition, in its deep desire to protect the interests of heat consumers, the ECA has also paid too little attention to other important matters, such as energy security, environmental aspects etc. Perhaps these are just growing pains of the institution with dualistic functions. The ECA is definitely used to acting as a competition authority, but it might just lack experience in combining the functions of competition and regulatory authority.

7.2 Bertan Ozerdag, Nicosia District Court, “Tendering of Telecommunications Licences”
(CYPRUS)

Information concerning the judgment:

- Name of the court of last instance: High Administrative Court
- Name of the parties / case reference number: *Cyport Communication Ltd., 11 Memduh Asaf Sokak, Köşklüçiftlik, Lefkoşa v. Council of Ministers, Ministry of Telecommunications and Transportation, Directorate General of Telecommunications*
- Date of the judgment: 18th March 2011

Facts

The government opened a public tender for operating the network of the Code Division Multiple Access (CDMA) on the conditions of operate and transfer. Initial CDMA network investment was already established by the State’s Telecommunications Authority. This technology enables local phone network users to utilise their local phones far from their cable settlement without any restrictions such as with mobile phones. This is the technology that is competing with and is an alternative to the GSM technology and is a less preferred technology globally.

According to the tender documents, the winner of the tender would reimburse the sum to the State Treasury invested by the Telecommunications Authority until the time of the tender with instalments divided in the period of the right determined by the tender.

The holder of the right would not pay any licence fee or lump sum to receive the right to the service. The winner of the tender would be responsible for the development of the infrastructure of the Telecommunication Authority which was an obligatory condition in order to be able to begin or facilitate the service at the time of tender. The holder of the right would also develop the system and make the necessary investments to catch up with technological developments and upgrade the quality of service.

The holder of the right would be entitled with the right to service to the end users for the period of ten years. At the end of that period the Telecommunication Authority would receive this right back and also would be free to open a new tender.

The tender was finalised on 13th February 2009 and the applicant as the winner of the tender was entitled to the right to service for 10 years according to the decision of the Council of Ministers.

The Competition Law was put in force by the Parliament on 30th March 2009 and came into effect by that date.

According to Art 4(5) of the Competition Law the practices that provide different conditions to the same transactions between competitors and therefore putting them into a disadvantageous position is restricted.

The applicant won the tender competing with another Internet Server Provider (ISP). Upon the decision of the Council of Ministers, the Telecommunications Authority signed an agreement with the applicant company and gave authority to the company to operate as the CDMA service provider for the final customers in the market.

The applicant upon the signature of the agreement started the necessary investments and operational facilities.

According to the agreement signed by the parties, the company would not pay any licence fee to the government, but it should make the necessary infrastructure investments for the operation of the system. The agreement is for 10 years and the company was obliged to transfer all the infrastructure and investments at the end of that period to the state.

CDMA technology can be used on cable phone networks and the system enables the users to use their local phones without any SIMs as mobile phones, far from their cable settlement, all around the country. Consequently, the local phones can be used as effectively as the mobile phones and they provide the opportunity to carry and use the local phones just like mobile phones.

However, there are two GSM mobile telecommunications companies namely Vodafone and KKTCELL in the country providing mobile phone communication services to their subscribers. Both companies are licenced by the government to operate in the country and their licences are subject to a period of time. The main condition to receive a mobile phone communication licence is to pay a licence fee which is considerably high, making it difficult for other prospective companies to enter the market.

The GSM companies in addition to the payment of the licence fee are responsible to make all infrastructural investments for the operation of the system.

They had been providing services in the market for several years. Both companies had received their recent licence from the state in 2008 that would enable them to operate for 15 years as mobile service operators.

Their licence were subject to a licence fee which is high, and in addition to the licence fee they are obliged to pay special taxes to the state.

Claiming the winner of the tender would provide the same or similar services to them, the GSM companies stated that GSM services and CDMA services are contained in the same product market. They believed that the operation of the applicant would create a demand – side substitution opportunity for consumers. They sent complaint letters to the government and said that the tender was an anticompetitive practice of the government since it would come to a conclusion that the government is applying different conditions between undertakings for the same kind of transactions. Their argument was based on the competition principles and following legal views.

Although the GSM Mobile Network Service Operators had to pay the licence fee before entering the market, the applicant would operate in the same product market without paying any access/entry fee.

The applicant company would take over the portfolio of the loyal customers of the Telecommunications Authority without making any investment for marketing. The GSM operators during the time of tender were investing to keep their market power and prevent losing their customers by advertising, making rebates on one hand and were recruiting high profile, high cost employees on the other hand. They stated that the market is highly competitive and it is very difficult to attract other operators' customers. Even with the aforementioned characteristics of the market, it would be very difficult for the GSM operators to keep their market power after the operation of the applicant for the reasons stated in this paragraph.

The applicant would have the opportunity to make more investment than the GSM operators since the applicant was not obliged to pay an access/entrance fee.

The applicant would have the opportunity to eliminate competitors and gain the dominant position with a potential risk of abuse of its position. This would have effects on the end users in terms of higher price and lower quality of service.

In their complaint letters their argument was based primarily on the fact that the government applied different conditions to the same transactions and therefore these constituted disadvantageous

conditions to those competing with the new entrant in the market. They also stated that if the government would not take necessary steps and cancel the agreement signed with the applicant they would sue the government on the legal principle of unfair practice.

The government by taking into account the complaints terminated the agreement that was signed with the applicant.

The state found the arguments and complaints to be justified and cancelled the tender decision on 26th August 2009.

Ruling of the Administrative High Court

Since the establishment of the Competition Board had not been yet settled at that time the applicant filed a case directly with the High Administrative Court.

Contending that the termination was unlawful, the applicant filed this case with the High Administrative Court.

The state was represented by the Attorney General's office and they filed a defence stating that the state's first decision regarding the tender was an infringement of competition rules and would have the capacity to distort the market and establish an anti-competitive mobile telecommunication service market.

The applicant complained that the principles of competition law could not be applicable to that case since the law was adopted after the final decision of the tender and also the signature of the agreement.

The prosecutors replied to this argument by stating that the principles of competition law are universal and the cancellation is as a result of the rule of law. They also added that although it is a fact that the law had been put into force after the tender and the signatures, the time of the agreement's enforcement would be effective in the future period falling into the scope of the law's enforcement.

Although the Court came to a finding that the government's decision was an anticompetitive practice, the principles of law did not allow it to enforce the conditions of a law on an agreement which was signed and put in force before the ratification and enforcement of the law by the Parliament.

The court stated that the enforcement of law regarding previous conflicts was only possible if the law prescribed its enforcement to that effect.

The court accepted the applicant's arguments and cancelled the second decision.

7.3 Ewa Stefanska, Warsaw Court of Appeal, “Competition Law and Regulation in the Water Supply and Collective Sewage Disposal Sectors” (POLAND)

Information concerning the judgment:

- Name of the court of last instance: Warsaw Court of Appeal
- Name of the parties / case reference number: *Municipal Water and Wastewater Company in Warsaw v. Poland Competition Authority*. Case number VI ACa 528/11.
- Date of the judgment: 10th November 2011

Facts

In the decision issued on 16th of April 2009 the President of the Office of Competition and Consumer Protection considered as an abuse of dominant position that is prohibited by Art. 9 paragraph 1 of the Act of 16th February 2007 on competition and consumer protection, the abuse by Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A. w Warszawie (entrepreneur) of the dominant position in the local market for collective water supply and collective sewage disposal by the deprivation of opportunities for valuable consideration of the transfer of water supply facilities or sewage facilities by investors which did not meet conditions set by the entrepreneur that would have permitted the paid transfer of water supply or sewage facilities built with their own resources to become the property of the entrepreneur, or these investors who wanted to give these units against payment under a different title than the legal transfer of ownership. The President of the Office of Competition and Consumer Protection prohibited this practice and imposed on the entrepreneur a fine of 82,213.23 polish zlotys (about €18,291).

According to the President of the Office of Competition and Consumer Protection, Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A. w Warszawie (Municipal Water and Waste water Company in Warsaw, a joint stock company) has the status of water supply and sewage company within the meaning of the Art. 2 point 4 of the Act of 7th June 2001 on the public water supply and collective sewage disposal. It carries out economic activities in the domain of water supply and sewage by implementing the tasks of the municipalities. The entrepreneur does not own all water supply and sewage devices that remain in its operation and through which it provides services. The ownership partially belongs to the municipalities and to the individuals.

The entrepreneur allows the transfer of water supply and sewage devices based on various types of contracts: the chargeable convention of property contracts, the unpaid convention of property contracts, or the contract of use device. However, the company in the document entitled “The rules of taking over the water supply and sewage devices” (standard contract) established stringent conditions and implemented indicated principles. The water supply and sewage devices may be at the request of the investor against payment taken over by company for its own, if three conditions are satisfied: (1) the devices were made in accordance with the applicable rules and technical conditions; (2) the devices were made by the applicant alone; (3) the applicant paid at its own expense the legal title to the land on which the devices are located. As a justification for regulating the condition of the title to land, the entrepreneur indicated the need to provide itself legal title to the water supply and sewerage facilities placed in the ground which is not a public road, in order to avoid claims from the owners or users of the land for payment of compensation for the land's illegal use or for a request of the removal of equipment from the land to which the entrepreneur has no legal title. It indicated also that access to land is essential to ensure the uninterrupted operation of equipment.

The entrepreneur did not have a separate standard contract for the free transfer of equipment, so in these situations it used the standard contract for the transfer of ownership with a change of wording

from 'against payment' to 'for free'. The investors which built devices using their own funds were also asked to enter into the contract of use devices. This standard contract indicates that the investor gives the device to the entrepreneur for free to use and dispose of its beneficial use, without any restrictions. The entrepreneur undertakes to use the equipment in a manner consistent with its purpose, and in particular to use it to provide the delivery of water and discharge wastewater services to the investor, and also bear all costs of maintenance resulting from its operation, maintenance, repair and modernisation.

According to the President of the Office of Competition and Consumer Protection, the public interest was violated by the dominant company by limiting the consumers' possibilities for considering transmission water supply and sewerage facilities, although that right is provided by Art. 31 of the Act of 7th June 2001 on the public water supply and collective sewage disposal. The entrepreneur used a dominant position to obtain benefits from other parties which were disproportionate to the benefits which they could expect if competition was not distorted in the market. This type of behaviour was contained in the concept of practices restricting competition, which may negatively shape the interests of the public water supply and sewage service consumers who would like to transfer to the entrepreneur-built elements of the network. The authority alleged that the entrepreneur denied the possibility of transmission equipment paid by the applicants which did not meet the conditions laid down in the standard contract or applicants which wanted to pass the device against payment, but under a different title than the legal transfer of ownership.

In this case the product market was defined as the provision of collective water supply and the collective sewage market. The geographic market, due to the technology (existing water supply and sewage network), was defined as the market covering the area of Warsaw and neighbouring municipalities. It was found that the entrepreneur had a dominant position in the market that enabled it to prevent effective competition in the relevant market to a considerable extent independently of competitors, consumers and contractors. Due to the network nature of the services of collective water supply and collective sewage disposal, companies in this sector do not face effective competition in the municipalities in which they provide services. The barriers to entry in the market include a lack of rationality in the construction of other water supply and sewage networks which could allow another entity to provide the same services. For customers and for potential consumers in the operation area of the entrepreneur there were no alternative services, so the company operated under the conditions of natural monopoly and it had a dominant position.

According to the President of the Office of Competition and Consumer Protection, the entrepreneur violated Art. 9 paragraph 1 of the Act of 16th February 2007 on competition and consumer protection, because it deprived investors the possibilities of the paid transfer equipment in case they did not meet the conditions set by the company or if they wanted to pass entrepreneur devices against payment but under a legal title different from the transfer of ownership. The entrepreneur used only one form of paid transfer of equipment by transfer of ownership, limiting the possibility for entities that meet the requirements specified in the standard contract, in particular the condition of the regulation at its own expense the legal title to the land. Meanwhile, Art. 31 of the Act of 7th June 2001 on the public water supply and the collective sewage disposal does not provide for such restrictions.

The authority noted that the established practice has a special character because it did apply to current issues associated with the performance of a service contract for water supply and wastewater disposal. It did not affect the availability for consumers, but it influenced the principle of participation by entrepreneur and its customers in financing the creation of infrastructure for providing services.

The entrepreneur appealed the decision to the Competition and Consumer Protection Court, claiming that the authority violated numerous provisions of procedural and substantive law, in particular Art. 31 of the Act of 7th June 2001 on the public water supply and collective sewage disposal by adopting the rule that the paid transfer of equipment in a form other than a transfer of ownership must be related to the rent paid, that regulating the legal title to land is the responsibility of

the entrepreneur and that the equipment's transmission can be made only to the company but not to the municipalities. Furthermore, the entrepreneur alleged that the claims arising from Art. 31 of the Act of 7th June 2001 on the public water supply and the collective sewage disposal did not create a market of goods that could be treated as a relevant market in the terms of the Act of 16th February 2007 on competition and consumer protection, so the entrepreneur could not abuse a dominant position in that market.

The entrepreneur's appeal was dismissed by the judgment of the Competition and the Consumer Protection Court issued on 30th of December 2010 (case reference: XVII AmA 158/09).

Ruling of the Court of First Instance

The court of first instance pointed out that Art. 31 of the Act of 7th June 2001 on the public water supply and the collective sewage disposal states that the investors which built their own water and sewer equipment resources may transfer them against payment to the municipality or the water supply and sewerage company under the terms of the contract if the device met the technical requirements specified in separate regulations. The purpose of this regulation was the arrangement of ownership and financial relations in the water supply and sewerage facilities according to the natural monopoly, the persistent underfunding of the water supply and sewage infrastructure and the bearing by those consumers which wanted to use the network of the claimant of the disadvantages associated with the construction of equipment from their own resources. At the same time this provision is to protect the weaker partner of the contract and protect the public interest.

The court held that the contracting parties are free to shape the title under which the entrepreneur will operate the facility involved in the network, so the right purchased by the complainant did not have to be the right of ownership. However, if the acquisition of equipment is on a basis other than legal title ownership (i.e. the agreement to use), these devices remain the property of investors and the entrepreneur uses their parts of the network which allows it to provide services, and thus makes a profit. The entrepreneur is obliged to settle expenses incurred by investors, which stems from the principle of the equivalence of benefits. The court accepted the authority's assessment of the complainant's behaviour enclosed in the contested decision.

Ruling of the Court of Second Instance

The entrepreneur appealed the judgment to the court of second instance, raising the same complaints as in the previous appeal. The entrepreneur's appeal was dismissed by the judgment of the Court of Appeals in Warsaw issued on 10th of November 2011 (case reference: VI ACa 528/11).

The court of second instance accepted the court of first instance's assessment of the complainant's behaviour contained in the contested judgment. It also pointed out that the statistical data constitutes evidence of making irrational decisions by investors, consisting of the unpaid transfers of rights over network elements to the complainant. The entrepreneur did not inform the investors about the possibility of the paid transfer of ownership, imposed on investors not provided by statute requirement to regulate the legal title to land, the conclusion of agreements not involving settlement with investors on investment. Using a dominant position in the relevant market, the complainant had failed to fulfil the duties arising from Art. 31 of the Act of 7th June 2001 on the public water supply and collective sewage disposal.

Conclusion

The network service markets are characterised by specific properties associated with the fact that the construction of alternative networks is uneconomic. Therefore in some markets (i.e. telecommunications markets) the law guarantees competitors the possibility to use the network by the regulation of these markets. In these cases network ownership is a problem of secondary importance. Usually the network is owned by the entrepreneur that took over the state's assets. Due to regulation, competition between entrepreneurs is possible regardless of network ownership.

Yet other network service markets (i.e. local markets of the collective water supply and collective sewage disposal) are not regulated by law and the competitors are forced to use the existing network based on the different legal titles. In these cases, network ownership is a problem of immediate importance. Usually the network is owned by local government enterprises or the homeowners. For this reason the homeowners have no real possibility to choose a service provider because their choice is limited by the existing right to the network of their present provider.

8. List of the judges who participated in ENTRANCE 2011

1. Elka Ermenkova, District Court of Blagoevgrad (Bulgaria)
2. Dimitrina Petrova, Varna Regional Court (Bulgaria)
3. Ivan Georgiev, Vidin District Court (Bulgaria)
4. Bertan Ozerdag, Nicosia District Court (Cyprus)
5. Pol Van Iseghem, Commercial Courts of Ieper and Veurne (Belgium)
6. Virgo Saarmets, Tallinn Circuit Court (Estonia)
7. Agnès Maitrepierre, French Supreme Court (France)
8. Andreas Dühr, Koblenz District Court (Germany)
9. Oliver Sporré, Amtsgericht District Court (Germany)
10. Dimitrios Kitsios, Court of First Instance of Grevena (Greece)
11. Katalin Gombos, Court of Appeal of Szeged (Hungary)
12. John Cooke, Irish High Court (Ireland)
13. Paola Ponassi, Genoa Court of Appeal (Italy)
14. Ivana Acacia, Court of Messina (Italy)
15. Judite Maulina, First Instance Court of Jelgava (Latvia)
16. Ieva Kalytienė, 2nd District Court of Vilnius (Lithuania)
17. Joseph Azzopardi, Valletta Civil Court (Malta)
18. Łukasz Piebiak, Court of Warsaw (Poland)
19. Ewa Stefanska, Warsaw Court of Appeal (Poland)
20. Carlos Marinho, Lisbon Court of Appeal (Portugal)
21. Maria José Costeira, Lisbon Commercial Court (Portugal)
22. Maria de Fátima Reis Silva, Lisbon Commercial Court (Portugal)
23. Catalina Ilea, Tribunal of Bucharest (Romania)
24. Raluca Elena Dinculescu, Tribunal of Bucharest (Romania)
25. Martin Baran, District Court Prešov (Slovakia)
26. Lidija Smolar, Ljubljana District Court (Slovenia)
27. Ignacio Ulloa Rubio, Spanish Constitutional Court (Spain)

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