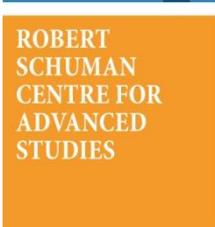




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# WORKING PAPERS

RSCAS 2014/68  
Robert Schuman Centre for Advanced Studies  
European Networking and Training for National Competition  
Enforcers (ENTraNCE)

European Networking and Training for National  
Competition Enforcers (ENTraNCE 2012)  
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** 2014/68

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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.

Information concerning ENTraNCE training program can be found at: <http://www.eui.eu/Projects/ENTRANCE/Home.aspx>

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 judgment 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 2012). The training program was organized by the RSCAS between September 2012 and June 2013 with the financial contribution of DG Competition of the European Commission. The case notes included in the working paper summarize judgments of new EU Member States and candidate countries 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

Each year the national judges who attend the European Networking and Training for National Competition Enforcers program (ENTraNCE) are asked to write a short case note about a notable judgment in their jurisdictions. The present case notes form part of the training program organized by the RSCAS between September 2012 and June 2013 with the financial contribution of DG Competition of the European Commission. The case notes included in the working paper summarize judgments of new EU Member States and candidate countries 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 Regulation 1/2003. The cases are presented orally during the training session and discussed among the judges.

We can read these cases both for their substantive content but also as a way of taking the temperature on how competition law litigation fares in the national courts. While this is an admittedly selective sample of cases, the signs are that the convergence in competition law enforcement sought by the Commission is taking place, in that the approach of the national competition authorities (NCAs) and the reasoning of the judges on appeal tallies closely that of the European Commission and the European Court of Justice.

It is perhaps remarkable that there are few cases among those selected here where EU competition law was applied without proper legal basis, and, not surprisingly, the courts quashed the decision once ascertained that the effect on trade test had not been met (see *Case U 5/2008*, chapter 4.5). However, this is fully understandable when we consider that for many goods and services markets remain local. Moreover, it is not clear what the added value would be of applying both EU and national competition law to the same infringement: in virtually all cases this would not make a difference as the rules are virtually the same.

In what follows, sections 1 and 2 below explore those judgments where we see a strong degree of convergence with the EU law norms. Section 3 instead considers some unusual applications of competition law – what is most striking here is the choice to use antitrust law when other rules may have appeared more apt. Section 4 pursues a similar theme in that the application of competition law in regulated industries continues to cause problems, in particular, it seems, as a result of a weak regulatory agency with limited powers. Section 5 moves to consider the relationship between competition law and related rules noting that at times the laws of unfair competition complement (and at other times conflict with) the antitrust rules. Section 6 turns to private enforcement and while the amount of case law is limited the judgments under review here show that issues of proof will continue to make claims difficult. Section 7 notes that sometimes the culture of competition is not quite there yet as the parties colluded in public.

This ENTraNCE programme had a close look at the state aid rules and the cases reviewed in section 8 reveal one of those issues that needs to be confronted by the national and Union legislator as a matter of urgency: how far the procedural rules need to be improved to ensure that decentralised state aid enforcement becomes an effective means to complement the Commission's powers. Section 9 presents a brief conclusion.

## 1. Convergence on substantive law issues...

A number of judgments reveal progressive convergence with the EU norms. The reasoning in these cases is on a par with the approach one would expect from the Commission and is faithful to the case law of the ECJ. For example the Romanian court's judgment in *SC P.R.F. SRL v. Romanian Competition Authority* (see chapter 2.2.) is a resale price maintenance case that is reasoned just like any Commission decision, and *Specialus Montażas and Eksortus v. Lithuanian Competition Authority* (see chapter 2.6.) is a bid rigging agreement that is found to restrict competition by object. *Siemens and others v. Hungarian Competition Authority* (see chapter 2.4.) is the Hungarian case upholding fines for the Gas Insulated Switchgear cartel, which had also been tackled by the Commission and the Czech authority and which raised issues pertaining to the legitimacy of multiple proceedings.<sup>1</sup> *Promet LLC and others v. Croatian Competition Authority* (see chapter 2.5.) is a cartel case in the bus transport market where the authority inferred collusion from parallel pricing and the absence of any plausible explanation for this parallelism, given the different cost structures of the parties. The Slovenian Supreme Court also upheld a cartel decision on the basis that the parties could give no reasonable explanation for the parallelism of their conduct and so it was concluded that there had been a concerted practice (*U 5/2008*, see chapter 4.5.). This is quite remarkable considering that, on contrasting collusive behaviours, even the Commission finds that rely on economic evidence of collusion is often complex and, whenever possible, prefers to rely on leniency applications and tangible evidence.<sup>2</sup> The Slovenian judgment in *X Ips* (see chapter 2.6.) is a cartel where the court applies the principles established by the ECJ to test if two firms are part of a single economic entity. Likewise in *Freeport of Riga v. Latvian Competition Authority* (see chapter 4.6.) the Supreme Court applied the functional notion of undertaking as set out by the ECJ and condemned the port authority for favouring its downstream operators at the expense of other rivals.

One also see convergence of sorts in failures: just as the Commission struggles to regulate excessive prices, so did the Lithuanian NCA in *Vilniaus Energija v. Lithuanian Competition Authority* (see chapter 4.1) where the court quashed the NCA's decision finding that the holder of an essential facility had exploited its dominant position by setting excessive fees. Here the NCA, in the opinion of the court, had used the wrong benchmark to test if prices were too high. Not all unfair pricing claims are doomed to fail, of course. In *T-Mobile Macedonia JSC v. Macedonian Competition Authority* (see chapter 4.8), the NCA was successful in applying competition law to the termination prices of T-Mobile, who charged callers that used the voice mail service from the moment the service provider announced that it was routing the call to voice mail, and not from the moment the recording began. The NCA considered that this was an exploitative abuse, and the court on appeal did not consider it relevant that similar charges were also imposed by operators in other EU Member States. These cases suggest that it would be helpful for the Commission to provide guidelines for exploitative abuses. This is particularly important in new EU Member States, where it appears that the authorities are prioritising exploitative rather than exclusionary abuses.

## 2. ... And convergence on procedural issues

As is well known, Regulation 1/2003 provides for minimal coordination of procedures. This leaves it to national courts to assess how to best adapt procedural issues so that competition law is enforced effectively. In some cases the courts achieve a convergent outcome, for example the Polish court in

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<sup>1</sup> Case C-17/10 Toshiba (14 February 2012). See Botta 'testing the decentralisation of competition law enforcement: Comment on Toshiba'(2913) 38 *European Law Review* 107, Monti 'Managing Decentralised antitrust enforcement: Toshiba'(2014) 51 *Common Market Law Review* 261

<sup>2</sup> The use of economic evidence that allows one to infer a concerted practice was confirmed in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. *Ahlström Osakeyhtiö e.a. (Woodpulp II)* [1993] ECR I-1307

*T.P.P.D v. Forestry Enterprise of Dobrzejowice* (see chapter 3.4.) applies the principles in *Masterfoods* to determine the precise relationship between public and private enforcement.<sup>3</sup> In *Marianum v. Slovak Competition Authority* (see chapter 3.5.), instead, one might wonder if the Court's approach is too conservative. Here the applicant had been fined for several abuses of a dominant position, and many of these abuses were not among those listed in the article: the competition authority applied the general provision on abuse and found other conduct to be abusive. On appeal, the question arose whether it was legitimate to impose a fine for such conduct on the basis that doing so infringed the principle of *nullem crimen sine lege* (no crime without a legal text explaining the nature of the offence). The court agreed that no fines could be imposed for these abuses when it was the first time that the competition authority found such conduct to be abusive. The case dealt with a very local abuse by a funeral parlour, so precisely the sort of conduct for which national authorities are best placed to enforce competition law. However, should an NCA really be prohibited from imposing a fine whenever it discovers a new abuse, even when the abusive conduct is so clearly exclusionary?<sup>4</sup>

### 3. Exotic cases

National courts sometimes are also willing to make reference to some of the more exotic approaches espoused by the ECJ. For example, in *INA Industrija nafte d.d., Zagreb vs. Croatian Competition Agency* (see chapter 3.1.) the national competition authority found an abuse of dominance where the seller of airline fuel set prices in a discriminatory manner in the downstream market, harming one of the airlines. At first blush, it is not clear why Article 102 should apply because the dominant firm was not a player in the downstream market, so that its interest in excluding a downstream rival is uncertain. However there is established case law (incidentally also in an airline market) suggesting that an abuse of a dominant position does not require proof that the dominant firm gain from the abuse of dominance.<sup>5</sup> However, it is not particularly clear why this kind of conduct falls to be regulated by competition law. It is perhaps for this reason that the Croatian authority did not impose a fine but only an order requiring that price discrimination cease.

*T.P.P.D v. Forestry Enterprise of Dobrzejowice* (see chapter 3.4.) is a remarkable case where a firm dominant in the market for the sale of wood made a contract to sell wood conditional on the buyer also buying one of the bad debts the company had. It is often said that the possibilities of abuse under Article 102 are endless, but this one is really extraordinary. Interestingly this was a damages action for abuse of dominance, but concurrently the Polish Competition Authority had received commitments from the dominant firm to stop such tied sales. It is perhaps worrying that if such conduct is clearly exploitative that the NCA did not consider imposing a fine to deter such conduct. This shows the need for tighter control of the commitment decision device.

A bizarre use of competition law is found in *EVN Bulgaria Electricity v. Bulgarian Competition Authority* (see chapter 4.2). Here the local electricity retail monopoly refused to supply electricity to the owner of a property unless the owner paid the bills which had been incurred by the property's previous tenant. Under the relevant Bulgarian law the owner had no such obligation to pay but he did so anyway and then complained to the competition authority, who found that the monopolist had used its dominance unfairly and condemned it to pay a fine. This is mystifying: the owner of the property would have been better off resisting payment and could have legitimately done so without having recourse to competition law. Moreover, the refusal to supply a universal service such as electricity is

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<sup>3</sup> Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I- 11369.

<sup>4</sup> In case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission* judgment of 6 December 2012, paragraphs 162-166, the ECJ held that the novelty of an abuse finding was irrelevant when the conduct in question was clearly anticompetitive

<sup>5</sup> Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929. This was also followed by the British courts in *Arriva the Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch).

probably, at least primarily, a matter for the national regulatory authority, rather than the competition agency. Even more peculiar is the fact that in another case with nearly identical facts *Bulgarian Competition Authority v E.ON Bulgaria Sales SC* (see chapter 4.4.) the court characterised the abuse as a refusal to supply, rather than as an exploitative abuse. The last approach is much to be preferred, because traditionally refusals to supply are only an abuse when they are exclusionary and a way for the dominant player to leverage its position from one market to another, which was not the case here.<sup>6</sup>

#### 4. Competition Law and Regulated Industries

It is to be expected that state monopolies would remain good clients of competition authorities long time after liberalisation is triggered. In *AS Eesti Post v. Estonian Competition Authority* (see chapter 4.10), for example, the dominant postal services provider used its dominance in the market for delivering post so as to favour its own upstream business (of preparing mail) and exclude a would be competitor.

The overlap between competition and regulation is also found in *Macedonian Competition Authority v. EVN Macedonia AD* (see chapter 4.3.) where the competition authority acted against the monopoly supplier who adopted a surcharge above the rates authorised by the energy regulator. While this was welcomed for reducing the tariffs, it is not clear why this practice was not stopped by the regulator. However, as the experience of the Commission has shown, at times the national regulator is insufficiently pro-active so that competition law has to step in.<sup>7</sup>

A further example of the limits of regulation is found in *Telekomunikacja Polska S.A v. Polish Competition Authority* (see chapter 4.9). Here, new firms had entered the market for international calls by allowing users of fixed line phones to select alternative carriers. The incumbent deployed an exclusionary strategy by which it increased the charges for carrier selection by 100%. The first attempt at challenging this failed because the court of appeal went beyond the points pleaded (by also noting that the incumbent had reduced its international call rates and that this was necessary to establish the abuse) and so its judgment was quashed by the Supreme Court on the basis of the *non ultra petita* principle. This is one of the few cases reported here where the NCA also applied Article 102, given the clear possible effect on trade. It should be noted also that the NCA had, on the basis of Article 11 of Regulation 1/2003 sent a draft decision to the Commission, who had approved of it. This is a clear reminder that even if the decision is satisfying for the Commission, national procedures continue to matter.

Another instance where the regulator's approach appears problematic is in *Mobiltel JSC and others v. Bulgarian Competition Authority* (see chapter 4.7): here it appears that the regulator had found that the three main telecoms players were dominant, on the basis that their market shares exceeded 25 per cent. However the competition authority determined that none were individually dominant when two complained about the other's practices. In this case the competition authority and the court simply concluded held that there was no single firm dominance on the market. This case is a reminder that better coordination between the regulator and the competition authority is necessary – at least insofar as defining markets and identifying market power, the two authorities should be reaching the same conclusions based on the same facts.

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<sup>6</sup> Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co.* [1998] ECR I- 7791.

<sup>7</sup> See G. Monti 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) 4(2) Competition Law Review 123.

## 5. Overlap of competition law and other norms

The *Iberia v SEAT* (see chapter 2.1.) case is an excellent example of the application of Article 3(3) of Regulation 1/2003. Here was an arrangement that is perfectly unproblematic under competition law: a non-dominant manufacturer terminate a distribution agreement because it chooses to integrate vertically into distribution. Absent a dominant position, the rescission of the contract with its existing distributor is not anti-competitive, nonetheless the Polish court finds that other provisions regulating ‘unfair competition’ apply to protect the existing distributor. This judgment reveals one of those issues that require urgent attention: what is the relationship between competition law and the laws of unfair competition? It seems as if the latter in Poland are designed to protect existing market operators and their viability and reputation, which both could be harmed by a terminated contract. However, there is a risk that these types of protective measures stifle the benefits that competitive markets should provide.

A case where instead the unfair competition laws appears to usefully complement the antitrust laws is *Raiffeisenbank Bulgaria Ltd v. Bulgarian Competition Authority* (see chapter 3.3). Here a bank had promised any customer buying a mortgage that they would get a free life insurance cover. However after some time it cancelled this deal without informing the recipients. It was found that this was an act of unfair competition because it allowed the bank to secure a competitive advantage on the home market, at the expense of other banks. On the facts the bank had tried to mitigate the effects of its action, so the fine was reduced. This is a neat example of how other national laws may complement EU competition law. Presumably these laws remain valid in that they fall under Article 3(2) of Regulation 1/2003, authorising the application of stricter rules to unilateral conduct that has anticompetitive effects.

## 6. Private enforcement

*Klevo Lapas v. ORLEN Lietuva* (see chapter 3.2.) shows some of the difficulties that plaintiffs face: in this case the abuse under domestic law had been established by the NCA, however under Lithuanian Law the decision of the NCA is not binding for the court, which raises the risk that the abuse needs to be proven all over again by the claimant. Under EU law, it is envisaged that this should soon change, making the final decision of an NCA binding.<sup>8</sup> Furthermore, the case is an excellent illustration of another major issue: proving a causal link between the abuse (here, price discrimination) and the losses suffered (here, bankruptcy). The Court found that the plaintiff would have gone bankrupt anyway, so no damages could be obtained. One wonders if the claim might have met with more success had it been brought by the insolvency administrator and then only for the overcharges that the company paid.

In *Šiauliy Tara v. Stumbras* (see chapter 3.6.) the Lithuanian Supreme Court was given a further occasion to consider damages claims and, in this case, the Court accepted the binding effect of the NCA’s decision. However again, the causal link between the abuse and the damage was not proven for all claims. The plaintiff claimed damages for two losses: first that it did not receive certain discounts that the dominant firm had offered to other competitors, second that this caused it a loss of profits. The court, aided by expert evidence awarded damages for the first head of damages, but was not convinced the second (lost profits) had been proven satisfactorily. This is a general problem in damages cases worldwide, which is why not always claimants try to seek damages for post profits and recover the full damage inflicted to them by the competition infringement.

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<sup>8</sup> See Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404.

## 7. The culture of competition

*Lithuanian Competition Authority v. Events Planners Association* (see chapter 2.3.) is a cartel among service providers fixing a tender participation fee for would-be clients: it meant that if any client issued a tender and wished to receive a bid from one of the members of the association, it would have to pay a fee. This judgment is notable for the fact that the parties discussed the deal publicly, and for the fact that the competition authority only secured a success after an appeal to the supreme administrative court, revealing the importance of making parties and courts aware of the role competition law plays. In fact, such a clear-cut violation should not raise too many difficulties: it is a restriction by object. Perhaps it would have been worth the courts investigating the association's counter-argument: that customers often used the ideas from the bids without actually awarding the tender. This might serve as an objective justification: the participation fee is an attempt to ensure that the bidders have some protection from a tenderer who appropriates their ideas. However, at present it seems such types of "external" justifications are not in favour with the ECJ.<sup>9</sup>

## 8. State Aid Law in the national courts

State aid recovery is the principal remedy that is used to resolve unlawful aid cases. However, national procedures often stand in the way of effective recovery, and national courts remain reluctant to fully accept the supremacy of EU Law. An excellent illustration is *Frucona Košice* (see chapter 5.1.). This firm (in insolvency) had done a deal with the tax authorities by which it was agreed that it would pay only a portion of the tax. This agreement was sanctioned by the national court. The Commission then found that this was unlawful state aid. Two parallel legal proceedings then started. First, the beneficiary appealed against the decision of the Commission and the ECJ agreed that on the merits the Commission had not applied the relevant notions of state aid correctly, so that the matter had to be determined again.<sup>10</sup> Second, however the Slovak Republic tried to recover the state aid. The problem here was that the judgment of the commercial court authorising the tax repayment had the status of *res judicata*. This prevented the issue from being re-considered even on a different point of law. The Slovak republic passed special legislation to overturn this principle and sought to apply it retrospectively. However the Supreme Court found that the law's retrospective effects were unconstitutional. This episode reveals two problems: first that sometime national procedures stand in the way of effective enforcement of EU Law. This is a long-standing issue that is resolved slowly. The second is that compliance with the duty to recover aid while the Commission decision is on appeal, is problematic when, as here the ECJ then quashes the original decision. The interdependence of these two procedures renders state aid recovery incredibly complex.

National procedures also dominate the judgment in *Varteks d.o.o v. Croatian Agency for the Protection of Market Competition* (see chapter 5.2.) where an adverse state aid decision was quashed because the beneficiary of the state aid had not been afforded the rights to a hearing provided under general national procedural laws. This judgment suggests that when NCAs are empowered to apply state aid law (as here) clear special procedures need to be provided, not least because we have an independent authority reviewing the policy choices of the state, but which affect a third party and others who rely on the state's decision (in this case a bank relying on the state's guarantee for the beneficiary's debt). These procedures are available in some member states as the judgment in *DELTA M Skopje v. Macedonian Competition Authority* (see chapter 5.3.) shows. This case, however, also shows that it is not easy to secure compliance from the state when the NCA seeks information about alleged state aids, but absent such information state aid decisions become very difficult if not

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<sup>9</sup> See Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, judgment of 7 February 2013 where the ECJ rejected an argument that the parties had agreed to boycott an undertaking because it was operating illegally on the market.

<sup>10</sup> Case C-73/11 P *Frucona Košice a.s. v European Commission*, judgment of 24 January 2013.

impossible to take. Similar procedural problems plagued the judgment in *Laivite v. Klaipeda County State Tax Inspectorate* (see chapter 5.5.). Here it appeared that a sound state aid regime was in place by which the state monitored whether authorised state aid was being used appropriately, but the courts appeared to have determined that the rules were inapplicable in the circumstances and that the tax exemptions should only be assessed on the basis of tax law. This approach nullifies a sound state aid policy that had been set up in Lithuania.

Once the procedural hurdles are overcome, the case reports suggest that the national courts at times apply the substantive rules without difficulty, for example in *W. v. Polish Tax Authority*, the grant of tax relief as a means of stimulating investment was found to be a state aid that required notification (see chapter 5.4.). However in *LEGIYA JSC v. Tax Inspectorate* (see chapter 5.6.), a tax exemption for manufacturers was evaluated in a somewhat confused manner. On the one hand the decision is probably right on the facts: the tax exemption was granted on condition that the beneficiary invests in that specific part of Bulgaria. This would be an aid scheme that would benefit from exemption by the Commission. On the facts however it appeared that the beneficiary used the benefit to export more clothes and so did not benefit the region. The national court appeared to take the view that Article 107 TFEU would not apply if the investment was local, but that exports made the tax break one that affected trade between Member States. Here, with respect, it appears that the court confused the scope of application of EU state aid law (which may well even apply if the state aid is used to invest in the local economy) and the criteria for exemption.

## **9. A brief conclusion**

All the cases discussed below show that convergence in Member States enforcement of competition law is rapidly advancing. Substantial legal provisions are largely aligned so that the choice to use EU law or national laws is only a matter of jurisdiction, based on the effect on trade test, but should not have substantive consequences anymore. Nonetheless, many of the cases examined reveal how diverging national procedures still bear a great relevance in the common application of competition law across the Union and perpetuate unwanted discrepancies.

New Member States are often dealing with more blunt anti-competitive behaviours, such as overt restrictive trade agreements, and face a relative high frequency of cases of exploitative abuses, but the legal and economic contents of the violations they are contrasting is far from novel.

Questions of uncertain boundaries between competition laws and other laws, especially unfair competition, and issues of jurisdiction, particularly between NCAs and regulatory agencies, appear frequently but probably not more frequently than in the rest of the Union.

Private enforcement is still underdeveloped in the EU and the cases examined show some of the many problems and factors for this delay. It is to be hoped that the new proposed Directive by the Commission and also some strong “instructions”, like the Practical Guide for damages calculation issued in June 2013, may improve results in the future.

Enforcement of State Aid EU rules remains a thorny issue indeed, as it implies the reaching of a complex equilibrium between state powers, administrative bodies initiatives and the review decisions of the courts. The recent trend of the Commissions toward the adoption of detailed general and sectorial guidelines is particularly welcome in such a difficult field but may not be sufficient to solve all the remaining difficulties exemplified by the cases examined.



## 2. Cartels and Anti-Competitive Agreements

2.1. Anna Wasilewska, Warsaw District Court (Poland), *Iberia Motor Company v. SEAT*

**Judgment of the District Court of Warsaw issued on 7<sup>th</sup> January 2013, case number XXVI GCo 90/12.**

### Facts

In January 1993, SEAT as a supplier and Iberia Motor Company as a Polish distributor signed an agreement - "New Vehicle Wholesaler Agreement (NVWA)", regarding Seat cars distribution system in Poland. Under the agreement, Iberia was supposed to be an exclusive distributor of Seat cars in Poland.

Iberia created from scratch the profile of selling Seat cars in Poland and created a chain of authorized distributors and providers of repair and maintenance services for Seat cars. This activity was successful. Iberia contributed to popularization of Seat brand in Poland. Under NVWA Iberia remained one of the selective distributors of SEAT cars operating at the wholesale level within the European Economic Area and the exclusive wholesale distributor (national importer) in the territory of Poland.

Iberia has been cooperating with SEAT in the area of distribution in the territory of Poland of SEAT cars for a continuous period of nearly 20 years. Nevertheless, SEAT decided, after so many years of cooperation with Iberia, to terminate that cooperation and replace Iberia in the role of the national importer with an entity belonging to the Volkswagen capital group, to which SEAT belongs itself. In November 2011, SEAT terminated the "NVWA Agreement" by giving Iberia three years prior written notice. Presently the parties are arguing about the correctness of this termination of "NVWA agreement". The litigation in this matter is going to be performed before Arbitration Court in Vienna.

In 2012, SEAT decided to appoint Volkswagen Group Polska (a limited liability company in Poznan) to be a new distributor of Seat cars in Poland. Both SEAT and Volkswagen Group Polska belong to the same Volkswagen Capital Group.

In December 2012, Iberia filed to the District Court in Warsaw an application for an injunction as security of a claim, according to which the court was requested to prohibit SEAT from: (a) *concluding with Volkswagen Group Polska or any other entities having an enterprise in Poland of an agreement or agreements having as their subject matter the wholesale by SEAT to Volkswagen Group Polska or any other entities having an enterprise in Poland of SEAT cars with a view to their further re-sale on the Polish market, carried out from the territory of Poland;* and (in particular) (b) performance of such agreements.

As a justification of its motion Iberia pointed that both companies are arguing about the correctness of termination of "NVWA agreement" and it is not disputable that finally the agreement will terminate on 30<sup>th</sup> November 2014. Furthermore Iberia explained that securing its claims by the court is necessary, otherwise Iberia will be irretrievably excluded from the market.

Iberia stressed that it is beyond any doubt that the introduction to the Polish market of a new (the second) national importer of the SEAT brand, which is additionally related to the producer (member of the same Volkswagen capital group), while simultaneously depriving the first importer (Iberia) of supplies of products and indispensable market tools (promotion systems) inevitably leads to elimination of the first importer (Iberia) from the market still before the expiry of the Agreement. That is because one can hardly expect dealers to continue cooperation with the national distributor in place

to date and order cars from it, being aware that only the new importer guarantees continuity of supplies and favorable financial conditions as it is a member of the same capital group as SEAT is. Thus, the aim of the breaches of the Agreement with Iberia and, above all, the aim of SEAT introducing in Poland the second importer was to get rid of Iberia from the Polish market and take over the chain of dealers it had been building for many years.

## **Procedural History**

On the 7<sup>th</sup> of January the District Court in Warsaw adopted an injunction decision, which prohibited SEAT from:

1. (a) concluding any agreements with Volkswagen Group Polska or any other entities running their business in Poland *having as their subject matter the wholesale by SEAT to Volkswagen Group Polska or other entities any other entities running their business in Poland of SEAT cars with a view to their further re-sale on the Polish market, carried out from the territory of Poland;*

1. (b) *performing any agreements concluded with Volkswagen Group Polska or any other entities running their business in Poland having as their subject matter the wholesale by SEAT to Volkswagen Group Polska or any other entities running their business in Poland of SEAT cars with a view to their further re-sale on the Polish market, carried out from the territory of Poland.*

This prohibition is binding until 30 November 2014.

According to the Court's decision, every infringement of point 1a) is susceptible to a penalty of 5 000 000 PLN and every infringement of point 1b) is susceptible to a penalty of 50 000 PLN.

SEAT lodged an appeal against this injunction decision to the Court of Appeal in Warsaw but the procedure is time consuming and SEAT is obliged to wait for the final judgment.

In the meantime SEAT asked the District Court to change the decision by itself as evidently contrary to the Law but the Court refused.

## **Reasoning of Court**

The District Court stressed that it is beyond doubt that introduction on the Polish market of a new national importer of the SEAT brand, which is additionally related to the producer, while simultaneously depriving the first importer of supplies of products and indispensable market tools inevitably leads to elimination of the first importer from the market still before the expiration of the agreements.

It should be accepted that SEAT's actions may lead to considerable deterioration Iberia's situation as the lack of injunction will result in earlier pushing of Iberia out of the market by SEAT permanently and irreversibly.

The court also stressed that Iberia is right while stating that Volkswagen Group Polska, selling SEAT cars, will very quickly replace Iberia in its market function, i.e. the function of the national importer of SEAT cars, and push it out of that market, which will result in Iberia's losing its commercial relations with car dealers, which will be irretrievable even if Iberia prevails in the future proceedings.

Apart from the above, the Court explained Iberia proved the probability that the breach of rules of fair competition could adversely affect its reputation, which could lead to losing part of the market to the benefit of SEAT. Court evaluated SEAT's actions only in the light of the Polish Law, mainly Art.

15 the Act on Combating Unfair Competition (ACUC). This article forbids practices that introduce difficulties for other entrepreneurs to access the market.<sup>1</sup>

The Decision of the District Court does not contain any deliberations referring to the European Union Law or rulings of the Court of Justice of the European Union, but only references to the legal bases of the security granted contained in the Polish Law, i.e. to relevant provisions to the Code of Civil Procedure (CCP) and the Act on combating unfair competition (ACUC). NVWA between Iberia and SEAT should thus be evaluated in the light of the EU competition Law as it affects trade between Member States of the European Union.

## Comment

SEAT raised the following objections against the Court decision: breach of Art. 4(3) of the Treaty on European Union (TEU) in conjunction with Art. 101 of the Treaty on the functioning of the European Union (TFEU) and in conjunction with the provisions of Commission regulation (EC) no 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (regulation 1400/2002), and especially with Art. 4(1) (c) and Art. 5(2) (b) of that regulation, and also breach of Art. 34 TFEU in conjunction with Art. 101(1-3) TFEU and in conjunction with the abovementioned provisions of regulation 1400/2002, in all cases in conjunction with Art. 91(2) and 91(3) of the Constitution of the Republic of Poland (Constitution).

In my opinion, SEAT is right. The aim of the EU competition Law and also Polish regulation of Art. 15 of the Act on combating unfair competition (ACUC) is to increase the competition level between entities that operate in the market. It could never be argued that the appointment of a new distributor of goods (in this case: passenger cars) could be classified as hindering access to the market to the other distributor. Appointment of a new distributor essentially causes the level of competition to increase, because, as a consequence, retail sellers who buy goods with a view to their further resale to final recipients are given freedom of choice between wholesale suppliers and thus are enabled to prepare more competitive offers. If Iberia's reasoning given in the application is considered correct, then this would lead to a conclusion that the best market situation and the only situation compliant to competition Law would be a situation where there is one exclusive distributor, *i.e.* an actual monopolization of the geographical market. Each introduction of a competitor to the market would thus be considered as hindering access to the market to the "monopolist", who would then not be able to provide for the whole market but would be forced to share that market with a competitor. Such an interpretation of competition law is in direct contradiction of the act's aims and therefore unallowable.

It should also be stressed that the final beneficiary of effective market competition must be the consumer, understood as the final recipient of certain goods. This view is particularly stressed by competition protection authorities – both national and European. The aim of competition law is not the protection of a market structure itself, *i.e.* not taking care that a certain number of entrepreneurs operate within a relevant market. The aim of competition law is market effectiveness understood as proper allocation of production means and distribution, so that consumers may benefit therefrom. Strangely enough, arguments supporting the view that fair competition principles have been breached laid out in the application for an injunction contradict the views expressed above. The applicant concentrates on the fact that the cessation of cooperation will be detrimental to it, that it will lose sources of profit. However, it is arguable that the distribution of cars by the capital group, to which SEAT belongs, will decrease distribution costs and thus have a beneficial impact on the – commonly

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<sup>1</sup> The text of this provision may be downloaded from [www.uokik.gov.pl](http://www.uokik.gov.pl)

pointed out in the doctrine – “welfare” of the consumers, who will receive the same goods at a price lowered by the intermediary’s costs.<sup>2</sup>

As a conclusion it should be stated that the state of things created by the application for an injunction Iberia, should be considered as contrary to the abovementioned provisions of Regulation 1400/2002, and therefore could be considered by the respective competition authorities as an illegal agreement that restricts competition which is forbidden under Art. 101 of the TFEU and Art. 6 of the Act on competition and consumer protection.<sup>3</sup>

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<sup>2</sup> A legal opinion by Prof. dr hab. Władysław Czapliński and dr Maciej Taborowski (renowned specialists in European Law) by dr Cezary Banasiński and dr Monika renowned specialists in the area of competition Law and of the Law of unfair competition.

<sup>3</sup> This statute may be downloaded from [www.uokik.gov.pl](http://www.uokik.gov.pl)

2.2. Paul Pricope, Bucharest Court of Appeals (Romania), *SC P.R.F. SRL v. Romanian Competition Authority*

**File number 6264/2/2011, sentence 4017/15.06.2012**

**Facts**

The appellant, SC P.R.F. SRL (LTD), sought the annulment of decision 18/31.05.2011 of the competition authority (CONSILIUL CONCURENȚEI), which imposed a fine of 14.895.900 RON (about 3.200.000 EURO), and, in subsidiary, if the decision was upheld, the reduction of this fine.

The Romanian competition authority founded its decision on Art. 5 alin. (1) a) of Law number 21/1996 (Romanian competition Law) which is similar to Article 101(1) TFEU. It was established that several written agreements had been concluded between S.C. I S.R.L., S.C. A.S S.R.L. and SC P.R.F. SRL which stated that the provider (S.C. I S.R.L.) could fix the price which will be used by the retailers (S.C. A.S. S.R.L. and SC P.R.F. SRL), for selling the goods (fruits and vegetables) to the customer (final consumer).

This resale price maintenance agreement was considered by the Romanian competition authority to be a vertical agreement restrictive of competition by object (fixing prices) which restricted competition on the fruit market, which was, in their opinion, a medium infringement, punishable by a fine of 2 to 4% of the sales figure of the enterprises (in the meantime S.C. A.S. S.R.L. merged into SC P.R.F. SRL, so the fine was inflicted only to the provider S.C. I S.R.L. and to SC P.R.F. SRL, as the retailer).

**The Appellant's Main Arguments**

1. The contracts were not correctly qualified by the competition authority: they were not sales contracts, but agency (middleman) agreements (a contract which implies that the property of the goods (and the risks) will remain to the "provider" and the "retailer" will only offer the place and services to sell those goods, in exchange of a commission (allowance)). So, if the property was not transferred to SC P.R.F. SRL, it is natural that they could not fix the prices and they were established by the owner of the goods (S.C. I S.R.L.). Although the contracts stipulate the transfer of property, they indicated (Article 20) that the risks remained to the provider (S.C. I S.R.L.) until the goods were effectively bought by the customers, which, in the appellant's opinion, will mean that, in fact, this were agency (middleman) contracts. Furthermore, the contracts stipulated that, in relations with other parties, including organs of state control (sanitary directions, consumer protections etc.) the provider (S.C. I S.R.L.) was responsible for the quality of the goods, so that meant that the property was not transferred to SC P.R.F. SRL.
2. The amount of the fine was not correctly calculated. Even if the Court were to hold that this was a vertical agreement restrictive of competition by object (fixing prices), it was not a medium infringement, but a minor one. The arguments on this matter were that this was not a complex agreement, it had a short duration in time, it involved only 10 out of 115 stores that the claimant has in Bucharest, and its impact on the market was very limited.

The Court (Court of Appeal of Bucharest) considered that in this case there was a vertical agreement that restricted competition by object (fixing prices), but the infringement was not medium, but minor, so it reduced the fine to 7.447.950 RON (about 1.600.000 EURO), the equivalent of about 1% of sales

figures of the claimant (minor or “small” infringements are punishable by a fine of 0,5 - 2% of the sales figure of the enterprises).

### **Analysis of the Court**

The Court held that the contracts in cause were not agency contracts, but sales contracts, mainly for these reasons: the property of the goods was formally transferred from the provider to the retailer; the retailer bore the risk for the goods between the moment of receipt and the moment that the provider accepted the eventual return of the goods that were not sold; the appellant assumed some expenses that were not specific for the function of agent (middleman), but for the owner of the goods; the clause that transferred, finally, the risk to the provider (the goods that were not sold in a certain period were returned to the provider, without other expenses) is not a clause that can invalidate the transfer of property because is not forbidden (or uncommon) in a sales contract.

Being a sales contract, the property was transferred, so the fixing of the price by the provider, with the agreement of the retailer (claimant) was a vertical agreement that restricted competition by object.

The infringement was minor not medium because the area of the market affected was not large (Some stores, only in District 6 of Bucharest), and it was a vertical agreement (which, in general, is seen as less dangerous for the competition as a horizontal one). So, the Court decided to reduce the fine by 50%.

2.3. Irmantas Jarukaitis, Supreme Administrative Court (Lithuania), *Lithuanian Competition Authority v. Events Planners Association*

**Judgment of the Supreme Administrative Court of Lithuania of May 27, 2011. Case No. A<sup>858</sup>-294/2011**

**Facts**

Five companies, providing events planning services (e. g., corporate events, conferences, seminars, symposia, product launch events, fairs, concerts, etc.) decided to set up the Events Planners Association (further – the EPA) at the end of 2007.

One of the first tasks that the association and its members had been working on was to set up a fixed fee for the proposals (concepts) of events organization in competitions/tenders. Once the EPA was established several meetings took place and e-mail exchanges were rather common among the members of the EPA concerning the set-up of the fixed fee for the proposals (concepts) of the event organization – that is, if a customer organizes a tender in order to choose the best concept for the event, the services of which organization it wishes to buy, and a member of the EPA participates in a tender, the customer has to undertake by a contract to pay in advance the participant of the tender a fixed fee for presentation of the proposal/concept of the planned event. If a particular agency (participant of the tender) wins the tender, the fee is included in the price of the service. Otherwise the member of the EPA would refuse to participate in a tender.

On January 22, 2008 the meeting of the EPA board took place and decision was taken to fix the tender participation fee (approx. 580 EUR) as well as to draft a standard contract form concerning the payment of the fee by a customer.

On February 4, 2008 a director of the EPA distributed by e-mail a standard contract form to all members of the EPA. Information about the EPA decision was openly and widely distributed through various media (including major internet news portals) shortly after the EPA took the above mentioned decision.

On April 14, 2008 one more meeting of the EPA board (which was attended by representatives of all the members of the Association) took place. All participants noted that since the introduction of the tender participation fee, the number of incoming orders had decreased. It was believed that there was a tendency among clients to invite to tenders only events organizers who are not members of the EPA. All participants of the meeting acknowledged that the introduction of the tender participation fee worsened the ability of the EPA members to compete, especially when customers were looking for bargains, rather than quality services. Still the unanimous decision was taken not to change the tender participation fee practice and further to apply the requirement to pay the tender participation fee whenever the EPA member is invited to tender for the organization of an event.

The Competition Authority established that once the EPA decision was taken members of the Association closely coordinated their behavior concerning the application of the fee both through the EPA and directly among themselves. They notified customers about the requirement to pay the fee in order to attract a member of the EPA to a tender and refused to participate in a tender if a customer refused to pay the fee in advance. It was established that some of the EPA members participated in several tenders where a customer actually paid the fee in advance to participants of the tender although they didn't win the tender. It was not established during the investigation that some kind of sanctions were applied for non-compliance with the EPA decision. The Competition authority established that the practice to require paying the fee has not been applied since July 2008.

## Decision of the Competition Authority and Appeal Rulings

After analyzing all the information collected during the investigation, the Competition Authority decided that by the above described acts the companies and the EPA concluded an agreement on tender participation fees and that such actions violated Article 5 para 1(1) of the Competition Law, which basically mirrors Article 101 para 1(a) of the TFEU.<sup>1</sup>

The Competition Authority taking into account the nature of the services provided by the companies defined the relevant product market as the organization of events services. The geographical market was defined as the territory of the Republic of Lithuania. Thus the relevant market was defined as provision of services of events organization in the Republic of Lithuania.

The Competition Authority also concluded that it collected plenty of evidence concerning the conclusion of the agreement fixing the fee. Since all five companies acted in the same relevant market and the object of the agreement was to fix the price of the service, the Competition Authority decided that companies concluded a horizontal price cartel which is *per se* illegal (i.e. that it restricts the competition by object). Accordingly, since its aim is to restrict competition, there is no legal obligation on its part to analyze an actual or potential impact of the agreement on the competition. The Competition Authority also imposed fines to the undertakings concerned.

The undertakings appealed decision of the Competition Authority before administrative courts and put forward several arguments. They claimed among the other things that: the Competition Law is not applicable at all to the above described situation since it is regulated by provisions of the Civil Code concerning public tender / contests (liet. *viešas konkursas*); there was no price-fixing cartel since the object of the agreement was not a price of service (i.e., that agreement is not about provision of services); the agreement concluded by the applicants pursued a legitimate aim: to protect the members' intellectual property rights and/or their ideas and thus should be exempted under Art. 6 of the Competition Law.<sup>2</sup>

The Vilnius Regional Administrative Court by its ruling upheld the applicant's complaint and annulled the contested decision of the Competition Authority. The first instance court basically agreed with the applicants that the Competition Law is not applicable. The court concluded that the object of the agreement was not the price of a service (or provision of a service) but conditions under which an undertaking organizes a public contest. Thus clauses of an agreement fixing tender participation fee should be treated as part of the tendering process to which only provisions of the Civil Code are applicable.

The Supreme Administrative Court upheld the appeal of the Competition Authority, annulled the ruling of the Vilnius Regional Administrative Court and ruled that contested decision of the Competition Authority is valid.

The Court noted that there was no dispute concerning the facts established by the Competition Authority, the parties disagreed only concerning the interpretation and application of Law. As regards the assessment of the agreement from the point of view of competition law the Court noted that the concept of a product / service price should not be defined too narrowly and should be interpreted as

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<sup>1</sup> Art. 5 para 1(1) of the Competition Law: "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: 1) agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase <...>".

<sup>2</sup> "Article 5 of this Law is not applicable, provided the agreement promotes technical or economic progress or improves the production or distribution of goods, thus allowing all consumers to get additional benefit, also when:

1) the agreement does not impose restrictions on the activity of the parties thereto which are not indispensable to the attainment of the objectives referred to in this Article;

2) the agreement does not afford contracting parties the possibility to restrict competition in a large relevant market share".

including any elements or parts of price, which directly or indirectly comes within the scope of the price of product / service. The Court emphasized that Art. 5 para 1 of the Competition Law prohibits any contract which directly or indirectly fixes a price of a product (service) and referring to among the other things to the judgment *SPO v. Commission* of the Court of First Instance pointed out that the economic effect of the contested agreement was that fees to those companies which were not awarded the contract were paid by the organizer of the tender.<sup>3</sup> Thus the organizers of the tender suffered additional costs which in effect formed a part of the final price paid by the organizers of the tender for the service they wanted to buy, whereas those members of the EPA which didn't win the tender received a real economic benefit. Therefore the Court sided with the Competition Authority that the agreement should be treated as a horizontal price-fixing agreement from the point of view of Art. 5 para 1 of the Competition Law.

The Court noted that it is not the fee itself that is problematic from the point of view of competition law but the agreement of the undertakings to fix it. Although the applicants claimed that such a fee is necessary in order to protect their ideas, because some customers used abusive practices by collecting proposals (concepts) from applicants and then not buying the service itself, the Court rejected such an argument. It noted that horizontal price fixing agreements are viewed as restricting competition by object, therefore the Competition Authority has no duty to analyze the (potential or actual) negative effects of the agreement on competition. If the applicants want their behavior to be exempted under Article 6 of the Law, the burden of proof rests on the applicants that their actions satisfy conditions of that provision. In the Court's view, the applicants advanced arguments which justified the fee itself but not the agreement fixing it. The amount of the fee was not in any way reflecting the real costs of preparation of the concept of the service. Besides the applicants argued that introduction of such fee stimulated the practice of organization of tenders (which is itself beneficial to competition) instead of directly concluding a contract with a service provider which is chosen by a customer without a tender. The Court noted that the applicants have not provided any evidence supporting their claims, besides their internal correspondence showed the opposite effect of their efforts to introduce such fee.

## **Comment**

Although the case is about a classic horizontal price fixing agreement, it is interesting for its unusual object - the fee which was applicable by those competitors which participate in tendering proceedings. Thus the main issue was whether the fee is part of a service price.

The case is also a reflection of still rather low knowledge of competition law in Lithuania, although the Competition Authority made quite big efforts last couple of years in educating the business sector about the requirements of competition law. As mentioned above, the undertakings concerned publicly advertised their practices, thus the investigation of the Competition Authority was an easy one in this case.

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<sup>3</sup> Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289



2.4. Judit Gyarmathy, Municipal Court of Budapest (Hungary), *Siemens and others v. Hungarian Competition Authority*

**ABB-GIS Supreme Court decision**  
**Case No. Kfv.III.37.011/2012/6.**  
**Supreme Court as a court of revision**

Appellants:

No.1. Siemens Aktiengesellschaft Österreich  
No.2. Alstom Holding S.A.  
No.3. Siemens AG

Respondents:

Hungarian Competition Office (Gazdasági Versenyhivatal, GVH)

Interloper (in favor of the Defendant)

ABB Switzerland Ltd.  
ABB Management Services Ltd.  
ABB Mérnöki Kft.

## **Facts**

The appellants had concluded a cartel agreement with other undertakings and they engaged in concerted practices on the market of Gas Insulated Switchgear run by at least 72 kW voltage (GIS) and the market of the connected substations respectively.

The respondent found in its decision that this conduct was capable of restricting competition on the Hungarian market during the period indicated in the GVH Decision (April 1988-May 2004.). As a result of the infringement, the respondent imposed the following competition fines on the appellants: HUF 159,000,000 on appellant No.1, HUF 440,000,000 on appellant No.2 and HUF 80,000,000 on appellant No.3. The Defendant calculated the fines on the basis of relevant turnovers realized by thirteen projects run by the appellants in Hungary. This calculation relied on factual and partially on comparative data.

## **Judgement of the Metropolitan Court of Budapest**

The Metropolitan Court altered the GVH Decision and reduced the fines imposed as follows: the reduced fine of appellant No.1 was HUF 27,300,000, that of appellant No.2 was HUF 147,380,000 and the reduced fine of appellant No.3 equaled to HUF 29,250,000. The Metropolitan Court highlighted in its judgment that the behavior of the appellants violated the Hungarian Competition Act. The Metropolitan Court also articulated that in order to establish a violation, anti-competitive effects of a conduct do not need to be proved - it suffices to substantiate the ability to distort competition.

The Metropolitan Court upheld those provision of the GVH Decision in which the GVH set out that a cartel agreement was in force affecting the Hungarian market, the object of which was to restrict and distort competition. The Metropolitan Court amended the GVH Decision and reduced the fines imposed by considering only the turnovers pertaining to those projects which were carried out in fact.

## **Judgement of the Metropolitan Court of Appeal**

The Metropolitan Court of Appeal altered the judgment of the Metropolitan Court and it altered partially the decision of the respondent, reducing the fine imposed on appellant No.2 to HUF 416,000,000. In the reasoning of the judgment, the Metropolitan Court of Appeal underlined that an anti-competitive agreement which has as its object the restriction of competition qualifies as a hard core cartel.

It stated that the respondent was correct to rely on the list of projects presented in the annex of its decision when it found the infringement. The court set out that the cartel aimed at sharing markets, thus those members of the anti-competitive agreement who took part in the cartel continuously without any interruption committed an infringement. The court set out that when assessing a violation it is irrelevant whether a project had actually been implemented or whether was just planned and later on its implementation failed for whatever reason. Therefore, these circumstances are not relevant in the calculation of the fines. The mere existence of a cartel agreement constitutes an infringement, thus there is no need to prove the anti-competitive effects of the said conduct, its ability to restrict competition is sufficient to establish a violation.

Based on all the foregoing considerations, the court of second instance found that the decision of the respondent complied with the legal provisions as far as the setting of the fine is concerned. In this respect the respondent duly and carefully considered the specificities of the case at hand, therefore, the second instance court was not entitled to decrease the amount of the fine in case of appellants No. 1 and 3, whilst as for appellant no. 2. a decrease was made in the amount of fine to HUF 416 million on the basis of the calculation of the respondent.

## **Judgement of the Supreme Court**

The Supreme Court upheld the Contested Decision. The Supreme Court noted that the assumption of the appellant, whereby the inclusion of fictitious amounts for non-implemented projects into the relevant turnover would infringe the provisions of the Hungarian Competition Act, is wrong. The Supreme Court made its view clear that the potential tenders were viewed as being rightfully taken into account in the calculation of the fine. The Supreme Court stated that the Plaintiffs were wrong to argue that a fine could only be imposed in respect of realized (achieved) turnover.

The Supreme Court underlined that the fining method used by the respondent (and generally accepted by the Contested Judgment) took into account that there were only a few implemented projects, meaning that the relevant conduct mostly concerned potential projects (i.e. regardless of whether the project was subsequently cancelled or not).

2.5. Katarina Bulijan, Supreme Court (Croatia), *Promet LLC and others v. Croatian Competition Authority*

- **Judgement of the Administrative Court No 10643/2007 from 15<sup>th</sup> September 2010**
- **Decision of the Croatian Competition Authority No UP/I-030-02/2006-01/39, reg. number: 580-02-07-62-152 from 24<sup>th</sup> September 2007**

### **Facts**

The Agency for the Protection of the Market Competition (hereinafter, the Agency) by its decision, class: UP/I-030-02/2006-01/39 reg: 580-02-07-62-152 of 24 September 2007 (further in text: the Decision) determined the following:

1. Fourteen transporter undertakings, the plaintiffs among them, by explicit agreement, that is, by harmonized actions, explicitly determined the selling prices of bus fares with their simultaneous application starting from 1 July 2006 and that way they accomplished a prohibited agreement with the intention, and the result of preventing, limiting and violating market competition on the market for public line transportation of passengers in buses in internal road traffic on routes Zagreb-Split and Split-Zagreb and Zagreb-Šibenik and Šibenik-Zagreb.
2. Therefore, the agreement has been annulled.
3. It has been determined that Article 11. Of the contract for the execution of inter-city transportation of passengers which has been agreed upon on 10 April 2006 ( hereinafter, the contract) between contractors Čazmatrans LLC, seated in Čazma, and contractor Autobusni promet Inc., seated in Varaždin, and entrepreneurs under its control of Croatia bus Inc., seated in Zagreb, embodied the agreements prohibited by the Law on Protection of Market Competition.
4. As a result that, paragraph of Article 11 of the contract has been declared invalid.
5. It has been determined that enterprises Korčula bus LLC, from Korčula, Croag LLC from Zagreb and Autoprijevoz Lika LLC from Gospić never reached a prohibited agreement which is described in Articles I and II of the decision.
6. It has been determined that the decision will be published in the "Official gazette".

### **Arguments of the Appellants**

Appellant 1) Promet LLC in its dispute against the legality of the contested decision, states that the administrative file does not contain a single evidence that would point to the conclusion that it and the rest of the transport undertakings made any agreement on price adjustments for the route Split-Zagreb-Split, and that there were no agreements, understandings, written contracts etc. among the transport undertakings. It states that all the transporters have similar rates, since they have identical costs in terms of purchase prices of vehicles, driver salaries and allowances, the prices of fuel, lubricants and oil, cost of spare parts and commission rates for sold tickets at the bus stations, costs of station fee and toll fee. Prices which it charges covering its costs of transportation and other costs and projected profits of the company, realized in the market.

Appellant 2) Croatia Zadar- Line Inc. (in bankruptcy), in its dispute against the legality of the contested decisions, states that for many years it has not been transporting passengers , and due to its bankruptcy, it has no transportation aids, and that the only connection between them and this economic activity is found in the contract with Laurus LLC from Split, which was only formally in cooperation with appellant 2) and is de facto performing passenger transportation services

independently. Therefore, it is not in any way involved with the conclusion of the prohibited agreement.

Appellant 3) Laurus LLC from Zadar in its dispute against the legality of the contested decision states that it has undoubtedly increased the price of bus tickets at the beginning of summer 2006, which presents the long-standing business practice of road transport to increase fares at the end of the school year or reduce their price at the beginning of the school year, so the disputed decision was wrong. In order for a prohibited agreement to arise, the appellant would have had to offer the same type of services as other transport undertakings (direct-express) on the same route, and it has not done that because it was transporting passengers from one place to another. Besides that, he never performed transportation on the route-Zagreb Šibenik-Šibenik-Zagreb and the wording of the disputed decision is in conflict with documents and records.

Appellant 4) Autoprometno poduzeće Inc. Požega in its dispute against the legality of the contested decision states that the fares on the routes Zagreb-Split and Zagreb-Šibenik had been increased in the same fashion as every year before the start of the summer season. It is, neither in a contractual relationship, nor affiliated or dependent on other transport undertakings which are parties in the proceedings and it is free to determine the prices for transport without any external influence. Regarding the appellant's participation in the relevant geographic market, it stated that it had not been transporting passengers on the routes Zagreb-Split and Zagreb-Šibenik, but on the route Požega-Split, which are parts of routes Zagreb-Split and Zagreb-Šibenik. Unlike other transport undertakings, transportation of passengers on the route Požega-Split had been performed on daily basis only during the period from late June to mid-September, and the rest of the year only for two days a week. Therefore, it has not been proven that there was a concerted action or explicit agreement with other transport undertakings about the prices of bus fares on routes Zagreb-Split and Zagreb-Šibenik.

Appellant 5) Autotransport Inc. from Šibenik, in disputing the legality of the contested decision, states that it is mostly owned by Bus Transport Inc. Varaždin who holds a major stake. In such position the appellants had no possibility to affect the pricing policy in intercity traffic nor signed any agreement to that effect. From pricing of products provided to the Agency, it is evident that such a calculation requires a change to higher prices than the then current, but because of the passenger standard it is impossible to enter the market competition with these prices, it has been decided that, at least in part, the related companies apply lower prices.

Appellant 6) Autopoduzeće Imotski Inc. (in bankruptcy) in disputing the legality of the contested ruling refers to the provision of Article 10, paragraph p.1. and 3 of the Law on Administrative Disputes perceiving it vague and incomprehensible because it does not mention or specify which agreement it is about, who are its participants and signatories. Most of the parties in the dispute do not have any actual or legal ties, except with those that it has legitimate contracts. The appellant is not a competitor with Autopoduzeće Imotski Ltd. with which it has signed agreements of cooperation, particularly because it is the holder of a joint concession for certain transport routes, and therefore it offers the same prices.

### **Arguments of the Respondent**

The respondent retain the position that the reasons for the contested decision were based on the provisions in Article 35, paragraph 3 of the Law on Protection of Competition, in accordance with the provisions of Article 70, paragraph 2, of the Agreement on Stabilization and Association, along with the Croatian legislation and it comes from the criteria of the European Community (now European Union) and the examples of practices of European courts, according to which prohibited agreements include both the agreement on the level of the harmonized costs and also price increases and the amount of time for the increase of prices.

Regarding ticket prices, the Agency stated that the form of the agreement is not important because the existence of identical prices and time coordination of their publication and application indicate a joint intention by the respondents to conduct themselves on the market in a certain way.

### **Ruling of the Administrative Court**

The Administrative Court in its review of the legality of the contested decision has brought a verdict no. US-10643/2007 on 15 September 2010 dismissing the claims as unfounded, saying that the respondent had properly conducted the proceedings in which it had accurately and completely established the facts, and did not violate the Law to the detriment of the appellants.

In doing so, the Court follow applied the following legal provisions:

1. Article 9, paragraph 1 of the Law on Protection of Competition,<sup>17</sup> which prohibits agreements between entrepreneurs, any agreements, certain provisions of the contract, explicit or implicit agreements, concerted practices, decisions by associations of entrepreneurs which have the intention or the effect of the prevention, restriction or distortion of competition in the relevant market, and in particular those which: 1. directly or indirectly determine the purchase or selling prices or any other trading conditions; 2. limit or control the production, markets, technical development or investment; 3. share markets or sources of supply; 4. apply unequal conditions to equivalent undertakings to various entrepreneurs, thereby placing them at a disadvantage compared to the competition, and 5, makes the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts.
2. Article 9, paragraph 2 of the same Act, under which agreements which prevent, restrict or distort competition within the meaning of paragraph 1 of that Article, and cannot be exempted in terms of Article 10 of that Act, are null and void.

The Court relies on the fact that the agency:

1. reviewed the price lists submitted by the Zagreb bus station and the official website of the bus station to determine that all contractors which provide bus services on the routes Zagreb-Split and Split-Zagreb transported passengers at unique price in of 150.00 kn, and on the routes Zagreb-Šibenik-Zagreb at unique price in the amount of 128.00 kn and with concurrent administration with effect from 1 July July 2006 and that transport undertakings delivered new pricing services from 1st and 4th of July 2006, applicable from 1st of July 2006;
2. requested a statement from the transport undertakings about the reasons for the determination of the listed price of bus fares and method of pricing, delivery, and an opinion from the Ministry of Sea, Tourism, Transport and Development, the Croatian Chamber of Economy, the bus stations in Zagreb, Split and Šibenik, and the Association for Consumer Protection.
3. Found that the transport undertakings had different business relationships with different suppliers of products and services (fuel, insurance, car parts, etc.) and that there was no consistency in the calculation of the ticket prices and that some transport undertakings had not made the calculations of ticket fares, and that the prices which were in force prior to 30 June 2006 ranged from 90.00 kn to 150.00 kn on routes Zagreb-Split and Split-Zagreb and Zagreb and Šibenik to Zagreb from 120.00 kn to 138.00 kn, that the transport undertakings determined them arbitrarily , and that the transport undertakings by providing the transportation service on these routes traversed different distances.

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<sup>17</sup> Official Gazette issue 122/2003

The court ruled:

1. That the agency concluded that the legal and economic analysis confirms that transporters Promet LLC from Makarska, Croatia Zadar-Line Inc. in bankruptcy, Laurus d.oo. from Zadar Autoprometno poduzeće Inc. Požega, Autotransportno poduzeće Inc. from Imotski Inc. in bankruptcy, Autopoduzeće Imotski Inc. from Zagreb, Autobusni promet Inc. from Varaždin, Inc. Autotransport Karlovac, Karlovac, Croatia bus Inc. from Zagreb, Čazmatrans Transport Ltd. from Čazma Denibus LLC from Zmijavci, Laurus LLC from Zagreb, Samoborček Ltd from Samobor and Vojvodić Promet from Blato, contrary to the current practice on other routes in Republic of Croatia, in advance harmonized the prices of one-way bus fares on these routes and reported them to the bus stations within a few days of each other, starting with concurrent application on 1 July 2006.
2. That the correct assessment of the contested decision was that it identified a prohibited agreement according to the Article 9, paragraph 1 of the Law which aims to prevent, restrict or distort competition in the relevant market. The fact of the identical price, timing and application disclosures indicates a mutual intention among transport undertakings to conduct them on the market in a coordinated way, despite the fact that the transport undertakings operate on the disputed routes travel different distances, offer different quality of services, and obtain their supplies (e.g. petrol) from different suppliers at different prices.
3. That it properly assessed the status of Croatia Zadar-Line Inc. (in bankruptcy). This appellant is the permit holder for performing inter-county regular services, and the permit is not transferable and that transportation service shall only be conducted with the license under the provisions of the Law on road transport, which means that the transporter is a party to prohibited agreement,
4. That the plea of of Laurus Ltd. regarding its negligible market share was unfounded. This was because an agreement on prices presents a severe limitation of competition, irrespective of the market power of the parties.
5. Irrespective of the fact that Autotransport Inc. from Šibenik is predominantly owned by Autobusni promet Inc. Varaždin, which indicates that these are affiliated companies, it is possible to find an agreement or concerted practice between related companies and other firms in the relevant market that , and such an agreement cannot be exempt pursuant to Article 10 of the Law.
6. It rules undecided the plaintiff allegations of Autopoduzeće Imotski Inc. in bankruptcy in respect of contracts on cooperation with Autopoduzeće Imotski Inc., and when they were reviewed during these proceedings and rated by the agency that those are not prohibited under the provisions of the Act, therefore, in accordance to the agreed rates between transporters Autopoduzeće Imotski Inc. in bankruptcy and Autopoduzeće Imotski Inc. had not been subject to this procedure.

Therefore, the Court has, based on the provisions of the Act on Administrative Disputes Article 42, paragraph 2 dismissed the appellants' complaints and ordered that the verdict shall be published in the "Official Gazette" on the grounds of Article 59, paragraph 2 of the Law for the Protection of the Competition.

## 2.6. Tina Omejc, Supreme Court (Slovenia), *X Ips v. Slovenian Competition Authority*

- **Decision of the Competition Protection Office of the Republic of Slovenia Decision of 26th February 2007**
- **Judgement of the Supreme Court of the Republic of Slovenia Judgement X Ips 113/2010 of 11th October 2011**

### **Facts**

This case is an example of public enforcement of competition law dealing with concerted practice of undertakings. It focuses on the single economic entity doctrine.

Slovenian National Competition Authority (hereinafter (Slovenian) NCA) issued a Decision on 26th February 2007 against four banks - A, B, C and D. The banks introduced a commission of 80,00 SIT (now approximately 0,33 EUR) that had to be paid by their clients for cash withdrawal with domestic debit card at the ATMs of other banks. The Slovenian NCA concluded that the banks' behaviour constituted a concerted practice.

Judicial review of the NCA Decision was carried out according to the rules of the old Slovenian Prevention of the Restriction of Competition Act (ZPOmK). The Administrative Court of the Republic of Slovenia (hereinafter (Slovenian) Administrative Court) carried out judicial review at first instance, whereas the Supreme Court of the Republic of Slovenia (hereinafter (Slovenian) Supreme Court) carried out judicial review in the second/last instance.

### **Ruling of the Slovenian Administrative Court**

The Slovenian Administrative Court dismissed the action filed by bank B. Therefore, bank B sought annulment of the NCA Decision of 26th February 2007 before the Slovenian Supreme Court. Bank B disagreed on the interpretation (of non-existence) of the single economic entity between bank A and bank B. Bank B did not succeed with the remedies.

The Slovenian Administrative Court took into account the capital links and management links between the banks, as well as the Strategic Partnership and Business Cooperation Agreement. The Administrative Court found out that capital and management links do not provide bank A with decisive influence on bank B's behaviour. It also found out that the subject of the Agreement was to act in a concerted manner with the aim of bank B becoming an associate member of the group A.

### **Ruling of the Supreme Court**

The Slovenian Supreme Court interpreted single economic entity doctrine in line with the ECJ case Law. In order to decide whether there is single economic unity, one has to answer the question whether the subsidiary has real freedom to determine its course of action on the market or not. Account must be taken of all the relevant factors relating to the economic, organisational and legal links which exist between the companies in the same group:

1. Capital links. According to the Supreme Court holding 49,42 % of the voting rights by itself is not enough for a decisive influence of bank A in bank B. When all shareholders are participating in the general meeting, bank A cannot achieve ordinary majority, much less qualified majority.
2. Management links. According to the Supreme Court the right to appoint three out of seven members of the supervisory board by itself does not provide a decisive influence on the supervisory board either.

3. Strategic Partnership and Business Cooperation Agreement. The Supreme Court concluded that the content of the Agreement does not give bank A decisive influence on bank B. Contractual obligation of the banks to act in a concerted manner on many areas shows independence of bank A and B. Otherwise such a contractual obligation would not make any sense. Single economic entity cannot be established, if concerted practice on the market is a consequence of an agreement between companies on their acting in a concerted manner. If a different view was taken, then cartel would be an economic entity as well.

The Supreme Court concluded that the Agreement represents a framework agreement or a concerted practice, whereas the introduction of commission for cash withdrawal at the ATMs of other banks represents an execution of this agreement.

### **Comment**

This case is another example of interpretation of national competition Law, which has its origin in EU competition Law. In such cases national courts take into account EU case Law and develop it further by applying it to the variety of facts in different individual cases.

2.7. Dalia Vasariene and Zelianka Vytautas, Supreme Court (Lithuania), *Specialus Montażas and Eksortus v. Lithuanian Competition Authority*

**Judgement of the Supreme Administrative Court of Lithuania in Administrative Case No A-552-2016-12, issued on 21<sup>st</sup> June 2012.**

**Facts**

The dispute in the case was caused by the Decision (hereinafter referred to as the Decision) of the Competition Council (hereinafter referred to as the Defendant) in which the Defendant decided that the Private Limited Liability Company “Specialus montažas - NTP” and the Private Limited Liability Company “Eksortus” (hereinafter together referred to as the Applicants) entered into the horizontal agreement prohibited by the Law on Competition of the Republic of Lithuania (hereinafter referred to as the LC) by which they agreed to submit negotiated tender bids regarding prices of goods, validity and legitimacy. The parties to the prohibited agreement without actually competing with each other and while coordinating their actions and prices in bidding for contracts in two calls for tenders made it complicated for the organizers of tenders to assess the actual prices of goods in the market and in this way violated Article 5(1)(1) of the LC which stipulates that all agreements which have the purpose of restricting competition or which restrict or may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof, including agreements to directly or indirectly fix prices of certain goods or other conditions of purchase or sale. For these actions penalties were imposed on them, i.e. fines constituting 1,2% of the gross annual income of the Applicants.

The Applicants applied to the court of first instance asking to annul the fines and to declare that the actions of the employees of both Applicants could not limit competition because of their minor importance. They stated that the Defendant had based the fact of the cartel agreement between the companies on assumptions about personal relations of the employees and had not attempted to find out whether the Applicants had an aim to limit competition; moreover, the imposed fines are unmotivated and not individualized.

**Ruling of the First Instance Court**

The court of first instance rejected the complaints of the Applicants as unjustified. The court established that the Applicants collaborated with each other in public tendering: in first case, the Applicants communicated before submitting tender bids; there were telephone calls among employees of the companies on the eve of the call for tenders; moreover, the public procurement documents of the competition organizer confirm that the final tender bids are basically the same (their form, structure, layout, the same grammatical and text formatting errors and inaccuracies, etc.); whereas, in the second case, the head of the Company “Specialus montažas – NTP“ sent the prepared tender bid of the Company "Eskortus" with the specified price to the director of the Company "Eksortus" via e-mail; the director of the Company "Eskortus" informed that she had signed the tender bid and sent it to those preparing tenders; the Company "Eskortus" submitted the same tender bid to the organizer of the tender. It was found out that in both companies the same employees worked during different periods of time; the companies were related by the same shareholder. The tender bids were negotiated between the Applicants; the Applicants did not compete with each other for submitting a better tender bid to the organizers of tenders; instead, they submitted the tender bids which had been coordinated in advance or during later negotiations. These actions made it impossible for the organizers of tenders to assess the actual conditions of public tendering. The damage is that the contracting authorities could not make use of advantages offered by normal public tendering. The court decided that the Applicants

entered into a cartel agreement (i.e. there was a horizontal agreement between opponents on coordinating prices while participating in public procurement procedures); therefore, the court did not apply the provisions regarding minor importance of the agreement which could not notably limit competition.

With reference to the size of the fines, the court concluded that the infringement (the cartel agreement consisting of two episodes) committed by the Applicants had been assessed as particularly serious. In the examined case, it was not found which of the Applicants was the initiator of the infringement. The data collected in the case file confirmed that both entities were active in performing actions constituting the elements of the infringement established in Article 5 of the LC; therefore, there is no basis for reducing the fines. The execution of the Defendant's instructions and provision of the requested information is not seen as help during the investigation. The court concluded that fines constituting 1,2% of the gross annual income of the Applicants, which were imposed on the Applicants by the disputed Decision, are small as compared to the maximum size defined by Law; therefore, if the fines were reduced, the aims of the penalty to punish and prevent similar infringements would not be achieved.

The Company "Specialus montažas – NTP" filed an appeal asking the court of first instance to overturn the Decision, i.e. to declare that the actions of the employees of the company were of minor importance and to annul the imposed fine. The applicant "Eksortus" filed an appeal asking the court of first instance to overturn the Decision and to reduce the fine imposed by the challenged Decision.

### **Ruling of the Supreme Administrative Court**

The Supreme Administrative Court of Lithuania rejected the appeals of the Applicants. The court stated that the aim of the provisions of Article 5 of the LC allows distinguishing two categories of prohibited agreements: agreements automatically limiting competition and agreements where it is necessary to determine and prove that they are contradicting the competition Law and have negative impact on competition. Agreements limiting competition per se which are defined in Article 5(2) of the LC belong to the first group. Thus, if the agreement falls into the application sphere of Article 5(2) of the LC (it is the case with price cartels), the defendant does not need to prove separately that the agreement is contradicting the competition Law and (or) has negative impact on competition. After the Defendant identified price fixing, in order to state that there had been an infringement, it was enough for him to find that the entities who were opponents to each other had entered into an agreement and that the object of the agreement was direct or indirect fixing of the price of goods (services).

The court stated that the exemption provided for in Article 5(4) of the LC which allows declaring that the agreement between the applicants could not limit competition notably because of its minor importance cannot be applied to horizontal agreements on prices irrespective of volume of the agreements, market share of the entities and other criteria.

Even though the appellants stated that both Applicants had acted as one economic unit in terms of competition law because they were related by mutual shareholders and employees, the court did not agree with such an opinion. The court concluded that the essence of organizing public procurement procedures is that entities competing with each other for orders submit tender bids on a competitive basis to acquire goods (services) and the contracting authority chooses the best of them; therefore, for the contracting authority (and in terms of the competition Law), the Applicants and other entities who took part in the public tendering and submitted commercial tender bids are seen as opponents and the fact that the entities are related by certain shareholders and employees and that these entities can be seen as related companies is not significant in terms of the competition Law for the examined case.

Pursuant to Article 41(1) of the LC, a fine of up to ten per cent of the gross annual income in the preceding business year shall be imposed on undertakings for prohibited agreements and other infringements. After holding that while imposing the fine the Defendant took into consideration the

nature of the infringement (cartel agreement on prices) and its gravity (serious), the number of tenders in which the Applicants participated and coordinated the prices (two episodes), the duration of the infringement (not longer than one-year) as well as mitigating and aggravating circumstances established in the case (no such circumstances established) and the influence of each of the entities on the commitment of the infringement (the initiator was not distinguished; both entities performed the same role), the court concluded that the fine constituting 1,2% of the gross annual income of the Applicants was imposed on the Applicants rightfully and reasonably.



### 3. Abuse of Dominance

3.1. Jelena Čuveljak, Zagreb Commercial Court (Croatia), *Dubrovnik Airline d.o.o. vs. INA-Industrija nafte d.d.*

**INA Industrija nafte d.d., Zagreb vs. Croatian Competition Agency, Class: UP/I-030-02/2009-01/035, 19 May 2011 (published in Official Gazette No 79/11), Court decision: High Administrative Court of the Republic of Croatia No. Us-7153/2011-8, 9 February 2012 (published in Official Gazette No 35/12)**

#### Facts

On 28 December 2009 Croatian Competition Agency (hereinafter: CCA) received a request from Dubrovnik Airline to open proceedings against INA -Industrija nafte Zagreb d.d. (hereinafter: INA) accusing it of restrictive practices contrary to competition law.

The claimant notably cited that INA, as a sole supplier of airplane fuel in the Republic of Croatia, abuses its dominant position in the market by setting the prices of fuel in an unfair manner when compared to the foreign suppliers of airplane fuel with whom Dubrovnik Airline d.o.o. (hereinafter: Dubrovnik Airline) cooperates abroad. Furthermore, the above mentioned undertaking cited that INA uses different criteria when defining the price of airplane fuels for Dubrovnik Airline from the criteria when defining the price of airplane fuels for the other air carriers causing Dubrovnik Airline to be in an unfavorable position in relation to competition.

INA, among others, is registered as a wholesaler of petroleum products, i.e. airplane fuel in airports in the Republic of Croatia, in seven main airports (Zagreb, Split, Dubrovnik, Zadar, Krk, Pula and Osijek) and two seasonal airports (Brač and Mali Lošinj). Dubrovnik Airline is registered for air carrier services.

The CCA defined the relevant market according to Articles 5 and 6 and Articles 7, 8, 9 and 10 of the Regulation on the definition of relevant market (Official Gazette No 51/2004, hereinafter: Relevant market regulation) as a market of wholesale of jet fuel JET A-1 in the Republic of Croatia and the market of supply of airplanes with jet fuel JET A-1 in airports in the Republic of Croatia.

Given that INA is a sole wholesaler of airplane fuel in the Republic of Croatia and a sole supplier of airplane fuel for airplanes, it is certainly determined that INA has a dominant position in the relevant market of wholesale of jet fuel JET A-1 in the Republic of Croatia and in the market of supply of airplanes with jet fuel JET A-1 in airports in the Republic of Croatia as specified in Article 15 Paragraph 1 item 1 of Croatian Competition Act (Official Gazette No 122/03).

Considering the claims of the claimant, CCA analyzed all sales agreements concluded between INA and its buyers in period between 2008 until 2010 to determine whether the same criteria when forming price for domestic and foreign buyers is applied.

By analyzing sales agreements it had been determined that INA concluded two types of standard agreements in reporting period, where it categorizes its buyers depending on their registered office location, and by which it distinguishes between sales agreements concluded with buyers whose head office is registered in the Republic of Croatia (hereinafter: domestic buyers) and sales agreements concluded with buyers whose registered office is outside of the Republic of Croatia (hereinafter: foreign buyers). Generally, both types of basic agreement are concluded for a one year period, and are extended by annexes for the following period, mostly for the next six months.

Consequently, INA does not set prices in the same way for two above mentioned categories of buyers. Furthermore, CCA determined that in the case of Croatia Airlines d.d. there exists an additional deviation when forming the selling price which INA applies in the case of domestic buyers.

Namely, in the case of domestic buyers the price in the basic agreements is defined as a price from the official pricelist of INA, which is delivered on a fortnightly basis and which contains several categories of structure of selling price, while in the case of foreign buyers the price is defined as an amount of Platt's quotation (indicator of trend in prices of petroleum products globally which is used when calculating domestic prices of petroleum products, pursuant to Act on petroleum and petroleum products) increased by the amount of premium for a single airport.

Since only the category of net selling price is transparent to domestic buyers, while at the same time they do not have insight in the basis of the selling price, the amount of Platt's 3 quotation, the method of statement of selling price for that category of buyers is obviously less transparent.

On the other side, Croatia Airlines d.d. has its selling price expressed in a special way in relation to domestic and foreign buyers. However, the share of Croatia Airlines d.d. in INA's sales of jet fuel JET A-1 for domestic buyers of 73 per cent, and share in total sales to all buyers of over 60 per cent makes it for a justified special discount tied exclusively with the volume of obtained products for that undertaking. For that reason, CCA did not consider the special discount for that undertaking as an application of dissimilar conditions to equivalent transactions pursuant to Article 16 Paragraph 2 item 3 of Competition Act.

Furthermore, by applying economic and legal analysis it was examined if the issue was solely about different expression of selling price in the case of domestic and foreign buyers, or it was about the different calculation of selling price. CCA analyzed the selling prices applied to domestic and foreign buyers from 19 June until 16 November 2008 in the Dubrovnik airport.

Results of this analysis in the observed period have shown that INA had used different ways of calculation of selling prices to domestic and foreign buyers, which resulted with different selling prices of jet fuel JET A-1 for every category of buyers.

Therefore, CCA concluded that the differences in contractual provisions, and consequently the price of jet fuel, by means of use of exclusivity criteria of domestic or foreign buyers, is by its nature discriminatory, pursuant to Article 16 Paragraph 2 item 3 of Competition Act.

With the assessment of every item of evidence separately and all the evidence together, and based on results of the entire procedure, CCA did not establish any justification for using different criteria when calculating the price of jet fuel JET A-1 for domestic buyers related to Croatia Airlines d.d. and foreign buyers, whose actions had a consequence of placing Dubrovnik Airline d.o.o., i.e. domestic buyers, at a competitive disadvantage in relation to competition, i.e. foreign buyers pursuant to Article 16 Paragraph 2 item 3 of Competition Act. Based on received documentation and assessed procedural aspects, comprehensive economic and legal analysis, the Croatian Competition Council (hereinafter: the Council) decided that INA restricted competition by abusing its dominant position on the relevant market of wholesale of jet fuel JET A-1 and the supply market of jet fuel JET A-1 in airports in the Republic of Croatia, pursuant to Article 16 Paragraph 2 item 3 of Competition Act.

The Council decided that INA by stipulating the price of jet fuel JET A-1 in ambiguous way in contract with Dubrovnik Airline, or by applying dissimilar conditions when calculating the price of jet fuel by which it supplies the undertaking Dubrovnik Airline from the conditions which it applies when forming the price of the same jet fuel for foreign buyers, has placed that undertaking, i.e. category of domestic buyers, at a competitive disadvantage.

The Council brought a decision which orders INA to change the restrictive provisions of jet fuel price from the sales agreements with domestic buyers of jet fuel JET A-1 in three months period from

the day of Decision delivery in a clear, transparent and non-discriminatory way determined for domestic and foreign buyers.

Also, the Council ordered INA to submit new contract agreements or annexes to the existing contracts as a proof of execution of the previously stated order in eight days time following the changes made on sales agreements of jet fuel JET A-1 with domestic buyers.

In June, INA submitted to the CCA new agreements concluded with its domestic buyers, in which the jet fuel price is specified according to a clear, transparent and non-discriminatory methodology. The Council established that they were composed in accordance with the order from the CCA decision and that they were not contrary to the competition legislation framework.

CCA brought a decision on 19 May 2011. INA filed a claim against decision to the High Administrative Court of the Republic of Croatia. The High Administrative Court of the Republic of Croatia delivered judgment on 9 February 2012 (No. Us-7153/2011-8, published in Official Gazette No 35/12) upholding the CCA decision.

### **Comment**

Perhaps the most important aspect of this entire decision on an abuse of dominant position is establishment of prevention, restriction or distortion of competition. In this decision it was established that INA, as a sole wholesaler of jet fuel JET A-1 in the Republic of Croatia and a sole supplier of jet fuel JET A-1 for aircrafts in airports in the Republic of Croatia in period from 21 April 2008 until 19 May 2011, restricted competition by abusing its dominant position in the relevant market of wholesale trade of jet fuel JET A-1 in the Republic of Croatia and the supply of jet fuel JET A-1 in airports in the Republic of Croatia by stipulating the price of jet fuel JET A-1 in an ambiguous way applying dissimilar criteria in forming prices of airplane fuels for Dubrovnik Airline and other domestic buyers, from the criteria which it uses when forming price of the same jet fuel for foreign buyers, thereby placing the above mentioned undertaking, i.e. domestic buyers, at a competitive disadvantage in relation to foreign buyers by applying dissimilar conditions to equivalent transactions with other trading parties.



### 3.2. Janina Stripeikiene, Supreme Court (Lithuania), *Klevo Lapas v. ORLEN Lietuva*

**Ruling of the Division of Civil Cases of the Supreme Court of Lithuania of 17 May 2010. By its application, the JSCL *Klevo Lapas*, claimed damages from the defendant, SC *ORLEN Lietuva*, in the amount of 36,606,156.42 LTL (approx. 10,610,480.12 EUR)**

#### **Facts**

The plaintiff indicated that from 1996, it had been engaged in the wholesale and retail sale of oil products. On 1 March 1999, PC *Mažeikių Nafta* (now SC *ORLEN Lietuva*) granted four foreign companies exclusive purchasing rights to its production, thus artificially creating unfavourable conditions to the plaintiff for further trade in the production of SC *Mažeikių Nafta* and its competition in the market. The plaintiff treated such actions of the defendant as unlawful as, by establishing discriminatory conditions, the defendant violated the provisions of the Law on Competition which prohibit abuse of a dominant position and to prevail in the market by giving exclusive discounts to some companies without applying the same treatment to others. Unequal conditions (60 LTL per ton discount to the oil products supplied) were created on the basis of an order issued by the Director General of SC *Mažeikių Nafta*.

By its decision of 10 July 2000, the Competition Council of the Republic of Lithuania imposed a fine on *Mažeikių Nafta* for violation of Article 9(1)(3) of the Law on Competition, i.e. for abuse of the dominant position in the market expressed by applying dissimilar (discriminating) conditions in equivalent transactions to certain undertakings, thereby placing them at a competitive disadvantage in the trade of oil products.

The company *Klevo Lapas* was no longer able to continue its economic activity as due to its outstanding debts, it ceased to be supplied with oil.

The plaintiff calculated the amount of damages claimed on the estimate that buying oil products without the 60 LTL per ton discount, which the company had unjustifiably been denied, during the period from 1 March 1999 to 30 December 1999 it suffered a 740,853 LTL loss; for the period until the case was heard, i.e. until 12 November 2007, assuming that the volume of sales would have been the same as in 1998, the plaintiff stated that it was denied 36,606,156.42 LTL net income which it would otherwise have received if the defendant had not terminated the delivery of oil products.

#### **Ruling of the Supreme Court of Lithuania**

The Supreme Court, as a court of cassation, held that, in absence of provisions in the European Union Law on damages for infringements of competition law, private enforcement is essentially realised taking in regard the practice related with the arising of liability applied in the civil law of the Member States and the right to determine the conditions for civil liability rests with the national law of the States. The decision of the Competition Council of the Republic of Lithuania which states an infringement of the competition law proves only one of the conditions for civil liability – unlawful acts, i.e. a *prima facie* evidence in the case related with the compensation for damages incurred as a result of the infringements of competition law, though such statement of infringement *per se* does not entail civil liability, i.e. in order to establish an obligation to compensate damages as a result of civil liability, it is necessary to determine existence of all necessary conditions of it, which, under national law, are the following: unlawful acts, damage, fault, and a causal relationship between unlawful acts and damages (Civil Code, Articles 6.245-6.255).

When deciding on a dispute related with compensation for damages incurred as a result of a violation of competition law, the court has to determine whether the infringement of competition law

could have determined or sufficiently influenced arising of the damage, the compensation of which is being claimed.

The Supreme Court, as a court of cassation, has supported the conclusions drawn by the court of the first instance and the court of appeal that the plaintiff failed to prove the condition of the causal relationship:

“The courts have established that insolvency, and the subsequent bankruptcy, of the plaintiff was determined by the outstanding debts accumulated as a result of improper business administration on the part of the plaintiff, a major part of which had appeared prior to the infringement of the competition law by the defendant. Due to its insolvency, the plaintiff was not competitive in the market thus the infringement of the Law of Competition in the activity of the defendant, as stated in the decision the Competition Council of 10 July 2000, could not reduce the competitive position of the plaintiff as the latter was neither continuing its economic activity nor was able to do that because of the bankruptcy action started by the court and being acknowledged insolvent by a subsequent ruling of the court.”

“The courts, having evaluated the circumstances stated above, could not reasonably establish any causal relationship between the infringement of the Law on Competition and the claim for the compensation of damages, thus they dismissed the requirements stated in the claim as not proved.”

## Comment

The Court stated a direct right of an enterprise to submit a claim for compensation of damages suffered as a result of anticompetitive clauses in a contract or actions that distort competition. Private enforcement in infringement of the competition rules is related with the public one, i.e. the forms of liability and measures applied by the Competition Council, as the institution responsible for competition supervision, are related with the application of tort liability and its consequences.

When the Competition Council establishes an infringement of competition in a relevant market, where this infringement has a direct effect on the relations between persons, including the party of the contract in bad faith, such persons are entitled to file a claim for damages provided they are able to prove the casual link of the emergence of damage to the infringement and substantiate the amount of the damages incurred.

According to the relevant case law, no fault in the proceedings of private enforcement actions is required, however the situation does not change due to the binding character of a decision of the Competition Council, and it remains just a *prima facie* evidence. A breach of competition rules has to be proved in the court, which makes the litigation for the claimant more complicated (e. g. burden of proof etc.).

Additional remarks:

1. The right to demand compensation for damage caused by a violation of the rules of competition is established in the Law:
2. Article 46 (1) of the Law on Competition of the Republic of Lithuania: “Undertakings which violate this Law must compensate for damage caused to other undertakings or natural and legal persons in accordance with the procedure established by the Law.”
3. Article 13 of the Law on the Prohibition of Unfair Practice of Retailers: “Persons shall have the right to apply to court, in the manner prescribed by the Law, for the compensation for damage resulting from the infringement of this Law.”
4. Article 6.263(2) of the Civil Code of the Republic of Lithuania: “Any bodily or property damage caused to another person and, in the cases established by the Law, non-pecuniary damage must be fully compensated by the liable person.”

5. There also is provision established in the Rules on Exemption from Fines, or their Reduction, Applicable to Persons Participating in Prohibited Associations that the fact of an entity being exempt from a fine, or it being reduced, does not exempt such an entity from civil liability arising from participation in a prohibited agreement restricting competition.
6. Other aspects of the situation in Lithuania related with recommendations of the European Commission:
  - a) There are no provision for claims to be represented by competent authorities, there exist only procedural joinder, the right of a prosecutor, state and municipal authorities to submit claim to protect a public interest, and representation of associations to certain groups of persons;
  - b) Group claims do not function yet;
  - c) No requirement to disclose information is established in Lithuanian Law;
  - d) No guidelines for calculation of damages have been established yet.



3.3. Galina Arnaudova, Plovidid Court of Appeals (Bulgaria), *Raiffeisenbank Bulgaria Ltd v. Bulgarian Competition Authority*

- **Decision of the Bulgarian Commission for Protection of competition No 1103/22.10.2009 in case N 682/2009**
- **Judgement of the Administrative Court No 5664/30.04.2010 of SAC in administrative case N 14475/2009**
- **Judgement of the Supreme Court No 825/15.07.2010 in case N 454/2010**

## **Facts**

The proceedings in the Commission for Protection of Competition are instituted pursuant to Art. 94, para. 1 in conjunction with Art. 38, para. 1, item 1 of Protection of Competition Act (PCA) to investigate a possible violation of Art. 30 of PCA (repealed) by "Raiffeisenbank Bulgaria" Ltd.

The reason for instituting the proceedings is a signal via e-mail to the Commission on 15.07.2009 by Mr. Ivaylo Mihailov in relation to misleading advertisement by "Raiffeisenbank Bulgaria" Ltd.

It is found that "Raiffeisenbank Bulgaria" Ltd - Sofia, operating on attracting public deposits, granting loans and other activities determined by the Bulgarian National Bank, during the period June 2004 - June 2006 was running the following promotional campaign: with a contract for a consumer or a mortgage loan the bank offered to its customers certain benefits - a grace period to settle the obligations, a free debit card Maestro or Visa and a free life insurance cover for the entire period of the loan.

On 08.10.2004 "Raiffeisenbank Bulgaria" Ltd and Ivaylo Mihailov and Ruzhka Mihailova (in their capacity as borrowers) signed a contract for a mortgage and after that the latter signed a declaration to take out a life insurance cover.

The Bank has entered into an agreement with "Bulgarian Properties" for a group life insurance of the recipients of consumer and mortgage loans of "Raiffeisenbank Bulgaria" Ltd and later it has changed its insurance company, the new insurer was "Vitosha - Life" Ltd. Although in the agreement of the group life insurance between "Raiffeisenbank Bulgaria" Ltd and "Vitosha - Life" Ltd it was explicitly stated that there was an obligation for the Bank to notify the insured person in writing that the insurer was changed, the customers were insured automatically without being aware of the credit institution's decision to change the insurer.

After a year the contract of the group life insurance was suspended by a mutual agreement between the parties on 01.06.2006, but the insured persons, among them Ruzhka Mihailova and Ivaylo Mihailov, were not informed by "Raiffeisenbank Bulgaria" Ltd for the termination.

On 15.04.2009 the wife of Mr. Mihailov died and he visited a branch of "Raiffeisenbank Bulgaria" Ltd to notify an inspector for credit insurance of this occurrence, but after a check it has been found that the life insurance cover had been terminated so that the bank could not claim payment from the insurer of indemnity.

In addition it has been found that other credit institutions in case of similar conditions in connection with mortgage loans, conscientiously informed potential clients for the changes and that they have explicitly indicated that the change is only for new customers of banks.

In application of the general principle that any administrative violation shall be assessed according to the legal act during its execution, and because the alleged wrongful conduct of the defendant took place in the period 2004 - 2006, relations should be regulated under the repealed PCA.

To establish a violation of the general prohibition under Art. 30 of PCA (repealed) is needed to be detected cumulatively referred to in the provision constituent elements, namely the presence of business and any act or omission contrary to good commercial practice that harms or threatens to harm the interests of the competitors in their mutual relations.

An essential element of the general prohibition under Art. 30 of PCA (repealed) is the contradiction of the act or omission with diligent commercial practices. The term is defined in § 1, item 6 of the Additional PCA (repealed), according to which "diligent commercial practices shall mean the rules regulating market behaviour which originate from Laws and normal commercial relations and do not breach good ethics".

The Commission states that "Raiffeisenbank Bulgaria" Ltd is an enterprise engaged in business activities related to the provision of banking services, in particular mortgage lending in the period from 2004 to 2006 and it offered a mortgage service lending package with a free life insurance for their borrowers.

The specific nature of the market for banking services, in particular that of mortgage lending, where multiple participants have been engaged in a competitive activity until now, has meant that businesses try to attract customers in different ways: low interest rate loans, preferences for the different groups of potential borrowers, etc. A similar method is also the proposed by the defendant: free life insurance coming with the mortgage contract at the relevant time, which usually the banking institutions were not required to sign, and it was an obligation for borrowers.

In this case the "Raiffeisenbank Bulgaria" Ltd's proposal to its potential customers to get a free life insurance with a contract for a loan is considered as an attractive option, aimed at stimulating consumer interest..

In the proceedings it was found that people were insured automatically without a notice from the bank to change the insurer, despite its express obligation to do so, and they have not been notified for the termination of the insurance contract, which is the contrary to diligent commercial practice within the meaning of § 1, item 6 of the AP of PCA (repealed) and good ethics.

The Commission believes that the offering a bonus including a free life insurance by "Raiffeisenbank Bulgaria" Ltd and the lack of any explanation of the reasons for the termination of the relevant contract on the initiative of the Bank support the conclusion that its intentions have been to use a proposal only as a means of attracting customers through attractive offers without an actual intention to maintain such insurance for the benefit of customers already signed the mortgage.

Such behavior is contrary to diligent commercial practice and leads to potential harm to consumers (in the case the real harm has occurred), it harms competitors of the financial services market too, where "Raiffeisenbank Bulgaria" Ltd operates in conditions of an effective competition, because the supply of such bonuses puts the company in a privileged position compared to those competitors who do not offer a similar service, and those who offer it, but allocate the necessary resources for its effective implementation.

Based on the foregoing, the Commission considers that the offense of Art. 30 (repealed) of the PCA was completed by "Raiffeisenbank Bulgaria" Ltd and it imposed a penalty in the amount of 5,584,570 Levs, representing 1% of the total turnover of 558 457 000 Levs for the previous financial year to the offending company.

### **Ruling of the Administrative Court**

The court adopts the conclusions about the violation of the competition rules, including that it is not necessary to show actual damage, but enough for there to exist a potential risk of negatively affecting the interests of competitors in their relations with consumers as a result of unfair business practice of

the particular legal entity, such as the promotion of insurance as a bonus provided by the complainant in the period of increased competition in bank lending and the subsequent termination of the contract for the group insurance on its own initiative without being informed insured customers – borrowers. All that point to an improper market conduct within the meaning of § 1, item 6 PCA (repealed) which could cause a undue competitive advantage to the unscrupulous legal entity that did not perform these additional services which were aimed to attract customers in a competitive effective environment.

The Commission's decision is set aside for the penalty imposed to the bank and the case was returned to the Commission to determine the amount, because the penalty should be determined according to the substantive law that was in force at the time of the offense, namely the provision of Art. 59, para. one of the PCA (repealed) (which provides for penalties up to 300,000 Levs) and not that of Art. 100, para. 1 under the current Law (which provides for penalties expressed as a percentage of the total turnover of the offender).

### **Ruling of the Supreme Court**

In accordance with the instructions given by the Supreme administrative court under the applicable Law for the individualization of the penalty, the Commission determines the amount of penalty to 100,000 Levs, guided by the facts that violation, resulting in the omission of the bank, which has not notified its customers of the change of the insurance company under the insurance contract and the suspension of this contract was performed once as an act, also the free life insurance was advertised only in brochures presented to customers only in the bank's offices, but not in television, radio and billboard ads(the bonus has not been specified there) which has restricted the territorial and personal extent of its addressees, and then the bank has taken good faith steps to limit the impact of the inclusion of the offense it (it has signed an agreement with Ivaylo Mihailov and has signed an annex to terminate the contract for the group life insurance borrowers to "Raiffeisenbank Bulgaria" Ltd with "Unica Life" Ltd (ex "Vitosha - Life" Ltd), which had the effect of re-terminating it. Thus, the bank has not only limited the negative effects of their wrongful conduct, but had also contributed to rectify abuses and that action has had a positive effect on the third party – customers. Another factor which is recorded is the equivalence of the penalty to the economic condition of the company that allow it to pay and then to be able to fully operate in competitive market conditions.



3.4. Anna Wasilewska, Warsaw District Court (Poland), *T.P.P.D v. Forestry Enterprise of Dobrzejowice*

**Judgement of the Polish Supreme Court of 23 July 2008, case number III CZP 52/08.**

**Facts**

T.P.P.D. Joint Stock Company wanted to buy some wood. The Forestry Enterprise had a dominant position on the market of wood sellers. Forestry Enterprise was a creditor of a bad debt (amount 26 130 PLN), which was not likely to be repaid. Forestry Enterprise agreed to sell the wood on condition that simultaneously T.P.P.D. Joint Stock Company buys this debt.

The parties signed two agreements, one regarding wood purchase, and the second regarding debt purchase.

In fact, T.P.P.D. Joint Stock Company was made to buy the debt because of abusing of the dominant position by Forestry Enterprise. Normally T.P.P.D. Joint Stock Company would not be interested in buying debt, which was obviously not likely to be repaid. After achieving its goal which was making a wood purchase, T.P.P.D. Joint Stock Company was no longer interested in fulfillment of the second agreement regarding debt purchase.

T.P.P.D. sued the Forestry Enterprise, claiming that the agreement of debt purchase should be nullified and demanding for 26 130 PLN payment.

In the meantime the President of the Polish Competition Authority (UOKiK) *ex officio* initiated a procedure and adopted a "commitment decision". This "commitment decision" obliged the Forestry Enterprise not to make any agreements of wood purchasing in relation to agreements of debts purchasing, as a result of abusing the dominant position.

The Court of First Instance found for the plaintiff making its own findings on the abuse of dominant position by the Defendant without any prior final decision of the Polish Competition Authority finding the abuse of dominant position. Defendant appealed and the Appellate Court decided to ask The Supreme Court about the legal issues before making a final judgment.

**Legal Issues**

1. May the civil court make its own findings on the abuse of dominant position if this is a prerequisite for the nullity of the contract and if there is no prior final decision of the Polish Competition Authority finding the abuse of dominant position?
2. May a "commitment decision" be considered as prejudicial in civil court proceedings and its findings concerning abuse of dominant position should be binding (having a prejudicial character) for civil courts?

**Ruling of the Supreme Court**

The Supreme Court ruled that it is not necessary to gain an administrative decision of the Polish Competition Authority affirming the abuse of dominant position before bringing an antitrust damages action to a civil court. The civil court may make its own findings on the abuse of dominant position if this is a prerequisite for the nullity of the contract.

The Supreme Court confirmed that only a "final administrative decision" is binding (that is, it has a prejudicial character) for civil courts. This rule does not, however, apply to "commitment decisions", which are not final. A commitment decision is not final because it only declares that an infringement of competition law is highly probable, although not definite.

### **Private Enforcement of Competition Law in Poland**

Polish Law does not have a special procedure for private enforcement based on EU Competition Law because the legislator did not introduce a direct legal basis for private enforcement claims. Under those circumstances, the provisions of the Polish Civil Code must be applied as the legal basis for establishing responsibility for the breaches of competition law in Poland. According to the changes made to the Competition Act of 2007, Polish competition Law enforcement before the Polish Competition Authority turned, from a mixed model (public-private), into a purely public enforcement model. Under the current Competition Act, competition proceeding before the Polish Competition Authority can be initiated only *ex officio* which means that individuals can not file a claim on infringements of competition law.

Individuals are only allowed to submit a notification of an infringement, which is does not require the Competition Authority to act. It is stressed by the Polish doctrine that eliminating such an activity of individuals was justified as an incentive to help improve the level of private enforcement of competition Law in Poland. In fact there are two pillars of competition law enforcement: public (with the exclusive competence of the President of UOKiK) and private (with the participation of civil courts). Naturally, results of public and private enforcement are totally different.

Nowadays initiating court proceedings by individuals is the only way to gain satisfaction confirming an infringement of the Competition Law and gain financial satisfaction. It should be also mentioned that the number of privately enforced competition Law cases in Poland is very small.

The judgment of the Supreme Court presented here is one of the most important judgments concerning some aspects of private enforcement of competition Law. The judgment analyzed here shows one of the key problems arising in competition Law cases in the context of private enforcement. This issue is the prejudicial character of administrative decisions of Polish competition authorities as there is no explicit provision in the current Competition Act concerning the prejudicial nature of the decisions of the Polish Competition Authority. This issue, however, was dealt with by the Polish Supreme Court several times. Although its position on the matter was inconsistent over the years, the judgment presented here tends to reflect the jurisprudence of the ECJ and other EU national courts. It also states another incentive bonus for individuals to raise private enforcement claims before civil courts.

### **Reasoning of the Supreme Court**

As the reasoning for its decision the Supreme Court stressed the independence of the two pillars (public and private) of competition law enforcement and their different objectives and it wanted to create clear relations between these pillars and to avoid discrepancies in civil and administrative rulings. However, the Supreme Court did want to limit the binding effect of competition authority decisions to claims for damages. In this way, the Supreme Court rather accepted the primacy of the public enforcer and noted that such position is in accordance with the general principle that civil courts are bound by final administrative decisions. The Supreme Court further held that if the European Commission or the President of the UOKiK have not yet ruled in a case, a civil court is free to make its own findings and decide for the sake of its plaintiff. The Supreme Court underlined that individuals should not be made to wait for administrative decisions as a prerequisite in private cases, because it could create too big obstacles, especially taking into account that administrative procedure can be initiated only *ex officio* which means that individuals can not file a claim on infringements of

competition law. It concludes that the opposite statement could lead to depriving the civil court of its essential competence to protect the individual interests of the private litigants.

However, in order to avoid the inconsistent application of competition Law provisions by the President of UOKiK and the civil court, the court should consider staying its proceedings when the Polish Competition Authority is simultaneously investigating a case.

## **Conclusion**

General conclusions can be drawn on the basis of this judgment. It was a significant judgment as it worked out basic rules for a co-existence between public and private pillar of competition law enforcement. It was confirmed that when the President of UOKiK adopts a final antitrust decision, its findings are binding (have a prejudicial character) for civil courts. This rule does not, however, apply to commitment decisions, which are not final. If the President of UOKiK has not yet ruled in a case, a civil court is free to decide for the sake of its plaintiff. The same may happen when the President of UOKiK adopted a commitment decision.

According to this judgement it can be concluded that the current legal framework of private enforcement of competition Law in Poland, or rather, a lack of special provisions in this field, does not create a barrier for private actions to be taken to enforce the provisions of competition Law.



**Judgement of the Supreme Court of the Slovak Republic No 3 Sžh 3/2010, issued on 3<sup>rd</sup> May 2011**

**Facts**

The Antimonopoly Office of the Slovak Republic (hereinafter “Office”) imposed fine of 7 160 000 Skk ( 237 670 €) on Marianum , an undertaking providing funeral services in the Bratislava municipality ( hereinafter Marianum) . The Office identified four types of abuse of dominant position in the conduct of the undertaking. The finding of the abuse of dominance was based on general clause of Act No 136/2001 Coll. on Protection of Competition (hereinafter also “Competition Act”) and on the word “especially” itself. The Office, knowingly, did not subsume conduct of undertaking under the subject matter of minor offences expressly stipulated in Article 8 par. 2, a) – e) because these provisions did not cover the abusive conduct.

In its decision, the Office identified the following types of abuse of dominant position:

1. Tying the services of borrowing the funeral parlour (in the cemetery) with services of funeral director and carriers, and borrowing the catafalque in cemetery, that are carried on by the undertaking, leads to the abuse of a dominant position under Article 8 par. 2 of the Competition Act.
2. Tying the borrowing of funeral parlour with services of funeral director and carriers in crematorium carried on by Marianum.
3. Unreasonable accounting of fees for the disposal of flower presents 3-4 weeks after funeral or according to wish of the family.
4. Unreasonable accounting of fee for tomb memorial disposal (fee for whole work connected with real disposal of tomb memorial and subsequent removal to the dumping ground).

**Legal Framework**

Under the Article 8 par. 2 of the Competition Act, abuse of a dominant position in the relevant market shall be defined, “especially”, as:

1. direct or indirect enforcement of excessive prices or other unfair trade conditions,
2. a threat of restriction or an actual restriction of the production, sale or technological development of goods to the detriment of users,
3. application of different conditions for identical or comparable performance with respect to the individual undertakings, through which the respective undertakings are or may be disadvantaged,
4. tying: the conclusion of a contract to the condition that the other party accepts further commitments, unrelated to the subject of the contract in terms of substance or according to customary commercial practice, temporary abuse of economic power with a view to excluding competition

Marianum filed an action against the competition authority. In particular Marianum objected that the definition of general clause consisting only the word “especially” is too vague to be enforced. The average undertaking cannot generally determine from the word “especially” what conduct is prohibited and punishable. The bringing such behaviour in the scope of anticompetitive infringement

is flagrant violation of the principle legal certainty and the principle *nullum crimen sine lege, nulla poena sine lege*.

### **Ruling of the Supreme Court**

The infringement decision of the Office was divided in two parts – the existence of an infringement (the guilt) and the punishment (the fine). The Supreme Court ruled that conduct of the undertaking defined by the Office’s decision had constituted an abuse of dominant position in the relevant market but the principle *nullum crimen* influenced the possibility to impose a fine. The Supreme Court quashed the decision of the Office in part relating to the imposed fine of 7.160.000,-- SKK = 237 670 € on Marianum and remanded the case to the Office for further proceedings.

The identification (description) of the abuse of dominant position based on general clause of the Competition Act itself is possible only via logic and founded discretion of the administrative authority, i.e. the competent administrative authority authoritatively lays down its opinion as to the issues of facts in its decision. There has to be somebody (Office) who says: “*this conduct of undertaking is an abuse of dominant position*”, and defines this abusive conduct authoritatively in its decision. The Office has such a power under the Article 22 par. 1 subpar. b) of the Competition Act (The Office passes decisions that an undertaking’s conduct or activity is prohibited under this or another Act; the Office decides on imposing on undertaking the obligation to refrain from such conduct and the obligation to remedy the unlawful conduct).

Judges insisted on the fundamental principle *nullum crimen* when imposing a fine.

The general clause of the Competition Act is vague and beside the word “especially” it do not explicitly stipulates subject matter of the minor offence.

Principle of proportionality requires that if the Office has power (on the grounds of general clause and demonstrative stipulation by the Competition Act) to lay down new subject matters of an abuse of dominant position, the undertaking has to have a possibility to know exact characteristics of the prohibited conduct. Only after that the sanction can be imposed. The Office, then, should focus on early identification of conduct, pass the decision in which this conduct will be laid down and will be prohibited, and subsequently impose the sanction on undertaking (when the request of principle *nullum crimen* will be met).

### 3.6. Janina Stripeikiene, Supreme Court (Lithuania), *Šiaulių Tara v. Stumbras*

#### **Facts**

The plaintiff, Lithuanian company Šiaulių tara in 2003 claimed damages, which amounted to 2 864 809 Lt (approx. 829 706 EUR) in the court from another Lithuanian company, Stumbras. The plaintiff based his claim on the following circumstances: he indicated, that since 1993 he distributes the alcoholic beverages, produced by the respondent and due to the discriminatory price and marketing policy, used by the respondent in 2000 – 2002, and due to discriminatory competition conditions, the income of the plaintiff decreased. The plaintiff indicated, that the actions of discriminatory competition conditions arose as a result of additional allowances for marketing and promotion, which the respondent paid to some distributors, freely chosen by him. As a consequence, these distributors were able to offer the alcoholic beverages cheaper than the plaintiff. The plaintiff several times, without success, requested the respondent for the same, beneficial policy conditions.

The breach of the Law of Competition has been indicated also by the decision of the Competition Council of Lithuania in 2002. The Competition Council also indicated that Stumbras abused its dominant position in the market, because several years he discriminated against some of the participants in the market through price discrimination. The Competition Council obliged Stumbras to terminate its discriminatory actions, which were in breach with the Law of the Competition. The plaintiff argued, that his damages (2 864 809 Lt, approx. 829 706 EUR) represent (i) the payments which he did not receive from the respondent (878 336,45 Lt, approx. 254 384 EUR) and (ii) the losses suffered as a result of the lost sales of alcoholic beverages (1 986 472,55 Lt, approx. 575 322 EUR).

The court of the first instance partially satisfied the claim of the plaintiff and awarded him 500 000 Lt (approx. 144 810 EUR) damages. The Court of Appeal reduced this compensation and awarded 301 633 Lt (approx. 87 359 EUR) and based this decision on the fact that the plaintiff did not prove the amount of the damages. The main argument of the Court of Appeal to diminish the amount of the damages was that the amounts, which the respondent did not pay to the plaintiff, are to be considered as not received income of the plaintiff; in order to determine to amount of it, special knowledge is required. The expertise that was used in this case showed that the amount of income not received by the plaintiff between 2000 – 2002 amounted to 302 541 Lt (approx. 87 622 EUR). Once the expenses of the plaintiff were withdrawn, Šiaulių tara did not receive 301 633 Lt (approx. 87 359 EUR) beneficial payments and considered it to be the damages of the claimant. The Court of Appeal stated that the plaintiff did not prove his damages, which occurred due to the lost part of the market and only partially proved that he suffered the loss (non – received income) due to the not received beneficial payments.

#### **Comment**

Firstly, it should be noted, that in this case not all conditions for civil liability have been established – the plaintiff did not prove the illegitimacy of the actions of the respondent, neither the fault. This is a different approach, compared to earlier cases (e.g. Ruling of the Division of Civil Cases of the Supreme Court of Lithuania of 17 May 2010 in a civil case on a claim for damages filed by the plaintiff *Klevo Lapas*, a joint stock company in liquidation (JSCL), against the defendant, Stock Company (SC) *ORLEN Lietuva*, discussed above. Only two conditions - the amount of the damages, as well as causal link – have been established in this case.

Secondly, in this case very interesting aspects of the proof to the amount of the damages are disclosed. The problematic aspect of this case is that the part of the market, which was lost, was not

established by the plaintiff and the Court of Appeal consequently, held that the amount of the damages requested has not been proved. This reveals the main problem, which exists in private enforcement proceedings and indicates the need to establish (1) the unified criteria, which should be used in order to establish the damages and (2) the need to identify the methods which should be used in order to determine the amount of the damages.

## 4. Competition Law Enforcement in Network Industries

4.1. Irmantas Jarukaitis, Supreme Administrative Court (Lithuania), *Vilniaus Energija v. Lithuanian Competition Authority*

### **Judgement of the Supreme Administrative Court of Lithuania of 13<sup>th</sup> August 2012, case No. A<sup>858</sup>-1516/2012**

#### **Facts**

The applicant, the joint stock company Vilniaus energija operates a system of underground technical collectors (communication tunnels) in Vilnius. It took over the rights to these assets from another company in 2002. The company leased collectors from Vilnius municipality in 2000 together with the right to rent the space of collectors to third parties. The specific collector space is in advance allocated to pipes of heat and hot water (which at the relevant time were non-operational), pipes of cold water, electric cables, telecom cables, radio cables and may not be changed by the applicant. Part of the collector space (two shelves devoted to electric cables) is fully 'booked' for technical reasons, because a distance between electric cables may not be less than 0.3 m, whereas three shelves devoted to telecom cables and radio cables have no such technical restrictions (because telecom cables are shielded) and may be fully filled by cables. At the relevant time approx. 20 companies leased shelves for telecom cables and one company for radio cables. Pipes of heat and hot water were used for provision of the applicant's services.

The fee paid by tenants was predetermined by the methodology adopted by Vilnius municipality in 1996 and amended in 1999. According to the methodology the rate of the fee is determined in two steps. First, the costs of maintenance of 1 km of a collector is calculated (103 km in total). Then, those costs should be distributed proportionally to the cross-section allocated to a particular company, operating a pipe or a cable (32400 cm<sup>2</sup> of cross-section in total).

It should be noted as well, that the above mentioned methodology clearly defined which categories of costs should be taken into account (the fee for the municipality for administration of the contract; collector repair works and materials; electricity consumed, etc.), it also envisaged 10 per cent profit margin for a company operating collectors (the applicant).

One of the tenants, renting a shelf devoted to radio cables (a radio company), refused to pay a lease to the applicant, which in turn brought an action before general competence courts for violation of contractual obligations and required to pay the rental fee. General competence courts upheld the action of the applicant.

The tenant filed a claim to the Competition Authority, arguing that the applicant established excessive prices for collector space thus violating Article 9 of the Competition Law prohibiting the abuse of dominant position.

#### **Decision of the Competition Authority**

The Competition Authority (hereinafter, the CA) adopted a decision in 2010, in which it found that the applicant violated Article 9 of the Competition Law, prohibiting the abuse of a dominant position.<sup>1</sup>

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<sup>1</sup> Art. 9 of the Competition Law is worded in the same way as Art. 102 of the TFEU, of course, without a reference to the possible effect of conduct of a dominant undertaking to trade among the Member States.

The CA first defined the relevant market. The investigation showed that only the applicant operated such technical collectors described above in Vilnius and that there were no other equivalent facilities for other companies wishing to operate pipes or cables. Besides, the duplication of the infrastructure was ruled out as economically unjustified. Thus those undertakings were forced to rent the infrastructure from the applicant. Accordingly, the product market was defined as the market of lease of technical collectors / communications tunnels<sup>2</sup>.

The CA found that the applicant operates collector networks in nine Vilnius districts. These networks are not interconnected, besides, in order to provide services, companies leasing collectors from the applicant had to obtain separate licenses in order to provide services in those different districts. Because of that the CA defined nine local relevant markets for provision of services of lease of technical collectors.

The CA also concluded that the applicant holds a dominant position in those markets, because it has the exclusive right to operate collectors which belong to the Vilnius municipality by the right of ownership. Taking into account features of collectors the CA ruled that it is unfeasible for other operators to duplicate such infrastructure, there were no other undertakings providing such services and in order to provide certain services access to these collectors is indispensable. Therefore, collectors were treated by the CA as the essential facility within the meaning of competition law and the applicant had a dominant position, because only it provided such services.

After deciding that the applicant had a dominant position in the relevant markets the CA also decided that the applicant abused its dominant position. The CA established that the applicant deviated from the 1996 methodology when establishing rates of lease. For example, it established that although telecom cables use only 8.9 percent of the total cross-section of the collectors, tenants which operate those cables pay 38.6 per cent of the whole fee payable by tenants; radio cables – 2.8 and 3.6 per cent respectively, cold water pipes – 11 and 20 per cent respectively, electric cables – 34.7 and 15 per cent respectively, heat and hot water pipes – 27,2 and 22,8 per cent respectively.

According to the CA, this also resulted in different profit margins received from different groups of tenants. This circumstance (difference in profit margin), taking into account the fact that the maximum profit margin (10 per cent) was set by the 1996 methodology should be *per se* treated as an establishment of the excessive (unfair) price. The CA established that the applicant received from tenants operating telecom cables higher fees than established by the methodology and the profit received by it, was 400-500 per cent comparing to the statutory costs envisaged by the 1996 methodology; for tenants operating radio cable – 40-80 per cent of profit.

The CA also pointed out that in the present case there was no ground to say, that 1 cm<sup>2</sup> of cross-section of collectors has different economic value depending on its location within the collector (for example, 1 cm<sup>2</sup> for telecom cable and 1 cm<sup>2</sup> for cold water pipe). Thus according to the CA, if all tenants buy 1 cm<sup>2</sup> cross-section of a collector, which has the same economic value, the big difference of rent fee, payable by different groups of tenants, is *per se* unfair, leading to excessive pricing. Calculations of the CA showed that some groups of tenants paid considerably bigger rent fees than the rest if calculated for 1 cm<sup>2</sup> of cross-section.

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<sup>2</sup> It should be noted that the question of definition of the relevant market was not evaluated in detail by administrative courts in this set of proceedings, since this litigation was a continuation from the first set of court proceedings, where administrative courts remitted the case back to the CA on procedural grounds, but found no problems with a definition of the relevant market. Thus, this issue was not explicitly raised by the applicant. However, one may ask a question, whether such a definition of the product market was not too wide, because a space devoted to, for example, hot water pipes could not be used for telecom cables and *vice versa* – thus different sections of collectors and lease of the parts of collectors could not be treated as substitutes.

## **Court Proceedings**

The applicant filed a claim against the decision of the CA to the Vilnius District Administrative Court. Basically it claimed that the CA failed to prove the existence of the abuse of dominant position, because of the fact that fees paid by tenants, were determined by the 1996 methodology. Besides the 1996 methodology was outdated and did not allow to take into account real costs of operation of collectors. According to the applicant, the CA did not take into account real costs, and had not calculated the real price of services, its assumption that 1 cm<sup>2</sup> of cross-section of collectors has the same economic value was flawed.

Both the Vilnius District Administrative Court and the Supreme Administrative Court of Lithuania found for the applicant. The Supreme Administrative Court dismissed the appeal of the CA basically on two grounds.

First, the chamber noted that the CA did not evaluate whether the applicant acted independently when setting the rent fees. Both the applicant and the Vilnius municipality constantly maintained during the court proceedings that the applicant is not free to establish its own pricing but has the obligation to follow the 1996 methodology which was updated in 1999. The CA admitted in its internal investigation documents that contractual prices, established with particular tenants, was in line with the methodology, however, the contested decision of the CA did not address this issue at all.

The CA argued that the 1999 amendments of the methodology were adopted in breach of certain Laws. The chamber ruled that the issue of legality of the methodology was not the object of the case, besides it further noted, that even if to admit the violation of the methodology took place (which was not proved by the CA), this does not in itself mean a breach of the Competition Law. To sum up, the chamber ruled that the CA failed to establish that the applicant was not obliged to follow the 1996 methodology and had a freedom to establish its own pricing strategies.

The chamber further ruled that the approach of the CA to the whole question was flawed, because it did not analyze the price of services, but only the income and profit of the applicant (to be more precise – the whole idea of the CA was to show differences of income and profit margins from different tenant groups). According to the chamber in order to evaluate to what extent the price of the service is fair, one has to evaluate the price of the service, not only income and profit. Once evaluating the economic value of the service the CA based its analysis on the 1996 methodology, although it was not disputed that it does not reflect the real cost structure and the profit margin set by it, and so has nothing to do with competition law. The CA did not evaluate real costs of the applicant, as well as factors not related to real costs (for example, the supply and demand for different parts of collectors, since it was clear that there was bigger demand for some sections of collectors in comparison to others). Because of that the CA's assumption that 1 cm<sup>2</sup> of cross-section of collector had the same economic value was not proven.

## **Comment**

The above described case confirms the thesis that it is notoriously hard to prove excessive pricing in cases of abuse of dominant position. Administrative courts basically took the approach that the CA conducted the whole investigation on the wrong premise that one may investigate a pricing from the point of competition law basing that analysis on provisions of statutory act. Besides the CA decision was based on the unsubstantiated thesis that 1 cm<sup>2</sup> of cross-section of a collector had the same economic value, which was not proven in this particular case.



## 4.2. Galina Ardaunova, Plovdiv Court of Appeal (Bulgaria), *EVN Bulgaria Electricity v. Bulgarian Competition Authority*

### **Summary**

The Commission for Protection of Competition found that EVN Bulgaria Electricity AD (joint-stock company) - Plovdiv has committed an offense under Art. 21, § 1 Protection of Competition Act (PCA), resulting in the imposition of unfair trading conditions in the supply of electricity and required the company penalty in the amount of 256 024.50 levs. The behaviour consisted in a refusal to restore a power before Nadejda – 94 Ltd paid its bills resulting from its previous consumption of electricity. Electricity would only be restored after the company had paid in full the obligation of his tenant Sersan Ltd . So this is an imposing of unfair trading conditions.

By a Decision № 2181/14.02.2011 of Supreme Administrative Court in administrative case № 5666/2010 was confirmed a decision № 258/11.03.2010 of the Commission for Protection of Competition.

Proceedings in the Commission were initiated by a complaint from f Nadejda - 94 Ltd.

### **Facts**

On 10.12.2007 Nadejda - 94 Ltd. purchased a property in the town of Kardzhali, which at that time was used by a lessee Sersan Ltd. At that moment there was a contract for the supply of electricity between EVN Bulgaria Electricity AD and Sersan Ltd. for the "Workshop for prints and screen printing", located in the property. On 14.01.2008 lease was signed between Nadejda - 94 Ltd. and Sersan Ltd for a period of six months. Before the expiry of the contract on 05.05.2008 Sersan Ltd. left the property without making payments due. On 08.07.2008 Nadejda - 94 Ltd. informed EVN Bulgaria Electricity AD of its acquisition of the property with a request to create a customer number (batch) on behalf of the company. By letters dated 03.12.2008 and 11.12.2008 the latter refused creating a customer number and to restore power to f the property due to the same outstanding financial obligations to the electricity consumption for the period February 2008 - June 2008, a total of 9 684.41 levs. EVN Bulgaria Electricity AD has not actually taken any action to collect the liability from Sersan Ltd. On 20.12.2008 a memorandum of understanding was signed between EVN Bulgaria Electricity AD and Nadejda - 94 Ltd under which Nadejda - 94 Ltd. was obliged to pay the obligations of Sersan Ltd. On 01.04.2009 "Nadejda - 94" Ltd. paid the due amounts. On 02.04.2009 after ten months the power was restored.

### **Applicable Law**

Under Article 21 PCA Undertakings with a monopolistic or dominant position, or two or more undertakings which jointly have a dominant position, are prohibited from acting in a manner which might prevent, limit or distort competition and affect consumers' interests, and in particular: "directly or indirectly fixing purchase or sale prices or laying down any other unfair trading conditions";

Under Article 117 of the Energy Act, the electricity transmission network operator, respectively the electricity distribution network operator shall be obligated to connect any works of an electricity customer located within the relevant area which:

1. has electric fixtures built within the boundaries of its real estate, which conform to the technical standards and to safe operation requirements;

2. has satisfied the conditions for connection to the transmission network or distribution network, respectively, and
3. has concluded a written contract for connection with the electricity transmission network operator, respectively the electricity distribution network operator.

Article 43 & 2, item 2a. Energy Act provide that only a single licence shall be issued for one self-contained area for electricity or natural gas supply by end suppliers;

Pursuant to Art. 49, & 1 of the General Conditions of Contracts for the sale of electricity of EVN Bulgaria Electricity AD, when there is a late payment of amounts due the company has right to suspend power supply without responsibility for damage and according to Art. 6, & 2 of the same General Conditions the obligations of the client can be performed by another person, provided that the owner has declared written consent to the electricity utility company or in writing with the signatures certified by a Notary Public, that this person is a user of electricity in his property for a specified period, in which case the owner is responsible for the debts with the person who has given consent.

### **Ruling of the Supreme Administrative Court**

The Court ruled that under the Law for a separate regional territory only one license for electricity supply and it was available, and this was held by EVN Bulgaria Electricity AD, which therefore has a monopoly in the relevant market.

The court also found that Nadejda – 94 had no legal obligation to make the payment that had been requested under the relevant legislation and there was no basis upon which to find that it was jointly liable with the tenant. For this reason the act of EVN Bulgaria Electricity AD was characterized as imposing unfair trading conditions within the meaning of Art. 21(1) PCA. The payment of another person's debt as a prerequisite for obtaining a universal service was undoubtedly an unfair condition which Nadejda - 94 Ltd. wouldn't be forced to comply with if there was an alternative for the electricity supply.

Moreover, the electricity utility company did not avail itself of the legal means available to collect debts from the debtor, but exercised a form of economic coercion on the new owner by refusing to restore power before paying the debt accumulated by another client - a tenant of the property. Although in itself the collection of outstanding payments is important and valuable for the commercial entity, taking certain restrictive measures is unacceptable to a person who is not a debtor.

Based on the foregoing, the Commission imposed a penalty at the rate of 0,05% of total turnover for the previous financial year to EVN Bulgaria Electricity AD (the penalty is in the amount of 256 024.50 lev.). The Commission took the view that it was a minor offence: it was vertical restraint of competition which covered a small geographical area and affected a limited number of users and the duration of the infringement was under a year. The penalty was confirmed by the judgment.

4.3. Aleksandar Shopov, Court of Veles (Rep. of Macedonia), *Macedonian Competition Authority v. EVN Macedonia AD*

- **Administrative Court judgment: EVN v. NCA [2009] -U.no.865/2009**
- **Supreme Court of the Republic of Macedonia judgment: EVN v. NCA [2010] - UZP.no.247/2010**

## **Facts**

EVN Macedonia AD Skopje (hereinafter: EVN) is a company which has a dominant position in the market for electrical power distribution on the territory of the Republic of Macedonia, and is a sole license holder on the Macedonian market for the supply of electricity to over 1 million retail tariff customers, which includes households, business customers, hospitals, schools, etc.

In 1999, EVN has adopted a Rulebook according to which on every monthly bill, beside the costs of the distributed electricity together with taxes, each retail tariff customer will be charged with 'handling costs' in a fixed amount of 6,00 denars (approx. 0,10 euro), as a compensation meant to cover the costs for drafting and delivering of the bills to the company's customers.

The market price of kWh electricity by which EVN is obliged to distribute and sell to the customers, is fixed and determined by The Energy Regulatory Commission of the Republic of Macedonia which is fully independent from the interests of the energy industry and the Governmental bodies, composed of Commissioners elected by the Parliament. The Commission determines the cost of kWh electricity for retail tariff customers in accordance to the Law on Energy and the Rulebook on the method and conditions for regulating electricity prices. In that manner, when determining the costs the Commission always takes into consideration all the costs for conducting regulated activities, and accordingly, the handling costs connected to the billing of the electricity to the company's customers.

The Law on the Protection of Competition in the Republic of Macedonia came into force on 25.01.2005 (Official Gazette of the Republic of Macedonia no. 4/05). Pursuant to Art.11, (1) of this Law, any abuse by one or more undertakings of a dominant position on the relevant market or a substantial part of it shall be prohibited; (2) The abuse, within the meaning of paragraph (1) of this Article, shall, in particular, consist in: (1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ...

Even with this novelty in the domestic legislative which took place starting from 25.01.2005, EVN continued to charge the retail customers with the 'handling costs' of 6,00 denars in each monthly bill, up until February 2008. Starting from March 2008, the company no longer charges this cost in a monthly bill.

Acting *ex officio* in compliance to the competencies by the Law on the protection of Competition, the Commission for Protection of Competition as a national competition authority in the Republic of Macedonia (hereinafter: NCA), initiated a procedure concerning the above presented conduct of EVN. On 26.01.2009 the Commission adopted a decision by which it was determined that: (1) EVN has the dominant market position for the supply of electricity to retail tariff customers; (2) in the period from 25.01.2005 to 28.02.2008 EVN committed an abuse of the dominant market position by charging the retail tariff electricity customers with 'handling costs' in a fixed amount of 6,00 denars in every monthly bill, which is contrary to Art.14 (2) t.1 of the Law on the Protection of Competition. Consequently, in the same decision NCA prohibited EVN to charge this cost in a monthly bill.

EVN filed a complaint against the above NCA's decision before the Administrative Court. After the court procedure was carried out in compliance to the Law on Administrative Disputes, The Court

brought a judgment on 10.12.2009, rejecting EVN's complaint against NCA's decision (A.C. case U.no.865/2009).

In January 2010 EVN filed an appeal against this judgment. At the time, the Supreme Court of the Republic of Macedonia had the second-instance level competence for appeals against judgments of the Administrative Court (starting from December 2010, this competence is transferred to a new formed Higher Administrative Court).

Deciding upon the appeal, the Supreme Court ruled on 06.09.2010. In its judgment the Court rejected the appeal and confirmed the judgment of the Administrative Court (S.C. case UZP.no.247/2010). The summary of this last instance court ruling is mostly the same concerning the decisive facts which are already stated above, which the NCA and respectively, the Administrative Court already adopted. In this regard, the Supreme Court accepted that, beside the fact that the disputed 'handling costs' in a fixed amount of 6,00 denars were charged in every monthly bill to all EVN's retail tariff customers in compliance with the company's Rulebook from 1999 (see par.2), since the Law on Protection of Competition came into force starting from 25.01.2005, as a sole license holder on the Macedonian market for the supply of electricity to retail tariff customers, up until 28.02.2008 EVN continuously abused its dominant market position by charging these costs, which (starting from 25.01.2005) is prohibited and contrary to the provisions of this Law. In the judgment the Court finds the main arguments for this conclusion in the indisputable fact that, these handling costs are meant to cover the outcome for drafting and delivery of monthly bills to the company's customers, and on the other hand, this is already taken into consideration and included in the kWh electricity retail price determined by the Energy Regulatory Commission. In this manner according to the Court, EVN's behavior leads to double charging of the same costs, on the burden of EVN's retail tariff customers. On these grounds the Supreme Courts rules that the judgment of the Administrative Court on the disputed issue (and consequently, the decision of NCA), is proper and Lawful.

## **Comment**

The presented case is relevant for understanding the public enforcement of competition law, focusing on a specific conduct of an undertaking which distorts competition on the market with an effect produced on the territory of the Republic of Macedonia, i.e. under the scope of application of the provisions of the domestic Law on the Protection of Competition. In the light of the presented case facts, it is quite logical that even though the extra charge of 6,00 denars (approx. 0,10 euro) in a monthly bill would not really concern any regular retail tariff electricity customer to object or report this issue in order to initiate any legal procedure concerning this specific cost, the competition rules still ensure that there is a competent legal authority that monitors the conditions on the market to the extent necessary for the development of free and efficient competition, or in other words, takes care of the competition on the market, and respectively, of the behavior of the market actors.

In the same time the case facts also point out that, if the number of bills on a monthly level that EVN issues to the retail tariff electricity customers is taken into consideration and the disputed costs are being summarized, a serious amount of money appears to be groundlessly collected every month by an undertaking which abused its dominant market position in this direction, which conduct on the other hand initiated the legal procedure starting before NCA, ending with a judgment of the Supreme Court on the last and highest instance which ensures the unconditional application of the provisions of the Law on the Protection of Competition, achieving its main purpose: to ensure free competition on the domestic market in order to stimulate economic efficiency and consumers' welfare.

4.4. Tatyana Andonova, District Court of Blagoevgrad (Bulgaria), *Gotar Investment Ltd. V. E.ON Bulgaria Sales*

- **Decision of the Commission for Protection of Competition № 350 of 22.03.2011 regarding case, inc. No KZK-55/28.01.2010**
- **The Supreme Administrative Court, three-judge panel No 7215 from 05.25.2011 Administrative Case No 4971/2011**
- **The Supreme Administrative Court, five-judge panel, No 2321 from 02.16.2012 Administrative case № 8930/2011, Bulgarian Commission for the Protection of Competition v E.ON Bulgaria Sales SC**

### **Facts**

E.ON Bulgaria Sales SC is a registered power distribution company with a prerogative to provide electrical energy to users within the borders of the licensed area of Novi Pazar city. Gotar Investment Ltd. is registered in the commercial register with the following business activity: buying and selling of real estate and any other activity, not prohibited by the Laws of the Republic of Bulgaria. The latter has acquired ownership of a property by a commercial transaction in Novi Pazar city and from 07.08.2008 it owns it. Before the transaction Gotar investment Ltd. has checked and made sure that the grantor of the said property, European Glass Ltd., had no obligations for consumed, but unpaid electrical energy. Therefore they asked the power distribution company to change the batch in their favor and to register it on their name in order to receive electricity, but they received a refusal from the power distribution company. The power distribution company explained its decision in this way: first, that the titular of the batch is a third party, which has not paid their obligations to the company; second, that the company was not informed about the change in the property ownership and therefore they have not discontinued the relations with the original owner. For these reasons the power distribution company has cut off the electrical energy to the property, and insisted that they will open a batch in favor of the applicant after payment of the old obligations from the previous owners and before this moment they will not resume electrical power. On the same territory there is no other entity with rights of a Power distribution company.

### **Decision of the Commission for the Protection of Competition**

After inspection, the Commission of the Protection of Competition has made a decision which has found, that E. ON Bulgaria Sales SC. has committed a violation of Art. P.5 of 21 LPC, consisting of unjustified refusal to supply electricity to the property of Gotar Investment Ltd. due to outstanding third party obligations for payment of the price of the consumed electrical energy from the previous owner of the property, and imposed a sanction of 3 204 225 BGN to E. ON Bulgaria Sales SC. It has also found that E. ON Bulgaria Sales SC has not made a violation of Art. 21 paragraph 5 of the CPA with connection to refusal for supply of electrical energy in the property of Gotar Investment Ltd., related to characteristics of electricity transport infrastructure.

The decision was appealed in front of the Supreme Administrative Court of Bulgaria, which in its decision has upheld the finding of an abuse in the circumstances because the dominant firm made improper use of its position. However, it reduced the sanction because of the financial economic situation of the company. This decision is confirmed by the decision of the five-member panel of the SAC.

## **Comment**

In this case, with its actions, the Power distribution clearly abused its position. Moreover, the applicants have suffered losses because they had to pay someone else's debts in order to use their own property. In accordance with the European law, it is perceived, that the refusal to supply due to outstanding foreign obligations for payment of the price of already received, have anticompetitive effect on the one hand, and has affected the consumer interests on the other. With these solutions regarding this case, it is explicitly confirmed that the established practice of CPC and SAC of Bulgaria, which is in line with Art. 102 TFEU which sanctions all actions of enterprises for actions in the market, through which the competition is distorted by abuse of dominant position and the conclusion of contracts depending on acceptance of additional or foreign obligations, which are not related to the specific subject of the contract.

#### 4.5. Tina Omejc, Supreme Court (Slovenia), *Slovenian electricity distributors v. Slovenian Competition Authority*

- **Competition Protection Office of the Republic of Slovenia Decision 306-168/2007-57 of 6th August 2008**
- **Supreme Court of the Republic of Slovenia Judgement U 5/2008 of 30th June 2009 (the same also U 2/2008, U9/2008, U4/2008, U6/2008)<sup>1</sup>**

### **Facts**

The Slovenian National Competition Authority (hereinafter the Slovenian NCA) issued a Decision on 6<sup>th</sup> August 2008 against five Slovenian electricity distribution undertakings. According to the Slovenian NCA, the undertakings' increase in electricity prices for households established concerted practice. Namely, those undertakings announced an increase in the prices simultaneously, rates of increase were almost identical and entered into force on the same day. The Slovenian NCA concluded that the cartel prevented, restricted or distorted competition in the Republic of Slovenia. It found a breach of Article 6 of the Slovenian Prevention of the Restriction of Competition Act (ZPOmK-1) and its corresponding Article 81 EC (now Article 101 TFEU).

All five undertakings concerned sought annulment of the NCA Decision of 6<sup>th</sup> August 2008 before the Supreme Court of the Republic of Slovenia (hereinafter (Slovenian) Supreme Court). Judgement U 5/2008 of 30<sup>th</sup> June 2009 concerns action filed by one of the undertakings concerned (hereinafter the petitioner).

Since 1<sup>st</sup> July 2007, households in Slovenia can freely choose among electricity suppliers. At the time of the NCA Decision there were five electricity distribution undertakings in Slovenia and all of them were parties to the NCA proceedings. The total price paid for the electricity by households consists of i) energy price, ii) price for the use of networks, iii) excise duty and iv) value added tax. Price for the use of networks remains subject to regulation after 1<sup>st</sup> July 2007, whereas energy price is determined in a free market. In this case the contested undertakings' behaviour relates to the increase in the energy price. All five electricity distribution undertakings announced the increase in the prices simultaneously, i.e. on 22<sup>nd</sup> and 23<sup>rd</sup> November 2007, whereby rates of increase were almost identical and entered into force on the same day, i.e. 1<sup>st</sup> January 2008.

When reviewing the NCA Decision, the Supreme Court gave an interpretation on the following elements: i) single economic entity, ii) concerted practice, iii) anticompetitive effect and iv) the use of the EC Law.

### **Concept of Single Economic Entity**

The petitioner stated that the Republic of Slovenia was a majority shareholder in all five electricity distribution undertakings. In its view the undertakings form a single economic entity whose conduct falls out of the scope of the prohibition of unlawful collusion.

The Supreme Court interpreted single economic entity doctrine in line with the ECJ case Law. Competition rules on collusion shall apply when there is a possibility of independent decision-making,<sup>2</sup> absence of national legislation precluding autonomous conduct<sup>3</sup> and existence of anti-

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<sup>1</sup> [http://www.sodisce.si/znanje/sodna\\_praksa/vrhovno\\_sodisce\\_rs/62881/](http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/62881/)

<sup>2</sup> (Case 15/74 Centrafarm BV and Adriaan de Peijpe v. Sterling Drug Inc [1974] ECR 1183, Case C-73/95 P Viho Europe BV v. Commission [1996] ECR I-5457)

competitive conduct in which undertakings engage on their own initiative.<sup>4</sup> The Supreme Court stressed that the ownership structure of undertakings by itself is not decisive for the assessment of autonomous conduct.

During the proceedings, the petitioner never stated that the prices were increased against its own will, following the instruction of the majority shareholder. At the same time, there was no national legislation fixing energy prices: on the contrary, since 1<sup>st</sup> July 2007 the market was deregulated. In such circumstances the Supreme Court concluded that the electricity distribution undertakings were not a single economic unit.

### **Concerted Practices**

The notion of concerted practice was interpreted on the basis of the ECJ case Law as well.<sup>5</sup> According to the Supreme Court, under certain circumstances, parallel behaviour can be sufficient for the establishment of concerted practice. This is the case when concerted practice is the only plausible explanation for parallel behaviour.

One of the arguments put forward by the petitioner was that the reason for its behaviour was an expected increase in price for the use of networks as of 1<sup>st</sup> January 2008. The argument was rejected by the Supreme Court on the ground that the increase in regulated price for the use of networks had not been known by the day of the undertakings' announcement of the price increase for households. There was only an expectation in this regard.

Another argument put forward by the petitioner was that purchase electricity prices for electricity distribution undertakings were determined by yearly contracts with their suppliers, running from 1<sup>st</sup> January to 31<sup>st</sup> December. According to the general terms and conditions, the undertakings were obliged to inform households of the price change at least one month in advance. Therefore, the price increase had to be announced by 30<sup>th</sup> November 2007. The Supreme Court rejected this argument as well. It pointed out that in the segment of selling electricity to households, the undertakings were making losses anyhow. Despite having concluded yearly contracts with their suppliers it would have been in their own interest to increase prices before 1<sup>st</sup> January 2008.

All arguments put forward by the petitioner were rejected. In this way the Supreme Court found no reasonable explanation for undertakings' parallel behaviour other than the existence of concerted practice among them.

### **Anti-Competitive Effect**

According to the petitioner, the conduct had no negative effect on competition. All the undertakings were making losses when it comes to selling electricity to households. Simultaneous price increase was not intended to prevent increase in the market share for any of them. Namely, any increase in market share would increase their losses, too.

The Supreme Court stressed that prevention, restriction or distortion of competition does not necessarily require direct increase in profits for the members of the cartel. Irrespective of profits or losses negative effect on competition exists because collusion excludes competition among competitors. Given that all electricity distribution undertakings supplying households in Slovenia were

(Contd.) \_\_\_\_\_

<sup>3</sup> (Case 41/83 Italy v. Commission [1985] ECR 873)

<sup>4</sup> (Case C-359/95 P and C-379/95 P Commission and France v. Ladbrooke Racing [1997] ECR I-6265)

<sup>5</sup> (Case 48/69 ICI v. Commission (Dyestuffs) [1972] ECR 619, Cases C-89, 104, 114, 116-117, and 125-129/85 A. Ahlström Osakeyhtiö v. Commission (Wood Pulp II) [1993] ECR I-1307)

part of the cartel, in this case exclusion of price competition among them established a significant effect on the competition in Slovenia.

### **Reference to EU Law**

The NCA decided the case both on the provisions of Slovenian Law as well as EU Law. However, the Supreme Court stressed that the NCA carried out no comprehensive analysis regarding the appreciable effects on trade between Member States. Therefore the Supreme Court annulled the NCA Decision regarding the finding of breach of Article 101 TFEU. The rest of the NCA Decision was upheld.

### **Comment**

In the end, this case was decided on the national competition rules only. Nevertheless, when interpreting national competition Law, the Supreme Court interpreted it in line with the EU case Law. This is important because it enables consistent application of competition Law both inside individual Member States as well on the broader EU level.



#### 4.6. Berkis Kaspars, Riga Regional Administrative Court (Latvia), *Freeport of Riga v. Latvian Competition Authority*

##### **Facts**

After purchasing its own towboats Freeport of Riga Authority started its economic activity in the market of towboat services in Freeport of Riga. The other market player – supplier of towboat services – PKL flote Ltd (hereinafter, PKL) submitted a complaint to Competition Council, alleging that Freeport of Riga Authority abused its dominant position against PKL.

The Competition Council on March 24, 2009 adopted a decision on imposing a fine in the amount of € 64029 and legal obligations on Freeport of Riga Authority for abuse of dominant position that hindered competition in the market of towboat services in Freeport of Riga.

The Competition Council established that after purchasing its own towboats and starting its economic activity in the market of towboat services in Freeport of Riga, Freeport of Riga Authority abused its dominant position against the other market player – supplier of towboat services – PKL. The violation took place as blocking and impeding PKL to provide towboat services in Freeport of Riga by setting unreasonable requirements as well as by not allowing PKL to provide towboat services to its customers.

Thereby Freeport of Riga Authority has created unreasonable advantages for itself in comparison to the other supplier of towboat services.

To ensure elimination of established violations and impact of unfavorable competition conditions as well as of further violation relapse Competition Council imposed legal obligations on Freeport Riga Authority.

Along with legal obligations preventing particular violations against PKL (Freeport of Riga Authority had to immediately allow towboats of PKL to commence supplying towboat services in Freeport of Riga) Competition Council stated that henceforth it is forbidden to set additional conditions for supplying towboat services in Freeport of Riga if these conditions are not related to the commencement of activities of any particular towboat in the Freeport of Riga.

Requirements applied to suppliers of towboat services have to be known in advance and clearly understandable, objectively justifiable and equitable, without implying discrimination of any particular supplier of towboat services. Freeport of Riga Authority also has to discontinue unitary information collection through its Ship Traffic Centre about ship owner's or agent's applications for towboat services.

Regulations of towboat service supply have to be elaborated. It was prohibited for Freeport of Riga Authority to regulate relationships between suppliers of towboat services and their clients in any way they wished. The Competition Council also ordered Freeport of Riga Authority to transmit supplying of towboat services to other legal entity within one month from the day its decision is coming into force.

Freeport of Riga Authority appealed decision of Competition Council to Administrative Regional Court, alleging that Freeport of Riga Authority has acted as public person (as administration of Freeport of Riga) and not as private person and a market player; therefore rules of competition Law are not applicable to Freeport of Riga Authority.

## **Ruling of the Administrative Regional Court**

The Administrative Regional Court and the Administrative Supreme Court rejected the complaint of Freeport of Riga Authority. The Supreme Court stated that competition Law defines as a market player any person who performs or is preparing to perform economic activity in the territory of Latvia or whose activity shall influence competition in the territory of Latvia. Concept of “market player” in competition law has to be evaluated in a functional manner, and it includes any entity that is performing economic activity, irrespective of legal form or source of financing of this entity. Rules of Competition Law are applicable to all market players including public persons, if those persons are performing economic activities. Taking into account that the court came to conclusion that Freeport of Riga Authority performed economic activity in the market of towboat services in Freeport of Riga, the Supreme Court decided that Freeport of Riga Authority has abused its dominant position against the other market player – supplier of towboat services – PKL, as it was stated in decision of Competition Council.

## **Comment**

The most important aspect of this case is that market player in competition Law meaning is any person that is performing economic activity, irrespective of legal form or source of financing of this entity. It means that activities of a public person like in this case – the administration of Freeport of Riga, has to be evaluated in competition cases as activities of market player irrespective of public status of this entity: if a public person is performing economic activity in relevant market, then those activities come under the scrutiny of competition authorities.

4.7. Darina Nikolova, Burgas Regional Court (Bulgaria), *Mobitel JSC and others v. Bulgarian Competition Authority*

**Administrative case № 9157/2011, Supreme Administrative Court (SAC) regarding the appeal of**

**Decision № 170/18.02.2010 of the Commission for Protection of Competition (CPC).**

**Facts**

The case under consideration aims to establish the work of the national competition protection authority – the Commission for Protection of Competition (hereinafter referred to as the Commission) and the Supreme Administrative Court, on occasion of the struggle between three different mobile operators – Mobitel JSC (with the brand name Mtel), Cosmo Bulgaria Mobile JSC (acting with the brand name Globul) and the Bulgarian Telecommunication Company JSC (Vivacom). The proceedings are a continuation of the years-long dispute between these companies for infringement the rules of fair competition, and in particular abuse of a dominant position with respect to particular services and markets.

Mobitel JSC had sent a request to the Commission with the purpose of establishing infringements under Article 21 of the Protection of Competition Act (similar to Art. 102 TFEU) committed by Cosmo Bulgaria Mobile JSC, in connection with its prices for providing mobile services.

Mobitel JSC, at whose request the proceeding has been initiated, and Cosmo Bulgaria Mobile JSC, are companies providing public electronic communication networks and services; they are registered in compliance with the procedure of the Electronic Messages Act, and operate on the market for access to mobile land networks and provision of mobile voice telephone services through them.

By a decision dated June 20th, 2006 the Communications Regulation Commission determined that Mobitel and Globul are dominant operators on the mobile voice services market, taking in consideration their market share – more than 25 per cent of the respective market. Also Cosmo Bulgaria Mobile JSC was determined as an enterprise having significant influence on the whole sale market. The same had been ruled also by a decision of the Commission for Protection of Competition dated June 24th, 2008.

On the grounds of the above decisions the claimant Mobitel JSC asserted that there exists a dominant position, by which Cosmo Bulgaria Mobile JSC has committed abuse according to the meaning of Article 21 of the Protection of Competition Act.

In the discussed case both companies have participated in a public procurement procedure initiated by one of the power supply companies in the country – E.ON Bulgaria. The Commission has ruled that the competition between both companies should be treated as single – until closing the procurement procedure, because after nominating the provider, the assignor (E.ON Bulgaria) becomes its client and the servicing company does not enter into competition with the others. The Commission has reached the conclusion that the dominant position of one product market does not automatically mean the same position also on another market. It has assumed that it concerns a retail market connected with providing services to a specific user, rather than a wholesale market concerning services provided between the three operators. Thus it has found out that in the specific market there is no company with a dominant position, such as to make such a company independent from both competitors - participating in the procurement procedure, and the user, who has the right of choosing a provider. One of the preconditions for abuse of a dominant position under Article 21 of the Protection

of Competition Act is missing, namely the interested company – Cosmo Bulgaria Mobile JSC does not have a dominant position within the meaning of the Act with regard to this market. The lack of a market participant, holding an independent power, with a view to its market share, level of technological development, financial resources and market access capability, to ignore its competitors, leads to the absence of an infringement.

### **Ruling of the Bulgarian Supreme Court**

The decision of the Commission on Protection of Competition is confirmed by the Supreme Administrative Court in two instances. The court assumed that the proper relevant market should be restricted to the subject matter of the public procurement, and that the competition between both companies is expressed only once – up to the moment the public procurement procedure is closed. The Supreme Court has asserted that the criteria for individual dominance of any of the participants, by which the effective competition of the respective market to be impeded, were not established.

### **Comment**

The case mentioned here reflects the relationship development of the CPC's practice for determining and imposing fines for offences related to competition. The analysis made by the CPC shows that the home market of mobile voice services, provided to the users, is oligopolistic, but the close positions of the companies participating in the oligopoly such as Mobiltel and Globul prove symmetric oligopolistic structure of the market, which leads to the conclusion that there is no participant with dominant position on this market. Although the companies have been determined as such with dominant position, but examining the situation in the case from different perspective has led the commission to reach a different conclusion.

This case is interesting on the local level on the basis of an ongoing procedure for another mobile services operator in the country and will affect other cases in the Bulgarian Commission regarding the development of this market.

4.8. Marija Skalova, Court of Kumanovo (Rep. of Macedonia), *T- Mobile Macedonia JSC v. Macedonian Competition Authority*

**Decision of the Supreme Court of Republic of Macedonia UZP 245/2010 from 05.07.2010, deciding upon the complaint of the complainant T- Mobile Macedonia JSC for Mobile Communications Skopje against the Decision of the Administrative Court Skopje U 990/09 from 10.12.2009, for assessment of abuse of dominant market position**

**Facts**

In the following case report, I will summarize the legal procedure regarding the complaint of T-Mobile Macedonia JSC for Mobile Communications Skopje submitted to the Supreme Court of Republic of Macedonia, as a highest and final judicial instance during the assessed period, regarding the Decision of the Administrative Court Skopje U 990/09 from 10.12.2009, for assessment of abuse of dominant market position. With the above quoted Decision, Administrative Court, rejected as unfounded the Lawsuit of the plaintiff T- Mobile Macedonia JSC for Mobile Communications Skopje, against the Decision of the Commission for Protection of Competition Skopje 07-6/2 from 26.01.2009.

The complainant submitted a complaint to the Supreme Court against the Decision of the Administrative Court, stating that the state of affairs had been misunderstood, and the material law was misused, with the proposal that the complaint should be recognised and decision should be in reached in favour of the complainant.

Defendant authority did not submit a response to the complaint.

Supreme Court of Republic of Macedonia, after investigating the case and the arguments in the appeal, found that the appeal is unfounded, due to the following reasons:

Within the administrative procedure, Commission for Protection of Competition, acting upon the instructions given with the Decision of the Administrative Court U 4829/07 from 09.10.2008, reached the decision on 26.01.2009, determining that the mobile operator T- Mobile Macedonia abused the dominant position on the market. This Decision referred to the procedure for call termination within the public mobile communication network, property of T- Mobile Macedonia. The undertaking charged a caller to a subscriber of T- Mobile Macedonia, who has activated the service "voice mail", from the moment of the opening the "voice mail", while the voice message for introduction of this service was playing.

The Commission found that this action was forbidden according to the Article 14 paragraph 2 point 1 of the Law on Protection of Competition valid in that period, and no longer in force today. Article 14 paragraph 1 states that : Any abuse by one or more undertakings of a dominant position on the relevant market or in a substantial part of it shall be prohibited, while the paragraph 2 says that the abuse, within the meaning of paragraph (1) of this Article, shall, in particular, consist in: 1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.....

The Commission determined that the voice message for introduction of the service "voice mail" is the part of the service and a subject of the charge, so the caller has no option to choose if he wants to use this service, that will be charged to his account. In this way, the caller will have costs, without having a previous notice that he will be charged, despite the fact that the number he called was currently unavailable. According to the Commission, this behaviour by T- Mobile Macedonia represents a direct imposition of unfair sale prices and it is contrary to the above quoted Article of the Law on protection of competition.

The Administrative Court ruled that the Commission for Protection of Competition, based on properly established relevant facts, properly applied the stipulations from the Law on Protection of Competition, when reaching the contested Decision.

### **Ruling of the Supreme Court**

According to the Supreme Court of the Republic of Macedonia, the disputed Decision was correct and lawful.

During the procedure, Supreme Court assessed that T- Mobile Macedonia is a mobile operator, with considerable market power on the relevant markets, and with its behaviour, has abused its dominant position. The Supreme Court accepted the Decision of the Commission, adopted by the Administrative Court as well, that T - Mobile infringed the Law on Protection of Competition, offering the service "voice mail", in a way that he left no "free space" for the callers to decide whether they will leave a message to the subscriber who is called, if he included the service "voice mail" on his mobile phone, so the charging could start only after the operator notifies the caller that this service is turned on. The Supreme Court also found that this behaviour represents a direct imposition of unfair sale prices and affects the efficient competition of the relevant market.

The Supreme Court also found unfounded the appeal statements of the complaint by T- Mobile that the above quoted service is wrongly understood as a wholesale service, while it's an additional retail service, as well as the described charging of the service "voice mail" does not represent an abuse of the dominant position. The complainant refers to the fact that this was evident from the proof attached to the case regarding the mode of functioning of this service in other European countries, and this were not taken in account by the Administrative Court while deciding.

The Supreme Court, judging the relevant parameters found that the imposition of unfair sale prices, according to the positive domestic legislation, represents an infringement of the competition rules. The fact that the Administrative Court did not appraise the activities of the mobile operators in other European countries, is not a violation that caused damage to the complainant, since the enclosed proofs regarding the business activities of the foreign legal entities, do not influence the concrete legal matter, nor the legality of the decision.

Due to the all reasons stated above, the Supreme Court of the Republic of Macedonia decided to reject the complaint from T- Mobile as ungrounded and to confirm the Decision of the Administrative Court U 990/09 from 10.12.2009.

4.9. Michael Dabrowski, District Court of Warsaw (Poland), *Telekomunikacja Polska S.A v. Polish Competition Authority*

**Judgment of the Court of Appeal in Warsaw of the 20<sup>th</sup> of November 2008, file no. VI ACa 384/08, published in the Official Journal of the Office of Competition and Consumers Protection of 2009, No. 1, p. 8.**

## **Facts**

The case was initiated Telekomunikacja Polska S.A. - TP S.A. (the largest telecommunication company in Poland – a former state telecommunication services provider) against the decision of the President of the Office of Competition and Consumers Protection with the participation of Netia S.A. (other large telecommunication company).

In the decision of the 30<sup>th</sup> of May 2006 the President of the Office of Competition and Consumer Protection recognized the actions of TP S.A., by which the company increased from the 1<sup>st</sup> of October 2005 the prices on the calls to phone numbers 0708 1xx xxx from 0,29 PLN to 0,58 PLN per minute on the national market of the access to the national and international phone calls on the numbers 0708 1xx xxx, as a practice restricting competition in terms of Art. 8 in connection with Art. 8 (2) no. 5 of the Act of 15<sup>th</sup> of December 2000 on Competition and Consumer Protection as well as Art. 82 of the Treaty establishing European Community (now Article 102 TFEU). This practice consisted in abuse of dominant position on the market and the President of the Office of Competition and Consumer Protection ordered to stop it. Furthermore imposed a fine on TP S.A. of 12.187.650 PLN.

TP S.A. appealed from this decision to the Competition and Consumer Protection Court which is the 17<sup>th</sup> Commercial Division of the Regional Court in Warsaw.

The President of the Office of Competition and Consumer Protection as well as the interested participant Netia S.A. pleaded to dismiss the appeal.

The Regional Court in Warsaw in the 17<sup>th</sup> Commercial Division and The Competition and Consumer Protection Court in the judgment of 27<sup>th</sup> of December 2007 dismissed the appeal of TP S.A.

TP S.A. appealed again from the judgment of the Competition and Consumers Protection Court to the Court of Appeal in Warsaw.

## **Ruling of the Court of Appeal**

The Court of Appeal in the judgment of 20<sup>th</sup> of November 2008 changed the judgment of the Regional Court and the decision of the administrative authority.

According to the judgment the main sentence of the decision should be reformulated in the following way: The President of the Office of Competition and Consumer Protection recognizes the actions of TP S.A., by which the company increased from the 1<sup>st</sup> of October 2005 the prices on the calls to phone numbers 0708 1xx xxx from 0,29 PLN to 0,58 PLN per minute and at the same time the company decreased on the 7<sup>th</sup> of July 2005 and on the 1<sup>st</sup> of September 2005 the prices for international calls accessible in tariff plans of TP S.A. as a practice restricting competition on the market of access to the fixed line network for national and international services of phone calls on the numbers 0708 1xx xxx, in terms of Art. 8 in connection with Art. 8 (2) no. 5 of the Act of 15<sup>th</sup> December 2000 on Competition and Consumers Protection as well as Art. 82 of the Treaty establishing European Community. The practice consisted in opposing the formation of conditions

necessary for the development of competition and should be stopped. The rest of the grounds of appeal were dismissed.

TP S.A. is the owner of the public fixed line network and participates as the necessary technological middleman on the national and international market of phone connections for the services related to the phone numbers beginning with 0-708. The company is also the direct service provider in this area. TP S.A. has the possibility of shaping prices on the wholesale market as well as on the retail market. The abovementioned phone numbers beginning with 0708 1xx xxx are used for different phone services also for national and international connections. The client connects first with the number beginning with 0708 1xx xxx and later calls the preferred national or international number. The price for the connection is counted by the access operator according to its tariff as a connection to the number 0708 1xx xxx. The possibility of national or international phone calls at price of 0.29 PLN per minute makes this service attractive for the clients. Since the beginning of providing services of this kind the number of minutes of phone connections and the income of alternative operators systematically increased. However, the income of TP S.A. in the period from August 2004 to August 2005 decreased. In the period from October 2003 to October 2005 the tariff of TP S.A. for the premium rate connections was not changed. Up to the 30<sup>th</sup> of September 2005 the price for the 90% of clients for whom TP S.A. is access operator and who do the national and international connections using numbers beginning with 0708 1xx xxx was 0,29 PLN per minute. Since the 1<sup>st</sup> of October 2005 TP S.A. increased the price up to 0,58 PLN per minute. The introduction of this 100% increase was preceded by the offers of TP S.A. directed to its clients, which lead to decrease of the cost of international connections done within the network of this company.

### **Reasons of the Court of Appeal:**

1. In the opinion of the Court of Appeal the relevant market in this case is, as it was determined in decision of the President of the Office of Competition and Consumers Protection, the wholesale market. However the direct actions of TP S.A. connected with providing of services in question relate to the retail market, the actual aim of these actions is the wholesale business volume. The lower interest of the clients means the limitation of the access to the phone network for the services done through the numbers beginning with 0708 1xx xxx. Thus, the retail business volume should be considered only as the market connected with the relevant market, which is the wholesale business volume. On this market take place the relationships between the competing participants of the market of phone connections and is decided the access to the market of alternative operators.
2. For the Court of Appeal the arguments presented by TP S.A. that the special offers for the group of clients on international connection within its network were unrelated to the increase of the prices for the connections to the numbers beginning with 0708 1xx xxx were irrelevant. TP S.A.'s aim was to convince that its intention was not affect the competition. According to the Art. 101 (1) of the Act of 15<sup>th</sup> December 2000 on Competition and Consumers Protection the sufficient requirement for imposing a fine is only the unintentional infringement of the prohibition of the Art. 8 of this Act. In the opinion of the Court the fact of introduction of special offers for international connections services provided directly by TP S.A. short time before the 100% increase of prices on connections via 0708 1xx xxx numbers proves sufficiently the intention of the claimant. For the qualification of certain actions as a practice restricting competition is of no significance, if this practice already caused a negative impact on the market. The meaning of Art. 101 (1) No. 1 and 2 of the Act of the 15th December 2000 on the Competition and Consumers Protection is undoubtedly that the requirement for imposing a financial penalty on the undertaking is infringement of the prohibition stated in the Art. 8 of this Act or Art. 81 or Art. 82 of the EC Treaty.
3. The Court of Appeal underlined that from the decision of the President of the Office of Competition and Consumer Protection clearly proves that the practice restricting competition

consisted in the 100% increase by TP S.A. of prices for the connections to the numbers beginning with 0708 1xx xxx and at the same time the decrease of the prices of services of TP S.A. for the international connections accessible in the tariff plans of this company. The analysis of the market environment of the claimant company and the market effects of its actions were the reasons for recognizing its behavior as a practice restricting competition. The relevant fact was also that the possibility of providing the service by alternative operators for the clients of TP S.A. depends largely on the approval of this company. In consequence one may not treat the wholesale market as competitive. Moreover, there is no real alternative solution for the access to the services provided by TP S.A. The service of the wholesale access to the phone services done on the numbers beginning with 0708 1xx xxx does not have any substitute. At the time there are no technical means to avoid dealing with TP S.A. In the opinion of the Court of Appeal this argumentation should result in above quoted reformulation of the questioned decision, because it is not only the increase of the prices defined the practice of TP S.A. that anticompetitive, but the market context is also relevant.

4. At the end of the reasons the Court of Appeal agreed with the Regional Court and the President of the Office of Competition and Consumer Protection that the actions of TP S.A. had the influence on the trade between Member States. The indirect effects of the actions of TP S.A. comprised the possibility of elimination from the specific market the competing undertakings as well as the separation of the Polish market from the Common Market. The Court stated that in the determination of the significance of the influence of specific action on trade, one should take into consideration, that the presence itself of an undertaking having the dominant position on the whole territory of a state may cause that the penetration of this market by other entities will be hindered. Sufficient is also only the possibility of the potential occurrence of such an influence on the trade between the Member States. Thus, it is not necessary to prove that the specific practice in fact influences the trade.
5. The Court underlined that the European Commission was informed about the project of the questioned decision according to the Art. 11 (4) of the Council Regulation (EC) No 1/2003 of the 16<sup>th</sup> December 2003 and it did not raise any objections. The Commission in fact recognized the decision of the President of the Office of Competition and Consumer Protection was correct in respect of the infringement by TP S.A. of Art. 82 of EC Treaty.

### **Ruling of the Supreme Court**

The judgment of the Court of Appeal was appealed on points of Law to the Supreme Court of the Republic of Poland by TP S.A. as well as by the President of the Office of Competition and Consumer Protection.

The Supreme Court in the judgment of the 18<sup>th</sup> of January 2010, file no. III SK 28/09, published in OSNP of 2011, No. 17-18, p. 243, annulled the decision of the Court of Appeal and referred the case back to this court. The Supreme Court shared the views on the merits of the claim and the legal conclusions of the Court of Appeal, however it had to take into consideration the argument of the appealing parties that changing the decision of the President of the Office of Competition and Consumer Protection the Court of Appeal violated the principle “ne ultra petita”, which was the ground to annul the judgment.

### **Comment**

1. For the qualification of certain actions as a practice restricting competition is of no significance, if this practice already caused a negative impact on the market. The meaning of Art. 101 (1) No. 1 and 2 of the Act of the 15<sup>th</sup> of December 2000 on the Competition and Consumers Protection is undoubtedly that the requirement for imposing a financial penalty on the undertaking is an

infringement of the prohibition stated in the Art. 8 of this Act or Art. 81 or Art. 82 of the EC Treaty.

2. At the determination of the significance of the influence of specific action on the trade between Member States, one should take into consideration that the presence itself of an undertaking having the dominant position on the whole territory of a state may cause that the penetration of this market by other entities will be hindered. Sufficient is also only the possibility of the potential occurrence of such an influence on the trade between the Member States. Thus, it is not necessary to prove that the specific practice in fact influences the trade.

#### 4.10. Villem Lapimaa, Tallinn Administrative Court (Estonia), *AS Eesti Post v. Estonian Competition Authority*

##### **Facts**

By the decision dated 16/11/2011, the Competition Authority imposed fines for a total amount of 36,000 euros on AS Eesti Post (Estonian Post) for an infringement of the Competition Act committed in September 2010. The Competition Authority found that Eesti Post discriminated against AS Itella Information on two separate occasions having offered postal services to the latter under unfair trading conditions.

In the first case, in September 2010, the Ministry of Finance conducted simplified public procurement proceedings for the “Provision of postal services” service to be purchased; the service included the storage of information materials about the adoption of the euro in Estonia and euro calculators and assembling them in sets, the production of envelopes, placing the sets in envelopes and delivering them as unaddressed direct mail (so-called blind mail) to the post boxes of all private persons. The bidders for this public procurement were Itella and Eesti Post jointly with its subsidiary undertaking AS Eesti Elektronpost.

Both Itella and Eesti Elektronpost offer the services of printing materials or letters and placing them in envelopes as well as personalisation and set-assembling services (so-called preparation services). None of the above companies deliver mail, and they have to use the services of a postal operator. Eesti Post is by far the largest postal operator in Estonia and the only holder of the nationwide postal network. Eesti Post uses the above postal network for providing a variety of postal services and other services including the delivery of direct mail (for instance, blind mail services). Thus Itella must usually use Eesti Post’s services for completing large-scale orders which imply the delivery of mail in addition to the services provided by Itella itself.

The Competition Authority found that in its joint bid with its subsidiary undertaking Eesti Elektronpost, Eesti Post had offered the delivery of the materials of the Ministry of Finance at a significantly lower price than the price Eesti Post had quoted to Itella on the basis of the price lists of the former for the purpose of Itella taking part in the public procurement announced by the Ministry of Finance. Considering the fact that Itella and Eesti Elektronpost would have equally prepared the materials of the Ministry of Finance to be forwarded to Eesti Post for delivery, the cost of the delivery incurred by Eesti Post could not have varied significantly depending on whether the materials of the Ministry of Finance were prepared by Eesti Elektronpost or Itella.

According to clause 3 of section 16 of the Competition Act, an undertaking of the dominant position in the goods market is forbidden to offer or apply dissimilar conditions to equivalent agreements with other trading parties, thereby placing some of them at a competitive disadvantage.

The Competition Authority confined the relevant goods market to the provision of blind mail (unaddressed direct mail) services in the Republic of Estonia and found that Eesti Post held a dominant position in the above market.

By quoting a significantly lower price for the delivery of the materials of the Ministry of Finance to be prepared by its subsidiary undertaking Eesti Elektronpost than the price for the delivery of equally prepared materials quoted by Eesti Post to Itella, Eesti Post placed Itella at a competitive disadvantage in the process of bidding for the provision of the preparation services. In a situation where the customer (the Ministry of Finance) wished to purchase a complex service which included both the preparation services and the delivery service, Eesti Post created an advantage for its subsidiary undertaking Eesti Elektronpost, thus limiting competition in the bidding for the provision of the preparation services. The Competition Authority found that the activity of Eesti Post described above

had violated the prohibition for a undertaking of the dominant position in the goods market established by clause 3 of section 16 of the Competition Act, which qualifies as the abuse of the dominant position in the market.

According to clause 1 of section 735 of the Competition Act, the establishment of unfair trading conditions, or the limitation of production, services, market, technical development or investments, or engaging in activities involving abuse of the dominant position in the market shall be punished by a fine of up to 300 fine units or by detention. The same act, if committed by a legal person, is punishable by a fine of up to 32,000 euros (clause 2 of section 735 of the Competition Act).

The Competition Authority found that the activity of Eesti Post met the criteria of a violation described in clause 2 of section 735 of the Competition Act and imposed a fine in the amount of 18,000 euro on Eesti Post.

In the second case, in September 2010, Eesti Energia AS conducted a tender procedure for the printing of letters about the replacement of the information system and delivering them to the customers of Eesti Energia AS. The bidders for the above public procurement were Itella and Eesti Post jointly with its subsidiary undertaking Eesti Elektronpost.

The Competition Authority found that in its joint bid with its subsidiary undertaking Eesti Elektronpost for the purpose of the tender of Eesti Energia AS, Eesti Post had offered the delivery of the letters of Eesti Energia AS at a significantly lower price than the price Eesti Post had quoted to Itella on the basis of the price lists of the former. Considering the fact that Itella and Eesti Elektronpost would have equally prepared the letters to be forwarded to Eesti Post for delivery, the cost of the delivery of Eesti Energia AS's letters incurred by Eesti Post could not have varied significantly depending on whether the letters were prepared by Eesti Elektronpost or Itella.

The Competition Authority confined the relevant goods market to the provision of direct mail (i.e. addressed direct mail) services in the Republic of Estonia and found that Eesti Post held a dominant position on the above market.

The Competition Authority found that by quoting a significantly lower price for the delivery of the Eesti Energia AS's letters to be prepared by its subsidiary undertaking Eesti Elektronpost than the price for the delivery of equally prepared letters quoted by Eesti Post to Itella, Eesti Post placed Itella at a competitive disadvantage in the process of bidding for the provision of the preparation services. In a situation where the customer (Eesti Energia AS) wished to purchase a complex service which included both the preparation services and the delivery service (provided neither by Eesti Elektronpost nor Itella on their own), Eesti Post created an advantage for its subsidiary undertaking Eesti Elektronpost, thus limiting competition in the bidding for the provision of the preparation services. The Competition Authority found that the activity of Eesti Post described above had violated the prohibition for a undertaking of the dominant position in the goods market established by clause 3 of section 16 of the Competition Act, which qualifies as the abuse of the dominant position in the market. As the activity of Eesti Post met the criteria of a violation described in clause 2 of section 735 of the Competition Act, the Competition Authority imposed a fine in the amount of 18,000 euro on Eesti Post.

### **Ruling of Harju County Court**

Eesti Post filed a complaint to Harju County Court concerning the Competition Authority's decision of 16/11/2011. On 27/04/2012, Harju County Court made a judgement according to which the Competition Authority's decision of 16/11/2011 concerning AS Eesti Post having violated the Competition Act was to remain in force, but the fine imposed on AS Eesti Post on the basis of clause 2 of section 735 of the Competition Act was to be decreased to 18,000 euros.

## 5. State Aid Control

5.1. Ivan Rumana, Supreme Court (Slovakia), *Frucona Košice v. European Commission*

### Case C-71/11, *Frucona Košice v. European Commission* (2013) n.y.r. ECR

#### Facts

The Commercial court, acting with a prior consent of local Tax Office, wrote off 65% of a tax debt of Frucona Košice (undertaking) in a collective bankruptcy procedure. The European Commission ruled this was unlawful aid which had to be recovered from Frucona.

Frucona owed the local Tax Office a tax debt of approximately 20 million Euro. In 2003 the company started talks with local Tax Office about settlement of the company's tax debts by means of arrangement procedure as the part of bankruptcy procedure before local commercial court.

Slovakia (SK) joined European Union on May 1, 2004. The EU State aid rules have been legally binding since accession. Frucona formally started bankruptcy procedures before accession to the EU proposing to its creditors (including the local Tax Office) to pay each of them 35% of the amount owed each of them. On July 6, 2004 (after SK's accession to the EU) Frucona's creditors, including the local Tax Office, accepted the proposal before the commercial court. The commercial court approved the arrangement by its decision in July 2004. The tax debt of 65 % was written off. The decision of the commercial court created a status *res iudicata*. In the case of *res iudicata*, the matter cannot be raised again, either in the same court or in a different court.

In 2006, European Commission declared the measure to constitute State aid incompatible with the common market and ordered Slovak Republic to take all necessary measures to recover from Frucona the unlawfully granted aid. The Ministry of Finance forced the local Tax Office to file an action against Frucona with relief to pay the tax debt back. The District Court dismissed the action on the ground *res iudicata*. The Regional Appeal Court confirmed the judgment of District Court.

*Res iudicata* is considered to be the main obstacle to get the tax debt back. The tax debt has been settled and does not exist anymore. How to get the illegal State aid back and not to break the principle *ne bis in idem*? There is a need for a special deed to recover unlawful aid. The Slovak Parliament, on a proposal of the Government, imposed new legislation to enforce the tax debt back. The new State aid act ("lex Frucona") stated that the infringement decision of European Commission would be directly enforceable as a judgement. The Commission's decision would have an effect of a *sui generis* deed. And a decision of the Ministry of Finance based upon such Commission's decision would also constitute a *sui generis* deed. The State aid act stipulated also a retrospective effect clause (to cover the case of Frucona). But the Constitutional court declared the retrospective effect clause of "lex Frucona" unconstitutional.

Consequently Frucona filled an action against the Commission's decision to General Court. The General Court by its judgement of 7 December 2010 in Case T-11/07 dismissed the action. Frucona succeed in an appeal. The Court of Justice by its judgement of 24. January 2013 in case C - 73/11 P set aside the judgement and referred the case back to General Court for further proceedings.

#### Comment

Is it possible to enforce the unlawful State aid from Frucona without prior cancelation of the court decision?

It seems to me a problem that the unlawful aid was granted to Frucona by a decision of the court. This decision is legally binding and created the obstacle *res iudicata*. There might be interferences with Constitution and European Convention on Human Rights. From the point of private Law the obligation to pay tax debt does not exist anymore.

Such problem would have been not so sensitive if the unlawful aid had been granted by the decision of an administrative body.

The burden of the Ministry of Finance is to prove different legal and factual ground of unlawful aid. It might be difficult to persuade a private Law judge thinking in traditional legal principles. A possible means for enforcement of unlawful State aid might be administrative decision made by Commission or made by Ministry of Finance itself. To review the legality is upon administrative justice. Administrative judges are keener to refer for preliminary ruling to ECJ if they are not sure about the interpretation of EU Law.

5.2. Katarina Bulijan, Supreme Court (Croatia), *Varteks d.o.o v. Croatian Agency for the Protection of Market Competition*

**Judgment of the Administrative Court of Republic of Croatia No US- 5362/2007 from 3<sup>rd</sup> November 2010.**

**Decision of the Agency for protection of the Market Competition: UP/I-430-01/2004-01/42 reg. number: 580-03-07-17-24 from 4<sup>th</sup> April 2007.**

### **Facts**

By its decision adopted on 4<sup>th</sup> April 2007, the Croatian Agency for Protection of the Market Competition (hereafter the respondent agency):

1. gave approval to the Decisions of Government of Republic of Croatia that contained guarantees, and they represented State aid for restructuring the plaintiff;
2. determined and decided upon special measures and deadlines for their execution towards the Ministry of Economy Labor and Entrepreneurship;
3. forbade to plaintiff to receive any State aid until 31st December of 2007, that is, to receive State aid for restructuring from 4th of April 2007 to 4th of April 2017(ten years).

### **Arguments of the Plaintiff**

The plaintiff disputes legality of the disputed decision by calling to reasons from Article 10. paragraph 1. subparagraph 1.-3. of the Administrative Disputes Act. The plaintiff objects that he hasn't had a possibility of participating and hearing in the procedure that preceded the issuing the disputed decision, and he considers it a grave injury to the rules of procedure.

Due to complexity of this case, he considers it necessary to include into the case the Ministry of Economy Labor and Entrepreneurship, the Ministry of Finances and the Croatian Bank for reconstruction and development as interested parties.

He states that by the termination of issued guarantee, based on the Decision of Government of Republic of Croatia on giving the state guarantee on which the respondent agency has given approval only to 31st December 2007, the Croatian bank for reconstruction and development as creditor by individually specified Credit Contracts and its addenda, is left without the guarantee in amount of 50 million kunas, as insurance instrument by the credit contracts mentioned and it could call out the plaintiff to payment, because with the cessation of the state guarantee, the plaintiff, as user of the credit now doesn't fulfill the conditions from the contracts mentioned - obligation of delivery and maintaining of the insurance instruments in power, of which one is the guarantee of the Ministry of Finances to the amount of 50 million kunas increased for the interests. Thus applying the disputed decision would bring forth irreparable damage and a huge cost for him.

The plaintiff also protests that the respondent agency shouldn't have used European Community regulations (now European Union) as sources of the Law because there are insurmountable constitutional reasons for it. In this case the Stabilization and Association Agreement, as well as, the Interim agreement on trade and trade-related matters between the Republic of Croatia and the European Community might be applicable, while criteria and instruments of interpretation by European Community which the agency relies upon and calls to, and which are neither contained nor accepted and published in any Croatian Law or decree, cannot be a source of the Law.

The plaintiff also protests and objects that the respondent agency made a mistake in interpretation and changed provisions of the State aid Act, not paying respect to the goals and purpose which the Law and its provisions were trying to achieve, thus it is incorrectly assumed that the credits contracted with the Croatian bank for reconstruction and development are concluded under conditions more favorable from the market conditions, thus containing State aid, as well as, it incorrectly deduced the amounts of state granted aids awarded by the credits mentioned, and the thesis that the process of restructuring of the plaintiff started on in 2004 and lasted until 31<sup>st</sup> December of 2007 is incorrect.

Plaintiff suggests that the claim be accepted and the disputed decision be repealed and made completely void.

### **Arguments of the Respondent**

Answering to the claim, the respondent agency considers that the reasons of the plaintiff are unfounded and unsound. It claims that the disputed decision is issued based upon correctly established facts and by deducing the right conclusions, and all according to provisions of the State aid Act and based on provisions of the Regulation on State aid. It claims and considers the claims of the plaintiff about infringement of the rules of the procedure in the sense that the plaintiff was not allowed to clarify his position during the procedure unsound, since the plaintiff is given an opportunity to state his opinion and give statement about all the important facts and circumstances which he considers important for bringing the case to conclusion, and which are determined during this procedure specifically in writing in several cases (Notice from 30<sup>th</sup> November 2005, meetings with the plaintiff with the purpose of clearing up certain parts of Restructuration plan held on 31<sup>st</sup> January 2005, 12th January 2006 and 3<sup>rd</sup> February 2006).

The administrative procedure in which approval, supervision and reimbursement of state granted aids is performed is regulated by the State aid Act. The main significance of starting the administrative procedure of approval of the state granted aid comes from the fact that in neither the cases the procedure can be initiated by an entrepreneur alone, that is, the beneficiary of the state granted aid, but only by the benefactor of the state granted aid or the Agency of ex officio. Thus, during the initiation of the administrative procedure the very giver as the initiator of the procedure decides which entrepreneur will be chosen to submit a proposal/recommendation for him, that is, on giving the individual aid, and to suggest the amount and kind of the state granted aid.

Approval of the state guarantees for credit contracts contracted between the plaintiff and Croatian bank for reconstruction and development is given until 31<sup>st</sup> December of 2007, that is until completion of the reconstruction project, because after completion of the reconstruction process, the state granted aid for restructuring cannot exist anymore, and these are in this case the state guarantees on behalf of the Croatian bank for reconstruction and development.

The respondent states further that the plaintiffs' claims that applying European community regulations (now European Union) as a source of the Law was not allowed is wrong. Namely the state granted aids regulated by the Act and the Regulation are completely based on the *acquis communautaire* of the European Community (now European Union), and since the plaintiff submitted the claim/request for state granted aid on 30<sup>th</sup> December 2004 in the time when European community Directive for state granted aid for rescue and restructuring of entrepreneurs having hardship, thus in this case have been applied the standards and criteria for assessment of the state granted aids for restructuring which follows from the 2004. directives mentioned.

## **Ruling of the Administrative Court**

The Administrative Court of Republic of Croatia, assessing legality of the disputed decision as per the requests from the claim, have issued decision No. US- 5362/2007 from 3<sup>rd</sup> November of 2010 by which the disputed decision is annulled.

The Court is led by the provisions of the State aid Act („Official Gazzete“ No.47/03 i 60/04) which defines and regulates general conditions and rules for approval of the aid, monitoring of the implementation and reimbursement. That act prescribes that the Agency for protection of the Market Competition, using the decision as an administrative act, does the following:

1. gives approval to proposal of the act which is intended to approve or give an individual aid;
2. refuses to give approval to proposal of the act which is intended to approve or give an individual aid;
3. rejects request for giving approval to the proposal of the act which is intended to approve or give an individual aid;
4. repeals the approval given earlier to the proposal of the act which is intended to approve or give an individual aid, and decrees reimbursement of the funds used based on the approved or given individual aid;
5. suspends the procedure.

So in the administrative procedure of giving approval to the decisions of Government of Republic of Croatia which contain government guarantees, and in this case it is State aid for restructuring the plaintiff, what ought to be applied are the rules of procedure stated in the State aid Act, Regulation on State aid Act (Official gazette No. 121/03 and, and 50/06) and the General Administrative Procedure Act (Official gazette No. . 53/01 and 103/96).

According to the provision of the Article 3. of the General Administrative Procedure Act in administrative areas for which no specific procedure is prescribed, it is to be acted upon the provisions of that Law.

According to the provision of the Article 1 paragraph 1 of the General Administrative Procedure Act, bodies/agencies of state administration are obliged to act according to that Law and other state bodies/agencies, when by applying Laws in administrative matters are directly deciding upon rights, obligations or legal interests of citizens or legal entities or other parties.

According to the provision of paragraph 2<sup>nd</sup> of that Article, other legal bodies/persons when they are deciding upon administrative matters while doing the public work are also obliged to act according to that Law.

By provision of Article 49 paragraph 1 of the General Administrative Procedure Act it is prescribed that a party is a person whose request initiated the procedure or against which the procedure is initiated and led or which, because of the protection of his rights or legal interests, has the right to participate in the procedure.

According to the provision of the Article 50 paragraph 1 of that Law, the party in the administrative procedure can be any natural/physical or legal person.

By the disputed decision, besides other things, the agency forbade to the plaintiff to receive any State aid from 31<sup>st</sup> December 2007, that is, it forbade him to receive any State aid for restructuring in period between 4<sup>th</sup> April 2007 until 4<sup>th</sup> April of 2017(Ten years).

The principle of hearing the parties is one of the basic principles of the administrative procedure. According to the provision of Article 8, paragraph 1, of the General Administrative Procedure Act, before issuing of the decision, a party must be offered the chance to present its facts and circumstances which are important to issuing the decision, and according to the paragraph 2 of that Article of the

Law, the decision can be brought about without previous hearing of the party only in cases when it is allowed by the Law.

The procedure of issuing the decision is regulated in the chapter XI of the Law. According to the regulation of Article 135 of the Law before issuing the decision, all facts and circumstances which are significant for decision must be established and parties must be allowed to actualize and protect their rights and legal interests. That can be done in shortened procedure or in a special hearing procedure. But since the shortened procedure is not accounted for in the State aid Act, in this case it was necessary before issuing the decision to perform a special hearing procedure, and possible oral hearing, and because of the plaintiffs' objections with regards to the established facts, and the agency didn't do it. Thus, making the decision in this case the agency totally neglected the fundamental provisions of the General Administrative Procedure Act.

Thus on the basis of the Article 39 paragraph 2 of the General Administrative Procedure Act, the claim is accepted and the disputed decision is made void/null and the agency obliged to issue a new decision respecting, according to the provision of Article 2<sup>nd</sup> of the Law, the legal understanding of the Court and its notices with regards to the procedure.

And with regards to the stated claim/objection about impossibility of applying the regulations of the European Community as the source of Law in this case, the Court cites the following: by provision of Article 140 of Constitution of Republic of Croatia ("Official Gazette" No. 41/01) it is prescribed that international treaties which are made and confirmed with accordance to the Constitution and published and are in power, make a part of internal legal system/order of Republic of Croatia, and their legal power is above the Laws. It means that in this case the Stabilization and Association Agreement may be applied, as well as the Interim agreement on trade and trade-related matters between the Republic of Croatia and the European Community, while criteria and standards not contained in the text of those agreements, and are not taken or co-opted nor published in any other Croatian Law or regulation cannot be a source of the Law.

It is decided that the decision will be published in the "Official Gazette" based on the provision of the Article 17<sup>th</sup> of the State aid Act.

## **Comment**

Although the Court wasn't making any decision based on the merits but made the agency decision void due to procedural reasons, this case is considered interesting, because it made visible that authorized agencies (administrative and court bodies) are applying EU Law due to obligations stemming for Croatia from the Stabilization and Association Agreement and all that in the period when Croatia has not yet become a legal member of EU.

5.3. Marija Skalova, Court of Kumanovo (Rep. of Macedonia), *DELTA M Skopje v. Macedonian Competition Authority*

**Decision of the Higher Administrative Court UZ 437/2012 from 24.04.2012, deciding upon the complaint of the complainant Company for trading and representing DELTA M Skopje against the Decision of the Administrative Court U 2715/2008 from 28.03.2011, for State aid.**

**Introduction**

In the following case report, I will briefly summarize the legal procedure regarding the complaint of DELTA M Skopje submitted to the Higher Administrative Court, as a highest judicial instance, regarding the Decision of the Administrative Court U 2715/2008 from 28.03.2011. With the above quoted Decision, the Higher Administrative Court recognized the complaint submitted by the complainant, abolished the decision of the Administrative Court U 2715/2008 from 28.03.2011 and sent back the case to the Administrative Court for a revised trial.

**Facts**

The Administrative Court with the Decision U br.2715/2008 from 28.03.2011, rejected as unfounded the lawsuit of DELTA M Skopje, against the Decision of the Commission for Protection of Competition 10-209/1 from 24.04.2008.

The complainant submitted a complaint against the Decision of the Administrative Court, stating that there is a misemployment of the material Law, with the proposal for revision of the Decision U br.2715/2008 from 28.03.2011, so the Decision of the Commission 10-209/1 from 24.04.2008 will be canceled, or the case will be sent to the Administrative Court for a revised trial.

The defendant authority did not submit any response to the complaint.

The Higher Administrative Court, after investigating the case, found that the appeal is founded, due to the following reasons:

The Ministry of Transport and Communications and DELTA M Skopje, based on the consent given by the Government of the Republic of Macedonia from 07.06.2006, reached a Contract for alienation of construction land with direct agreement 22-11650/05 from 14.06.2006, regarding the KP 1225/3 with the surface of 4.614 m<sup>2</sup>, with a price of 1.000,00 denars for a square meter or a total of 4.614.000,00 denars. VEROPULOS Skopje, have submitted a request to the Commission for protection of Competition 07-223/1 from 21.07.2006, for overruling of the abovementioned contract, due to the unequal treatment towards foreign investors and breaching the principles of equality and competition.

The Commission for Protection of Competition requested information about this contract from the parties concerned.

The State Attorney of the Republic of Macedonia with the letter from 09.10.2006 has addressed the Commission in order to get an explanation regarding the abovementioned data request concerning the Contract.

The Ministry of Transport and Communications, acting upon the requests submitted by the Commission, filed information on 16.10.2006 explaining the ways, procedure and the content of the abovementioned Contract, attaching the copy of the Contract and the Opinion of the State Attorney of

Republic of Macedonia. The Ministry has also submitted a copy of the Conclusion of the Government of Republic of Macedonia from 26.09.2006 for getting out of the Contract for alienation of construction land with the purchaser DELTA M Skopje.

On 27.10.2006, the Commission for Protection of Competition reached the Decision for initiating a formal procedure 07-223/10, which was published in the Official Gazette of the Republic of Macedonia number 113/06 from 27.10.2006.

After initiating the procedure for formal investigation, the Commission once again addressed the Minister for Transport and Communications to submit the Report for granted State aid. The Ministry for Transport and Communications has addressed the Ministry of Finance with request for refunding the paid amount of DELTA M Skopje, due to the getting out of the Contract.

The Commission for Protection of Competition has reached a Decision 10-209/1 from 24.04.2008, stating that the State aid granted by the Ministry of Transport and Communications was incompatible. It was also decided that with the Contract for alienation of construction land with direct agreement 22-11650/05 from 14.06.2006 for the amount of 140.104.110,00 denars, the mentioned State aid is not approved, the State aid is annulled and DELTA M Skopje within 15 days of of the Decision becoming, should pay an amount of 140.104.110,00 denars, to the full and real value of the purchased land.

The plaintiff, displeased with the reached decision, submitted a complaint for an administrative action, disputing the legality of the Decision, proposing that the contested Decision should be abolished.

### **Ruling of the Administrative Court**

The Administrative Court with its Decision assessed that the contested Decision of the Commission for Protection of Competition did not breach the Law and it is in accordance with the Article 2 of the Law on State aid and Article 8 from the Regulation for Ways and Procedures for submitting a report to the Commission for State aid and for assessment of the State aid.

The Higher Administrative Court found that in this case the relevant facts for properly deciding were incomplete, so they brought to the wrong application of the Articles of the Law on State aid.

According to the Article 10 of the Law on State aid (Official Gazette of Republic of Macedonia 24/03, 70/06 and 55/07 - no longer in force), with the exception of compatible aid of Article 4 any State aid provider shall notify in advance plans for providing aid or modifying existing aid schemes to the Commission. Before the decision of Commission on a notified aid measure, the aid shall not be put into effect. Any State aid provider shall annually report to the Commission on the amounts, use and effects of approved State aid.

Article 11 of the same Law states that the notification of Article 10 paragraph 3 of this Law shall contain all information necessary for assessment of the aid by the Commission and in particular about the objective, size, duration, form and legal basis, the aid provider and the aid recipient. Form and procedure of submitting notification will be established by the Government of the Republic of Macedonia.

According to the Article 12 of the same Law, the Commission assesses the compatibility of each State aid with this Law and decides to approve it or not to authorize it due to non-compliance with this Law. The Commission shall have the right to request from all State aid providers and aid recipients all information for assessing a State aid. Information received from an interested party may be used, if all parties to an assessment procedure have been able to comment on them. With regard to aid schemes approved according paragraph 1 of this Law and aid schemes in force since before the entry into force of this Law, or aid granted by the Commission (existing aid), the Commission on its own initiative or on request of third parties, may propose appropriate measures to align such aid with the provisions of

this Law. If the aid provider does not align such an aid scheme as proposed by the Commission, the matter is submitted to the authorized Commission of the Government of the Republic of Macedonia for decision.

On the basis of the abovementioned legal regulations, the Higher Administrative Court, noted - that the Ministry of Transport and Communications, as a provider of State aid, did not submit a report for the granted State aid, in accordance with the Regulation for Ways and Procedures for submitting a report to the Commission for State aid, and which was requested by the Commission for Protection of Competition.

Due to this reason, The Higher Administrative Court finds that there is a need of a review and a new decision on the case. During the revised procedure, the Court should establish whether the Ministry of Transport and Communications is a provider of a State aid of DELTA M Skopje, according to the Law on State aid. At the same time, the Court should take in consideration that the Contract for alienation of construction land with direct agreement concluded between DELTA M Skopje and the Ministry of Transport and Communications from 14.06.2006, is terminated by the Ministry of Transport and communications, bearing in mind the fact that the Resolution of the Government of the Republic of Macedonia from 26.09.2006 for termination of the Contract for alienation of construction land with the purchaser DELTA M - Skopje. In the revised procedure, the Administrative Court should also take in consideration the Information from the Ministry of Transport and Communications, quoting that the contested land was purchased by another buyer and to clarify whether the abovementioned Contract has a legal backup which is a ground for establishment of a legal aid.



**The judgment of the Supreme Administrative Court of 22<sup>nd</sup> of June 2011, file no. II FSK 361/10<sup>25</sup>.**

**Facts**

On 4 November 2004 Mr. W. who operated a business named O informed the mayor of the city N. that since the 21<sup>st</sup> of October 2004 he became the owner of the enterprise Z. and to the end of November 2004 he will meet the criteria of City Council Resolution no. XXIV/228/2000 of 24<sup>th</sup> of March 2000 on real property tax relief for the investors. Mr. W. informed that his investment in new jobs connected with the purchase of this enterprise exceeds 10 million PLN and his aim is to hire one hundred workers. He demanded granting him the real property tax relief for the period of seven years.

The mayor of the city being the tax authority in this case did not agree with the tax payer and imposed a real property tax in the amount of 624498,- PLN for the year 2006.

The tax authority stated inter alia that mentioned resolution could not be applied because on the 1<sup>st</sup> of May 2004, i.e. with the Poland's accession to the European Union, the provisions of the resolution became non-compliant with Art. 87 of the EC Treaty. The tax authority added that the resolution no. XXIV/228/2000 does not constitute the aid scheme, but it is only the basis for awarding the individual aid, which should be subject of the opinion of the President of the Competition and Consumer Protection Office and should be notified to the European Commission.

The appellate authority did not find any grounds to change the decision of tax authority.

The tax payer filed a complaint with the Voivodship Administrative Court which upheld the mayor's property tax decision.

The judgment of the Voivodship Administrative Court was appealed on points of Law to the Supreme Administrative Court. One of the arguments of the appeal was that the property tax relief on the basis of the City Council Resolution no. XXIV/228/2000 does not constitute the unlawful public aid.

**Ruling of the Supreme Administrative Court**

The Supreme Administrative Court dismissed the appeal arguing inter alia that the tax relief in this case constituted the public aid non-compliant with the Art. 87 of the EC Treaty (now Art.107 TFEU).

The Supreme Administrative Court stated that according to the assumptions set out in the Annex IV to Art. 22 of the Treaty of Accession of 16<sup>th</sup> of April 2003 the public aid existing in the Member States accessing the European Community before the date of accession should be communicated to the European Commission if the state wishes to continue providing this aid after the accession. The lack of notification meant that it was impossible to grant the aid in the form of real property tax relief after 1<sup>st</sup> of May 2004. This view had a crucial influence on the decision regarding the determination of the real property tax for the year 2006.

The court stressed also that the public aid envisaged in the City Council Resolution no. XXIV/228/2000 was concerning the real property tax and the amount of this aid from 2005 – 2007 would exceed 200000,- EURO and was not within the *de minimis* limits. The consequence was that the

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<sup>25</sup> Published at Central Database of Administrative Courts Judgments <http://orzeczenia.nsa.gov.pl/>.

Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid could not be applied.

In the view of the court unjustified was also the objection of infringement of Art. 87 of EC Treaty (now Art. 107 TFEU).

According to this Article, save as otherwise provided in that Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

So, the definition of public aid is very broad and comprises a priori undefined number of means of support for an enterprise by the state.

The court analyzed also the ECJ case Law and identified in the definition of State aid four fundamental elements: a) benefit, b) selectivity, c) state resources and d) influence on trade between the Member States. In the opinion of the Supreme Administrative Court the tax relief provided by the aforementioned resolution met all these criteria and thus it constituted the public aid.

As regards the last criterion the court stated that for the qualification of national activity as public aid it is not necessary the factual influence of the provided aid on trade between the Member States, nor the real distortion of competition. Sufficient is only the examination if the aid may have influence on trade and may distort the competition. Even if the business sells its products only within the territory of one Member State it does not mean the impossibility of the distortion of trade exchange between the Member States.

## Comments

The following comments can be elaborated from the ruling of the Supreme Administrative Court:

1. The definition of public aid is very broad and comprises a priori an unlimited number of means of support provided by the state to an enterprise.
2. Even if the business sells its products only within the territory of one Member State it does not mean the impossibility of the distortion of trade between the Member States.

## 5.5. Dalia Vasariene, Supreme Court (Lithuania), *Laivite v. Klaipeda County State Tax Inspectorate*

### **Facts**

This dispute regards the termination of State aid granted by making tax allowances for the stock company Laivite.

On 20 May 2008, Klaipeda County State Tax Inspectorate adopted resolution No. (6.5)-73 and declared resolution No. (16-05)-J-1 adopted by the head of Klaipeda County State Tax Inspectorate on 17 March 2003 null and void (“Due to the natural persons’ income tax exemption from default interest of 382 393 LTL calculated from 1 April 1998 to 31 August 2001 and declared on the stock company Laivite”), and on 27 June 2008 State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania adopted resolution No. 69-108 and confirmed the above mentioned resolution adopted by Klaipeda County State Tax Inspectorate on 20 May 2008.

The claimant stock company Laivite asked the court to reverse the defendant’s decisions. In compliance with resolution No. (16-05)-J-1 adopted by Klaipeda County State Tax Inspectorate on 17 March 2003 it was decided to exempt the claimant from default interest of 382 393 LTL calculated from 1 April 1998 to 31 August 2001 regarding the natural persons’ income tax, on condition that if the claimant does not comply with the conditions listed in the investment project, then Klaipeda County State Tax Inspectorate will be able to adopt a resolution and terminate State aid which is being granted. The above mentioned resolution was supported by the decision made by Competition Council. There were the following conditions stipulated due to granting of State aid: 1. The provider of State aid - Klaipeda County State Tax Inspectorate – shall ensure that the recipient of State aid will save jobs and investments in the stock company Laivite not less than for five years, having implemented the investment project described in the report the way it is provided in Paragraph 2 of Article 11 of Law on State aid Control for Business Entities. 2. The provider of State aid - Klaipeda County State Tax Inspectorate – shall control the investment project implementation process according to the submitted investment schedule.

Pursuant to Paragraph 1 of Article 2 of Law on State aid Control for Business Entities which was in force the moment the above mentioned decisions were reached “State aid - the aid measures applied or supported by the providers of State aid either directly or indirectly, financed by the state or municipality budgets or monetary funds and allotted to some business entities or manufacturers of some goods or provision of the service which provide some economic benefit to the business entities that would be impossible without the above mentioned measures under free market conditions. The following ways also belong to State aid regulated by legal acts: subsidies (grants), tax exemption, tax reduction and credit, default interest and fines write-offs, increasing the amount or value of shares in the companies belonging to the state in various ways, loans on easy terms, state guarantees and other ways of aid”.

The decision to exempt the claimant stock company Laivite from default interest regarding the natural persons’ income tax was reached in accordance with legal acts regulating tax legal relations. Furthermore, the application of the above mentioned legal acts regarding the tax exemption corresponded to the criteria of granting State aid provided in Law of the Republic of Lithuania on State aid Control for Business Entities.

The defendant (State Tax Inspectorate) in its responses asks the complaint to be rejected as groundless. It was explained that the claimant’s purpose of exemption from default interest wastate aid for shipbuilding and development of the region while encouraging investments and creating new jobs, because the claimant’s investment project complied with the regional purposes of the country and it was expected to have a positive impact on the development of Klaipeda and the region of Western

Lithuania as this is required in “Rules Regarding State aid for Regional Development” confirmed by the decision made by Competition Council. Therefore, Klaipeda County State Tax Inspectorate decided to exempt the claimant from default interest of 382 393 LTL regarding the natural persons’ income tax. For the above mentioned purpose there was an interim working group created. It evaluated the data submitted by the claimant as well as the collected information about the process of the implementation of the decision and drew a conclusion that the claimant did not fulfil the conditions listed in the investment project according to the schedule as well as the conditions laid down by Klaipeda County State Tax Inspectorate. Such actions taken by the claimant contradict to State aid purposes and are incompatible with legal acts regulating the granting of State aid for business entities. The claimant was obliged to take care of implementation of the conditions listed in the investment project as well as the decision, i.e., to properly assess risk and the ability to adjust to changing economic conditions, be active and honestly exercise the rights provided by Law. While conducting economic and commercial activities the claimant had to assess risk, accept the consequences and properly evaluate the ability to adjust to changing economic conditions, foresee the consequences of tax obligations and ensure the implementation of the above mentioned obligations and other commitments on time. If the obligation regarding the payment of default interest due to the natural persons’ income tax was not fulfilled, in competitive terms the claimant would be in a better position rather than persons engaged in tax obligations, i.e., the principles of tax general binding as well as taxpayers’ equity would be infringed.

### **Ruling of the Vilnius Regional Administrative Court**

The court established the fact that application of the legal acts regulating tax legal relations while exempting the persons from taxes was in compliance with the criteria of granting State aid provided in Law of the Republic of Lithuania on State aid Control for Business Entities and was also under conditions of provisions of Law of the Republic of Lithuania on State aid Control for Business Entities. It means that the persons could be exempted from taxes only in particular cases, i.e., if such an exemption did not contradict to the provisions of Law of the Republic of Lithuania on State aid Control for Business Entities, while trying to avoid substantial distortions of competition and influence on trade between the Republic of Lithuania and the countries of the European Union or the countries which the Republic of Lithuania has entered into free trade and other international contracts with (Paragraph 1 of Article 1 of Law of the Republic of Lithuania on State aid Control for Business Entities).

The Law of the Republic of Lithuania on State aid Control for Business Entities has not been effective since 1 May 2004. When particular provisions of the Competition Law of the Republic of Lithuania came into force, the limitation to grant State aid for business entities, which distorts competition, has still remained (Article 48 of Competition Law of the Republic of Lithuania). Therefore, the application of legal acts regulating tax legal relations that is not related to granting of State aid for business entities falls outside the scope of regulation of the legal acts regulating the competition issues.

On 12 December 2008 the court of first instance – Vilnius Regional Administrative Court – reached the decision, satisfied the claimant’s complaint and vacated the resolution No. 69-108 adopted by State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania on 27 June 2008 as well as the resolution No. (6.5)-73 adopted by Klaipeda County State Tax Inspectorate on 20 May 2008. Having appealed this decision to Supreme Administrative Court of Lithuania, the latter reached the decision on 14 December 2009 while vacating the decision made by Vilnius Regional Administrative Court on 12 December 2008 and remanded the case to the court. In the decision it was established that the legal relations examined in the case come from tax legal relations, therefore the provisions of Paragraph 2 of Article 145 of Law on Tax Administration (the matter of the dispute corresponds to the criteria of tax dispute) were to be applied.

Having examined the dispute for the second time, Vilnius Regional Administrative Court satisfied the complaint partially. On 15 March 2010 the court reached the decision in the administrative case No. I-0748-189/2010 and established the fact that the dispute came from tax legal relations but not the legal relations regarding State aid. Therefore, the case was transferred to the Commission on Tax Disputes under the Government of the Republic of Lithuania to be examined according to the order provided by Law on Tax Administration of the Republic of Lithuania.



5.6. Darina Nikolova, Burgas Regional Court (Bulgaria), *LEGIYA JSC v. Tax Inspectorate*

- **Administrative case № 2533 / 2010 of the Plovdiv Administrative Court.**
- **Administrative case № 3023 / 2011 of the Supreme Administrative Court.**

### **Facts**

The cases under consideration examine and settle the issue related to trades with products done with materials supplied by customers and in particular whether the final products made with funds gained from retained corporate tax - a form of State aid according to the CITA - constitute a distortion of competition.

On the occasion of an inspection (revision) made with regard to corporate tax liabilities of LEGIYA JSC, the Chief Revenue Inspector of the Territorial Directorate of the National Revenue Agency issued an inspection certificate (assessment act), which was appealed before the Administrative Court of Plovdiv.

The main activity of the company LEGIYA JSC is production of clothes with materials supplied by customers from Belgium, the Netherlands and Spain.

The Company used tax relief as minimal State aid for carrying out manufacturing activity in municipalities where the rate of unemployment was higher than the national average according to the provisions of Article 184 of the CITA. The mentioned provision states that any taxable person shall be allowed to retain 100 per cent of the corporation tax [due therefrom] in respect of the tax profit derived thereby from the manufacturing activities carried out, including processing of materials supplied by customers, where the following conditions are simultaneously fulfilled: 1/ the taxable person carries out manufacturing activities solely in municipalities where the rate of unemployment for the year preceding the current year was by 35 per cent or more higher than the national average for the same period; 2/ the amount of the received minimal aids from the taxable person during the last three years, including the current one, regardless of their form or source of their acquisition, does not exceed the BGN equivalence of EUR 200 000; and 3/ the conditions under Articles 188 of the CITA are covered, in the cases of minimal aid, i.e. the retained corporation tax to be reinvested in assets with a term up to 4 years as of the beginning of the year for which such tax has been retained. This investment should not concern the export in Member States.

During the inspection there was established that the company had indicated the amount of the received minimal aids for the last three years and they did not exceed EUR 200 000.

Furthermore, the company had made investments that constitute purchased assets and construction works of industrial premises, as some of the investments were financed by the retained corporate tax.

On other hand, the inspection authorities assumed that the company did not meet the requirements of Article 184, in connection with Article 182, par. 2, clause 7 of the CITA, because the retained corporate tax is invested in assets used to provide services for production of garments for clients from the EU member states, by which the competition rules were violated. Therefore, the State aids in the form of tax relief had been illegally used and such tax was determined as payable back to the budget.

### **Ruling of the Court of First Instance**

The Court of first instance decides that the inspection certificate issued was unlawful due to incorrect application of the Law.

Taking into consideration that the conditions entitling the taxable person of tax relief had been met with regard to production activities in municipalities with unemployment rate higher than the national average, the inspection authorities had to recognize that right and to apply the provisions of Art.184 CITA and "Legiya" JSC to be allowed to retain the corporate tax in full.

The Court judged that the company was engaged only in services related to processing of materials supplied by customers, and the rendering of services does not fall within the exceptions under which the granting of State aid could violate the competition rules on the market.

Indeed, Article 182, Paragraph 2, Item 7 CITA stipulates the cases in which the taxable persons may not use this tax reliefs – if it invests in assets, used in activities related to export to third countries or member states. This means that the retained tax under Article 184 should be invested in long-term assets, which are not used in activities related to export. In this particular case the court has assumed that as far as the activity of the taxable person is related to processing with materials supplied by customers, it cannot be assumed that the assets in which the company invests are related to export. The processing with materials supplied by customers is associated with production of a final product with materials of the ordering customer, who is owner of such final product. It is pointed out that the action of delivering the finished goods to the owner cannot be identified as an export, because there is no transfer of ownership, but only mechanical processing of materials is preformed – materials which are property of the principal and a new product is created which is also property of the principal. Therefore, there is no transfer of ownership, and thus there is no export.

Therefore, the court found the appeal of Legiya JSC reasonable, that processing with materials supplied by customers did not fall within the exception of Article 182, paragraph 2, item 7 CITA and annulled the inspection certificate issued.

### **Ruling of The Supreme Court**

In compliance with procedure of the appeal, the Supreme Court found this judgment incorrect. The court provided arguments that according to the invoices attached in the case, the company had sold to its contracting parties - companies from Belgium and the Netherlands, the clothes produced by "Legiya" Jsc. The court did not share the argument that it concerns rendering of service - manufacturing of garments, but not production and sale of goods.

The court stated that the requirement of Art. 182, para. 2, item 7 CITA covers all types of State aid, including Art. 184 CITA for processing of goods with materials supplied by customers. The text aims to limit the use of State aid for export purposes. The State aid is provided to support the development of the settlement with high unemployment, which explains the requirement to invest in assets and own assets not related to exports in Member States. If this requirement is not met, the competition in the common market of the European Union is violated, which will include goods produced by State aid. The granting of State aid is permissible under Art. 107, paragraph 3 of the Lisbon Treaty seeking to promote the economic development of areas where the standard of living is abnormally low or where there is significant unemployment rate, as they aim to change the economic level of the region, suggesting use of assistance in region in which they were produced. The Court finds the argument groundless that in the processing of goods with materials supplied by customers the competition rules of the Community are not violated. Investment was made for export-oriented production of goods, by which the restriction of Art. 182, para. 2, item 7 CITA was fulfilled. In this sense, the court cited also the practice of the European Commission Decision of 18.07.2007 with regard to State aid C-37/05, CALEX 32008D0723, in which with regard to State aid in Greece, similar to that provisioned in Art. 184 CITA, in item 56, the Commission assumes that the measure influences the competition and the trade between the Member States. It can distort or threaten to distort competition, because it gives advantage to the recipients. In this particular case, the State aid supports the garment processing with materials supplied by customers which are intended for other member states, by which the export-

oriented activity is proved and therefore the prerequisites of Art. 182, para. 2, item 7 CITA are applicable.

On those arguments, the court deemed the inspection certificate issued to be proper and Lawful, as the amounts received in the form of State aid are to be refunded to the budget as illegal aid.

### **Comment**

The above-described court decision is cited as an example of the court practices in Bulgaria regarding to the interpretation and application of the Law and in particular the provisions of Art. 182, para. 2, item 7 CITA in connection with Art. 107 TFEU. The legal text aims to limit the use of State aid for export purposes. Failing to observe the requirement to invest in assets and such assets to not be related with export in third countries or Member States would lead to distortion of competition within the common market of the EU, as it will involve goods produced with the help of State aid



5.7. Zelianka Vytautas, Supreme Court (Lithuania), *Baltic Legal Solutions Lietuva v. Public Institution Lithuanian Business Support Agency*

**Judgment of the Supreme Administrative Court of Lithuania in Administrative Case No A-261-1743/2010, issued on 3<sup>rd</sup> January 2011**

**Facts**

In the present case, the dispute has arisen from the refusal of the defendants, the Public Institution Lithuanian Business Support Agency (hereinafter referred to as the Agency, the defendant) and the Ministry of Finance of the Republic of Lithuania (hereinafter referred to as the Ministry of Finance, the defendant), to accept the application of the applicant, the Professional Law Partnership “Baltic Legal Solutions Lietuva” (hereinafter referred to as the Partnership, the applicant), concerning the funding of the project “Innovative Solutions - Quality Service” (hereinafter also referred to as the Application) in accordance with the measure “E-Business LT” for funding from the European Union funds granted under the measure “E-Business LT” of Priority 2 of the Operational Programme for Economic Growth “Increasing Business Productivity and Improving Business Environment” (hereinafter also referred to as the Measure). The applicant stated in the appeal that the Application could not have been dismissed because, taking into account national and international legislation, the Partnership complies with the requirements of the Description of Funding Conditions; therefore, it has the right to receive financial assistance from the Structural Funds of the European Union (hereinafter referred to as the EU) in accordance with the measure “E-Business LT”. A professional Law partnership is a legal entity who meets the definition of “the enterprise” within the meaning of the Law on Small and Medium-Sized Business Development of the Republic of Lithuania (hereinafter referred to as the LSMBD) and the EU legislation.

In its response to the appeal, the Agency stated that the Member States receiving funding from the EU Structural Funds have the right to impose funding conditions and identify the circle of potential applicants. Whereas, the Agency only assesses and determines whether a particular project is eligible to receive funding in accordance with the requirements of a relevant measure for the implementation of a priority of a specific operational programme and a description of project funding conditions. Since both the Complement of the Operational Programme for Economic Growth (hereinafter also referred to as the Operational Programme Complement) and the Description of Financial Conditions stipulate that eligible applicants under the measure “E-Business LT” are private legal entities grouped as small or medium-sized enterprises as defined in the LSMBD, while assessing the eligibility of the Application to receive funding, the Agency was right to conclude that the applicant was not grouped as a small or medium-sized enterprise as defined in the LSMBD and, in accordance with the Rules on Project Management and Funding, it made a decision to dismiss the Application.

In its response to the appeal, the other applicant, the Ministry of Finance, stated that the Description of Funding Conditions was prepared in accordance with the EU regulations specified in Point 1 of this Description and in the appeal of the applicant as well as in accordance with other legal acts and it does not contradict them. The Member States receiving financial assistance from the EU funds influence the process and directions of the provision of financial assistance, plan and initiate projects, plan calls for applications and impose conditions and assessment criteria for providing financial assistance, prepares State aid schemes. This also includes the right to lay down in a particular measure for the implementation of a priority of an operational programme detailed requirements for eligibility of applicants.

Projects are planned or selected in a competitive process which means that a description of project funding conditions imposes a procedure for organizing a tender and assessing applications on every

measure for the implementation of a priority of an operational programme, which has to ensure that at a specific call for projects all applications are subject to the same assessment principles, as well as other conditions for the tender.

### **Ruling of the Vilnius Regional Administrative Court**

By its Decision of 25 January 2010, the court of first instance, Vilnius Regional Administrative Court, dismissed as unfounded the appeal of the applicant, the Professional Law Partnership “Jurevičius, Bartkus ir partneriai”.

The court established that in accordance with Articles 2(1), 32(1),(2) and (5), 63(1) and (2) and 65a of Council Regulation (EC) No 1083/2006 of 11 July 2006 and Points 49 and 52 of the Rules on Project Management and Funding, Decision No 2 (Part 10) of 25 January 2008 of the Monitoring Committee approved one of the criteria of the measure “E-Business LT” which stipulates that the applicant has to be an enterprise operating for at least a year, except where an enterprise is controlled by another enterprise operating for at least a year.

The court concluded that the detailed analysis of the legislation of the EU and the Republic of Lithuania shows that the Member States receiving funding from the EU funds have the right to influence the process and directions of the provision of financial assistance, plan and initiate projects as well as impose conditions and assessment criteria for providing financial assistance, which includes the right to impose in a specific measure for the implementation of a priority of an operational programme assessment criteria (requirements) for eligibility of applicants to be funded.

The court concluded that the actions of the defendants, the Agency and the Ministry of Finance, were consistent with the legal acts of the Republic of Lithuania which were prepared in accordance with the EU regulations (including the Recommendation and Regulation). The court stated that in the present case there is no conflict between the legislation of the EU and the Republic of Lithuania because the EU Law, in so far as the present dispute is concerned (in particular with the assistance from the EU funds under the measure “E-Business LT” and under the requirements of this measure imposed on applicants) has become part of the national Law and, in so far as the present dispute is concerned, it has not been narrowed, altered or otherwise restricted.

The court noted that in accordance with the provisions of the LSMBD an enterprise is a legal entity engaged in commercial economic activities. The Law on the Bar of the Republic of Lithuania stipulates that Lawyers are engaged in provision of legal services and that this is not considered as commercial economic activities. Where services are provided and actions taken by a professional Law partnership, it is subject *mutatis mutandis* as well as a Lawyer to the provisions of this Law (Article 2(2) of the Law on the Bar). The same Law stipulates that a professional Law partnership cannot undertake other activities than provision of legal services.

In accordance with the provisions of the Law on the Bar and the data established in the case, the court concluded that the applicant is a legal entity not engaged in commercial economic activities; therefore, in accordance with the provisions of LSMBD, the applicant may not be regarded as belonging to the category of small or medium-sized enterprises and it is an eligible applicant, in accordance with the Description of Funding Conditions, to receive financial assistance under the measure “E-Business LT”.

This court decision was appealed to the Supreme Administrative Court of Lithuania (who makes final and binding decisions in administrative cases in Lithuania), who dismissed the appeal and upheld the decision of the court of first instance.

## **Ruling of the Supreme Administrative Court**

The appellate court confirmed that Regulation No 1083/2006, which defines general rules governing the activities of the European Structural Funds and the Cohesion Fund, does not elaborate on the beneficiaries of financial assistance. Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, which is relevant to dispute relations, does not provide specific characteristics of beneficiaries. Article 32(1) of Regulation No 1083/2006 stipulates that the activities of the EU Funds in the Member States shall take the form of operational programmes within the national strategic reference framework. An operational programme is a document submitted by a Member State and adopted by the Commission setting out a development strategy with a coherent set of priorities to be carried out with the aid of a Fund (Article 2(1) of Regulation 1083/2006). In accordance with Article 32(2) of this Regulation, each operational programme shall be drawn up by the Member State or any authority designated by the Member State, in cooperation with the partners referred to in Article 11. The European Commission approves the programme of a Member State or its institution (Article 32(5) of Regulation 1083/2006). Thus, in every individual case an operational programme approved by the Commission determines entities to receive funding.

Decision No K (2007)3740 of 30 July 2007 of the European Commission approved the Operational Programme for Economic Growth. In accordance with its provisions, projects under this measure are implemented by “private legal entities who are engaged in activities of production and (or) services and who do not provide services of development and deployment of e-commerce solutions, who are included into a group of very small, small or medium-sized enterprises, as defined by the Law on Small and Medium-Sized Business Development of the Republic of Lithuania, and who comply with the conditions of provision of financial assistance laid down by an institution in charge of implementation of the measure.”

The Law on Development of the Republic of Lithuania does not specify what activities shall be considered as “commercial economic activities”. However, it stipulates that “the other terms used in this Law shall be understood in accordance with the definitions contained in the Law on Competition, the Law on Higher Education and Research, the Law on Securities, the Law on Collective Investment Undertakings and the Law on Investment.”

In accordance with the Law on Competition of the Republic of Lithuania, an economic activity “means any type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, except for acquisitions by natural persons intended for personal and household needs.” This Law defines a good as “any object of purchase or sale, including all kinds of services and works, rights or securities. Purchase or sale represents transfer or acquisition of goods based on the contracts of purchase-sale, supply, works and other transactions.”

The court stated that the definition of a commercial economic activity contained in the Law on Development of the Republic of Lithuania is much broader and it includes not only legal services as such specified in the Law on the Bar but also any other economic activity. Nevertheless, the court concluded that the activity of a professional Law partnership includes only provision of legal services as they are defined in the mentioned provision of the Law on the Bar; therefore, the fact that the legislator recognized in the national Law that this activity is not a commercial economic activity allows recognizing that the activity specified in the Law on the Bar does not fall into the activities specified in the Law on Development; therefore, the court of first instance was right to dismiss the appeal of the applicant as unfounded.



## **6. List of the judges who participated to ENTRANCE 2012**

- Tatyana Andonova, District Court of Blagoevgrad (Bulgaria)
- Galina Arnaudova, Court of Appeal of Plovdiv (Bulgaria)
- Kaspars Berķis, Regional Administrative Court of Riga (Latvia)
- Katarina Buljan, Supreme Court (Croatia)
- Jelena Čuveljak, Zagreb Commercial Court (Croatia)
- Michal Dabrowski, Warsaw District Court (Poland)
- Jasna Golubic Vargec, Zagreb Commercial Court (Croatia)
- Judit Gyarmathy, Court of Budapest (Hungary)
- Villem Lapimaa, Tallinn Administrative Court (Estonia)
- Irmantas Jarukaitis, Supreme Administrative Court (Lithuania)
- Darina Nikolova, Burgas Regional Court (Bulgaria)
- Tina Omejc, Supreme Court (Slovenia)
- Paul Pricope, Court of Appeal of Bucharest (Romania)
- Ivan Rumana, Supreme Court (Slovakia)
- Aleksandar Shopov, Court of Veles (Rep. of Macedonia)
- Marija Skalova, Court of Kumanovo (Rep. of Macedonia)
- Janina Stripeikiene, Supreme Court (Lithuania)
- Dalia Vasariene, Vilnius Court of Appeal (Lithuania)
- Vytautas Zelianka, Vilnius Regional Court (Lithuania)
- Anna Wasilewska, Warsaw District Court (Poland)



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