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# WORKING PAPERS

RSCAS 2016/20  
Robert Schuman Centre for Advanced Studies  
European Networking and Training for National Competition  
Enforcers (ENTraNCE)

European Networking and Training for National  
Competition Enforcers ENTraNCE for Judges 2014  
Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti



European University Institute

**Robert Schuman Centre for Advanced Studies**

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EUI Working Paper **RSCAS** 2016/20

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## **European Networking and Training for National Competition Enforcers (ENTraNCE Judges)**

This series of working papers is published in the context of ENTraNCE Judges, training for national judges in competition law. The training is organised by the RSCAS, with the financial support of DG Competition of the European Commission. In the context of the training programme, 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 that is relevant to the national judiciary.

Information concerning the ENTraNCE Judges 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 in one edition of ENTraNCE Judges. In the context of the training activities, in fact, each participating judge is requested to summarise and to comment on a national judgement that is related to the field of competition law. The working paper thus aims to increase understanding of the challenges faced by the national judiciary in enforcing national and EU competition in the context of the decentralised 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 for Judges 2014). The training programme was organised by RSCAS between January and October 2014 with the financial contribution of DG Competition of the European Commission. The case notes included in the working paper summarise judgments from the different EU Member States relating to different aspects of competition law enforcement. The working paper thus aims to increase understanding of the challenges faced by the national judiciary in enforcing national and EU competition in the context of the decentralised 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

The 48 case annotations included in this working paper have been written by the participants to ENTraNCE for Judges 2014, training program for national judges in competition law and economics. The 2014 edition represented the fourth edition of the program, organized by the RSCAS at EUI with the financial support of DG Competition of the European Commission. In particular, the 2014 edition program took place between January and October 2014, and focused on the application of the right of defence and due process in competition law proceedings. Besides training, the program aimed at fostering networking among national judges; participants could exchange their experience in relation to competition law enforcement in an informal setting.

The reason for publishing these accounts is to inform other judges, but also policymakers and lawmakers and other interested stakeholders, of the state of play of competition enforcement across the EU and the role national judges are playing. In the absence of a database collecting all judgments these working papers serve to provide a snapshot of the kinds of issues that arise in the national courts and the emerging jurisprudence.

This introduction provides a thematic summary of the contributions to help the reader gain a quick impression of the key legal and economic challenges that national courts have faced,

### **Anti-competitive State action**

Judge Carlson (section 2.2) provides us with an interesting case which applies a specific provision of the Swedish competition legislation: *Swedish Competition Authority v. Rådningstjänsten Dala Mitt*. The relevant provision gives the NCA the power to examine how far actions of the State or of local authorities may restrict competition and empowers the NCA, when necessary, to apply to the national court to seek an injunction. On the facts of the case, an association of municipalities denied access to training facilities to a firm that wished to participate in a public procurement bid and the Market Court agreed that the denial of access was likely to harm competition as the would be competitor would be unable to submit a competitive bid without such access. This provision in Swedish law is very important indeed as a good number of anticompetitive effects stem from national legislation. Often this conduct falls outside EU competition law, so national laws are helpful. On the facts, however, it is arguable that the municipalities may have been considered in direct breach of Article 102, because it appears that the defendant association was actually a competitor of the new entrant and so its refusal to give the competitor access to training facilities cemented its dominant position, and in refusing to deal it was acting as an undertaking.

Judge Charleton's discussion (section 2.3) of *Lifeline Ambulance Services Limited v Health Service Executive* provides a very nice contrast. Here the defendant used to hire ambulance services from the plaintiff but with the onset of the economic crisis it cut back on its expenditures with the result that it no longer utilized the ambulances offered by the plaintiff, and relied exclusively on the ambulances it owned. The court held that competition law was inapplicable in the circumstances and so the refusal to continue to buy these services was not prohibited. The key distinction between this case and the one discussed by judge Carlson is that there was no dominant position to protect by the defendant's action, so the conduct of the Health Service Executive did not harm competition in the market for the

provision of ambulance services. It is also notable that the court in this case indicated that it would be inefficient to require the Health Service to continue to hire ambulances when it had its own fleet that sufficed to carry out its tasks. This judgment will provide valuable guidance on exploring when imposing a duty to deal is justified.

### **Cartels**

Judge Phorib's annotation (section 2.1) of *CECCAR vs. National Competition Authority* brings up an issue that a good number of other judges have faced in other jurisdictions: NCASs challenging restrictive practices entered into by professional associations. In line with EU Law the national court here upheld a finding that price fixing regulations are anticompetitive and that the professional association is indeed subject to Article 101, when these associations facilitate anticompetitive conduct.

In the case of *A v IEFP – Institute of Employment and Vocational Training*, (section 2.4) the Portuguese court was faced with an unusual set of bids in response to a public procurement tender. Two of the bidders (A and C) were subsidiaries of the same corporate group and the question was whether they could be excluded from the bid. Judge Araújo explains that the court first considered the case under the domestic procurement legislation, which applies standards analogous (but not identical) to those in competition law, by testing whether A and C were to be considered as a single undertaking – under national law this was so only if one company had a 100% shareholding in the other, which was not the case here. Second the court looked for collusion between A and C under the competition rules which provide that bidders may be excluded if there is proof of bid rigging, but found that the two firms did not collude and as they were considered two separate undertakings both bids were lawful. One wonders if a different definition of control of an undertaking, less formal and more substantive, could have brought to a different conclusion.

In *Scheidersöhne Baltija Ltd. (or Papyrus Ltd.) and Libra Vitalis Ltd* (section 2.5) we find an information exchange that had collusive effects, with the Lithuanian court following the approach taken by the EU, citing case law as well as soft law documents. Two interesting issues are noted in judge Surgiliene's summary: first that the parties brought to the court's attention a market assessment carried out by the Commission in a merger case, which the domestic court took into account although noting the limited probative value of market assessments carried out in a different context, and second that the national court reduced the penalty because the effect on trade had not been demonstrated, the infringement being on a local market and ending a few weeks after Lithuania's accession to the EU.

The Romanian High Court judgment in *Eureka - Management Company Private Pension Funds v Competition Commission*, reported by judge Gherasim (section 2.6) shows a very sophisticated dissection of the case law of the ECJ on determining whether an agreement among competitors is anticompetitive. The issue at hand was the following: a set of compulsory insurance schemes had been offered and some individuals signed up, erroneously it seems, to more than one scheme. As they should not be able to benefit from double membership, the administrators allocated these customers among themselves, giving each the option of eventually re-selecting another provider. The competition authority thought this was an anticompetitive agreement but the High Court, following the guidance from the ECJ, indicated that the market context was such that the agreement did not restrict competition: first because the number of interested customers was a very small proportion of customers eligible for the service, second, because a reasonable solution to avoid duplicate membership had to be found and what the parties did was in line with what the national regulatory framework provided, thirdly because whatever allocation was made, the customer did not lose the

capacity to switch to another, thus finally remaining free to choose their provider. Judged in the round, the High Court felt, rightly in our view, that this is not really a cartel conduct that needs condemnation.

### **Fundamental rights**

In *Slovenian Competition Authority v Geoplin*, judge Hočevar (section 3.1) explains how a national court assesses the extent to which documents benefit from legal and professional privilege. At EU level there is much discussion of the personal scope of this privilege, while here the national court is more concerned with determining what kinds of communication are protected, and the extent to which communications incorporating data provided by the undertaking under investigation is also privileged. On the facts, information provided by the undertaking, which is integrated into a document detailing the defense strategy of the undertaking was found to be privileged.

In *Toshiba Corporation (and others) v Czech Competition Authority*, judge Langášek (section 3.2) reports on the follow-up of the much discussed Toshiba judgment of the ECJ. It will be recalled that the ECJ had ruled that the principle of *ne bis in idem* does not prevent an NCA from prosecuting a suspected cartel that had already been condemned by the Commission provided that there is no identity of facts, so that here the Czech NCA was free to investigate a cartel organization in its territory before accession to the EU as the Commission in its decision had not considered the impact of the cartel in that territory before accession. However, the Czech court in the end annulled the decision on another ground, which is that the fine was not properly attributed to the various undertaking and so infringed the principle of non-discrimination. The court acknowledged that it was difficult to apportion blame in a long running cartel but requested that the NCA is more precise in the way it allocates the penalties.

With *X Ips* judge Grbović (section 3.3) discusses the difficult question of how to manage confidential information when releasing a decision to the parties concerned. In this case the applicant complained that the redacted version of the decision deprived him of his rights. The court's judgment is a tactful exercise of balancing the competing rights of the parties and identifying whether the deletions were proportionate to the right being protected. On the facts it held that the information that was deleted was not central to the decision, but there were aspects of the decision that hinted to a counter-argument made by another co-defendant, and that there was enough visible for the applicant in this case to understand the nature of the co-defendant's argument so that the claimant could make it his own as well.

Judge Słysz-Marcinów (section 3.4) reports on the ECJ's judgment in *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o.* as readers will recall, this judgment serves to prevent national competition authorities from issuing decisions establishing when there is no infringement of competition law. It means that if, after an investigation an NCA believes there is no infringement it can only abandon the case by registering its intention not to continue. This is said to help because it allows the Commission to eventually take up the case again (avoiding a breach of the principle of *ne bis in idem*) but on the other hand it always gives the Commission the final say in any matter, something which might be argued goes against the spirit of decentralized enforcement.

Judgment 1933/2013 of the Greek Council of State (section 3.5) raises the question of how to balance the presumption of innocence with the presumption, in cartel law, that a party participating in an anticompetitive concerted practice infringes Article 101. Here one of the companies appeared to have

played a marginal role but it was still held that it infringed national competition law. As judge Vouxinou recalls, the undertaking may rebut the presumption but there is a question on whether it may appear too easy to establish a presumption from mere presence without asking for greater involvement by the parties under investigation.

In *Brabomills v. The Competition Council and the General Assembly of the Belgian Competition Council* (section 3.6) the court addresses issues arising in the flour mills cartel, a case that occupied at least four national competition authorities. This case was a challenge against the Belgian NCA's fine, for breach of the principle of *ne bis in idem*. The appellant had been acquitted in The Netherlands and questioned the lump sum fine that the Belgian NCA had imposed. Judge Van Ransbeek explains that the court took the view that by imposing a fine on a lump sum basis the Belgian NCA did not make it clear whether it sought to punish the effects only on the Belgian market, and so there was a risk that the fine also punished the undertaking for the effects of the conduct on the Dutch market, which would breach the appellant's rights, as he would thereby have been prosecuted twice for the same offence on the Dutch market. As the learned judge notes the Belgian Court drew on the principles established by the ECJ in *Toshiba*, and explains that the logical consequence of this is that the NCA has to be clear in its decision that the territorial reach of the fine is delimited to the effects caused in the Member State in question, in order to be sure of avoiding infringing the undertaking's rights. Of course it may well be that in other instances, when there is only one NCA in the EU prosecuting a cartel, that it should be free to impose a penalty for the effects across the EU if national and European laws confer the power.

Judge Aerts (section 4.1) reports back on the aftermath of the ECJ's judgment in *T-Mobile*. The issue here arose whether a single meeting where information was exchanged by mobile phone operators concerning the remuneration to be paid to dealers for post-paid subscriptions could amount to a concerted practice contrary to Article 101. The Dutch Court of Appeal followed, but also augmented the judgment of the ECJ. First, it was more explicit about the anticompetitive consequences of this information being exchanged, noting the combined market power of the parties and also the way in which this information was exchanged would facilitate coordinated conduct. Second, the Dutch court added a nuance. It accepted the view of the ECJ that provided the undertakings remain on the market one could presume that their conduct would be affected by the added knowledge of their competitors' plans. However it added that, by reference to the judgments of the European Court of Human Rights, this presumption must always be capable of rebuttal by the defendants. On the facts, it means that the defendants should provide sufficient information to demonstrate that the reduction of the remuneration rate for dealers was motivated by internal business considerations, unrelated to the knowledge of what the other competitors were planning. Since these alternative explanations were not considered, the decision was quashed. The NCA carried out further proceedings in the aftermath of this judgment. In this new decision the NCA looked closely at documentary evidence suggesting that the parties did act on the information received and studied carefully the reasons offered by the operators, in particular their argument that falling revenues meant that they needed to reduce operating costs, which included remunerations to dealers. The NCA's decision to condemn was upheld and it seems no further legal proceedings are pending. It is remarkable, and quite problematic, that more than ten years passed between the one round of collusion and the final decision condemning this.

Judge Pennanen (section 4.2) writes about the Finnish Asphalt Cartel, and of the importance of the judgment of the Supreme Administrative Court. First, this court explained that in view of the difficulties in obtaining solid evidence of complex, long-running conspiracies (in contrast to most criminal trials) that the courts could rely on deductions and inferences from the totality of the

evidence. It also indicates that, in line with the practice of the Commission, this long running cartel affecting national, municipal and private contracts was a ‘single’ infringement and it would have been artificial to segment it into several discrete offences, not least because the parties saw the entire asphalt market as a single one to exploit. This is an important case for it settles the legal standards for assessing evidence on cartel cases. After this judgment there were a number of damages claims against the firms, and judge Rennanen notes that the 40 million settlement appears as the largest ever in Finnish legal history. Tellingly, the state itself was not successful in a damages claim because it was discovered it was aware of the cartel and did not act. This is an important matter, and it follows the *Courage v Crehan* approach of denying compensation to parties who are significantly responsible for the breach – in this case is the state that should have alerted first the NCA.

Judge Strumskiene (sectin 4.3) writes about a case (*National Health Insurance Fund, and others v Competition Council of the Republic of Lithuania*) where producers of orthopaedic equipment colluded in setting prices at which they would sell their equipment to the National Health Services. A complicating factor here was that the National Health Insurance Fund had tried to work out what a fair price for this equipment could be and had involved the association of equipment manufacturers. The question arose here whether the state had thus required or encouraged anti-competitive conduct in such a way that the responsibility for collusion rested partly with the state and not all with the equipment manufacturers. The NCA and the national courts reviewed the case law closely and noted that on the facts of the case the state had not required the manufacturers to collude or threatened them with reprisal if they did not collude – it had asked for information about prices which in no way entailed a request to fix prices. Quite the contrary, it may be argued that the National Health Insurance Fund had every interest in working out the competitive price for the goods in question.

Judge Vidusa (section 4.4) reports on a tricky case, *Latroad v Latvian Competition Authority*. A set of road design and construction firms formed a partnership, Latroad which then bid for roadwork contracts and was quite successful. The NCA suspected that this partnership was a cartel in disguise in that it saw no good reason for the undertakings in question to participate in the partnership, as each could have bid for the relevant contracts independently. A kind of situation that presents often itself when large firms participates to biddings together. The NCA did not define the market, nor the market shares of the firms in question. It rested its reasoning simply on the perceived lack of justification for the partnership. As it stands, this judgment condemns a partnership on the basis that there seemed to be no other explanation for it than facilitating collusion. Some might take the view that a little more market analysis would have gone a long way to confirm the infringement of competition law, for instance working out the market power of the undertakings, to see if the partnership had eliminated (or significantly weakened) competition in the market or whether Latroad was competing against a good number of other bidders. In the latter case, one may wonder whether the anticompetitive effects would really be found. On the other hand, it is a reminder to defendants of the need to explain suspect conduct.

Judge Kukovec (section 4.5) reports on a judgment of the Slovenian Supreme Court that also considers the issue of a long running infringement. Here the NCA had sporadic evidence of collusion in the market for daily adult ski passes: there was clear evidence of collusion in some years, but less compelling evidence in other years. In some years the NCA tried to infer collusion from market conduct but the Supreme Court was not always persuaded that this inference was satisfactory, it was only persuaded when it found that the prices were identical among all competitors. In the end, the court ruled that instead of a single infringement the NCA had only found evidence of two rounds of

collusion (one between 2000 and 2004, and one between 2008 and 2010). This case is further illustration of the challenges faced by an NCA when addressing collusion across a long time period – the manner of collaboration among the undertakings probably varies and the NCA has to be on the lookout for this.

Judge Kovač (section 4.6) reviews a spate of appeals against a finding of the Slovenian NCA in the road construction cartel case. Much like in appeals against Commission decisions, we see a robust review of the fact finding and some aspects of the decision are annulled. Of special interest is the manner in which the Supreme Court reviews the evidence closely and finds that some documentary evidence is not probative of collusion. Similarly in one case a joint bid between two companies was condemned but the Court found that the NCA had paid insufficient attention to the fact that one of the joint bidders could not have placed a bid independently and so there was an objective justification for the agreement to place a joint bid. One aspect of this and also judge Kukovec's paper (section 4.5) is that the Slovenian Supreme Court is slow to find an effect on trade in cases where the collusion and the parties to collusion are all nationals of Slovenia. This aspect may be somewhat out of line with the position preferred by the CJEU. Judge Kovač wonders if the court here was too demanding, but it seems that in light of the Menarini judgment, it is imperative that the courts do review the decisions of NCAs closely, it will also improve the trust citizens have in the NCA if they know that their decisions are subjected to close judicial scrutiny.

Judge Ruskan (section 5.4) identifies a case where the Lithuanian NCA found a very long-running cartel in the market for shipping agency services at Lithuanian's major port, in *UAB 'Amber bay', UAB 'Afalita' and twenty-five other companies, as well as the Lithuanian Shipbrokers and Agents Association versus the Competition Council of the Republic of Lithuania*. Here the NCA managed to make the finding of a single, continuous infringement stick under appeal, but the fines imposed were reduced slightly because not all the parties to the agreement followed its terms and often prices for shipping agency services were below those recommended by the cartel.

Judge Vîlvoi (section 5.5) discusses another cartel case in *T.A.G. S.R.L. v. Romanian Competition Council* where the NCA found collusion in the market of those teaching people to drive to pass the driving license test. There had been clear meetings to discuss prices, followed by an implementation of the higher rates, and the decision was upheld. Of significance here is that one of the parties had sent a representative who had no mandate to make decisions on behalf of the undertaking, but the court held this was irrelevant, insofar as the collusion was then agreed and implemented.

### **Competition and regulation**

Judge Cholakova (section 5.1) discusses a judgment where the regulatory tasks of the Bulgarian National Bank included coordination of interest rates on deposits. To this effect the National Bank discussed rates with the Association of Bulgarian Banks. There were concerns that this facilitated collusion among banks and indeed the business community, the appellants here, were concerned about this conduct. However the national court found that the rates of interest were finally set by the regulator, and not by the firms so that the competition rules did not apply. It is not particularly clear why the national regulator has the competence to regulate rates of interest on deposits as this would appear to be one of the legitimate ways for banks to compete for customers. It appears that this situation should rapidly evolve toward a more competitive framework.

Judges Rodrigues and Pedroso (sections 5.2 and 5.3) review the national dispute that led the court to make a reference in the OTOC judgment and notes how this case revisits for the first time the Wouters judgment and examines in what circumstances restrictions of competition might not fall within the framework of Article 101, if the restrictive practices are necessary to provide certain other benefits. On the facts this seemed unlikely in the case under judgement as the Order for Chartered Accountants in Portugal appears to simply have reserved part of the market to itself and made entry of others difficult for no apparent good reason. In fact the Lisbon Court of Appeal found that the defendant had indeed infringed Article 101 by its decision.

### **Vertical agreements**

Judge Cerqueira and judge Bogdan (sections 6.1 and 6.4) both discuss resale price maintenance agreements. Judge Cerqueira discusses the case taken by the Portuguese National Competition Authority against the major milk producer, who had implemented a system of resale price maintenance. The Court and the NCA follow the Commission guidelines to find a restriction by object. Of interest here is that the NCA considered the fact that milk was an essential product as an aggravating circumstance when determining the amount of the fine. Judge Bogdan instead reviews a judgment which involved luxury goods, where again the Court spent much time discussing and elucidating the notion of restrictions of competition by object. In reading the proceedings it seems a pity that much time is devoted considering the precise contours of the meaning of restriction by object and little heed is taken to examine if elimination intra-brand competition in this case was actually harmful.

Judge Nedelcheva (section 6.2) considers a case where the producer of a sports TV channel in Bulgaria had an exclusive dealing relationship with a downstream distributor. The complainant wished to also have access to the same TV channel due to its popularity. However this was denied because the parties' market shares were below the thresholds set by the Block Exemption Regulation for Vertical Restraints and so the exclusivity agreement fell within the exception of Article 101(3). The learned judge notes that the complainant also tried to find a way to obtain the TV channel by alleging dominance – perhaps not without some justification given that in some merger cases the Commission has insisted that there is some premium content which is very important for the success of downstream operators. However here no dominance was established so even this second argument failed, it seems mostly because this TV channel was not as unique as the complainants suggested.

Judge Norkus (section 6.3) brings up the interesting issue of vertical agreements that are restrictive because of their cumulative effects. This arose in *SEB Bankas, DNB Bankas, Swedbank, G4S Lietuva v. Lithuanian Competition Authority*. G4S was the leading provider of cash handling services in Lithuania and it had entered into exclusivity agreements with the three major banks. The combined effect of these three vertical agreements was a foreclosure of the market for cash handling services. The Supreme Administrative Court agreed that the facts constituted an agreement foreclosing market access, but corrected the NCA on a significant point: the imposition of a fine. The NCA had imposed fines on all undertakings but the court rightly noted that the fine should only be imposed on the service provider, in that only this undertaking is aware of the network of vertical restraints it has created, which may foreclose market access. Each bank cannot be held responsible. It is submitted that the banks would not even be responsible if aware of the other agreements, after all the exclusivity probably works against the bank's interest as they would prefer price competition in this market. If this last conclusion fully excludes the banks' responsibility, if they are aware of the restrictive effect of the network of agreements, is open to questioning.

### **Abuse of dominance**

Judge Bastos (section 7.1) refers to the Reuters case – where Article 102 is pleaded by the defendant as a means of trying to avoid paying a debt. The defendant owed Reuters money for services received and it said its refusal to pay was justified by virtue of the fact that Reuters had provided the same services to others at lower prices. However, it seems that while the court was persuaded that Reuters was dominant, the defendant had not done enough to persuade the court that there had been an abuse of a dominant position, so the claim failed.

Judge Georgiou (section 7.2) brings up the important role of interim relief in *Pancyprian Organisation of Cow Farmers v. The Cyprus Commission for the Protection of Competition*. The applicant was the dominant milk producer and had recently merged with one of the two downstream dairy products manufacturers. Upon doing so it is alleged that it sought to exclude the other rival. On these facts the NCA imposed an interim order to ensure that the other downstream competitor was able to receive milk supplies as before, so as to ensure competition in the downstream market remains. As the learned judge notes, this power is important for otherwise there is a risk that competition is eliminated before the final proceedings are completed. It is a welcome sign to see an NCA bravely using this remedy, especially as it is used seldom by the Commission so that there is little EU case law to guide national competition enforcers.

Judge Mattila (section 7.3) discusses the Finnish Market Court's judgment in *Valio Oy*. This is a case where the leading milk producer sought to defend itself against a new entrant by setting rebates and reducing its prices to entice supermarkets not to buy milk from the new entrant. The Market Court applies the principles of Court of Justice diligently, and the most interesting issue in this case is how to assess total and variable costs in the framework of the case. Here the dominant firm was vertically integrated with a number of farmers and had to buy their milk. Accordingly it is not easy to say that the cost of buying the milk is without any doubt a variable cost as the NCA and Market Court concluded. At any event, as the learned judge notes there was also sufficient documentary evidence indicating that the defendant intended to eliminate a new entrant. This case shows that while cost-based approaches to predatory pricing are helpful proxies to determine predation, in a case like this, identifying the correct fixed and variable costs is not simple and intent may be an important element of the assessment.

Judge Trečan (section 7.4) reviews an important decision of the Slovak Supreme Court: *ENVI-PAK, a.s. vs. The Anti-monopoly Office of the Slovak Republic*. The facts are less important than the general principle, but it is worth setting this out: the applicant was a firm involved in issuing 'green dot' licenses to goods that could be recycled, but it offered licenses at more favourable terms to customers who also used the same company's recycling and waste disposal services. This is a clear case of leveraging one's dominant position from one market to another. However this conduct does not fall squarely in the examples set out in Article 102 and the corresponding abuse of dominance provision in Slovak Law. Previously a line of jurisprudence in the Slovak Republic prohibited the NCA from condemning a firm for conduct that it had not previously specified as abusive, on the basis that the law should be certain. However the Supreme Court has now denied the validity of this approach, and held that the NCA is free to refer to the general principles of abuse of dominance to examine whether the conduct of the dominant player is exclusionary. There may well be cases where the fine could be reduced or even not imposed when the 'new' abuse discovered is so different from those identified

before, but the facts of this case do not present something so novel as to justify any mitigation in the fine: leveraging one's dominant position is a well understood aspect of abuse of dominance.

One of the important considerations to bear in mind when looking at abuse of dominance cases is that the NCAs in many jurisdictions are also required to apply rules of law prohibiting the abuse of economic dependence. These rules look similar to competition rules, but pursue a different aim: they are more designed to protect weaker market players than the competitive process. Judge Arkouda's summary of the Odeon case (section 7.5) provides a good example. Odeon refused to license its films to a downstream multiplex cinema, while these films were shown in Odeon's competing multiplex cinema in the same market. Since Odeon had no dominance in the film market nor in the distribution market there was no antitrust infringement. However in applying the rules on abuse of economic dependence the NCA was able to protect a small, local cinema complex against the more powerful economic entity. Of significance for Greek law, the Council of State clarified that the status of economic dependence did not require that there was a pre-existing relationship between two parties, but this dependence arose as soon as the weaker party sought contractual links with the other, more powerful player.

Judge Cazangiu (section 11.4) reports on an interesting excessive pricing case, which shows how vital market definition is and how disagreements over the precise delimitation of markets are. It also shows us two different approaches to handling price increases: with the lower court applying a cost/price test and the Supreme Court instead asking if the price was excessive by reference to the economic value of the service. The learned judge favours the latter court's interpretation as closer to the original spirit of EU competition law.

### **Competition law and telecom markets**

In a number of Member States the NCA is also the regulator for telecommunications markets, and this is so in The Netherlands – Judge Kerkeester's annotation (section 8.1) provides an example of the NCA identifying the appropriate termination rates for fixed and mobile telecommunications. The NCA had chosen a method for fixing this rates that afforded particularly low prices and the regulated firms wished for a higher rate of return. In applying the regulatory framework the NCA and the appeal courts are guided primarily by competition considerations and in this case the court held that since the relevant markets were competitive there was no need for the NCA to impose such a strict pricing regulation. The learned judge notes that perhaps the NCAS would have had a better case if it invoked another aspect of the regulatory framework: the need to create an internal market for telecommunications.

Likewise, judge Christodoulidou (section 8.3) notes how the Cypriot competition authority handled a refusal to deal case in the telecoms sector. Here, in view of the foreclosure effect that results what is perhaps surprising is that the competition authority only imposed a fine, and did not go further to impose a behavioural remedy to ensure that henceforth access was provided.

Judge Kosta instead notes (section 8.2) how in Greece the antitrust and regulatory functions are in the hands of a dedicated regulator for electronic communications. In the case regarding the former state monopoly, OTE SA, the regulator imposed fines for breach of both the telecommunications rules and the competition rules when the incumbent refused to transfer some customers to new entrants. Of interest here is that the Council of State agreed that two distinct fines could be imposed for the infringements of the telecommunications rules and of the abuse of dominance provisions, as they

protected different interests. However the same court also held that the regulator should have looked more closely at OTE's concern that the new entrants were acting unlawfully in signing up clients and that this may justify some of OTE's refusals to deal with rivals.

Finally, Judge Öwerströmdan (section 8.4) reports on the final decision of the Telia Sonera saga in Sweden, which led the ECJ to issue a major judgment on the concept of margin squeeze. He notes that this was the largest competition case in Sweden and the learned judge pauses on two aspects of the ruling: first that the defendant is presumed innocent and that the procedures of the Market Court make sure that this is respected by a close assessment of the case brought by the competition authority. But the second aspect of concern is more significant: the Market Court did not agree on the application of the long run average incremental cost (LRAIC), and preferred an accounting method that is less clear cut. Not only did this serve to reduce the size of the margin squeeze, and consequently the fine (down from 14,400,000 EUR to 3,500, 000 EUR) but it also leave the law uncertain when it comes to future cases.

### **Competition law in the energy sector**

Judge Bearkauskas (section 9.1) reviews a judgment of the Supreme Administrative Court of Lithuania where the Competition Council found an abuse of dominance by an oil producer designed to exclude competitors and applied closely the legal standards set by the ECJ's case law on exclusionary contracts in finding that the pricing practices were discriminatory, loyalty-inducing and also likely to restrict imports into Lithuania by foreign competitors.

Judge Stoyanova (section 9.2) instead uncovered an unconventional use of the abuse of dominance provisions: here the dominant electricity supplier disconnected a client. A complaint with the National Regulatory Authority (the State Energy and Water Regulatory Commission) did not serve to resolve the dispute, so the matter went to the competition authority. Two aspects are worth noting: it is arguable that the refusal to supply a client could constitute an exploitative abuse of dominance, but it is not clear that antitrust law is the best way to address this kind of issue: the matter would seem to be more suited for resolution either by the regulator or by a private law claim. Second, as the learned judge noted, the procedure first involved a commitment decision, which was followed by an infringement decision, and the national court was concerned that the fine imposed was inappropriate given that the matter had been settled by a commitment decision – accordingly care must be taken to select a single procedure for an infringement and to recognize the actual behaviors of the companies involved.

Judge Nõmmiko (section 9.3) reports on a damages claim whereby the dominant supplier of electricity made the supply of electricity conditional upon unrelated obligations. The learned judge explains how the national court considered carefully whether a damages claim can be brought for infringements of competition law, noting in particular whether the claimant is entitled to protection by competition law and whether damages for pure economic loss may be claimed, as these are usually not awarded in tort law. The court concludes that a damages claim may be brought. It is to be hoped that the Damages Directive will henceforth make these claims smoother.

### **Private enforcement**

Judge Wiggers-Rust (section 10.1) provides an account of a judgment of major significance for any follow-on claims. When the claimant bases a damages claim on a Commission decision which is on appeal, must the national court stay proceedings? The answer given by the Dutch judgment here (in

considering a damages claim based on the air-freight cartel) is that the answer to this question depends on whether the national court has doubts about the validity of the Commission decision. This means that the national court has the task of performing a type of judicial review of a decision, when the competent court for that is the General Court. This makes the life of the national judge quite difficult insofar as one has to assess the grounds upon which the defendants are contesting the decision and make a guess as to whether these are plausible. This raises the costs of litigation, and may create unease when there is a national court reviewing matters that are truly within the remit of the European courts. Finally, it exposes the national court to wrong guess the attitude of the European courts weakening the certainty of rights.

Judge Spera (section 10.2) also confronts a follow on claim considering a judgment of the Italian Corte di Cassazione in one of the many cases stemming from the car insurance cartel. Here the national court held that while the claimant may rely on the decision of the National Competition Authority, it is open for the defendant to present evidence to deny the infringement. It remains to be seen whether this approach can continue once the Damages Directive is transposed into national law, but it is relevant to note that in any case the defendant cannot simply re-use claims that were made in the proceedings against the competition authority and were rejected, so it is likely that only in rare instances will the defendant manage to rebut the finding of the national competition authority.

Judge Palömaki (section 10.3) reports on a judgment about limitation periods: in this case the plaintiff found that their claim was time barred because he should have known that there was a cartel in view of the press release from the national competition authority, indicating dawn raids and thus time had started to run from that period. The judgment is now largely of historical interest as the Damages Directive addresses this matter by preventing public enforcement procedures starting the clock, thereby allowing follow on actions to proceed at a later time, when the infringement is clear. This evolution appears of particular relevance considering that most competition infringements are subject to lengthy judicial reviews before they are finally established.

Finally, Judge Correia (section 10.4) reports on the use of the Portuguese procedure known as ‘popular action’ used by a consumer protection association to bring a damages claim against certain charges imposed by Portugal Telecom on its customers. The claim was settled before reaching trial, but Judge Correia explains in careful detail the procedures of this special cause of action, which is seen as resembling an opt-out class action system. Whether it will be used in further competition cases remains to be seen as it has not been used widely so far.

### **State aid and unfair competition**

In state aid cases, recovery is a major issue facing national courts, and so it is with judge Mitrova’s report (section 11.1) of a case which she handled that clarifies the procedures for recovery of state aid in an accession state, which faces the challenge of working out how to best enforce the law when state aid is awarded before accession but needs to be recovered afterwards. The judgment here seeks to simplify procedures to make recovery effective.

Judge Stoyanova (section 11.2) reflects on an intriguing judgment at the crossroad between unfair competition and the internal market. Under Bulgarian Law there are certain limits placed upon offering legal services and some local law firms complained about unfair competition from foreign entrants; however these national rules were criticized by the Commission as hindering the free provision of services and thus reducing competition in the downstream market; accordingly national

law was amended. This is an illustration of one of the more significant –competitive results of the internal market rules of the Treaty on the Functioning of the European Union, increasing competition by pursuing the goal of a single European market.

Similarly, Judge Milachkova (section 11.3) reports on a judgment which link issues of labour law and competition law and challenges the court to consider how certain provisions of labour law may have restrictive effects on competition. This is a fascinating matter that has so far received little attention in other jurisdictions and can bring in the future to facing very thorny issues of balancing among different important rules.

### **Conclusions**

Some general trends emerge when reviewing all of these 48 judgments. First, many of the judgments make ample reference to the case law of the CJEU and utilize it as a source of law. In many fields this case law provides sufficient guidance for the national courts, however we see that many puzzles remain and national judges are called upon to make references for a preliminary ruling; a number of the case notes tell us what happened after the ECJ's ruling in the national courts and allow us to judge the effectiveness of the guidance provided by the European Court of Justice not only as a general indication but as a concrete help to solve specific cases.

Second, the collection of cases shows that certain issues are relatively well settled, but that topics like abuse of dominance or the relationship between competition law and other forms of regulation or with rules of private law continue to raise difficult issues for judges. While the Damages Directive may help to resolve some of these, it raises its own interpretative difficulties, for example with respect to the boundaries of the binding effect of decisions of national competition authorities.

Finally, the judgments reveal that national authorities select increasingly more complex and significant cases, and the national courts are adept at handling hard technical matters and resolving issues with a good dose of legal sophistication joined with commercial realism.

## **2. SCOPE OF APPLICATION OF THE COMPETITION LAW**

### **2.1. POHRIB ALINA, BUCHAREST COURT OF APPEAL (ROMANIA)**

#### **Information concerning the judgment**

High Court of Justice / Bucharest, Romania

Judgment No.5157/ 24.04.2013

CECCAR vs. National Competition Authority

#### **Facts**

Following a national inquiry, the National Competition Authority established a breach of Article 5 of the Competition Law nr.21/1996 and Article 101 of the Treaty by CECCAR (a professional non-profit organisation of accountants). By adopting a Regulation on the establishment of criteria for determining fees, allowances and compensations for accountants, CECAR fixed minimum and maximum tariffs for its members.

As a penalty, the National Competition Authority imposed a fine of €4,056,264, representing 9.2% of the total revenues of the applicant in 2009 and ordered the repealing of the Decision of CECCAR Superior Council, approving the Regulation published in the Official Journal N. 87 from 13.02.2009.

In determining the fine, the National Competition Authority took into account the total turnover of CECCAR members in 2009 and applied two aggravating circumstances: an increase of 10% of the fine for the continuation of the infringement after the initiation of the investigation and another 10% of the basic fine for ignoring the previous Authority's warnings on the anti-competitive nature of a Regulation establishing professional fees. Prior to the adoption of the Regulation, in fact, CECCAR had been warned by the National Competition Authority not to adopt such a measure.

#### **Decision**

1. The first issue, underlined by the plaintiff was the application of Article 5 of the National Competition Law and of the provisions of Art. 101 TFEU to a professional non-profit organisation. According to CECAR, it could not be regarded as an association of undertakings, because its purpose was not an economic one, although chartered accountants could exercise their profession individually or could be employed in companies. The Court of the First Instance held that CECCAR was an association of undertakings / enterprises and the internal Regulation was thus a decision of the association of undertakings, under Article 5 of the Competition Act and Article 101 TFEU.

In turn, the higher court upheld in appeal that the notion of an economic / association of undertakings (phrase used by the legislature prior to the adoption of GEO No.75/2010) within the meaning of

Article 5 para. (1) of the Competition Act, interpreted in harmony with the Community rules and the case law of the ECJ (in respect of the principle of full effectiveness of Community law) includes associations, given that these legal entities are pursuing an aim that is not only professional, social or public, but carries out economic activities, within the limits of its own rules of organisation and operation.

2. Second, the plaintiff denied the existence of a breach of Art. 101 TFEU, saying that establishing minimum and maximum tariffs for CECCAR members was in accordance with European legislation.

Both Courts (the Court of Appeal and the High Court) ruled that CECCAR, by constantly intervening in its members' activities (auditors, accountants and accounting firms) by modifying, publishing and maintaining in force a regulation that fixed in a concerted and direct way the minimum and maximum rates for the prevailing market in professional accounting expertise, altered the fundamentals of competition in that market, which was a violation of the provisions of Article 5(1)(a) of the Competition Act. As long as the main parameter of a market was the price, it was obvious that the activity of establishing and maintaining minimum and maximum tariffs for services in a market was likely to limit CECCAR members' economic freedom in the market. Under ECJ case law, a decision of an association of undertakings fixing prices / rates was a restriction of competition by object (Case 246/86, *Belasco v Commission* 1989). Therefore, the effect of the Regulation adopted by CECCAR of the activities of its members was irrelevant. Moreover, it was difficult to accept that the establishment of professional rates was ignored by members of CECCAR given that, according to paragraph 121 of the Rules of Organisation and Operation of CECCAR, failure by members to comply with the rules and decisions of governing bodies constituted misconduct and could result in disciplinary action.

On appeal, the High Court confirmed that by fixing the maximum and minimum fees of its members, CECCAR had carried out a restriction of competition by object. It was not necessary to assess the effects of the Regulation on the competition in the market. The High Court rejected the argument that CECCAR did not have any anti-competitive intent in adopting the Regulation. According to Community case law, in fact, intention was irrelevant in determining the restrictive nature of anti-competitive practices.

3. The High Court also rejected the arguments put forward by the appellant concerning the lack of intra-community effect of the Regulation, and thus the impossibility to apply Art. 101 TFEU. According to the ECJ case law, in order to apply Art.101(1) TFEU it was not necessary to prove that the agreement / decision produced an appreciable impact on competition or on actual interstate commerce; in the event that agreement that is anti-competitive by object is able *per se* to produce such

effects. Since the Regulation covered the whole country, and thus one EU Member State, it was capable to affect intra-community trade. Under Community case law, agreements that covered the whole territory of a Member State had the effect of reinforcing the partitioning of markets on a national basis, (see, e.g. *Wouters*).

Finally, the High Court concluded that the National Competition Authority rightly concluded that the Regulation had an impact on intra-community trade in the light of the criteria set out in the *Commission Communication on the Concept of Effect on Trade*.

#### 4. The Application of Art. 101 (3) TFUE

The plaintiff argued that the Regulation was needed for the smooth functioning of the business activities of the accounts, and thus it was in the general interest. The High Court rejected such argument, by ruling that CECAR intervention in the determination of the price of the services provided by the accounts did not have an impact on the quality of the services. Both the First Instance and the High Court concluded that the Regulation could not be exempted under Article 5(2) of the Competition Act and Article 101(3) TFEU.

#### **COMMENTS**

I personally found this ruling relevant because the High Court broadly interpreted the concept of association of undertakings, in accordance with ECJ case law. The ruling concluded a debate lasting 9 years concerning the nature of CECCAR as association of undertakings, and thus whether CECCAR was subject to the competition rules.

## 2.2. CARLSON PER, MARKET COURT (SWEDEN)

### Information Concerning the Judgment

- Name of the Court of Last Instance: Market Court
- Names of the Parties: *Swedish Competition Authority v. Räddningstjänsten Dala Mitt*
- Case reference number: MD 2014:1<sup>1</sup>
- Date of the judgment: January 31, 2014

### Legislation

According to the Swedish Competition Act<sup>2</sup>, a certain conduct by the State, a municipality or a county council within a sales activity covered by Chapter 1, Article 5, first paragraph, may be prohibited through an injunction, if such conduct:

1. distorts, by object or effect, the conditions for effective competition in the market, or
2. impedes by object or effect, the occurrence or the development of such competition (Article 27, Chapter 3, first paragraph)<sup>3</sup>.

However, such an injunction may not be imposed in relation to conduct that can be justified by public interest considerations (Article 27, Chapter 3, second paragraph).

For the purposes of the Act, an undertaking is defined as a natural or legal person engaged in activities of an economic or commercial nature. To the extent that such activities involve the exercise of authority, they shall not fall within the scope of this definition (Article 5, Chapter 1, first paragraph). The term undertaking also includes associations of undertakings (Article 5, Chapter 1, second paragraph). In the government bill for these provisions, it was stated that the criterion “conduct” comprised concrete actions as well as omissions from acting (prop. 2008/09:231 p. 36). One example of such conduct, mentioned in the Bill, was denying a company admission to public infrastructure.

Cases concerning injunctions pursuant to Article 27 are tried by the Stockholm City Court on application by the Swedish Competition Authority, SCA (Article 32, Chapter 3, first paragraph). If the SCA, in a particular case, decides not to apply for an injunction pursuant to Article 27, an application

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<sup>1</sup> <http://www.marknadsdomstolen.se/Filer/Avg%C3%B6randen/Dom2014-1.pdf>

<sup>2</sup> [http://www.kkv.se/upload/Filer/ENG/Publications/The\\_Swedish\\_Competition\\_Act.pdf](http://www.kkv.se/upload/Filer/ENG/Publications/The_Swedish_Competition_Act.pdf)

<sup>3</sup> These provisions came into force on January 1st, 2010.

for injunction may be brought by an undertaking that is affected by the conduct or activity in question (Article 32, Chapter 3, second paragraph).

### **Facts**

SCA is the national, state authority working to safeguard and increase competition and supervise public procurement in Sweden. The authority's task is to work for efficient competition in the private and public sectors for the benefit of the consumers as well as for efficient public procurement for the benefit of the society and of the participants in the markets.

Räddningstjänsten Dala Mitt (RDM) is a municipality association responsible for rescue services within four municipalities, situated in the County of Dalarna in Sweden: Borlänge, Falun, Gagnef and Säter. RDM runs an incident ground located at Bysjön – Bysjöns Utbildningscenter (Bysjön) – where the association arranges courses in relation to rescue services, *inter alia* courses for fire fighters.

A special agency in Sweden is responsible for issues concerning civil protection, public safety, emergency management and civil defence: The Swedish Civil Contingencies Agency (MSB). One of the agency's tasks is to provide training for fire fighters from different municipalities in Sweden. For several years the MSB has arranged a course called Räddningstjänst (Rescue Service) through different service providers.

In January, 2009, MSB initiated a public procurement procedure concerning the arrangement of the "Rescue Service" course in different geographical areas, during autumn, 2009 (and with an option for spring, 2010), among them was the county of Dalarna. According to a special condition set out in the descriptive documents, the candidate must have access to an "incident ground". Four companies submitted requests for participation in the procurement, among them Brandskyddsöreningens Service AB (SBAB) and Stanley Security AB.

SBAB is a subsidiary of the Swedish Fire Protection Association, which is a non-profit trade association for companies in the field of fire protection. Amongst other things, SBAB offers education, acting with a view to a more secure Sweden, especially aiming at fire protection.

SBAB had previously been commissioned by MSB to arrange the "Rescue Service" course. And SBAB, on its part, had engaged RDM to actually carry out the courses held at Bysjön.

Stanley Security AB is a Swedish training and consulting company within the area of risk and safety. The company had previously rented Bysjön from RDM and had arranged rescue courses for upper secondary school pupils. In order to get access to a suitable incident ground in Dalarna and in that way

be able to participate in the procurement, Stanley Security AB approached RDM and made a request to rent the incident ground at Bysjön. Stanley Security AB's request was denied by RDM on the ground that it was not reasonable to let the incident ground to "a competitor". Stanley Security AB therefore did not have access to an incident ground within the geographical area in question.

In the evaluation process of the procurement, MSB rejected Stanley Security AB's tender on the ground that it did not comply with the special condition of access to an incident ground. Later, MSB initiated four more public procurements concerning the arrangement of the "Rescue Service" course in the county of Dalarna and surrounding counties. In these procurements, an arrangement of the course on Bysjön and a few other incident grounds complied with the conditions. Anew, Stanley Security AB made requests to rent Bysjön, but the requests were denied by RDM.

SCA brought an action against RDM at the Stockholm City Court and claimed that the Court could prohibit RDM, through an injunction to deny Stanley Security AB access to Bysjön, on the ground that the municipality's conduct distorted the conditions for effective competition in the market, or impeded the occurrence or the development of such competition for the "Rescue Service" course. SCA asserted that the relevant product market was the market for the "Rescue Service" course and that the geographical market was to be defined as a market consisting of not more than three connected counties, including Dalarna.

RDM contested the claim on the basis of a number of grounds. RDM asserted that the provisions on anti-competitive sales activities by public entities were not applicable in the case at hand. RDM did not dispute that the relevant product market was the market for the "Rescue Service" course. However, RDM disputed that the relevant geographical market was limited to three connected counties, asserting that the geographic market was wider. RDM also disputed that the fact that Stanley Security AB was prevented from using Bysjön had led to a significant price increase.

The Stockholm City Court rejected SCA's action. The Court found that the relevant product market was the market for the "Rescue Service" course, but held that the relevant geographical market might be wider than three connected counties. The Court held, that other incident grounds within the geographical market – after some adjustments – would come up to standard, and that access to any of these incident grounds would therefore comply with the actual conditions. Furthermore, the Court found that SCA had not proven that it would be economically unfavourable, or that the chances of winning a contract would diminish, if a candidate submitted a tender founded on access to an incident ground other than Bysjön. The Court added that the effects of distortion or impediment must be of some significance.

The Market Court sustained SCA's action and prohibited RDM from denying Stanley Security AB access to Bysjön at the penalty of a fine of SEK 1 million. The Market Court agreed with the City Court, that the relevant product market was the market for the "Rescue Service" course. However, the Market Court found that the relevant geographical market was "procurement specific", that is to say, that the relevant market depended upon the conditions set out in the descriptive documents of the procurement. The Market Court stated that it was in the nature of things that adjustments to an incident ground would involve costs that, in the end, would affect the total cost of a course. Furthermore, the Market Court found that it was proven that adjustments to one of the other incident grounds (Västerås) would cost more than SEK 80 000. Against this background, the Market Court found that RDM's denial of Stanley Security's requests had impeded the occurrence or the development of such competition in respect of three of the public procurements.

### **Comment**

This case is the first case concerning anti-competitive sales activities by a public entity ruled by the Final Instance in Sweden. The judgment shows that the legislation on anti-competitive sales activities by public entities may be an effective measure through which to eliminate and counteract obstacles to effective competition.

### **2.3. CHARLETON PETER, HIGH COURT (IRELAND)**

*Lifeline Ambulance Services Limited v Health Service Executive*, ruled on 23<sup>rd</sup> October, 2012.

This was a decision of Judge John Cooke of the High Court, previously Judge of the European General Court. So, he knows his stuff.

Firstly, though this was decided under section 5 of the Competition Act 2002, the relevant Irish legislation, Judge Cooke felt obliged to apply Article 101 and 102 of the Treaty. This is because Regulation No 1/2003 on the implementation of the rules on competition, laid down by Articles 81 and 82 of the Treaty, provides at Article 3.1 that in the enforcement of EU competition rules both national and EU law must be enforced in order to ensure, as Article 35 states, the effective application of EU competition law.

To remind ourselves, here are Articles 101 and 102 that are at issue in that case:

101 (formerly Article 81)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

102 (formerly Article 82)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### **The Facts**

The defendant is the National Health Service provider for Ireland. As such, it has to have ambulances for emergencies, for bringing patients from hospital to hospital and for special events (by which they seem to mean large open-air concerts or sports fixtures). The defendant maintained a fleet of ambulances, about 400, but sometimes due to the pressure of work the defendant needed more. There are also private ambulances operating in Ireland and there is a considerable overlap between what the defendant does and what firms such as the plaintiff provides. The plaintiff had a fleet of 38 ambulances which it hoped to hire out to the defendant and to two other ambulance companies and

private healthcare providers. When an accident happens, the closest ambulance, whether private or public, will go to the scene and bring the person to hospital. A person may be insured for health provision or may be dependent entirely on public services. Where there is an emergency, a public ambulance will not charge for bringing a victim to hospital, whether the person is insured or not. A private ambulance will recover the cost from the defendant or, as I understand it, from the person's private health insurer. The defendant, as the national health provider, is under a legal obligation to make health services available to the Irish population. It does nothing from a commercial point of view therefore, but in what it does it does compete with commercial undertakings, such as the plaintiff.

The plaintiff brought a competition case against the defendant. Essentially, this was triggered by the defendant cutting back on expenditure following the near collapse of the Irish economy with the banking crisis of 2008. The specific cut back targeted here was for transfers from hospital to hospital. The defendant decided that they would only use outside ambulance fleets to take patients from one hospital to another where it was not an emergency and in exceptional circumstances. Further, the defendant wanted to cut back its reliance altogether over time. In this they had been successful. The figures indicated that it had reduced this emergency response work to the plaintiff from around €1 million in 2008 to €150,000 in 2010, and in 2011 the defendant had not called on the plaintiff at all.

The plaintiff claims that cutting down on the use of private ambulance operators was an anti-competitive practice by the defendant and further claims that since the defendant had a dominant position in the marketplace for ambulance services, it had abused it by refusing to use any ambulance other than its own. This is how Judge Cooke put the matter:

*Bluntly put, the plaintiff alleges that the HSE is abusing its position as operator of the State's largest ambulance fleet in a way which has as its purpose or consequence to exclude the plaintiff and other private undertakings from what it says is an existing commercial market for the provision of services for transport of public patients.*

There were a number of questions in the case. The first of these was whether the defendant, as a national health provider, could be regarded as an undertaking. This should be a question which allows an easy answer. It is complicated, however, by the principle of national solidarity, the concept in EU law, which states that Member States are entitled to take measures for the good of the population. Examples of this would be the provision of health services, education, defence, police, judiciary and public service. Ordinarily, an undertaking has a wide meaning which is similar to that adopted by the Court of Justice in Case C-41190 *Hofner and Elser* [1991] ECR I-1979 para 21 as: "... the concept of

an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.” Let us take an example. In Case 29/76 *LTU v Eurocontrol* [1976] ECR 1541 the plaintiff refused to pay the charges for air navigation services in Belgium. These were collected on a basis which differed from user to user, so that the Court of Trial in Belgium found that the defendant had abused a dominant position by fixing its charges and had variable amounts for services which were essentially the same. When the matter came to the Court of Justice, the defence was that the defendant was not an economic undertaking. Just because air traffic control could be provided by private firms did not mean that when the nation provided that service through national solidarity it was distorting the marketplace. A further distinction was necessary. This is the distinction between the purchase of economic activity and the provision of services in the marketplace. In order to fulfil a State duty, a country may be purchasing, for instance, thousands of computers for its civil servants. Purchasing is not ordinarily engaging in economic activity. It can be different if the computers are, let us say, kept only for a short time by the civil servants and may then be sold on by them in the open market. Where a country is purchasing services, however, it is ordinarily acting as a consumer and not as an economic undertaking. In the *Eurocontrol* Case, the Court of Justice, at paragraphs 29-30, made this clear:

*The collection of route charges, which gave rise to the dispute in the main proceedings, cannot be separated from the organisation's other activities. Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services... Eurocontrol must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers" as the Court had earlier held in Case 29/76 L.T U v. Eurocontrol [1976] ECR 1541. It concluded: "Eurocontrol acts in that capacity on behalf of the Contracting States without really having any influence over the amount of the route charges. Responsibility for the fact... that the amounts of the charges vary in time or with respect to the areas overflown, cannot be attributed to Eurocontrol, which merely establishes and applies a common formula in the circumstances set out above, but to the Contracting States which set the amount of the rates per unit. Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.*

In another case this was also made clear. In Case C-205.03P *Fenin*, what was at issue was the wholesale purchase of medical goods and equipment for use in Spanish hospitals by the Spanish health service but in circumstances where there were delays in paying invoices. This was alleged to amount

to an abuse of a dominant position. The matter went to the General Court and then to the Court of Justice. The same distinction between offering goods and services as an economic activity and purchasing goods and services in the marketplace was made. As Judge Cooke explains at paragraph 51 of his decision:

*In its subsequent judgment of the 11th July, 2006, the Court of Justice rejected the appeal and upheld the determination of the lower court on both issues. It did so, however, without considering it necessary to refer the issues of fact identified by the Advocate General back to the Court of First Instance. It held that part of the applicant's ground of appeal that the lower Court should have considered whether purchasing activity is economic in nature was a ground which had not been put forward prior to the appeal stage and was therefore inadmissible. (para. 21). It upheld the Court of First Instance however, in its determination that it is the activity of offering goods and services on a given market that is the characteristic feature of an economic activity and held "there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity".*

So, while it is clear that a public authority can be an undertaking, entering the marketplace merely to purchase services, and purchasing services only in a way that does not distort free competition in the marketplace does not attract Articles 101 and 102. When it comes to an abuse of a dominant position, where pursuant to the imperative of national solidarity an organisation, such as a health service or an air traffic control service, is given an exclusive right, this does not necessarily lead to dominance unless in the exercise of those rights or the structure of the way in which it interacts with the marketplace leader to commit abuses. Dominance in itself is not enough, abuse is also necessary.

From this, it may not be immediately obvious, but it is clear that once goods and services are offered in the marketplace that there is no defence which states "I am a public body fulfilling my duty and so I am exempt from competition law." No, what you have to do instead is to see what the public body is doing. Is it purchasing or is it, on the other hand, offering goods and services? What is the marketplace in which it is operating? Nowadays, the distinction between public services and private services can be very blurred. When it comes to air traffic control, the situation may be very clear. There, there is one national body and it provides direction to all planes. When it comes to health services, in every country there are public providers at a basic level, in terms of hospitals and doctors and the like, and then people who want a bit more and who don't want to wait around for years to get an appointment or an operation, will pay for private health insurance. When it comes to public and it comes to private,

each of these will be offering various services, such as hospital care or, as in the case of ambulances in Ireland, sometimes it will be a private ambulance service that will pick someone up at an emergency, and sometimes it will be a public or a private ambulance that attends at big concerts or big matches and charges a fee for it. So, you have to split up what is the public and exclusive nature of the service that is purchasing and realise that a public body, such as the health service that was the defendant in this case, can be carrying out an exclusively public role in running public hospitals and in ferrying patients from hospital to hospital, but that it can also be charging out for services, in this instance attending at matches and concerts with an ambulance and a paramedic for a fee. When it does the latter, it is competing in the marketplace and is subject to competition rules. When it is fulfilling its public duty and merely purchasing services and transferring those services from place to place inside its organisation, as in bringing patients from hospital to hospital, it is outside Articles 101 and 102.

At paragraph 61 of his judgment, Judge Cooke reduce the case law to 7 principles and I quote these:

(a) A public body funded from public monies and exclusively engaged in the exercise of entrusted functions which have the object of securing some public interest benefit will not come within the scope of the prohibition, as an economic activity even where it makes a charge for the services it provides and notwithstanding the possibility that those services could be provided by private undertakings: (*EuroControl*).

(b) A non-profit organisation entrusted by law with responsibility for both emergency and non-emergency ambulance services maybe considered to engage in an economic activity in respect of its non-emergency services when provided for remuneration where similar services are also provided by private operators: (*Ambulanz Glöckner*)

(c) A public authority which occupies a dominant position in a service market by virtue of being entrusted with special rights in the public interest does not by virtue of that fact alone infringe Article 102, unless the very exercise of those rights lead it to commit an abuse;

(d) Such an abuse may arise if the exercise of the right enables the undertaking to reserve to itself the provision of an ancillary service on a related but distinct market where private operators are present; (*Ambulanz Glöckner*)

(e) Where the functions of a public authority involve it in activities some of which are economic and others are non-economic, it will come within the scope of the prohibition in respect of the economic activities only and will not be excluded from it by the fact that its public functions are partly non-economic;

(f) A public agency exclusively engaged in providing services on a non-economic basis in the public interest does not become engaged in an economic activity because it concludes contracts to purchase services from private operators provided it does so as an end user of those purchases in its non-economic activity; (*FENIN*)

What Judge Cooke said was that the defendant had a clear statutory responsibility for transporting patients from one hospital to another. That put them outside the marketplace. Secondly, in using its ambulances to transport patients from one hospital to another, the defendant was not engaging in an economic activity for gain. Even through the fact that it, from time to time, supplemented its ambulance fleet by purchasing the services of ambulances on the open market, it did so not on the basis of engaging in that for the purpose of other economic activity and nor did it seek to procure some other advantage in a neighbouring or relating market. Thirdly, while the defendant had a dominant position in purchasing ambulance services from private operators, it was not an abuse of a dominant position to reduce or ultimately eliminate its supplementary reliance on private ambulances outside its own fleet of 400 ambulances. This was because not purchasing goods and services did not procure any competitive advantage for the defendant. Further, there was no evidence to suggest that this strategy had any purpose or effect in benefiting the defendant in any service which it might provide to private patients outside its statutory remit. Lastly, Judge Cooke felt that he couldn't compel the defendant to continue to use and pay for services which it did not need. Forcing a public authority to do that would cut across one of the basic objectives of the competition rules, which was that of ensuring allocative efficiency. In other words, by forcing the defendant public health service to purchase some of its services on the marketplace when it already had enough of the goods and services as of its own resources would turn competition law on its head by bringing about inefficiencies: namely under using its own resources and unnecessarily purchasing services that it did not need.

## **2.4. ARAÚJO ANABELA, LISBON ADMINISTRATIVE COURT (PORTUGAL)**

### **Information concerning the judgment**

Court: STA - Supreme Administrative Court

Plaintiff: A.

Defendant: IEFP – Institute of Employment and Vocational Training, I.P.-public Institute

Date of the ruling : January 11th, 2011

### **Facts**

-The Defendant launched the international public tender n° 2009.210.0050 for the acquisition of services for providing meals and bar services for the vocational training center of Porto, whose announcement was published in the *Diário da República*, second Series, no. 187, of September 25th, 2009. “A” was one of the bidders which participated to the tender.

-On December 17th, 2009, the Jury drew up a final report in which it proposed to exclude companies A and C from the tender. The excluded bidders, in fact, were had a common shareholder. Under Art. 2 and 109, paragraph 1 of the Law No. 182003, the bidders should be considered as a single company. For this reason, the jury concluded that their offers should be excluded pursuant to paragraph 2 of Article 146 and subparagraph (g) of paragraph 7 of Article 70 of the Competition Act Act. The contract was thus awarded to B.

### **Court proceedings**

A. appealed the decision of the Jury to court, by arguing that it had made better offer in comparison to B. A, in fact, proposed a lower price for the meals to be sold in the IEPP training center in comparison to B, and thus it deserved to be awarded the tender.

During the proceedings, A. asked the court to submit a preliminary ruling request to the ECJ concerning the compatibility of Articles 70(2)(g) and 146(2)(i) of the Competition Act with the Council Directive n. 9250 from 18/6/1992 on public procurement rules. The court, however, rejected the A’s request to ask a preliminar ruling from the ECJ.

The court noted that companies A and C had proposed substantially different offers, although they were part of the same economic group. Although A and C were linked by the same shareholding structure, they were autonomous legal entities. Art. 54 of the Public Procurement Code only prohibits the participation in the same tender of companies of companies in which one controlled 100% of the capital of the other company; this was not the case with A and C. Therefore, the court concluded that A and C submitted autonomous offers, which were not in breach of the public procurement law.

The court then assessed the case under competition law. Under Art. 146(2)(o) of the Competition Act bidders could be excluded from a public tender procedure when they had exchanged information and coordinated their offers. According to the court, the Competition Act did not provide any presumption that two bidders which had a joint shareholder had coordinated their offers, and thus they had breached the competition law. Before excluding A and C, the Jury should have assessed the offers submitted, in order to determine whether A and C had drafted the offers autonomously. As a consequence, A and C did not breach the Competition Act by submitting separate offers to the tender organized by IEFP.

## 2.5. SURGAILIENE EGLE, VILNIUS DISTRICT COURT (LITHUANIA)

### Information Concerning the Judgment:

- Court of the highest Instance: the Supreme Administrative Court of Lithuania
- The names of the parties/case number: *Schneidersöhne Baltija Ltd.* (or *Papyrus Ltd.*) and *Libra Vitalis Ltd.* / No. A<sup>502</sup>-34/2009
- Date of the Decision: 16th October, 2004.

### The Facts

The Competition Council of the Republic of Lithuania (Competition Council) carried out an investigation on the compliance of actions of economic operators trading in paper with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 81 of the EC Treaty (now Article 101(1) TFEU). The investigation covered the period from 1999 to May, 2004. After the Republic of Lithuania became a member of the European Union on 1st May, 2004, the rules on competition laid down in the EC Treaty came into force in Lithuania.

It was found that during the period of investigation, the main players in these markets, and competitors, were the economic operators *Libra Vitalis Ltd.*, *Lukas Ltd.*, *MAP Lietuva Ltd.*, *Papyrus Distribution Ltd.*, *Schneidersöhne Baltija Ltd.* and *Antalis Lietuva Ltd.* These six economic operators may have been holding up to 94% of the coated paper market share, and 97% of the office paper market share; all other companies took a small part of the market share – from 3% to 19%. The Competition Council was concerned that, during the period under investigation, the markets for coated paper and office paper were oligopolistic markets with a relatively large concentration.

These six economic operators signed contracts in 2000, 2001, 2002, and 2003 with a Lithuanian company which conducted research – monitoring trading in paper -- by the mail survey method and by questioning the economic operators quarterly. These six economic operators exchanged information every quarter. The last known exchange of information between the companies occurred in May, 2004.

Article 5(1) of the Law on Competition of the Republic of Lithuania (hereinafter referred to as “the Competition Law”) prohibits all agreements which have the purpose of restricting competition, or which restrict, or may restrict, competition. According to Article 3(10) of this Law, an agreement means contracts concluded in any form (written or oral) between two or more economic entities, or concerted practices between economic entities, including decisions made by any combination (association, amalgamation, consortium, *etc.*) of economic entities or by the representatives of such a combination.

### **Resolution of the Competition Council of the Republic of Lithuania**

The Competition Council made a ruling No 2S-13 on 26<sup>th</sup> October, 2006. During the period of investigation, the Competition Council found separate wholesale markets for coated and office paper. The geographical market has been defined as the territory of the Republic of Lithuania. After considering the nature of the information exchanged, the Competition Council decided that each of the six companies concerned might have been aware not only of their own and competitors' market share in the paper markets, but also, as a result of simple calculations, might have obtained all of the information about their competitors' volumes of sales in tonnes of common and separate paper types, and what the amount of money for the marketed production was (and the amount of money for which their production was marketed). Since the companies had been exchanging data quarterly, they were able to analyse the changes in each of their competitors' market shares, the dynamics of the volumes of sales of separate paper types, and the types of changes in the market shares in relation to the volumes of sales. Such information, which was shared between the companies, was not available to other economic operators in the relevant markets, but only to the representatives of the investigated companies who attended the competitors' meetings; such data were not available to other economic operators from the market research companies because they were committed to protecting the confidentiality of the data.

Article 5(1) of the Law on Competition of the Republic of Lithuania prohibits all agreements which have the purpose of restricting competition, or which restrict or may restrict competition. In accordance with Article 3(10) of this Law, an agreement means contracts concluded in any form (written or oral) between two or more economic entities, or concerted practices between economic entities, including decisions made by any combination (association, amalgamation, consortium, *etc.*) of economic entities, or by the representatives of such a combination. On the basis of the Council's Regulation (EC) No 1/2003 of 16<sup>th</sup> December, 2002, on the implementation of the rules on competition by Article 5, laid down in Articles 81 and 82, and stated the infringement of the Articles referred to, as well as pointing out that, due to the exchange of such confidential information between the economic operators concerned, the limitation of the effects of competition might lead to a decrease in the incentive to compete and an increase in the obstacles to accessing the respective markets. There was a possibility that such a structure might have been used with a purpose that was opposite to competition. Due to the infringements of the economic operators concerned, competition was restricted in the whole territory of the Republic of Lithuania by creating obstacles to accessing the respective markets. At the same time, obstacles were created to accessing the national coated and office paper markets in Lithuania. These factors directly influenced the imports into Lithuania. There was a noticeable effect on trade between Member States, as the exchange of information did not take place between individual operators but between economic operators, who together took a very large share of the relevant markets. It constituted an additional barrier to Lithuanian and foreign economic

operators entering the markets. Considering that the exchange of information has completely covered the national markets, the import volumes have also been influenced. The Competition Council decided that by exchanging confidential information about their presence in the markets for coated paper and office paper every quarter, and because of information providing the volumes of sales for the separate types of paper that are relevant to every economic operator, the six mentioned companies restricted competition in the relevant coated paper and office paper markets, and such actions affected trade between Member States from 1st May, 2004. In this way, these operators infringed Article 5(1) of the Law on Competition, and Article 81(1) of the EC Treaty (now Article 101(1) TFEU) as well as the Council's Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82, implemented by Article 5, and fines were imposed of up to 10% of the gross annual income of each company in the preceding business year: *Antalis Lietuva Ltd.* – EUR, 19358; *Libra Vital Ltd.* – EUR 56,432 ; *Lukas Ltd.* – EUR 6,583 ; *Map Lietuva Ltd.* – EUR 46,666 ; *Schneidersöhne Baltija Ltd.* – EUR 68,156.

#### **Decision of Vilnius Regional Administrative Court**

The two companies – *Schneidersöhne Baltija* and *Vital Libra* – appealed the ruling of the Competition Council before the Court. The companies disagreed with the findings of the Competition Council, as the main arguments of the complaint were that during the period of investigation, the Competition Council 1) incorrectly defined the relevant product markets; 2) the relevant paper market, according to the applicant, should not be considered highly concentrated and oligopolistic, as they are sufficiently competitive, and therefore the exchange of information in these markets should not pose any risk to competition; 3) the nature of information being shared between the companies does not suggest that this type of information helps competitors clearly predict each other's behaviour; 4) the exchange of information has not influenced trade between Member States and, consequently, an infringement of Article 81(1) of the EC Treaty should not be stated. As evidence, the European Commission's findings, made in the concentration case *COMP/3822 Stora Enso Oyi/* of 25th July, 2005, were submitted by *Schneidersöhne Pater*, wherein the Commission assessed the Lithuanian market. The Commission found that the concentration would not cause competition problems in Lithuania, because there is a sufficiently large number of competing companies in the market, the commercial paper market is competitive and there are no barriers to market entry. The Commission cleared the concentration and, on this basis, *Papyrus Distribution Ltd.* and *Schneidersöhne Baltija Ltd.* merged in Lithuania. In addition, the companies pointed out that the exchange of information lasted a very short time, in the point of view of EU law (17 days). During this time, the companies sent only one e-mail to every competitor. This could not have affected competition on the EC level, or have had a significant effect on trade between countries.

The Court of First Instance adopted a decision on 7th June, 2007. The Court partly upheld the appeal of *Schneidersöhne Baltija Ltd.* and reduced the fine to EUR 51,972. Other requests of *Schneidersöhne Baltija Ltd.* and *Libra Vitalis Ltd.* were rejected.

The Court concluded that the Competition Council correctly defined a product market as the market for coated paper and office paper in the wholesale market, and the geographical market as the territory of Lithuania. The Court pointed out that, according to the market definition, six market participants took up from 89% to 96% of the national market, and decided that the Competition Council had reasonably assessed those markets as oligopolistic markets. The relevant case on the collection and share of information was considered to be a horizontal cooperation agreement. The Court indicated that, in this case, the indicator of concentration is the Herfindhal-Hirshman Index (HHI). The Court stated that the applicants, as a proof of the absence of an oligopolistic and concentrated market structure, wrongly presented the concentration case COMP/M.3822 *Stora Enso Oyi/Schneidersöhne Papier*, because the European Commission's conclusion was made in the absence of information about the existence of a horizontal agreement (it had not been discovered at that time). Furthermore, the relevant wholesale markets for coated and office paper were been investigated, some remarks were merely made about the paper market in general.

Since the information was not accessible to other market participants, and the treaties stated that this information was confidential, the evidence indicates that there are companies that have not been accepted into the category of cooperating competitors, the exchange of information cannot be considered to be negligible. The Court decided that the agreement on the exchange of information about the volumes of sales on a quarterly basis is reasonably recognised as potentially limiting competition. Since there were some imports of products in the relevant market, the Court acknowledged that such exchange of information violated the prohibition provided for in Article 81 of the EC Treaty on concluding agreements of such a nature. The Court relied on points 77 and 78 of the Guidelines on the effect on trade, and concluded that in the presence of such characteristics as the burden of the possibility to access one of the national markets which is depressed, when the agreement covers the entire market of one Member State, there are grounds for recognising that it is exposed to the trading of goods between Member States.

### **Judgment of the Supreme Administrative Court in Lithuania**

The extended panel of judges of the Supreme Administrative Court of Lithuania heard a case that was subject to appellate review. The Court referred to the ruling formed by the Judgment of the Court of Justice of the European Communities of 28th May, 1998, in Case *John Deere Ltd v Commission* (No C-7/95 P, para 34), and said that the court usually has to assess in detail the conditions for the application of Article 81 of the Treaty. However, while assessing the findings of complex economic research, the Court must, in principle, (and can) check only whether the Competition Council has

complied with the procedural rules, whether all of the findings were well-grounded, whether facts were not distorted, whether there has been any obvious mistake in the assessment, or if there is a misuse of powers.

The Court stated that, in the present case, the Competition Council rightly defined two separate markets – the wholesale market for coated paper and the wholesale market for office paper -- in the Republic of Lithuania, because of their intended use of different paper types. These papers, in the view of the customer (consumer), cannot substitute for one another, as well as for other types of paper. The Court decided that the geographic market was also properly set up. The Court mentioned that the European Commission has already emphasised that the commercial paper market is a national market (*Decision of the European Commission of 15th December, 2000, in Case No COMP/M.2245-Metsä-Serla/Zanders, Decision of the European Commission of 10th October, 2003, in Case COMP M.3227 Paperlinx/Buhrmann Paper Merchanting Division*). In the assessment of the applicants' arguments that the investigated markets were wrongly recognised as oligopolistic and of a relatively high concentration, the Court analysed the case-law of the Court of First Instance of the European Communities (CFI). The Court stated that the large number of players in the present case cannot be unambiguously considered of such an extent that they would raise obvious doubts on the oligopolistic market structure. The CFI recognised an oligopolistic market structure where ten market participants took nearly two thirds of the relevant market (*Judgment of the CFI of 11th March, 1999, in Case Thyssen Stahl AG v Commission, No T-141/94, para 400*). The Court followed point 29 of the Commission's recommendations on the application of Article 81 of the EC Treaty to horizontal cooperation agreements, as a general guideline. The Court pointed out that in assessing the impact of cooperation in a market, without the market position of the parties and the addition of market shares, an additional factor may be concentration in the market, and such an indicator may be the Herfindhal-Hirshman Index (HHI). Another possible indicator would be the concentration ratio of the leading firms. A relatively high concentration has been recognised in this case. The Court pointed out that the infringement of competition law in the case-law of the Court of Justice of the European Communities (CJEC) is found not only in the oligopolistic market with a high concentration (*see, e.g., Judgment of 2nd October, 2003, in Case Thyssen Stahl AG v Commission, No C-194/99 P, para 86-87*). The Court commented on the Judgment of the Commission of 25th July, 2005, on a concentration case, and agreed with the decision of the Court of First Instance. The Court has stated that the findings of the Commission must be interpreted with the reservation that this investigation was not associated with the agreement. In addition, the fact that the Commission cleared the concentration does not prevent the competition body which assesses the application of Article 81 of the Treaty from believing that the market concerned is oligopolistic and (or) concentrated. The Commission's judgment of 5th July, 2005, in the present case can have no prejudicial power or crucial importance.

Turning to the nature of information exchanged, the Court agreed with the conclusion of the Court of First Instance that the information concerned was not publicly accessible to other economic operators in terms of the same frequency, same degree of detail and its relevance of content. There is no evidence in the case that other market participants, particularly those who show an interest in the exchange of information, would be invited to share information or would have the relevant conditions that would be necessary to easily access the analogous information. The information cannot be deemed historic, because there was sufficiently relevant (still relevant) information about economic operators' market shares and volumes of sales. In this case it was the exchange of information on the previous quarter and such exchange was available quickly enough. The case-law of the Commission suggests that the sharing of information of similar relevance and content with the same frequency as that laid down in the present case was essentially opposed by the Commission (for example, the Commission's report in the *CEPI-Cartonboard* case (1996 C310, p. 3); *Decision of the Commission of 2nd December, 1986, in Case No IV/31.128 - Fatty Acids 1987 L 003, p. 17*). In accordance with the case-law of the Commission and the Courts, legal doctrine also indicates that current (new) and detailed exchange of information about individual economic operators may violate Article 81(1) of the Treaty (*see, to that effect, Van Bael, Ivo; Bellis, Jean Yves-François. Competition Law of the European Community. Kluwer Law International, 2005, p. 429*). The Commission has previously held that the infringement of the Treaty is in relation to the exchange of information on production and sales volumes, market shares (*Capobianco, A. Information Exchange under EC Competition Law. Common Market Law Review, 2004, No 41, p. 1263-1264*).

The Court concluded that both the Competition Council and the Court of First Instance rightly upheld the infringement of Article 5(1) of the Law on Competition. However, the Court disagreed on the infringement of Article 81(1) of the Treaty. The information exchange between the companies ceased shortly after Lithuania entered the European Union. Article 81(1) of the Treaty entered into force on 1st May, 2004. The actions of individuals until this date cannot be characterised as being in violation of Article 81(1) of the Treaty (*lex retro non agit*). The Court decided that there is reason to doubt whether those actions, which were performed after 1st May, 2004, (after this date, information was exchanged only once), by themselves, could have a significant effect on trade between Member States. The Court followed the provisions of the Commission's guidelines on the effect on trade and pointed out that it is necessary to take into account the legal and economic environment, and given this, the fact cannot be based on the remote hypothetical effect (impact). The significance of the impact can be measured by absolute volumes (turnover). The Commission has indicated that agreements between small and medium-sized enterprises (as defined in the Annex of the Commission's recommendations on small and medium-sized enterprises (96/280/EC)) cannot normally affect trade between Member States. Meanwhile, one of the criteria to determine whether the company can be considered as a small or medium-sized enterprise is the size of its annual turnover, which shall not be greater than EUR 40

million. When the agreement only covers the territory of a single Member State it may be necessary to carry out a detailed study on the possibility that such an agreement could affect trade between Member States. The Supreme Administrative Court of Lithuania pointed out that horizontal cooperation agreements which are confined within a single Member State, and which are not directly related to imports and exports, do not belong to the category of agreements which may affect trade between Member States so, by its nature alone, this might therefore require very careful investigation (Points 32, 43, 47, 49, 50, 77, 83 of the Commission's guidelines on the effect on trade).

In compliance with these arguments, the Court ruled that in the resolution of the Competition Council, wherein it was recognised that the applicants infringed Article 81(1) of the Treaty (now Article 101(1) TFEU), this is not legitimate and justified. Accordingly, the Court changed the decision of the Court of First Instance and reduced the penalties to economic operators by one-eighth.

### **Comment**

The Court's decision fits well into the development of national competition law in the EC competition law context. In view of the fact that there might be an effect on trade between the Member States, the Lithuanian Competition Authority and Courts analysed the practice in question in light of the provisions of Lithuanian competition law and of European Union law. Both of those provisions have to be applied. The Law on Competition of the Republic of Lithuania was adopted before Lithuania became an EU Member State. Yet the Law's Art 5 has similar content to that of Article 101 TFEU (ex Article 81 TEC). This is the reason why the result of the interpretation given by the national court to the concept of anti-competitive agreements does indeed coincide with the sense given to it by EU law jurisprudence. Still, most of the actions for which the companies were fined happened before 1st May, 2004. Moreover, the National Court judge argued that, although the disposition of Art 101 par. 1 TFEU was not directly applicable, the EU law jurisprudence on this matter did represent a referential element in interpreting the law's Art 5. The actions of individuals until this date cannot be characterised as being in violation of Article 81(1) of the Treaty (*lex retro non agit*). The Court decided that there is reason to doubt whether those actions, those performed after 1st May, 2004, by themselves, could have a significant effect on trade between Member States.

## **2.6. GHERASIM ADRIANA, COURT OF APPEAL CONSTANTA (ROMANIA)**

### **Facts**

The applicant SC "Eureko - Management Company Private Pension Funds" SA sued the defendant, the Competition Council, asking the Court to annul the Decision No.39/07.09.2010, issued by the defendant.

By the contested decision, the Competition Council found a violation of Article 5 paragraph (1) (c) of Law No.21/1996 and Article 101 of the Treaty on the European Union (hereinafter in the present decision, "TFEU") and decided to penalise the company with a fine in the amount of 382,215 RON.

The applicant claims that there was no violation of the provisions above, provided that the agreement between the managers of the companies involved had anti-competitive object, but the agreement was made to solve a practical technical problem (on double accessions to funds) and did not change the market's structure.

To avoid a participant being allocated to the applicant while he would have preferred to be transferred to another administrator, Eureko offered participants the opportunity to be assigned, free of charge, to the administrator of their choice, which actually happened to some of the participants for whom Eureko facilitated a transition to an elected administrator.

It is claimed that this agreement did not have as an object the significant restriction of competition because the number of duplicate bookings remaining after the end of the initial campaign for adherence was insignificant, so their distribution, made by lottery, bilateral assignment or otherwise, had no significant effect on market structure, the market positions of managers, or effective competition in this market.

Regarding the violation of Article 101 TFEU, the applicant submits that the applicability of these provisions is limited to agreements which may affect trade between Member States and refers to the case law of the Court of Justice of the European Union (*Carlo Bagnasco v BPN*).

The defendant Competition Council asked for this plea to be dismissed, arguing that, on the one hand, the conditions of Article 5 paragraph (1) of Act No.21/1996 are fulfilled and, on the other hand, the Act is based on the personal will of participants, including the company in question, to share the participants who had signed the accession papers to the two pension funds.

The legal procedure for resolving duplicates involved random allocation, based on a standard resulting from effective competition between operators and the market share of these companies.

On these conditions, the agreement regarding the mediation of the duplicates is an anti-competitive agreement by its object, having the ability to produce anti-competitive effects by distorting competition in the private management of pension funds, competition which, manifested freely and fairly, in compliance with the applicable rules, should lead to a market structure that reflects the number of participants that were validated for each fund.

In the opinion of the defendant, an agreement must have either an object, or an anti-competitive effect. Being an alternative condition, it is enough that, in this case, the anti-competitive nature of the agreement between administrators was demonstrated.

### **Judicial Proceedings**

At a hearing, the applicant asked the Court of the First Instance to request a point of view from the European Commission's Directorate General for Competition, on compliance with the Community's competition rules regarding the application of Article 101 TFEU, and on whether the arrangements of private pension funds on the distribution of doubled participants constitutes an agreement which has as its object the prevention, restriction or distortion of competition within the meaning of Article 101, and is thus prohibited by the provisions of this Article.

By its Judgment the Court of Appeal:

- decided to reject the applicant's solicitation on submitting a request to the European Commission to communicate its views on the rules of Community competition relative to the application of Article 81 TEC, now article 101 TFEU, on the agreement of private pension fund managers;
- dismissed the action of the applicant. The Court of Appeal held that matters which it was sought to clarify were defined in the case law of the European Commission and the Community Courts.
- The notion of enterprise was defined in *Hofner and Elser*, a definition that includes any entity engaged in an economic activity, regardless of its legal status or the way it is financed.
- The notion of agreement in the meaning of competition matters was defined in Case T-41/96 *BayerSG v. Commission*, wherein the notion that covers those situations where there is a concurrence of wills between economic operators on the implementation of a policy, pursuit of a particular purpose, or the taking-up of a specific line of action on the market.
- The CJEU has ruled on the concept of effect on trade (Cases C-319/82, *Kerpen & Kerpen*, Cases C-240/82 and others, *Stichting Sigarettenindustrie*, and Case T-25/95 *Cimenteries CBR and Others v Commission* and others).

- However, under the provision of Article 11 of the EC Council Regulation No.1/2003 the Competition Council sent to the European Commission the summary report of investigation, which analysed the attitude of managers from the mandatory private pensions market, including the applicant, receiving confirmation regarding coherent application of the concepts and practice of European Community institutions in this situation.
- In the analysis of a possible cartel for the sharing of clients, the Court of the First Instance found the existence of anti-competitive agreements concerning the sharing of customers between private pension fund managers, including the applicant. Agreements aimed to register participants as "duplicates" in the initial accession to the private pension funds.
- The anti-competitive character of the sanctioned agreements results from the combination of the following: a legal framework that led to the establishment and functioning of the market for mandatory private pension funds, the specific market where the agreement was made, the existence of the administrators' interest how the problem of duplicates was solved, and how this agreement affects participants in mandatory private pension funds, the interests of competitors in this field of battle, and a market structure for training, by distorting the competition game's outcome.

According to the Court of First Instance, the mediation of those participants registered as duplicates by the managers of mandatory private funds was made, in fact, by deal that shared these duplicates 50% - 50%. This was a potential impairment, respectively, a distortion of competition in the compulsory private pensions funds market.

The potential for damage related to a factual situation in which the principles of free competition were applied, in the sense that the expected random distribution of duplicates should have been based on the market share obtained from effective competition between administrators.

Bearing in mind the distribution of territory for these companies and participants, the relevant geographical market was defined as the national market, which is thus a substantial part of the common market. With regard to horizontal agreements concerning a whole Member State, they are normally capable of affecting trade between Member States.

The existence of an agreement concerning the sharing of customers registered as duplicates was retained for a total of 14 of the 18 companies that entered Pillar II, in 2007. After completing the random distribution, in March 2008, in relation to the number of participants, these 14 managers totalled over 90% of the relevant product market.

The investment activity of pension fund assets by managers from Pillar II is therefore not limited only to the territory of Romania, but it represents a potential for damage to the trade of Member States.

The appellant has mainly criticised the way the Court of the First Instance interpreted and applied Art. 5 of Law No. 21/1996 and Article No. 101 TFEU, arguing that the sentence was wrong.

### **Judgment of the Supreme Court**

14 companies (private pension fund managers), from the total number of 18 existing on the market, were fined by this administrative decision, for the breach of provisions of Article 5, paragraph 1.c of Competition Law No. 21/1996 and Article 101 TFEU, by entering anti-competitive agreements concerning the sharing of customers.

In the light of the law, the anti-competitive object and effect are alternative conditions of the interdiction, not the cumulative conditions, so the Supreme Court did not hold the same opinion as the First Court, who considered that "an agreement whose object is allocating customers, automatically falls within the prohibition laid down in Art. 5 paragraph (1) of the law."

In other words, it was noted that the stipulation of the managers regarding the sharing of dual customers had the object of restricting competition *per se*, without analysing the legal and economic context in which it had occurred and the potential anti-competitive aspect of this fact.

The High Court disagrees with this approach.

During its case-law, the ECJ has established that agreements which have as their object the restriction of competition are those agreements which, by their nature, are "detrimental to the proper functioning of normal competition" (Case C-209/07 *Irish Beef*), with high potential [for] negative effects on competition under the European Commission Guidelines on the application of Art. 81 paragraph (3) of the Treaty, J.O. 2004 C 101/81 (now Art. 101 paragraph (3) TFEU).

In determining whether an agreement that restricts competition by its nature one should consider the "content of the agreement", "its objectives goals", the "legal and economic context wherein the agreement is applied / to be applied", "actual attitude of the parties in the market" and its ability "to affect significantly market conditions" (conditions analysed in Cases C-501, 513, 515 and 519/06 *Glaxosmithkline Services Unlimited*, Case C-8/08 *T-Mobile Netherlands*, Case C-209/07 *Irish Beef*, Case 5/69 *Franz Volk*, etc.).

There is no necessity to undertake a comprehensive analysis of the effects of an agreement to identify a restriction of competition by object, but its potential effects cannot be completely ignored, so long as

it shown that it is "fit that in a particular case (...) to prevent, restrict or distort competition in the market". (Case C-8/08 *T-Mobile Netherlands*).

The initial adherence had to last, according to Regulation no 18/2007, for 4 months. It began on September 17th, 2007, and ended on 17th January, 2008.

By this time, undoubtedly, the administrators had competed strongly in order to obtain as many individual acts of accession of potential participants as they could.

The problem that caused these proceedings was determined by the existence of people registered as "duplicates", i.e., (namely) participants who had signed the accession papers for two or more pension funds, for diverse reasons.

The legal mechanism for solving this problem, provided in Rule No. 18/2007, stated that the distribution of these people was fulfilled by CNPAS, proportionally to the market share obtained by the managers during the initial voluntary membership.

Previously, the administrators were required to verify the authenticity of the accession acts of doubled participants and the ability to re-report those who expressed their intent to join a fund.

Although the exercise of verification should lead to the clarification of this situation, (from a theoretical point of view), in practice it was found that people who had joined the two funds were re-reported to the CNPAS fund and by the "doubled" fund.

The difficulties faced by administrators at this stage, uncontested by the Competition Council, were amplified by the pressure of short deadlines within which reports have to be performed: initially two weeks and then monthly.

There is a particular context in which, since November, 2007, administrators have agreed to share the duplicate accessions recorded in equal percentages (50%-50%) to funds for which they had opted, instead of applying the regulation which had provided for the sharing of random duplicate accessions proportionally with the market share obtained by administrators in the initial period for adherence.

An important consideration (plea) in the grounds of the judgment ruled by the Court of First Instance was the subjective attitude of private pension fund managers.

The Court of First Instance held, taking into consideration the position of the Competition Council, that even before the start of the initial adherence, the managers expected a large number of "duplicates" that could affect direct interests and, in the that same time, at the moment of sharing agreements 50%-50%, there was still uncertainty around the estimating of many situations of this type.

The Supreme Court observed that the number of duplicates existing before the mediation was insignificant in relation to the total number of participants, so, dividing these duplicates 50%-50% (less than 1% of the total number) could not have had the ability to change the market structure, which was already clear; the customers had selected their preferred fund and only a small number of them had enlisted several times.

In other words, the infringements of specific legislation in the field of mandatory private pensions, referred to in Art. 21 of Regulation No. 18/2007, is not likely to prove to be an "inevitable" violation (according to the defendant-respondent) of the Competition Act, in the absence of evidence to support such a conclusion.

In addition, it must be borne in mind that the appellant, "Eureko", held out the possibility to participants with double signatures of free transfer (although the regulation provides for a penalty for transfer) to any of the competing pension funds, and thus the participant in question manifested his/her option, thus confirming that the required purpose was a practical resolution of this situation and not the distortion of competition, which was impossible to achieve at this stage in the examined context.

Without going into further analysis of the practical advantages and disadvantages of the two mechanisms of sharing "duplicates", both the legal and the other, (established by the agreement for which they were fined by the Competition Council), the High Court retains as highly relevant the facts that the algorithm adopted by administrators and the parity for the allocation of duplicates, were institutionalised by the legislature.

By Law No. 241/7 December, 2010, Art. 33 paragraph (2) of Law No. 411/2004 on private pension funds was thus amended in the sense that "The random distribution shall be made in equal shares for each private pension fund at the time the distribution is made."

Regarding the allegations of NCA, according to which the concept of the "estimation" of potential damage to competition is only a condition for the incidence of Art. 101 of the Treaty, and the national rule contains no such stipulation, the High Court finds that these are even contradicted by its instructions on the application of Art. 5 paragraph (2) of the Competition Act, according to which "restrictions by object are those that by their nature, may affect competition in the sense of restricting, preventing or its distortion. It's about restrictions in terms of the objectives of the competition rules, have a high anti-competitive potential (power), so it is not necessary to prove a material effect on the market for the purposes of the application of Art. 5 paragraph (1) of the Act. "

Concluding, the High Court held that, related to the real purpose of the allocation of the "duplicate", the content of the agreement, the economic and legal context in which the agreement occurred, and the

lack of a potential for harm to competition, the solution reached in the Court of First Instance is incorrect.

In the light of the foregoing considerations, the appeal was admitted, modifying the first judgment and cancelling Decision No. 39/7.09.2010 Competition Council, as it concerns the applicant SC "Eureko - Management Company Private Pension Funds" SA Bucharest".

### **Comment**

In my opinion, no agreement between several companies has an anti-competitive potential, so, in each case, it is very important for the courts to analyse all the conditions that are written into their National Law and into European legislation.

It is most important for the national instances that are dealing with competition law cases to know, respect and apply the case law of the CJEU, in order to give their judgments, based not only on the law, but also on the definitions already established in the jurisprudence.

### **3. COMPETITION LAW PROCEEDINGS AND FUNDAMENTAL RIGHTS**

#### **3.1. HOČEVAR PETRA, ADMINISTRATIVE COURT (SLOVENIA)**

**SLOVENIAN COMPETITION PROTECTION AGENCY (or the Agency) as proposer, V. GEOPLIN (the natural gas distributor, or distributor) as the opposing party**

**Case I U 1408/2013, decided on the 23<sup>rd</sup> September, 2013;**

#### **Facts**

The Agency adopted a decision, whereby the Agency ordered the distributor to submit to an investigation on the basis of Article 9 of Prevention of the Restriction of Competition Act and Article 102 TFEU. The investigation aimed to seek evidence of possible abuse of a dominant position. During the course of the investigation of the agency's officials at the premises of the distributor, while comparing certain copies of the documents with the originals, the distributor refused access to two documents, claiming that these documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients (legal professional privilege, or LPP) – they were internal discussion, containing legal opinions of their lawyers and were connected to the subject of the investigation, and legal opinions and strategies for the defence in the course of the investigation. After obtaining the distributor's observations, the agency's head of the investigation, since doubt arose about whether the documents should be privileged, took the copies and placed them in a sealed envelope, demanding that the distributor's lawyer give reasons for the exclusion of the documents from the investigation.

The first document, named after one of the distributor's employees (or Document A-1) contains: An explanation of the reasons for concluding a contract for the agreed supply of natural gas, information about sales by the individual consumers, a description of the market shares of the suppliers, information about quantities that are tied up until 2017, and their market share in the whole supply. The document doesn't contain the author's name and has no date. The second document is an e-mail, named after the other distributor's employee (or Document B-2), from the 4<sup>th</sup> July, 2013, composed of the first document, named after the external expert. The sender, receiver and author of e-mail are all the distributor's employees. The e-mail has an attachment. Part of the document is underlined in yellow. The distributor's lawyer explained that the document was written in their office and was part of the defence strategy in this procedure. He also enabled Agency's officials access to his meetings calendar and the defence strategy's draft.

**Judicial proceedings:**

Under the Article 32 (3) of Prevention of the Restriction of Competition Act (or the National Competition Act) the justification of claiming privileged communication shall be decided by the Administrative Court of the Republic of Slovenia within 15 days of the date after the request has been filed by the Agency. The Agency shall attach the sealed envelope to the request.

**Arguments of the Parties:**

In the claim for the justification of privileged communication, filed by the Agency under the above reproduced Article 32 (3) of the National Competition Act, the Agency submits that the documents, challenged in this case, are not the documents to be considered as LPP. In the Agency's opinion, the distributor did not identify that the documents in question represent written communication between professional lawyer and a client, but they are merely legal opinion, prepared by external experts (one of them is, for instance, a professor at the Law Faculty in Ljubljana, Slovenia), who are not to be classified as professional lawyers. Such documents can't be protected under the LPP, as considered a document, containing legal opinion, prepared by external lawyers, cannot be considered. If in-house lawyers supply (external) legal opinion, such a document does not fulfil the conditions for the grant of legal protection. Furthermore, if the above described document circulates within the undertaking's employees, the grant for protection must be denied.

The distributor opposes the agency's claim. It replies that the documents were prepared for the purposes of the exercise of the distributor's right of defence and they emanated from independent lawyers in cooperation with external experts. It invokes privilege against self-incrimination and the case law of the Court of the EU. It states that, in view of the content, only one document is to be discussed in these judicial proceedings. The document in question was prepared in a lawyer's office, sent to the client to be checked and certain data was supplied, for which the lawyer's office provided the instructions to their format and content. One of the first drafts was prepared on the 8<sup>th</sup> May, 2013, (in the format of targeted legal opinion which contained the structure of important legal issues, composed by the lawyer's office). That document was being discussed and amended at multiple meetings between lawyer and client. At first, more comprehensive legal opinion was given, then it was constructed for the defence strategy (in forming the defence strategy, the external legal expert who participated was the above mentioned law professor), and part of the final amendments to the defence strategy are these two documents. One of the last drafts of the defence strategy was sent to the distributor on the 18<sup>th</sup> June, 2013. The distributor's lawyer allowed the national authority's officials access to the index of the final version of the defence strategy (which contained the chapters' titles) and to his meetings calendar, from which it was clear that the document was written directly before one of the arranged meetings between lawyer and client, where the strategy was handled. Legal

opinions and the defence strategy were undoubtedly prepared at the independent lawyers' office, its lawyers are entered in the lawyers' register. The circumstances that created the defence strategy that involved the participation of external experts does not affect the fact that independent lawyers prepared these opinions. Those documents were not accessible to a wider number of employees, but only to in-house lawyers and the management of the distributor. Between the parties of this judicial procedure there was discussion about the method of examination of these documents. In the course of the investigation at the undertaking's premises, the distributor opposed any method of examination since the documents' content would immediately be revealed, but the Agency's officials forced this (under the threat of imposing a penalty) to enable the examination of the documents. Nevertheless, a cursory look did not facilitate the Agency in assessing whether the documents fell under legal protection without being able to inform itself of its content, therefore the distributor also argues that the procedure for legal protection was breached.

### **Final Ruling**

Under Article 32 (1) of the National Competition Act an inspection shall exclude letters, notifications and other means of communication between the undertaking against which the procedure has been initiated, and its attorney, to the extent that such communications pertain to the procedure in question (hereinafter privileged communication). This means that Article 32 of the National Competition Act falls to being interpreted as the protection of the confidentiality of communications between lawyer and client, provided that such communications are made for the purposes of the exercise of the client's right to defence and that they emanate from independent lawyers. That protection can also extend to earlier written communications which have a relationship to the subject-matter of that procedure and, in view of its purpose, can be regarded as extending to the internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice. Furthermore, so that a person may be able to effectively consult a lawyer without constraint, and so that the latter may effectively perform his role in collaborating in the administration of justice for the defence, it may be necessary in certain circumstances (for example, in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 101 and 102 of the Treaty, or Article 32 of the National Competition Act) for the client to prepare working documents, even if they were not exchanged with the lawyer, or were not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercising the rights of the defence. Protection under the LPP is an exception to the national authority's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. For this reason, the possibility of treating a preparatory document as being covered by LPP must be constructed restrictively. It is for the

undertaking that is relying on this protection to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves, or from the context in which those documents were prepared and found (as in Joined Cases of the Court of the First Instance T-125/03 in T-253/03 *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd.* – Nos. 117, 122, 123, 124 and 127).

The Court finds that the Agency *ex officio* adopted an order for the commencement of procedure against the distributor on the basis of Article 9 of the National Competition Act and Article 102 of the Treaty (Order on the 17<sup>th</sup> July, 2013). Agency was (and still is, at this time, based on known data) investigating a complaint of the distributor's abuse of their dominant position in the natural gas market in Slovenia and, consequently, on a major part of the internal market in the EU, especially in: concluding long-term contracts on the supply of natural gas, in which contractual quantities are determined in advance for the whole period of the validity of a contract; the obligation to take delivery of a minimum quantity of natural gas for the whole period of the contract's validity; penalties and expenses for non-acquired delivery of natural gas under the minimum contracted quantity, in order to prevent, or to make it more difficult, for its competitors to enter the market. At the same time, the Agency issued an order of inspection (also issued on the 17<sup>th</sup> July, 2013) to examine the books of accounts, contracts, papers, business correspondence, and internal communication between the employees, and any other data which is connected to business and in any way connected to concluding the contracts for supplies of natural gas to their customers, negotiations on concluding these contracts and other post-contractual activities, data relating to, the strategy on market entry and relationships with competitive undertakings. The purpose of the inspection is to find papers and other evidence which directly or indirectly reflect the existence of the breaching of Article 9 of the National Competition Act and also to determine the time-frame and the scope of breach under complaint.

As regards the procedure to be followed when applying the protection of confidentiality, the undertaking which is the subject of an investigation under the National Competition Act, by claiming protection under the LPP, has to produce, as part of the business records demanded by the national authority, written communications between itself and its lawyer, it must nevertheless provide the authority's officials with relevant materials which demonstrate that the communications fulfil the conditions for the granting of legal protection, while not being bound to disclose their contents (as in No. 79 of the judgment T-125/03 and T-253/03). It is apparent that the mere fact that an undertaking claims a document to be protected by legal professional privilege is not sufficient to prevent the national authority from reading that document, if the undertaking produces no relevant material of such a kind as to prove that it is actually protected by LPP (as in No. 80 of judgment T-125/03 and T-253/03).

The Court states that the documents in question (or rather one document with an e-mail note, dated the 4<sup>th</sup> July, 2013) do not by themselves constitute the correspondence between the independent lawyer and the distributor, or an internal note reporting the content of a communication with such a lawyer, or when it is not obvious from a cursory look at the document, as the case may be. There is no outer indication that the document was prepared by the independent lawyer for the purpose and intention of defence, and the e-mail was undoubtedly prepared by one of the employees, and was sent to another employee by (also) one of the employees, so the conclusion might be that the document represents internal communication, in relation to the opinion prepared by an external legal expert. Nevertheless, the evidence submitted by the distributor, confirms that the document(s) fall under the LPP, especially the viewing of the index of the defence strategy, dated 18<sup>th</sup> June, 2013, where (on page 5) it states: "the distributor – disclose the reasons for concluding the long-term contracts for tied quantities of supply of natural gas", and "insert the data about the down-stream market, especially on sales according to individual elements and market shares", and (on page 6): "distributor – disclose survey of current state of the down-stream market, especially the proportion of sales among buyers that concluded 10-year contracts in 2007 and other buyers", which is all part of the content of the document. It is apparent that the index was prepared by the independent lawyers' office. From the content of the strategy, appended to the index, it also continued that it is about the analysis of the competitive-legal status of the long-term, take-or-pay contracts. The words "distributor – disclose..." themselves demonstrate that the document was prepared by an employee (and apparently the document was inspected by two other employees – which in the opinion of the Court cannot be perceived as the document being widely accessible to many employees), but by the order of the independent lawyers to the distributor to prepare the defence strategy for this procedure. An e-mail, dated 4<sup>th</sup> July, 2013, confirms the order, with the words "the data and the format of the data that the distributor must provide is underlined in yellow". The time-frame during which the document was drawn up (from May to July, 2013), confirms the purpose and intention of the preparation of the document in question for the defence strategy in this procedure (orders, adopted by the Agency on the 17<sup>th</sup> July, 2013).

The Court therefore concludes that the documents fulfilled the conditions to be granted privileged communication status, so it put the documents into a sealed envelope and sent them to the distributor.

## **Conclusion**

In my opinion, the case is relevant for several reasons. The matter of the case unquestionably relates to one of the main subjects of this year's ENTraNCE seminar – Interaction between the European Convention on Human Rights and the enforcement of competition law. It deals with one of the basic human rights – a right to a fair trial.

Furthermore, this case is one of two cases relating to privileged communication, heard at the Administrative Court of the Republic of Slovenia, since the revision of the Restrictions of Competition Act was adopted in 2008. It deals with a very relevant legal question, since the legal position of an undertaking in competition cases depends on the solution to this question. If the Court (or, in cases under the EU Treaty, the Commission) unduly rejects such a claim, it could have irreversible consequences for an undertaking, if the investigative authority are acquainted with the content of documents under LPP. Considering the special protection of privileged communication between a professional lawyer and their client, which is to ensure full realisation of the right to defence and also to protect the right for a person to be able to effectively consult a lawyer without constraint, it may be necessary to perceive that the authority's familiarisation with the document violates this principle. Protection of confidentiality therefore exceeds the claim of the need to acquire the information that may prove the breaching of the competition law if this is the information an undertaking gives to its lawyer in confidence, or the legal opinion given to an undertaking by its lawyer for the purpose of defence in competition cases. The goal of the protection is also to preserve the public interest for the proper execution of judicial power that shall ensure the right to confidentiality.

The case is also relevant as, in its decision, the Administrative Court invoked the case of The Court of the First Instance T-125/03, T 253/03, delivered on 17<sup>th</sup> September, 2007, (Azko Nobel Chemicals Ltd., and Akcros Chemicals Ltd., v. The Commission).

### **3.2. LANGÁŠEK TOMÁŠ, SUPREME ADMINISTRATIVE COURT (CZECH REPUBLIC)**

#### **Parties**

Toshiba Corporation,; T&D Holding, formerly Areva T&D Holding SA; Alstom Grid SAS, formerly Areva T&D SAS; Alstom Grid AG, formerly Areva T&D AG; Mitsubishi Electric Corp.; Alstom; Fuji Electric Holdings Co. Ltd; Fuji Electric Systems Co. Ltd; Siemens Transmission & Distribution SA; Siemens AG Österreich; VA Tech Transmission & Distribution GmbH & Co. KEG; Siemens AG; Hitachi Ltd; Hitachi Europe Ltd; Japan AE Power Systems Corp.; Nuova Magrini Galileo SpA; (hereinafter as “petitioners”) v. Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition) (hereinafter, the “Respondent”).

#### **Third Parties Joining the Proceedings**

ABB Management Services Ltd.; ABB Switzerland Ltd. 3. ABB Ltd.;

#### **Ruling**

The decision of the Chairman of the Office for the Protection of Competition No. R 059-070, 075-078/2007/01-08115/2007/310, dated 27th April, 2007, is annulled and the case sent back to the administrative authority for a fresh assessment.

#### **Headnote**

The provisions of Article 81 EC and Article 3(1) of Council Regulation (EC) No 1/2003 of 16th December, 2002, on the implementation of the rules on competition that are laid down in Articles 81 and 82 of the Treaty must be interpreted as meaning that, in the context of a proceeding initiated after 1st May, 2004, they do not apply to a cartel which produced effects in the territory of a Member State which acceded to the Union on 1st May, 2004, during periods prior to that date.

The opening by the European Commission of a proceeding against a cartel under Chapter III of Regulation No. 1/2003 does not, pursuant to Article 11(6) of Regulation No. 1/2003, read in combination with Article 3(1) of the same regulation, cause the Competition Authority of the Member State concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the European Union.

The *ne bis in idem* principle does not preclude penalties which the National Competition Authority of the Member State concerned imposes on undertakings participating in a cartel, on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision, taken before the decision of the said National Competition Authority was adopted, were not designed to penalise the said effects.

The offence of liability for a breach of cartel law shall be determined individually, pursuant to specified principles in relation to particular undertakings (legal entities) forming a concern. Otherwise, offence liability determination and subsequent related penalty imposition may produce discriminatory effects on affected entities.

### **Summary of the Relevant Facts**

#### *The Procedure Before the Administrative Body*

On 2nd August 2006, the Office for the Protection of Competition initiated a proceeding for infringement of the Law on the Protection of Competition, concerning the members of the cartel at issue in the main proceedings. On 9th February 2007, it adopted a first decision against which the petitioners in the main proceedings formed an internal administrative action. Following that action, by a decision of 26th April, 2007, the Chairman of the Office for the Protection of Competition amended that first decision.

In that decision of 26th April, 2007, the said authority held that ABB Management Services Ltd. (holder of the rights of ABB Power Technologies Management Ltd), ABB Switzerland Ltd., ABB Ltd., Alstom, Areva T&D SA, Fuji Electric Holdings Co. Ltd., Fuji Electric Systems Co. Ltd., Hitachi Ltd., Hitachi Europe Ltd., Mitsubishi Electric Corp., Toshiba Corporation, Schneider Electric SA, Siemens AG, Siemens AG Österreich (holder of the rights of VA Technologie AG and VA Tech T & D GmbH), VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission and Distribution Ltd., (formerly VA Tech Transmission & Distribution Ltd.) and Nuova Magrini Galileo SpA, had participated in a cartel in the territory of the Czech Republic. By so doing, those competitor undertakings had, during a period up to 30th June, 2001, infringed the prohibition set out in Article 3(1) of the Law on the Protection of Competition, in the version thereof arising from Law No 63/1991 Sb., as amended, and, during the period from 1st July, 2001, to 3rd March, 2004, infringed the prohibition appearing in Article 3(1) of that law, in the version thereof arising from Law No. 143/2001 Sb. Those undertakings thus infringed the Law on the Protection of Competition during the period up to 3rd March, 2004. Apart from one undertaking, which benefited from leniency

measures laid down by National Law, all the undertakings concerned in the proceeding, brought at the national level, had fines imposed upon them.

### **Proceedings Before the Courts**

In the main proceedings, the applicants brought an action against the decision of the Chairman of the Office for the Protection of Competition before the Regional Court in Brno. They argued, *inter alia*, that the authority had determined the duration of the cartel that was at issue in the main proceedings, in an erroneous manner, and that it had knowingly placed the cessation of the latter at a date prior to the accession of the Czech Republic to the Union, in order to justify the application of the Law on the Protection of Competition. According to those applicants, it follows from Article 11(6) of Regulation No. 1/2003 that the said authority no longer had the power to implement a proceeding at national level, since the Commission had already initiated a proceeding at European level on the same case. They concluded that the proceeding brought at the national level infringed the *ne bis in idem* principle, prohibiting an accumulation of penalties.

The Regional Court in Brno at first dismissed the action. However, the Office for the Protection of Competition appealed, on a point of law, against the judgment of the Regional Court in Brno before the Supreme Administrative Court. By a judgment of 10th April, 2009, No. 2 Afs 93/2008-920 the Supreme Administrative Court set aside the judgment of the Regional Court in Brno and referred the case back to the Regional Court in Brno for a new ruling. It took the opinion that until the accession of the Czech Republic to the Union on 1st May, 2004, the cartel that was practised on Czech territory fell exclusively under the national jurisdiction and could be prosecuted only under National Law.

The Regional Court in Brno referred the case to the Court of Justice of the European Union for a preliminary ruling. The Court of Justice of the European Union ruled on the preliminary question by a judgment of 14<sup>th</sup> February, 2012 (Case C-17/10 *Toshiba Corporation e.a.*). After the ruling given by the Court of Justice, the Regional Court in Brno (hereinafter “the Court”) decided the case by an analysed judgment.

### **Reasoning**

I. In the first part of the reasoning, the Court rejects the plea that the proceedings before the Office for the Protection of Competition infringed the *ne bis in idem* principle. The petitioners argued that the Respondent infringed the principle by opening the proceedings, despite the fact that another proceeding concerning the same undertakings’ participation in a cartel had already been initiated by the European Commission under Chapter III of Regulation No. 1/2003. According to the petitioners

the Office for the Protection of Competition lacked the authority to initiate the current proceedings, pursuant to Article 3 of Regulation No. 1/2003.

The Court, in compliance with the decision of the European Court of Justice of 14th February, 2012, C-17/10 *Toshiba Corporation e.a.*, holds that the provisions of Article 81 EC and Article 3(1) of Council Regulation (EC) No. 1/2003 of 16th December, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, must be interpreted as meaning that, in the context of a proceeding initiated after 1st May, 2004, they do not apply to a cartel which produced effects in the territory of a Member State which acceded to the Union on 1st May, 2004, during periods prior to that date.

The opening by the European Commission of a proceeding against a cartel under Chapter III of Regulation No. 1/2003 does not, pursuant to Article 11(6) of Regulation No. 1/2003, read in combination with Article 3(1) of the same regulation, cause the Competition Authority of the Member State concerned to lose its power by the application of national competition law to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the European Union.

The *ne bis in idem* principle does not preclude penalties which the National Competition Authority of the Member State concerned imposes on undertakings participating in a cartel, on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said National Competition Authority was adopted, were not designed to penalise the said effects.

The Court refers for further details to the reasoning of the decision of the European Court of Justice of 14th February, 2012, C-17/10 *Toshiba Corporation e.a.*, and finds the part of the petition concerned to be ill-founded.

II. As for the other arguments of the petitioners, the Court holds that the Respondent correctly determined and proved in the reviewed decision that the deed shows the characteristic features of an offence in the form of a cartel. The authority correctly determined and proved the duration and the factual existence of the cartel at issue, and that the cartel produced effects in the territory of the Czech Republic. As far as the afore-mentioned grounds are concerned the Court finds the reviewed decision lawful and the action ill-founded.

Furthermore, the Court found ill-founded the arguments of the petitioners concerning procedural failures in the proceedings before the Respondent, since none of the contested procedural steps could have in its effect affected the lawfulness of the decision in its entirety.

Moreover, the petitioners raised an objection before the Court, implying that the Respondent, in the proceedings, brought evidence only against the concerns as whole economic groups, and did not determine offence liability in relation to the petitioners as particular undertakings (legal entities) forming the concern. However, according to the petitioners, only particular undertakings (legal entities) actually possess a legal personality.

As for the aspect of determining offence liability, the Court applied the conclusions from the judgments of the General Court of 29th June, 2000, T-234/95 *DSG*, of 17th December, 1991, T-6/89 *Enichem Anich SpA*, and of 15th September, 2005, T-325/01 *DaimlerChrysler*. According to conclusions found in these judgments, the term “prohibition of cartel agreement” is to be understood as a set of rules that are applicable to various economic entities, each comprising of independent organisations of personal, material and immaterial components, which follow a particular economic goal on a long term basis and which may contribute to the forming of a cartel. The Court therefore reiterates that the concern, as an entity without legal personality, cannot be held liable for an offence. The liability for an offence shall be attributable to the legal entities possessing legal personality.

The administrative authority shall, when applying the rules prohibiting cartels on an inter-state as well as on the level of Community *acquis*, attribute the liability for participation in a cartel to a particular legal entity, which can be held responsible (see Judgment of the General Court of 20th April, 1999, T-305 – 307/94 *PVC II*). Such legal entities can be found and determined within each concern pursuant to the control-rules (see Judgment of the Court of Justice of 16th November, 2000, C-297/98 P *SCA Holding*) or pursuant to other inter-concern behaviour, so that the enforceability of the cartel law is not impaired (see Judgment of the General Court of 30th March, 2002, T-9/99 *HFB*). The particular legal entities (undertakings) liable for the conduct of cartel activities are thus always to be determined, and there is no exception to this rule (see Judgments of the General Court of 20th April, 1999, T-305 – 307/94 *PVC II*, or of 12th December, 2007, T-112/05 *Akzo Nobel*).

The case-law of the Court of Justice of the European Union does not in itself exclude the possibility of holding individual undertakings that form an economic entity jointly liable for committing an offence against anti-competition law (see Judgment of the European Court of Justice of 6th March, 1974, C-6-7/73 *Commercial Solvents*). However, such findings shall not produce discriminatory effect. The determination of liability shall not be based, in such a case, on the cumulative principle leading to a cumulative imposition of fines, instead of applying the principle of joint liability (see Judgments of the General Court of 15th June, 2005, T-71/03, T-74/03, T-87/03, T-91/03 *Tokai Carbon*).

After carefully examining the case files, the Court found no evidence on which the Respondent in the present could determine the liability of individual legal subjects within particular formed economic entities. For that matter, the Court is well-aware of the fact that, in the present case, the Respondent analyses the constitution of a long-term cartel conducted by multinational concerns with an apparently

complex and variable structure. In such a situation, drawing up the exact evidence can surely not be done without difficulty, which would, in all the periods of the existence of the cartel, beyond any doubt lead to precise identification of a particular undertaking (legal entity) participating in the cartel in variable time-periods. Despite all these facts, the administrative body, however, cannot determine offence liability at random and conclude from the examination of different levels of offence the liability that is accountable to particular undertakings (legal entities) within a concern structure. Such conclusions and the subsequent fine imposition would be discriminatory. From the reviewed and preceding decision, the Court cannot deduce the rules and principles, pursuant to which the Respondent determined liability within economic entities. For these reasons, Verdicts I and II of the reviewed decision cannot be subjected to a judicial review. The Respondent also did not offer any grounds on which he took a different approach towards the liability determination of participating undertakings and economic groups. The afore-reproached produces a discriminatory effect on individual petitioners and is also linked to the aspect of the incorrect imposition of fine penalties.

The Court thus annuls the decision of the Chairman of the Office for the Protection of Competition, No. R 059-070, 075-078/2007/01-08115/2007/310 of 27th April, 2007, and sends the case back to the Respondent for a fresh assessment.

### 3.3. GRBOVIĆ DJORDJE, DISTRICT COURT OF LJUBLJANA (SLOVENIA)

In its judgment X Ips 70/2010 of 15th June, 2010, the Supreme Court of Slovenia reviewed the judgment of the Administrative Court that itself had reviewed the NCA's decision, holding that four Slovenian banks acted in concert by simultaneously introducing the same fee, of about 1/3 EUR, for withdrawing cash from ATMs, thereby illegally restricting and distorting competition with the object of fixing trading conditions. These judgments dealt with the claim and the appeal of one of the four banks only, while the other banks pursued their claims and appeals separately. The First Instance Judgment upheld the NCA's decision, and the Supreme Court, in turn, upheld the First Instance Judgment.

The Supreme Court first ruled on the admissibility of the appeal. This was an appeal on points of law, permitted by statute, *inter alia*, when it raises an important legal issue. The Court ruled that the bank's appeal did raise several issues, procedural as well as substantive. The criterion of their importance was established by the fact that the Court's previous case-law did not resolve them (or, at least, not neatly enough).

This case note concentrates on the reasoning put forward by the Court for dismissing the procedural claim: that the court below perpetuated the NCA's violation of the appellant's due process rights by issuing to it an edited version of the decision from which certain parts were deleted (the text was blacked out). It was submitted that this violated the appellant's right to be heard.

The contentious excerpt of the NCA's decision, a single paragraph (No. 62) of its reasoning, was reproduced in the Court's judgment. In that paragraph, the NCA dismissed the argument of Bank X, a bank other than the appellant, that the costs of withdrawing cash from ATMs were not an important factor for clients when choosing a bank “as [here there is the first deleted portion that comprises two and a half lines of text; deleted as well is the number of an otherwise visible footnote that reads: '30 Appendix to document no. 306-14/2006-79: Operating ATMs in Group of X, October 2006, p. 60.']” (The square brackets and internal quotations already in the original text of the Court's judgment, here given in my translation; 'X' is subsequently inserted to denote the bank, which is not the appellant.) The NCA further found, in the next sentence, that “*the said study*” was irrelevant, because it predated, and did not assume the existence of, the fees for cash withdrawals, and because “*cash machines were not used by merely [here there is the second deleted portion of less than ten characters] of clients [with the footnote No. 31: “Ibid., p. 63’].*” (The brackets and internal quotations are in the original text.)

The deletions were based on a provision of the Prevention of the Restriction of Competition Act that required the NCA to delete, from the version of the Judgment handed to a party, the trade secrets of his co-defendants. (A corollary seems to be that every defendant can be handed a different edition of the decision).

The Court noted that the use of that provision inevitably creates a tension with the requirement that the decision may not be based on facts or evidence that the party has not had the opportunity to challenge. Therein, it identified a paradox relating to the unknowability of whether this requirement is respected if one cannot see what is deleted.

The Court found the approach taken by the court below wanting. The Court of First Instance, itself looking at the undeleted text of the unedited NCA decision, apparently simply stated that the decision did not rest on facts or evidence that the appellant could not have challenged. In the Court's view, such an approach denies the party is a subject, and not merely an object, in the court proceedings.

The acceptable method was to take as the point of departure the edited version of the decision, all deletions included, and draw inferences on the contents of the deleted parts from what remained visible. It is not necessarily the case that all parts of the decision relate to a party when, as in the case at hand, the decision is addressed not only to that party but also to many parties (the co-defendants).

The reliability of drawing such inferences depends on the scale of the deletions, how systematic the reasoning is and on where the deletions fit. According to these criteria, the Court found that the reasoning of the NCA was clear, systematic and comprehensive, whereas the above deletions were not really ample. They were part of a subsection entitled 'Object or Effect of Competition Restriction'. Under this subsection the NCA rejected three of Bank X's arguments (not all three are reproduced in the above citations), of which only one was partially deleted. What remained visible was that the study put forward by X as proof was rejected because it was built on assumptions that later proved to be false. The shorter of the two deletions had obviously to do with those assumptions, and specifically with the small number (or percentage) of X's clients who were not using the ATMs.

The Court was of the view that the Court of First Instance could have drawn inferences without availing itself of the unedited version of what was deleted.

It disagreed with the opinion below that the deletions related only to Bank X, and not to the appellant. What relates to whom is a question of substantive law. It is important from that perspective, the Court said, that the deletions are part of the NCA's reasoning that the concerted practice of the four banks

was anti-competitive by its object. Essential to this reasoning was what immediately preceded this conclusion, namely, the NCA's reasons that: a) all the defendants would benefit from the simultaneous introduction of equal fees, and b) that the defendants, owning a widespread network of ATMs, would benefit more, as the small impact of the fees on their clients did not present a serious risk to those defendants of losing their clients to banks that did not introduce the fee. Taking account of the NCA's finding that, apart from X, the appellant also owned a widespread network of ATMs, the assertion, that what was partially deleted, if accepted, would also exonerate the appellant was dismissed. The deletions were therefore relevant to the appellant, too.

The Court then found itself at a crossroads. It noted that the impugned decision would be sufficiently founded. It chose, however, to follow a more principled path – to admit that a part of the NCA's reasoning did affect the appellant's right to be heard. At the same time, we should note that this right is not absolute. Here, it needed to be balanced against the rights of the defendant's co-defendants to keep their trade secrets secret. In that regard, the Court noted that in spite of finding themselves on the same side of the proceedings, this did not mean that the defendants did not have a legitimate interest in not disclosing their trade secrets among themselves. To insist on revealing those for the sake of the unrestricted right to be heard would mean denying the protection of trade secrets (the latter also has a firm constitutional underpinning).

Thereafter the Court took on a balancing exercise. It considered that the restriction of the appellant's right was proportionate, having regard to the fact that a) the deletions were not part of the reasoning of the essential elements *of the appellant's infringement* of competition law; the deletions were undoubtedly part of an argumentation dealing with (and rejecting) the reasons that the appellant's co-defendant X offered, b) the appellant could not rely on the trade secrets of its co-defendants to being exonerated, and c) the deletions were such that they left X's arguments visible, so that the appellant was free to pick them up and pursue them on its own account.

*The importance of the case lies, to my mind, in its approach, which sets an example of how to deal with a case on the difficult topic of trade secrets. The topic has many face(t)s, .....but, almost as a rule, it requires careful, even tortuous, analysis and balancing, that is adapted to the particularities of a case, sometimes made even harder as they may involve a variable that is (and, maybe, must remain), as the above case demonstrates, to some extent unknown to a party and to a court.*

### **3.4.SŁYSZ-MARCINÓW ANNA, DISTRICT COURT OF SOSNOWIEC (POLAND)**

#### **Facts and Judicial Proceedings**

The Prezes Urzędu Ochrony Konkurencji, acting as the National Competition Authority for the purposes of Article 3(1) of the Regulation, initiated a procedure against Telekomunikacja Polska SA, which was suspected of having infringed Article 8 of the Law on Competition and Consumer Protection and Article 82 EC. At the end of that procedure, the Prezes Urzędu Ochrony Konkurencji found that the conduct of the undertaking in question, which had a dominant position on the market, did not constitute an abuse of that position and that, therefore, that their conduct did not amount to an infringement of the National Law and of Article 102 TFEU. Consequently, the Prezes Urzędu Ochrony Konkurencji took a decision under National Law stating that the undertaking in question had not implemented any restrictive practices, whilst, with regard to the infringement of Article 102 TFEU, the procedure was brought to an end on the ground that it was devoid of purpose.

Next Tele2 Polska sp. z o.o., now Netia SA, contested that decision.

The Sąd Okręgowy – Sąd Ochrony Konkurencji i Konsumentów (District Court – Court for Competition and Consumer Protection) annulled that decision and the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) upheld the annulment of that decision, holding that the Prezes Urzędu Ochrony Konkurencji ought to have taken a decision stating that there was no restrictive practice under Article 102 TFEU, since they had taken such a decision regarding the prohibition of abuse of a dominant position provided for by National Law.

The Prezes Urzędu Ochrony Konkurencji brought an appeal on a point of law before the Sąd Najwyższy (Supreme Court), claiming that the Regulation did not allow the Court to take a negative decision on the merits of the case as regards the assessment of the compatibility of the practices of the undertaking concerned with Article 102 TFEU.

According to the Prezes Urzędu Ochrony Konkurencji, Article 5 of the Regulation governs the powers of the national competition authorities and limits their decision-making abilities. Article 5 does not confer on them any power to adopt a negative decision on the merits as regards the assessment of the compatibility of undertakings' practices with Article 102 TFEU. When it appeared, on conclusion of the procedure initiated against Telekomunikacja Polska SA, that that undertaking had thus not abused a dominant position within the meaning of Article 102 TFEU, the Prezes Urzędu Ochrony Konkurencji took a decision to bring that procedure to an end without ruling on the merits. Article 5 of the Regulation lists four types of substantive decisions, none of which provides that the National

Competition Authority may find that there has been no infringement. In addition, Article 10 of the Regulation, which recognises the right of the Commission to adopt a decision on its own initiative, finding that Article 102 TFEU is not applicable to certain conduct of an undertaking in the Community's public interest, does not grant that right to the national competition authorities. In the opinion of the Prezes Urzędu Ochrony Konkurencji, the purpose of Article 10 of the Regulation is to prevent national competition authorities from being able to block any possibility for the Commission to establish infringements of Articles 101 TFEU or 102 TFEU, by taking decisions stating that there has been no breach of those provisions, regard being given to the principle of *ne bis in idem*.

The Sąd Najwyższy first takes the view that procedural autonomy is limited in this case and does not make it possible for the Prezes Urzędu Ochrony Konkurencji to take a decision stating that a practice does not restrict competition, since such a decision does not feature among the types of decision listed in the second sentence of the first paragraph of Article 5 of the Regulation.

The Sąd Najwyższy (Supreme Court) observes that a teleological and functional interpretation of the second paragraph of Article 5 of the Regulation, read in conjunction with the second sentence of the first paragraph of Article 5 of the Regulation, and the other provisions thereof, might allow the National Competition Authority to take a decision such as that at issue. The wording of the second paragraph of Article 5 of the Regulation, which mentions that the national competition authorities may decide 'that there are no grounds for action on their part' where the conditions for prohibition are not met, suggests that such a possibility cannot be ruled out.

The Supreme Court (Sąd Najwyższy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 5 of [the] Regulation ... to be interpreted as meaning that a National Competition Authority cannot take a decision stating that a practice does not restrict competition within the meaning of Article 82 EC in a case in which it has found, after conducting a procedure, that the undertaking did not breach the prohibition of abuse of a dominant position under that Treaty provision?

(2) If the answer to the first question is in the affirmative: in a situation in which, under national competition law, if it should be established that the practice of an undertaking does not infringe the prohibition in Article 82 EC, a National Competition Authority may bring anti-trust proceedings to an end only by taking a decision which states that the practice does not restrict competition, is the [second paragraph] of Article 5 of [the] Regulation... to be interpreted as constituting a direct legal basis for that authority to decide that there are no grounds for action on its part?'

**Judgment of the Court (Grand Chamber) of 3rd May, 2011.**

*Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA.*

**Reference for a preliminary ruling: Sąd Najwyższy – Poland.**

1. Article 5 of Council Regulation (EC) No 1/2003 of 16th December, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, must be interpreted as precluding a National Competition Authority in the case where, in order to apply Article 102 TFEU, it examines whether the conditions for applying that article are satisfied and where, following that examination, it forms the view that there has been no abuse, from being able to take a decision stating that there has been no breach of that article.,

2. The second paragraph of Article 5, Regulation No 1/2003, is directly applicable and precludes the application of a rule of National Law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that Article.

Following the ECJ preliminary ruling, the Supreme Court annulled the previous ruling of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw).

**Comment**

The ruling was very important because it allowed the setting of the limits to the power of national authorities in the application of European Competition Law (the principles of equivalence and effectiveness). Particularly in the field of the powers of the competition authorities of the Member States to find that there has been no breach of Article 102 TFEU, there were a few important issues:

- Under Article 3(1) of the Regulation, where the national competition authorities apply national competition law to any abuse by an undertaking having a dominant position on the market, which may affect trade between Member States, they must also apply Article 102 TFEU
- It is only where European Union law does not lay down a specific rule that a National Competition Authority may apply its national rules
- A ‘negative’ decision on the merits of a case would risk undermining the uniform application of Articles 101 TFEU and 102 TFEU, which is one of the objectives of the Regulation that is highlighted by Recital 1 in its preamble, since such a decision might prevent the Commission

from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law

- Empowerment of national competition authorities to take decisions stating that there has been no breach of Article 102 TFEU would call into question the system of cooperation established by the Regulation and would undermine the power of the Commission
- A National Competition Authority cannot take a decision stating that there has been no breach of Article 102 TFEU. According to the second paragraph of Article 5 of the Regulation, such an authority may, however, decide, in cases where, on the basis of the information in its possession, the conditions for prohibiting a practice under Article 102 TFEU are not met, that there are no grounds for action on its part
- The second paragraph of Article 5 of the Regulation is directly applicable, and it precludes the application of a rule of National Law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that Article

### **3.5. VOUXINOU FOTEINI, ATHENS ADMINISTRATIVE COURT OF APPEAL (GREECE)**

**The judgment 1933/2013 of THE COUNCIL OF STATE setting aside the judgment 163/2006 of the Administrative Court of Appeal (acting as First Instance Court) regarding one of the appellants having the burden of proof on a presumption of participation in meetings at which anti-competitive agreement was presumed to have been concluded**

#### **1. The facts:**

Five supermarket chains (the five largest shares in the country's market) invited other undertakings and their suppliers to an event on 26.2.2004 at Hotel SOFITEL. The meeting was labeled as a "discussion regarding general problems in the market". The chains notified the Greek Supermarket Association regarding the date of a new event, and this event was held at the same hotel on 23.4.2004. In this second meeting, the guests were divided into three groups (with the same business object) and in one of them, a representative of another (6<sup>th</sup>) supermarket company, which was not invited to the first meeting (the "Trofino" S.M.), was present for a few hours. Arising from the Minutes of meetings of the Secretariat of the Competition Commission, the Competition Commission, on a routine on the spot inspection, found that the main topics of the discussions were the development of discount stores in the country, own label products, and sales of these products under the tariff costs (in regard to the last topic, the Competition Commission held that it did not establish any infringement of Competition Rules). In particular, as is stated, *inter alia*: "The supermarket chains have expressed their anxiety to their suppliers about the spread of discount stores, and the suppliers were asked whether they wished to enter in such outlets. The discussion focused on the company Lidl (on which the major super market chains expressed their irritation at its presence and growth) and some other, more minor discount stores. In reference to some suppliers, the chains expressed their dissatisfaction, even with encouragement to supplying companies not to make own label products for discount companies, but to continue to make such products for them. The chains also formulated indirect threats, such as not displaying the products of suppliers, not introducing their new products, etc., should they choose not to stop the flow of supply to the discount chains in question". As the organisers of the meetings stated, the representative of Lidl was not invited to these meetings, because, in their own words "they didn't know who the legal representative was, as he and a person on the telephone didn't speak Greek". The Competition Commission considered that, in the above case, it was apparent that, the supermarket companies, in the aforementioned meetings, had established, in a coordinated manner between them and by putting pressure on suppliers, the "exclusion", from sourcing of some enterprises. The above behaviour of organisers was contrary to Articles 1 § 1 of Law 703/77 (the law in force at the time of the meeting) and Art. 81 EC Treaty, as it was considered a harmonised business practice in order to achieve the exclusion of other supermarket chains and discount stores in the market through lobbying

and the threats of penalties to suppliers. So, the Competition Commission enacted the 277/IV/2005 decision, imposing fines on each participating undertaking for infringing Competition Rules.

2. All the companies appealed before the Administrative Court of Appeal (as a First Instance Court), which held that the Commission legally imposed the fines on the five participating (supermarket) companies, and dismissed their action against the contested decision, but it annulled the contested decision, in so far as it regarded the fine over the sixth supermarket company, TROFINO, on the ground that: “from those facts it was not proved that the sixth of the applicants ( TROFINO SA) participated in this offence, since it does not appear in any way that its participation or acceptance of the above coordinated practice, given that from the time-limited attendance at the second of these meetings at the aforementioned hotel, without the contribution of other elements, it cannot be inferred that the applicant was involved in the formation of a concerted practice or that it had accepted such practice tacitly afterwards”

3. All the parties (the companies and the Commission) appealed the above judgment before the Council of State (Supreme Administrative Court), which, rejected all of the appeals except the Commission’s appeal regarding the fine on TROFINO, and held, by a majority, that the Competition Commission had sufficiently demonstrated TROFINO’s contribution, on the ground that if an undertaking participates at meetings during which anti-competitive agreements take place without manifestly opposing these agreements, that is sufficient proof of an undertaking’s participation in the cartel. Whether, therefore, it has been shown that the company in question participated at such meetings, it is for the company to establish further evidence that its participation in those meetings was devoid of any anti -competitive issue, and to demonstrate that it had indicated to its competitors that it was participating at those meetings with a different perspective than their own (invoking case law: ECJ 28.6.2005, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C- 213 / 02 P, DANSK RØRINDUSTRI Others v Commission, Dust. 142, 7.1.2004, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213 / 00 P, C-217/00 P and C-219/00 P, Aalborg Portland and Others v Commission, Dust. etc.81). It was thus not certified in the judgment under appeal that the company had demonstrated that it participated at the meeting with a different angle than that of the other participants and, on that ground, the Council of State set aside the contested judgment, as being not legally justified on this point.

4. On the contrary, the minority stated that, since the judgment under appeal found that from the Minutes of the meetings of the Secretariat of the Competition Commission that were referred to, it was questioned whether the topic of conversation among the companies and representatives of the suppliers was not only the growth of discounters and of own label products, but also the sales of

products under the tariff costs (for which the contested decision of the Commission held that it could not establish a legal offence) etc., and thus the involvement of TROFINO in the concerted practice, or in the acceptance thereof, was not proven without the assistance of other evidence. The Court had not erred in its judgment, and the findings of the contested judgment were legally and sufficiently justified, having in mind that the existence of doubt for the judge is in favour of the company, even in cases dealing with an infringement of the competition rules (invoking case law: ECJ Judgments of 8.7.1999, C- 199/92 P, Hüls v Commission, Dust. 149-150, General Court of 16.06.2011 T-191/06, FMC Foret, SA v Commission rec.111).

### **Comment**

1) Under the above facts (a non-unanimous decision by a cartel -for any reason- affecting the freedom of competition, issued during a multi-topic discussion, not all of them establishing an infringement), the mere time limited presence of an undertaking (not as an organiser, but as a Guest) at a meeting, is a sufficient reason to establish an infringement of Art. 81 E.C., so, the burden of proof must be reversed specific, clear proof of the company's opposition is required.

2) Are there more elements necessary to establish the infringement by the 6<sup>th</sup> company, bearing in mind that the presumption of innocence would possibly apply?

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Article 1 par. 1 of **Law 703/1977** (in force until 6.8.2009):

All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

### **Case law of the European Court of Justice and General Court**

JUDGMENT OF 28. 6. 2005 - JOINED CASES C-189/02 P, C-202/02 P, C-205/02 P TO C-208/02 P AND C-213/02 P

JUDGMENT OF THE COURT (Grand Chamber), 28th June, 2005 \*

Rec.142. It is settled case-law that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without

manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating at those meetings in a spirit that was different from theirs (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 81 and the case-law cited).

I-4383 JUDGMENT OF 8.7.1999 — CASE C-199/92 P

Rec. 150. It must also be accepted that, given the nature of the infringements in question and the nature and degree of the severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular, the judgments of the European Court of Human Rights of 21st February, 1984, *Öztürk*, Series A No 73, and of 25th August, 1987, *Lutz*, Series A No 123-A).

General Court T-191/06:

111 Any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed, in accordance with the principle of the presumption of innocence, which, as a general principle of European Union law, applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hüls v Commission*, paragraph 99 above, paragraphs 149 and 150).

112 The question whether, in the present case, the Commission has established to the requisite legal standard that the applicant took part in the infringement in question must be examined in the light of those considerations.

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### **3.6. VAN RANSBEEK RAF, COURT OF APPEAL OF BRUSSELS (BELGIUM)**

#### **Information concerning the judgment:**

- Name of the Court of Last Instance: Brussels Court of Appeal
- Name of the parties/case reference number: Brabomills v. De Raad voor de Mededinging en de Algemene Vergadering van de Raad voor de Mededinging (A.R.nr. 2013/MR/6) (free translation: Brabomills v. The Competition Council and the General Assembly of the Belgian Competition Council)
- Date of the Judgment: 12th March, 2014.

#### **Facts**

Pursuant to a leniency application by a German company on 28th February, 2008, and by a Dutch company on 22nd September, 2010, the Belgian College of Prosecutors (investigating body) initiated, on 8th April, 2008, an investigation against six companies in the flour industry, including the firm Brabomills. Within the framework of this investigation, house searches were carried out on 15th April, 2008, and information was also exchanged with the Dutch and German cartel offices.

On 23rd December, 2010, the Prosecutor submitted his report and filed it to the Belgian Competition Council. In the report, he made it known that he had established that the companies involved had made arrangements with the German and Dutch millers in regard to the prices charged, market sharing and capacity limitation in the Benelux countries and Germany.

In his report, the Prosecutor concluded that these arrangements were focused on market stabilisation through (1) exchanging information on the coordination of sales prices and price increases; (2) limiting price competition; (3) allocating customers in the framework of a so-called non-aggression pact, and (4) exchanging sensitive information that resulted in an infringement of Article 2 of the Belgian Competition Act of 2006 and Article 101 TFEU as regards the prohibition of restrictive agreements.

The Dutch Competition Authority has, in the meantime, acquitted Brabomills.

## **The First Decision**

In its decision of 28th February, 2013, (Case No. 2013/O-06), the Belgian Competition Council, as the Administrative Court, adopted the prosecutor's reasoning and imposed a penalty of 100,000 EUR on Brabomills as it was shown that, from August, 2000, up to and including December, 2006, Brabomills had been participating in horizontal arrangements which included the exchange of commercially sensitive information and consultation on prices, with the aim of market stabilisation.

In this case, an appeal was lodged against this decision of 28th February, 2013.

## **The Arguments of Both Parties on Appeal**

As regards the merits of the case, Brabomills formulated four grievances: (1) the contested decision by the Competition Council was based on documentary evidence that did not meet the required evidentiary standard in competition cases; (2) the contested decision allegedly provides for unequal treatment between Brabomills and the other flour producers involved; (3) the contested decision violates the underlying principles of consistent application of European Competition Law of Regulation 1/2003 and the related *ne bis in idem* principle, and (4) the contested decision allegedly breaches the formal obligation to provide reasons, since it is characterised by different discrepancies.

## **The Decision of the Court of Appeal**

The Court of Appeal rejected the first two arguments, but nevertheless overturned the contested decision of the Competition Council because of a breach of the *ne bis in idem* principle. Due to the overturning of this decision, it was no longer necessary to examine the fourth argument, since it was not demonstrated that this last argument could lead to the overturning of a broader decision.

Brabomills invoked a breach of the *ne bis in idem* principle, because in the Netherlands it would have been definitively cleared of the same alleged indictments for which it was also to have accounted before the Belgian Competition Authority.

With a view to examining whether there was a breach of the *ne bis in idem* principle, the Court established that, compared to the Dutch case, there was the same "company identity" and "identity of right". This did indeed relate to the same company, and there was an adverse effect on the competition that extended across the entire Benelux territory. The protected right coincided with the undistorted competition within a substantial part of the internal market that is common to different authorities.

Finally, the Court tackled the issue of the “identity of the withheld punishable facts” on the part of the company concerned. Based on the case law of the European Court of Justice, the Court considered whether a territorial delineation resulted from the goal and the consequences of the anti-competitive practices (TOSHIBA case (Case C-17/10), Rec. 99-100).

As significant elements which point to the presence of adequate territorial delineation, in Recital 101 of the TOSHIBA case, the Court of Justice refers to:

1. The language in which the decision of the Commission is written, and which specifically refers to a delineated territory on which the consequences of the breach occurred (EC and EEA);
2. The limitation to that territory of the imposed sanction;
3. The calculation of the penalty on the basis of the turnover realised within that territory.

Although the objective of the contested decision of the former Belgian Competition Council is to be limited to sanctioning the conduct that affects the Belgian market as regards the determination of the anti-competitive aim and the consequences thereof, it was established that the Council did not calculate the penalty according to a delineated territorial turnover.

However, the Court held that the Belgian Competition Council did not find a concrete distinction between the consequences that related specifically to the Belgian market, because it had determined the penalty on a flat-rate basis and did not start from the company’s realised turnover in Belgian territory. It does expressly state that the breach whose objective it was to limit competition is presumed to have consequences that will limit competition, but it does not specifically indicate which relevant turnover on Belgian territory it takes into account here.

As a consequence of the lump-sum nature of the penalty, and the lack of territorial limitation of the consequences of the infringement of competition in terms of affected turnover by the Council, the Court cannot determine whether the appellant is not sanctioned for the consequences of the infringement that occurred on Dutch territory, and for which they were not convicted.

The Appellant can therefore not be penalised for its alleged infringement since the breach of the *ne bis in idem* principle cannot be precluded.

## Comment

The case under consideration involves circumstances in which a cartel that was active in the Benelux market (Belgium – the Netherlands – Luxemburg was discovered in the flour industry).

It must first be observed that this case relates to an appeal against a decision of the former Competition Council under the procedure provided in the Belgian Competition Act of 15th September, 2006. Under the previous legislation, the Competition Council had the status of an Administrative Court. Since the Act of 3rd April, 2013, proposing the insertion of Book IV in the Code of Economic Law, that came into force on 6th September, 2013, at the latest, a new procedure has been introduced and the Belgian Competition Council has been replaced by a new administrative body, that is, the Belgian Competition Authority. Despite the fact that neither Act contains any transitional measures, the Court remains of the opinion that it still has jurisdiction in this case under the former Belgian Competition Act of 2006.

It should subsequently be observed that this case relates to the typical situation of the prosecution of a cartel with a “transnational” character and by which the one national authority seeks to act against offenders on its territory using the research evidence of another national authority. Under such circumstances, great care and caution must be taken that the offender is not prosecuted twice for the same offence. In this instance, the Court of Appeal found that the ruling of the Belgian Competition Authority had to be overturned because the Belgian Competition Authority failed to provide for sufficient territorial delineation of the consequences of the infringement on the competition, in terms of affected turnover. Since the Court of Appeal could therefore not sanction Brabomills, exclusively or not, for the consequences of the infringement that occurred on Dutch territory, the risk of double jeopardy at which the *ne bis in idem* principle is aimed could not be excluded, and the ruling was overturned.

This decision is of importance because the Court recalls the conditions of the *ne bis in idem* doctrine, and this doctrine also applies in the Belgian legal order.

The Court of Appeal thus confirmed in its decision that when a National Competition Authority and tribunals enforce European competition law in relation to cross-border infringements (cartels) the *ne bis in idem* principle, which is part of a fundamental right at the European Union level, must be applied (Article 50 Charter of Fundamental Rights of the European Union). The Court stresses that respecting this principle is guaranteed by the European Court of Justice, and by the national tribunals, in compliance with the case law of the ECHR with respect to Article 7(1) of Protocol 7 of the European Charter of Human Rights.

In the judgment under consideration, the Court, in this case, used the three-prong test that the European Court of Justice applies in established case law in this context (TOSHIBA, Case C-17/10):

- Identity of the company concerned
- Identity of the facts
- Identity of the legal interest protected

While the Court established that the identity of the company concerned and the interest protected were the same as those in the case in question in the Netherlands, this judgment concentrated mainly on the provision of the “identity of facts”.

To check whether the facts are the same, the Court of Justice is of the opinion that it must consider the consequences of conduct that limits competition. To be able to prosecute and sanction distinct consequences in cross-border infringements, the Competition Authorities must define the consequences, and do so regardless of whether this was the intention of the contested conduct to limit competition, or whether this was merely the consequence.

It should be observed that when it comes to assessing the conduct or agreements that aim to limit competition in a specific market, the Competition Authority need not further determine the consequences of the infringement, because it can be assumed that such conduct or agreement, by its nature, can be deemed damaging to the proper functioning of normal competition.

In this case, however, the prosecution was based on conduct in the context of an agreement that envisaged limiting the competition, without the Belgian Competition Council assessing the actual or potential consequences of it on prices, for example. The Belgian Competition Council nevertheless took the existence of consequences for competition in the Belgian market as being established.

The Belgian Competition Council ruled that the contested decision was limited to sanctioning the consequences within its own territory, but it did not delineate the territory affected by the consequences.

The issue raised in this case is whether it is sufficient to take into consideration only the presumed consequences, so as to speak of the required territorial delineation of the consequences of an infringement with a view to penalising it.

The Court believes that an effective territorial delineation and the sanctioning of the consequences of a cross-border (cartel) agreement can only occur if the effective or possible consequences in the territory concerned are taken into account.

This means that insofar as an authority, through its assessment of the contested facts, does not clearly indicate that it is only considering the consequences of the competition within its own territory, but the territorially distinct consequences on which it bases itself are not specified in its decision, it creates the risk of an overlap when another authority subsequently rules on it. The Court states clearly that a

National Authority must make perfectly clear the different consequences of the infringement in its territory before the company concerned can be sanctioned for the particular facts. When there is still uncertainty on this, then the company being prosecuted must be given the benefit of the doubt. It must be assumed that as long as there is no certainty regarding the elimination of the risk of overlap, the criterion of “identity of facts” is also met. The Court concluded that the conditions of the *ne bis in idem* principle were satisfied, such that the decision of the former Belgian Competition Council was overturned.

## 4. HORIZONTAL AGREEMENTS – CARTELS AND CONCERTED PRACTICES

### 4.1. AERTS HANS, COLLEGE VAN BEROEP VOOR HET BEDRIJFSLEVEN (THE NETHERLANDS)

#### **The Facts of the Case**

The case concerns fines imposed by the National Competition Authority (NCA) on (the) five operators providing mobile telecommunications (providers) in the Netherlands. The operators were: KPN, Ben (now T-Mobile), Dutchtone (now Orange), Libertel-Vodafone (now Vodafone) and Telfort. They all had their own mobile telecom networks in the Netherlands.

The fines were imposed because the NCA found that the telecom operators had entered into a concerted practice regarding (amongst others) reductions of standard dealer remunerations for post-paid subscriptions. This subject was discussed between representatives of the telecom operators on 13th June, 2001, where confidential information about the subject arose. Taking the view that such conduct restricted competition to an appreciable extent and was thus incompatible with the prohibition in the national competition law (Mededingingswet), the NCA imposed fines on those undertakings. The fines, in total, amounted to €88.000.000.

The undertakings concerned lodged an objection against the decision of the NCA.

By a decision of 27th September, 2004, the NCA upheld in part the grounds of the challenge put forward by the telecom operators and found that the practices described in the decision in the First Instance constituted an infringement, not only of the national competition law but also of Article 81(1) EC. Accordingly, the NCA upheld all the fines imposed on those companies while, at the same time, reducing the amounts imposed to (in total) €52.168.000.

The telecom operators brought an action against the decision of 27th September, 2004, before the District Court of Rotterdam. In its Judgment of 13th July, 2006, that Court annulled the decision in question and ordered the NCA to adopt a new decision. The fines imposed on Telfort and Dutchtone were dismissed, because the District Court found that the participation of these providers in the exchange of information during the meeting on 13th June, 2001, was not proven.

T-Mobile, KPN, Orange and the NCA appealed against that judgment to the College van Beroep voor het bedrijfsleven (Court of Appeal for Trade and Industry), to which it falls to determine whether the concept of concerted practice was interpreted correctly in the light of the established case-law of the Court on that matter.

### **The Questions Referred to the European Court of Justice (ECJ)**

The Court of Appeal (Referring Court), after having confirmed the decision by the District Court regarding the (non-)participation of Telfort and Dutchtone in the concerted practice, considered in its Ruling of 31st December, 2007 (AWB 06/657 e.a.; ECLI:NL:CBB:2007:BC1396), that it was required to determine, first, whether the purpose of the exchange of information on post-paid subscriptions at the meeting held on 13th June, 2001, was to restrict competition, and whether it was correct for the NCA to omit consideration of the effects of the concerted practice and, second, whether there is a causal **connection** between the concerted practice and the market conduct of the telecom operators in question.

The Referring Court stated, firstly, that the concerted practice at issue in the main proceedings related neither to the consumer prices to be applied by the undertakings in question, nor to the subscription tariffs to be invoiced by those telecom operators to the end users. What it actually related to is the remuneration which those telecom operators intended to pay for the services supplied to them by dealers. The point that was therefore emphasised by the Referring Court was that the direct object of the concerted practice cannot be said to be the determination of prices for post-paid subscriptions on the retail market. Next, the Referring Court stated that it was uncertain as to whether the object of the concerted practice of the telecom operators in question, which related to the remuneration paid to dealers for concluding post-paid subscription agreements, might be considered to be the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC. Lastly, as regards the causal link between the concerted practice and the market conduct of the telecom operators, the Referring Court was uncertain whether the presumption established in Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125 and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, according to which undertakings participating in concerting arrangements and remaining active on the market are presumed to take account of the information exchanged with their competitors when determining their conduct on that market, also applied in situations in which the concerted practice had its roots in participation at a single meeting.

The Referring Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. When applying Article 81(1) EC, which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market?

2. Is Article 81 EC to be interpreted as meaning that, when a national court applies that provision, the evidence of a causal connection between concerted practice and market conduct must be adduced and appraised in accordance with the rules of National Law, provided that those rules are no less favourable than the rules governing similar domestic actions and they do not make the exercise of the rights granted by Community law in practice impossible or excessively difficult?

3. When applying the concept of concerted practices in Article 81 EC, is there always a presumption of a causal connection between concerted practice and market conduct, even if the concerted practice is an isolated event and the undertaking which took part in the practice remains active on the market, or only in those cases in which the concerted practice has taken place with a certain degree of regularity over a lengthy period?

### **The Judgment of the ECJ**

The ECJ ruled on the referred questions in its Judgment of 4th June, 2009 (Case C-8/08; ECLI:EU:C:2009:343):

1. A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition, or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

2. In examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

3. In so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.'

### **The Final Judgment of the Court of Appeal**

After the Judgment of the ECJ, the Court of Appeal firstly enabled the parties involved to react on that Judgment. After that, a new public hearing was held.

The final Judgment was given on 12<sup>th</sup> August, 2010 (ECLI:NL:CBB:2010:BN3895).

In its Judgment, the Court of Appeal reiterated that it already (in the referring ruling) had expressly and without reservation ruled that the telecom operators had concerted regarding the dealer remunerations for concluding post-paid subscriptions. Parties were therefore not allowed to contest this after the ECJ-Judgment. The (first) question at stake after the ECJ-Judgment was whether this concerted practice constituted an infringement by object (i.e., had an anti-competitive object). The ECJ-Judgment made clear that it is not necessary to investigate the consequences of the concerted practice. Moreover, a direct link between the concerted practice and consumer prices does not have to be proven. It is sufficient that the concerted practice has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market (point 31 of the ECJ-Judgment). The Court of Appeal repeated these considerations of the ECJ and furthermore pointed at the opinion of Advocate General Kokott.

Applying the criteria given by the ECJ, the Court of Appeal concluded that the telecom operators, on 13th June, 2001, exchanged essential information regarding the reduction of dealer remunerations (with respect to time, amount and modality). This information was capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned. The concerted practice must therefore be regarded as pursuing an anti-competitive object. Due to the market shares of the participants, the infringement is also noticeable.

The Court of Appeal further examined the causal link between the concerted practice and the market conduct. The Court considered that (given ECJ case-law and the ECJ-Judgment in this particular case) it is required to apply the presumption of a causal connection, according to which, where the undertakings concerned remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors. This presumption is subject to proof of the contrary, which is for the undertakings to adduce.

In the light of the case-law of the European Court of Human Rights (especially the *Salabiaku* Judgment of 7th October, 1998), the Court of Appeal considered that the undertakings cannot be obliged to deliver irrefutable evidence that their concerted practice didn't influence their market behaviour. Such an obligation would mean an infringement of Article 6 of the ECHR. It is sufficient

that they deliver enough evidence to rebut the presumption. In this case, telecom operators should make clear that the reduction of the dealer remunerations was, despite their sharing of information at the meeting in 2001, an independent decision of their own. In the procedure leading to the decision of the NCA on the objections by the telecom operators, the telecom operators gave alternative explanations for their market conduct. The NCA, however, didn't take these alternative explanations into account in their decision of 27th September, 2004. As a result of this, the District Court had annulled this decision and ordered the NCA to adopt a new one. None of the applicants have raised arguments regarding this decision of the District Court. The Court of Appeal therefore held that the NCA, in its new decision (still to be taken), had to take the alternative explanations into account and, if it found that the alternative explanations did not suffice, why was this the case?

With regard to the fines, the NCA also had to take some arguments of the telecom operators into account, especially arguments regarding the turnover concerned (which is an important parameter in establishing the amount of the fine).

In the end, the Court of Appeal dismissed the appeals of the applicants (NCA and telecom operators), which meant the order given by the District Court still had to be carried out, and the NCA still had to take a new decision on the objections lodged by the telecom operators.

### **The New Decision of the NCA**

The NCA took a new decision on the objections lodged by the telecom operators on 26th October, 2011. The NCA extensively discussed the arguments from the telecom operators about the presumption that they had reduced the dealer remunerations for reasons other than the information shared in June, 2001. It, first of all, stated that the presumption of causal connection between the concerted practice and market conduct was strengthened by some direct and indirect evidence obtained by the NCA. This evidence contained some statements by (leading) officers of the telecom operators, according to which there was a direct connection between the information shared during the meeting in June, 2001, and the reduction in the remunerations. After that, the NCA took the alternative explanations given by mobile operators into account. These explanations were based on some reports on circumstances in the mobile telecommunications market (which was, according to the reports, satiated, a circumstance that allegedly would lead to a reduction in the dealer remunerations). There were also some internal documents of the mobile operators, according to which the undertakings had already taken notice of the amount of the dealers' remunerations, and they were already considering measures to reduce them.

The NCA found none of the arguments convincing and held that the presumption of causal connection was not rebutted.

Subsequently, the NCA upheld the fines, but reduced the amounts to be paid, mainly because the turnover to be taken into account was substantially smaller. Another reduction was applied, because

the procedure didn't come to an end within a reasonable time. The total amount of the (three remaining) fines was €16,249,000.

I'm told (that one, some, or all of) the telecom operators again brought an action against the new decision before the District Court, but withdrew this action shortly afterwards.

## **4.2. PENNANEN PAULA, COURT OF APPEAL OF VAASA (FINLAND)**

### **Introduction**

The Supreme Administrative Court ended five-year long court proceedings in September, 2009, in a matter involving the imposition on a competition infringement fine in the so-called ‘asphalt cartel case’ in Finland. The Supreme Administrative Court found that a national asphalt cartel operated in Finland during 1994-2002, and all the biggest actors in the field were involved. The parties were sentenced to fines which amounted to 82.5 million euros in total. The decision set a very important precedent in many ways.

In the Supreme Administrative Court's decision, the asphalt companies were found guilty of serious, long-standing and extensive market partitioning and bidding cooperation, in breach of the Competition Act. It was one integrated cartel that was composed of several parts, with the intention of eliminating competition from the asphalt market. The undertakings had agreed in advance about the regional and quantitative division of asphalt work conducted by the state, municipalities and private individuals, and this division was maintained by agreeing in advance on the prices paid in the bidding contests and, by monitoring this, the pricing was followed. The joint market share of the companies involved in the cartel during 1994-2002 was roughly 70%. The total amount of the fines set by the Supreme Administrative Court corresponded to the figures proposed by the Finnish Competition Authority (FCA), within the maximum limits permitted by the legislation.

### **Background**

#### **The FCA's Investigations and the Proposal of the Competition Infringement Fine**

The FCA carried out dawn raids on the asphalt companies under investigation in March, 2002. Two years later, in March, 2004, the FCA proposed to the Market Court that it impose a competition infringement fine on seven asphalt companies and on the Finnish Asphalt Association. To allocate markets and maintain the situation those suspected of cartel had:

- limited the output of cartel members by imposing an annual tonnage for asphalt production
- applied an arrangement whereby, in tendering, some companies had to waive making a tender, others had to submit a higher or lower bid than the others, or the price was otherwise based on cooperation between the bidders
- created a system for monitoring the agreed market allocation shares

- organised a cartel at the managerial level of asphalt operations
- disrupted the operations of non-cartel members and the entry of new companies into the market, and
- exchanged information classified as ‘business secrets’.

According to the FCA's evidence, the companies were guilty of forbidden national price and bidding cooperation and the allocation of markets, at least during 1994-2002. The Association was considered guilty of the forbidden exchange of information in 1997. The FCA determined the amount of the proposed infringement fine according to the volume of operations, the duration and severity of the infringement and the companies' role in the cartel. The FCA proposed that the Market Court impose infringement fines as follows:

- Lemminkäinen 68,000,000 euros
- Valtatie 12,700,000 euros
- Skanska Asfaltti 11,000,000 euros
- Interasfaltti/NCC Roads 4,600,000 euros
- SA-Capital (Savatie) 500,000 euros
- Rudus Asfaltti 140,000 euros
- Super Asfaltti 68,000 euros
- Finnish Asphalt Association 4,000 euros

The combined turnover of the companies involved was 290 million euros in 2002, and their share of the total volume of the asphalt markets had been approximately 70 % during the past few years. The social effects of the cartel were considered especially harmful, since asphalt works are largely public procurements made by the state and the municipalities.

#### **The Market Court Decision (19.12.2007, 94/04/KR)**

The Market Court issued its decision in December, 2007, which largely confirmed the violation as proposed by the FCA. However, the level of fines remained much lower than had been proposed (total of 19.4 million euros).

The FCA appealed the decision to the Supreme Administrative Court in January, 2008. It was argued in the appeal that the imposed penalties do not fulfil their deterrent purpose, considering the financial gain obtained by the cartel. The decision was also appealed by six of the companies whom the decision concerned.

## Supreme Administrative Court Decision

### Assessment of Evidence

It is stated in the Supreme Administrative Court's decision that the same demands cannot be set on evidence presented in a competition case as in a criminal case. The evidence shall be assessed as a whole, and in the assessment weight shall, for example, be given to circumstantial evidence.

The main conclusions of the Supreme Administrative Court can be found in section 985 of the decision:

*“In deciding, in a manner prescribed in 51 (1) of the Administrative Judicial Procedure Act, which facts a decision involving forbidden cooperation among business undertakings may be based on, attention shall be paid to the problems in obtaining evidence for the collaboration of business undertakings which show e.g., in the Cement ruling, and the fact that the same demands cannot be set on the evidence presented in competition and criminal issues in Finland, where the competition legislation is part of the European legislation. Therefore deduction can also be used in finding such forbidden collaboration. In the lack of consistent explanation, events and procedures resembling each other in the market, and circumstantial evidence, may therefore act as a sign of competition law violation. In such a deduction, there is no obstacle to giving weight to both scattered evidence and witness accounts on what they have heard told. Similarly, it may be possible to deduce a connection between events from the resemblance of individual events, and the entity formed by them. The important thing is a comprehensive examination of the evidence. As for duration, it should be considered sufficient that the evidence presented is temporally linked to facts that are sufficiently close, in order to reasonably find that the said violation of the competition rules has continued uninterruptedly between the starting time of the alleged cartel and its date of termination.”*

The issues relating to evidence in section 985 may be expressed as follows, for the sake of clarity:

- Finding evidence in cartel cases is difficult. Deduction may also be used in finding cartels. A comprehensive examination is important.
- It may be possible to deduce a connection between events and the entirety formed by them from the resemblance to individual events. Similar events and procedures in the market, and other circumstantial evidence, may therefore act as a sign of the violation of the competition rules in the lack of a coherent explanation.
- In addition to other scattered evidence, there is no obstacle to giving weight to witness accounts of what they have heard told, in the deduction.

- As regards duration, it is enough if the evidence is temporally linked to facts which are sufficiently close. If this is the case, the violation may reasonably be assumed to have continued uninterruptedly between the starting time of the alleged cartel and its date of termination.

The Supreme Administrative Court also takes a stand on the level of counter-evidence proving innocence in its decision. According to the Court, companies that are subject to an infringement fine proposal shall be able to present a credible alternative interpretation to the FCA's evidence and conclusions. This statement can be found in section 1141 of the decision:

*“The FCA has presented extensive and consistent evidence based on documents, recordings of telephone conversations, witness statements and economic analysis that an anti-trust cartel has operated in the asphalt sector during 1994-2002. To prove their innocence of the violation of the provisions of the Competition Act, the defendant companies should have been able to present a credible alternative interpretation to the existence of the FCA's evidence or the conclusions drawn by the FCA thereof. The defendant companies have not been able to undermine the credibility or trustworthiness of the evidence presented by the FCA, or to show that the conclusions drawn by the FCA of the evidence are false. The Supreme Administrative Court therefore finds that, based on the evidence presented by the FCA, a national cartel has operated in the Finnish asphalt market, breaching Articles 5 and 6 of the Competition Act.”*

### **The Nature of the Restrictive Practices**

The cartel could not be separated, on one hand, into state contracts and, on the other, into municipal and private contracts. Rather, it was one and the same comprehensive arrangement concerning all types of contract, the central goal of which was to remove sound competition from the Finnish asphalt market.

The evidence presented by the FCA did not cover, either geographically or temporally, all of the events in the asphalt market during the time referred to in the proposal. However, the evidence presented gave a good overall picture of the activities in the asphalt market during this time. The evidence excluded the possibility of similar action being taken only by chance at the same time. Considering, in general, earlier experiences and studies of the activities of cartels, the most plausible explanation for the similarity between the events in different areas and the observation of the witnesses was that the business undertakings in question, operating in the asphalt sector, had agreed on dividing up the entire Finnish asphalt market, and on measures to accomplish this.

### **Level of Fines**

Within the framework of the normal scale laid down in Section 8 of the Act on Competition Restrictions (480/1992), a penalty payment may be imposed on a business undertaking, independent of its previous year's turnover.

The Supreme Administrative Court stated that the previous year's turnover, influencing the maximum amount of the penalty payment, has primarily be the turnover during the year preceding the decision to impose a payment by the Court of the First Instance, i.e., the Market Court.

The fines set by the Supreme Administrative Court were roughly similar to those proposed by the FCA, and were within the maximum limits provided by the law. The amount of the sanctions imposed by the Supreme Administrative Court for the asphalt cartel were so high that it is fair to say that it has a special and generally preventive effect.

### **Application of European Community Law**

The Supreme Administrative Court took into account the EC's provisions on restrictive practices that were in force during the time referred to in the penalty payment proposal, and the practice of the Court of Law of the European Communities concerning these provisions when interpreting the provisions of the Act on Competition Restrictions.

The Supreme Administrative Court referred i.e., to rulings:

- Judgment of the Court of 16th December, 1975. *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities*. Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73.
- Judgment of the Court of First Instance (Fourth Chamber) of 12th July, 2001. *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission of the European Communities*. Joined Cases T-202/98, T-204/98 and T-207/98.
- Judgment of the Court (Sixth Chamber) of 8th July, 1999. *Commission of the European Communities v Anic Participazioni SpA*. Case C-49/92 P.
- Judgment of the Court (Fifth Chamber) of 7th January, 2004. *Aalborg Portland A/S and others v Commission of the European Communities*. Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P.

## **Conclusions**

The policy definitions of the asphalt cartel decision, on the assessment of evidence, increased the risk of getting caught, which spurs companies involved in forbidden restraint from seeking leniency. The amount of the infringement fines was also raised to a level at which a special and generally preventive effect can be reached. To this extent, Finnish case law is now in line with the EU law.

After the Supreme Administrative Court's decision, 40 municipalities and the state of Finland sued the companies involved in the asphalt cartel for damages, demanding compensation totalling 120 million euros. Helsinki District Court ordered, in November, 2013, that the firms pay nearly 40 million euros in damages, the largest financial settlement in Finnish legal history. The 40 municipalities were recompensed with an average of a million euros each. However, the state was denied any recompense. The Court ruled that the government-owned road agency, Destia, knew about the cartel and approved of the overcharging.

#### **4.3. STRUMSKIENE JURA MARIJA, VILNIUS REGIONAL ADMINISTRATIVE COURT (LITHUANIA)**

##### **Case No A520-1301/2012 of the Supreme Administrative Court of Lithuania**

##### **National Health Insurance Fund, UAB ‘Ortopagalba’, UAB ‘Ortopedijos centras’, UAB ‘Ortopedijos klinika’ and others *versus* the Competition Council of the Republic of Lithuania**

On the ruling which imposes fines for prohibited agreements on the setting (fixing) of prices of orthopaedic technical means, the fixing of production volumes for certain goods, the sharing of the product market on a territorial basis, as well as non-compliance with the duty of entities of public administration to ensure the freedom of fair competition

##### **Ruling of the Competition Council of 20th January, 2011.**

The Competition Council of the Republic of Lithuania adopted a ruling in 2010 whereby it punished twelve undertakings for the infringements of the requirements of Article 5(1) points 1, 2, 3 of the Law on Competition, and Article 101(1) points a, b & c of the Treaty on the Functioning of the European Union, and is also recognised by the National Health Insurance Fund as having infringed Article 4 of the Law on Competition and they were obliged to terminate the infringement. Fines ranging from EUR 260 to EUR 476,667 were imposed on the undertakings.

Article 4 of the Law on Competition provides that in carrying out the assigned tasks related to the regulation of economic activities within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual economic entities or their groups and which give, or may give rise to, differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition may not be avoided when meeting the requirements of the laws of the Republic of Lithuania.

Points 1, 2, 3 paragraph 1 Article 5 of the Law on Competition provides 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 the conclusion thereof, including: 1) agreements to directly or indirectly set (fix) prices of certain goods or other conditions of purchase or sale; 2) an agreement to share the product market on a territorial basis, according to groups of buyers or suppliers, or in any other way; 3) an agreement to fix production or sales volumes for certain goods, as well as to restrict technical development or investment. Article 5(2) of the Law on Competition provides that the

agreements concluded between competitors, as listed in Points 1, 2, 3 and 4 of paragraph 1 of this Article, shall, in all cases, be considered to restrict competition.

Compensation for orthopaedic technical equipment in the Republic of Lithuania is exercised by the National Health Insurance Fund, which organises the purchase of devices from the orthopaedic technical equipment manufacturers. Every year, the National Health Insurance Fund concludes contracts with the orthopaedic technical equipment manufacturers which meet the conditions of the Description of Procedures for State Support of Orthopaedic Technical Equipment Purchase, approved by the order of the Minister of Health.

Two associations, the Association of Orthopaedic and Medical Industry Undertakings and the Association of Providers of Orthopaedic and Rehabilitation Services (together hereinafter also, the Associations), unify the economic operators that are engaged in the production of and trade in orthopaedic technical equipment. The Associations started their cooperation in 2004 in order to jointly address issues relating to providing patients with orthopaedic technical equipment. The cooperation of associations was mostly active in joint meetings. Available data shows that a few of the Associations' meetings took place in the period from 21st September, 2006, to 19th December, 2008. The Associations aim to consolidate and unify orthopaedic service providers to solve common problems that arise, and to participate in the improvement of orthopaedic technical equipment compensation in Lithuania.

According to the information gathered during the investigation, the manufacturers of orthopaedic technical equipment agreed at the Associations' meetings on the prices, the production and the sales volumes of orthopaedic technical equipment, as well as on market sharing.

While carrying out a new National Health Insurance Fund project in 2006 on base orthopaedic technical equipment prices, the calculation of prices was provided to the members of the Association of Orthopaedic and Medical Industry Undertakings so that they could make their suggestions. An agreed methodology for determining the base price of the project was discussed at the meeting of the Associations on 21st September, 2006. A working group was composed, by the order of the Director of the National Health Insurance Fund, for the pricing of services project, and it included some of the producers' representatives. The manufacturers of orthopaedic technical equipment met in the Associations' meetings, discussed questions relating to the development of orthopaedic technical means' prices project and they suggested their decisions to the working group. In one of the Associations' meetings, on 29th January, 2007, the President of the Association of Providers of Orthopaedic and Rehabilitation Services indicated that the National Health Insurance Fund had invited

the associations to submit proposals on an orthopaedic footwear base price calculation, and pointed out that it is necessary to agree on a methodology for the calculation of prices when taking a joint decision and proposing it to the National Health Insurance Fund. Cost calculations for orthopaedic technical equipment were presented to the National Health Insurance Fund at the meeting of the Associations and were discussed at the meeting of a working group on 14th February, 2004.

Subjects such as cost elements for orthopaedic technical equipment, the production and tariffs, average duration of operations, profit rate settings, were considered at other Associations' meetings. Undertakings not only directly adjusted their actions as regards the establishment of base prices, but also agreed on the level of compensation for partially compensated orthopaedic technical equipment, *i.e.*, the prices that will be paid by the National Health Insurance Fund. In the Associations' meeting on 21st January, 2008, a decision was taken to unanimously apply the maximum premiums for partially compensated orthopaedic technical equipment. At the meeting of the Association of Providers of Orthopaedic and Rehabilitation Services on 27th April, 2009, the question discussed was the orthopaedic companies' unused quotas for the first quarter of the year.

In the ruling of the Competition Council, the market is defined as the production and trade in orthopaedic technical equipment in the territory of the Republic of Lithuania. Participants in this market are all economic operators producing orthopaedic technical equipment, in accordance with the agreements with the National Health Insurance Fund.

In giving explanations to the Competition Council, undertakings alleged that their behaviour was conditioned by National Law. The Commission's Communiqué 'Application Guidelines of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation' establishes that authorities in certain cases, in pursuance of the public policy objectives through self-regulation, encourage enterprises to conclude horizontal cooperation agreements, but Article 101 of the TFEU is further applied on companies, if National Law only encourages and helps them in order that their behaviour be independently anti-competitive. The fact that the authorities encourage horizontal cooperation agreements does not mean, however, that it is admissible under Article 101 of the TFEU. Only if the companies' anti-competitive behaviour is required by national legislation, or if it establishes a legal framework which prevents any companies' competitive processes, will Article 101 of TFEU not apply. After examining the legal regulations, the Competition Council concluded that the legislation did not oblige economic operators to conclude agreements, and such a legal framework, which did not allow companies to compete and decide independently on their behaviour within the market, was not created.

It is established that the relevant geographical market is the territory of the Republic of Lithuania. For the purposes of applying Article 101 of the TFEU, Paragraph 78 of the Explanations on the ‘effect on trade’ were considered, which states that because of agreements covering the whole territory of the Member State, the division of markets on a national basis is strengthened, whereas these arrangements constitute a barrier to economic penetration. Agreements which cover the whole of the national territory, by their nature, affect trade between Member States. It is noted that the Lithuanian law prescribes no barriers to foreign operators providing services in the present market. Pending agreements raise difficulties to effective competition and exploitation to their advantage. The new economic operator is forced to participate in a prohibited agreement wherein the manufacturers agree on output quota; otherwise it would face unfavourable competition conditions.

**Decision of the Vilnius Regional Administrative Court of 29th September, 2011.**

In accordance with the decision of the Vilnius Regional Administrative Court, the complaints of the undertakings and the National Health Insurance Fund were dismissed. The Court noted that the Judgment of 12th July, 2011, of the European Court of Justice, Case No T-112/07, paragraph 288, explains that an undertaking that has taken part in such an infringement, through conduct of its own which constituted an agreement or concerted practice having an anti-competitive object and which was intended to help bring about the infringement as a whole, is also liable, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement, where it is established that the undertaking in question was aware of the offending conduct of the other participants, or that it could reasonably have foreseen it, and that it was prepared to take the risk (*Commission v Anic Partecipazioni*, paragraph 83). On these grounds, the applicants’ arguments concerning its passive role in the agreements while determining the fine levels, were dismissed. The assessment of the role of a participant shall not be regarded as important because, although in the absence of actions, in not adjusting or not adjusting each time the price proposals and market distribution, a person might have received material benefit from the fact that the base prices and compensation mechanisms that are established by the National Health Insurance Fund affected every person’s position within the production and trade market. The fact that the agreements were known to the National Health Insurance Fund and that this institution did not take the necessary actions for the prevention of the harmonisation of prices and markets between market participants, does not exempt the applicants from their liability. By acting correctly and answering to the initiatives of the National Health Insurance Fund, the applicants, each independently, might have provided the data requested, rather than combine them with other participants within the same market. The applicants did not have any reason to interpret the appeals of the National Health Insurance Fund as obliging them to cooperate with other undertakings in competition matters, since their actions had to be assessed in the light of the provisions of the Law on Competition.

**Ruling of the Supreme Administrative Court in Lithuania of 15th May, 2012.**

The Supreme Administrative Court of Lithuania partially amended the decision of the Vilnius Regional Administrative Court, namely reduced penalties imposed on the companies. The Court stated that the case-law of the Court of Justice of the European Union prescribes that Articles 101 and 102 of the TFEU shall apply only to the companies' anti-competitive activities carried out on their own initiative (Decision of the CJEU of 11th November, 1997, in Case No C-359/95 P and C-379/95 P, the Commission and France v Ladbroke Racing), and if the companies' anti-competitive activities are governed by national legislation or where they eliminate any possibility of competitive behaviour, the liability shall not apply. A possibility to exclude the application of Articles 101 and 102 of the TFEU in the case-law of the Court of Justice is recognised only to a limited extent (Decision of CJEU of 29th October, 1980, in Case No 209 / 78-215 / 78 and 218 / 78, van Landewyck and Others v European Commission, Decision of the CJEU of 20th March, 1985, in Case No 41 / 83, Italy v the European Commission, Decision of the CJEU of 10th December, 1985, in Case No 240 / 82-242 / 82, 261 / 82, 262 / 82, 268 / 82 and 269 / 82, Stichting Sigarettenindustrie and Others v the Commission, Decision of the CJEU of 9th September, 2003, in Case No C-198 / 01 CIF). It is also apparent from the case-law of the CJEU that Article 101 of the TFEU can be waived only if the anti-competitive behaviour were to be conditioned by national legislation, or these acts would create such a legal base, in the context whereof any opportunity for competitive activities would be eliminated (Decision of the CJEU of 29th June, 1993, in Case No T-7/92, Asta Motor France and Others v the European Commission) or, if it is established that national legislation allows companies to engage in self-employed activities which prevent, restrict or distort competition. The conclusion that economic operators had no leeway (*i.e.*, that their anti-competitive behaviour was conditioned by the actions of the government), might be reached only if transparent, on the basis of objective, consistent and decisive new evidence, such that their (anti-competitive) behaviour was unilaterally forced by the authorities while using high pressure, *e.g.*, by threat of receiving sanctions (from public entities), which would result in severe losses to the relevant operator (Decision of the CJEU of 11th December, 2003, in Case No T-66/99, Minoan Lines SA v the Commission of the European Communities).

The Court ruled that neither the legislation, nor the Ministry of Health and the National Health Insurance Fund, were obliged to require operators to provide mutually agreed data or common positions, or demanded such actions by pressure (*see, inter alia*, by harassing governmental measures that would cause negative consequences for companies) which would not leave companies any other possibility but to behave in a different way. Such types of action by public authorities expressed an awareness of a certain coordination of economic operators' actions, their promotion and tolerance, which, under the case-law of the CJEU, does not exempt economic operators from their responsibility for the performance of prohibited actions (Decision of the CJEU of 10th January, in Case No 229 / 83,

Association des Centres Distributeurs Edouard Leclerc and Others v Luxembourg SARL ‘Au blé vert’, Decision of the CJEU, 29th June, 1993, June, 1997, in Case No T-1192, Asia motor France and Others v the European Commission). The Supreme Administrative Court of Lithuania agreed with the remaining arguments of the Competition Council and the Vilnius Regional Administrative Court.

#### **4.4. VIDUSA RUDITE, SUPREME COURT (LATVIA)**

##### ***Latroad v. Latvian Competition Authority***

##### **Facts of the Case**

In 2010, five road construction design and supervision companies established a general partnership, Latroad, to participate in public tenders.

Following a complaint of a competing undertaking, the Latvian Competition Authority (Competition Council, hereinafter, the CA) initiated an investigation on the alleged prohibited agreement between the members of the partnership.

##### **The Findings and the Decision of the CA**

As the CA found, the aforementioned five companies, in general, were competing market participants when participating in public tenders and providing services of road construction design and road construction supervision. The definition of the market was left open, since this is not of determinative value in the case of cartel agreements.

Latroad had participated in public tenders and was awarded contracts in many of them.

Each participant in the partnership had employees with the right to perform supervision of construction works and/or construction design. The previous experience of the participants, the scope and amount of services previously performed, as well as the general capacity of the undertakings, did not demonstrate the inability of any of those undertakings to participate in tenders individually.

In 23 of 24 tenders where Latroad was awarded the contract, the percentage of works to be performed was allocated among the partnership members in the submitted tender documentation. The tender documentation showed that in many cases the members of the partnership had agreed that 92 to 98 % of the works under a given contract would be performed by one of them; only an insignificant share would be left to some other member. In some tenders, a significant amount of works was allocated to more than one member, but, as assessed by the CA, in those cases also, the members of the partnership were not able to prove that individual participation would not be possible.

The actual execution of the contracts also showed that, in most cases, a major part of the work under each contract was performed by one of the members of the partnership.

Taking into account their findings, the CA concluded that the undertakings which had performed the major share of the contract were able to participate in every respective tender individually, and the participation of other members was merely of a formal nature. The members of the partnership had not provided the evidence that separate participation would not have been possible.

Since it was found that the members of the partnership had allocated the contracts (i.e., had allocated tenders) and also had shared commercially sensitive information, the CA concluded that they had committed a breach of Art.11 para.3 of the Latvian Competition Law. The aforementioned norm provides that: agreements between market participants, which have as their object or effect the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, including agreements regarding, *inter alia*, the allocation of markets, taking into account territory, customers, suppliers, or other conditions, i.e., the CA found that the agreement involved a cartel as its object. The CA decided not to go into considerations about the partnership as a form of lawful horizontal cooperation, since the facts demonstrated a case of a “hardcore” cartel.

The CA argued that the establishment and the operation of a general partnership as such, as well as the establishment of any other form of commercial activity provided in Commercial Law, should not be recognised as a prohibited agreement. However, it is prohibited to conclude and execute any agreements in breach of competition law, including those implemented through the operation of a partnership.

The fines imposed by the CA were within the range of 4000 to 9300 euro, i.e., the lowest fines possible in the case of cartel agreements, taking into account the turnover of the undertakings.

### **The Appeal**

All the members of Latroad appealed the decision to the Administrative Regional Court (the First Instance Court for decisions of the CA), and, after its Judgment, to the Supreme Court (the Court of Cassation). Both the Administrative Regional Court and the Supreme Court rejected the appeals, generally accepting the argumentation of the CA.

The appeal was based on the following argumentation.

- 1) A general partnership is one of the forms of commercial activity that is clearly recognised by Commercial Law. Additionally, Commercial Law *expressis verbis* prohibits competition between the members of the partnership.

- 2) Law on Public Procurement provides associations with the possibility to participate in tenders. This is true for any kind of association of undertakings, regardless of the legal form of their cooperation.
- 3) Since the forming of a general partnership could not be *per se* prohibited, it was necessary for the CA to scrutinise the effects of the operation of the partnership on the relevant market. The CA, on the contrary, did not even define the relevant market.
- 4) There used to be rather rigid requirements as to the financial and economic standing of the tenderers, as well as of their technical and professional abilities. This was a reason why any separate undertaking was denied the possibility to participate in tenders individually. In particular, account should be taken of the prohibition of including the same professionals into more than one tender's documentation.

### **The Judgment of the Supreme Court (20.06.2014, No.SKA-333/2014)**

In its Judgment, the Supreme Court stressed that it is true that a general partnership is not prohibited as a form of commercial activity. The Court, however, pointed to the danger this form of cooperation may foster in the field of public procurement (referring comparatively to the recommendations of the OECD): this is the possibility that a general partnership actually is used as a platform for the allocations of markets and the sharing of commercial information, and not as a genuine joint commercial activity. When a general partnership participates in a tender, it is crucial to bear in mind the objective of the public procurement regulation allowing the participation of associations of undertakings in tenders. According to the Public Procurement Directive<sup>4</sup>, one of its goals is in encouraging the involvement of small and medium-sized undertakings in the public contracts' procurement market. This is the reason why the Directive (as well as the Latvian Public Procurement Law) supports the submission of joint tenders, regardless of the form of cooperation between the undertakings.

However, in this particular case, the necessity for the cooperation and the partnership – a need for genuine joint operation – was not established and proven since, according to the facts found by the CA, the members of the partnership would be able (and were able) to perform the contract works single-handedly. The Supreme Court did not agree with the appellants that the additional evidence submitted to the court could prove the real necessity to form a partnership for a successful tendering. The court also rejected the argumentation that there was a lawful agreement of horizontal cooperation. This argument would be justified (and consistent with Commercial Law and Public Procurement Law) only if the agreement had not demonstrated the signs of a horizontal cartel agreement.

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<sup>4</sup> Directive 2004/18/EC of the European Parliament and of the Council, 31st March, 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Further, as in others cases of “hardcore” cartel agreements, the Court confirmed that it is not necessary to scrutinise the effects that the agreement had on the market, since any agreement having as its object the allocation of market is prohibited as such.

### **Comment**

This case is the first one where the CA and the Court have assessed a cartel agreement which manifested itself in the form of a formally allowed general partnership and in joint participation in public procurements. The CA and the Court’s assessment was that the true object of the partnership was the allocation of the market, taking into account the buyers (the procurements) among the members of the partnership. Both the CA and the Court have thus signalled to the market that the possibility to cooperate in the submission of tenders and in the performance of awarded contracts should be used according to the goals supported by procurement law, i.e., to give a possibility for small and medium-sized undertakings to participate in the performance of contracts. It is necessary to distinguish between a genuine joint operation and the use of a general partnership as a platform for the allocation of market and the sharing of information.

#### **4.5. KUKOVEC POLONA, SUPREME COURT (SLOVENIA)**

##### **Decision of the Supreme Court of the Republic of Slovenia: G 18/2010 from the 17. 12. 2013**

The National Competition Authority (NCA) established with a decision that seven undertakings had breached Article 6 of Slovene competition law (ZPOmK-1), and from 2004, also Article 81, now Article 101 TFEU, by agreeing (or by establishing concerted practice in regard with) the pricing of a daily adult skiing card for each skiing season, so that they established similar or the same prices for a daily skiing card for adults for each separate skiing season, namely, undertaking A from at least 2000 until 31.5.2004, undertaking B....., which represents a concerted practice between undertakings that involved conditions for acting on the market, whose aim or goal is distortion or restriction of competition in the Republic of Slovenia (point 1). All of the undertakings concerned are prohibited from any further agreement or concerted action on determining the prices of skiing cards.

Undertaking C challenged the decision of the NCA before the Supreme Court, claiming that there had been breaches of the procedure and that the material law has not been correctly applied. It suggested that the Court repeal the decision of the NCA, or annuls it, and brings the case in front of the NCA once more.

The Supreme Court annulled the decision of the NCA in the part that refers to the claimant, and brought the case in front of the NCA once more in this part.

##### **Reasons:**

##### **1) In regard to relevant product and geographical market:**

The claimant disputed the way that the NCA had established the relevant product and geographical market. In relation to the relevant product market, it claims that because of its small housing capacities it represents a day skiing centre, whose clients are predominantly skiers from the northern areas around Ljubljana, and partly from the Primorska region and that its only competitor is company A, with which it shares many common features. In regard to the relevant geographical market, it claims that the NCA has not established any facts that would prove that companies A to G act in the same, unified market. It disputes the findings of the NCA that geographical relations between the skiing centres of the penalised parties are relatively short, which means that all of the centres are relatively easily accessible from all parts of Slovenia, and this is why they form a unified geographical market. The claimant also argues that the NCA mixes the notion of geographical accessibility with a notion of actual accessibility.

The NCA established as the relevant product market a market for recreational skiing with a ski lift access. As a relevant geographical market, it established that this was the territory of the Republic of Slovenia, with a remark that it had not finally defined the market as this was not crucial to the procedure. The NCA explained, that the definitions of ‘the relevant material’ and ‘the geographical market’ are not crucial in establishing the breach of Article 6 of ZPOmK-1 and Article 81 (now Article 101) of TFEU, as it is the question of the agreement of prices which represents a restriction by goal, besides, a price agreement excludes the application of rules on restrictions of minor importance, where the market shares of companies in the relevant material market are relevant. As the claimant does not dispute this argumentation, the Supreme Court finds that his disputing of the relevant geographical and material market is not relevant, and that is why the Supreme Court did not take any stance towards them.

## **2) In Regard to Other Products Offered by the Claimant**

The claimant disputed the conclusion of the NCA in regard to the facts, that facts in regard to certain products of company D and other parties in the procedure were automatically applied to the product: a daily skiing card for adults. It claims that a daily adult skiing card represents only 12-16% of the whole annual sales of skiing cards, and this is why the smoothing out of the daily adult skiing card has a neglectful economic effect on the functioning of the companies.

The NCA has used the information on the agreement on prices for skiing cards that are not daily adult skiing cards as an indication for overall agreement on the prices of skiing cards between parties in the procedure. Daily adult skiing cards are part of the broader group of skiing cards. The Supreme Court concluded that the claimant cannot successfully dispute such reasoning merely by quoting the value of daily adult skiing cards in the entire sales of skiing cards, and by referring to their negligible economic effect on the functioning of the company. Furthermore, the claimant cannot be successful with claims that the NCA had not established the structuring of the pricing lists of each party in the procedure, what type of skiing cards parties in the procedures were offering, what the price of each separate type of skiing card was, what the value of each separate skiing card in the overall sales of skiing cards of each separate party in the procedure was, what the prices of similar products from other parties in the procedure were, because it had not explained what effect such findings would have on the final decision of the NCA.

## **3) Restrictive Practices**

From the decision of the NCA one can imply that the NCA based its conclusions on undertakings participating in a cartel on the basis of the Minutes of meetings of the Board of Slovene Skiing Associations (BSSA), where the undertakings discussed, and agreed on, the pricing policies.

According to the case law of the EU court, it suffices for an undertaking to be part of a cartel if the NCA proves that the undertaking took part at a meeting. NCA, in its decision, wrote that although the claimant did not take part in the meeting, it is nonetheless part of the cartel agreement because other evidence and the chart of prices for daily skiing cards for adults prove its culpability. As the NCA did not prove that the claimant took part in the meetings of the BSSA after 2004, nor is it clear what other evidence there is that supports the NCA decision, the Supreme Court found that the decision of the NCA cannot be tested in this part, this was why it annulled it in this respect, and ordered that the NCA try it again.

The NCA claimed that contacts between undertakings, by which they exchanged information on prices, do not need to be explicitly proven, as concerted practice can be deduced from the behaviour of the undertakings on the market. There are charts of prices for daily skiing card prices for adults that prove that undertakings must have exchanged information on prices. The claimant opposes such an argument and says that merely data on prices does not amount to evidence on an agreement on prices, or of concerted action. The Supreme Court found the claimant to be correct, in that that merely having similar daily prices for skiing cards for adults in the years 2004/2005, 2007/2008, taking into account that the NCA does not even explain when the prices are similar, does not amount to agreeing on the market or concerted action. This is why the decision of the NCA, in this part, cannot be tried and has to be repealed and brought into a procedure before the NCA again.

In regard to season 2000/2001, the claimant did not succeed in disputing the findings of the NCA on the concerted practices between the parties in the procedure, although the NCA has based its decision regarding the daily adult skiing card on the agreed discounts on the membership card of the Slovene Skiing Association. The Supreme Court has not followed the claim from the claimant, that the membership card of the Slovene Skiing Association represents a non-market product. The discount awarded to holders of the membership card of the Slovene Skiing Association is nonetheless still part of the price of the skiing card. This is why agreeing on a unified discount on skiing cards represents an agreement on the prices of skiing cards.

In regard to season 2001/2002, the claimant said that at the meeting on 10.9.2001 only a recommendation on the percentage of an increase in the price of skiing cards, in relation to the annual inflation rate, was passed, and not all parties in the procedure followed this recommendation. Final prices for the end users have been changed differently; the claimant was determined to change prices, even before the recommendation, and, finally, changing prices in accordance with the annual inflation rate is a normal market practice. The NCA found that the Minutes of the meeting concerned

established a maximum skiing card price, which is why all claims that contravene this finding cannot be relevant.

Similar facts have been established also for the season 2003/2004.

In regard to seasons 2008/2009 and 2009/2010, the NCA established that prices for adult skiing cards at all skiing centres were unified. It concluded that full uniformity of prices cannot be attributed to the independent adjustments by companies to the market, because ski centres vary according to the number of ski pistes, the age of their ski lifts, and the equipment at individual centres. The claimant disputed the stated findings by pointing to the fact that bringing prices for adult skiing cards to the same level is something quite normal, because the ski centres are in the same categories. The claimant pointed to the same state of affairs regarding ski centres in Italy, Austria and France. The Supreme Court did not follow the arguments of the claimant, as neither from the facts nor from the argumentation of the NCA does it follow that the dimensions of the centres would only be unified in the last two years. Different conditions at ski centres (number/age of ski lifts, number of ski slopes, etc.) should, in normal market conditions, reflect on the price. The state of affairs in neighbouring countries was not found to be relevant, as they were not the object of NCA investigation. The Supreme Court found the arguments of NCA for concerted practice in regard to seasons 2008-2010 convincing, as they were based on analyses of the profit margins for adult ski cards, and the profit margin was reduced from 56.99 % in the season 2002/2003, to 11.42% in the season 2009/2010, when there had also been a world recession.

Taking into account that the claimant agreed on prices from the year 2000 until the season 2003/2004, and his concerted practice in the seasons 2008/2009 and 2009/2010, the question in front of the Supreme Court arises as to whether the NCA is correct in its conclusion that what constitutes violation is not an agreement on a single meeting, but in the decision resulting in the described activity. The European case law demands that when there is no evidence to support the duration of the violation, there should be stated at least facts that are time-related closely enough, so that it can be reasonably concluded that the violation took place between relevant facts/evidence without being interrupted. In the opinion of the Supreme Court this condition has not been fulfilled. The NCA successfully proved violation for 4 consecutive seasons, between 2000-2004, and violation for the seasons 2008-2010. The period of five seasons in between is a period that is too long and that does not support the NCA's finding that the violation took place also in this period and thus without interruption.

#### **4) Application of 101 TFEU**

In regard to Art. 101 TFEU, the claimant said that in the case of the Slovene Supreme Court U5/2008, it follows that when judging whether there has been influence on the trade between member countries one has to present an analysis of the nature of an agreement and actions, the sorts of products and services that are the object of an agreement and situation, and the relevance of the undertakings involved. Taking into account that the daily price of ski cards for adults represents just a 6-16% share of all of the sold tickets and that a service of this kind is also registered in Italy, Austria and France, where the prices of daily skiing cards for adults are comparable and are at an almost similar price to those in Slovenia, this does not amount to the criteria of significance of Article 81 of the European treaty. In regard to 101 TFEU, the Supreme Court found that the NCA did not explain how the restricted practices of national undertakings prevent or make the entrance of foreign companies into the Slovene market more difficult.

#### **Conclusions**

I regard this case as relevant since it deals with a Judgment of the Supreme Court which annulled the previous ruling of the First Instance Court and it also represents a Judgment which made reference to the ECJ case law, namely, Case C-199/92 P Hüls AG v. European Commission, in regard to agreeing / presence at the meeting without publicly distancing itself from it, Case T-450/05 Peugeot in Peugeot Netherlands v European Commission, in regard to the “period of interrupted violation”)

#### 4.6. LUKA KOVAČ, SUPREME COURT (SLOVENIA)

##### I. Decision of the Competition Authority and Some Background Information of the Cases

1. At the beginning of 2012, the Slovenian Competition Authority, after two year of investigation, issued a decision that sixteen construction companies had violated Article 6 of the Prevention of Restriction of Competition Act and, since 1.5.2004, when Slovenia became a Member State of the EU, Article 81 of the Treaty establishing the European Community, by concluding market-sharing agreements, coordinating their practices, coordinating their bids in public procurement procedures for the construction of national motorways, sharing information on the prices they would offer in public procurement procedures for the construction of national motorways. The restrictive agreements and practices lasted for roughly ten years, from 2000 until 2010.

2. The relevant market in the case in question was the motorway construction market. The Motorway Company of the Republic of Slovenia (DARS is the Slovenian acronym) was, and still is, a state-owned, joint-stock company, established by law for the purpose of the construction of the motorway infrastructure in Slovenia, as envisaged by the national plan for the construction of motorways. A motorway construction project initiated by DARS starts with an open invitation to tender (a call for competition) according to the Slovenian Public Procurement Act. A company's tender is evaluated *in merito* if the applicant company meets various conditions that are specified by DARS in its call for competition, i.e., the applicant must have the required references in order to compete in the bid.

3. The case has become notorious, not only because motorway construction was financed by public funding, and therefore a cartel in this market directly affects public spending, but also due to facts revealed by the investigation, which showed a complete disregard of, indifference to, or ignorance of competition law. The malpractices were conducted by some, if not all, of the most prominent Slovenian construction companies. The investigation revealed, among other facts, that written agreements were concluded, which defined the market shares for each cartel member in the motorway construction market. The written agreements included provisions for mediation procedures in case of a dispute between cartel members, and provisions stating that maverick members of the cartel would be sued for compensation. The existence of a cartel was corroborated by considerable evidence of “bid rigging”.

4. The legislation in force at the relevant time provided that a decision of the Competition Authority can be challenged through an administrative dispute procedure. This legal remedy was basically an appeal on points of law. No new fact and evidence can be taken into consideration in this procedure, and the Supreme Court adjudicates only within the bounds of the claim of the plaintiff and on reasons deriving from the claim.

5. Some of the companies initiated the administrative dispute procedure at the Supreme Court. The Supreme Court issued a number of decisions on each of the disputes initiated in this matter in early 2014 (27. 1. 2014). A two-year delay was caused by the Supreme Court's reference to the Constitutional Court arguing that the Prevention of the Restriction of Competition Act is unconstitutional in as far as the rules of the Court procedure is concerned.

## **II. Selected Issues From Selected Cases**

6. In Case No. G 23/2012 the Supreme Court had no problem in upholding the decision on the violation of a national provision (Article 6 of the Prevention of Restriction of Competition Act), as opposed to the decision on the respective violation of Article 81 of the EC Treaty. It pointed out that Article 81 of EC is infringed only if trade between Member States may be affected. According to the Supreme Court, the Competition Authority had failed to elaborate properly on why the trade between Member States may have been affected. The Competition Authority did state, however, that, due to the cartel, companies of other Member States were obstructed in the relevant market “as they had to compete with the whole group of companies”. The Supreme Court ruled that it is not clear in what sense the competition with the whole group of companies would be obstructive to foreign companies. If the purpose of the cartel was to raise prices, it would be easier for foreign companies to compete in this market, offering lower, more realistic prices, the Supreme Court concluded. It also rejected the Competition Authority's further argument that it is clear from the case-law of the ECJ that an effect on trade between member states exists if a restrictive agreement applies to the whole territory of a Member State, as was the case in this matter. The Competition Authority referred to the Wouters Case (No. C-309/99). This case concerned the National Bar of the Netherlands' prohibition of multi-disciplinary partnerships between members of the Bar and accountants and demanded that legal and accounting services be separated. This prohibition applied to all the territory of the Netherlands, thus affecting foreign legal offices in the Netherlands. In this way, trade between Member States was affected. However, no effects for the potential foreign construction companies of the restrictive agreements or the practices under consideration in this case, were established, argued the Supreme Court, and therefore concluded that a cross border impact is not (yet) established.

7. In Case No. 17/20012, the plaintiff argued that they attended cartel meetings for the purpose of drafting the so-called joint tenders that can also be lodged in public procurement procedures, explaining that in some cases they could not lodge a tender by themselves because they lacked the references required. They referred to the fact that such joint tenders are legal, according to the Public Procurement Act, and to the fact that no public procurement procedure in which he was involved was annulled. The Supreme Court rejected the arguments, stating that for the purpose of establishing a violation of Article 6 of the Prevention of Restriction of Competition Act, non-annulment of a public

procurement procedure has no significance and, likewise, the legality of a joint tender is irrelevant, since the companies concluded a restrictive agreement prior to the submission of a joint tender.

8. In Case No. G 22/2012, the plaintiff argued that they could not participate in public procurement procedures, because they lacked the required references. The Supreme Court affirmed that it is necessary to determine whether a construction company had the references required to compete in a public procurement procedure, because the relevant market in this case is the motorway construction market, on which only companies with required references can compete. A company without references cannot therefore compete in a relevant market. An agreement between companies that are not in the relevant market cannot influence the competition in that relevant market. The Competition Authority nevertheless argued that even if a company cannot participate independently in public procurement procedures, its joint bidding with a member of a cartel that can participate is questionable from the perspective of competition law, arguing finally that “a repeated pattern of conduct of companies” (by which it was probably referring to a long term cooperation in similar circumstances) can justify a violation decision. The Supreme Court disagreed. It stated that although it is possible that a company which is not eligible to compete in a public procurement procedures violates competition rules, such conclusions must be well supported. Evidence gathered by the Competition Authority against the plaintiff in this case was, in the opinion of the Supreme Court, not presented in a way that would compromise the plaintiff. Furthermore, the Supreme Court agreed with the plaintiff that the Competition Authority ignored the objection, raised in the administrative procedure that they could not compete in public procurement procedures. Due to the violation of procedural provisions, the Supreme Court annulled the decision and returned the case to the Competition Authority.

9. In Case. No G 18/2012 the only direct evidence for the plaintiff’s involvement in a cartel were two written records (Minutes). The first record is about a meeting of companies involved in a cartel, which was also attended by the representative of the plaintiff. The theme of the discussion was “the possibility of harmonised solutions” in connection with future public procurement procedures for the construction of motorways. Public procurement in progress was also discussed. The Supreme Court, although acknowledging that a meeting of a cartel is recorded, was of the opinion that the record does not prove the representatives actually agreed to restrictive practices. The record does not state that some of the construction projects were to be given to the plaintiff, as the Competition Authority alleges. The attendance of a plaintiff’s representative at the meeting does not necessarily mean that they concluded a restrictive agreement. The second record was a handwritten record about another meeting attended by the plaintiff’s representative. Its content is the following (the meaning of the text is not entirely clear): “Call for applications: motorway section X - He wants 5 million, possibly somewhere else – he thinks about the seaside! From the motorway construction programme he wants this (names of construction projects) – He does not want war – he is for the agreement (said the plaintiff’s representative).” The Supreme Court was of the opinion that this record does not by itself

prove the plaintiff agreed not to compete for motorway section X in return for his involvement in a future market-sharing agreement. It is not clear who was at the meeting and who wrote the record. The plaintiff proposed to the Competition Authority that a hearing with the representative of the plaintiff be conducted to establish whether the meeting was actually conducted in a way the record shows, who was at the meeting and what its purpose was. The Competition Authority ignored the proposal. The plaintiff also pointed to the fact that they were not invited to any further meetings of the cartel, which indicates that they did not become a cartel member. The Supreme Court held that the Competition Authority ignored potentially relevant submissions from the plaintiff and by so doing it violated the rules of procedure. The decision was annulled and it was returned to the Competition Authority.

### **III. Conclusion**

10. Though the existence of a cartel of construction companies and of the restrictive practices of construction companies was self-evident, the legal reasoning and conclusions of the Competition Authority were obviously not waterproof in all respects, at least not for the Supreme Court. Was the Competition Authority carried away by the abundance of evidence, or are the standards of the Supreme Court too vigorous?

## **5. HORIZONTAL AGREEMENTS - DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS**

### **5.1. CHOLAKOVA VESELINA, ADMINISTRATIVE COURT (BULGARIA)**

#### ***NATIONAL ASSOCIATION OF BULGARIAN BUSINESS V. COMMISSION FOR THE COMPETITION PROTECTION***

**Decision No. 622 from 03.06.2010 of the Commission for Competition Protection**

**Decision No 11077 from 09.08.2011 from the Supreme Court, Case No. 9578/2010**

**Final Decision No. 16668 from 16.12.2011, Case No. 13667/2011**

1. The National Association of Bulgarian Business contested before the Supreme Administrative Court, First Instance Trial Chamber, Decision No: 622, from 03.06.2010 of the Commission for Competition Protection /CPC/, enacted on Case File No. COMMISSION FOR PROTECTION OF COMPETITION /CPC/-507/2009 г. with which has been found that by the Association of Banks in Bulgaria no violation under Art. 15 of the Competition Protection Law was committed, and that there is no reason for taking actions for violations committed under Art. 101 from the Treaty on the Functioning of the European Community.

2. The Court stated that CPC has collected the information necessary to investigate the existence of factual elements of alleged violation, including that which was seized from the premises, targeted association documents and computer records, with data containing information as well as detailed information from "ABB" and from each of the banks – which are its members: "DSK Bank", "Sibank" AD and others which were obtained, and that the information provided by the BULGARIAN NATIONAL BANK /BNB/, is relevant to the components on which assessment of the violation of competition law is based. It considered justified the conclusion of the CPC that the factual elements of violation under Art. 15, para. 1 from the Law on the Protection of Competition requires the combination of three elements: an association of undertakings, a decision of the association, and the decision to have an anti-competitive purpose or effect. The conclusion of CPC, that the first element is present, is considered justified - The Association is an association of undertakings within the meaning of the term by the additional provisions of § 1 from the Law on the Protection of Competition, but the second one, to have a decision of the association of undertakings, is not available and it is therefore considered pointless to discuss the existence of a third-anti-competitive purpose or the effect of the decision.

By the substantive issues for this disputed question on the presence or, respectively, the absence of an association decision, the Court, in accordance with the product-market of retail banking with two of the main submarkets: loans and deposits for individuals, each of which satisfy the

requirements of § 1, para. 15, b. "a" LAW ON THE PROTECTION OF COMPETITION and the geographical area as a national one. Once it became subject to detailed analysis, on 22.12.2009 two letters were forwarded by mail to "ABB" by the Executive Director of one of the banks stated hereinabove. A member of "ABB", conducted a discussion with the representatives of the Board of Bank "ABB", a meeting on 12.01.2009, discussing possible measures by BNB to regulate the interest rates on deposits. The written statement of this meeting, conducted by "ABB" from 12.01.2009 with the idea of creating a model for the regulation of interest rates on deposits, including the interest rate, defined as the benchmark, which must be crossed in order that the bank be able to submit a higher minimum compulsory reserve for such a deposit in BNB. Preliminary material sent on 21.01.2009 by the Secretary of the Association to experts from six banks with an invitation for a meeting, a written statement of a meeting held on 23.01.2009 at "ABB", and a Proposition from 29.01.2009 for regulation by BNB of the interest rates on deposits / including the part under item 3, a proposition to determine the parameters of the benchmark brought forth the decisive conclusion that, in this case, there is no law that is relevant to the competitive decision of the association which, as a subject which does not execute business activities in the relevant market, but that unites independent businesses and aims to protect their interests, to impose the need to follow a coordinated and concerted behaviour with the replacement of effective competition between them with collaboration. This conclusion was reached by pointing out that, firstly, -there is no coordination of the wills of at least two members of the "ABB" to assume that there is a decision and, secondly, - that all the proposals discussed are for regulatory measures, which "ABB" proposed to BNB, since the association is not a regulatory authority and cannot impose in any manner the following of any of the measures discussed, even if there is agreement by its members to comply with them. The last conclusion was brought out by argument on the aggregate analysis under Art. 2, para. 6 and Art. 41, para. 1 from the Law on the BNB. On this basis the decisive conclusion about the correctness of the conclusion of the CPC, that there is no factual element in the alleged concerted practices, was grounded, and thus they dismissed the appeal.

3. The National Association of Bulgarian Business contested the decision before the Supreme Court, the Administrative Court, the Final Instance Trial Chamber. The main appellant argument was that the conditions referred to in the written statement of the meeting of "ABB" of 12.01.2009, is ungrounded.

4. The Supreme Administrative Court, Final Instance Trial Chamber, found the decision of the First Instance Trial Chamber to be correct. The interpretation of the evidence that is relevant to this case's legal norms is the following.

5. Art. 15 of the BULGARIAN LAW ON THE PROTECTION OF COMPETITION introduces a general prohibition of all of the agreements between undertakings, the decisions by associations of enterprises, as well as the concerted practices of two or more undertakings, which have

purpose or effect prevention, restriction or distortion of competition within the relevant market. In order to implement the prohibition under Art. 15, para. 1 of the LAW ON THE PROTECTION OF COMPETITION, the cumulative presence of factual elements referred is required in that provision, which is related to the concerted practices of undertakings, but according to the legal definition in § 1, para. 14 of the Supplementary Provisions in the LAW ON THE PROTECTION OF COMPETITION, the concerted practice constitutes coordinated action or inaction of two or more undertakings. The constant law practice of the Supreme Administrative Court, that concerted practice is a form of coordination, in which the undertakings have achieved, without coordination among themselves, conscious replacement of the risks of competition with a practical cooperation between them, that the presence or absence of a coordinated practice may be judged by the objectified actions of the undertakings on the market,- whether they are adequate or not for the specific conjuncture, as well as that on concerted practices, duly by undertakings to perform anti-competitive actions, which may have had a real impact on the market behaviour of undertakings. The purpose of the LAW ON THE PROTECTION OF COMPETITION, formulated in Art. 1, para. 1, is to provide protection and conditions for the expansion of the competition and unrestricted initiative in economic activity. Moreover, considering the obligation of the CPC, consequent from Art. 3, para. 1 of Council Regulation No. 1/2003 to implement Art. 101 from the Treaty on the Functioning of the European Community in cases which affect trade between the member countries of the EU and the fact that the present case only concerns the establishment of the presence or, respectively, the absence of violations under Art. 15 of the LAW ON THE PROTECTION OF COMPETITION, associated with a decision of an association of undertakings, affecting only the national market, and not affecting the territory of other EU member countries, or any other fulfilment of cross-border economic activity. It was properly accepted that this case should be analysed solely in the context of the factual elements of the general prohibition under Art. 15, para. 1 of the LAW ON THE PROTECTION OF COMPETITION.

Referred to the foregoing, the allegation by the appellant, that the Court assumed was a violation of the substantive law is groundless. Evidence in the file grounded an unambiguous conclusion, that "ABB" and the banks too, and, its members have not committed coordinated actions or inactions by which they consciously realised practical anti-competitive cooperation in relation to the interest rates on deposits, the claim for such in terms of interest rates on loans is beyond the scope of the dispute. Contrary to the contention in the complaint, in the opposite view, a conclusion cannot be grounded by the evidence in the case, nor by the case explanations presented by "ABB", in which "it was claimed that there were similarities in the behaviour of the banks", which was objectively conditioned by the market juncture and the economic context of the market.

6. In discussing the main argument of the appellant, the Court found that such models for the regulation of interest rates on deposits, including the interest rate defined as a benchmark, represent a concerted practice within the meaning of the LAW ON THE PROTECTION OF COMPETITION,

because it does not have the disposition of a decision. Similar considerations are applied with regard to the claim of the existence of such in the Proposal, from 29.01.2009, for the regulation by BNB regarding interest rates on deposits, in which para.3 of the benchmark, accepts that a weighted average aggregated bank interest rate on the newly contracted deposits of households and non-financial undertakings published by the interest rate statistics of BNB, plus an allowable margin for deviation, since no coordination of wills of at least two members of “ABB” exists therein. Moreover, even if it is hypothetically assumed that they represent decisions when proposals for regulatory measures which “ABB” proposed to the competent authorities, BNB, in order to implement them, they still would not be in conjunction with the factual elements that are relevant to the case norm of Art.15 para 1 from the LAW ON THE PROTECTION OF COMPETITION. This conclusion is imposed by Art.1, 2 and 3 of Ordinance No. 21 on the minimum compulsory monetary reserves that banks hold at the BNB (this came into force from 01.04.1998 and was issued by BNB, pursuant to Art. 41, para. 1 from the Law on the BNB. The discussion on the introduction of a threshold for the interest rate (the benchmark), the crossing of which is to be the reason for higher required minimum monetary reserves, cannot justify the conclusion about an agreement reached between its members that is aimed at regulating the economic relations between them in respect of the realised activity, i.e., for an anti-competitive agreement, at the least because the minimum value of this threshold is not yet set, furthermore, that this proposal only reached this stage of discussion because of its non-approval by the Management Board of the Association in general, has not been sent to BNB.

7.On the grounds of this interpretation of the evidence relevant to this case and the decisive legal norms that the Court provided, the final conclusion was that the Association of Banks in Bulgaria, located in Sofia, has not committed an infringement of the prohibition under Art. 15 of the LAW ON THE PROTECTION OF COMPETITION

### **Comment**

Perhaps the most important aspects of this case are the following:

1. Whether such a decision as that of the Association of Banks in Bulgaria affects only the national market, and not the territory of other EU member countries, or other fulfilment of cross-border economic activity.
2. Whether Art. 101 from the Treaty on the Functioning of the European Community is applicable.
3. To assess whether such a decision could infringe the main rules of fair competition.

## **5.2. RODRIGUES CARLA, TRIBUNAL DO COMÉRCIO DE LISBOA (PORTUGAL)**

### **Information Concerning the Judgment**

- Judgment of the of the Lisbon Commercial Court of 29th April, 2011, – Case No. 938/10.7TYLSB
- The CJEU Case C-1/12 Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência

### **Introduction**

Tribunal de Relação de Lisboa (Lisbon Court of Appeal), asked the Court of Justice if EU competition law applies to professional associations.

The Court sought clarification regarding the interpretation of EU competition law (Articles 101 and 102 TFEU) and Articles 56 et seq. TFEU, namely, its application to professional associations, such as the Professional Association of Chartered Accountants (OTOC), and its rules on professional training.

### **Facts**

The Order of Chartered Accountants (Ordem dos Técnicos Oficiais de Contas; ‘the OTOC’) is a Portuguese professional association of which chartered accountants must be members. The OTOC represents their professional interests and oversees all aspects of the practice of their profession.

In Portugal, by virtue of a regulation adopted by the OTOC, chartered accountants are required to have obtained, over the course of the previous two years, an annual average of 35 credits for training provided or approved by the OTOC. The Training Credits Regulation, also adopted by the OTOC, provides for two types of training for that purpose: firstly, institutional training (of a maximum duration of 16 hours), which is intended to make the professionals aware of legislative initiatives and amendments and of questions of ethical and professional conduct; this training can be provided only by the OTOC and every chartered accountant must earn 12 institutional training credits per year. Secondly, professional training (of a minimum duration of more than 16 hours), consisting of study sessions on topics central to the profession. This training may be provided by the OTOC, but also by bodies registered with the OTOC. The decision to accept or reject the registration of training bodies and the decision to approve or reject training sessions proposed by those bodies are taken by the OTOC following payment of a fee.

By a decision of 7th May, 2010, the Portuguese Competition Authority held that the Training Credits Regulation had distorted competition in the market for compulsory training for chartered accountants throughout the national territory, in breach of EU law. A fine was, for that reason, imposed on the OTOC. That market, it was found, had been artificially segmented, a third of it being reserved for the OTOC (12 credits from a total of 35), and, in the other segment of that market, discriminatory conditions were imposed to the detriment of competitors to that professional association.

The OTOC sought the annulment of that decision before the Portuguese courts.

The judgment of 29th April, 2011, of the Lisbon Commercial Court (Court of First Instance) partially upheld the decision issued by the PCA in May, 2010, imposing a fine on the The Order of Chartered Accountants (Ordem dos Técnicos Oficiais de Contas; ‘the OTOC’) for anti-competitive practices involving a system of mandatory training for the exercise of the profession of chartered accountants.

The Lisbon Commercial Court confirmed that OTOC had breached Articles 4 of the Portuguese Competition Act and 101 TFEU, but concluded that there had been no infringement of Articles 6 of the Portuguese Competition Act and 102 TFEU. The Lisbon Commercial Court had thus lowered the fine imposed on OTOC to €90.000, but maintained the order requiring publication of an extract of the decision.

Tribunal de Relação de Lisboa (Lisbon Court of Appeal), sought for the Court of Justice clarification, of whether EU competition law applies to professional associations, and reported the main arguments in the referring order.

The OTOC submitted that the Portuguese Competition Authority had made its assessment on the basis of Article 81 EC (now Article 101 TFEU), without having taken into consideration Articles 16 EC and 86 EC (now 106 Article TFEU), which it should have done, since professional regulatory bodies provide services in the general economic interest.

Further, the OTOC submitted that the compulsory training regulation could not be considered to be an infringement of competition law: the compulsory training system fell outside the economic sphere; indeed, it formed a part of its exercise of public powers, which were vested in it by the state. As a result, the OTOC did not form an association of undertakings.

The absence of a profit motive prevented the OTOC from being equated with other establishments which supplied education. Their differing goals meant that it was incorrect to come to a finding that the OTOC was in the relevant market for the training of chartered accountants.

The Regulation relating to the obtaining of education points did not impede or distort competition because it used objective, clear and non-discriminatory criteria. That this Regulation granted the OTEC a particular position could not be contrary to competition law given that it was the regulatory body charged with regulating the profession. That the OTOC was solely competent to provide institutional education was equally not contrary to competition law given that it, as the regulatory professional body, was to ensure the quality of the services provided to the profession’s members. Moreover, the rule complied with the principle of proportionality that is inherent to Article 101 TFEU. The OTOC therefore relied on the unwritten exemption recognised in *Wouters*, arguing that proper account had to be taken of the context and objectives of rules relating to continuing professional education. The Court recognised the applicability of that principle at [93], and concluded that the measure was aimed at guaranteeing the quality of services offered by chartered accountants; that compulsory training did effectively contribute to the pursuit of that objective, but that these particular measures imposed restrictions beyond what was necessary [94-100]. The CJEU also dismissed,

shortly, the argument that the measures fell within the exemptions in Article 101(3), for the similar, but not identical, reason that the restrictions imposed were not essential.

### **Questions Referred**

Tribunal da Relação de Lisboa has asked:

1. Must an institution, such as the Ordem dos Técnicos Oficiais de Contas (OTOC), be regarded in its entirety as an association of undertakings for the purposes of applying the Community competition law rules (training market)? If so, is the present Article 101(2) TFEU to be interpreted as also rendering subject to those rules an entity which, like the OTOC, lays down binding rules for general application and does so in compliance with legal requirements concerning the mandatory training of chartered accountants with a view to providing citizens with a quality service that can be relied upon?
2. If an entity such as the OTOC is required by law to implement a mandatory training system for its members, may the present Article 101 TFEU be interpreted as allowing the possibility of challenging the setting up of a training system that was legally imposed by the OTOC and by the Regulation governing that system, in so far as the latter strictly confines itself to giving effect to the legal requirement? Or, on the contrary, does this matter fall outside the scope of Article 101, and must it be examined under the present Article 56 et seq. TFEU?
3. Having regard to the fact that the Wouters judgment [Case C-309/99 Wouters [2002] ECR I-1577], and similar judgments, were concerned with rules having an impact on the economic activity of the professional members of the professional association in question, do Articles 101 and 102 TFEU preclude rules on the training of chartered accountants which have no direct influence on their economic activity?
4. In the light of Union competition law (in the training market), may a professional association impose the requirement, for the practice of the profession, for particular training that only it provides?

### **Decision**

The Court of Justice ruled that such regulation integrates the notion of «decision taken by an association of undertakings» within the meaning of Article 101 of the Treaty, even though OTOC is compelled to enforce such a system. The fact that its legal rules do not directly affect the economic activity of its members is without prejudice to the application of the said provision, since the alleged infringement relates to a market in which it carries out an economic activity.

Asked whether Community Law allows for a professional association to require, for the exercise of the profession, specific training that it exclusively carries out, the Court responded negatively, stating that such behaviour represents a forbidden restriction, in so far as it eliminates competition in a substantial part of the market in favour of that professional association and establishes, on the other hand, discriminatory conditions in relation to its competitors.

In the Court's opinion, the market access conditions for the mandatory training of the chartered accountants imposed by the regulation may hold a significant importance in the companies' option to exercise their activities in Portugal, which could affect the equality of opportunities among the different economic operators.

In its decision, the Court took into consideration the case law, according to which, to be capable of affecting trade between Member States the relevant decision, agreement or practice shall allow the prediction of an influence - whether direct or indirect, actual or potential - with a sufficient degree of probability, on trade flows between Member States, creating a concern about the creation of barriers to the achievement of a single market.

The European Court of Justice also ruled that EU law precludes a professional association from imposing on its members a system of compulsory training that eliminates competition or lays down conditions that discriminate against competing providers of continuing education courses.

### **Comment**

The decision is interesting, as it is the first time that the ECJ has considered its own decision in *Wouters* in any detail.

In Case C-309/99 *Wouters*, the ECJ held that the decision of a professional body was outside Article 101 because of the legislative environment in which it was made (where the national legislation had laid down the principles and objectives that the professional body has to follow).

It was a somewhat surprising decision, as it appeared to create a new exclusion from Article 101 that did not appear in the Treaty in any expressed way.

To some, it suggested the emergence in European competition law of a "rule of reason". Professor Whish preferred to treat it as an example of a stand-alone doctrine of "regulatory ancillarity" that enabled the courts to overlook the incidentally anti-competitive effects of what are primarily regulatory measures. Whatever the explanation, it was clear that the ECJ had introduced a doctrine which cut across the express wording of Article 101(1) and allowed measures of certain types to benefit from an unwritten exemption. It was unclear whether that doctrine was a new beginning or an evolutionary dead-end.

The OTOC decision recognises the limits of the *Wouters* doctrine, concluding that where rules are laid down almost entirely at the discretion of the professional body (albeit that they were required by legislation to lay down such rules) the professional body cannot escape Article 101.

Interestingly though, it also quite clearly recognised and applied the *Wouters* 'exemption', suggesting that it is a principle that it is content to recognise.

### **5.3. PEDROSO ALBERTINA, TRIBUNAL DA RELAÇÃO DE COIMBRA (PORTUGAL)**

***Portuguese Competition Authority v. Professional Association of Chartered Accountants (OTOC)***  
**(Litigation No. 938/10.7TYLSB.L1-5)**

#### **Facts**

Article 1 of the Statute of the Ordem dos Técnicos Oficiais de Contas - Order of Chartered Accounts - (OTOC) reads as follows: "The Order of Chartered Accountants (...), is a public legal person organised to include a professional membership, which is responsible, on the basis of mandatory registration, for representing the professional interests of chartered accountants and overseeing all matters relating to the exercise of their functions."

Article 3, No. 1, al. b) of the Training Credits Regulation, Diário da República, 2nd series, No. 133, Series II, of 12th July, 2007, provides that OTOC promotes institutional training, consisting of events organised by OTOC for its members, of a maximum duration of 16 hours, aiming in particular to make the professionals aware of legislative initiatives and amendments and of questions of ethical and professional conduct.

Under Article 5 of that Regulation, institutional training may be provided only by OTOC.

According to Article 15 (1 a) b)) of the Training Credits Regulation, chartered accountants taking part in institutional or professional training, are awarded 1.5 credits per hour of training, and all chartered accountants are required to earn 12 institutional training credits per year.

#### **Object**

The present case concerns the interpretation of Article 101 No. 1 of the Treaty on the Functioning of the European Union (TFEU), concerning, in particular, the compatibility with Article 101 TFEU of Training Credits Regulation, in order to know whether, in the light of EU competition law, a professional association may impose the requirement, for the practice of the profession, of training that only it provides.

#### **The Procedure**

1. By a decision of May, 2010, the Portuguese Competition Authority imposed a fine on the OTOC, as it approved and adopted a regulation for the mandatory remunerated continued training of chartered accountants, the Training Credits Regulation, by virtue of which the market for the compulsory training of chartered accountants was artificially segmented, a third of it being reserved to the OTOC

itself, and setting out standards and criteria for the approval of other training bodies for the purposes of providing training. The decision on the approval of training sessions is to be taken by the OTOC.

2. The OTOC sought the annulment of that decision before the Lisbon Commercial Court, which upheld the Competition Authority decision, imposed a fine on the OTOC, and declared null and void the provisions of the Training Credits Regulation that infringe competition rules.

3. The OTOC appealed the decision of the Lisbon Commercial Court to the Lisbon Court of Appeal and requested a preliminary ruling concerning the interpretation of articles 56 TFEU, 101 TFEU, 102 TFEU and 106 TFEU.

4. The Lisbon Court of Appeal, by a decision of 15th November, 2011, requested a preliminary ruling, referring the following questions to the Court of Justice of the European Union:

1st. Should an institution such as the OTOC be regarded in its entirety as an association of undertakings for the purposes of applying the Community competition law rules (training market)? If so, is Article 101(2) TFEU to be interpreted as also rendering subject to those rules an entity which, like the OTOC, lays down binding rules for general application, and does so in compliance with legal requirements concerning the compulsory training of chartered accountants, with a view to providing citizens with a quality service that can be relied upon?

2nd. If an entity such as the OTOC is required by law to implement a system of compulsory training for its members, may Article 101 TFEU be interpreted as allowing the possibility of challenging the setting up of a training system that is legally imposed by the OTOC and by the regulation governing that system, insofar as the latter strictly confines itself to giving effect to the legal requirement? Or, on the contrary, does this matter fall outside the scope of Article 101 TFEU and must it be examined under Article 56 TFEU et seq.?

3rd. Having regard to the fact that the Wouters judgment, and similar judgments, were concerned with rules having an impact on the economic activity of the professional members of the professional association in question, do Articles 101 TFEU and 102 TFEU preclude the rules on the training of chartered accountants which have no direct influence on their economic activity?

4th. In the light of European Union competition law (in the training market), may a professional association impose the requirement for the practice of the profession, for particular training that only it provides?

5. The Court of Justice of the European Union (ECJ), on 28th February, 2013, answering two of the questions submitted by The Lisbon Court of Appeal, clearly stated that the Training Credits Regulation adopted by the OTOC should be regarded as a decision of an association of undertakings within the meaning of Article 101 TFEU, and when it adopts rules such as the Training Credits Regulation, a professional association such as the OTOC does not exercise powers which are typically those of a public authority, since the Training Credits Regulation was adopted by the OTOC without any input from the State, thus imposing discriminatory conditions.

According to the ECJ judgment, a regulation such as the one adopted by the OTOC constitutes a restriction on competition that is prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU).

6. The Lisbon Court of Appeal, in a recent Judgment of 7th January, 2014, bound by the interpretation given, decided that by adopting the regulation for remunerated mandatory continued training for chartered accountants, the OTOC violates the Portuguese and European competition law, upholding the Lisbon Commercial Court Judgment, which confirmed the Competition Authority's decision.

### **Comment**

In my opinion, the relevance of this case is conveyed through two essential aspects.

On one hand, decisions taken by the Portuguese Competition Authority and by the Lisbon Commercial Court are due to an interpretation of the proceeding's facts, in accordance with the interpretation of the EJC, regarding the extension of Article 101 TFEU, as far as professional associations are concerned, when their acts cannot be considered outside of the sphere of economic activity, clearly distinguishing their activity that belongs to the scope of public interest from their activities that fall within the scope of economic activity

On the other hand, the fulfilment of Article 267(3) TFEU by the Lisbon Court of Appeal, which considered that the questions raised by the OTOC fell outside the limits imposed by Portuguese law, and which, on the contrary, imposed the so-called preliminary ruling, and stayed the proceedings in order to allow the EJC to itself pronounce on the referred questions.

#### **5.4. RUSKAN VESLAVA, SUPREME ADMINISTRATIVE COURT (LITHUANIA)**

##### **Case No A-54/2014 of the Supreme Administrative Court of Lithuania**

**UAB ‘Amber bay’, UAB ‘Afalita’ and twenty-five other companies, as well as the Lithuanian Shipbrokers and Agents Association *versus* the Competition Council of the Republic of Lithuania**

##### **On the Ruling Which Implies Fines for an Agreement Restricting Competition on Shipping Agency Costs**

The Competition Council of the Republic of Lithuania commenced an investigation in 2010 and raised a question on whether economic operators providing shipping agency and other navigation services might have agreed on minimum agency tariffs, or have made other agreements, whilst participating in the Lithuanian Shipbrokers and Agents Association’s (hereinafter referred to as ‘the LSBAA’, or ‘the Association’) activities; and questioned whether this did not violate the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 of the Treaty on the Functioning of the European Union (hereinafter referred to as ‘TFEU’).

Article 5 paragraph 1(1) of the Law on Competition of the Republic of Lithuania provides 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 the conclusion thereof, including agreements to directly or indirectly set (fix) the prices of certain goods or other conditions of purchase or sale. Article 5(2) of the Law on Competition provides that the agreements concluded between competitors, as listed in paragraph 1(1) of this Article, shall, in all cases, be considered as restricting competition.

‘Shipping agency’ is the provision of shipping services under a contract with the ship-owner, charterer or operator of a ship, including the representation of their interests in seaports, public authorities, as well as law enforcement authorities and other services.

Two associations were established in 1995, Klaipėda Shipping and Freight Forwarding Association of Undertakings (KSFFAU) and LSBAA; they merged into one in 1999 and took the name LSBAA (the Association). In 2011, the Association unified 36 economic operators which provide shipping agency services in Klaipėda State Seaport, for example, freight forwarding, shipping agency, bunkering,

towage, ship supply, etc. Economic operators providing shipping agency services, whilst participating in associations' activities, negotiated the price agreements for shipping agency services.

**Ruling of the Competition Council of 8th December, 2011.**

By the ruling of 8th December, 2011, the Competition Council stated that a horizontal price fixing agreement had been concluded and acknowledged that the Association, together with 34 association members, having agreed to establish (fix) the minimum prices for shipping agency services, violated Article 5 paragraph 1(1) of the Law on Competition and the requirements of Article 101(1) TFEU. Pecuniary sanctions (from 232 EUR to 485,713 EUR) were imposed on the Association and its members.

During the investigation carried out by the Competition Council, it was established that 'recommended' minimum shipping agency tariffs, which later were considered in the meetings of the Association that followed, the sittings of the Board and Disciplinary Committee, had been introduced at the meeting of KSFFAU and LSBAA on June 18th, 1998.

The brochure for shipping agency tariffs, having been prepared by the contractors (KSFFAU and LSBAA) in 1998, prescribes that both associations adopted the agency tariffs' provisions to help to retain high standards for agency services, agents' faithfulness and the commitment to protect all Klaipėda Seaport's clients' interests, and the minimum tariffs for shipping agency services, as well as the principles thereto, when basic tariffs are to be applied, and when they may be reduced, for example, *'shipping liners are recommended to apply 75% of basic tariff, cruise ships, 50% of basic tariff'*.

The preparation of the recommended shipping agency tariffs was announced in the press. Moreover, the tariffs were announced on the Association's website. The Association exercised a supervisory framework for compliance with such minimum tariffs which might have become, and indeed became, a reason for the application of corresponding sanctions on economic operators for non-compliance of fixed tariffs. Disciplinary proceedings and grounds for initiating the procedure which aimed to avoid incorrect actions in respect of other members of the Association were embedded in the Association's Code of Conduct. Breach of the provisions of the Code of Conduct was considered in the sittings of the Board and Disciplinary Committee; sanctions were applied for the non-conformity of tariffs. Some members of the Association voluntarily complied with the recommended minimum shipping agency tariffs between 2000 and 2010.

In the ruling of the Competition Council, the market is defined as the provision of shipping agency services in Klaipėda State Seaport, and all economic operators who meet in the market, or who might face competition within the internal market while providing shipping agency services, are considered market participants. Pursuant to the European Commission's communication 'Explanations of the concept "effect on trade" in Article 101 and Article 102, No 2004/C 101/07', an effect on trade between Member States was ascertained since Klaipėda State Seaport is the only international commercial seaport of Lithuania wherein purchasers, Lithuanian and foreign ships, carry passengers or transport goods in international travel. It is acknowledged that shipping agency services are very important to Lithuanian and other Member States' economic operators who provide international maritime transport services. The effect on trade is of high significance because the Association's members serve 40% of all ships arriving at the Klaipėda Seaport. A reference was made to the European Council's decision in the *Fenex* case, wherein it is stated that services provided by the economic operators, which unify the Netherlands Shippers' Association, are provided in the Netherlands and in the territory of other Member States; therefore, the aforementioned condition is sufficient to find a possible effect on trade in Member States.

In fixing the amounts for the fines, the fact was considered that the violation had continued for more than thirteen years. It is stated that the duration of violation by every economic operator differs, subject to the moment of accession to this prohibited agreement by every economic operator.

**Judgment of the Vilnius Regional Administrative Court of 3rd May, 2013.**

By the ruling of the Vilnius Regional Administrative Court, the Association's and the 29 association members' complaints are upheld in part; the violation is acknowledged to have been proven; fines imposed on the companies are reduced.

In ascertaining the range of operators who had participated in the agreement, the rule which is laid down in the case law of the Court of Justice of the European Union (Judgment of CJEU in Case No.C-199/92 P of *Hüls AG v Commission of the European Communities (Polypropylene)*; Judgment of CJEU in Case No.C-74/04 of *European Commission v Volkswagen*, pages 36-37; Judgment of CJEU in Case No.107/82 of *AEG-Telefunken v Commission of the European Communities*) was applied, stating that any communication between economic operators, the purpose or result whereof is to influence concrete behaviour or to reveal delicate information and/or intentions related to the actions planned in market, including a unilateral act, if it expresses the common will of two parties at least, as well as the indirect manifestation of will with silent approval, should be qualified as an agreement.

The Judgment of the Court of Justice of the European Union of December 10th, 1991, in Case No.C-179/90 of *Merci convenzionali porto di Genova* states the importance of airports' and seaports' facilities whilst providing international services, as well as influencing trade among the Member States, has been considered in the finding of the violation of Article 101 TFEU.

The application of Article 101 TFEU to agreements, decisions and concerted practices does not depend on their impact on the market or on results because the mere fact that the purpose of agreement, decision and concerted practices, as well as the intentions of Member States, is the distortion and restriction of competition, is a sufficient application of competition rules (It is stated pursuant to the Judgment of CJEU of January 30th, 1985, in Case No.123/83 of *Bureau national interprofessionnel du cognac v Guy Clair*; Judgment of CJEU of July 11th, 1989, in Case No.246/86 of *SC Belasco and others v Commission of the European Communities*).

Having considered the duration of the involvement in the infringements, the fact that the shipping agency tariffs applied were, in many cases, lower than those established by the prohibited agreement, the level of participation while adopting the prohibited agreement, the actions of public authorities, the part of the shipping agency in the activity of the concrete company, the principle of reasonability, criteria of proportionality and equal treatment, the Vilnius Regional Administrative Court reduced the fines on some of the companies.

**Order of the Supreme Administrative Court of Lithuania of 7th April, 2014. Case No.A-54/2014**

On April 7th, 2014, the Supreme Administrative Court of Lithuania amended the ruling of the Vilnius Regional Administrative Court, namely, it reduced the fines imposed on some of the companies. The biggest fine was reduced to EUR 295,565 (the Competition Council had imposed a fine of EUR 539,681, The Vilnius Regional Administrative Court imposed a fine of EUR 485,713). Fines were reduced under new rules of imposition of fines at the time of the proceedings.

Under the previous legislation, the amounts of fines were established by following the rule that a fine of up to 10% of the gross annual income in the preceding business year shall be imposed on economic operators. New provisions prescribe a rule that the basic amount of the fine shall be assessed by taking into consideration the value of the goods sold by the economic entities, which are directly and indirectly related to the infringement and duration of the violation.

The Supreme Administrative Court of Lithuania indicated that the breach of Article 5 paragraph 1(1), agreement on prices, is, in every case, considered as restricting competition, its negative effect is

assumed, such agreements restrict competition by object; the Competition Council is not obliged to separately prove negative effects on competition and the consequences thereof.

The Supreme Administrative Court of Lithuania noted that the Competition Council is not obliged to prove that illegitimate aims were intended by this agreement, or that negative consequences on competition might have arisen, or have arisen, because of this agreement. The Supreme Administrative Court of Lithuania referred to the case-law of the European Court of Justice (ECJ), whereby it is acknowledged that in cases when agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers, such agreements are presumed to have a negative effect on the market. It is therefore not necessary to examine their actual effects on competition and the market (Judgment of Case No.41/69 *Chemiefarma v Commission of the European Communities*, 15th July, 1970, Judgment of Case No.T-374/94 *European Night Services Ltd (ENS) and others v Commission of the European Communities*, 15th September, 1998, Judgment of Case No.C-272/09 *P KME Germany AG and other v Commission of the European Communities*, points 64-65.)

The Supreme Administrative Court of Lithuania refuted the companies' arguments that the tariffs applied in practice differed from the established tariffs. The Supreme Administrative Court of Lithuania noted sufficient fact of the prohibited agreement, and there is no need for the implementation (realisation) of an agreement. As the Supreme Administrative Court of Lithuania indicated, according to the case-law of the European Commission, legal doctrine provides that even an individual's behaviour, or the application of prices opposite to those which were agreed, also does not prove the subject's absence in an agreement (Van Bael & Bellis, *Competition Law of the European Community* (Kluwer Law International, 2010), p. 352).

Considering the importance of the Klaipėda State Seaport's activities, the Supreme Administrative Court of Lithuania acknowledged that agency services in the Klaipėda State Seaport shall be equated to activities exercised in the whole Republic of Lithuania. In accordance with the case-law of the European Court of Justice, anti-competitive agreements, which cover the whole area of the Member State, are usually considered as restricting competition among all Member States, because they may have the effect of reinforcing the partitioning of markets on a national basis (Judgment of CJEU of 17th October, 1972, in Case No.-8/72, *Vereeniging van Cementhandelaren v the Commission*, p.29)

The violation of Article 101(1) TFEU was therefore well-founded.

## **5.5. VÎLVOI DENISA, TRIBUNAL OF VÂLCEA (ROMANIA)**

### **Information Concerning the Judgment:**

- Name of the court: The High Court
- Name of the parties / case reference number: S.C. „T.A.G.” S.R.L. v. Competition Council
- Case number: 6975/2/2009
- Date of the Judgment: 29th June, 2011.

### **Preamble:**

This case concerns the annulment of a Competition Authority decision which found violation of the provisions of Article 5, paragraph 1, letter a, of Law 21/1996- in the existence of several meetings of representatives of several companies in the market for driving lessons in the which were taken decisions on the amount of tariff, meaning an increase and fixing the amount at 800 lei.

### **National Law:**

#### **ART. 5**

„ (1) Any express or tacit agreements between economic units or associations of economic units, any decisions made by associations of economic units and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition in the Romanian market, or only on one part of it, shall be prohibited, especially those aimed at:

a) the concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, mark-ups as well as of any other terms of trading;”

### **The Facts**

The Competition Council (an autonomous body that manages and implements the Competition Law No.21/1996, which aims to protect, maintain and enhance competition and a normal competitive environment to promote consumer’s interests) penalised 32 economic agents operating in the schooling services market, specificall the market for training people to obtain car driving license category B in Bucharest for violation of Art. 5 para. (1). a) of the Act, by the signing and implementation of an anti-competitive agreement.

The analysis performed during an investigation by the Competition Council, which found that on 31.01.2008, 32 economic agents operating in the market for auto schooling for driving license category B in Bucharest, including a representative of the applicant without power of attorney for such participation, achieved a horizontal anti-competitive agreement that targeted two purposes: -

Increasing the self service charge for schooling for category B as of 01/02/2008, and the setting of a minimum of 800 lei for this category.

The National Law is harmonised with Community law on competition, the notion of "agreement" means any agreement recorded in writing or orally, whether public or secret, however described, between one or more economic operators. The prohibition provided for in Art.5(1) operates on any agreement, without requiring that the expression of the will of the parties to a contract is valid or obligatory under National Law. "Horizontal" agreements are arrangements between economic agents.

The law prohibits, in Art. 5 para. (1), A) any agreement, express or implied, between operators which have as their object, or effect the restriction, prevention or distortion of competition in the Romanian market or a part thereof, regarding concerted fixing, directly or indirectly, of the sale or purchase prices, tariffs, discounts, markups, and any other trading conditions.

Common understanding on 31.01.2008 was that there was a premeditated nature, in the sense that, from June, 2007–January, 2008, some of the operators active in the market had met several times at the headquarters of the Federation of Private Employers' Driving Schools in Romania (FPSSR), and repeatedly approached the theme of a uniform tariff policy, which demonstrates their intention to coordinate the behaviour of the economic agents in the market for auto schooling in competition through tariff.

The understanding concerned falls within the prohibition laid down in Art. 5 para. (1) a) of the law. In the case of *European Night Services v Commission*, the Court of First Instance ruled that when an agreement contains obvious restrictions on competition, the Commission is not obliged to consider the effect that horizontal agreements have had on the market. At the Community level, it was decided that when it is clear from the terms of that decision that it serves to prevent distortion or distortion of competition, it is necessary to examine the effects.

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

SC "T.A.G." LLC contested the decision at the First Instance of the Court of Appeal, claiming that it violated the provisions of Article 5, paragraph 1, letter a) of Law no.21/1996 because it was not part of the anti-competitive agreement aimed at increasing, after 02/01/2008, the tariffs for auto enrolment category B. Moreover, their representative had no legal mandate to participate.

The Court of Appeal upheld the action and ordered the annulment of the decision as regards the applicant.

To that judgment, the Court held that the person mentioned in the Minutes of 31.01.2008 as being present at the anti-competitive agreement had no authority to represent the company, the records of the same document cannot be clear evidence of the applicant's participation in the alleged agreement.

The Court found that the tariff increase to 800 lei from 01.02.2008 is not evidence of the applicant's participation in the anti-competitive agreement, establishing a surcharge that resulted from economic reasons, given that auto schooling is insignificant in the company's business.

The Competition Council appealed against this judgment, stating that it was unlawful and ungrounded. It was argued that the judgment does not establish that it would be an economic explanation that justified the increase in the tariff by the applicant, even if dated 01.02.2008, to the same amount, 800 lei. In this regard, the defendant pointed out that the defense must be rejected, since the rate increased by 36.2% (from 510-800 USD), while gasoline prices had increased at the same time by only 6.3% (from 3.42 / l to 3.65 euros / l). However, in these circumstances, the increase is presumed to be the result of an understanding between the representatives of driving schools, which, according to the defendant, constitutes a distortion of competition.

It was also shown that the absence of the mandate of the company is not relevant for an anti-competitive understanding, since the applicant has aligned himself with the established practice.

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

The High Court of Cassation and Justice upheld and modified the sentence in that it rejected the applicant's complaint.

The Court held that the evidence was wrongly appreciated by the First Instance court, since the proof of the case showed that the applicant took part in the anti-competitive agreement, the defendant rightly noting the infringement of the provisions of Article 5, paragraph 1, letter a) of Law No.21/1996.

According to these provisions, any express or tacit agreements between undertakings, any decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, especially those pursuing concerted fixing, directly or indirectly, of the sale or purchase prices, tariffs, discounts, markups, and any other trading conditions, are prohibited.

The evidence thus showed that during the period 2007-2008 several meetings were held between representatives of several companies with auto schooling activities, in which decisions were taken on the amount of charge practiced, which was increased and an amount of 800 lei was fixed.

The measure of fixing a premium rate, starting from 02/01/2008, that is recorded in the Minutes of 31.08.2008, was arranged at a meeting of representatives of 32 companies, including that of the applicant, and presents no relevance to the fact that there is no quality in it, nor is there the existence of a power of attorney.

Even in the absence of formal powers for the society, simply informing the employer of the society about the understanding established, followed by the implementation of the joint decision, and is itself anti-competitive content in the context of the Act that is sanctioned by the contested decision.

In this regard, address 129 of 10.06.2008, that the applicant informed the defendant increased tariff with effect from 02.01.2008, should be noted.

On the other hand, the evidence does not support its defence on the economic justification for the tariff increase, while the increase in the amount of 800 lei happened suddenly, without any new economic factors that would have objectively influenced this decision, having taken place before 02.01.2008.

The Court's decision, cancelling No.35/2009 concerning the applicant, appears to be incorrect, resulting in evidence that the company, relying on information available following the meeting of operators on 31.08.2008, engaged in the practice of that single charge, that it was anti-competitive and therefore was legally penalised.

### **Conclusions**

The decision of the High Court of Cassation and Justice is wise, being certain of the applicant's participation in that agreement, and the lack of a representative's mandate is irrelevant, and as long as the decision is implemented.

## 6. VERTICAL AGREEMENTS

### 6.1. CERQUEIRA MAGDA, TRIBUNAL JUDICIAL DE BARCELOS (PORTUGAL)

#### The Facts

The defendant is a major milk and milk products' production company in Portugal, which was fined €341,098.00 by the National Competition Authority for the practice of violating Articles 4, 43, No.1, a) and 44 of Law 18/2003 of 11-6 (the Portuguese Competition Law) for fixing resale prices.

The defendant appealed to the Competition Court on the basis that there is no difference in the facts as to the distribution contract with 55 distributors. The trial ended with the decision to dismiss the appeal.

The defendant then appealed to the Second Instance Court, on the basis that there was no intent, and as the infraction was considered a permanent one due to its object, it would be necessary to prove permanent intent (*existência continuada de dolo*), which is considered necessary in Portuguese jurisprudence (Acórdão da Relação de Lisboa de 28-3-2001, Processo No. 00112623; Acórdão do Supremo Tribunal de Justiça de 21-9-1994, Proc. No. 461823) which is contrary to the fact that, after 2005, the parties moved away from the contract, understanding that distributors were free to determine their resale prices (*preços de revenda*).

The jurisprudence is very clear in establishing the fact that, in permanent infractions, the agent is acting with the intent that is initially put into the formulation and that is never ever abandoned (*reiteração do animus*) (as in Acórdão da Relação de Lisboa de 28-3-2001, Proc No. 00112623) in terms of establishing a unity of intent. Contracts were not implemented after 2005.

The intentional action, that is, the infraction of fixing resale prices in commercial relations with distributors would then be confined to the years 2003 and 2004.

The facts that occurred during this period are already limited (*prescreveram*), as in Article 48, No.1, al b) *Lei da Concorrência*.

The fact that the contracts were never terminated (*revogados*) could allow the prices in them to act as recommended or reference prices and as the Guidelines of the European Commission, such recommended or reference prices do not constitute any infraction or behaviour divergent from the law (paragraphs 226 and 228 of "Orientações da Comissão Europeia relativas às restrições verticais", JO C-130 de 19-5-2010).

Lactogal even opened its net of distributors to third parties for reasons of efficiency.

Prices used in the market today do not conform with the distribution contracts.

Lactogal, in a subsidiary request, asked for the fine to be dispensed with or proportionally reduced, in the light of the legal criteria for the determination of fines and the concrete case circumstances.

The Prosecutor reached the following conclusions, stating that:

- Article 4, No.1 of the national Competition Law (Lei 18/2003 de 11-6) has its source in Article 101, No.1 of the Treaty on the Functioning of the European Union forbidding agreements between enterprises with intention or effect in restraining or distorting competition in the Common Market.
- Regardless of the effects that may or may not have been produced, there is an infraction by object because the contracts are able to restrain competition.
- The enterprise knew price fixing to be illegal, but decided to maintain the clauses till 2010.
- In Art. 48, No.1, al b) of Law 18/2003, the time for a limitation is five years, and this is a permanent infraction. So this time period has not yet passed.

The National Competition Authority reached its conclusions.

The questions that the Court of Second Instance underlined as having to be decided were:

- The end of the infraction by 2005 for lack of intent (*dolo*);
- Limitation (*prescrição*) of the infraction after 2005;
- Reduction of the amount of the fee;

In short, the Lactogal economic group exercises its activities at a national and international level in the milk products industry, using the milk to be transformed, produced and sold to the final consumer and to the wholesaler.

Lactogal has its own network of sellers in defined geographical areas, as well as selling to large distribution chains and wholesalers.

In the distribution contracts that Lactogal made with the distributors so that they could sell to their own clients, there are clauses fixing the mandatory minimum prices (previously created by Lactogal and enforced with distributors) as well as clauses fixing the trade margins, using the same kind of distribution contract with 55 distributors between 2003 and 2010, non-stop.

The defendant claims that it changed the infraction behaviour after 2005, and thus there is a lack of intent after 2004 and limitation on the offence from 2003 to 2004, because, as the procedure started on 10-9-2010, there was limitation of the infraction (*prescrição*), that is, it can no longer be punished because, between 2004 and 2010 more than five years have passed.

The infraction of Article 4 of the Portuguese Competition Law 18/2003 de 11-6 occurred. The First Instance Court ruling clearly distinguishes between the execution effects and the restrictive effects on Competition. The infraction is an infraction by object, and it consists of the violation of competition law by the clauses of certain contracts which is in itself restrictive of competition, independently of the concrete production of effects, since the legislator presumed they existed.

The infraction thus remains during the time in which the contracts are executed and not terminated. The infraction is, then, permanent.

As to the subjective type of the infraction, what matters is the commercial relationship concretely established with the distributors. There is a need for willful misconduct, which means the defendant has to have the knowledge and the will to practice the restriction by object, that is, resale price fixing with the Lactogal distributors.

The defendant states that the non-implementation of these clauses since 2005 has determined the absence of intent in its acting. However, this thesis cannot be accepted, because the issue is not the effect of the agreements, but their object, and its object subsisted in 2010, in the obvious interest of the defendant.

The conduct of Lactogal is not covered by Regulation 330/2010, as we can see by the Guidelines. There is no margin left to the distributors for them to determine the resale price freely, thus being able to lower it at their will and according to the market. Fixing the margins of profit prohibits discounts, which hampers the distributors from competing among themselves, eliminating competition by product price. This hinders the final consumers by not allowing them to benefit from goods at a lower price.

The restriction of the liberty to set the price necessarily produces a distortion in the market.

The Prosecutor quite clearly explains the character of the intent in types of mere activity and the danger foreseen in Article 4 of Law 18/2003, in the light of the orientations of national case law and European Community case law. There is no need to prove the intent to cause harm to competition as an element of the concept “object” (Acórdão da Relação de Lisboa de 7-11-2007) in a procedure for infraction of the rules of competition law.

To understand the origin of Article 4 of Law 18/2003, it is essential to interpret it according to the practice of the EU’s institutions and the case law of the European Union Court of Justice (TJUE), as well as to observe the principle of the uniform application of EU competition law that is defined in Regulation No.1/2003.

Richard Whish, in *Competition Law*, Oxford University Press, Oxford, 6<sup>th</sup> edition, 2009, p 116, presents a definition of anti-competitive object that is based on the developments of the EU Court of Justice Case Law translated thus:

“There are types of agreements whose anti-competitive aspects can be determined simply by its object; the expression “object” in this context does not mean the intention of the parties when they have concluded the agreement, but the objective sense and orientation of the agreement considered in the economic context where it should be applied”.

In the same understanding, there are several Judgments of the EUCJ, like *Compagnie Royale Asturienne des mines SA* proc. C-29/83, *Sandoz Prodotti Farmaceutici*, Proc. No. 277/87, *Tréfilunion*, Proc. No. T-148/89, & *General Motors*, Proc. C-551/03.

Presuming that the object restraining competition would only be punishable if there were intent, would be to limit the concept of object to the intention of harming competition. As the notion of object cannot be reduced to the harming or restraining of competition, the thesis of the defendant cannot be accepted.

Furthermore, the legislator clearly states, in Article 43, No.6 of Law 18/2003, that infractions are punishable also if committed with negligence (fault), without establishing a distinction between infractions by object or by effect.

Fixing prices is an act that is objectively prone to stop, misrepresent, or restrict competition. Directly imposing fixed or minimum prices for resale is one of the examples of a serious restriction of competition, by direct object, appointed by the European Commission in the *Orientations to Vertical Restrictions*.

Moreover, there is no reason to believe that there is lack of intent from the moment when the defendant stopped controlling the prices of resale by the distributors, because there was no termination of the distribution contracts where that clause existed. *Lactogal* thus maintained the right to enforce such clauses on the distributors, so this intent subsisted, whether *Lactogal* chose to enforce the clauses or not.

In the Judgment *Sandoz Prodotti Farmaceutici SPA*, the EUCJ declared: “The fact that the provider has not taken measures to make their clients respect a clause of a contract that aims at restricting competition is not enough to suppress that clause from the prohibition of Article 101, No.1”.

On the third point: the suspension or reduction of the fine, it should be considered that the Competition Authority has not applied the suspension of the fine which is foreseen in Law 39/2006 of 25-8. The Courts of the First and Second Instance found it to be well founded, as one of the prerequisites of Article

4, No.1, al c) of that law demanded that the defendant had ended its participation in the infraction by the moment it gave the Competition Authority information and elements of proof.

Article 43, No.1, al a) of the Portuguese Competition Law states that infractions to Article 4, No.1 of the same law are punishable by a fine amounting to no more than 10% of the defendant's volume of business in the last year. Lactogal's volume of business in 2010 was €682,195,712.00, 10% of that corresponds to €68,219,571.2.

According to Article 44 of the Portuguese Competition Law, the fines are fixed according to the severity of the infraction to the maintenance of competition, the advantages from which the enterprise has benefitted due to the infraction, the occasional nature or the continuity of the infraction, the degree of participation, collaboration with the Competition Authority until the procedure, the behaviour of the offender in eliminating the forbidden practices and in repairing the prejudices caused to Competition.

In our case, the behaviour is very serious because of the acts in themselves- the fixing of prices in contracts-, the number of contracts involved, the large range of the defendant's activities involving several well-known brands in the national market. Although only the distribution of some brands in the HORECA distribution channel (hotels, restaurants and cafes) is at stake, and the volume of those sales is far less than the global volume of sales of the company, which must be considered, the infraction is still very serious. The type of food involved in the fixing of prices should also be considered, especially when it is as basic and fundamental as milk.

The fixing of prices has the effect of diminishing competition within the brand and avoids pressure on the defendant to lower its prices.

In favour of the defendant, one must consider that since 2005 the distributors have not abided by the fixed prices clause and the defendant does not control such behaviour, and it was the defendant who gave the Competition Authority the contracts and confessed that they were in force, confessing the facts until 2005.

However, the Competition Authority applied a fine, whose amount does not seem unreasonable, as €341,098 corresponds to 0.05% of the volume of business of Lactogal in the year 2010. Considering all the elements above, the fine applied seems reasonable and proportionate.

### **Judicial Proceedings**

The Competition Authority fined Lactogal for fixing the prices for resale with its distributors.

Lactogal appealed to the Portuguese Competition Court ( First Instance Court).

Lactogal lost the appeal and then appealed to the Tribunal da Relação de Lisboa ( Second Instance Court).

### **Final Ruling**

The Second Instance Court maintained the Portuguese Competition ruling on exactly the same grounds.

### **Relevance of the case**

This is a very important case for Portugal as Lactogal is the biggest player in the milk production market in Portugal and the infraction in question, by its own object, distorts free competition. The freedom of trade, as with the freedom of economic initiative, means there can be no artificial barriers to entering the market and functioning within it, is a fundamental freedom of the European Union.

In fact, it aims to obtain the maximum efficiency in the market for creating goods with the minimum use of resources. The guarantee that this should always be so is found in Articles 101 and 102 of the Functioning Treaty of the European Community.

In our case, the fact that Lactogal is a major player in the market for milk production does not grant it the right to exclude others from the market by avoiding the lowering of the price of milk artificially, by fixing resale prices in contracts with distributors, even if it has other channels of distribution for milk!

## **6.2. NEDELICHEVA NATALIYA, VARNA DISTRICT COURT (BULGARIA)**

### **Preamble**

I chose to write a short case note about Judgment No.16075/17.12.2012 of the Supreme Administrative Court, Sofia, Bulgaria. In my opinion, this Judgment is very interesting. Although the appeals were dismissed as unfounded, and the Commission's decision was confirmed, I think that it deserves attention because of the parties involved in the proceedings: specific subject /distribution of TV programmes, and reference to the European legislation and the case law of the European Union.

### **Proceeding Before the Bulgarian Commission for the Protection of Competition (CPC)**

The CPC instituted proceedings in this case regarding a request under Art. 38, para. 1 item 1 of the Protection of Competition Act /PCA/ from "BTC" AD to investigate the possible violation of Art. 15 and Art. 21 of the CPA by "BG Sat" AD and "Bulsatcom" AD in relation to the distribution of the television programme "TV +".

By order No.115 of 02.02.2012, the CPC constituted the "Megalan Network" AD as a concerned /third/ party in the proceedings.

### **General Information**

#### **1. The Parties:**

A. The Bulgarian Telecommunications Company "BTC" AD was established in 1992 as part of the separation of the state-owned enterprise Bulgarian Posts and Telecommunications. In June, 2004, the Bulgarian government sold 65 % of BTC's capital. In January, 2005, the Bulgarian state made a public offering of the remaining shares and offered 34.78 % of the company's capital (2,869,573 shares) on the Bulgarian Stock Exchange, Sofia. In May, 2005, the BTC was granted a license for the development of third-generation mobile telecommunication systems under the UMTS standard, class B. In November, 2005, the company launched its mobile services under the 'Vivatel' brand, Bulgaria's third mobile operator. In September, 2009, BTC and Vivatel were united under a new brand: VIVACOM. Currently, VIVACOM is providing various telecommunication services, including fixed-line, mobile, Internet, radio and TV broadcasting, and data transmission services. VIVACOM's 3G network coverage reaches 99.41% of the population and 99.95% of the territory of Bulgaria.

B. "BG Sat" AD is a company which acts in the market for the reception and distribution of television and radio programmes. "TV+" is a Bulgarian television channel, owned by BG SAT AD. It airs entertainment programmes, TV series and films, and also broadcasts sports events, like Spanish La Liga, Dutch Eredivisie, ATP World Masters, Wimbledon, WTA, Moto GP, Formula 1, NHL and NBA.

C. "Bulsatcom" AD is a Bulgarian satellite television, internet & mobile operator, founded in 2004 as the first DVB-C operator in the country. Since 2009 it has begun building an internet LAN network. Currently, it is the second-biggest in terms of numbers of subscribers in Bulgaria. In 2012, the Bulgarian communication regulator (CRC) gave Bulsatcom AD the permission to use radio-frequency resources for mobile and internet services. Bulsatcom also manages the company BG Sat, which owns the sports channel TV+ and the movie channel F+.

D. "Megalan Network" EAD is a Bulgarian Telecommunications Company, established in 1998. Its main activity is the provision of Internet connectivity to end-users. The company is one of the largest LAN suppliers in Sofia. Since 2009, Megalan Network Ltd. Has provided digital TV on their fibre optic and copper tracks. At the end of 2010, the company, together with Spectrum Net, were acquired by the largest mobile operator in Bulgaria "M-Tel" AD

## **2. The Case:**

The "BTC" AD alleged that there are the following violations:

- "BG SAT" AD, as a company with established market dominance in the wholesale distribution of television programming, had violated Art. 21 CPA, distributing TV + including its attractive sports content, which discriminated against the platform operators and reduced the spread of this programme through the other operators, which prevents, restricts and distorts competition in a vertically related market for the retail distribution of television programmes and the interests of consumers.

- "BG Sat" AD and "Bulsatcom" AD, had violated Art. 15, para. 1 PCA, by their participation in a vertical agreement and/or concerted practice aimed to restrict the spread of television programme TV + by other platform operators, which has the object and effect of the prevention, restriction or distortion of competition in the vertically related markets of the retail distribution of television programmes.

- "BG SAT" AD breached Art. 15, para. 1 PCA. Its violation consists in the imposition of territorial restrictions in the types of contracts to which the Company grants rights to broadcasters for the

television programme TV+, which aims to prevent, restrict or distort the competition in the retail distribution of television programmes.

### **3. The Applicable Law:**

#### **A. The Bulgarian Competition Protection Act /CPA**

Art.15. (1) The following shall be prohibited: all types of agreements between undertakings, decisions by associations of undertakings as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition in the relevant market, such as those which:

1. Directly or indirectly fix prices or other trading conditions;
2. Share markets or sources of supply;
3. Limit or control production, trade, technical development or investment;
4. Apply to certain partners dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage;
5. Make the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or in accordance with commercial usage, have no connection with the subject of the main contract or to its performance.

(2) Any agreements and decisions referred to in paragraph (1) shall be null and void.

#### **Prohibition of Abuse of Monopoly or Dominant Position**

Art. 21. The conduct of undertakings enjoying a monopoly or dominant position, as well as the conduct of two or more undertakings enjoying a collective dominant position that may prevent, restrict or distort competition and impair consumers' interests, shall be prohibited, such as those which:

1. Impose directly or indirectly purchase or sale prices or other unfair trading conditions;
2. Limit production, trade and technical development to the prejudice of consumers;
3. Apply to certain partners dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage;

4. Make the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance;

5. Unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity.

B. European Law:

- The Treaty on the Functioning of the European Union Art. 101, 102

- The Notice of the European Commission to define the relevant market

- Cf. Block exemption regulations;

- Commission Regulation (EU) No. 330/2010 of 20th April, 2010, on the application of Article 101, paragraph 3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Block Exemption Regulation on vertical agreements).

- Communication from the European Commission Guidelines on Vertical Restraints on 10.5.2010, hereinafter referred to as the Guidelines on Vertical Restraints

C. The terms:

A. DTH (Direct-To-Home) is a technology that delivers TV content through a digital signal, which is distributed by satellite and is received by satellite dish users

B. the television programme TV + is registered in the First section of the Public Register in the Electronic Media Council of BG with the following characteristics:

- Programme Profile - common / polythematic;

- daily length - 24 hours;

- Date of distribution - 01.09.2009;

- The means of distribution - via satellite;

- Territorial scope – national

C. The Programme schedule TV +, when it was registered with The Electronic Media Council, said it provided and included a variety of diverse programmes, including: news, TV games, advertising, culinary and more; programmes and external productions, television series and feature films, shows.

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

The Commission found that there is no violation of Art. 15, para. 1 and Art. 21 of the CPA.

To pronounce its decision, the Commission considered the following:

### **1. Determining the Relevant Product market**

Definition of the relevant market follows the principles set out in the Methodology of the CPC to determine the relevant market, and in the Notice of the European Commission to define the relevant market for the purposes of Community competition law, where "relevant product market comprises all those products and/or services that are regarded as interchangeable or substitutable by the consumer because of the products' characteristics, their prices and their intended use."

The applicant "BTC" AD is dealing with the distribution of radio and television programmes through DTH technology. The defendant, "BG Sat" AD, is an owner of the distribution rights to specific sports content included in television programmes (in this case, TV+), which distributes wholesale to the platform operators active in the market to provide distribution rights to television programmes. This puts both companies in vertical relationships that are connected with the desire of BTC to distribute the television channel TV + and to retail it to final users.

Both markets are vertically related and represent separate units of the channel in which TV content reaches the final user/viewer/ and they could not functioning independently. Participants of the two markets are different, since the activities of the buying and the creation of TV content, the creation of TV programmes and those in their distribution to the final users are on a separate licensing regime which contains specific requirements corresponding to the realisation of the subject.

The structure of the distribution of the channel includes all of the steps –from producing the TV content to making it available to the final user/viewer.

The concerned parties therefore act in different vertically related markets, because BG SAT - as a holder of rights to TV content - participates in the market that provides distribution rights to television programmes wholesale, while BTC distributes television programmes to final users. This means that the analysis of the competitive environment should cover both vertically related markets, namely:

- The market granting rights to distribute TVP /wholesale market, and
- The market for distributing the TVP to final users /retail markets.

According to case-law practice /Case COMP/M.4353 – Permira / All3Media Group/ of the European Commission for Competition, the content of the market for TV is divided into:

- Production of content for their own use and such that is created for sale; and
- Distribution (licensing) of rights to distribution or acquisition of distribution rights (audiovisual content) Case COMP/M.5121 – NewsCorp / Premiere;

In our case, because BG Sat owns broadcasting rights for specific sporting events that are included in the programme schedule of the channel TV +, the relevant market is the market for providing the rights of distribution for TVP (the wholesale market), and the vertically related market for the distribution of TP to the final users.

The market granting rights to distribute TP (wholesale). From an economic perspective, the creation of television programmes is connected with very high fixed costs and low variable costs, which enables the realisation of economies from that scale. The same rules are applicable to the distribution of sports television, especially if the fees are high and fixed.

CPC concluded that, in considering the content included in the TP TV+, the relevant product market is the market for the wholesale distribution of television programmes with polythematic and sports profiles.

## **2. Geographical Market**

It is normally in licensing TV rights to broadcast certain sporting events that broadcasting rights to be given in a particular area are negotiated, and therefore the content is adapted (as subtitling / dubbing) in that language

In our case, the spread of sports broadcasts that is included in the programme schedule of TV +, over which “BG SAT”AD has exclusive distribution rights, is for the entire territory of Bulgaria

### **Analysis of the Behaviour of BG Sat of Art. 21 of the CPA**

In order to implement the prohibition under Art. 21 of the CPA and the characteristics of the present case, it is necessary to establish a cumulative presence of the following elements

- Parties in the proceedings to be "enterprises";
- Dominance of BG Sat;
- Real or potential anti-competitive effect of the conduct and the involvement of consumer interests

There is no doubt that all the companies in this proceeding are undertakings within the meaning of Art. 21 LPC.

### **Dominance of BG Sat.**

Pursuant to Art. 20 of the CPA, the dominant undertaking is this, which in view of its market share, financial resources, its opportunities for market access, technological level and economic relations with other enterprises, it is able to operate independently with respect to other market participants, competitors suppliers or buyers.

In view of the above, and having in mind the market analysis of the definition of the product market, namely, the market for the wholesale distribution of television programmes with polythematic and sporty profiles and the finding of a *de minimis* market share that the defendant company owns, the CPC found no data to justify the existence of a dominant position for "BG Sat" on the determinate product and geographical market. In view of the above, the CPC found that there was no violation of Art. 21 CPA.

### **Analysis of the Behaviour of BG Sat and Bulsatkom of Art. 15 of the CPA**

In order to implement the prohibition under Art. 15, para. 1 of the CPA and the characteristics of the present case, it is necessary to establish a cumulative presence of the following elements:

- Parties in the proceedings to have the quality of "enterprises";
- The existence of an agreement and/or concerted practice between the parties;
- Anti-competitive effect, evidenced by the object or effect on the prevention, restriction or distortion of competition

An agreement and/or concerted practice between the parties: In regard to the vertical relationship between BG Sat and Bulsatkom, the Commission considers that within the scope of prohibited conduct under Art. 15, para. 1 CPA, as in the scope of the prohibition under Art. 101, para. 1 TFEU, fall all forms of formal and informal business relations between independent enterprises, whereby they achieve an agreement of coordination and consistency by which they can limit or restrict the freedom to determine independently in their market behavior.

The practice of BGPC, the European Commission and the ECJ /Case T- 7/ 89 SA Hercules Chemicals NV v Commission [1991] ECR II- 1711, para.2; Case T- 41/ 96 Bayer AG v. Commission [2000] ECR II- 3383, para. 69, ruled that 'agreement', within the meaning of the prohibition, exists when companies have demonstrated a general intention to have a certain market behaviour. In order to fall within the scope of competition law, certain conduct within the meaning of Art. 15, para. 1 LPC, it

is not necessary that this be expressed in a particular form. It may be oral: Case 28/ 77 Tepea Bv v. Commission [1978], or written, signed or unsigned: Case BP Kemi-DDSF [1979] OJ L 286/32, and even in the form of informal gentlemanly arrangements which are not binding: a "Gentleman's Agreement" is subject to the decision of the ECJ in Case C-41/1969, ACF Chemipharma NV v. Commission.

The ECJ, in its case-law in relation to vertical agreements, stated that an agreement within the meaning of the prohibition expressed their will to carry out certain market behaviour. Agreement exists when the parties adhere to a common pattern of behaviour, which limits their self-dependent marketing policy making or refraining from certain market behaviour. As to the form in which the parties will express their common will – it is not necessary to achieve this in a lawful, binding contract form, and the common intention of the parties arising from the presence of mutual intention to have a certain market behaviour is not essential. In competition law, the concept of (vertical) agreement focuses on the availability of matching intentions between at least two undertakings, regardless of the form in which this is achieved.

The scope of vertical agreements and of entering into such terms and conditions that may be imposed by either party means that if it is determined that conditions are accepted, the fact that one of the parties was willing to accept them does not lead to a lack of agreement within the meaning of Art. 15 LPC. In such suggestions only one of the parties may be punished.

In this case, despite the absence of direct documentary evidence outside the contracts, in considering the distribution of TP TV +, the CPC found that between BG Sat and Bulsatkom there exists an informal vertical agreement and/or concerted practice, which builds on the written contract between them, with the following content:

- Bulsatcom is obliged to provide to BG SAT the exclusive rights for dealing with the TP TV+ on the whole territory of Bulgaria
- BG SAT takes the exclusive supply obligation, under which BG Sat is obliged to provide the legal rights of distribution of TP TV + nationwide only to Bulsatcom.

The character of the established informal vertical agreement does not impose the rigid constraints of the meaning of Art. 4 of the Block Exemption Regulation on vertical agreements.

Given the overall market analysis and, in particular, the market share of BG Sat, the CPC assumes that in the defined market “the wholesale market” the share of "BG Sat" AD is insignificant and does not exceed the maximum limit of 30% set by the Block Exemption Regulation. As regards "Bulsatcom" AD, it is established that its market share is about 25%, which is why the CPC has concluded that the

market share of the company, from which it purchases goods or services, did not exceed the maximum limit of 30% set in the Regulation Block Exemption.

In regard to the above, the CPC found that such established informal agreement between the companies falls under the benefit of the Block Exemption Regulation, according to which it is exempted under Art. 15, para. 1 LPC.

In view of the analysis, and on the basis of Art. 77, para. 1, item 3 of the CPA the Commission on the Protection of Competition holds that there has not been a violation by "BG Sat" JSC and "Bulsatcom" AD under Art. 15, para. 1 and Art. 21 of the CPA.

The decision of the Commission could be appealed on a point of law before the Supreme Court by the parties, and any person who has a legal interest, in the fourteen days starting from the notification under the APC, and, for third parties, its publication in the electronic register of the Commission.

As I mentioned at the beginning, "Magalan Network" AD and "BTK" AD appealed the decision of the CPC before the Supreme Administrative Court.

The appeals were dismissed as unfounded, and the Commission's decision was confirmed. According to the reasons of The Supreme Administrative Court:

- Contrary to the applicants' complaints, the definition of the relevant market is in accordance with the Methodology of the CPC and the European Commission Notice on the definition of the relevant market for the purposes of Community competition law, according to which and pursuant to § 1 of the CPA, the "relevant product market" comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer because of the products' characteristics, their prices and their intended use.

-It is correct, however, that the second cumulative condition – the dominance of "Sat BG" AD within the meaning of Art. 20 CPA, had not been established. This conclusion is in accordance with the case-law of the ECJ, which defines market dominance as a situation in which a company is able to impede effective competition in the market, as it has economic power, allowing it to act largely independently of its competitors, customers and ultimately the user. The starting point in the analysis of a possible dominant position in a particular market in the European practice is the market share of the undertaking, as very high values are themselves a sufficiently clear indicator of market dominance. Besides the market shares, the EC/European Commission and the Community Courts account in their decision structure for the market conditions and the competitive environment, the characteristics of the particular company, and the products and services.

- The Commission /CPC properly applied and complied with the relevant: 1. Decision for block exemption under Art. 15, para. 1 of the Law on the Protection of Competition in reference to certain categories of agreements, decisions or concerted practices adopted by Decision No.55/20.01.2011, 2. EU Regulation No 330/2010 of 20.04.2010 on the application of Art.101, par. 3 of the Treaty on the Functioning of the European Union, to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010/; 3. Block Exemption Regulation on vertical agreements, and 4. The European Commission Notice - Guidelines on Vertical Restraints on 10.05.2010

### **6.3. NORKUS RIMVYDAS, SUPREME COURT (LITHUANIA)**

*SEB Bankas, DNB Bankas, Swedbank, G4S Lietuva v. Lithuanian Competition Authority*

**Judgment of the Supreme Administrative Court of Lithuania of 8th April, 2014, Case No. A502-253/2014**

#### **Facts and the Decision of the Lithuanian Competition Authority**

The Lithuanian Competition Authority (hereinafter LCA), upon an application by the security firm Eurocash1, conducted an investigation and established that, in the period between 2007 and 2008, the security firm G4S entered into cash handling agreements that effectively tied three major Lithuanian banks: SEB bank, DNB bank and Swedbank. On the date the agreements were concluded, G4S enjoyed a market share of more than 90 % of the cash handling market in Lithuania. During the period in question, the three mentioned banks were buying, on aggregate, not less than 85% of the cash handling services of the total relevant market in Lithuania. The market share of the cash handling services acquired by each individual bank amounted to more than 15%.

Although the agreement with each bank was concluded separately, in every agreement there was a clause, according to which G4S was entitled to unilaterally cancel the agreement or to amend prices in case a relevant bank started buying cash handling services from another provider. According to the LCA, those agreements had an anti-competitive effect, since they limited the possibilities for other providers of cash handling services to expand their activities in the market or to enter it. Consequently, those agreements led to a sufficient degree of market foreclosure. In view of the LCA, it was irrelevant whether banks were interested in buying services from Eurocash1. Although there is no objective of the LCA to impose a duty on banks to change security firm or to allot services to multiple providers, it is, however, important that banks are free in choosing their partners and that, in the current case, their freedom was restricted by the threat of sanctions on the part of G4S. Even if each bank was unaware of the content of the agreements between G4S and other banks, they must have reasonably predicted that an individual agreement to which each bank was a party was capable of restricting competition.

The LCA concluded that by the mentioned agreements the banks and G4S violated Article 5 para 1(1) of the Lithuanian Competition Law and Article 101 para 1(a) of the TFEU. Fines were imposed on both the banks and G4S. The LCA dismissed the arguments of the banks that they were constrained by the pressure of the dominant undertaking G4S, and that the case should have been investigated on the

basis of Article 102 TFEU rather than on the basis of Article 101 TFEU. According to the LCA, Article 102 TFEU has no priority in application. Even if Article 102 were to be applied, it does not limit the application of Article 101 TFEU.

### **Judgment of the First Instance Court**

The First Instance Court, in essence, supported the position of the LCA. Nevertheless, the Court reduced fines for both the banks and G4S on the arguments that vertical agreements are to be considered less harmful to competition than horizontal ones. It was not established who had initiated the infringement; each bank might not have been aware of the agreements between G4S and other banks; only G4S profited from the agreements while the banks did not take any advantage from them; the agreements were terminated even before the LCA finished its investigation.

### **Judgment of the Supreme Administrative Court**

All the parties appealed to the Supreme Administrative Court of Lithuania, which granted the appeal of the banks and annulled the fines imposed on them.

The Supreme Administrative Court reminded that there is a very broad notion of agreement in the sense of Article 5 para 1(1) of the Competition Law and Article 101 para 1(a) of the TFEU, according to which the essence of an agreement is the expression of the joint intentions of the parties.

The Supreme Administrative Court held that by concluding agreements with G4S, the banks committed themselves to buying cash handling services from a single provider without resorting to any other provider. This type of exclusivity agreement could be qualified as a vertical agreement, i.e., an agreement between undertakings that act at different levels of the supply chain.

The Supreme Administrative Court held that the agreement, according to which a party commits itself to buying services from a single supplier, did not automatically qualify as an infringement of competition rules. Since it was not obvious from the text of the agreements that they had the restriction of competition as their object, the effects on competition had to be established. By reference to the Commission Guidelines on Vertical Restraints (2010 C 130/01), the Supreme Administrative Court held that for vertical agreements to be restrictive of competition by effect, they had to affect actual or potential competition to such an extent that the negative effects on prices, output, innovation, or the variety or quality of goods and services on the relevant market, could be expected with a reasonable degree of probability. Appreciable anti-competitive effects are likely to occur when at least one of the

parties has or obtains some degree of market power, and the agreement contributes to the creation, maintenance or strengthening of that market power, or allows the parties concerned to exploit such market power.

As a result of the agreements, competitors of G4S only had a prospect of competing for the remaining 15 % of the market for cash handling services. The situation in the market was specific, due to the fact that since 2001 only G4S was providing cash handling services. Only in 2007, did a competitor, Eurocash1, appear on the market. There were relatively high entry barriers to this market (financial stability, high repute, technical infrastructure, etc.). As a result of the agreements, the demand and the supply on a large part of the market became 'frozen'. The Supreme Administrative Court also noted that the resistance power of the banks was an important factor in analysing the relations between the banks and G4S. Since the choice of cash handling services was very restricted at that time, and banks would have risked the quality of the service had they chosen a new and inexperienced service provider, thus the resistance power was also limited. Consequently, G4S became 'an unavoidable trading partner' for the banks.

Despite the fact that there were agreements with anti-competitive effects, the situation was specific, due to the fact that the restrictions on competition were caused not by every individual agreement between each bank and G4S, but by their cumulative effect. Each bank could not necessarily have been aware of the agreements of other banks with G4S, therefore they could not have predicted the effects on competition. By reference to the jurisprudence of the European Court of Human Rights, the Supreme Administrative Court ruled out the liability of the banks, with no fault on their part.

The Court also referred to the Judgment of the Court of First Instance of 23rd October, 2003, in the Case Van den Bergh Foods Ltd., T-65/98, in which vertical agreements between a supplier holding a significant market share and retailers had a cumulative effect on competition, nevertheless certain obligations were imposed only on the supplier, but not on the retailers.

The Supreme Administrative Court ruled that the LCA failed to provide evidence that the banks, at the time of the conclusion of the agreements, were, or could have been, aware of the effects of their respective agreements on competition. The Supreme Administrative Court annulled the fines imposed on the banks and ruled that the banks were not at fault for the restrictions on competition created by the concluded agreements.

Unlike the banks, G4S was in a different situation. It must have seen the dynamics of the competition on the market and was capable of assessing the anti-competitive effects of those agreements. Hence, the imposition of a fine on G4S was, in principle, justified, nevertheless this part of the case was returned to the LCA because of some procedural irregularities.

## **Comment**

This case is significant in two respects. Firstly, it is one of few examples of vertical agreements in the practice of the Lithuanian Competition Authority and the Administrative Courts. It is not a straightforward price fixing cartel, but a rather complicated set of agreements, the anti-competitive effects of which could have only been established after analysing the market, its dynamics and counterfactual scenario (how the situation in the market would have looked if the agreements were not concluded). Secondly, it is relevant because it underlines the need to individualise the role of each participant in an agreement. Their liability without fault is excluded, therefore, even if the cumulative effects of agreements cause restriction on competition, a party to each individual agreement must not necessarily be blamed if it could not have been aware of the whole market situation.

#### **6.4. CRISTEA BOGDAN, BUCHAREST COURT OF APPEAL(ROMANIA)**

I. The plaintiff S.A., a limited liability company, filed an application before the Bucharest Court of Appeal, Administrative and Tax Section,<sup>[1]</sup> seeking annulment of Decision No.99/27.12.2011 of the Romanian Competition Council.

By its civil judgment of 18th December, 2012, the Court of Appeal dismissed the application as ill-founded.

The plaintiff's appeal against this judgment was dismissed by a decision of 21st March, 2014, issued by the High Court of Cassation and Justice.

The High Court laid out that, by its Decision No.99/2011, the Competition Council had established a violation of Article 5 paragraph 1.a),<sup>[2]</sup> of Law No.21/1996 on competition, by the manufacturer D & P, Importers W., S & A. and P., by the conclusion of contracts wherein retail prices to final consumers in Romania were established by a Turkish manufacturer in agreement with the Romanian importers.

S.A. took part in the anti-competitive agreement by concluding a dealer and sale contract on the distribution of perfumery from the D & P brand, being punished by a civil penalty in the amount of 16,945 lei (approx. 3,500 EUR), representing 2.3% of total turnover for the year 2010.

The High Court could not accept the criticism of the appellant on an alleged lack of description, in the Decision No.99/2011, of the concrete facts representing restriction of competition and of the circumstances in which the alleged facts were committed.

Instead, the High Court showed that the judge of First Instance had correctly held that the contested decision described the contravention reproached.

It was thus noted that, according to contractual clauses inserted in section 5 of Contract no. X/2010, the applicant, as dealer, will use for sale/resale the prices set in the Annexe to the contract, the breach of this obligation having as consequence the unconditional cancellation of the contract.

It follows that, in the process of distribution, the applicant took part in an anti-competitive agreement covering pricing for fragrance products, a violation "by object", its effects being without any relevance. The deed of the appellant-plaintiff is included in the category of "hardcore" restraints. The High Court laid out that the competition had been distorted as the freedom of the distributors, brokers and retailers was restricted in determining for themselves, or in negotiating, the sale prices they wanted to charge for Turkish produced perfumery, depending on the costs incurred by each trader, as well as on the supply and demand report.

The appellant's argument, that the prices set out in the Annexe to the contract were not imposed but recommended, was not accepted by the High Court, given the existence in the contract of the following clause: "The Seller reserves the right to refuse to accept the buyer's orders where prices are not those specified in Annexe 2 to this contract", which contradicts the appellant's defence.

The existence of such contractual sanctions, agreed by the contracting parties, contests the fact that prices were just a recommendation, confirming the mandatory nature of the obligation to comply with the price list, Annexe to the contract.

Being in the presence of an agreement concerning the fixing of selling prices, the offence committed by the applicant falls within the category of hardcore restraints, prohibited *per se* by the relevant law, and thus cannot be classified as a low gravity one.

The High Court holds that the duration of the infringement was set correctly in relation to the duration of the contracts concluded by the applicant, which led to an increase in the fine, given the appropriate criterion, concerning the infringement of medium duration.

For the reasons above, noting that there aren't any grounds for an annulment of the contested administrative decision, The High Court dismissed the appeal as ill-founded.

2. An author<sup>[3]</sup> remembers that there are relatively few agreements that always, or necessarily, restrict competition. Those agreements that are plainly anti-competitive will often be treated as having as their object the restriction of competition. This classification means that there is no need to prove their actual effects upon competition. The classification is justified by a combination of economic consensus, practical experience and policy judgment about the likelihood of harm to competition. The EU courts have consistently made clear that it is necessary to consider the purpose of the agreement in its surrounding context. It has been argued that the existence of an object restriction cannot be determined simply by taking into account the form of the agreement or by analogy to previous cases. An object restriction does not need to be harmful to final consumers. An agreement may have a restrictive object even if it does not have the restriction of competition as its only objective, but also pursues other legitimate objectives.

The same author<sup>[4]</sup> shows that it has been argued that there are four situations in which an object restriction may be permitted under Article 101. First, restrictive object, in particular when the agreement seeks to correct a market failure. Secondly, undertakings can plead an objective justification for *a prima facie* object restriction, although this principle has yet to be developed by decisional practice and case law under Article 101 (1). Thirdly, a restriction by object may fall outside Article 101 (1) where it does not have an appreciable effect on competition and/or on trade between Member States. Fourthly, the case law recognises the possibility that undertakings can argue that a restriction of competition by object should be permitted under Article 101 (3), an argument which has been upheld in some, albeit rare, cases.

3. The Romanian case summarised above deals with a restriction of competition by object, namely a direct form of price fixing.

The High Court of Cassation and Justice from Romania used, as a starting and also an essential point of its analysis, the content of the agreement, specifically the clauses written by the parties.

The result of the decision is that its approach is similar to that line of case law that is developed by the Court of Justice of the European Union, according to which an anti-competitive object dispenses with the need to consider any effects. In *Commission v. Anic*<sup>[5.]</sup> ECJ thus held that it follows from the text of Article 101 (1) that “concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object”. In *Belgian Roofing Felt*<sup>[6]</sup>, the Court of Justice held that the anti-competitive object of a common price list for all members of an association of Belgian roofing felt manufacturers rendered the prices that were actually offered irrelevant.

At the same time, it is clear from the decision of the High Court of Cassation and Justice that it didn’t find it necessary to examine the subjective intentions of the parties when assessing the object of the agreement and it was not necessary to show that the undertaking knew that it was infringing the law.

## 7. ABUSE OF DOMINANCE

### 7.1. BASTOS FERNANDO, JUÍZO DE MÉDIA INSTÂNCIA CÍVEL DA AMADORA (PORTUGAL)

My choice is for a Supreme Court ruling that is focused on abuse of dominance – Judgment of the Portuguese Supreme Court of 24-4-2002 - the Reuters case.

In its defence against a suit for failure to pay invoices, the defendant argued that Reuters had sold the same financial information services to other clients at lower prices, and that this constituted an abuse of a dominant position, under the national equivalent of the (current) Article 102 TFEU. It produced no evidence regarding the alleged discriminatory practices, the relevant market definition or the alleged dominant position. On the other hand, it requested that the applicant produced several invoices to other clients for the same services (which it did), and the applicant did not challenge that, at the same time, it held 90% of the market as defined by the defendant.

The Court considered it had been proven that there were different prices charged for the same services and that, at the time of the facts in question, Reuters held a "dominant position on the market for the supply, through data terminal, of news and financial information in real time, through a dedicated data line".

The same Court also considered the distribution of the burden of proof: it is for the party who invokes the infringement to "demonstrate beyond any reasonable doubt" that its conditions are met. It also noted that it is very difficult for the party to meet this burden in such cases. It expressed a preference for evidence of dominance in the form of statistical data, adding that this presented the party with an added difficulty, given the lack of reliable national statistical data.

The First Instance prematurely included a legal conclusion in the list of proven facts, considering "dominant position on the market (...)".

The Treaty does not explain what is dominant, so this task was left to case law. According to the CJEU, a dominant position is "a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market, to have the power to behave to a large extent independently of its competitors' mode, clients and in the last line of its consumers " (Judgment of TJEU, 14<sup>th</sup> February, 1978, United Brands).

The verification of a determining position depends, in general, on "the combination of several factors which, taken separately, are not necessarily determinative".

Among these factors, the market share of the undertaking concerned is especially important, even if considered in the context of market structure (in particular, by comparison with the market shares of the competitors).

That is, although a high market share does not translate automatically and necessarily into market power, in practice, market shares have been used in case law to establish presumptions to simplify analyses that would otherwise be too complex without prejudice, and invariably other factors are discussed.

The Court held, in particular, the presumption that a market share of at least 50%, in the absence of exceptional circumstances, is sufficient proof of the existence of a dominant position. At the same time, there are examples of companies with market shares below 50% (40% *proving*) that the Court concluded had a dominant position based on several factors (Judgment of TJEU 3rd July, 1991, *Akzo* and Judgment of TJEU 14th February, 1978, *United Brands*).

Competition Law does not prohibit the possession of dominant positions, or even monopolies. A competitor can be so efficient that the others will eventually exit the market, or their shares become negligible. Competition Law is only concerned with this situation from the moment the dominant undertaking uses its market power to adopt unfair practices.

In the Judgment referred to here, and in order to demonstrate the existence of discriminatory practices, the defendant had to show that the other companies in question were its competitors and that the “commercial positioning” of Reuters in relation to them was “objectively equivalent”.

The defendant had claimed an abuse of dominant position, but he ended up discussing only the existence of an “abuse of economic dependency”.

As a result, this case includes a number of important clarifications on the requirements applicable to the identification of a “relative dominant position” (economic dependence). In this discussion, the Court combined references to the national equivalent of Article 102 in the first Portuguese Competition Act, and to the prohibitions of the abuse of economic dependency.

### **Article 102 TFEU**

Any abuse, by one or more undertakings, of a dominant position within the common market, or in a substantial part of it, shall be prohibited as being incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a) Directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
- b) Limiting production, markets or technical development, to the prejudice of consumers;
- c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature, or according to commercial usage, have no connection with the subject of such contracts.

In the Judgment it is in mainly the paragraph c) of Article 102 which is in question.

The Judgment distinguished between equivalent products and equivalent solutions, for to say the weighting of several factors in the assessment of the state of economic dependency - such as reputation, brand, market share, scope of relations with the client, amount of time needed to find alternatives, etc., that may lead to the conclusion, if there is an equivalent solution.

So, to determine if a company is acting with abuse of economic dependency, we need to know whether the solution presented to other trading parties are not equivalent.

The subject who is invoking an abuse has to prove the existence of the dominant position. It had to prove the assumptions of abuse of dominant position, but failed to do so. It is important to note that it is very difficult for the party to meet this burden.

## **7.2. GEORGIOU ELIAS, JUDICIAL AUTHORITY OF CYPRUS (CYPRUS)**

### **Case 1023/2012**

*Pancyprian Organisation of Cow Farmers*  
(*applicants*)

*Vs.*

*The Cyprus Commission for the Protection of Competition*

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1. The case concerned the interim measures issued by the Commission for the Protection of Competition (hence forth CPC) against the Pancyprian Organisation of Cow Farmers (hence forth the applicants).
2. The applicants were established as a cow farming association in 2004, and were legally registered. The above association had one hundred and seventy (170) members from the total of two hundred and fourteen (214) cow farmers in Cyprus and represented around 80% of the milk producers in Cyprus. The association supplied the overriding majority of milk industries. The companies Pittas Dairy Industry and Pittas Dairy Ltd. were registered companies (henceforth Pittas companies) dealing with dairy products, such as cheese, halloumi, yogurt and other similar products.
3. The applicants had denied supplying milk to the Pittas companies and, as a result, Pittas companies lodged an allegation to the CPC against the applicants in 8/5/2012 for abusing its dominant position, and they asked for interim measures. The Pittas companies alleged that the applicants had imposed abusive conditions on them and had compelled them to sign contracts. They had imposed unfair selling prices by increasing them, and also imposed dissimilar conditions to those for equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

The applicants had sold milk at a lower price to the Papouis Dairies Ltd., which was a competitor of Pittas companies and had been taken over by the applicants.

4. The CPC issued an interim decision ordering the applicants to supply the Pittas companies daily with 65 tonnes of fresh cows' milk, under the condition that Pittas companies would deposit with the applicants the previous month's value of the milk delivered, and also the applicants would deliver a bank guarantee for the equal sum of 45 days; worth of milk. Pittas companies would take delivery of the whole milk quantity. In case Pittas companies wished to stop the delivery of milk, they were obliged to inform the applicants in writing at least one month before deliveries should

cease. In the case that they did not accept the above quantity of milk, the interim order would not exist. The duration of the interim order was until the final judgment of the CPC.

5. Then, the applicants lodged an application to the Supreme Court of Cyprus to annul the decision of the CPC, which is an administrative body exercising important powers. It intervenes, where necessary, for the implementation of the rules of free competition and the relevant legislation. According to Article 28 of Law 13(1)/2008, the CPC has the discretion to issue interim measures where necessary.
6. The purpose of the Law is to manage and protect free competition in implementation of Regulation 1/2013 of the Council. In its Judgment, the Supreme Court stated that: "... In *Josephine Steiner & Lorna Woods*: E.C. Law P.396 stated that "*Broadly speaking, the purposes of EC competition policy, which is spelt out in detail in the Commission's annual reports on competition policy, is to encourage economic activity and maximise efficiency by enabling goods and resources to flow freely amongst Member States according to the operation of normal market forces. The concentration of resources resulting from such activity functioning on a Community, rather than a national, scale is intended to increase the competitiveness of European industry in a world market. In addition to this primary goal, and sometimes conflicting with it, Community competition policy seeks to protect and encourage small and medium-sized enterprises so that they too may play their full part in the competitive process.*"

Every Competition Authority in the Member States has to enforce the above principle according to Article 5 of Regulation 1/2003. The Competition Authority has, amongst others, power after complaints or *ex proprio motu* to investigate and take appropriate measures, such as interim measures, which intercept the abuse of a dominant position.

7. The applicants had denied the supply of milk to Pittas companies. The applicants took over Papouis Dairies Ltd., competitor of the applicants. It was an indisputable fact that the applicants had a dominant position in supplying milk and also were competitors to Pittas companies, due to the take-over of Papouis Dairies Ltd. The Supreme Court stated that the refusal of the applicants to supply milk had, as a final recipient, the consumers, by damaging them and, in case of exclusion, one of the competitor dairy companies, the market would shrink.
- 8.1 The Commission also determined that for the provision of Section 6(2) of the Law, the following three parameters must concur, cumulatively:
  - (a) The existence of a relationship of economic dependency of a company to another company from which it obtains a certain type of product or service
  - (b) The absence of equivalent alternative(s) and
  - (c) The existence of abuse of this dependency.

The Commission concluded that, under the above circumstances, the applicants had an abusive dominant position and, as a result, there was a *prima facie* infringement of Article 6(1) (b), which is

similar to Article 102(b). The CPC mentioned in its Judgment that the order was an interim protection and would not exceed absolutely necessary measures.

8.2 In addition, the CPC stated that the matter was urgent and also there was serious danger of irreparable damage and that damage was substantial for Pittas companies. In the case where the CPC had not issued such an interim order, the losses of the Pittas companies would not only be monetary, but there would be the possibility of losing its share in the market, or that their business would close.

9. The Case 87/500 BBI/Boosey & Hawkes 1987 EEL 280 mentioned that in examining interim measures it is legitimate to ask a company to immediately supply the other company, which was in danger of discontinuing its business. The main argument was whether the final Judgment was that B & H abused its dominant position, it would have a symbolic significance if the other companies were forced to discontinue their business.

10. The Supreme Court of Cyprus stated that the Judgment was justified and the CPC exercised its discretion legitimately and also there was no reason to intervene. The Supreme Court finally ratified the Judgment.

11. Decisions ordering interim measures can be an important tool for competition authorities to ensure that while an investigation is going on no irreparable damage is caused to competition, because it cannot be remedied by any decision which may be taken at the final Judgment. Interim measures, by their nature, are temporary and protective. In line with the principle of proportionality, they must be restricted to what is necessary in the circumstances of the case. It is also important to ensure that the procedures relating to interim measures are effective and efficient.

### **7.3. MATTILA MARKUS, MARKET COURT (FINLAND)**

#### **Abuse of Dominant Position — Valio Oy**

#### **Finnish Market Court Decision 467-468/14**

##### **Introduction**

1. The Finnish Market Court issued, on June 26th, 2014, its decision on a case, which is the first ever predatory pricing case in Finland and which can also be considered as the most significant abuse of dominant position case thus far. The penalty payment imposed on the Finnish dairy company Valio Oy (“Valio”) for the competition law violation is the highest ever in Finland. Valio has already stated in public that it will appeal the decision to the Finnish Supreme Administrative Court, which means that the final decision can be expected in two years at the earliest.

2. The Market Court held that the restriction of competition had an effect on trade between member states, since the restriction made it more difficult to enter the Finnish market. The Court also noted, in this regard, that the restriction was partially targeted at a competitor from another Member State and the import of raw milk. Hence, Article 102 TEU was applied, together with National Law. The Court applied the criteria for predatory pricing that was laid down in the AKZO<sup>5</sup> case and also numerous other Judgments of the CJEU that are mentioned in the decision.

##### **Brief Summary of Facts and the Decision of the Competition Authority**

3. The Finnish Competition and Consumer Authority (“FCCA”) held in its decision that Valio was in a dominant position in the production and wholesale market for fresh milk in Finland and had abused this position during the period between March 1st, 2010, and December 22nd, 2012, by selling fresh milk to retail chains at prices that were below average variable costs.

4. Valio is owned by cooperative societies formed by Finnish dairy farmers. While Valio itself is a limited liability company, its operations have many characteristics that resemble a cooperative society. Valio purchases the raw milk for its production from the cooperative societies which, in turn, collect

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<sup>5</sup> AKZO Chemie BV v. Commission, EU:C:1991:286

the milk from the dairy farmers who are their members. According to Valio, it also distributes a part of its profits through the price of the raw milk.

5. According to its decision, the FCCA found that Valio Oy decreased the prices of the basic variety of fresh milk in 2010, following the loss of certain important customers to its main competitor Arla Ingman Oy Ab ("Arla Ingman"), which was gaining market share from Valio.

6. Arla Ingman was created in 2008 when a smaller Finnish dairy company Ingman Foods Oy Ab was merged into Arla Foods, a multinational dairy group. After the merger, Arla Ingman aimed to increase its market share and, as part of this plan, started in 2009 to sell milk on the Finnish market, which was produced from raw milk imported from Sweden. Apart from Arla Ingman, there are only certain smaller regional dairies competing with Valio on the Finnish market.

7. In Finland, approximately 80 to 90% of the basic variety of fresh milk is sold to food retailers. The food retail market is also highly concentrated, with two major retail chains having a very high combined market share. Valio has sufficient capacity to act as the main supplier to both of these chains, whereas Arla Ingman cannot act as the main supplier for both chains at the same time due to its smaller size. According to the market practice, the dairies and the retail chains enter into yearly framework agreements regarding the purchase of milk, whereas the quantities and prices are normally negotiated three times a year.

8. In the case at hand, there was intense competition between Valio and Arla regarding supplies to the S-Group, which is one of the two major retail chains, for the year 2010. The S-Group is a nationwide cooperative society whose members are independent regional entities. The S-Group negotiates the prices for the whole group and the regional entities make the final decisions regarding their own purchases.

9. When the prices had been agreed for the first pricing period in 2010, three regional entities belonging to the S-Group switched their main supplier from Valio to Arla Ingman. After this, Valio reduced prices to all of its customers in the middle of the ongoing pricing period. According to the FCCA decision, the reductions were significantly higher than the changes to the wholesale prices normally discussed in pricing negotiations. Due to the situation, Arla Ingman was also forced to reduce its prices. Arla Ingman, however, remained as the main supplier to the S-Group. Later in the same year, Valio offered additional reductions exclusively to the S-Group for the next pricing period. These reductions were subject to the condition that the S-Group would increase the volume of its purchases from Valio by a certain specific amount of litres. Arla Ingman, on this occasion also,

reduced its prices but managed to slightly increase it later without changes to its supply volumes. At the beginning of 2011, both Valio and Arla Ingman raised their prices due to increased production costs. At the end of 2011, Valio offered new reductions to the S-Group, despite the fact that the price paid by Valio to its producers of raw milk had been increased. The reduction offer was again subject to an increase in the purchase volumes while, under the existing volumes, the prices would have slightly increased. In order to maintain its supplies to the S-Group for the rest of the year, Arla Ingman had to withdraw its proposal to raise prices.

10. The FCCA found that after the reductions the prices charged by Valio no longer covered the average variable costs for the production and sale of the basic varieties of fresh milk. In addition, the FCCA found, on the basis of documentary evidence, that the reason for the price reductions was a strategic decision made by the top management to forego profits in order to prevent Arla Ingman from importing Swedish unprocessed milk to Finland, and to gain a very significant market share, after which the prices would have been raised to the level existing before the entry of Arla Ingman into the market. According to the FCCA, the exclusionary effect of the pricing was increased due to the conditional price reductions offered to the S-Group, based on purchase volumes. These reductions caused increasing losses to Arla Ingman.

## **Market Court Proceedings and Decision**

### **Procedural Setup**

11. Based on its findings, the FCCA prohibited the abuse of dominant position and made a proposal to the Market Court that an administrative fine be imposed on Valio Oy. On its part, Valio appealed the FCCA decision with respect to the prohibition of the abuse of dominant position.

12. An interesting side issue was the claim from Arla Ingman to be granted the status of a party or an intervener in the Market Court proceedings. In an interim ruling, the Market Court rejected the claim on the grounds that the decision of the FCCA did not have directly adverse effect on Arla Ingman, and the interests of Arla Ingman were sufficiently protected by providing it with an opportunity to be heard. Since the ruling was of an interim nature, it was not separately appealable. Arla Ingman nevertheless appealed the interim ruling to the Supreme Administrative Court and invoked, in addition to National Law, Article 102 TEU and Article 47 of the EU Charter of Fundamental Rights concerning the right to effective remedies. The Supreme Administrative Court dismissed the appeal on procedural grounds.

## **Main Issues in Dispute**

13. Valio contested the FCCA decision on several grounds, including the definition of the relevant market, the existence of a dominant position, pricing below costs, the character of its volume-based rebates, the assessment of the effects of its behaviour and the amount of the fine proposed by the FCCA.

14. First, according to Valio, the relevant product market and geographical market should be broader than had been suggested by the FCCA. It argued that the product market should consist of all liquid milk products, instead of just the basic variety products. The demand should have been evaluated from a retail/ wholesale perspective, instead of a consumer perspective. The Court held that the product market, i.e., basic fresh milk, was correctly defined by the FCCA. Retail stores do not have much power to shift consumer demand from one liquid milk product to another, and there is little or no substitution between basic fresh milk and other liquid milk products, *e.g.*, cream or lactose-free milk, due to different purposes of use. Supply substitution is affected by constraints in the supply of fresh milk from dairy farmers and in manufacturing capacity. As to geographical market, Valio argued that the relevant market would be Southern Finland, instead of the entire country, since there have been significant milk imports from Sweden and Swedish milk has been popular in the region. The Court held that the FCCA had correctly defined the geographical market to be Finland, as the major dairies and food retail chains mainly negotiate on a countrywide basis. On the other hand, the relevant market is not wider than Finland, since the market share of imported milk has been small, and the possibilities to expand imports are small, mainly due to the limited possibility of preserving fresh milk, sea transport costs and consumer preferences. There has been no direct importation of fresh milk by the retail chains during the period of investigation.

15. As to the existence of a dominant position, the Court accepted the reasoning of the FCCA and held that the market share of Valio has exceeded 50% during the entire period in question, although the share had been declining. The market share of Arla Ingman was approximately 24% in 2008 and was growing until 2010, when it reached approximately 30%, since when it has remained at the same level. The market share of the regional dairies has been 12-15%. It was noted by the Court that a dominant position would be presumed due to the high market share, unless there are exceptional circumstances suggesting otherwise. The fact that the market share had been declining did not affect this presumption. In its defence, Valio brought up, among other issues, that its market power is limited by international competition and the negotiating power of the large retail chains. Valio also argued that the barriers to market entry are not high. The court did not find sufficient evidence of potential new competition, or of the significant negotiation power of the retail chains.

16. In its decision, the court further noted that each year Valio purchases 86% of the raw fresh milk produced in Finland. Due to the cooperative structure of Valio, the price Valio pays to its suppliers is affected by its overall sales to customers. According to the Court decision, Valio can increase the price paid for raw fresh milk, based on revenues generated by other products. Although Valio is obliged to sell a certain quota of the raw fresh milk it purchases to its competitors, the competitors must, in effect, pay a price corresponding to the price paid by Valio. In addition, the competitors must, in effect, pay to their own suppliers a price that is slightly higher than the price paid by Valio, so as not to lose the suppliers to Valio. The Court also noted that further issues strengthening Valio's market position include its own distribution systems, strong brands and broad product categories.

17. With regard to the abuse of the dominant position, the Market Court applied the criteria laid down in the AKZO case, *i.e.*, that prices below average variable costs are presumed to be predatory, and prices below average total costs are predatory if they are proven to be part of a plan to eliminate a competitor.

18. Valio argued that its business in the basic variety of milk had been profitable during the period in question and that the rebates were given to customers in order to meet the competition. The volume rebates were lawful and based on efficiency gains from each customer. As to the pricing at below costs, Valio's main argument was that the price for raw milk that Valio pays to producers is not a variable cost, and the FCCA has therefore based its calculations on false assumptions. Valio argued that it is partly a fixed cost since, due to its ownership structure, which consists of cooperative societies, Valio has an obligation to purchase all of the raw milk produced by its suppliers, and the purchase volumes do not vary depending on the volumes further processed by Valio. The purpose of Valio is to use all of the purchased raw milk as profitably as possible to make various types of products. According to Valio, the price of raw milk is determined by the aggregate revenue from all types of products and it aims to maximise the price it pays for raw milk to the suppliers, which are its owners. In addition to actual costs, the price paid to suppliers also includes a share that can be characterised as the distribution of profits, and the price does not depend on the volumes produced. Valio further argued *e.g.*, that the price of raw milk should be regarded as avoidable costs. According to Valio, the alternative to producing fresh milk would, in practice, have been producing other less profitable products, such as industrial butter, for export markets. Valio also claimed that the revenue from other products than the basic variety milk, such as cream and butter, should be taken into account in the evaluation of whether the pricing is predatory or not.

19. The FCCA used the price of raw milk paid by Valio in order to evaluate the prerequisites for the operation of an equally efficient competitor. In order to operate profitably, the competitors must, according to the FCCA, set their prices on a level that covers the costs of the quota of raw milk the competitors are entitled to purchase from Valio. Due to this approach, the FCCA held that it is not relevant whether the price Valio pays to its suppliers for raw milk includes profits, or whether the price is a fixed cost for Valio due to an obligation to purchase all produced milk, as the cost is in any event a variable cost for the equally efficient competitors of Valio. The Market Court accepted the approach used by the FCCA. The Court also noted that it is not possible to determine the possible amount of distributed profits in the price of the raw milk that Valio pays to its suppliers and rejected various other arguments from Valio relating to the pricing and costs.

20. While it was held by the Court that Valio's pricing was below average variable costs, the issue of an intention to eliminate competitors was nevertheless addressed. The possibility for Valio to recoup its losses was also addressed, while this is not required to be proven in order to establish predation. According to the Court's decision, both the intention to eliminate and the possibility of recoupment were proven mainly by certain internal documents prepared by the top management of Valio. The language used in the documents was quite explicit in this regard. The Market Court also held, like the FCCA, that the volume rebates offered to the S-Group had accentuated the effects of the competition restriction, since Arla Ingman had to offer a price that was lower than the price offered by Valio with the largest quantity rebate. The Market Court also found that there was sufficient evidence of concrete anti-competitive effects, although the court noted that no proof of such effects would be required, since pricing below average variable costs is in itself a violation unless it can be objectively justified.

21. Valio invoked the 'meeting competition' defence and other arguments as justifications for its conduct. According to Valio, it was only responding to the aggressive pricing of Arla Ingman in order to avoid bigger losses which would have been caused in the case that Valio had lost its market share and sales volumes. Valio argued that since it was obliged to purchase all the raw milk produced by its suppliers, due to its declining market share it could not profitably use the raw milk in the short term for other products than basic variety milk. The Court held, among other issues, that it was not proven by Valio that it could not accommodate its raw milk purchases to the demand for its products and that less profitable products would have been its only option. Neither was it proven that the initiative for pricing below average variable costs would have come from customers or competitors. The price reductions, which were unusual in their size and timing, were not reasonable and proportionate.

22. In determining the amount of the fine, EUR 70 million, the court took into account, among other issues, the duration, scope and seriousness of the restriction, the approximately EUR 2 billion annual

turnover of Valio and the fact that this is the second time Valio has been found to have abused its dominant position. Preliminary claims for damages against Valio by its competitors were not taken into account, as the extent of Valio's potential liability for damages could not be quantified.

### **Conclusions**

23. In my opinion, the most interesting aspect of the case is whether and how the operating principles of a cooperative society should be taken into account in the calculation of costs. The FCCA's view, which was adopted in the Court decision, is that entities should not be treated differently based on their legal form only. One should also bear in mind that Valio itself is not a cooperative society, even though some aspects of its operating principles appear to reflect those of a cooperative society due to its ownership structure.

#### **7.4. TRENČAN MARIÁN, REGIONAL COURT OF BRATISLAVA (SLOVAKIA)**

##### ***ENVI-PAK, a.s. vs. The Anti-monopoly Office of the Slovak Republic***

##### **(The Supreme Court of the Slovak Republic, 8Sžhu/1/2012)**

1. On August 6th, 2010, the Council of the Slovak Anti-monopoly Office decided in the Administrative Appeal Procedure that ENVI-PAK, a.s. had abused its dominant position in the relevant market of awarding licences to use the trademark 'Green Dot' (hereinafter only trademark) of the Slovak Republic, infringing both the Slovak Act on the Protection of Competition and Article 102 of the Treaty on the Functioning of the European Union (previously Article 82 of the EC Treaty).

2. According to the decision, the abuse of its dominant position consisted in setting the sub-licence fee for the use of the "Green Dot" trade mark in such a manner that, on one hand, companies using the packaging waste collection, recovery and recycling services of ENVI-PAK (so called "service clients") did not have to pay such a licence fee while, on the other hand, companies that use the services of its competitors (so called "licence clients") had to pay a separate licence fee, even for packages without the "Green Dot". Moreover, ENVI-PAK's pricing policy was set in such a way that the final price, including the Green Dot licence fee, was always better for undertakings who also used ENVI-PAK's other services, including collection, recovery of waste from packaging, than for those that subscribed to such services through its competitors.

3. The Council of the Anti-monopoly Office concluded that the above abuse of the dominant position, pursuant to Article 102 of the Treaty on the Functioning of the European Union and Section 8 part 6 of the Act on the Protection of Competition, is banned and the Council imposed a fine on the undertaking.

4. The Office did not sanction only for the charging of an unreasonable price for the 'Green Dot' trademark, but also for a series of mutually related actions by ENVI-PAK (hereinafter only "Plaintiff") that resulted in limiting the competition in the relevant market.

5. The Plaintiff appealed the decision of the Office at the Regional Administrative Court, asking for a judicial review thereof, its cancellation and a return to the Office for new proceedings.

6. The Regional Court in Bratislava set aside the decision of the Office, mostly due to its ambiguity and insufficient justification. It concluded that the administrative procedure shall follow the penal policy principles, as set out in Recommendation No. R (91) 1 of the Committee of Ministers to

Member States on Administrative Sanctions, above all the principle of *nullum crimen sine lege, nulla poena sine lege*. The domestic Act on the Protection of Competition, along with Article 102 of the Treaty on the Functioning of the European Union (previously Article 82 of EU Treaty), in general, ban the abuse of dominant position (general clause) and, at the same time, define some examples (merits) of the banned abuse of dominant position. The Court of First Instance presumed that since the undertaking is entitled to know the exact definition of a banned practice, the Office should have firstly identified the anti-competitive conduct that is not explicitly stipulated in the law, and should forbid it. Only provided that the undertaking disrespects the ban defined in the decision of the Office, can it be sanctioned.

7. Such procedure, respecting the penal policy principles, was defined as being lawful by the Supreme Court of the Slovak Republic in two previous cases of abuse of a dominant position based upon the breaching of the general clause (4Sžhu/1/2010 from June 28th, 2011, and 3Sžh/3/2010 from May 3rd, 2011). That approach of the Supreme Court made a stir, and there was heated discussion among the professionals.

8. The Regional Court also objected that, with the parallel application of Article 82 of the EU Treaty and Section 8 part 6 of the Act on the Protection of Competition, the misuse of a dominant position must have a clear potential to impact on trade among Member States, while, in this case, this was not clearly established.

9. The Anti-monopoly Office appealed against this decision from the Regional Court.

10. Pursuant to Article 15 part 3 of Regulation no. 1/2003, the European Commission issued its opinion on this case based on the information submitted by the Slovak Anti-monopoly Office. It expressed its opinion on the parallel application of the national and European competition rules (including Articles 101 and 102 of the Treaty), prohibiting the abuse of a dominant position. It pointed to Article 3 part 1 of Council Regulation No. 1/2003 and the rulings of the European Court of Justice No. C – 17/10 Toshiba Corporation, C-238/99 P and others, the relevant case law of the ECHR, and noted that an undertaking with a dominant position in the market has special accountability not to interfere with efficient and uninterrupted economic competition in the internal market through its conduct. Over and above this, the undertakings cannot refer to the alleged unpredictability of the implementation of Articles 101 and 102 of the Treaty. The Commission also clarified the notion ‘bundling’ (grouping of products), being sold as part of one package.

11. The decision of the Supreme Court of the Slovak Republic from May 23rd, 2013, overruled the Judgment of the Regional Court, dismissing the complaint of the Plaintiff against the Office, since it contradicted the European law and the Judicature of the European Court of Justice. It concluded that the definition of an “abuse of dominant position“ is to be set forth by the national competition authorities and the courts. The listing of such practices, indicated in Section 8 part 2 of the Act on the Protection of Competition, shall primarily help the competitors to become acquainted with the most common violations of the competition rules by the undertakings. The Competition Authority shall review the cases of abuse of dominant position in the market that are not listed in Section 8 part 2 of the Act, or in Article 102 of the Treaty on the Functioning of the European Union, pursuant to a general clause. The Slovak Supreme Court also referred to the decisions of the Supreme Administrative Court of the Czech Republic (7Afs 40/2007, likewise 7As 58/2006). These concluded that the structure of the general clause is similar to the wording of Article 102 of the TFEU and is essential, since it is impossible to provide a full list of all abusive practices in the market that are to the detriment of other market participants.

12. Since the anti-competitive conduct of the Plaintiff could not be subsumed under any of the practices listed in Section 8 part 2 of the Act on the Protection of Competition, the Office was fully authorised to apply the general clause of the Act in parallel with Article 102 of the TFEU (originally Article 82 of the EU Treaty) to the action of the Plaintiff. The Appeal Court also uphold the conclusion of the Office: that the Plaintiff’s conduct could have impacted on the import of goods, with or without the trademark ‘Green Dot’, thus influencing common trade.

13. The Appeal Court concluded that the pattern of fees for the ‘Green Dot’, as applied by the Plaintiff separately for the service clients vs. licence clients, could not be reasoned as being satisfactory. This competitive practice was aimed at disadvantaging the competition in the market in the organising, collection, separation and recycling of the waste from the packaging.

14. The Supreme Court also referred to the decision of the European Court of Justice in C-457/2010 P (Astra Zeneca). The undertaking was fined €60 million for abusing the system of patent protection when launching pharmaceutical products in the market with the aim of preventing or postponing the introduction of competitive generic drugs in the market. The European Court of Justice refused the arguments of the complainant, arguing that since the “abusive practices have been relatively new in the market” the fine should only be symbolic. The decisions of the European Courts, in the given case, imply that Astra Zeneca should have expected that those practices of abuse of dominant position are subject to Article 102 of the TFEU, even though the Commission or the Court had not yet reviewed identical methods of anti-competitive conduct. Even in this case the general clause had been applied.

15. The Supreme Court of the Slovak Republic underlined the State's constitutional obligation to protect competition. It concluded that the National Competition Authority and the courts shall prefer such interpretation of the law that will assist in fulfilling this goal, i.e., not strictly textual interpretation, but objective and teleological interpretation of the legal norms.

**Comment:**

The above case is an important one for Slovak judicial practice in the field of competition law. Primarily, the ruling of the Supreme Court confirmed concurrence with the Judicature of the European Courts in reviewing cases of abuse of dominant position that are not explicitly set out by the national legislation in the member states and in Article 102 of the TFEU. It took a clear position that new ways and methods of anti-competitive practices of dominant undertakings in the relevant market, bearing attributes of abuse of dominant position, should be considered and reviewed as violations of the general clause. Imposing sanctions does not require such practices to be firstly identified and forbidden by the competition authorities. In this respect, the given decision finally broke through the previous, opposite positions resulting from some earlier decisions of the Supreme Court of the Slovak Republic. Respecting penal policy standards in administrative proceedings does not imply that the sanction may be imposed only for anti-competitive practices that are explicitly banned by the legislation. The competitors must be aware that all cases of competition law violations, restricting or potentially restricting the competition, may represent grounds for administrative liability, disregarding the previous intention of the undertaking to violate competition rules.

## **7.5. ARKOUDA CHRISTINA, DISTRICT COURT KATERINI (GREECE)**

### **Information Concerning the Ruling:**

#### **Decision of the Council of State No. 3935/2013**

- Name of the parties: “TECHNOPOLIS CINE TSAGARAKIS SA.” / “ODEON SA.”
- Case summary: Film distribution. Multiplex cinemas. Abuse of dominant position. Abuse of the relationship of economic dependency. A business can be considered to be in a relationship of economic dependency on another even if entering for the first time into the market, desiring to acquire the position of customer or supplier.
- Legal context: Art. 102 TFEU/ National Law No. 703/1977 (competition law with provisions equivalent to Articles 101, 102 TFEU).

### **Facts**

**The parties:** The Greek company “TECHNOPOLIS CINE TSAGARAKIS S.A.” (hereinafter TECHNOPSIS) is a family- owned business, which operates in the field of entertainment services and, in particular, in the management and operation of cinemas in Heraklion, Crete. In 2004, the company created the first multiplex in Iraklion, ‘TECHNOPOLIS’, which has five (5) modern cinemas, an outdoor theatre, a playground and parking. On the other hand, “ODEON CORPORATION PUBLIC SHOWS SA” belongs to the ODEON group and engages in film distribution in the domestic market, exclusively representing 20th Century Fox and other well known film production companies. On July 11<sup>th</sup>, 2007, ODEON’s subsidiary company ‘CRETA CINEMAS ENTERPRISES SA’ started to operate a multiplex cinema of eight (8) cinemas in TALOS Heraklion (hereinafter ‘ODEON TALOS’), an undertaking, which was directly competitive to ‘TECHNOPOLIS’, providing similar services to it.

### **The Case Before the Hellenic Competition Commission (2007):**

The case concerned a complaint filed by TECHNOPSIS CINE TSAGARAKIS against ODEON for an alleged abuse of the dominant position held by ODEON, in breach of Article 2 of National Law No. 703/1977 for the Protection of Competition Law, as applicable, and for the alleged abuse by ODEON of the relationship of economic dependency that existed between TECHNOPSIS and ODEON, in breach of Article 2a of the same law. In particular, the complaint referred to the refusal of ODEON to deliver movies to TECHNOPSIS, in this way abusing the dominant position it occupied in the relevant market.

**Complainant Allegations:**

- i) According to the complainant, the competitor multiplex ODEON TALOS had accessibility to the film archive of all major distributors, unlike TECHNOPSIS, which couldn't have access to ODEON movies, despite the fact that the latter represented an average of more than 20% of annual tickets. As a matter of fact, according to the complainant, all similar businesses in the relevant market across the country featured films from all four large distribution companies (ODEON, Audiovisual, Village Roadshow and UIP). The complainant claimed that due to the refusal of ODEON to supply the TECHNOPSIS multiplex cinema with its movies, the latter was driven to elimination from the relevant market.
- ii) The relationship of economic dependency between Technopolis and ODEON had been initiated by the time ODEON TALOS was launched by ODEON in Heraklion.
- iii) The abuse by ODEON of the above existing relationship of economic dependency arises from the fact that the degree of distribution of ODEON films in similar enterprises in the relevant geographical market of Heraklion (ODEON TALOS) is up to 100%.
- iv) ODEON'S refusal to supply was without objective justification, since: a) Technopolis is a trustworthy company, b) TECHNOPSIS cinemas are at least equivalent to the halls of Odeon Talos, in terms of capacity, aesthetics, quality and safety, and c) there are no technical or economic reasons for the refusal to supply.
- v) As far as the alleged abuse of the dominant position held by "ODEON" is considered, the complainant claimed that in regard to the film "First Time Godfather", which played at "ODEON TALOS" in many halls, with huge success since it was a movie with a strong local character, therefore relating it to a distinct relevant market, ODEON refused to supply Technopolis, with at least one copy of the movie (while it granted three copies to ODEON TALOS), in this way abusing its dominant position.

**Market definition:**

The Hellenic Commission for the Protection of Competition defined the relevant product market in this case as below:

i) *The Relevant Market for Film Distribution,*

The case concerns the relevant market for film distribution, in which, distribution companies distribute movies to cinemas, whilst cinemas display, generally, all kinds of films, without specialising in any particular kind. In this sense, the relevant market for film distribution is uniform with regard to the type of content of the films. On the other hand, with regard to the element of the 'time' of the distribution of the films, the relevant market may be divided into two sub-markets, namely, the market for films that are released and exhibited to the public for the first time, and that of the movies that are played for a second time. The conditions of competition between the two relevant markets are

substantially different, especially when it comes to commercial films, which have mostly been advertised and are expected by the public, since, in this case, the overwhelming majority of the tickets are sold out by the early days. On the grounds that TECHNOPOLIS' viability depends, to a large extent, on the supply of first-run movies, as a Cineplex, the Hellenic Competition Commission limited the relevant market to the market for movies that are exhibited to the public for the first time.

*ii) The Relevant Market of Cinemas Exploiters.*

With regard to the present case, the second relevant market is that of the cinema's exploitation, in which both of the involved parties operate. In this market, both companies holding individual halls, as well as other enterprises holding cinemas with more halls (so called multiplexes) are engaged. Multiplexes have grown rapidly in Greece over the last decade, with a corresponding reduction of the presence of individual halls. The success of the multiplexes is mainly due to certain characteristics that distinguish them from most individual halls, such as the numbered seating, the possibility of telephone booking using a credit card, the film variety, and due to the fact that services, in the case of multiplexes, extend beyond the movies, and also into the field of food services and entertainment.

*iii) The Relevant Geographical Market*

Regarding the relevant geographical market, in the case under examination, the Commission decided that it extends throughout the territory of Heraklion, Crete

## **Conditions of competition**

### *Market Shares*

ODEON engages both in the film distribution market and the market for cinema exploitation, as defined above, in contrast to TECHNOPOLIS, which operates only in the second market (of cinema management and exploitation). Consequently, with regard to the first market, for cinema distribution, TECHNOPOLIS is a (potential) customer for ODEON. On the contrary, as far as the second relevant market, for cinema exploitation is considered, the two parties are considered to be competitors. Given that the conduct complained about relates to the relationship of TECHNOPOLIS with ODEON, as a customer-supplier, the analysis was focused on the first market, for film distribution.<sup>6</sup> According to the data available, the market share of the four main competitors in the market for the distribution of films, namely, ODEON, VILLAGE, AUDIO VISUAL, and U.I.P, was estimated at being up to 25% for each one of the three first companies and up to 15% for the fourth one.

### *Criteria for Distribution*

Odeon sets a certain number of quality standards, which cinemas have to meet in order to be supplied with its films, always depending on the potential for the financial exploitation of each movie. In the

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<sup>6</sup> According to ODEON's data, its market share ranged nationwide over the year 2003-2004 between 17% -19% in 2004-2005, between 20% -23% in 2005 -2006, between 28% -30% in 2006-2007, and between 19%-21% in 2007-2008.

Greek market, it is an established practice that the four main film distribution companies, as mentioned above, supply each other's multiplexes with their films. ODEON films usually represent an average of one third (1/3) of all films viewed and of one third of the halls occupied in a multiplex cinema.

### **Decision of the Hellenic Competition Commission**

*i) Abuse of Dominance?* With regard to the alleged abuse of the dominant position held by ODEON, the Commission decided that ODEON did not hold a dominant position in the relevant market, due to its aforementioned market share and, as a consequence, found no violation of Article 2 of Law 703/1977.

*ii) Abuse of the Relationship of Economic Dependency?*

With regard to the alleged abuse by ODEON of the relationship of economic dependency that existed between TECHNOLIS and ODEON, in breach of Article 2a of the National Law No. 703/1977, the Commission determined that, for the provision of Article 2a of the Law, the following three parameters must exist, cumulatively: (a) the existence of a relationship of economic dependence of one company by another company from which it obtains a certain type of product or service, (b) the absence of an equivalent alternative, (c) and the existence of abuse of this dependency. The Commission concluded that only in the case that a contractual relationship or cooperation of any kind has been developed between two undertakings, could there also be a relationship of economic dependency between them. Taking into account that there were no former or present contractual relationships, or occasional or permanent cooperation, between the complainant and the complained company, the Commission decided that the first of the three aforementioned parameters, and particularly, that "of the existence of a relationship of economic dependency of one company by another company" wasn't fulfilled in this case. It thus found that there was no infringement of Article 2a of the Law, and consequently rejected Technopolis's complaint.

### **The Ruling of the Administrative Court of Appeal (Decision No. 2498/2010)**

The complainant company, TECHNOLIS, appealed against the Commission's decision before the Administrative Court of Appeal. The Court held that the prohibition under the provision of Article 2a of Law 703/1977, and especially the first parameter "of the existence of a relationship of economic dependence of one company by another company, from which it obtains a certain type of product or service", does not require for its application an existing or pre-existing customer relationship. It thus annulled the Commission's decision and returned the case to the Commission, in order to examine the existence of the other two conditions set under Article 2a of Law 703 / 1977 (absence of equivalent alternative and the existence of abuse of this dependency).

### **The Decision (No. 3935/2013) of the Council of State**

Against the decision of the Administrative Court of Appeal, ODEON lodged an appeal before the Council of State (Supreme Administrative Court). The Council of State (composed of seven members due to the importance of the case) ruled that the appellant (ODEON), as a film distribution company in Greece, which exclusively represents large foreign film production companies, some of which, due to the quality, reputation, extensive advertising, and hence their popularity, find it possible to make products with high prestige, and therefore it possesses a strong financial position in the market of Heraklion Crete, regarding the distribution of these films. After taking into consideration that the respondent (TECHNOPOLIS) asked ODEON to supply it with its products (films), there existed a relationship of economic dependency between them, in the sense of the provision of Article 2 of Law 703/1977, even in the absence of a pre-existing contractual relationship between them.

### **Comment**

The Supreme Administrative Court (Council of State) makes an authentic interpretation of the first condition for the application of the provision of Article 2 of Law 703/1977, and particularly that of a “relationship of economic dependency” between two undertakings, underlying **that a business can be considered to be in a relationship of economic dependency on another, even if entering for the first time into the market, desiring to acquire the position of customer or supplier, despite the absence of a pre-existing contractual relationship.** Despite the fact that the Court, in its Judgment, referred to the protection of the consumers as the *ratio* of the relevant provision, the Court’s above approach can be deemed to apply more widely and in accordance to the principles of the ECJ’s case law<sup>7</sup>, which imply that the prohibition of the abuse of a relationship of economic dependency, aims not only to protect consumers from exploitation by dominant undertakings, but also to protect the competitive process itself, since the refusal to supply a customer, even if the latter enters into the market for the first time, may consist of an abuse of dominant position, by reason of the exclusionary effect that might result from it, since it prevents the access of other competitors to the market for a certain product or service, and risks eliminating all competition on the part of the customer.

Indeed, the Greek legislator, in the Explanatory Memorandum of the Posterior Law 3784/2009, adopted a contrary interpretative approach, by indicating that "the provision of Article 2 protects an individual right and not the proper functioning of the competition in favour of the consumer, which is

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<sup>7</sup> Judgment of 6th March, 1974, Joined Cases 6/73 and 7/73 [1974] ECR 223, Judgment of 14th February, 1978, Case 27/76 [1978] ECR 207, Judgment 3rd October, 1985, CBEM v. CLT and IPB, Case 311/4, [1985] ECR 3261, Judgment of 5th October, 1988, AB Volvo v. Erik Veng (UK) Ltd., Case 238/87, [1988] ECR 6211

the subject of law 703 / 1977 " and therefore repealed the provision of Article 2a of Law 703/1977. By the time that Law 3784/2009 came into force, Competition Commission thus no longer had jurisdiction to impose administrative fines on the offenders. Nevertheless, with regard to the present case, the provision of Article 2a Law 703/1977 was applicable by the time the case was pending before the Hellenic Competition Commission (29-1-2009), and at the time the former's decision was appealed before the Administrative Court of Appeal (06/04/2009). However, the same provision of Article 2a of Law 703/1977, has been transferred as Article 18a in National Law 146/1914 'for unfair competition'<sup>8</sup> and, hereafter, similar conduct can only be examined by National Courts, in the terms of Article 1 of Law 146/1914. The most significant changes are that the process is no longer based on the inquisitorial system, and that the penalties for the breach of the provision are imposed purely on the level of private law. This legislative amendment has already been criticised for creating many issues, both on the level of interpretation and implementation. The main question is whether the former Article 2a of Law 703/1977, and now 18a Law 146/1914, remains a provision against restraints on competition. In my view, the aim of Article 18a (formerly Article 2a of Law 703/1977), besides the protection of competitors and consumers, is also to safeguard the structure of competition, even though there is implementation of the general clause of 'good morals' of Art.1 of Law 146/1914. Indisputably, the interpretative principles which stem from the annotated Judgment of the Council of State, as well as from the rest of the relevant case-law of the Administrative Courts and the Competition Commission, still remain useful and shed light on the above issues, even under the rule of Law 146/1914.

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<sup>8</sup> Law 146/1914, on unfair competition, prohibits and imposes sanctions on unfair trade practices, whilst Law 702/77 provides for the control of monopolies and oligopolies and the protection of free competition.

## 8. COMPETITION LAW ENFORCEMENT IN THE TELECOM INDUSTRY

### 8.1. KERKMEESTER HEICO, COLLEGE VAN BEROEP VOOR HET BEDRIJFSLEVEN (THE NETHERLANDS)

#### **Decision by the Trade and Industry Appeals Tribunal of 31st August, 2011<sup>9</sup>**

The Trade and Industry Appeals Tribunal (hereinafter: ‘the Tribunal’) rendered a decision on 31st August, 2011, on the appeals against the Market Analysis Decision on Fixed and Mobile Termination of 7th July, 2010, (reference: OPTA/AM/2010/201951). In this decision, the Independent Post and Telecommunications Authority (hereinafter: ‘OPTA’) set the rates which providers of fixed and mobile telephony in the Netherlands may charge each other for call termination. ‘Termination’ is the service consisting of delivering a telephone call to the party called. Fixed and mobile termination are thus services which providers with a fixed or mobile telephone network furnish in order to route an incoming call to a number that is connected through their network.

#### **Summary of the Disputed Decision**

Fixed and mobile termination are services which, in the Recommendation on Relevant Markets, the European Commission (hereinafter: ‘the Commission’) has determined should be assessed by national regulatory agencies to determine whether there is ‘significant market power’ (hereinafter: ‘SMP’). OPTA concluded in the decision that all fixed and mobile termination providers have SMP. Without regulation, they can exploit this position by charging excessively high prices for termination. OPTA found that excessively high termination prices produce several adverse consequences, resulting in an inefficient retail price structure. OPTA therefore deemed that the regulation of fixed and mobile termination by all providers was necessary. The most important element of such regulation is ‘symmetrical price regulation’, that is, imposing the same price ceiling for all fixed providers and the same price ceiling for all mobile providers.

In the disputed decision, OPTA opted for price regulation based on a cost price in which only the incremental costs have been allocated. The incremental costs are only the additional costs that are caused solely by the termination service. OPTA felt that regulation of prices based on this cost-price method was necessary to fully avoid the detrimental effects of an inefficient retail price structure. An efficient retail price structure can only be created if termination prices charged at the wholesale level

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<sup>9</sup> [www.rechtspraak.nl](http://www.rechtspraak.nl); LJN BR6195

are equal to, or less than, the incremental cost price. Higher termination prices will result in higher retail minute rates, causing end-users to make fewer calls.

The cost-price method, in which only incremental costs are allocated, has also been recommended by the Commission and is known as the ‘pure BULRIC’ method, with ‘BULRIC’ being short for ‘Bottom-Up Long-Run Incremental Costs’. According to the Commission, this method is proper, given the specific characteristics of termination markets in which the services are mutually purchased by providers from one another. Prices based on incremental costs encourage efficient production and consumption, and minimise the potential disruption of competition.

### **Summary of the Appellate Proceedings**

The disputed decision was appealed to the Tribunal by 10 parties. In cases such as this, in which parties are appealing a market analysis decision by OPTA, the Tribunal renders judgment in the first and sole instance. The inquiry occurred at the hearing on 15th and 17th March, 2011, and on 25th May, 2011. The mobile telephony providers put forward arguments on appeal against OPTA's choice for pure BULRIC. These parties contend that the cost-price method that is based on pure BULRIC is not an appropriate price obligation within the meaning of Article 6a.2(3) of the Dutch Telecommunications Act (hereinafter: ‘TA’), since this obligation goes beyond what is strictly necessary to rectify the potential competition problems. In particular, the competition problem of excessively high prices can also be combatted by applying a cost-price method that is based on ‘plus BULRIC’. The plus BULRIC model not only assumes the costs which are incremental to providing termination, but also applies a mark-up for non-incremental fixed costs.

### **The Tribunal’s Ruling in Sum**

The price obligation imposed by OPTA must be appropriate, which, under Article 6a.2(3) TA, means that this obligation has to be based on the nature of the problem observed in the relevant market, and is proportional and justified in light of Article 1.3 TA’s objectives.

The Tribunal will answer the question about whether a price measure based on pure BULRIC is appropriate, or whether OPTA should have suggested that a less stringent form of price regulation would have sufficed. Under the Tribunal’s settled case law, OPTA must, pursuant to Article 3:4(1) of the General Administrative Law Act, weigh the interests directly affected by the imposition of obligations in connection with a market analysis decision. Article 6a.2(3) TA must be considered a provision which does not impair, but, rather, further details this obligation. A price obligation is appropriate if it is based on the nature of the problem observed in the relevant market, and is proportional and justified in light of Article 1.3 TA’s objectives.

The objectives mentioned in Article 1.3 TA include fostering competition in furnishing electronic communications networks, electronic communications services or related facilities by, for instance, encouraging efficient infrastructural investment and supporting innovation, shaping the internal market and promoting the end-users' interests in terms of choice, price and quality. These objectives are regarded as the interests to be served by regulation, against which the regulated parties' interests need to be balanced. OPTA pointed to the legislative history behind Article 6a.7 TA. It is apparent from this history that the measures must focus on fostering the creation of sustainable competition and ensuring that consumers are offered maximum benefits. The Tribunal does not infer from this that OPTA must impose price measures which furnish the maximum benefit to consumers, irrespective of the consequences for the regulated parties.

The proportionality of the regulation should be assessed in light of the seriousness of the problem in the market which has been determined to not actually be competitive.

It is undisputed that the mobile providers' interests are affected to a very substantial degree by price regulation based on pure BULRIC. This is not changed by the fact that 'two-way access' exists in the transmission markets, in the sense that providers mutually purchase termination services from one other. Although this does result in a situation in which, because mobile termination prices are set at a lower rate, a mobile provider earns less income, the provider has lower expenses too, because termination on other mobile networks can be purchased for lower prices. Yet mobile providers nonetheless suffer a very substantial loss of earnings, especially in comparison to fixed telephony providers.

Nor is it disputed that, in contrast to these disadvantages for the mobile providers, there are benefits for the fixed providers and/or end-users. These interests must be taken into account in balancing the interests.

The question which must be answered is whether the nature of the observed competition problem is such that price regulation based on pure BULRIC, with the aforementioned far-reaching consequences, can be viewed as appropriate. The discussion between the parties has concentrated in this regard on the competition problem of excessively high prices.

In principle, OPTA has the authority to impose price regulation on parties, which results in these parties not being able to charge more than the costs and investments, plus a reasonable profit mark-up which a theoretically efficient provider would earn. OPTA has asserted that it is permitted to impose a

price regulation which goes beyond what is strictly necessary to rectify the observed competition problem. Such authority is supposedly evident, for example, from Article 6a.7(2) TA, which mentions cost orientation as a price measure. Insofar as OPTA intends to state here that a price obligation may, in principle, extend so far that the prices charged by a party with SMP are reduced in whole from an excessive to a cost-oriented level, the Tribunal agrees with this argument. Likewise, the Tribunal shares OPTA's opinion that plus BULRIC is a cost method which can be applied to set a cost-oriented price. The Tribunal does not, however, accept OPTA's reasoning that, besides plus BULRIC, pure BULRIC may be applied. After all, pure BULRIC is a more far-reaching type of price regulation than plus BULRIC – there is no mark-up for non-incremental fixed costs – and the text of Article 6a.7(2) TA in no way supports the view that a form of price regulation may be imposed which goes beyond a price measure which can already be regarded as cost-oriented.

OPTA primarily based its choice for BULRIC on the ground that price regulation based on pure BULRIC is the only model which completely avoids the adverse effect of an inefficient retail price structure. There is no dispute that this problem raised by OPTA does not occur in the markets constituting the subject of the market analysis decision, which markets were examined in accordance with Article 6a.1(3) TA. Insofar as the problem is occurring and insofar as it can be overcome with the aid of pure BULRIC, it is happening in the mobile telephony relevant market, which is considered effectively competitive by OPTA. In addition, the Tribunal notes that this is an issue which is not included in the list of potential competition problems on which, consistent with the ERG Common Position on the approach to appropriate remedies in the new regulatory framework of 1st April, 2004, OPTA has relied in all its market analysis decisions and which was also reflected in the market analysis decision. In the Tribunal's judgment, this circumstance does not support the conclusion that pure BULRIC would result in price obligations which are appropriate within the meaning of Article 6a.2(3) TA.

That the consequences for combatting the inefficient retail price structure justify imposing price obligations based on pure BULRIC is also substantiated by OPTA, with a reference to the results of the effects test. These results suggest that pure BULRIC has more favourable effects on the consumer surplus and the total welfare than plus BULRIC. In this connection, the Tribunal points out, first and foremost, that Article 1.3(4) TA lays out an additional obligation for OPTA to furnish substantiation, based on, *inter alia*, a report on the foreseeable relevant consequences, OPTA must, both qualitatively and, insofar as reasonably possible, quantitatively, show that the measure imposed by it is necessary and that another, less extensive measure, would not be effective, and cannot justify a measure which is not appropriate. Further, OPTA has acknowledged that Article 1.3(4) TA does not change the fact that an obligation must be appropriate.

The aforementioned situation is not altered by the Commission's having recommended pure BULRIC as an appropriate rate measure in the termination markets, in its Recommendation of 7th May, 2009, on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC; hereinafter: 'the Termination Rates Recommendation'). While Article 19(1) of the Framework Directive provides that Member States should ensure that the national regulatory authorities, in carrying out their duties, take into account the Commission's recommendations as much as possible, this does not change OPTA's obligation to deviate from the non-binding Termination Rates Recommendation, if it would otherwise be acting contrary to national regulations.

Hence, the conclusion is that OPTA may not base the mobile termination rates on pure BULRIC.

The Tribunal must then answer the question about whether a price obligation based on pure BULRIC is appropriate to regulate the fixed termination prices. As support for its viewpoint, one of the parties has put forward a ground for appeal against this notion, in which it refers to what has been asserted with respect to the regulation of mobile termination rates. In defence, OPTA has referred to what it has observed concerning the mobile termination rates. The Tribunal sees no reason to reach a different conclusion regarding the fixed termination rates than regarding the mobile termination rates.

The Tribunal believes that the termination prices set by OPTA cannot be upheld. Next, rendering a final decision, the Tribunal itself hereby sets the price for mobile termination, based on plus BULRIC, at no more than 2.4 euro cents per minute, effective 1st September, 2012. Until that date, the providers may not charge each other more than 2.7 euro cents per minute.

OPTA must take a new decision before 1st January, 2012, on the rate for fixed termination and for a number of termination-related services. By way of preliminary relief, the Tribunal hereby orders that, until such time as this decision has been taken (no later than up to 1st January, 2012), the rates set by OPTA for the second half of 2011 shall continue to apply.

### **Comment**

The case summarised above is interesting because it raises points about:

- The relation between European soft law and national hard law in the field of competition law.
- The procedural issue around whether previous market definitions (in this case, in particular, the separation between retail and wholesale markets) limit the possibility to reach an outcome that is optimal from an economic point of view.

- The relation between the (essential legal) principle of proportionality (a measure should not go further than necessary) and the economic goal of wealth maximisation.

The way OPTA (now AC: the Authority for Consumers & Markets) and the other parties presented the case before the Tribunal did not allow it to refer preliminary questions to the European Tribunal of Justice.

It is settled case law of the Tribunal that the proportionality of a tariff measure should be regarded in the context of the objectives of article 1.3 TA. For example, in some (exceptional) cases a tariff measure that does not allow a regulated party to recover its costs completely is still regarded as proportional, if indispensable to promote the aim of competition. In this case, this did not help OPTA, since the underlying retail market (where the problem of an inefficient retail tariff structure occurred) was regarded as being competitive anyway.

OPTA could, however, have stressed the importance of yet another objective mentioned in Article 1.3 TA, namely, the shaping of the internal market. OPTA's point might have been that a tariff structure that was in accordance with the Recommendation of the Commission would be required to further this objective. Part of telecommunications traffic is trans-border and if termination tariffs in different countries were based on different systems (pure BULRIC versus plus BULRIC) some telecom operators (regulated on the basis of plus BULRIC) might gain an unfair advantage over others (regulated on the basis of pure BULRIC), allowing them to cross-subsidise activities.

Whether this would have led to a different outcome in the case is far from certain. Trans-border telecommunications traffic is only a small part of the total, a pure BULRIC MTA-tariff in one country is not necessarily higher than a plus BULRIC-tariff in another, and the internal market argument does not necessarily point in the direction of pure BULRIC if regulators in other countries do not follow the EC recommendation. Moreover, following this viewpoint could lead to the undesirable result that a Recommendation of the Commission could get a *de facto* binding character, allowing the Commission to circumvent the usual procedures to reach a binding European rule (like laying it down in a directive).

At least, the Tribunal might have considered referring a preliminary question to the European Court of Justice on this issue, allowing it to raise the other interesting points mentioned above, on the way.

## **8.2. KOSTA OLYMPIA, FIRST INSTANCE COURT OF LARISSA (GREECE)**

### **Information concerning the Judgment:**

Council of State ΣΤΕ 715/2013 (Supreme Administrative Court):

ΔΕφ Αθ 1780/2008 Administrative Court of Appeal

Parties : “ OTE S.A” and “The National Telecommunication Post Commission of Greece -NTPC ”

### **Facts**

The case came about when 10 companies, the complainants (FORTHNET, TELEDOME A.E.B.E, VIVODI, ALGONET, NET ONE, SATPE, TELEPASSPORT, COSMOTELCO, TELLAS and LANNET) denounced to the National Telecommunication Post Commission of Greece (NTPC) OTE S.A for continuously violating telecommunications law by repealing default mobile operator by subscribers in violation of the relevant regulations (decision of NTPC 254/70/2002) and by denying the requests of new subscribers to activate the phone provider of their selection. With this attitude, OTE S.A violated the National Law No. 703/1977 (competition law with provisions equivalent to 101, 102 TFEU).

### **Decisions of the EETT and Ruling of the Courts**

-The National Telecommunication Post Commission of Greece (NTPC) enacted Decision 412/43/29-11-2006 and imposed a fine of 3,000,000 euros on OTE S.A (1,000,000 euros for violation of telecommunications rules and 2,000,000 euros for infringement of the law of free competition). The Commission (NTPC) decided that OTE S.A had violated telecommunication rules (Law No. 2867/2000, Regulatory Decision of E.E.T.T 254/70/31.5.2002) because it did not follow the provisions and terms of integration and the activation of the telephone operator who had been preselected by customers and also that it violated the rules of competition Law (703/1977 Article 2) by abusing its dominant position in the telecommunications market. NTPC held that the relevant market should be defined as: the market of access and of interconnection of the public telephone network, and the market of voice telephony, which is directly affected by the former, and that the relative geographical market was the Greek territory. NTPC noticed that up to 31/12/2000 OTE S.A had a monopoly in the installation, operation and exploitation of the public telecommunications network, and taking into account the existing significant economic and trade barriers for new entrants, as well as the overall size of OTE S.A and its benefits at the technological level, NTPC ruled that the company held a dominant position in the above two markets (access / interconnection to the public telephone network and voice telephony). In addition, NTPC held that the misconduct was the refusal of new applications when the selection of the provider was different than O.T.E S.A. That attitude constituted an abuse of its dominant position, because O.TE S.A was the only provider in Greece that could provide access to

this service. By this behaviour, OTE S.A was blocking customers from selecting other providers, and thus minimised the competition possibilities. NTPC commented that: OTE SA should not use its power to strengthen its position in the market, and to prevent competition, by imposing difficulties against its competitors entering the market.

-Against this decision OTE SA lodged an appeal to the Administrative Court, claiming that there was no economic benefit from such behaviour or blockage in the relevant market, proven by the fact that many other providers entered the market, increasing the competition, and the overall number of qualified subscribers has eventually risen. OTE S.A also claimed that the attitude of its competitors was illegal, because they activated contracts without signed consents from the customers, and they declined to send to OTE S.A the details of customers requesting the discontinuation of their pre-selection of a competitor to the O.T.E S.A. company. In addition to the above, it claimed that the imposition of such a fine for violation of the telecommunications rules prevents from the imposition of another fine for the breach of competition rules, when it is caused by the same behaviour.

-The Administrative Court of Appeal (number of decision 1708/2008) held that the imposition of different fines based on different rules is not prohibited by the Greek Constitution or European Law, and that imposing different forms of administrative sanctions is in accordance with Greek Law. The Court concluded that all allegations against OTE S.A were proven and that OTE SA violated the rules of telecommunication, and abused its dominant position in the Market (as NTPC had already decided) and after repeating the above mentioned conclusions, overruled all of OTE S.A's defending arguments. In support of its arguments, the Court refers to the consistent line of decisions of the European court which show that an abuse is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market, where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened (*Hoffman- La Roche v Commission*, paragraph 91, *Michelin v Commission*, cited at paragraph 239, *AKZO v Commission*, cited at paragraph 69). The Court took the view that for the purposes of establishing an infringement of Article 2 of Law 703/1977 it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect, regardless of whether ultimately that effect occurred (*British Airways Case T 219/1999*, paragraph 239, 297). That's why the court overruled as irrelevant the OTE S.A's arguments that it did not obtain any financial benefit and that ultimately its behaviour led to completion development in the telecommunication market. Furthermore the Court held that the company's behaviour (the denial or improper fulfillment of providing access and irregular rejection of the discontinuation request for carrier pre-selection), which resulted in the decrease in reputation and credibility of other telecommunications companies, imposed barriers to new competitors entering the market and reduced alternative options for customers, and therefore prevented the development of competition, and violated the provisions of Article 2 of Law 703/1977.

Finally, having found that according to the provisions adopted for controlling and protecting the smooth operation of the electronic communications services market and free competition, infringements of OTE SA were serious, and after assessing the number of illegal cases of discontinuation of pre-selected carriers contracts (166,464), the extent and duration of the violations, ultimately reduced the relative fines imposed, based on the principle of proportionality, to the amount of 400,000 euros for breaching the rules on telecommunications, and the amount of 600,000 euros for breaching competition rules. In considering the fines, the court also took into account that O.T.E S.A at the end followed the cancellation proceedings according to default service requests from consumers and that many competitive companies were acting illegally by demanding that O.TE S.A activate contracts without relevant customers. Those two facts partially justified its behavior, so the fines were reduced as a result.

-Then, OTE SA lodged a request before the Supreme Administrative Court (Council of State) to set aside Decision No. 1780/2008 of the Administrative Court, because the cumulative administrative sanctions for the same misconduct that violated the principle *non bis in dem*, and that there was no evidence of dominant position abuse by OTE S.A, because the behaviour of OTE SA was neither directly detrimental to consumers, nor influenced, or sought to influence, the structure of the market unfairly. OTE SA also claimed that consumers were able to express their free will as proven in that case.

The Council of State, with Decision 715/2013, underlines that in this case the requirement for the identity of the legal interest among the rules of telecommunications and the rules of competition is not met, and also that the conditions for the application of the corresponding law provisions are not the same, nor are the consequences of breaking them and therefore there is no application of the *non bis in dem* principle in this case.

Furthermore, the Court referred to the above mentioned case law by determining what “an abuse of a dominant position” consists of, but also underlined that, in order to determine whether an undertaking with a dominant position in the market has abused such a position, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (with reference to *Hoffman-La Roche, v Commission*, paragraph 38, 91, *France Telecom S A v Commission*, paragraph 104-107, *Deutsche Telekom v Commission*, paragraph 170-176). Then the Court annulled the earlier decision, finding that the claim from OTE S.A that many competitors were operating illegally, demanding that O.TE S.A activate connections (contracts) without signed requests from the consumers, was proven, and that this was not properly investigated by the Administrative Court of Athens, as it should. The court held that in order to decide whether or not OTE S.A abused its

dominant position, it is essential to investigate all its above mentioned arguments, and that it was not enough to consider them only as factors in order to reduce the fines imposed. According to the Court, an abuse occurs when an undertaking aims to eliminate competitors, in order to gain benefit from the weakening of competition. The Court held that the conduct of an undertaking (regardless of whether it was contrary to other specific provisions of the telecommunications rules) does not seek, nor lead, to an attempt to affect the structure of the market in its favour, when it is a direct response to consumers' requests, consumers who had formed their will freely, without being affected, directly or indirectly, by the company (OTE S.A) that holds a dominant position.

### **Comment**

There are two important aspects of this case.

1) The interpretation and implementation of the *non bis in dem* principle in Greek authorities and Courts. Both the NTPC and the Courts agree, even with different conclusions, that there is no application of the *non bis in dem principle* to offences committed by the same person and arising out of the same facts, in violation of rules aimed at achieving different regulatory or policy objectives, such as competition rules, on the one hand, and rules in the area of telecommunications regulation, on the other. This was also the conclusion in the Case C 280/08 P Deutsche Telekom AG v Commission (2010) ECR I-9555, paragraph 56-110, that undertakings may be subject to telecommunications regulations as well as competition law. That is why, in my opinion, it is correct that only NTPC, and not the National Competition Committee can deal with cases of companies that violate the rules of telecommunications and the rules of competition law, in order to avoid over- punishment by different Authorities.

2) The Court's and the NTPC's definition of an 'abuse of dominant position' is in accordance with the principles of European competition law and the case law of the European Court of Justice (Hoffman-La Roche c Commission, paragraph 239, AKZO v Commission, paragraph 69, Michelin v Commission, paragraph 239, France Telecom S A v Commission, paragraph 104-107, Deutsche Telekom v Commission, paragraph 170-176).

### **8.3. CHRISTODOULIDOU MESSIOU STELLA, NICOSIA DISTRICT COURT (CYPRUS)**

#### ***Cyprus Telecommunications Authority v The Cyprus Competition Committee***

**Recourse No.1/2009, Judgment delivered on 18th February, 2011.**

The applicant, Cyprus Telecommunications Authority (CYTA), filed a recourse in the Supreme Court of Cyprus asking for a declaration that the decision of the Cyprus National Competition Authority, dated 27/11/2008, which imposed on CYTA a fine of 75,000 euro is illegal, null and has no binding effect.

#### **The Facts of the Case**

Thunderworx Ltd., a Cypriot limited liability company which provides telecommunication services, filed a complaint against CYTA, which denied connection, and access, to that company to Cyta's SMS centre. Cyta also denied Thunderworx the opportunity to provide these services for that period, as a result of which Cyta created a barrier to minimum healthy competition. At that time, the only entity to offer SMS services was Cyta.

The Competition Protection Service carried out an investigation and, as part of that process, it sought the position of both Cyta and Thunderworx.

It decided that there was a *prima facie* violation of sections 6(1) and 6 (2) (b) of the Competition Law of Cyprus, which prescribe the conditions under which an abuse of dominant position takes place.

In particular, the committee decided to ask Cyta to express its views on the following:

- a) Violation of section 6 (1) (a) of the law for abuse, if its dominant position as a provider of the only SMS centre as a result of the prices and the conditions offered to Thunderworx.
- b) Violation of section 6 (1) 0(b) of the law for the same reason as a result of the harmful practices that Cyta implemented in the barrier to the provision of the necessary telecommunication connection which would have allowed Thunderworx to offer this service, leading to the restriction to access or technological development to the detriment of Thunderworx.

The Competition Committee, after considering Cyta's reply, decided that its actions in this instance amounted to an abuse of its dominant position in breach of section 6 (1) (b) of the Law and in particular Cyta:

- a) Failed to respond to its particular obligation to Thunderworx to provide access and connection to the sms centre, which was deemed to be basic infrastructure;

b) Failed to offer an objectively reasonable alternative solution, under fair terms and at a fair price so as to allow Thunderworx to provide retail “premium sms” services, thereby restricting completion on the technical development of the market to the detriment of the consumer.

Cyta received a fine of €75,000. Cyta, in its recourse, submitted that the Committee:

- a) Wrongly defined the sms market in Cyprus.
- b) Wrongly considered that Cyta and Thunderworx were competitors.
- c) Wrongly decided that the refusal to provide access and connection to the Cyta SMS centre wrongly amounts to an abuse of dominant position.

The Court dismissed Cyta’s arguments and upheld the validity of the Committee’s decision, which decided that the Service’s assessment of the abuse of a dominant position was correct, bearing in mind the circumstances of the market, Cyta had a dominant position, and this position was abused by refusing access to the SMS centre to Thunderworx.

## 8.4. ÖWERSTRÖM DAN, SVEA COURT OF APPEAL (SWEDEN)

### *Case Note on Dominant Position in the Telecoms Industry.*

#### **Relevant Documents**

The Swedish Competition Authority vs. TeliaSonera AB (publ), Stockholm District Court Case No. T 31862-04, 2011-12-02.

C-52/09 (REFERENCE for a preliminary ruling under Article 234 EC).

Swedish Competition Authority and Tele2 Sverige AB as intervener vs. TeliaSonera AB (publ), The Swedish Markets ‘ Judgment Case No. A 8/11, 2013-04-12.

#### **Facts and Ruling**

1. So far, I believe that this is the largest competition case ever, in Sweden. It took the “court system” eight years to process this case. The issue in question was whether TeliaSonera AB (publ), (“Telia”) during the period 2000 to 2003 had misused its dominant position by a so-called margin squeeze<sup>10</sup>. The Swedish Competition Authority, which brought the case to court, claimed that Telia offered its Asymmetrical Digital Subscriber Line (ADSL) to its competitors with a margin, which in relation to what Telia offered its own end-users (consumers), was insufficient to cover the costs for competitors when they resold the product to their consumers. It was alleged that the margin was not even enough to cover Telia’s own costs.

2. Telia started as a state monopoly in the early 1900s, but in contrast to neighbouring countries, there was never a formal monopoly. As a logical endpoint to this public service corporation, Telia was formed in 1993 as an independent and competitive company.

As with most other European countries in the 1900s, Sweden established a state telephone monopoly in the form of the Royal Telegraph Service, which in 1953 became Televerket. In contrast to the neighbouring countries, Denmark and Norway, there was never a formal monopoly for telecommunications in Sweden, even if there was a *de facto* monopoly in place by 1918. For quite some time, Sweden also lacked, the only country in Europe to lack this, specific telecommunications legislation.

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<sup>10</sup> A dominant undertaking which charges a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis [EU Commission Guidance Paper on the Enforcement of Art. 82 (102)].

Televerket had, as a public service corporation, been operated along strict business lines since 1912, but by the 1980s the organisation was becoming outdated. As technical development in the telecoms field accelerated in, among other ways, the form of cordless phones, fax machines and mobile telephony, private competitors started entering the Swedish market. Due to this, the need to modernise Televerket quickly became acute.

As of July 1<sup>st</sup>, 1993, Televerket became a state owned limited company which offered shares; Telia AB. One third of the shares were introduced on the Swedish stock market and traded. As a result of being a former monopoly, Telia owned the net for ADSL broadband, which covered most of Sweden. Telia therefore had to allow its competitors access to the net.

3.The Stockholm District Court ruled on 2nd December, 2011, that Telia had misused its dominant position from April, 2000, until January, 2003, and was ordered to pay an administrative fine in the amount of 144,000,000 SEK (EUR 14,400,000) payable to the State. On appeal to the Market Court (Last Instance) Telia raised several issues. I will not address all of them, but concentrate on two issues; margin squeeze and the rules of evidence.

4.On the subject of margin squeeze, Telia claimed that there was no documentation that showed what a reasonable margin for Telia would be, nor had the Competition Authority used an LRAIC method (Long Run Incremental Costs)<sup>11</sup>. The calculations made by the Competition Authority were made by using a method for the analysis of a business going forward (projections). Such a method could not be used for past conduct. Telia itself had not used the LRAIC method in its calculations. Furthermore, the ADSL business was not separated from Telia's other business and, consequently, the LRAIC method could not be used in this case.

The Competition Authority claimed that it is the entire pricing that is used by Telia, as is evident from offers, standard pricing and invitations to treat, that, combined, resulted in a marginal squeeze for the entire market. The European Commission have, in its previous praxis applied the LRAIC test. The test can be applied in different ways but the purpose is always the same. None of the arguments put forward by Telia motivates a deviation from the calculations made by the Competition Authority.

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<sup>11</sup> In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor, are the LRAIC of the downstream division of the integrated dominant undertaking. In some cases, however, the LRAIC of a non-integrated competitor downstream might be used as the benchmark, for example, when it is not possible to clearly allocate the dominant undertaking's costs for downstream and upstream operations. (Guidance Paper on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty, 2009/C45/02.)

5. The case in the Market Court, as it materialised, centred on the rules of evidence in this type of case. Firstly, the Market Court concluded that in a procedure ‘which has been going on for more than 10 years it is difficult to evaluate the evidence. Witnesses have a tendency to forget, amend, etc., their statements over time’. Secondly, it was emphasised that breaching the competition rules is a crime to which the rule “innocent until proven guilty” is applicable. The standard of proof is therefore relatively high and the evidence presented has to be robust enough to be relied upon. Additional evidence shall not affect the evidence presented. The Competition Authority, which has the burden of proof, has to prove all the circumstances that constitute the abuse of dominant position, as well as the circumstances, which affect the fine to be imposed by the Court. Having said this, the Market Court turned to evaluating the circumstances that the Competition Authority claimed constituted a margin squeeze.

In its reasoning, the Market Court relied on the preliminary ruling made by the European Court that when assessing whether a pricing practice which causes a margin squeeze is abusive, account should, as a general rule, be taken primarily of the prices and costs of the undertaking concerned on the retail services market. If, and only if, it is not possible to establish those prices and costs, then the competitor’s prices and costs should then be taken into account.

One of Telia’s witnesses testified that Telia had not used the LRAIC method in its calculations. The ADSL business was not separated (which is a prerequisite for using the LRAIC method) and the material presented by the Competition Authority could not be used as verification of the calculation of the alleged margin of 5.7 EUR, which the Competition Authority had come to in its calculations of the margin. The Market Court came to the conclusion that the LRAIC method could not be applied in this case. The Market Court therefore had to decide whether the Competition Authority’s calculations of the margin was based on reliable evidence. The Market Court concluded that although the material presented was comprehensive it was deficient (i.e., the Competition Authority did not reach the relatively high threshold of evidence). Under those circumstances the Market Court could only apply those figures which Telia itself had attested, i.e., 3 EUR. As a consequence of this the fine that had to be paid dropped significantly from 14,400,000 EUR to 3,500, 000 EUR.

### **Comment**

The lesson to be learned from this case is: that a violation of the competition rules is, in essence, an allegation of a criminal act to which the rule of “innocent until proven guilty” is applied, which in my opinion was emphasised, if compared to the Market Court’s previous precedents. Taking this into account the Market Court emphasised that an allegation of the abuse of a dominant position by the Competition Authority, a) had to be supported by an investigation that was robust, in the sense that an

additional investigation will not affect the evidence value of the first investigation presented; and b) the LRAIC method is not an exclusive method.

The lesson in b) above requires some further analysis.

As we recall, a margin squeeze is defined as a situation in which a vertically integrated dominant firm hampers downstream rivals' competitiveness by raising the wholesale price of its essential input and/or reducing the retail price of the product or service. In order to examine if an abuse of a dominant position by a margin squeeze is at hand, the Commission relies on the LRAIC as a benchmark.<sup>12</sup> In this case, however, the Market Court did not apply the LRAIC test. Obviously, Telia was successful in its argumentation around why this method should not be applied in this case. The method that the Market Court used instead is unclear. It seems as though it bought the calculations or the method used by Telia itself, which resulted in a margin of 3 EUR. This leaves a question mark for the future. If the LRAIC method can be disregarded, what test should the Competition Authority then apply as a benchmark? The Commission may, in appropriate cases, require the dominant company to produce audited separate accounts dealing with all of the necessary aspects of the dominant company's business<sup>13</sup>. Whether this rule can be applied in a National Court remains to be seen.

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<sup>12</sup> P 80 Guidance paper.

<sup>13</sup> P 117 Official Journal of the European Commission 22.8.98

## 9. COMPETITION LAW ENFORCEMENT IN THE ENERGY INDUSTRY

### 9.1. BEARKAUSKAS ALVYDAS, VILNIUS REGIONAL COURT (LITHUANIA)

Case No. A-502-801/2013 of the Supreme Administrative Court of Lithuania

*AB Orlen Lietuva (former AB 'Mažeikių nafta') v. the Competition Council of the Republic of Lithuania (hereinafter referred to as 'the Council')*

#### **On the Ruling Whereby Fines Are Imposed for the Abuse of a Dominant Position**

The dispute arose because AB Orlen Lietuva, which manufactures oil products, abused its dominant position between 2002 and 2004 by selling petrol and diesel on the market of the Republic of Lithuania. The investigation was initiated on 15th July, 2004, after suspected entry into a vertical agreement between the manufacturer AB Orlen Lietuva' and companies trading in petroleum products, wherein different prices are set to wholesalers of every aforementioned state, and they aim to share petroleum markets on the grounds of territory or under groups of buyers, also, that before taking the leading position in the Lithuanian petroleum market, AB Orlen Lietuva might have abused this position. Having considered the fact that the actions of AB Orlen Lietuva may have an effect on trade between the Member States of the European Union, apart from the compliance of AB Mažeikių nafta, actions with the requirements of the Article 82 (currently – Article 102 TFEU) of the Treaty on the Functioning of the European Union were added to the investigation on 7th March, 2005.

Having carried out the investigation, the Council acknowledged in =Ruling No. 2S-16 of 22nd December, 2005, that AB Mažeikių nafta (currently – AB Orlen Lietuva) engaged in anti-competitive practices, *i.e.*, it abused a dominant position within the market by refining petroleum products, or from petrol sales from the factory, and accordingly, within the markets of Lithuania, Latvia and Estonia (or the Baltic States), by refining petroleum products or petrol sales from the factory, applied discriminatory practices and, having no economic justification, pricing, annual loyalty and non-competition obligations, territorial pricing discrimination, and exercised other restrictive practices.

A former amendment of Article 9(3) of the Law on Competition provided that it shall be prohibited to abuse a dominant position within a relevant market by performing any acts which restrict or may restrict competition: limit, without due cause, the possibilities of other economic entities acting in the market or that violate the interests of consumers, including the application of dissimilar (discriminatory) conditions to equivalent contracts with certain economic entities, thereby placing them at a competitive disadvantage.

After hearing the applicant's appeal, the Supreme Administrative Court of Lithuania, by the ruling of 8th December, 2008, allowed the appeal in part, and obliged the Council to carry out a further investigation.

Having considered this ruling of the Supreme Administrative Court of Lithuania, the Council reopened the investigation by Ruling No. 1S-10 of 15th January, 2009, on the non-compliance of AB Orlen Lietuva's actions with the requirements prescribed in Article 9 of the Law on Competition and Article 83 TFEU.

#### **Ruling of the Competition Council of 16th December, 2010.**

The Competition Council, having evaluated the conclusions of the investigation of 16th December, 2011, stated that AB Orlen Lietuva (through former AB Mažeikių nafta) whilst implementing discriminatory pricing and having no economic justification for the pricing, annual loyalty, and by restricting the possibilities to engage in parallel importing, as well as imposing restrictions on customers to whom the buyer may sell the contract goods, violated Article 9 paragraph 9(3) of the Law on Competition of the Republic of Lithuania, and Article 102 of the Treaty of the Functioning of the European Union. AB Orlen Lietuva was obliged to stop anti-competitive practises which had violated the Law on Competition and the Treaty of the Functioning of the European Union. A fine of LTL 8,231,000 was imposed on AB Orlen Lietuva for the infringements.

During the additional investigation, the same period was investigated (between 2002 and 2004), the appropriate market definition was clarified by limiting the geographical market to the territory of the Republic of Lithuania, as well as additional arguments in support of product market definition, were provided. The Competition Council concluded that AB Orlen Lietuva engaged in anti-competitive practices, *i.e.*, had abused its dominant position within the market and through the sales of petrol from the factory, respectively, diesel sales from the factory on the market in the territory of the Republic of Lithuania, by applying economically unjustifiable and discriminatory pricing, annual loyalty and non-competition obligations, as well as by limiting the opportunities for parallel importation by its customers and limiting customers as to whom the buyers may sell the goods.

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

Vilnius Regional Administrative Court rejected the applicant's (AB Orlen Lietuva) appeal on 15th April, 2011.

The Vilnius Regional Administrative Court stated that AB Orlen Lietuva's commercial policy between 2002 and 2004 was seen as an abuse of a dominant position and took several directions: 1)

economically unjustifiable and discriminatory pricing; 2) annual loyalty and non-competitive agreements; 3) restriction of imports and parallel imports; 4) restriction on the customers as to whom the buyers may sell goods (diesel ‘Ventus’).

The Court concluded that the bonus system in the company investigated was opaque and was not applied to all customers on an equal basis. Discounts were illegally personalised on a discriminatory basis in regard to the customers’ import opportunities. The fact that the determination of price to the concrete buyer was made by following subjective factors, instead of objective circumstances, *i.e.*, the opportunity to import, whilst determining import price parity to every buyer, which cannot be recognised as complying with transparency requirements. The Court stated that although the potential importers (Lukoil, Statoil, the Neste Company groups), in some cases, bought larger quantities that might be evidence of price differentiation. However, at the moment of this investigation, the applicant, AB Orlen Lietuva, submitted any economically reasonable estimates that its pricing is well-founded. In addition, discounts were not sufficiently different and therefore their legitimacy cannot be proven. The Court considered that AB Orlen Lietuva’s pricing policy (its application of economically unjustifiable and discriminatory pricing) has led to a situation where only a few companies (potential importers) had the opportunity to take advantage of the potential of an applied system of discounts, while others were discriminated against by allowing them different conditions of competition in the market.

The applicant abused its dominant position in the market for petrol and diesel sales from the factory in the territory of the Republic of Lithuania because it set the prices directly according to the customer’s annual commitment to buy a certain quantity of petroleum products and a fixed individual minimum and close to its planned annual quantity commitment in purchasing-sales agreements, and it applied pricing aiming to determine customer loyalty and anti-competitive behaviour.

Their actions in setting prices, depending on the customer’s annual direct commitment to buy a certain quantity of petroleum products, by fixing the individual minimum close to its planned annual commitment for each customer, for which, in the case of non-compliance, a fixed amount of compensation and/or a fine for the termination of the agreement, sooner than it had fulfilled the minimum amount of commitment, was to have a stable buyer, to prevent them from free practices within the market, taking into account the changes in the prices of petroleum products or other factors, and the choice of other manufacturers was only possible in cases where AB Orlen Lietuva had not been able to provide them with petroleum products and, in that way, the petrol and diesel markets in the Republic of Lithuania was essentially ‘delimited’ from other manufacturers, and this fact greatly restricted competition.

The Court considered the evidence gathered during the investigation, which shows that the applicant AB Orlen Lietuva, by making companies buy their production in quantities that are close to their overall demand, tried to keep its position as strong as possible. The Court agreed with the Competition Council's conclusion that economic operators and consumers in Lithuania suffered damage due to the actions of AB Orlen Lietuva. It was noted that in the assessment of anti-competitive effects of non-competitive obligations, the most important factors are the supplier's position in the market and the duration subject to such commitment. Attention was drawn to the fact that the applicant's actions were not objectively justified in the context of the infringements of the Law on Competition and TFEU. The system of discounts applied by the applicant shows the abuse of its dominant position in order to deprive companies of their right to choose the sources of supply or to restrict their choice for their benefit, create barriers to its competitors entering the market, applying discriminatory conditions to equivalent contracts and strengthening its dominant position by distorting competition.

AB Orlen Lietuva took a dominant (over 90% of the market) position on the petrol and diesel markets in Lithuania. The Court concluded that the applicant, in setting prices which depend on each customer's commitment to buy a certain minimum quantity of petroleum products for its planned annual needs in cooperation agreements, by applying such pricing, resulting in the purpose of determining customer loyalty and anti-competitive behaviour, violated the provisions of Article 9 of the Law on Competition.

The Court agreed with the Competition Council's conclusion that the applicant, when making a provision in the abovementioned agreements, aimed to maintain a higher level of the selling prices of fuel in Lithuania and forbade access to cheaper fuel oil products within the Lithuanian market. The Court held that the applicant, when using a territorial principle in defining trade limits, restricted the buyer's possibility to export petroleum products (petrol and diesel), to deliver them to buyers in Lithuania from 1st April, 2003, to 31st December, 2003, acted (through restrictions on imports, parallel import restrictions) in violation with Article 9 of the Law on Competition. The Court also found that the applicant had abused its dominant position because of restrictions to customers, and that it unfairly discouraged buyers' opportunities to be engaged in in the market, as well as infringing the interests of consumers in relation to buying diesel 'Ventus' more cheaply.

**Ruling of the Supreme Administrative Case of Lithuania of 21st January, 2013, Case No. A-502-801-13**

The Supreme Administrative Court of Lithuania amended the decision of the Vilnius Regional Administrative Court by reducing the amount of the fine to the company. The Supreme Administrative Court of Lithuania pointed out that although the Competition Council found in the ruling that AB

Orlen Lietuva, whilst purchasing diesel ‘Ventus’, had violated the Law on Competition (imposed discriminatory sales prices on diesel ‘Ventus’ in accordance with its intended purpose, and restricted their customers, *i.e.*, the marked diesel, sold at reduced prices, is intended only for the bunkering of ships). However, in the opinion of the Supreme Administrative Court of Lithuania, the Competition Council failed to prove the validity of this infringement, did not consider all of the important circumstances in order to prove this breach, and the ruling in this part of the case was therefore annulled. In this regard, the extended panel of judges of the Supreme Administrative Court of Lithuania reduced the fine imposed on the applicant by five per cent, *i.e.*, LTL 7,819,450. Other parts of the decision of the Vilnius Regional Administrative Court were left unchanged.

The Supreme Administrative Court of Lithuania pointed out that the mere fact that the applicant’s dominance in the market had not been stated, shall not be considered as being in breach of the Law on Competition. To set the abuse of a dominant position as a breach of competition law, such actions must be carried out which are not compatible with the normal running of the competition, *i.e.*, such commercial practice is prohibited, which is different than what is typical of normal competition in practice (Judgment of the Court of Justice of the European Union of 3rd July, 1991, in Case No. C-62/86 AKZO Chemie BV v Commission of the European Communities, p. 69; Judgment in Case No 322/81 NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, p.70; Judgment of 13th February, 1979, in Case No 85/76-Hoffmann La Roche & Co. AG v Commission of the European Communities, p. 91).

The Supreme Administrative Court of Lithuania also pointed out that, under the case-law of the Court of Justice of the European Union, it is considered that the vendor who has the dominant position in the market, through applying any form of loyalty (quantitative, targets, etc.) discounts through which he, by giving buyers certain financial benefits, aims to prevent potential buyers to purchase goods from its competitors, is seen as being guilty of an abuse of a dominant position within the meaning of Article 102 TFEU (Judgment of the Court of Justice of the European Union of 9th November, 1983, in Case No 322 / 81 NV Nederlandsche Banden-Industrie Michelin v Commission, 71 p. 1).

The Supreme Administrative Court of Lithuania acknowledged that the Competition Council rightly found that AB Orlen Lietuva had applied economically unfounded and discriminatory pricing by introducing a system of discounts which was not transparent and which was not applied on an equal basis to all customers, *i.e.*, discounts had been personalised in a discriminatory fashion.

## **9.2. STOYANOVA LYUBKA, SOFIA ADMINISTRATIVE COURT (BULGARIA)**

### **Information Concerning the Judgment:**

Decision No. 350 of 22.03.2011 in Case of CPC, ent.No. KZK-55/28.01.2010 on

Decision No. 7215 of 25.05.2011 of SAC case № 4971/2011 r. IV o. /3 judge panel/

Decision No. 2321 of 16.02.2012 of SAC case № 8930/2011, /5 judge panel/

C-441/07 P - Commission v Alrosa, ECR II-2601

The following case is an example of an abuse of a dominant position in a fully regulated market – the supply of electricity.

1. Proceedings before COMMISSION for protection of competition /CPC/ were initiated in 11.01.2010 with a claim by Gotar Investment Ltd. /GOTAR / against E. ON Bulgaria EAD and E. ON Bulgaria Sales AD regarding a refusal of the defender, E.ON, to consign/ open an account and deliver to it electricity. The claimant requests the imposition of a sanction and the termination of the infringement. The claim observes also issues that are related to the abuse of dominant position in the regulated market for the supply of electricity.

E.ON Bulgaria Sales AD belongs to the group of companies / holdings of E.ON AG. E.ON is a mediator between electricity consumers and the distribution company that has a licence for the supply of electricity, in the market for the supply of electricity in North-eastern Bulgaria. E.ON mediates the relationship between electricity consumers and the distribution company that has a licence for the supply of electricity. At the same time, E.ON provides services to other companies in its group based on service contracts.

GOTAR is a commercial company which executes the following commercial activities: sale-purchase of real estate, and any other activity which is not prohibited under the laws of the Republic of Bulgaria.

The relationships between the parties have developed as follows. The entity which is supposed to be supplied with electricity is a real estate lot, together with a massive industrial building that is in it – a factory, formerly owned by Kitka Style Ltd. The former owner has had an open account with E.ON and has not paid electricity since the beginning of 2008. In February, 2008, E.ON cut the electricity at the factory.

GOTAR purchased the property in August, 2008. Immediately after this, the new owner filed a request to E.ON, under the file of the former owner, asking that electricity be provided to the factory and declaring that the factory exists and is unchanged.

E.ON replied that the previous owner had not terminated its relations regarding the provision of electricity with E.ON. The electricity provider clearly and definitively refused to change the customer

account numbers of Kitka Style Ltd. until payment of all of the old, unpaid electricity bills relative to the previous owners of the property.

GOTAR filed a complaint with the State Energy and Water Regulatory Commission, the national regulatory authority. It led to no resolution of the dispute, as the Regulatory Commission only stated a general opinion that both parties should observe the general terms. No measures were taken regarding the claim of the client for violation of the prerequisites of the licence granted to the electricity provider.

In November, 2009, E.ON put the obligation of Kitka Style Ltd. out of the accounts, due to lack of any sizable property, but without notifying the claimant about this. At the end of March, 2010, E.ON made an internal check in order to restore the electricity of the real estate but it turned out that it could not be done without previously restoring the electricity of a neighbouring real estate property. The neighbouring real estate property in question is a separate entity on whose territory the power generator which was supplying the factory was situated. E.ON informed GOTAR of the need to initiate a procedure to merge the two users.

2. Meanwhile, another case was filed before the CPC was filed by Pachiko Ltd. against the same respondent: E.ON. With a ruling issued in December, 2009, the CPC accused E.ON of committing abuse by imposing unfair commercial conditions in the process of providing electricity. E.ON offered to undertake certain obligations, assuming that this would be considered to be sufficient measures and the infringement should be considered to be terminated. In its decision, passed in March, 2010, the CPC approved the obligations which were to be undertaken for the adoption of internal regulations regarding the procedures for signing customers' contracts for electricity provision, which guaranteed that new owners should not be held responsible for bills that were unpaid and related to former owners. It was also stipulated that a new customer's account must be opened for the new owner, and the provision of electricity must be made. One month delay was given to E.ON to implement and bring to execution this procedure and to duly notify the CPC afterwards. The file was closed. In April, 2010, E.ON informed the CPC of the execution of its obligations and declared that the newly adopted procedures had been followed and the documents regarding them had also been applied.

3. After revising all of the facts relevant to GOTAR's claim, CPC passed a ruling in December, 2010, which indicated the facts that were ascertained and made an economic and legal analysis. In order to do this, CPC defined the product and the geographical market and applicable law. It justified the dominant position of the respondent in this market, and discussed the scope of the licence that had been provided.. CPC considered that, acting in its capacity as a monopoly enterprise, E.ON is subject to the prohibition against the abuse of a dominant position. After revising the behaviour of the other party, together with its anti-competitive effect and the consumer interests involved, CPC presented statements to E.ON for the abuse committed, which consisted of an **ungrounded refusal** to provide a commodity or service to an existing or potential client in order to prevent him performing his normal

business activity, which represents a violation of Art. 21, para. 5 Protection of Competition Act /PCA/. CPC defined that this is an ungrounded refusal to provide electricity to the property of the claimant.

After both parties' statements were reviewed and examined, together with the evidentiary support, CPC held an open hearing in March, 2011, and in the same month rendered its decision.

CPC separated the electricity provision into two separate time periods. The refusal of the provider to provide electricity to the claimant during the period until November 2009, because of the outstanding debts of the previous owner of the property is qualified as an abuse of a dominant position. Special attention was paid to the defendant's objection due to a lack of infringement in view of the commitments and obligations fulfilled by the company concerning the Pachiko Case. It is assumed that the approval of the obligations undertaken cannot once and for all release the offender's liability in other similar cases, even if they are prior to the adoption of the procedures in question. The Commission analysed the implications of E.ON's illegal behaviour and decided that a penalty was needed. In section 1 of the Decision, CPC declared that E.ON had committed a violation of Art. 21, item 5 of the PCA, resulting in E.ON's unjustified refusal to provide electricity to the claimant's property for the period 11.09.2008 - 29.11.2009 their reason being the outstanding unpaid obligations of a third party (the previous owner) for the electricity consumed by the previous owner of the property.

In item 3 of the final decision, CPC proclaimed that E.ON had not committed a violation of the rules by refusing to provide electricity for reasons that are related to the specificities of the electric infrastructure. This is justified by the fact that the claim for such an infringement concerns the behaviour of E.ON Bulgaria Grid AD, which is a separate legal entity operating in another market - the market for the distribution of electricity, which is beyond the scope of these proceedings.

4. The decision was appealed by GOTAR and E.ON and the Supreme Administrative Court /SAC, when a three member panel of First Instance held that:

- a) The period of the offence should be increased, since a delay in notification also constitutes a form of abuse of a dominant position. It is a direct consequence of the initial refusal to supply, due to the previous outstanding financial obligations of the previous owners.
- b) That they should change the way that the penalty for changing the period during which the offence was committed, was calculated.

The Court therefore annulled the CPC's decision in regard to part of the specified period for the violation of Art. 21, item 5 of the PCA, which constituted an unjustified refusal to supply electricity at the property of GOTAR due to the outstanding liabilities of the previous owner of the property to E.ON for the supply of electricity. This was designated a new duration of the infringement and the new amount of the penalty. At the same time the CPC dismissed the GOTAR plea against this part of the CPC's decision, which establishes the absence of a violation of Art. 21, item 5 of the PCA,

constitutes an unjustified refusal to supply electricity to the property of GOTAR due to the characteristics of an electric infrastructure.

5. This decision was appealed by all of the parties in the proceedings - GOTAR, E.ON and the CPC, before a five member panel of the SAC.

The Court of Cassation disagreed with the Lower Court's judgment regarding the amendment of the infringement and therefore of the sanction imposed. It was proclaimed that the period specified by the CPC was correct. The Court of Cassation fully reversed the penalty, as the case imposed a sanction hypothesis that, in principle, precludes sanctioning by the state authority. SAC refers to Art. 9 of Regulation (EC) No. 1/2003 on the implementation of the rules on competition that are laid down in Articles 81 and 82/101, and now in 102 TEU, and the practice of the ECJ in the Alrosa Case C-441 / 07P. It upheld the decision of the CPC and the SAC 3 member panel because of a lack of the abuse of a dominant position based on the technical reasons given by E.ON.

### **Comment**

The case presented is interesting to observe due to the fact that, simultaneously with the proceedings following the complaint of GOTAR, the Commission for the Protection of Competition had a similar proceeding in which Art. 9 of Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82/101 and now in 102 TEU.

Two different final decisions on two cases that are similar from a factual stand point, led SAC to comment on the actions of the law enforcement agency in the light of European legislation on the competition and practice of CEC.

### **9.3. NÕMMIKO, TALLINN COURT OF APPEAL (ESTONIA)**

#### **I. Facts**

The defendant was the former state owned electricity company which used to have the monopoly on the electricity market. After the market was opened to other companies, the claimant concluded a broker-contract with a company which had been the defendant's client. The defendant remained the supplier of electricity, but the claimant was named as the administrator or broker of the client's electricity needs with the purpose of finding the best price on the market.

After the defendant discovered that his client decided on a named claimant as his administrator or broker for electricity supplies, the defendant stopped supplying electricity to this client by changing the standard terms and saying that he had no obligation to supply electricity to clients who refuse to name him as the administrator or broker of electricity supplies.

The supply of electricity was stopped for three months until the Competition Authorities prescribed that the defendant's new lower standard term was not acceptable as it contradicts Estonian Competition Act § 16 (4) which prohibits making an entry into an agreement that is subject to the acceptance by the other parties of supplementary obligations which have no connection with the object of such an agreement; and (6) which prohibits the unjustified refusal to sell or buy goods.

During the period when the supply was stopped by the defendant the claimant, as the administrator of the electricity supplies to the client had to purchase electricity from other companies at a higher price and sell it to the client for price. The price difference therefore meant damage to the claimant.

The Estonian Competition Act § 53 provides that the existence or absence of unfair competition shall be ascertained in a dispute between parties that is held pursuant to civil procedure; and § 78 says that proprietary or other damage that is caused by acts that are prohibited by the Competition Act and they shall be subject to compensation by way of civil procedure.

Based on the facts above, the Civil Chamber of the Supreme Court decided that as there was no contract between the claimant and the defendant, the case for compensation for damage must be solved by tort law. By saying this, the court faced two main problems that are typical in this kind of case.

## **II. The Question of the Violation of Statutory Provision**

To solve the case, the Court had to verify the purpose of the Competition Act. The main question was whether the Competition Act § 16 (4), which prohibits entering into an agreement that is subject to acceptance by the other parties of supplementary obligations which have no connection with the object of such an agreement; and (6) which prohibits the unjustified refusal to sell or buy goods, are statutory norms in that matter and must provide protection against the damage that the claimant had suffered.

Similarly to BGB § 823 I and II, the Estonian LOA § 1045 section 1 also lists absolute rights that are protected by tort law, and it adds that unlawfulness can also be concluded from the violation of the statutory provision (LOA § 1045 section 1 subsection 7 and § 127 section 2). This means that the element of unlawfulness is here made to depend upon the notion of a violated protective norm. The term is widely taken to refer to the statutes of private and public law, government decrees, local by-law or ordinances, etc.

Tort liability that is based on the violation of statutory provision is fault-based liability, which means that LOA § 1045 section 1 subsection 7 can be applied only if some fault can be found in the wrongdoer. In Estonia, LOA § 1050 lg 1 has reversed the burden of proof and placed it squarely on the defendant. So, fault will be presumed unless the defendant can positively disprove any fault on his part. In this sense, liability that is based on the violation of statutory provision is more favourable to the plaintiff. However, it is also more favourable in another respect also, notably in its recognition of the compensability of pure economic loss. (This explains why the plaintiffs in so-called cable cases, try to base their claims on LOA § 1045 section 1 subsection 7).

These observations, however, should not be taken to imply that plaintiffs can base their claims on this provision on every occasion when there has been a violation of some statute. The requirement that the violated statute be a protective norm provides the greatest obstacle in this regulation.

The first thing to note in this respect is that the breach of a particular statute will give rise to civil remedy only if the violated norm was a protective statute. This means that the plaintiff must show that the misconduct that occurred was in fact the one that the legislator wished to avoid. Moreover, it must show that the plaintiff himself belongs to the class of persons to whom the legislator intended to grant a civil remedy. Both of these propositions are quite simply stated, but the answer to these questions is by no means easy to find. It involves the difficult question of statutory construction, which varies from case to case.

The main requirement, however, is that the statutory rule protects individual interest. If only the general public is protected, the rule is considered not to be a protective one in the sense of LOA § 1045 section 1 subsection 7. If the statutory provision protects the individual interest two more

requirements must be established. Firstly, the victim must belong to the group of persons who are intended to be protected by this rule and, secondly, the infringed interest must be within the scope of the protection of the rule. Finally, certain rights are only protected against infringements by certain conduct.

Using the above mentioned rules of interpretation, the Supreme Court found that the Competition Act regulation, which prohibits entering into an agreement that is subject to the acceptance by the other parties of supplementary obligations which have no connection to the object of such an agreement, and the regulation that prohibits the unjustified refusal to sell or buy goods, are statutory norms in that matter and they must provide protection for the claimant. In the words of Supreme Court, this also follows from the consolidated version of the Treaty on the Functioning of the European Union Rule 102 subsection b and d.

### **III. The Question of the Compensability of Pure Economic Loss**

Pure economic loss is considered to be property damage, the incurring of which is not related to any personal or physical harm. By setting pure economic loss in contrast to physical damage, the pure nature of pure economic loss becomes apparent. Such a negative-type of definition is the most common way to define pure economic loss.

Paragraph 127 section 2 of LOA provides that damage shall not be compensated for, to the extent that prevention of damage was not the purpose of the obligation or provision that was due to the non-performance of which the obligation of compensation arose.

Ernst Rabel, the author of the purpose of the obligation theory, maintained that all obligations serve a specific purpose, i.e., the protection of certain interests, and that the size of the risk of the emergence of loss that is assumed by those obligated is determined pursuant to the meaning and purpose of the obligation. It means that the allowance of compensation for pure economic loss is limited, according to the liability rules, primarily by the requirement that the scope of liability can be determined by assessing whether the incurred damage has the same nature and means to incur, and the damages incurred must be the consequences of the realisation of exactly the kind of risk that the legislator wished to protect against by establishing liability. In solving such issues of interpretation, the goals stated that, according to the legal policies of the specific legal Acts and Courts, considerations have the conclusive role.

Limiting compensation for pure economic damage is based on widespread arguments. The more well-known of these are: the Economic Argument, the Floodgate Argument, the Purpose of Normative Protection, and the Historical Argument.

The Economy Argument for the limiting of compensation for pure economic damage is based on the view that liability for pure economic damages should always be ruled out if private economic damages are compensated by revenues received by other third parties, so that unlawful actions do not cause any societal damage.

The Floodgate Argument is based on the view that, in certain cases, to allow compensation for pure economic damage opens the door to an infinite number of claims, which would overload the Courts. It is believed that economic damage has a stronger tendency to spread widely and farther. The floodgate argument is thus based on the fear that a liability that reached compensation for pure economic damage would put an unbearable burden on the liability of the inflictor of the damage that would exceed all common sense proportionality, to the extent of negligence by the inflictor of the damage. It is also thought that the notion of pure economic damage is simply part of the contemporary tendency to extend liability and that such a tendency should be kept under control.

The scale of values argument, i.e., that the purpose of normative protection is based on the system of philosophical values and reflects the fact that pure economic damage has been attributed a lower value in this system. According to this argument, the interest for economic welfare, interfering with which causes only pure economic damage, is positioned at the lowest level of the hierarchy of legal protection priorities, thus protection against this can be considered only in a case where there are special circumstances. In this way, goal setting according to the legal policies and according to what is considered important by the Courts has importance in deciding and determining the specific normative protection goals.

According to the historical argument, the lack of protection against pure economic damage is based on a tradition of lacking such protection. It is considered that the primary goal of a tort law has always been to ensure protection for persons and property and that pure economic damage has been knowingly left out of the protection system. The proponents of this argument say that the rules of tort law, as a fruit of history, are established for cases of physical damage and that applying these rules out of their context would lead to unbearable burdens of liability.

Despite these widely known arguments, the Supreme Court of Estonia found that the provision of Competition Law that, where violated by a defendant, carry the meaning of allowing compensation for

pure economic loss. The Supreme Court stated that the purpose of the Competition Law is, among other goals, to guarantee fair and honest competition and to protect the market as a whole, not only the concrete parties to the contract. The value protected by Competition Law is competition as a functioning mechanism of a market-based economy. In cases of competition torts, the economic interests of victims are protected. The Court found that the purpose of the regulation of Competition Act § 16 4 and 6 is, among other goals, to allow compensation for just such a damage as the claimant in this case suffered. There is a causal link between the defendant's behaviour and the damage caused, because if the defendant had not stopped the supply of electricity to the client, the claimant would not have had, in order to fulfill his contractual obligations, to buy more expensive electricity from third persons.

As a result of this tort, the defendant had to pay 168,144 euros in damages for violating the Competition Law.

## 10. PRIVATE ENFORCEMENT OF COMPETITION LAW

### 10.1. WIGGERS-RUST LIDY, COURT OF APPEAL ARNHEM-LEEWARDEN (THE NETHERLANDS)

#### Information Concerning the Judgment:

- Name of the Court of Last Instance: Court of Appeal Amsterdam
- (The Netherlands)
- Names of the parties: Equilib Netherlands B.V. (previously: Equilib S.A.R.L.) – Koninklijke Luchtvaartmaatschappij N.V. a.o.
- Case reference number: ECLI:NL:GHAMS:2013:3013
- Date of the Judgment: 24<sup>th</sup> September, 2013.

#### Abstract

The Amsterdam Gerechtshof (Court of Appeal) handed down a fundamental judgment on 24th September, 2013:

In case of a timely action by the addressee of a Commission Decision (hereafter Decision) to have such a Decision annulled, the staying of national proceedings is only compulsory in as much as, in the national proceedings, there are points of fact or of law that are at issue, to be decided upon in the light of the validity, or not, of the Decision.

The Amsterdam Gerechtshof also holds that such a question is only pertinent if there can be reasonable doubt as to the validity of the Decision. This implies that in order to stay the case there must be *reasonable doubt* as regards the *validity* of the *Decision*.

#### Effects (in so Far as they are Relevant Here)

According to a Press Release of the European Commission on a decision dated 9th November, 2010, eleven air cargo carriers were fined a total of Euros 799.,45.000 for operating an international price fixing cartel (the so-called Airlines Cartel). The Commission had established that from December, 1999, until 14th February, 2006, fuel and security surcharges were co-ordinated for flights from, to and within the European Economic Area (EEA) and Switzerland. All addressees (but one) appealed to the Court of the European Union.

Over 140 (groups of) injured parties, listed on two annexes to the introductory summons, assigned their claims unto a special purpose vehicle that was styled Equilib.

### **Judicial Proceedings (in so Far as they are Relevant Here)**

Equilib, by a Summons of 30th September, 2010, summoned KLM (Royal Dutch Airlines), Martinair and Air France to appear before the Rechtbank in Amsterdam (Court of First Instance) and – after amending its Statement of Claims – filed for a declaratory judgment to the effect that – to put it briefly – the said airlines had acted unlawfully towards the injured parties in participating in the air cargo cartel and, for that reason, they were *pro capita* liable for the damages to the injured parties, therefore soliciting a *pro capita* judgment to pay those damages and an award for legal costs. To that effect, Equilib had advanced that the injured parties had assigned their claims to itself.

In incidental claims – in as much as they are to be dealt with here – the airlines demanded to stay the national proceedings until such time as the Decision of the Commission had become definite.

In the judgment being appealed (ECLI:NL:RBAMS:2012:BV8444), the Amsterdam Rechtsbank stayed the proceedings until such time as the Decision of the European Commission, or the Judgment of the Union Court, had become definite.

It was against this Judgment that Equilib filed an appeal with the Gerechtshof.

### **Point at issue**

The parties disagree about the answer to the question as to whether or not it follows from the judgment of the Court of Justice of the European Union of 14th December, 2000 (case C-344/98 *Masterfoods*), and subsequent case-law and regulations, whether the present case is to be stayed or not, since the validity of the Decision is at issue in the action for annulment before the Union Court.

Equilib advances that the proceedings should *not be* stayed.

KLM et al. advance that the proceedings *must be* stayed.

### **Ruling of the Amsterdam Gerechtshof (Points of Law 3.12 – 3.15)**

The point of departure for the Gerechtshof is that the *Masterfoods* case and its entailed case-law and regulations are to be seen in the light of the division of tasks, based on EU law, between the Union Courts and the Commission, on the one hand, and the national courts, on the other, and in the light of the object of the rules, resulting from this division of tasks and the proper functioning of EU law.

### *Division of Tasks*

With regard to the division of tasks in competition law, so the *Gerechtshof* holds, the Union Courts have exclusive jurisdiction to decide on the validity of the doings of the institutions of the EU, whereas the National Courts cannot decide contrary to the Decision of the Commission (*vide e.g.*, Judgment of the Court of the European Union of 6th November, 2012, Case C-911/11, *Otis*, Nos. 53 and 54).

### *Object of the Division*

The object of the rules, which result from the division of tasks and the proper functioning of EU law, is to make certain that the National Courts take all the necessary general or particular measures that are apt in order to assure due observance of the obligations resulting from Union Law, and to abstain from measures which might put into danger the realisation of the objects of the Treaty and, in particular, to warrant that the National Courts, when ruling on agreements or Acts that are already decided on by the Commission, shall not run counter to that Decision (*Masterfoods* Case under 49 and 52).

### *Masterfoods Case*

In the *Masterfoods* Case, the Court of Justice of the European Union held *inter alia*:

‘55 If, as here in the main proceedings, the addressee of a Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision pursuant to that article, it is for the National Court to decide whether to stay proceedings until a definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling.

(...)

57 When the outcome of the dispute before the National Court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the National Court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.’

(Point of Law 55)

This text and its various (official) translations do not show, so the *Gerechtshof* holds, that the staying of proceedings by the National Court is compulsory in all cases in which one of the parties to national proceedings has brought an action for the annulment of the relevant Decision of the Commission. According to the *Gerechtshof*, this does also not follow from the subsequent rules laid down by the Council and the Commission.

- Council Regulation (EC) No 1/2003 of 16th December, 2002, on the implementation of the rules on competition that are laid down in Articles 81 and 82 of the Treaty;

- Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (1) (Official Journal C101 of 27th April, 2004).

According to Point of Law 55 of the *Masterfoods* Case, the National Court, so the *Gerechtshof* holds, is at liberty to decide whether or not to stay the proceedings, to await the outcome of a definite ruling in the action for annulment or, rather, to refer a question to the Court of the European Union for a preliminary ruling.

(Point of Law 57)

Article 16 sub 1 of Council Regulation (EC) No1/2003 also allows for this room for appreciation, so the *Gerechtshof* holds. It is this Article that lays down that the National Court is to avoid taking decisions that run counter to a Decision adopted by the Commission, or to decisions which would conflict with a Decision contemplated by the Commission; to that effect, the National Court may assess whether it is necessary to stay the proceedings. The *Gerechtshof* concludes, from consideration of Point of Law No. 57 of the *Masterfoods* Case, that the border of the margin of appreciation depends on the validity of the Decision of the Commission, because the National Court cannot make a decision which runs counter to the Decision of the Commission.

**Judgment of the *Gerechtshof***

The *Gerechtshof* reads this case-law and the said regulations in such a manner that staying the national proceedings is only compulsory in as much as in the national proceedings there are points of fact or of law that are at issue, the decision about which depends on the validity of the Decision of the Commission. The Amsterdam *Gerechtshof* also holds that such a question is only pertinent, if there is reasonable doubt of the validity of the Decision. This implies that in order to stay the case there must be *reasonable doubt* as regards the *validity* of the *Decision*.

The *Gerechtshof* feels itself supported in this finding by:

- the opinion of Advocate General P. Cruz Villalón, as expressed in his opinion of 26th June, 2012, before the *Otis* Case, under 52:

*'Therefore if the Rechtsbank had doubts regarding the validity of the decision and, furthermore, noted that the decision is sub judice before the Courts of the Union, staying the national proceedings would avoid any risk of conflict between the decisions given by the Court of the Union and the (Belgian) court'.*

- Article 16 point 1 of Regulation No. 1/2003, which leaves it to the National Courts to decide whether staying the proceeding is necessary.

Taking into consideration that the Union Courts have both the jurisdiction and the remedies to appraise to the full the validity of the Decision of the Commission, when the National Courts review whether there can be reasonable doubt of validity, in the opinion of the Gerechtshof this will involve a *limited judicial review* of the arguments of the party which brought an action for annulment. That judicial review concerns the question around whether or not, from the arguments of that party, it can be deduced that in the action before the Union Court it has contested *within reason* that Commission Decision.

The Gerechtshof draws the conclusion from the above that if one party to the proceedings bases its claims on a Decision of the Commission, the onus is on the other party, which contests the validity of that Decision and wishes the case to be stayed:

- a. to show that it brought a timely action for annulment;
- b. to explain that it contests within reason the validity in the Union Court of the Decision of the Commission;
- c. to raise the objections which it desires to advance in the action for annulment, so as to allow the National Court to inspect if and to what extent those defences depend on the validity of the Decision of the Commission.

On the basis of the exhibits and the explanation given, the National Court can then decide if and to what extent the proceedings must be stayed.

In so doing, due regard is given, on the one hand, to the interest of the claimant in preventing undue delay in having its claims for damages dealt with and, on the other hand, to the interest of the defendant in limiting the costs of defence against those claims as long as the validity of the Decision of the Commission is not definite.

According to the Gerechtshof, for the subject action, it holds good that:

KLM et al. have sufficiently demonstrated that they brought a timely action for annulment of the Decision of the Commission.

Before whether and to what extent the proceedings must be stayed can be considered, KLM et al. must first file a Statement of Defence to satisfy what the Gerechtshof held hereinbefore under b and c. In so far as the decision of the Rechtsbank will be reformed.

### **Comment**

The Amsterdam Gerechtshof demarcated a position in an area of tension for the National Courts because of the effect of the *Masterfoods* Case, and subsequent case-law, and the rules for National Courts to prevent conflicting findings, on the one hand, and, on the other hand, the desire to prevent unnecessary delays in awarding claims.

The Gerechtshof handed down a clear guideline about the question as to how the National Courts must deal with this issue. More particularly, the Gerechtshof indicated the way in which the National Court must arrive at its findings about the problem of whether or not to stay proceedings.

This is of great importance in dealing with follow-on-procedures by the National Courts, the more so as the (draft) Directive on anti-trust damages actions gives no further clues in this regard.

As a result of these findings of the Amsterdam Gerechtshof, this Court will have to give a judicial review – albeit to a limited extent – on the merits of the Decision of the Commission.

## **10.2. SPERA PIETRO, TRIBUNALE DI GENOVA (ITALY)**

1. In 1999 the Italian Authority for Competition and the Market started an investigation against 39 Insurance companies after a report from the Finance Police. The Finance Police discovered a horizontal agreement among these companies based on which they imposed on their clients – beyond the mandatory third party insurance – fire and theft coverage, which are not mandatory according to the law. Additionally, the Finance Police unveiled an exchange of information among those companies that related to prices and contract conditions.

Thanks to the investigations, in 2000 the Authority verified that:

- The 39 Insurance Companies had created an effective network of information sharing and cooperation;
- The sharing of information was much more intense than the normal and legal communication among companies operating in the same field: indeed, the information shared related not only to the evaluation of risks, but also concerned sensitive information;
- Such cooperation caused a relevant impact on the functioning of the market and subsequent damage to consumers, especially in the increase in final prices;
- In particular, the prices of insurance contracts rose 97% in 6 years, that is, 63% more than the average increase in insurance contract prices in Europe in the same period;
- Such a difference, compared with the standard increase in prices in Europe, caused an additional expense of 3.5 billions of Euros per year to Italian consumers.

As a consequence of this investigation, the Authority imposed heavy fines on the companies and issued an order that they cease this cooperation.

The decision of the Authority was challenged before the Administrative Court, but, in 2001, the Court confirmed the decision.

The verdict of the Administrative Court was appealed to the Consiglio di Stato (the Administrative Supreme Court). In 2002, the Consiglio di Stato finally stated for the legality of the Authority's decision in essence, revoking only the fines for some of the 39 Companies.

2. Based on these verdicts and decisions, two similar and interesting cases were started before the Civil Court of Naples.

In both cases, a consumer sued his insurance company – a party in the cartel of 39 Companies – arguing that he had paid a too expensive insurance premium for insurance cover for his car and asking that the company refund the extra amount.

As evidence, in both cases the plaintiffs presented the above mentioned decision, adopted by the Authority for Competition and Market in 2000 (a decision that imposed heavy fines on the companies and issued an order to cease cooperation)

In both cases, The Tribunal – First Instance – and the Appeal Court, rejected the case.

The cases were then brought to the Corte di Cassazione (the Supreme Court) and the Supreme Court revoked both verdicts.

3. In the first case, before the Corte di Cassazione, the consumer based his reasoning on three main arguments:

1. The principle of the burden of proof was erroneously applied by the Appeal Court;
2. The Appeal Court did not properly clarify the evidence on which its decision was made. On the contrary, the Court based its decision on generic reasoning, which could be applied to any person;
3. The Appeal Court did not take into proper consideration the reasoning behind the decision of the Authority for Competition and the Market, especially in reference to the causal relation between the illegal exchange of information and the rise in prices.

The Corte di Cassazione (Decision 4th March, 2013, No. 5327) stated – among other things – that in the case of a cartel of insurance companies the insured/client has the right to prove his case against one of the companies, on the assumption that the insurance premium/price he/she paid was higher than the market price. The company, on the other hand, may give adverse proof.

In particular, basing its decision on precedents from the same Court in recent consumer and competition cases, the Cassazione stated as follows:

- Results of an evidentiary proceeding before the Authority for Competition and the Market may be used in judicial proceedings, but the company is entitled to present adverse evidence: in other words, after assessment by the Authority, the burden of proof is reversed, it shifts from the plaintiff to the defendant.
- According to the Supreme Court decision, therefore, the company needs to prove that the price was not caused by the agreement among companies, but by other/different factors.
- However, the company cannot base its defence on the same pieces of evidence that have already been taken into consideration by the Authority for Competition and the Market in the previous proceeding.
- To fulfill the burden of proof, the company cannot refer to general elements, but must submit specific pieces of evidence, or facts that are related to the actual case and/or the actual parties and/or the actual contract (for instance, the company should prove that the specific increase in the price of the actual contract is not in line with the trend in growth that has been verified by

the Authority as an effect of the cartel; the specific economical/financial conditions of the company; the particular risks insured; the particular conditions/risks of the client).

In this actual case, the Corte di Cassazione deemed that the non-specific reasoning of the Appeal Court was not satisfactory, and it did not comply with the legal standards for a logical and exhaustive explanation of decisions, in accordance with the principle of the Civil Procedural Code.

In conclusion, the Corte di Cassazione granted the plea of the consumer and sent the case back to a different division of the Court of Appeal of Naples for new consideration of the case.

4. A similar decision was adopted by the Corte di Cassazione on the 4<sup>th</sup> June, 2013 (No. 14027), in the second of the two mentioned cases.

As has been said above, in 2006, the Appeal Court in Naples rejected the request for compensatory damages that had been presented by a consumer. The request was based on the same decision taken by the Authority for Competition and the Market in 2000, mentioned above. (a horizontal agreement among 39 insurance companies)

In short, the decision of the Appeal Court was based on the argument that the consumer – if not satisfied with the proposed prices – could choose another insurance company, that was not linked to the cartel.

The Corte di Cassazione deemed that such reasoning was not logical, because:

- The consumer was not necessarily aware of the existence of an agreement among companies, which reduced competition.
- The consumer was not necessarily aware of which companies were taking part in the agreement;
- Most of all, the consumer should not bear the costs of illegal agreement: such costs should be paid by companies which violated the law, not by the victims of such violation.

For these reasons, the Court of Cassazione revoked the decision and sent the case to another division of the Appeal Court of Naples for new consideration of the case.

So far, the Appeal Courts have not issued new decisions in either of the two cases. So we don't know the end of the story.

5. The cases cited are relevant because they state important principles that are related to evidence and the burden of proof in competition cases.

In fact, they have a practical impact on the defensive strategy of the parties and – *de facto* – make it easier for private plaintiffs to enjoy an effective judicial enforcement against the possible violation of competition law.

Without the principle that, following the assessment of the Authority, the burden of proof is reversed, shifting from the plaintiff to the defendant, it would be difficult for most consumers to prove their case in competition law proceedings.

### 10.3. PALOMÄKI PETTERI PIRKANMAA, DISTRICT COURT (FINLAND)

*Tapani Toivanen v. Metsäliitto Osuuskunta, Stora Enso Oyj and UPM-Kymmene Oyj*

Helsinki District Court, 28th March, 2014, No. 14/13974 (No. L 11/53515)

#### Claims for Damages in Helsinki District Court

650 claims for damages were brought at the Helsinki District Court on 20th December, 2011, and 10th May, 2012, by certain private persons and corporations. The claimants had in the period 1997-2004 sold raw wood to the defendants, which are large Finnish forestry companies.

The claims for damages are follow-on actions, as the Finnish Market Court on 3rd December, 2009, at the proposal of the Finnish Competition Authority, ordered Metsäliitto Osuuskunta to pay 21 million Euros, and Stora Enso Oyj 30 million Euros, of infringement fines for their participation in a cartel that operated in the Finnish raw wood market between 1997 and 2004.

UPM-Kymmene Oyj was not ordered to pay an infringement fine because it supplied information to the Finnish Competition Authority, information which it delivered in order to be granted immunity from the fine imposed for violation of the Finnish Competition Act (*leniency*).

The total amount of the claims for damages is 215 million euros.

The defendants have contested the claims.

Helsinki District Court pronounced the first 13 Judgments on 28th March, 2014. The other cases are still pending.

#### The Judgment

Helsinki District Court dismissed the 13 actions after voting, considering that the claims for damages had become statute-barred. One of the presiding judges disagreed with the majority of the Court in his dissenting opinion and considered that the claims had *not* become statute-barred.

The claimants appealed the Judgments to the Helsinki Court of Appeal.

My case note is on one of the above-mentioned Judgments.

## **Reasoning of the Court**

**Provisions in Finnish law.** According to the application of the Restraint of Competition Act (480/1992) section 18 a (3), the right to compensation shall expire if the action for damages has not been instituted within five years of the date on which the claimant has received, or should have received, the information on the damage that has occurred.

According to the new Competition Act (948/2011) section 20 (3), if the damages claim is based on a restraint on competition which the Finnish Competition Authority has, by its decision, found to violate the prohibition referred to in 20 (1), or on which it has made a proposal to the Market Court for the imposition of a penalty payment, the right to damages shall not be considered to expire until one year has passed from the date that the decision on the matter becomes valid.

The new Competition Act entered into force as late as 1st November, 2011, and could not therefore be applied.

## **Information on the Cartel**

The Finnish Competition Authority made a media release on 25th May, 2004, in which it reported that it had launched surprise investigations into the premises of the Metsäliitto Group and Stora Enso Oyj in several regions in Finland. Based on information provided by UPM-Kymmene Oyj, it seemed evident that the forestry industry companies had e.g., exchanged confidential information about raw wood procurement prices and discussed means whereby mutual price competition might be limited in the raw wood procurement market. The investigations were reported to aim at discovering whether the companies under inspection had participated in cartel cooperation that is forbidden by the EC Treaty and the Competition Act.

The media release was reported widely in the Finnish media.

## **Conclusions**

The majority of the Court considered that the claimant had already, from 25th May, 2004, had sufficient information to start investigating whether the cartel had caused him damage. The right to compensation had started expiring from that moment and had become statute-barred since the actions for damages had not been instituted within five years of that date.

The majority gave special importance to the Finnish Competition Authority's media release and to the fact that UPM-Kymmene Oyj, as a public company, had confessed to taking part in the cartel.

Furthermore, the majority referred to *Siegfried Pohl v. ÖBB Infrastruktur AG* (16th January, 2014, C-429/12) in which the European Court of Justice considered that the Austrian national provisions concerning time limits were not disproportionately difficult for the claimant to comply with..

However, the dissenting judge considered that in 2004 it had so far been a question about only a suspected cartel. There was no information on e.g., when and where the forbidden exchange of confidential information had taken place, and which species of tree it had concerned. Moreover, no allegations were reported about the defendants having fixed prices, or on the price impact or the damage caused to the claimants. The judge considered that the claimant did not have sufficient information in 2004, and that his right to compensation had not therefore become statute-barred.

In addition, the dissenting judge alluded to the Council Regulation on the implementation of the rules on competition, laid down in Articles 81 and 82 of the Treaty (16th December, 2002, 1/2003). Its Article 25 (3) states that any action taken by the Commission or by the Competition Authority of a Member State for the purpose of investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. He considered that this regulation has interpretative impact in the present case.

The dissenting judge also emphasised that *Metsäliitto Osuuskunta* and *Stora Enso Oyj* had denied taking part in the cartel.

## **Comment**

In this case it was clear that the defendants had taken part in a cartel that operated in the Finnish raw wood market between 1997 and 2004.

Likewise, it was clear that undertakings who violate the prohibition prescribed in Article 101 or 102 of the Treaty on the Functioning of the European Union are obliged to compensate for damages caused by restraint on competition.

The main question in the case was whether the claims for damages had become statute-barred or not.

In the *Manfredi Case* (13th July, 2006, C-295/04) the European Court of Justice stated that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member

State to prescribe the detailed procedural rules governing these actions, provided that they do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice that is prohibited under Article 81 EC.

Both European Union and Finnish law changed after the Manfredi Case.

On 17<sup>th</sup> April, 2014, the European Parliament adopted a Directive (IP/14/455) 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. Its Article 10 (4) states that member states shall ensure that the limitation period is suspended or, depending on National Law, interrupted, if a Competition Authority takes action for the purpose of investigation or proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end, at the earliest, one year after the infringement decision has become final, or the proceedings are otherwise terminated.

The new Finnish Competition Act, which entered into force on 1st November, 2011, is in accordance with the aforementioned Directive.

Consequently, this case is partly history of law and its most relevant legal question is how the law in force during the cartel should be interpreted. It remains to be seen how the Helsinki Court of Appeal will resolve the case.

#### **10.4. CORREIA JOÃO, TRIBUNAL JUDICIAL DA GRANDE COMARCA LISBOA NOROESTE (PORTUGAL)**

The Deco v. Portugal Telecom Case stands alone, as the only example of national legislation on popular action being used in an attempt to enforce competition law. Essentially, Portugal Telecom had imposed, in 1999, an “activation charge”, on all its clients and on all phone calls (a similar practice had occurred in 1998).

One of the legal bases invoked was an abuse of a dominant position, but the Court declared the application successful on other grounds, without discussing competition law.

Acting under Law 83/95 of 31st August, which grants, *inter alia*, consumer protection associations the right to initiate court proceedings to protect diffuse interests, such as public health, the environment, etc. The Portuguese Consumer Protection Association sued the company, asking that it be ordered to return the unlawful charge to all clients.

Competition law is not specifically mentioned in the non-exhaustive enumeration of the type of interests that is encompassed by Law 83/95, of 31st August and so, to this day, there may be doubts as to whether and to what extent *actio popularis* is available for private enforcement of competition law. At the very least, what can be said is that, in this case, right up to the Supreme Court, the admissibility of the part of the application that deals with competition law was not rejected.

Another issue discussed in this case was that of the admissibility of two separated *actio popularis* running simultaneously and autonomously. The Lisbon Appeal Court considered that these proceedings could be decided independently of another popular action that was introduced by Deco against Portugal Telecom, because they were based on different facts (*maxime*, they related to different time periods) and because different remedies were sought (the first action was not aimed at obtaining compensatory damages).

This case may also be referred to as an example of cases being admitted that essentially relate to the same facts, but in subsequent years. Indeed, Deco initiated separate proceedings regarding the same practices in 1998 and in 1999, and the Lisbon Appeal Court confirmed that both were admissible.

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The Portuguese legal framework for popular actions has drawn a great deal of international attention, in particular within the framework of the debate on the collective enforcement of competition law. It

has been singled out as the most extensive form of collective action based on the “opt-out” model that is available in the EU, and is being viewed, in theory, as the most liberal regime in Europe.

The basis of civil popular action in Portugal is found in Article 52 (3) (a) of the Constitution, implemented through Law 83/95 of 31st August (the Popular Action Act, or PAA). It should be noted that the PAA has a broad scope, encompassing both administrative and civil actions and, in the latter, being applicable to the protection of public, diffuse, collective and homogenous individual interests.

In two cases relating to damages suffered by clients of Portugal Telecom for breach of contract and for a breach of legal obligations, the Supreme Court has generally confirmed that this type of action, which is aimed at compensation for mass damages that falls within the scope of PAA, under the category of homogenous individual interests, i.e., cases in which the members of the class hold diverse rights but are dependent on a single factual or legal issue, all of them requiring a judicial solution for identical content.

While certain branches of the law include special provisions concerning *actio popularis*, the use of this mechanism for the enforcement of competition law is governed exclusively by the general provisions. Although not unanimously accepted in doctrine, it now seems fairly settled that *actio popularis* may also be used to seek provisional measures and injunctions. The possibility of its use to seek judicial enforcement of a previous declaratory court ruling is less clear.

Article 1(2) presents a non-exhaustive enumeration of the interests which may be protected through popular actions. Competition law is not included in this enumeration, which does mention consumer protection. However the Supreme Court has already implicitly confirmed that *actio popularis* may also be used to seek compensation for damages arising from infringements of competition law, at least when consumer protection is at stake. Furthermore, since the list of interests to be protected, provided in the Constitution and in the PAA, is not exhaustive, it can be argued that promoting effective competition in the market is one of the interests which legitimises the use of *actio popularis*, even when the specific law suit is meant to be compensatory, e.g., SME, especially when one considers that the ultimate beneficiaries of competition policy and of undistorted competition in the market are the consumers. In short, the protection of competition in the market is one of the public interests which may be pursued through *actio popularis*.

Standing to initiate a popular action is granted to a citizen and to any legally constituted association or foundation created for the defence of relevant interests, regardless of whether or not they have a direct interest in the claim (Art. 2(1)). An example is thus that any individual consumer or group of consumers may initiate a popular action to seek the termination of and reparations for infringement,

but a company (e.g., a client of the company responsible for the infringement) may not do so, even if it is an SME.

The application is subject to a preliminary assessment and should be dismissed by the judge if it is concluded that its success is “manifestly unlikely”. If the action proceeds beyond this preliminary assessment, the claimants shall be deemed to represent, with no need for a mandate or an express authorisation, all the holders of the rights or interests in question who do not opt-out. In other words, the association, consumer or client who initiates an *actio popularis* against a company, seeking compensation for a specific anti-trust infringement, shall represent, before the Court, all the consumers/clients who suffered damages as a result of that infringement.

One of the legally disputed aspects of the representation that is inherent in the *actio popularis* is the extent of the effect of *res judicata*. As a rule, any person who does not opt-out is bound by the effects of the rendered judgment. Only two exceptions are foreseen: there shall be no *erga omnes res judicata* effect when the action is unsuccessful due to insufficient evidence and when the Court should have decided differently, considering the specific characteristics of the case in question.

Aside from its usual competencies, the Public Prosecutor’s Office may, in the context of an *actio popularis*, decide to take over the action, replacing the claimant, when the latter withdraws from the lawsuit, or proposes a settlement, or adopts other behaviours which might be damaging to the interests at stake.

If the claimant in a popular action is successful, the next step is how the issue of compensation should be handled. There are two options: (i) the claimant and the company found liable for the anti-trust infringement reach an agreement, or (ii) the Court issues a ruling on compensation.

In the first case, the fact that the claimant represents all the injured persons (who didn’t opt-out) may raise significant problems. These are, however, mitigated by two factors. Firstly, as previously mentioned, the Public Prosecutor’s Office may step in and take over the case if it believes the proposed settlement is not equitable. Secondly, the Court also has a role to play in assessing the fairness of a proposed settlement. In the second case, there are some authors who exclude the use of *actio popularis* to obtain compensation for damages that can be individualised, even though, given the letter of the law, this seem to be more of a criticism than a proposed interpretation. Other actions seem to be more a criticism than a proposed interpretation. Yet others seem to arrive at much the same result indirectly. One thing is certain: there is a shocking absence of criteria relating to the awarding and effective distribution of compensation to the holders of interests who were not individually identified.

In any case, Art. 22 foresees two types of compensation, which may be awarded upon request or on the Court’s own initiative:

- (i) Individual compensation: “the holders of interests who are identified are entitled to the corresponding compensation in accordance with the general rules of civil liability, and
- (ii) Global compensation: “compensation for a violation of the interests of parties who are not individually identified, set globally.

The large majority of Portuguese authors have assumed that it seems fair to conclude that the law of popular action has been applied very rarely, whether due to the prohibition of *quota litis* agreements or to the doubts that the application of Law 83/95 has raised.

The case took approximately 4 years from the First to the Last Instance. The claimant did not ask the Court to rule on compensation, nor did it attempt to demonstrate that the requirements for liability were met.

According to Portugal Telecom’s financial report for 2004, the case ended in a settlement between Deco and Portugal Telecom, on 15th March, 2004, to the estimated value of 120 million Euros. No direct payment was made. Instead, “PT did not charge its costumers for their national, regional and local calls on March 15th, 2004 (National Consumers’ day), and on 13 consecutive Sundays between March 21st, 2004, and June 13th, 2004”. PT also agreed to reimburse any customer who makes a claim for its portion of the 1998 call set-up charges”. The two complaints that had, in the meantime, been made by Deco were withdrawn in June, 2004. A total of approximately two million Portugal Telecom customers were represented, and only five opted out.

## **11. UNFAIR COMPETITION AND STATE AID CONTROL**

### **11.1. MITROVA DENITZA, SOFIA ADMINISTRATIVE COURT (BULGARIA)**

The case that I've chosen is related to the enforcement of state aid to the steel plant, Kremikovtzi, which is in bankruptcy proceedings.

In this case, I have made reference to the Court of Justice, which answered the questions of judgment in C - 262/11.

Kremikovtzi is a legal entity incorporated under Bulgarian law which was State-owned until 1999, when it was privatised.

After 1997, Kremikovtzi received State aid in various forms, including the cancellation of debts that were owed to the State, the use of State resources to pay other debts, and favourable credit terms.

In accordance with the requirement laid down in Article 2 of the Additional Protocol, the Republic of Bulgaria submitted to the Commission a restructuring and development programme for the Bulgarian steel sector, as well as a business plan for the only steel undertaking which had received public aid for restructuring, namely, Kremikovtzi.

According to the Commission's report to the Council and the European Parliament of 12th August, 2008, entitled 'First monitoring report on steel restructuring in Bulgaria and Romania' (COM(2008) 511 final), no aid was granted to Kremikovtzi in 2006.

Towards the end of 2006, an extension until the end of 2008 of the time-limit for the implementation of the plan was requested, due to changes in investment projects and the time lost due to a change in the ownership of Kremikovtzi. The recitals in the preamble to Decision EU-BG No 3/2006 refer to a modified restructuring programme and business plan. According to the order for reference, the modified restructuring programme provided that the restructuring process would end before 31st December, 2008.

On 6th August, 2008, Kremikovtzi was placed in bankruptcy proceedings. As part of those proceedings, it was declared officially insolvent as from 6th June, 2008.

In the light of that insolvency declaration, the Deputy Minister for the Economy and Energy adopted the notice contested in the main proceedings for an amount of BGN 431,073,159, plus interest. According to Administrativen sad Sofia-grad, that notice was premised on the idea that the insolvency declaration pertaining to Kremikovtzi, and the opening of bankruptcy proceedings, had rendered the individual plan for the viability of the company obsolete. In those circumstances, Kremikovtzi was not in a position to achieve viability under normal market conditions, which constituted an infringement of Article 9(4) of Protocol 2 of the Europe Agreement and rendered the State aid that had been granted unlawful. In the opinion of the Deputy Minister, the recovery of the aid was governed by the restructuring programme, as updated.

Kremikovtzi brought an action, upon which the Referring Court (in a different composition) annulled the notice contested in the main proceedings. The Chamber hearing the case held that, under the prevailing legislation, the aid could be recovered only if the Minister for Finance notified the Commission beforehand, so that the latter could adopt a decision ordering the recovery of the aid on the grounds of its being unlawful; neither of those two conditions was satisfied in the case before it.

The Minister for the Economy, Energy and Tourism appealed against that decision before the Administrative Supreme Court. That court quashed the Administrativen sad Sofia-grad's decision and referred the case back to it, to be heard by a different composition, adding binding instructions regarding the handling of the case as to its merits, requiring the Chamber Hearing of the case to take account of the new written evidence, including the Commission decision of December, 2009.

Given these historical facts, the CJEU answered the questions I asked: Proceedings to recover public aid granted to Kremikovtzi AD before the Republic of Bulgaria's accession to the European Union; aid measures which, following that accession, were not 'applicable' for the purposes of Annexe V of the Act concerning the conditions of accession for the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, must, in the event of infringement of the conditions laid down in Article 9(4) of Protocol No 2 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19th December, 1994, be based on Article 3 of the Additional Protocol of the Europe Agreement, as amended by Decision No 3/2006 of the EU-Bulgaria Association Council of 29th December, 2006. In that context, the competent national authorities in the Republic of Bulgaria may, pursuant to the third paragraph of Article 3, adopt a decision to recover public aid which does not satisfy those conditions. A decision adopted by the Commission on the basis of the second paragraph of Article 3 of the Additional Protocol does not constitute a necessary prerequisite for the recovery of such aid by those authorities.

In view of the answers given by the Court in Luxembourg, I have accepted that Articles 87-89 EC Regulation No. 659/1999 are applicable in the Republic of Bulgaria after the country's accession to the European Union of 01.01.2007, considering the Commission Decision of 15.12. 2009, as its opinion on the process support and final monitoring report, as the Commission is the primary regulatory and monitoring body for competition within the EU.

I therefore concluded that they were unfounded objections raised by the applicant for the invalidity of APVD, as issued by the Deputy Minister of Economy.

Relying on the decision of 29.11.2012 in Case C - 262/11, at the Court of Justice, the applicable law on the basis that should be required for aid granted to Kremikovtzi is Protocol 2 of the Europe Agreement with the Republic of Bulgaria, the EU, which by its nature is an international treaty

(ratified by a law passed by 39 - National Assembly on 11.05.2005 and promulgated in SG. 40 of 12.05.2005), as this is part of domestic law and prevails over domestic legislation which contradicts it (Article 5, paragraph 4 of the Constitution B.). It is not disputed between the parties that the information provided on Kremikovtsi's support from the Bulgarian State prior to Bulgaria joining the EU, and that Part 2 of Annexe V to the Act of Accession provided control mechanism. The aim of this mechanism is to cover various benefits, since a process at the time of accession could be considered "existing aid" within the meaning of Art. 88 paragraph 1 EC. Based on this mechanism, it agrees that the assistance the accession of Bulgaria to the EU, on the one hand, is applicable after accession; on the other hand, the date of accession is consistent with what is cumulatively referred to in Art. 87 paragraph 1 EC criteria that are bound by specific rules in Annexe V of the Act of Accession, either in their quality of existing aid as they relate to any of the three categories listed in the Annexe, or in their capacity as new aid when not referring to any of the three categories. These benefits shall therefore be applicable after accession in order to fall within the scope of Annexe V of the Act.

Referring to the Act on State Aid Decision No. 175/06.11.2003 and Decision No. 6/03.02.2004 of Commission Competition Law and Protocol No. 2, Art. 64, § 8 of the Europe Agreement of Bulgaria's accession to the EU, came to the conclusion that the defendant in the case ruled that the aid granted to the applicant should be required since it does not relate to the developed steel industry, part of which was at that time, Kremikovtsi, but the company is instead insolvent and bankrupt, and it has thus not achieved the desired result from the provision of rehabilitation assistance.

With my decision rendered, an Act was proclaimed making public the state void in part of certain obligations on interest under the settlement of non-performing loans for the period 30.04.1999 - 14.06.1999, since these state claims enjoy *res judicata* under Art. 297 and Art. 298, paragraph 1 of the Civil Procedural Code.

The rest dismissed the appeal, finding that Kremikovtsi was not adequately viable, which was granted state aid.

This case is interesting, on one hand, because the State aid granted was on such a large scale for the size of Bulgaria, nearly 800 million Leva, with interest.

The case is interesting from a legal point of view, as there is an object: a long and dynamic period during which Bulgaria goes through all the different stages of EU membership.

## **11.2. STOYANOVA KAMELIYA, SOFIA ADMINISTRATIVE COURT (BULGARIA)**

### **Information Concerning the Judgment**

Decision of the Bulgarian Commission for the Protection of Competition 626/22.07.2008 in Case 202/02.04.2008

Judgment of the Supreme Administrative Court 8370/23.06.2009 in Case 10951/2008

Judgment of the Supreme Administrative Court 7260/02.06.2010 in Case 13271/2009

### **Facts**

The administrative proceedings before the Commission for the Protection of Competition were instituted pursuant to Art. 94, para 1, in conjunction with Art. 38, para 1, item 1 of the Protection of Competition Act to investigate and establish a possible violation of Art. 30 of the Protection of Competition Act (repealed), by 8 companies, registered under Bulgarian law – CMS Cameron McKenna Ltd., Cerha Hempel Spiegelfeld Hlawati Ltd., CMS Reich-Rohrwig Hainz Ltd., DLA Piper, Sofia branch, Wolf Theiss Ltd., IK Rokas & Partners Ltd., Studio Legale Sutti Ltd. and Schoenherr Bulgaria Ltd., as these companies had not been officially registered as law firms according to Bulgarian Bar Law.

The proceedings before the Commission were instituted on the grounds of application, in writing, by 6 Bulgarian law firms, listed in the register of law firms at the Sofia City Court and registered as law firms, according to Bulgarian Bar Law. The interests of these companies were affected by the violation of Art. 30 of the Protection of Competition Act. Applying the general principle that any administrative act shall be assessed according to the legal act in force during its execution, and because the alleged wrongful conduct of the defendants took place before 2008, the relations should therefore be regulated under the Protection of Competition Act then in force.

According to the applicants, the activities pursued by the defendants through companies are identical to the activities exercised by law firms. This activity thus violates the specific rules governing the law profession. The provision of legal services in the prescribed legal manner is contrary to the fair commercial practice and affects, or is likely to harm, the interests of competitors: law firms and partnerships registered and operating in accordance with Bulgarian Bar Law. The application also indicated that the companies against which the procedure was instituted obtained undue competitive advantage, since they are not registered under Bulgarian Bar Law and do not fall under the restrictions of this special law.

During the investigation, based on the inspection and assessment of the evidence, the Commission identified the parties, the relations between them, the market and the competitive environment. It was found that the applicants in the administrative proceedings are law firms listed in the register of law firms at the Sofia City Court, having the activities of providing legal advice, legal assistance and the protection of the rights and legitimate interests of clients, drafting legal documents and other services that are related to the practice of the lawyers' profession.

In regard to Wolf Theiss Ltd., IK Rokas & Partners Ltd., Studio Legale Sutti Ltd., and Schoenherr Bulgaria Ltd., the Commission accepted that they are not in competition with the applicants, as the analysis of the evidence collected shows that these companies do not provide legal services. In this evidence the Commission considered that those companies do not operate in the relevant market – the market for the provision of legal services and therefore they are not competitors to the applicants. Regarding this, the Commission considered that the behaviour of the above-named companies could not objectively be held accountable under unfair competition, respectively, in the general prohibition under Art. 30 (repealed), and therefore there are no grounds for liability under Article 30 (according to Article 30, any action or inaction shall be prohibited in the course of pursuing economic activity which contradicts fair commercial practices and harms, or may harm, the interests of competitors in their mutual relations).

For the remaining defendants CMS Cameron McKenna Ltd., Cerha Hempel Spiegelfeld Hlawati Ltd., CMS Reich-Rohrwig Hainz Ltd., DLA Piper, Sofia branch, the National Competition Authority found that they provide legal services, on their own or jointly with Bulgarian lawyers and/or law firms, and this circumstance places them in competition with the applicants, who are registered and who provide legal services in compliance with Bulgarian Bar Law.

As regards DLA Piper Sofia branch, the Commission found that the latter was registered as a branch of a foreign legal entity (Weiss DLA Paper-Tesbah Rechtsanvelte GmbH, Osterreich), a law firm, providing legal services.

The business interests of Cerha Hempel Spiegelfeld Hlawati Ltd., included legal services, the principle owner of the company is Cerha Hempel Spiegelfeld Hlawati, a legal firm in Vienna.

As regards CMS Cameron McKenna Ltd., the Commission found that the company was registered to provide legal services and that the company was granted the right to act on behalf of CMS Cameron McKenna Ltd., England and Wales, including the right to provide legal advice on specific issues and the representation of foreign law firms to government bodies, institutions and courts.

As regards CMS Reich-Rohrwig Hainz, the Commission found that the latter provided consultancy services. According to the registration, the principle owner is CMS Reich-Rohrwig Hainz GmbH, Austria, a law firm in Vienna that provides legal services in Austria. Based on its findings, the Commission drew the conclusion that CMS Reich-Rohrwig Hainz offers legal services, including the services of lawyers, through subcontractors.

The Commission therefore drew the conclusion that the provision of legal services by companies or, respectively, by a branch of a company that is not officially registered as a law company can be construed as unfair behaviour and this thus circumvents the provisions of Bulgarian Bar Law. It is considered that in this case the four defendants act as intermediaries in the process of offering legal services, and they had circumvented the statutory procedure for practising lawyers' activities. The Commission stated that by the registration of companies, through which the profession of lawyers is exercised, the above-named four companies aimed to circumvent the requirements of Art. 59 of Bulgarian Bar Law, concerning the name of the legal firms with a joint practice as legal firm, as the defendants actually practise as lawyers under the names of the companies by whose names they are known in their countries of origin (according to Art. 59 of Bulgarian Bar Law, in the name of a law firm no other words or names shall be used beside the names of the associates). In this sense, it is reported that the names of foreign law firms, under which the Bulgarian companies were registered, play a crucial role in the formation of customers' choice. Hence, it is concluded that as the activity of the defendants did not meet the provisions of Bulgarian Bar Law, these defendants received undue competitive advantage from being preferred by foreign customers who operate in the country, but who are not familiar with the legal services' market and the activities of local law firms.

According to the National Competition Authority, the circumvention of the Bulgarian Bar Law by registering companies, or, respectively, branches of companies, through which (directly or mediated) lawyers' activities are exercised under the names of the international law firms is considered to be an economic activity which contradicts fair commercial practices and harms the interests of competitors in their relations. This behaviour represents a violation of Art. 30 (repealed) and is subject to appropriate sanctions and the enacting of the termination of the violation under Art. 30 (unfair competition). Based on this, the Commission imposed penalties on them, amounting as follows: 40,000 BGN (to DLA Piper, Sofia branch), 30,000 BGN (to Cerha Hempel Spiegelfeld Hlawati Ltd.), 50,000 LGN (to CMS Cameron McKenna Ltd.), 30,000 BGN (to CMS Reich-Rohrwig Hainz) and the Commission ordered the termination of violations under Article 30.

As regards the remaining companies (Wolf Theiss Ltd., IK Rokas & Partners Ltd., Studio Legale Sutti Ltd. and Schoenherr Bulgaria Ltd.) the Commission ascertained that there was no violation of Art. 30.

### **Ruling of the Supreme Administrative Court, Examined by a Three-Judge Panel**

The Court adopted the conclusions of the Commission on the violation of competition rules, including that it was not necessary to show actual damage, but the existence of a potential risk is enough to negatively affect the interests of competitors in their relations with customers, as a result of the unfair business practice of the particular legal entity, such as providing lawyer services without registering as a law firm in compliance with Bulgarian Bar Law.

The Court found that the rules of the Protection of Competition Act (repealed) were absolutely applicable to the activities of law firms or, respectively, to the activities of lawyers and, as a result, the procedure which was instituted before the Commission, and that was finalised with the decision above, was entirely within the competence of the Commission.

The Court adopted the conclusions of the Commission that the law firms should be classified as enterprises according to para 1 of the Concluding Provisions of Protection of Competition Act ("Enterprise" shall be any natural person, legal person or civil partnership that pursues economic activity in the relevant market, regardless of their legal and organisational form).

With a view to the relevant market, namely the market for the provision of legal services on the territory of the Republic of Bulgaria, the Court found that, regarding the applicants in the procedure before the Commission, there is a legitimate interest in making an application with a request to establish the unfair commercial practice by companies, rendering the same services as lawyers, but not in compliance with the provisions of Bulgarian Bar Law.

The Court found that in order to establish a violation of the general prohibition under Art. 30 (repealed), all elements of the provision need to be present, namely, the presence of business, and any act or omission that is contrary to good commercial practice that harms, or threatens to harm, the interests of competitors in their relations. An essential element of the general prohibition under Art. 30 (repealed) is the contradiction of the act, or its omission within diligent commercial practices. The term is defined in para 1, item 6 of the Protection of Competition Act (repealed), according to which diligent commercial practices shall mean the rules regulating market behaviour which originate from laws and normal commercial relations and that do not breach good ethics.

The Court found that, in determining the competitive environment, the Commission had properly taken into account the companies' real activities and made the explicit distinction between legal services as a whole, which it is permissible to have provided by jurists, who are not lawyers or law firms, and lawyers' services, within the meaning of Article 24 (according to this provision, pursuing the profession of a lawyer shall include oral or written consultations and opinions on legal issues, the drafting of all types of papers: petitions, complaints, applications, appeals, etc., in relation to the assignment made by the client, the representation of clients and defendants and the defence of their rights and legitimate interests before bodies of the judiciary, administrative authorities and services, as well as before individuals and legal persons) for which Bulgarian Bar Law provides specific regulations for their rendering.

The Court found out that having clarified the content of the type of legal services, including the content of the lawyers' services, the Commission had correctly ascertained that the relevant services in the case were lawyers' services, as determined under Bulgarian Bar Law.

The Court accepted the appeals of Cerha Hempel Spiegelfeld Hlawati Ltd., and CMS Reich-Rohrwig Hainz Ltd., and found that the conclusion of the Commission, based on the evidence that those companies provided lawyers' services and were competitors in the relevant market for such services, was not in conformity with the evidence collected. The conclusions of the Commission on the absence of competition between the applicants, on the one hand, and Wolf Theiss Ltd., IK Rokas & Partners Ltd., Studio Legale Sutti Ltd., and Schoenherr Bulgaria Ltd., on the other hand, were found to be in compliance with the law and the evidence collected. The Court drew the conclusion that despite the fact that the principle owners of those companies were law firms, this did not lead to the conclusion that the services which those companies were offering were lawyer services.

The Court adopted the conclusions of the Commission about the presence of the violation of competition rules regarding CMS Cameron McKenna Ltd., and DLA Piper, Sofia branch, in compliance with Art. 3, item 1, according to which the profession of the lawyer may only be pursued by an attorney-at-law practicing alone or as a member of a partnership. *Per argumentum a contrario*, companies such as those mentioned above practice the profession of lawyer. Despite not being registered in compliance with Bulgarian Bar Law, those companies nevertheless provide lawyers' services and, objectively, they are not bound by the requirements and limitations of the special law (attorneys-at-law shall not be able to advertise their operations, for the duration of their professional activity; attorneys-at-law shall be insured against damages which may occur as a result of being guilty of a failure to discharge their obligations, an obligation to protect confidentiality between lawyer and client, etc.). The Court found that, in this way, by circumventing the registration that is obligatory

according to Bulgarian Bar Law, those companies obtained unfair competitive advantage, as they were placed in a more favourable position, while at the same time they harm, or create an actual threat to harm, the interests of law firms, which are duly registered and are obliged to behave in order to conform to the requirements of the special law.

### **Ruling of the Supreme Administrative Court, Examined by a Five-Judge Panel**

In the course of the Court hearings, the applicants stated that they withdrew their application in as far as it concerned the decision of the Commission that established the violations under Art. 30 of the Protection of Competition Act (repealed), by CMS Cameron McKenna Ltd., and also requested that the Court annul the decision of the Supreme Administrative Court, examined by a three-judge panel in regard to the part in which CMS Cameron McKenna Ltd. was penalised in the amount of 30 000 BGN. Considering this request, and according to Art. 36, item 1.1 (repealed) the Court annulled the decision in regard to part of the penalty for CMS Cameron McKenna Ltd.

In the course of the court hearings DLA Piper, Sofia branch, asked for a preliminary ruling, which concerned Art. 267 TFEU and Directive 98/5/EC of the European Parliament and of the Council of 16th February, 1998, to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

DLA Piper, Sofia branch, based their reference for a preliminary ruling on the fact that the internal EU market is to comprise an area without internal borders, as well as the freedom of movement of persons and services, and this constitutes one of the objectives of the Community. The reference for a preliminary ruling concerns freedom of establishment and freedom to provide services. According to the applicants, the reference for a preliminary ruling concerns law firms established in one Member State which wish to establish themselves in another Member State to provide legal services there, enjoying the rights established by Art. 43 and Art. 49 of the EU treaty and Directive 98/5/EC of the European Parliament and of the Council of 16th February, 1998, to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

The Court did not grant the motion of the company for referral of the reference for a preliminary ruling on the interpretation of the provisions of Directive 98/5/EC of the European Parliament and of the Council of 16th February, 1998, to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. The Court stated that, in the proceedings, which had been instituted before the National Competition Authority, the defendants were the companies, registered according to Bulgarian law, or as a branch of a foreign

legal company, registered also in compliance to Bulgarian law, all entered in the register of companies pursuant to the provisions of the Commerce Code. The Court found that the issues raised in the reference for a preliminary ruling would be relevant in case of infringement of the rights and interests of foreign law firms and the defendants in the proceedings before the Commission were Bulgarian legal entities. The findings of the Court cannot undergo any changes, despite the fact that the principle owners of the companies, registered in Bulgaria, are foreign legal entities.

The Court accepted the reasoning of the Supreme Administrative Court, examined by a three-judge panel, that the law firms shall be classified as enterprises according to para 1 of the Concluding Provisions of the Protection of Competition Act ("Enterprise" shall be any natural person, legal person or civil partnership that pursues economic activity in the relevant market, regardless of their legal and organisational form). The Court analysed the meaning of the provision of Art. 24 of the Bulgarian Bar Law (according to this provision, pursuing the profession of lawyer shall include oral or written consultations and opinions on legal issues, the drafting of all types of papers, petitions, complaints, applications, appeals, etc., in relation to the assignment made by the client, the representation of clients and defendants and the defence of their rights and legitimate interests before bodies of the judiciary, administrative authorities and services, as well as before individuals and legal persons). The Court stated that the interpretation of this provision in connection with the other provisions of the law, and the law, with its purpose, clearly requires the conclusion that the mentioned activities must be provided exclusively by natural persons or legal entities that are registered as lawyers according to Bulgarian Bar Law. Assuming that part of that activity could be implemented by persons who are not registered as lawyers under the special law, not only does this violate specific legal rules, but this is a total negation of legal principles and practices. Having considered this, the Court found that the activities exercised by Cerha Hempel Spiegelfeld Hlawati Ltd. and CMS Reich-Rohrwig Hainz Ltd., also including legal services, should be defined as competitive activities. On the grounds of this, the Court found that the decision of the Commission and the decision of the Supreme Administrative Court, examined by a three-judge panel in the part discussed (as regards the two companies mentioned above) was incorrect by reason of the violation of the substantive law.

The Court adopted the conclusions of the Commission and the conclusions of the Supreme Administrative Court, examined by a three-judge panel, on the violation of the competition rules regarding DLA Piper, Sofia branch. DLA Piper, Sofia branch, supported the statement that the contested decision did not define the relevant market and that the Commission disregarded the fact that the applicants, on whose request the proceedings before the Commission had been instituted, represented one side of the argument, and DLA Piper, Sofia, represented the other side, operating in a different market and there is therefore no relationship of competition between them; the legal services

provided by DLA Piper, Sofia, are directed at big multinational corporations and they are not limited to legal services that are provided for by the Bulgarian legislation. In contrast to DLA Piper, Sofia branch, the applicants provided only legal services according to Bulgarian law. The Court found this statement to be unsubstantiated and stated that the legal services provided by DLA Piper, Sofia branch, could be defined only as a part of a lawyer's activities, but could not form a differentiated product market.

The conclusions of the Commission and the Supreme Administrative Court, examined by a three-judge panel, on the absence of competition between the applicants in the administrative proceedings, on the one hand, and Wolf Theiss Ltd., IK Rokas & Partners Ltd., Studio Legale Sutti Ltd., and Schoenherr Bulgaria Ltd., on the other hand, this was found to be in compliance with the law and the evidence collected.

The Court adopted the conclusions of the Commission and the Supreme Administrative Court, examined by a three-judge panel, on the presence of the violation of competition rules regarding DLA Piper, Sofia branch, in compliance with Art. 3, item 1, according to which the profession of the lawyer may only be pursued by an attorney-at-law practicing alone or as a member of a partnership. *Per argumentum a contrario*, a company such as that mentioned above practicing the profession of lawyer. Despite not being registered in compliance with Bulgarian Bar Law, this company nevertheless provide lawyers services and is not objectively bound by the requirements and limitations of the special law (attorneys-at-law shall not be able to advertise their operations, for the duration of their professional activity, attorneys-at-law shall be insured against the damages, which may occur as a result of their guilty failure to discharge their obligations, an obligation to protect confidentiality between lawyer and client, etc.). The Court found out that, in this way, by circumventing the registration that is obligatory according to Bulgarian Bar Law, this company obtained unfair competitive advantage, as this company was placed in a more favourable position, while, at the same time, this company harms, or creates an actual threat to harm, the interests of law firms, which are duly registered and are obliged to behave in conformation with the requirements of the special law.

The Court found that the rules of the market behaviour, that arises from the special law and habitual trade relations, requires that the companies, registered in compliance with the Commerce Act, refrain from carrying out activities for which the State has provided specific conditions for their implementation. If the companies do not comply with the specific requirements of the law, they must not undertake such activities.

## **Notes**

1. According to Art. 59, item 2 (repealed), in the name of a law firm no other words or names shall be used besides the names of the associates.

2. In 2009, the European Commission has taken action to put an end to certain obstacles to the free movement of services in Bulgaria. The Commission sent a formal request to Bulgaria concerning national rules that restrict the free circulation of EU lawyers and EU law firms in Bulgaria. This formal request takes the form of a 'reasoned opinion', the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. The Commission considers that some provisions of Bulgarian legislation relating to lawyers constitute a violation of the freedom of the establishment of lawyers and law firms in Bulgaria, as enshrined in Article 43 EC and they also infringe Directive 98/5/EC, which aims to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. The Commission considers that the requirement of Bulgarian nationality for a person to obtain the qualification of Bulgarian lawyer, and the requirements in Art. 59, item 2, are not justified, nor is the fact that Community lawyers do not benefit from the same rights as Bulgarian lawyers in the exercise of their activity.

3. The new text was amended in 2012 (SG No. 97/2012) and, according to the new text, the name of a law firm may not contain words or names other than the names of the associates, excluding the cases referred to in Article 58a, when the law firm name may include the name of the grouping in the home Member State. According to Article 58a, a grouping of European Union lawyers who have permanently established themselves in the Republic of Bulgaria pursuant to Article 16(1) may be established in Bulgaria as a law firm. Attorneys-at-law and European Union lawyers who are permanently established in the Republic of Bulgaria may be members of a law firm, individually or jointly.

### **11.3. MILACHKOVA KRASIMIRA , SOFIA ADMINISTRATIVE COURT (BULGARIA)**

#### **Section I. Applicable Provisions of the Bulgarian Law**

Protection of Competition Act (PCA), Labour Code (LC), Administrative Procedure Code (APC), Ordinance No. H-18/13.12.2006 for the registration and reporting of sales in trade objects through fiscal devices (The Ordinance)

#### **Protection of the Competition Act (PCA):**

Article 1. (1) The purpose of this Act shall be to ensure the protection and conditions for expansion of competition and free enterprise in business activities.

Article 2. (1) This Act shall apply to:

1. Undertakings and associations of undertakings which operate on the territory of the Republic of Bulgaria, or beyond it, should they explicitly or tacitly prevent, restrict, distort, or may prevent, restrict or distort, competition in Bulgaria;

2. Government authorities, including bodies of the executive and of local self-government, should they explicitly or tacitly prevent, restrict, distort, or may prevent, restrict or distort, competition in Bulgaria;

3. Undertakings to which the government or a municipality has assigned the provision of services in the public interest, insofar as the implementation of the Act does not impede, in actual or legal terms, the performance of the tasks assigned to them and does not significantly affect competition in Bulgaria;

4. Individuals who commit or contribute to violations of this Act.

Article 29. Any act or omission in the conduct of a business operation which comes in conflict with diligent commercial practices and harms, or may harm, competitors' interests shall be prohibited.

Article 36. (1) Unfair competition aimed at soliciting customers and resulting in the termination or breach of previously concluded contracts or in the prevention of conclusion thereof with competitors shall be forbidden.

Article 64. (1) The Commission's resolutions, unless otherwise provided for by law, may be appealed against in terms of their legitimacy before the Supreme Administrative Court by the parties and by any third party that is legally interested. Resolutions may be appealed against within 14 days as of the date when they are communicated as per the procedure prescribed by the Administrative Procedural Code, and in the case of third parties - as of the time when they are published in the Commission's electronic register.

#### Additional Provisions (AP)

§ 1, point 7. "Undertaking" shall mean any natural person, legal entity or unregistered establishment engaged in business activity, regardless of its legal and organisational form.

#### **Administrative Procedural Code (APC)**

**Article 146.** The grounds for Contestation of administrative acts are:

1. Lack of competence;
2. Non-compliance with the established form;
3. The material breach of administrative procedure rules;
4. Conflict with the provisions of substantive law;
5. Non-conformity with the purpose of the law.

**Article 217.** (1) The case shall be examined by a three-judge panel of the Supreme Administrative Court, where the judgment has been rendered by an Administrative Court, and by a five-judge panel, where the judgment has been rendered by a three-judge panel of the Supreme Administrative Court.

**Article 223.** The Court of Cassation judgment is final.

#### **Labour Code**

**Article 126** Upon performance of the work on which he or she has agreed, the factory or office worker shall be obligated:

9. to be loyal to the employer and not to abuse the employer's trust and not to disclose any confidential data for the employer, as well as to protect the reputation of the enterprise;

#### **The Ordinance**

Art. 1. (1) This Ordinance shall be established:

1. The terms, the order and the way of approving or revoking the type for input/output to / from exploitation, registration/deregistration, reporting, storage of documents issued by/in relation to the fiscal unit (FU) and the integrated guidance system for the management of commercial activities (IGSMCA).
2. The Service, expertise and control of FU and IGSMCA, the technical and functional requirements for them.
3. The requirements, the order and the method for establishing a remote connection and the giving of data to the National Revenue Agency.

4. The issuing of fiscal receipts from FU and receipts from IGSMCA and the mandatory elements that must be contained;

5. The type of the data given, the form and the deadlines for their submission.

(1) The ordinance regulates the obligation of any person to register and report the sales of the trade objects realised by him by issuing a fiscal receipt from FU (fiscal receipt) or a receipt from IGSMCA (a systemic receipt), depend on the event for which another tax document was requested. Art. 7. (Revision to 30.04.2013)

(2) Persons, under Art. 3, are obliged to install, put into operation, and use registered in the National Revenue Agency (NRA) fiscal unit (FU) from the date of the start of the activities of the object.

(3) It is not permitted to allow the sale of goods and services from persons under Art. 3 without a functioning FU, unless in the cases, specified in this ordinance.

(4) (New) Do not allow FU from the persons under Art. 3 without having developed a remote connection of FU with NRA, unless in the cases, specified in this ordinance. Art. 45. (Revision to 30.04.2013)

(5) (prev. 3) The President of SAMTS, or a person authorised by him, should issue a certificate in accordance with Annexe No. 14 for registration of a service company which has registered in it a number of certificates for approval of a type 1 FU listed in the contract under para. 2, item 1, or to reasonably refuse them when they have not met the requirements of para. 2.

## **Section II. Proceeding before the Commission for Protection of Competition (CPC)**

This was initiated at the request of E. Ltd., the town of B., against DGT Ltd., village T., B. municipality, and the individuals GG and DD, managers of DGT, to identify possible violations of Art. 36, para. 1, Art. 29 and Art. 2, para. 1, item 4 of the CPA and to impose the sanctions and fines. From the study realised by the Commission, the following facts were established:

E. runs a business, related to the production, sales and servicing of electronic cash registers with fiscal memory (ECR), fiscal printers and other fiscal devices, as well as systems for management in shops, restaurants and other places offering public services, from 1997 to now..

In the quality of a manufacturer of cash registers, it has requested, under the current legislation, documents (certificate of conformity) that verify compliance with the fiscal devices (FU), which it manufactures and distributes with normative requirements.

The company has a valid certificate, issued by the State Agency for Metrology and Technical Surveillance (SAMTS), based on Art. 45, para. 3 of the Ordinance, according to the relevant type of FU. Since 1997 E. has offered and distributed the cash registers and provides repair services throughout the whole country, either through a dealer network, or through direct sales to final customers (including Sofia and B.). DGT carries on a business that is related to the sale / distribution and servicing of computer and office equipment, systems and components, during the period of

registration of the company, from 2008 until today (the CPC's decision is from 20.12.2012). From 10.05.2011 until now, DGT realise a business activity in the distribution and servicing of electronic cash registers with fiscal memory (ECR), fiscal printers and fiscal terminals. Based on a contract for distribution from 10.05.2011, signed between T. Ltd. and DGT, the last distributes (through resale to final users and/or sub-distributors) fiscal devices (electronic cash registers with fiscal memory, fiscal printers and fiscal terminals) which T. Ltd. manufactures and which meet the requirements of the Ordinance, as well as SIM cards for the transfer of data to the server of the National Revenue earmarked for remote connection to the server of the Agency (item 2 of the contract). The rights and the obligations of the distributor on the warranty and after warranty service for the devices are regulated in a separate service agreement between the parties. Based on the service agreement of the same date and between the same parties, T., as a manufacturer of ECR, fiscal printers and fiscal terminals (named FU), assigns, and DGT is obliged to undertake the warranty and after warranty technical maintenance of these products.

The specific conditions and activities in the servicing of cash registers, the conditions for sale of the devices, the signing of subscription contracts with customers, the commissioning and registration of fiscal devices in the server NRA according to the requirements of the Ordinance, the maintenance of non-fiscal devices in T's product line, are covered. DD, in his capacity as an authorised representative of DGT, is certified to use specialised software (Reg FU) for registration, deregistration and changes in the fiscal devices of T. On the website of T., DGT is shown as a distributor for this company in the Sofia region. DGT, the city of B. has a certificate issued by SAMTS for registration as a service company, pursuant to Art. 45, para. 4 of the Ordinance. According to the certificate, the company serviced FU with approved types (twelve in total) produced by T. GG has worked under an employment contract with E. since 3.8.1998, with a place of work - servicing for cash registers in the town of B. in the position of "service technician". On 01.12.2009 GG he was reappointed to the position of "head of office". By a declaration of 03.09.2007, which is considered an integral part of the employment contract, the employee is obliged, during the implementation of I.T. jobs' duties, to protect the interests of the employer, E., to protect technical and commercial secrets, for the duration of employment contract, and also for three years after its termination, he must retain this secrecy, not disclosing or transmitting to third parties any information made known to him at the time in connection with the performance of his duties. On 28.05.2012, GG was dismissed from E. because of "abuse of the trust of the employer, rendered during the assignment of a task during the implementation of his work". It states that during the term of his employment contract, GG was a partner and manager at DGT, which has a similar subject and is a competitor to E's activity. As a manager of DGT since the registration of the company in May, 2008, GG realises actions, the purpose of which was for him to derive economic benefit for himself, and in that way he had abused the trust of his employer, impeded the normal flow of the business process and undermined the prestige and

reputation of his employer, taking advantage of his official position to perform actions contrary to their duty of loyalty to the employer, in accordance with Art. 126, item 9 of the Labour Code. DD was appointed to a position of "system administrator" in office B. of E., with a labour contract from 13.09.2007. According to a declaration from the same date, the employee assumed its obligations to protect the company's interests, to protect the technical and commercial secrets of E., both during the term of the employment contract, and three years after its termination, to agree secrecy, not to disclose and transmit to third parties any information made known to him at the time in connection with the performance of his duties.

On 28.05.2012 DD was fired from E. because of abuse of the trust of the employer during the performance of the employee's assigned job function. Similarly to GG, she had expressed that, DD, during the term of his employment contract with E., had participated as a partner and manager in DGT, the implementing of this company's activities has similar subjects and is a competitor to the activity of E. Eleven customers of E., subsequently became clients of DGT. Some of them indicated in their submissions to the Commission that they terminated their contract with E due to the expiry of the contract and the new legal requirements that the cash registers be connected to NRA that was imposed, as the buying of new cash registers from DGT Ltd. is motivated "due to a better price offer" from that company. Others indicated that they had seen an advertisement for the activity of T. or that they had favourable impressions of the work of DD and GG during their contract with E. Evidence before the Commission did not find in the statement of E. that the employee had used the mobile phone number, owned by E., for DGT's activities.

The Commission found that E. and DGT are companies under the meaning of § 1, item 7 of the AP of the PCA. The specific norm of Art. 36, para. 1 forbids the implementation of unfair competition aimed at attracting customers as a result of the termination or violation of contracts, or to frustrate their signing with a specific competitor. The prohibition covers any unfair action aimed at attracting of customers to a competitor. This can be any action that is inconsistent with fair trade practices that motivate and influence the independent judgment of customers as a result of the termination or violation of contracts with a competitor, or to frustrate their conclusion. It requires the occurrence of a specific and well proven injurious result (the termination or violation of the contract, or the obstruction of contracts) and not just the possibility and hypothetical occurrence of such. There is a potential possibility for harm, but without its actual implementation it cannot lead to the engagement of responsibility for violations realised. Indeed, the defendants, the individuals GG and DD, during the course of their employment contracts with E. in 2008, registered DGT, whose activity is mainly related to the supply and maintenance of computer and office equipment and components, since, in the first years after its establishment, the company operated as a company for the distribution and sales and servicing of computer and office equipment, which activities it still carries. The company started

to operate activity in the distribution and servicing of FU, which is competitive to the business of E, from 29.11.2011, on the basis of a contract with the manufacturer of the FU T. To justify the responsibility of the defendant company, it is necessary that it is proved beyond reasonable doubt that there is the existence of a direct and proximate causal connection between the defendant's deception and what occurred as a result of this behaviour must have legal consequences - suspension/violation or frustration of the signing of contracts with competitors. The actions should be of such a nature as to be able to motivate clients to stop, respectively to breach, its contractual relationship, or not to enter into contracts, and that it has benefitted from the signing of contracts with them.

By analysing the reasons why the customers of E. discontinued their contracts with this company and bought cash registers from T., DGT, with which they have entered into contracts for the servicing of FU, the Commission subsequently adopted the following decision. The main reason, which the customers of E. indicated for the termination of their contracts is related to the change in the ordinance that requires the establishing of a remote connection for fiscal devices with NRA. Meanwhile, the traders explicitly state that DGT offered prices for ECR and repair services that were less favourable than those of E. The Market behaviour of the clients was affected by many complex objective and subjective factors, which include both the price of the product/service and the quality of the product/service, deadlines, the quality of service, offering more affordable alternative goods/services, and the elimination of the need for certain goods/services, as well as others. The attracting of customers by offering better prices and trading conditions is a characteristic manifestation of fair competition, which, in practice, can lead to the loss of customers to a competitor. By itself, however, this commercial behaviour couldn't be qualified as a violation of Art. 36, para. 1 of PCA. It is in the interest of the customers and facilitates the development of the competition environment in the current market. From the perspective of merchants who use them, cash registers or other FU and the purchase of the handset are a long term investment which propose/ entail long-term commitment to one or other manufacturer and service company.

An important factor in the decision will therefore be to provide related services for registration and service. The choice of a new, more advantageous and favourable terms by the customer shows the presence of a competitive environment, and the logical market behaviour suggests a logical consequence, and a possible change in the contractor - supplier of the goods or services. The Commission relied on the constant practice of both the CPC and the Supreme Administrative Court (SAC) that the attraction of customers, which is determined by the availability of better conditions, does not constitute unfair competition. The Commission considered that it had not established that GG and DD, as managers of DGT and employees of E., had used their official positions or company information and contacts to which they had access as an employee of the applicant, contrary to good practice, in their personal interest and to develop their own business. They had not been observed

making calls, writing correspondence or engaged in other forms of contact through which the customers of E. might be motivated to terminate their contracts with a view to concluding a new one with DGT. On the contrary, in the information provided by the clients for the needs of the case, both companies' submissions contain explicit statements that GG and DD did not undertake similar actions. Concerning the other complaint, the Commission indicated that the overall composition of Art. 29 of the CPA prohibits any act or omission in the performance of business, which is contrary to good business practice and harms, or may harm, the interests of competitors. More analogous to the reasons mentioned above, the CPC accepted that no other act or omission had been established that is contrary to fair commercial practice within the meaning of Art. 29 of the CPA, and therefore there is no possibility to apply the general prohibition of unfair competition under Art. 29 of the CPA in regard to the actions of the DGT and the defendants - individuals. For those under art. 2, para. 1, item 4 of the CPA, sanctions for violations of the law were introduced in two situations: when the individuals offend, or when they help to realise an offence. In relation to both defendants, the individuals in the proceedings, to establish that they are partners, founders and managers of DGT and have not implemented their own business. Both have not transacted business as individuals, and this was realised for the company DGT, whose managers they are. In this sense, the responsibility of both DD and the GG would not be involved in the first case, under Art. 2, para. 1, item 4 of the PCA. In the second situation, of Art. 2, para. 1, item 4 PCA, to be qualified as assistance to violation of CPA, in terms of the cumulative, it is necessary that the individual is not an operator and that a breach of competitive enterprise in which the person has cooperated must be established. In practice, the Commission accepted that the assistance should be rendered to actions outside the powers and functions that the individual has in relation to employment, business or other relationship, which is located in the offender - competitive enterprise. The present case did not establish a violation of law under Art. 29 and Art. 36, para 1 by the defendant company DGT, it is not the aiding and abetting of a breach in the meaning of Art. 2, para. 1, item 4 of the CPA by the two individuals. On those grounds, the Commission adopted, with its decision, that this was not a violation of Art. 36, para. 1 and Art. 29 of the CPA by the DGT, GG and DD. This decision was appealed by E. before a three-member panel of the Supreme Administrative Court (SAC), which adopted the Commission's arguments and considered the decision, relevant to the law.

### **Section III. Proceeding Before the Court**

The composition of the SAC (three-member panel) held that registration of a company with a similar business scope by officers of a merchant cannot be regarded as violating the rules of fair trade practices.

To be defined as conduct that violates the general prohibition of unfair competition that is weighted for the trader is to establish that this behaviour has led, or could lead, to distortion of the competitive

market. The appeal stated a view that the perception of the opinion of the applicant, would limit the competitive environment, as this will limit the ability of the staff of that company to carry out, on its own account, an activity for which they have professional qualifications. With the limited local market it would mean limiting the possibility for the distribution of cash machines from other manufacturers, which can now be defined as an anti-competitive effect. The assessment of whether the activities of the company, DGT, violates the competition rules should be conducted with a view to the specifically established facts and not appear merely *a priori* from the fact that the newly registered company, with an activity similar to that of the company who submitted the infringement. In this case, the only concrete fact alleged by the complainant is published in an advertisement with a telephone number for contact that is registered in a group contract relating to E. In this connection, it has not been proven that this method had implemented competitive commercial transactions. On the other hand, on the site of T., whose cash registers were distributed by DGT, a different phone to call to connect to the officially announced distributor was given. In these proofs, the panel accepts that this action cannot be regarded as being contrary to fair commercial practice. In this Judgment, it was stated, in view of Art. 2, para. 1, item 4 PCA, that individuals may commit an offence under the Protection of Competition Law in two situations: when they realise a business alone and implement a breach, or when they assist the relevant entity to undertake unfair competition. The Court's decision was appealed to the five-member panel of the SAC, by which final decision that of the three-member panel was overturned, and the Case was referred back to it by the CPC. This five-member composition of the Court held that the dispute in this case boils down to the interpretation of the facts. The composition considered it was undoubtedly the case that the mobile phone number used by subscriber E. to advertise on the DGT website. Using the contacts and database of E. the defendants thus started their activities to seek their first customers in a competitive market.

Using a number belonging to competitors and knowing his methods for the pricing offered and/or being able to offer lower prices for their products, to which the reactive behaviour of the user is predictable: they correctly preferred a product at a lower price in the proposed technical data. That is why the five-member panel accepted that action constituting Art. 36, para. 1 of the CPA was implemented. Even an unscrupulous competitor has failed to benefit for themselves, the fact that their behaviour has affected the consumer's behaviour, which led to their withdrawal from its competitor, is enough. The attraction of a customer as a result of the terminating of a contract with a competitor is not unfair competition if it is objectively determined by offering better conditions. In this case, however, the objective element is not established, because the price of the product offered is not the only element, and the specifications of the products and their scope, if they were correctly identified by the competitors, are also relevant. The facts of the case justify the conclusion that offering a lower price on fiscal devices is the result of information that DD and GG have, as employees of E., for goods and their price.

The Court also held that the actions of the individuals, GG and DD, contributed to the implementation of unfair competition by a listed company, whose managers they are. Stakeholders-individuals have carried out an employment relationship, and later acted as the partners and managers of DGT. They performed a parallel registration of their company, with an identical subject and actually performing the same activity – the sale of cash registers and fiscal printers. Through their contacts with the clients of E., they were a help to DGT in the realisation of the established infringement of PCA by the company represented by them, proof of which occurred by the outflow of customers' from E. This composition does not accept the Judgment adopted by the three-member panel, that the reason for this outflow is the change in legal video-intercom equipment that is required for direct connection of the fiscal device with the NRA, because this option is provided and offered by E. products. The deceptive behaviour of GG and DD is objectified only in their ability, by their knowing the products offered by their employer, their technical capabilities and the price at which to offer, on behalf of their company's higher class of cash registers, but with lower prices in order to attract their competitors' customers.

#### **Section IV. Comment**

I find the presented case to be relevant for several reasons. Firstly, the opinion of the specialised Commission for the Protection of Competition (CPC) and the First Instance Court in the interpretation of facts, and, respectively, the application of the law, which wasn't shared by the five-member panel that gave the final judgment, annulling the previous one.

Another feature of the case is the issue about the possibility of an individual breaching competition rules, which was discussed. In general, the offenders are new enterprises - entrepreneurs with a different legal-organisational form. More specifically, this is a case where the offender is an individual person, and further, when s/he was not acting as a company under the law.

Thirdly, the case is interesting due to its diversity, because, together with the competition problems it poses questions of labour law, the freedom to exercise a profession, and disciplinary and ethical rules.

#### **11.4. CAZANGIU MIHAELA CAMELIA, TRIBUNAL OF VALCEA (ROMANIA)**

##### **Information Concerning the Judgment:**

- Name of the Court of Last Resort: High Court of Cassation and Justice
- Names of the parties: SC UPC ROMANIA SA, as economic and legal successor of SC ASTRAL TELECOM SA vs the Romanian Competition Authority
- Date of the Judgment: 30<sup>th</sup> September, 2011.

##### **Preamble**

The investigation was initiated on the 11<sup>th</sup> January 2012, based on two complaints filed by natural persons against the operators of CATV (cable television) services, located in Bucharest. Based on these complaints, the object of the investigation was the review of potential anti-competitive practices in the network cable market in Bucharest.

Following the investigations, the Competition Council (the Romanian National Competition Authority) imposed sanctions on SC UPC ROMANIA SA, based on Article 51 of Law No. 21/1996 regarding competition, for the breach of Article 6 letter a) of the same law, namely for abuse of dominance that is manifested by imposing unfair tariffs, consisting in a fine in the amount of 17,605,784 Lei (5,132,283 Euros).

##### **Romanian Law**

- Article 6 letter a) of Law No. 21/1996 on competition states that: 'Any abuse of a dominant position held by one or more economic operators on the Romanian market, or on a substantial part of it, by resorting to anti-competitive actions which have as an object, or may have as an effect on, the distortion of commerce or the prejudice of consumers, are prohibited. Such abusive practices are primarily those: a) imposing, directly or indirectly, the sale or purchase prices, the tariffs or other inequitable contractual clauses, as well as refusing to deal with certain suppliers or customers.'

##### **Facts**

In Decision No. 237/12<sup>th</sup> December, 2006, of the Competition Council – the Romanian Competition Authority, it was held that:

ASTRAL TELECOM operates in certain areas of Bucharest as the single economic operator that provides CATV services, holding a *de facto* monopoly position.

The basic principle of any market economy and of the anti-trust law is that the prices and tariffs are determined freely, by means of competition and in accordance with the demand and supply. In this case, in the areas where the CATV services operator holds a *de facto* monopoly position, competition does not exist with regard to the tariffs formation, and the subscribers have no alternative: they either accept the tariffs imposed by the CATV services provider or terminate the CATV contract services.

During the investigation, it was held that ASTRAL TELECOM had abused its dominant position in Bucharest between 2002 and 2005.

In the contracts concluded with subscribers between 2002 and April, 2004, ASTRAL TELECOM did not mention any criteria regarding the increase in the tariffs. It was held that during this period ASTRAL TELECOM increased the tariffs, despite the decrease in its costs.

The increase in the tariff was not motivated by the operator because, in light of the contract, it did not commit to presenting the reasons for the increase, but only to notifying its intention to increase the tariffs. Despite the fact that, starting in May, 2004, ASTRAL TELECOM included in the contracts criteria based on which it could increase the tariffs, namely an increase in the unit costs. It was held that between May, 2004, and 2005, ASTRAL TELECOM acted in the same discretionary manner, failing to apply the established criteria, and increasing the tariffs, even during the months when the unit costs decreased.

The abuse of a dominant position that was committed by this economic agent affected the consumers, who were forced to accept the tariffs imposed by the CATV services operators, since they had no other alternative than to terminate the CATV contract services.

### **The Relevant Product Market and the Relevant Geographical Market. Romanian and European Legislation.**

#### **Case Law of the European Court of Justice, Invoked by the Competition Council**

##### *The Relevant Product Market*

According to the *Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ 372,09/12/1997* for the definition of the relevant market, demand

substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions.

The same principle is set out in the guidelines adopted by the Council for Competition in the Electronic Communications Sector (*Instructions concerning the application of the competition rules to access agreements in the sector of electronic communications; Instructions concerning the definition of the relevant market, in order to establish the substantial part of the market*).

The European Commission's practice concerning the definition, on the one hand, of the market for the retransmission of TV programmes (CATV), to which consumers' access implies the payment of a subscription and, on the other hand, of the market for services transmission of TV programmes which are received free by consumers via individual antenna, collective antenna or satellite antenna, as two distinct markets, was invoked in *Case no. IV/36.237-TPS1999/242/EC; Case IV/36.539-British Interactive Broadcasting/Open, 1999/781/EC, Case no. COMP m. 3411-UGC/NOOS*.

In the Case *MSG Media Services, IV/M.469/09.11.1994 and Nordic Satellite Distribution, IV/M.490/05.07.1995*, separate product markets for each type of transmission were also established, namely a market for the operation of cable networks, a market for the distribution of TV channels via DTH technology, and a market for satellite channels.

#### *The Relevant Geographical Market*

According to the *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law*, when analysing a concentration where the analysis is essentially prospective, of an *ex ante* type, the scope of the geographical market may be different from the situation in which an anti-competitive practice is analysed with the purpose of establishing the status and the role played by the economic agents in the market, where the analysis is of an *ex post* type.

According to the *Instructions Concerning the Definition of the Relevant Market*, the geographically relevant market comprises the area where the economic agents that are involved in the delivery of the products included in the product market are located, where the conditions of competition are sufficiently homogeneous and which can be differentiated in neighbouring geographical areas, especially due to substantially different conditions of competition.

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

Regarding the definition of the relevant market.

- The product market: the Court noted that the product market included cable retransmission services, but the Council did not reveal arguments with regard to the reason why, during the period under investigation, it did not take into consideration other interchangeable services of the same type (i.e., the DTH retransmission service)

- The geographical market: the Court noted that the geographical market is national, not regional, since the transmission of cable TV programmes was made throughout the country, on the basis of the same contracts applied at the national level.

With respect to the contracts' content, it was noted that the contractual provisions may not be interpreted as prejudicial to the consumer. The same conclusion was drawn by the relevant authority (the National Authority for Consumer's Protection), which certified the contracts.

In addition, the Court held that there is no evidence showing the unfair nature of the prices charged by the applicant, taking into account the EU legislation on this matter, which imposes the interpretation of the concept of unfair price by reference to either an excessive price or to a predatory price.

To reach this conclusion, the Court took into account the accounting expertise carried out in the case, where the level of the tariffs applied with reference to the revenues-expenses comparison was analysed.

The First Instance Court therefore annulled the Council's decision regarding the abuse of a dominant position.

## **Ruling of the High Court of Cassation and Justice**

The High Court examined the concept of a "dominant position in a substantial part of the market" by reference to the relevant product market and to the relevant geographical market.

-With regard to the geographical market, the Supreme Court noted that it was correctly established by the Council that the said market was regional, because the applicant operated without competition from other companies in regard to cable retransmission, as the beneficiaries of the service in that area were not able to opt for another provider of the same service.

- Regarding the product market, the Court noted that it includes only the services of cable retransmission which are chargeable, and not direct transmissions that are free of charge, via an antenna, nor any DTH (Direct to Home) technology, via satellite, for which the consumer would have to pay the value of the reception equipment.

The High Court concluded that the applicant, abusing its dominant position, had imposed increased tariffs without any objective justification and without granting the consumers the option to negotiate the contractual clauses (unfair selling prices of the service), thereby carrying out the content of the offence covered by Article 6 paragraph 1 letter a) of Law No. 21/1996.

## **Conclusions**

In my opinion, this case is relevant in the context of competition law, because of the different methods employed by the two courts to define the relevant market as an essential element for the assessing of dominance, in terms of the product market and geographical market.

Another aspect of the case also consists in the definitions adopted by the two courts regarding the concept of “unfair price”, the two different approaches being based on Romanian legislation, which distinguishes between an unfair price [Article 6 letter a) of the law] and an excessive/predatory price [currently Article 6 letter e), *ex* Article 6 letter f) of the law].

It is noted that the Court of First Instance performed a cost/price analysis (a test which is usually applied in the case of excessive prices), while the Supreme Court concluded that the prices charged were unfair in themselves, focusing on the economic value of the provided service.

It is therefore interesting to analyse the fact that the Supreme Court held that, through the imposition by the dominant undertaking of unfair tariffs to consumers, it committed an exploitative abuse.

Taking into consideration that the wording of Article 6 letter a) is criticised as being ambiguous, since it does not establish its scope of application, the Constitutional Court held that, in matters of competition, Member States may impose additional criteria in order to protect fair competition and the recipients of the service provided, as a guarantee to ensure real economic freedom.

It appears that the Romanian legislator rediscovered the “original spirit” of Article 102 TFEU, which does not conflict with the notion of dominant exclusive abuse and nor with the Guidance Paper adopted by the EU Commission in 2009.

**LIST OF THE JUDGES WHO PARTICIPATED IN ENTRANCE FOR JUDGES 2014**

- HANS AERTS, COLLEGE VAN BEROEP VOOR HET BEDRIJFSLEVEN (THE NETHERLANDS)
- ANABELA ARAÚJO, LISBON ADMINISTRATIVE COURT (PORTUGAL)
- CHRISTINA ARKOUDA; DISTRICT COURT KATERINI (GREECE)
- FERNANDO BASTOS, JUÍZO DE MÉDIA INSTÂNCIA CÍVEL DA AMADORA (PORTUGAL)
- ALVYDAS BEARKAUSKAS, VILNIUS REGIONAL COURT (LITHUANIA)
- SIDNEY BERNEMAN, COURT OF APPEAL OF ANTWERP (BELGIUM)
- PER CARLSON, MARKET COURT (SWEDEN)
- MIHAELA CAMELIA CAZANGIU, TRIBUNAL VALCEA (ROMANIA)
- MAGDA CERQUEIRA, TRIBUNAL JUDICIAL DE BARCELOS (PORTUGAL)
- PETER CHARLETON, HIGH COURT (IRELAND)
- BÉATRICE CHARLIER-BONATTI, FRENCH COMMERCIAL COURT (FRANCE)
- VESELINA CHOLAKOVA, ADMINISTRATIVE COURT (BULGARIA)
- STELLA CHRISTODOULIDOU MESSIOU, NICOSIA DISTRICT COURT (CYPRUS)
- JOÃO CORREIA, TRIBUNAL JUDICIAL DA GRANDE COMARCA LISBOA NOROESTE (PORTUGAL)
- BOGDAN CRISTEA, BUCHAREST COURT OF APPEAL (ROMANIA)
- ELIAS GEORGIU, JUDICIAL AUTHORITY OF CYPRUS (CYPRUS)
- ADRIANA GHERASIM, COURT OF APPEAL CONSTANTA (ROMANIA)
- DJORDJE GRBOVIĆ, DISTRICT COURT OF LJUBLJANA (SLOVENIA)
- RIITTA MAIJA HÄMÄLÄINEN, SUPREME ADMINISTRATIVE COURT (FINLAND)
- PETRA HOČEVAR, ADMINISTRATIVE COURT (SLOVENIA)
- HEICO KERKMEESTER, COLLEGE VAN BEROEP VOOR HET BEDRIJFSLEVEN (THE NETHERLANDS)
- OLYMPIA KOSTA, FIRST INSTANCE COURT OF LARISSA (GREECE)
- LUKA KOVAČ, SUPREME COURT (SLOVENIA)
- POLONA KUKOVEC, SUPREME COURT (SLOVENIA)
- TOMÁŠ LANGÁŠEK, SUPREME ADMINISTRATIVE COURT (CZECH REPUBLIC)
- ALAIN LEVINSPUHL, COURT OF MARSEILLE (FRANCE)
- MARKUS MATTILA, MARKET COURT (FINLAND)
- KRASIMIRA MILACHKOVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)
- DENITZA MITROVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)
- NATALIYA NEDELCHEVA, VARNNA DISTRICT COURT (BULGARIA)
- IKO NÖMM, TALLINN COURT OF APPEAL (ESTONIA)

- RIMVYDAS NORKUS, SUPREME COURT (LITHUANIA)
- DAN ÖWERSTRÖM, SVEA COURT OF APPEAL (SWEDEN)
- PETTERI PALOMÄKI, PIRKANMAA DISTRICT COURT (FINLAND)
- ALBERTINA PEDROSO, TRIBUNAL DA RELAÇÃO DE COIMBRA (PORTUGAL)
- PAULA PENNANEN, COURT OF APPEAL OF VAASA (FINLAND)
- ALINA POHRIB, BUCHAREST COURT OF APPEAL (ROMANIA)
- CARLA RODRIGUES, TRIBUNAL DO COMÉRCIO DE LISBOA (PORTUGAL)
- VESLAVA RUSKAN, SUPREME ADMINISTRATIVE COURT (LITHUANIA)
- MARTINA SEVER, SUPREME COURT (SLOVENIA)
- ANNA SŁYSZ-MARCINÓW, DISTRICT COURT OF SOSNOWIEC (POLAND)
- PIETRO SPERA, TRIBUNALE DI GENOVA (ITALY)
- KAMELIYA STOYANOVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)
- LYUBKA STOYANOVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)
- JURA MARIJA STRUMSKIENE, VILNIUS REGIONAL ADMINISTRATIVE COURT (LITHUANIA)
- EGLE SURGAILIENE, VILNIUS DISTRICT COURT (LITHUANIA)
- MARIÁN TRENČAN, REGIONAL COURT OF BRATISLAVA (SLOVAKIA)
- FRANCISCO UBEDA TARAJANO, ADMINISTRATIVE COURT OF SANTA CRUZ DE TENERIFE (SPAIN)
- RAF VAN RANSBEEK, BRUSSELS COURT OF APPEAL (BELGIUM)
- RUDITE VIDUSA, SUPREME COURT (LATVIA)
- DENISA VÎLVOI, TRIBUNAL OF VÂLCEA (ROMANIA)
- FOTEINI VOUXINOU, ATHENS ADMINISTRATIVE COURT OF APPEAL (GREECE)
- LIDY WIGGERS-RUST, COURT OF APPEAL OF ARNHEM-LEEWARDEN (THE NETHERLANDS)

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