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# WORKING PAPERS

RSCAS 2016/21

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 2015  
Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti



European University Institute

**Robert Schuman Centre for Advanced Studies**

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

This series of working papers is published in the context of ENTraNCE for 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 for 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 for 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**

This working paper includes a collection of case notes written by the national judges who attended the European Networking and Training for National Competition Enforcers (ENTraNCE for Judges 2015). The training programme was organised by RSCAS between September, 2015, and June, 2016, with the financial contribution of the DG Competition of the European Commission. The case notes included in the working paper summarise judgments from different EU Member States that relate to diverse aspects of competition law enforcement. The working paper thus aims to increase the understanding of the challenges that are faced by the national judiciary in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement that was introduced by Reg. 1/2003.

## **Keywords**

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





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## **1. INTRODUCTION TO THE COLLECTIVE WORKING PAPER**

**Giorgio Monti and Pier Luigi Parcu**

### **1. INTRODUCTION**

This collection of cases from the 2015 edition of the ENTraNCE for Judges programme reveals one major difference in the more recent case notes that the judges have reported upon: the greater awareness of the judgments of the Court of Justice of the European Union across the jurisdictions sampled here. The case annotations remark on how frequently the CJEU's case law is used; not only in proceedings applying EU law, but also in cases that revealed no effect on trade and where national law was applied. This allows for an increased convergence in the way the national courts apply competition law. However, this convergence shows some limits when it comes to abuse of dominance where the uncertainty over the best legal standard remains and shows up in national litigation.

Similar to the earlier editions of this working paper, we find that many of the cases brought by national competition authorities (NCAs) relate to domestic infringements of competition law, with the territorial effects focused either on national or regional markets. Furthermore, we find that the use of economic analysis is something that a number of courts should be more willing to embrace.

In the sections below, we summarise the main legal issues in all the case notes collected here, so that the reader has a concise roadmap of the issues that are addressed in closer detail in the annotations that follow.

### **2. SCOPE OF APPLICATION AND PROCEDURAL ISSUES**

Judge Konsta discusses *Greek Competition Authority v X* (section 2.1), a judgment about whether a gas company, exercising a statutory duty to certify gas installations, could abuse its dominant position by refusing to certify the complainant's pipes. The Council of State, applying the case law of the Court of Justice of the European Union (hereinafter CJEU) held that the applicant was an undertaking insofar as granting permits for the use of pipes had economic consequences. However, this conclusion might warrant further reflection, one could also investigate the reasons, especially

the economic sense for the company to refuse to certify certain pipes and if this could give it some benefit (eg. if the applicant was also in the business of manufacturing pipes and was reserving, or somehow leveraging market power toward, that downstream market). In the absence of any economic foundation of the behavior, one cannot exclude that the administrative court's decision, noting that the activity of certifying pipes was carried out in the exercise of public authority rights, might be preferable. In any case, these are frontier cases in which one should always consider if competition law is the best instrument to intervene to redress discriminations or abuses of public powers.

Judge Amizas discusses another controversial case where a complaint was made by a firm offering services to people looking for jobs: *Stylianou v National Committee for the Protection of Competition* (section 2.2). The complainant found out that the Department of Labour was also helping certain groups of unemployed finding jobs and the complaint was that this activity interfered with that of the complainant. Specifically he maintained that the Department of Labour was abusing its dominant position by offering services for free, while the complainant took a commission from employers. It was held that the Department of Labour was an undertaking but that there had been no abuse since there was no foreclosure for competitors. This is quite striking because it appears from the facts that the Department of Labour was providing employment services for those with disabilities and other persons with special difficulties, so one might have considered that this would have served to exclude the application of competition law completely insofar as it provides a service of general interest, but this line of argument did not seem to impress the national competition authority (NCA) or the court.

Judge Petkuvienė's case note on *URBICO v Nordea Bank Finland Plc* (section 2.3) is fascinating for the inventiveness of the plaintiff. In brief, there is a loan agreement whereby as security of the loan the bank imposed many restrictions on the business of the lender. Obviously wishing to escape from the conditions of this loan agreement the lender claimed that the effect of these conditions were analogous to the realization of a merger between him and the bank, and that because this merger was not notified, the transaction was void. This is an unprecedented and creative use of the so-called euro-defence where EU competition law is used strategically to exit a bad deal. Happily the court noted that the conditions merely restricted the borrower's conduct but the bank did not obtain control over the plaintiff's business in a way foreseen by the merger regulation, noting also that the terms and conditions were fairly standard in loan agreements of this type.

In *Energoprojekt v Bulgarian Commission for the Protection of Competition*, discussed by judge Krachunov (section 2.4) the delicate relationship between energy regulation and competition law came up when a generator of renewable energy complained that its entry to the market was delayed

by the dominant undertaking controlling the grid. The court doubted the existence of an abuse insofar as the defendant was not in competition with the plaintiff in the market for renewable energy. However, as noted by the learned judge, it is arguable that the delay caused by the dominant firm could concretely constitute an exploitative abuse of dominance.

### **3. BID-RIGGING CARTELS**

The cases reported in this part require courts to apply national and EU rules and touch on broadly the same kinds of legal issues that the Commission confronts in its appeals: is the evidence sufficient to warrant a finding of an agreement or concerted practice, does one need to test the effects of the agreement, and are the parties' procedural rights respected? The judgments all make regular references to the relevant case law of the CJEU which has by now consolidated in providing ample guidance. The judgments reported also raise some other points worthy of comment.

In *Abbot Laboratories, Menarini Diagnostics and Johnson & Johnson v Portuguese National Competition Authority* (section 3.1) judge Soares Torres notes how closely the national court reviewed the legal issues surrounding the concerted practices at hand. Perhaps one of the more special considerations is that the Court of Appeal corrected the first instance court in characterising a set of related rounds of bid-rigging as a single, continuous infringement. The Court reached its conclusion by assuming the economic argument that the economic reality of the collusion meant that the effects are felt on the market across time. This seems to be particularly appropriate in the circumstances of the case in that it seemed that the collusion spilled over onto other markets, making the evaluation of these continuing effects even more plausible.

Judge Nemeth reports on the Hungarian's Supreme Court (the Curia) judgment in one of the biggest cartel cases in Hungary, where the dawn raids yielded the 'smoking gun' evidence that the parties had colluded (section 3.2). Of significance here is the simultaneous use of several instruments of competition law, including inspective powers, leniency declarations of involved managers, broad definitions of economic entity. Also it is interesting to remark that the fine was very high because it was calculated taking into account also other infringements of national law.

The two judgments from Romania (sections 3.3 and 3.5) may be treated together. The interesting point here is that the national antitrust statute has a specific provision (Article 5(1)(f) of the national Competition Law) that gives as one example of unlawful collusion the participation in bid-rigging and related activities. This being the case, one wonders if, in applying national competition law the

national court is free to set out its own jurisprudence, or whether it is more prudent to interpret this provision in light of the case law of the ECJ, so as to avoid the risk that it applies national law in a manner stricter than which would happen if one applied only Article 101. In practice, the issue may be purely theoretical but if one looks at the CJEU's recent approach to restrictions by object one might wonder if there is some divergence between national law in this context, which might favour a fairly simplified object analysis, and the emerging case law of the CJEU demanding a more detailed assessment of the agreement in its market context even in agreements where the allegation is that they are restrictive by object.<sup>1</sup>

Judge Grigore's case note (section 3.3) on *SCM SA v Romanian Competition Council* is amusing insofar as the two parties who colluded in rigging their bids finally lost the tender because other firms were effectively competing. As the high court rightly noted this still qualifies as a restriction of competition, although one might suggest that unsuccessful collusion might merit a lower fine. On the other hand an adequate fine could be seen as reasonable also in case of a losing bidding cartel in view of the necessity of preserving and strengthening the deterrent effect of competition law.

Judge Stefanita's note (section 3.5) on *Competition Council v SC Plasidrum* is intriguing and somehow puzzling because the Council ran the case against two associations for collusion, but did not seem to follow the link up to consider that competitors who get together in an association are also possibly colluding.

Finally, Judge Puzinskaite's annotation of *AB Lithuanian Railways v Competition Council* (section 3.4) raises the interaction between antitrust law and procurement regulation in an acute manner. The applicant, after receiving nearly identical bids by two parties, asked the competition council to investigate. The Competition Council found that the two bids came from actors that were part of the same undertaking, so on the facts competition law could not apply. It might be, as the learned judge intimates, that the complaint would have been more successful under national procurement legislation. This case is perhaps striking from an economic perspective: according to the late Ronald Coase, the reason firms grow internally is to ensure better coordination more cheaply;<sup>2</sup> if so it is puzzling that here two divisions of the same firm both submitted bids for the same contract unless one concludes that the double bidding may reasonably increase the probability of getting the contract. In any case, trying to win is a competitive aspiration certainly legal for a single undertaking, the double betting behavior may eventually be questioned only if contrary to the specific rules of the tender.

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<sup>1</sup> See, e.g. Case C-67/13 P, *Groupeement des cartes bancaires (CB) v Commission* judgment of 11 September 2014.

<sup>2</sup> R.H. Coase 'The nature of the Firm' (1937) 4(16) *Economica* 386.

A last remark here is that whilst all these cases see the application of Article 101 because of the potential impact of trade, none of the defendants appear to be situated outside the home jurisdiction. We have some way to go before most public procurement markets become competitive on a European scale.

#### **4. CONCERTED PRACTICES AND DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS**

In this section, the judges reported on a number of hard core restrictions of competition. Two important issues come out when reading these cases: the first is that in all of them collusion is a domestic affair: the firms are all local and the relevant markets affected are at most national, and often regional. This may suggest that national competition authorities prioritise domestic cases, and one might question whether this is an appropriate enforcement strategy. Second, and related, only one of these cases saw the application of EU competition law, while at the same time it is interesting to observe how all of the judgments use EU case law to inform the application of national competition law.

Judge Leirão discusses a concerted practice orchestrated by an association of baking industry companies that facilitated collusion among bread makers (section 4.1); what in the antitrust jargon is referred to as ‘hub-and-spoke’ collusion. The association collected the price lists of all members of the cartel and this allowed and facilitated the 49 companies belonging to this association to raise prices. The learned judge notes the importance placed by the court on the intention of the association. While this is vital, it would seem that it is equally important to check the likely effects of this collusion, but from the report it seems that the court was satisfied that there was illegal conduct merely by noting the potential losses that the cartel could yield in the absence of collusion.

Judge Stoyanova’s case note shows us the difficulties faced when judging collusion without any tangible evidence that the parties talked to each other, but relying solely on the economic evidence (section 4.2). Here the issue arose in a bid-rigging case and the court held that when two bidders offered the same prices for nearly all of the services that were specified in the tender, then the competition authority would be justified in holding that there was an agreement, having excluded other factors that might have led to price parallelism. However, when the similarities were not as marked (for example one of the appellants had provided different prices for about half of the services specified in the tender) then this was not sufficient proof of collusion. This case presents an



interesting approach to tacit collusion in bid rigging cases based on statistical elements and economic relevance of the examined collusive behaviour..

Judge Raeva annotates a cartel in the car insurance market, with an unusual procedural challenge by the cartel members (section 4.3). They appealed against the application of EU competition law in parallel with national law on the basis that the national competition authority had not informed the Commission of their intention to issue a decision as required by Article 11 of Regulation 1/2003. This plea was not successful because the national court noted that this was not a material breach because the Commission had not initiated proceedings. It is not clear what the effect of the plea would have been, even if successful because there is little to suggest that the decision would have been any different on the merits had the proceedings been based solely on national competition law.

Judge Valušnig reports on a concerted practice in the market for newspapers in Croatia (section 4.4) where she finds it unusual that the court on appeal did not request a hearing: this is particularly so when the issue was one where the competition authority appeared to conclude there was a cartel as a result of there being no other good reason for the uniform price increase of newspapers. This is precisely the kind of situation where one should closely analyze a plurality of market elements to investigate if there is any other reason, aside from collusion, that might explain price increases. The learned judge is also right in noting that the absence of a fine is unusual, as is the fact that the price of newspapers has remained the same after the decision!

Finally, judge Bravo reports on bid rigging in the Portuguese healthcare market (section 4.5). Here she notes how on appeal the cartel members sought to import notions derived from criminal law to escape conviction while the national court was perfectly aware that competition infringements were based on administrative procedures. This calls to mind the debates surrounding the judgment of the ECHR in *Menarini*.<sup>3</sup>

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<sup>3</sup> *Menarini Diagnostics S.R.L. v Italy* (European Court of Human Rights, Second Chamber), judgment of 27 September 2011.

## **5. VERTICAL AGREEMENTS**

The cases in this section deal with a wide range of issues relating to distribution agreements. In Case n.18/12.0YUSTR (section 5.3) we see a resale price maintenance clause imposed by a dairy product firm with about 60 customers. It is clear that we are faced with a hard-core restraint but it is very surprising to find out from judge Galante's case note that this was examined as a criminal case. While nothing in European Union Law prevents Member States from criminalising certain types of anticompetitive conduct, it is odd and uncautious, as a matter of policy, to impose criminal sanctions for vertical restraints, especially considering that the welfare effects of these practices are often unclear or at least not fully understood.

Judge Goldschmitt takes us to the complex field of manufacturers limiting on line sales (section 5.2). In this case, about digital cameras, the court held that an agreement preventing a distributor from selling goods via websites hosted by third parties, like eBay, was a restriction of competition by object which could not benefit from the protection of the Block Exemption on Vertical Restraints. This is in line with the CJEU's approach in *Pierre Fabre*, which one of the authors of this introduction does not think shows an entirely convincing approach.<sup>4</sup> As noted by the learned judge, there are different opinions by other courts so the matter may be finally resolved by the Federal Court.

Two cases are set in Croatia and both address the distribution of motor vehicles. These are *Euro Rent Sport v Croatian NCA* (noted by judge Lovrinov in section 5.1) and Case no. Us-13467/2009-6 noted by judge Persic Brlekovic in section 5.4). The facts of these two cases seem quite similar: the defendant is appointed as distributor of a brand of cars in Croatia and his agreements with retail outlets are challenged. The grounds for the challenge are that the selection criteria that it adopts are not clear: so dealers that are not selected feel that they have been treated unlawfully. At the outset, the applicable law in the two cases is different: in *Euro-Rent* Croatian Law is applied (although the learned judge indicates that principles of EU Law were applied) while in the second case, relating to motor vehicles of brand 'L' the court applied directly EU Law and the Block exemption regulating motor vehicle distribution. Nevertheless, both courts come to the same result, and this is a bit surprising. Under ordinary EU competition law, there is no duty to deal by non-dominant firms. In the old block exemption for car distribution (which expired in 2013) the main aim was to ensure greater intra-brand competition so one might have thought that simply applying EU competition law would have led to a finding of no infringement.

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<sup>4</sup> G. Monti, 'Restraints on Selective Distribution Agreements' (2013) 36(4) *World Competition* 489.

Judge Kurick (section 5.5) discusses a difficult damages claim which is at the intersection between unfair competition law and antitrust law. It concerns a distribution agreement for wine where the Croatian distributor wished to use the unfair competition rules to secure damages against a competing importer who, it was alleged, took a free ride on the claimant's marketing efforts. While the action failed for procedural reasons (it was time barred), judge Kurick notes how one must navigate the competing values promoted by EU competition law (facilitating market integration) with those of the national rules that were designed to protect traders.

Judge Bacsin reports on an important ruling by the Romanian High Court of Cassation and Justice in a distribution agreement entered into by a pharmaceutical company and three local distributors (section 5.6). It was found that the pharmaceutical company had distributed three pharmaceutical products to three different distributors, killing off any intra-brand competition among them. The result was that hospitals buying the drugs were forced to buy from each of the three distributors to ensure they had all necessary drugs. The case also raises the interesting question of how distributors in this kind of scenario may be held responsible for anticompetitive effects that materialise because of the manufacturer's commercial policy.

Judge Gkotsi comments on a judgment of the Greek Council of State in a complain for abuse of dominance by a distributor that was alleged to foreclose a national wholesaler by purchasing goods directly from the manufacturer (section 5.7). This is an important judgment in view of the efforts of the Council of State to examine the likely economic effects of the defendant's business practice. Having regard to the defendant's reasonable commercial choices, the court upheld the national competition authority's conclusion that this was not an anticompetitive practice. Notably, as with some judgments in the English courts, the Council of State held that it was unnecessary to discuss the precise definition of the market when there was no anticompetitive conduct to be concerned about, confirming the idea that the relevant market is an instrument to be used only when necessary or useful.

Finally judge Selles Ferreiro (section 5.8) discusses the question of when a maximum recommended price in an agreement might, in reality, hide a minimum price/resale price maintenance clause, which is considered as a restriction of competition by object. This is one of the many cases in Spain where the relationship between service stations and wholesalers of petrol have been debated. It is unusual that this market is subjected to such a significant antitrust scrutiny in Spain when it has received hardly any attention in most other jurisdictions.

## **6. ABUSE OF DOMINANCE**

All but one of the judgments annotated in this section address price based abuses by dominant players. The recurring theme in all of these cases is how to balance between preventing harmful conduct by dominant firms on the one hand with giving dominant operators sufficient commercial freedom to react to market events. Perhaps the clearest illustration of this difficulty is in judge Sundlöf's annotation of *Uppsala taxi v Swedavia and Euro Park* (section 6.7). This was not the first time that the operators of the taxi lanes at Arlanda airport had their management challenged. This time the taxi drivers taking clients from the airport to Uppsala objected at the level of fees charged, and the Market Court had the difficult task of considering how far the new charges could be justified by the new way of managing taxi traffic that had been introduced, and how far the charges were instead anticompetitive because they risked excluding competition. One has to wonder whether, in a situation like this one, competition law is an effective tool for resolving matters or whether some regulatory intervention might be preferred to settle issue of cost/ price relative equilibrium.

Judge Korfiti (section 6.1) considers an allegation of price abuse by a dominant undertaking which forced the Cypriot national competition authority and court (on appeal) to distinguish between lawful and unlawful pricing practices. Normally this is a complex exercise, but on the facts the matter was made rather simple because it was found that the dominant company had not altered its prices. In contrast judge Tomova (section 6.2) considers a judgment where the Bulgarian court had to determine if the prices set by the dominant collecting society were excessive. This judgment is also interesting for the close connection between copyright rules (which provided, on the facts of the case, that hotels broadcasting music in their public spaces were obliged to secure a licence from the defendant) and competition rules (which then step in to regulate the prices). Like all cases requiring the competition authority, and then the courts, to evaluate the adequacy of a price these are very difficult judgments indeed.

Judge Malström's comment on *Bring CityMail Sweden AB v. Posten Meddelande AB* (section 6.3) shows that while the Swedish NCA considered that the Guidance Paper on Exclusionary abuse published by the Commission provided a helpful framework for assessing the legality of rebate schemes, the market Court preferred to rely on the conventional case law of the CJEU. As a result while the NCA considered that the rebates did not appear to exclude a rival as efficient as the dominant firm, the market court found that the rebates had the potential to exclude the incumbent's sole competitor, insofar as it was not proved that it was strictly based on actual cost savings and limited to those. The tension between the conventional and the more economic approach to Article 102, still present at the EU level, in this case finds a clear manifestation also at national level.

Judge Zhilova instead considers a margin squeeze price abuse in the sector of fairs' organization (section 6.4); what is noticeable here is that the same defendant had already been found to have abused its dominant position in a related market some years before this case. The learned judge rightly suggests that the deterrent effect of Bulgarian competition law may not be fully optimal.

Judge Wiren discusses the first predatory pricing case in Finland, where the Finnish NCA (section 6.5), while applying national antitrust law grounded its approach on EU law standards. This the case provides all the classic ingredients of a predatory pricing litigation, including issues of identifying costs, and the difficult distinction between meeting competition and excluding rivals.

Judge Brugman discusses issues pertaining to a non-price abuse which partially pertains to the idea of the abuse of right but it remains difficult to classify. Here the defendant (owners of Schipol airports and surrounding lands)) participated in administrative decisions about the use of land near the airport. The developer who owned this land alleged that Schipol airport misused the public procedure, and legitimate public concerns, by persuading public authorities not to allow the development of facilities that would compete with those operated by Schipol airport. The learned judge notes how difficult is to adopt the proper framework because, on the one hand, Schipol airport has a right to make comments about land use (because it is in charge of airport security) but, on the other hand, being a for profit undertaking, it is also likely to be tempted to misuse its influence in an exclusionary manner. The national court here agreed that the cumulative principles found in the *Promedia* case<sup>5</sup> would serve as a helpful starting point, but the issue probably requires further reflection.

## **7. COMPETITION LAW ENFORCEMENT IN THE NETWORK INDUSTRIES**

One of the enduring difficulties in network industries is that the incumbent has the ability and the incentive to restrict market access. Both judge Slavova (section 7.2) and judge Perna (section 7.3) identify cases where the national competition authorities were called upon to intervene to determine how far the incumbent had abused its position by exclusionary tactics. Both of these annotations bring up the question of whether the NCA or the regulator should be addressing the issues at hand, in particular because the legality of the conduct hinges on the understanding of complex technical issues, for which regulators seem best placed to understand and balance than thee NCAs. Judge Perna also suggests that this judgment is part of a larger trend in the Italian case law of the limited

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<sup>5</sup> Case T-111/96, *ITT Promedia v Commission* [1998] ECR II-2937.

use and role of economic analysis. However, the complexity of the case, that presents both a refusal to deal and a margin squeeze conduct, and the articulated debate both in the NCA proceeding and within the appeals at the administrative courts, suggest that the use of competition law in regulated industry may actually be warranted when technical and economic aspects of exclusionary conduct overcome the normal boundaries of ex-ante control that can be exercised by a regulatory authority.

Judge Lange (section 7.1) addresses an intriguing case where a municipality used clauses in its sale contract to regulate the prices of the cable operator. The municipality claimed that its price regulation was motivated by public interest considerations but it was found that the only body capable of regulating prices in a manner consistent with EU Law was the National Regulatory Authority. This is a somewhat unusual set of facts, and it would be worth considering how far this kind of issue arises in other jurisdictions, and whether national regulatory authorities have enough powers to protect users.

Judge Rosalino discusses an exploitative abuse in the bus transportation market where according to her comments one of the key issues that remained for debate was the definition of the relevant market and the extent to which consumers might find alternatives. The case also raises the difficulty of assigning the management of natural monopoly (on the facts a bus terminal) to a private undertaking who is likely tempted to exploit this exclusive right. The case raises a question as to whether it may be more fruitful to attack the state for creating the conditions for abuse (on the basis of a joint reading of Articles 106 and 102 TFEU) than to challenge the consequent conduct of the holder of the exclusive right.

## **8. PRIVATE ENFORCEMENT OF COMPETITION LAW**

Judge Hanno (section 8.1) reports on the recent judgment of the Regional Court in Dusseldorf that hampers the business model deployed by some enterprising firms of collecting a number of claims and seeking damages which are then shared with those that have assigned the claim. This is an innovative way of creating something like a class action which is vital for relatively small claims and makes for more efficient procedures, but as is noted here the German court was reluctant to allow this approach, which is an unfortunate development when seen from the Commission's wish to increase damages claims.

Judge Belicka (section 8.2) discusses whether decisions of the NCA are binding in Latvia, an issue which is now addressed and solved in the affirmative by the damages Directive. However, this

Directive is no panacea for the many difficulties that may slow down the spreading of private enforcement in Europe as the issues raised by Judge Krajnc (section 8.4) shows. Here not only is the burden of proof in stand-alone cases one that is hard to discharge, but it also is a case where the plaintiff is reluctant to disclose all information as this might cause it some commercial disadvantage, and national procedures have yet to find a way of protecting self-disclosure in Slovenia.

Judge Bernard (section 8.3) discusses the approach of the national court to abuse of dominance and the advantage of the as efficient competitor test as a way of avoiding the plaintiff shopping for the easiest abuse. The case show the difficulty of stand alone cases where the plaintiff is unable to present a reasonable economic case and founds its request on several unconnected and partially contradictory allegations, or even worse, on the missed realization of largely unfounded and over ambitious business plans.

Judge Pesch (section 8.5) report raises a different kind of issue: when the Commission holds two undertakings jointly liable for a fine, how is the liability to be shared between the two undertakings? This is an issue that may arise in multiple settings and in this case the matter was resolved by the judge trying to articulate a fair balance between effective enforcement of competition law and fairness as between the parties. Here the German court favoured a fact intensive approach to identify the weight of the fine that each undertaking should be subjected to. The CJEU had confirmed that the matter remained for national procedural law to determine but it may well be that this in the future will require judicial intervention to ensure a harmonised approach across the EU.

Judge Werner (section 8.6) tells us what happened, so far as the case is still under appeal, to the Commission's damages case against Otis, which was controversial because the Commission had originally issued a decision imposing fine on the escalators cartel and was now seeking damages as a purchaser of escalators. On the merits, however, the Commission did not persuade the Belgian courts that it had suffered any damage. The Belgian court did not accept the Commission's reasoning on the quantification of the required damage, evaluating it too vague. It is important to notice that the Damages Directive now allows national courts to estimate the damage (see Article 17) but even this cannot probably absolve the plaintiff from giving some indication of how the antitrust offence caused it harm (whether by inflated prices or the inability to enter into more profitable contracts with third parties). However, with the Directive in force, the requirements on the plaintiff will be reduced and in case of a price overcharge caused by a cartel the existence of the damage will be presumed.

## **9. UNFAIR COMPETITION**

Cases of unfair competition are based on national laws; the economic rationale is often similar to that informing competition law, but the approach is quite distinct. The cases under review here fall into three categories: intellectual property law, the responsibilities of former employees, and the damage that a competitor may do to another in defamation-type actions.

Judge Sipek (section 9.1) shows how national trademark and unfair competition rules are designed to prevent free riding on the commercial efforts of successful firms. In this case the Croatian courts had to discuss how far the lilac colour trademarked by Kraft and used to sell chocolates could be used by another firm for packaging mint flavoured bon bons. A similar issue arose in the case annotated by judge Viokaviciene (section 9.3) where the question was how far a successful comedy had been used unfairly by defendants in producing another show for the Lithuanian market. Finally, judge Jakupak (section 9.5) considers a trademark infringement where the defendant was found to have misappropriated a famous foreign trademark and registered it in Croatia to take advantage of the reputation of the foreign brand. The underlying issue in all these cases is whether the defendant is misleading the consumer by making it seem that the product they are selling is as good as that of the plaintiff. It is interesting to remark that always the complaints come not from the consumer but from the owner of the property right, which suggests that the real concern of the litigants is not an abstract protection of consumers, but that of their own profits and market reputation.

Judge Enikiene (section 9.2) discusses the case law in Lithuania about situations when former employees who start a business in competition with the former employer might be found liable in damages for causing losses of profit to the former employer. The judgment clarifies the measure of damages for these kinds of actions and it is noteworthy that the national competition authority participated in the hearing and suggested what the substantive legal standard should be. This is quite unusual as labor conflicts are one of the areas where the NCAs traditionally tend to avoid to be involved.

Judge Josipovic (section 9.4) identifies another kind of unfair competition case, where the plaintiff alleges that the statements of the defendant harm the plaintiff's reputation, leading to economic losses. The case has some connection with the ones discussed above but clearly presents unfair competition under a different and subtle angle. In the judgment that is annotated here the court took the opportunity to clarify what the plaintiff has to demonstrate to succeed under Croatian law in a similar kind of litigation.



## **10. CONCLUSION**

As with earlier editions of this working paper we can see that judges can learn much useful information on how issues similar or analogous to the ones that they face have been addressed in other jurisdictions. This is particularly important for the many instances when the issue will not have come up in national practice before and there is a lack of precedent and know-how.

The complexity and sophistication of many of the cases presented in this report suggests that a common cultural effort from judges of different member states can yield extremely fruitful results. It is heartening to see that judges are increasingly familiar with the case law of the CJEU and are willing to apply it in creative ways across the EU.

## **2. SCOPE OF APPLICATION AND PROCEDURAL ISSUES IN COMPETITION LAW**

### **2.1 ELEFThERIA KONSTA, COURT OF TRIKALA (GREECE)**

#### **Case note on:**

**Council of State ΣΤΕ2075/2014 (Supreme Administrative Court)**

**ΔΕΦΑ02742/2012 Administrative Court of Appeal**

**Name of the parties: Greek Competition Authority v. X**

#### **FACTS**

The gas company ensures the safety of the gas distribution system in the Thessaly region and checks whether the materials that are used in gas installations follow the requirements of the Technical Regulations. The company X complained to the Competition Commission that the gas company, exploiting its dominant position, selectively allows the use of conventional rigid steel and copper pipes, although the complainant company has a flexible stainless steel GSST-Gastite pipe and it had informed the gas company, in its letter, dated 27.1.2006, that it had CE marking and a CE declaration of the conformity of the product manufacturer. The Competition Commission imposed a fine against the gas provider because of the abuse of its dominant market position.

#### **JUDICIAL PROCEEDINGS-RULING OF THE COURT**

The Administrative Court of Appeals in Athens annulled the fine because it considered that the competition rules did not apply to an activity that is associated with the exercise of public authority rights, because the gas company cannot be characterised as being a «business», even if it undertakes the provision of public utilities. The Competition Commission argued before the Council of State that there is no case law in relation to the latter regarding the above-mentioned legal issue of the character of the respondent, either as a commercial company exercising business activity or as a carrier of public authority in the exercise of its expertise.

The Council of State accepted the appeal by noting, *inter alia*, that: For the purposes of these provisions in the context of competition law, the concept of being a «business» covers any entity that is engaged in an economic activity, namely supplying goods or services on a given market (Decision of 12-9-2000, C-180 to 184/1998, Para.74 et seq., Decision of 11-7-2006, C-205/2003, Para. 26, Decision of 1-7-2008, C -49/2007, Para.22, Decision of 26-3-2009, C-113/2007, Para.69-71), coupled with the financial risks connected to the activity undertaken (Decision of 17-12-2008, T-196/2004, Para. 101), regardless of the legal status of the entity and the method of its financing

(Decision of 3-3-2011, C-437/2009, Para. 41, Decisions of 11-12-2007, C-280/2006, Para. 38, Decision of 17-2-1993, C-159, 160/1991, Para. 14-21, Decision of 12.12.2000, T-128/1998, Para. 107-110, 124, 137), even if it is under public law (Council of State 125/2009). The criterion is therefore the nature of these activities (Decision of 06.16.1987, Para. 118/1985 Para. 7, Decision of 21-9-1999, C- 67/1996 Para. 71-87). In particular, the rules on competition, exceptionally, do not apply to an activity which, by its nature, the rules to which it is subject and its object fall outside the sphere of financial transactions, but it is associated with the exercise of public authority rights (Decision of 19-2-2002, C-309/1999, Para. 57-59, Decision of 18-3-1997, C-343/1995, Para. 22-25, Decision of 19-1 -1994, C-364/1992, Para. 24-31). The fact, however, that an entity has, in the exercise of some of its activities, the privileges that are associated with the organisation of such activities under a monopoly (Decision of 11.11.1986, Para. 226/1984 Para. 9, C-438/2002, Decision of 24-10-2002, C-82/2001, Para. 74-76) does not prevent its designation as a «business» and its inclusion into the provisions protecting competition. This is because, by definition, the relations of financial dependence that are created are a feature of a dominant position in the market and can lead to behaviours, at which the suppression of the rules of competition are aimed (C -41/1990, Para. 21-30).

The gas company has a bipolar nature, on the one hand, it is a commercial business, acting as an exclusive exploiter and seller of gas in the geographical region of Thessaly, and, on the other hand, it is a public authority, because it has to ensure the safety of the gas distribution system in the region and to check whether the materials used in the gas installations comply with the requirements of the Technical Regulations. The gas company has, under the relevant State authorisation, a monopoly on the distribution and sale of natural gas in its area of responsibility, and the granting of permits concerning gas installations and the supply of gas to these facilities. These powers have an economic nature and, therefore, they render the company a «business», within the meaning of the provisions for the protection of competition. In the exercise of such exclusive rights X notes the agreement of both the Technical Report Installation and the materials with the provisions of the Technical Regulations, and of the installation with the Technical Report. The care for the compatibility and suitability of the materials used in gas installations with the requirements of the abovementioned regulations aims to secure the functionality of the gas supply system, and are therefore linked to economic activity, i.e., to achieve the main objective of the distribution and sale of gas in the area of responsibility, nor is this fact invalidated, either by the nature of this activity as a public utility, or by the organisation of these activities under a monopoly or the requirement of the Law for its licensing.

**COMMENT**

The competition rules do not apply to an activity that is exclusively associated with the exercise of public authority rights, but there is a case in which a company is engaged in commercial activities and also holds the special privileges of public authority. However, the fact that a company has privileges associated with the organisation of activities under a monopoly status does not suffice, as it must also have the character of a «business», i.e., to exercise economic activity, even if this activity is related to a public utility.

## **2.2 MICHAEL AMBIZAS, DISTRICT COURT OF NICOSIA (CYPRUS)**

**George Stylianou v National Committee for the Protection of Competition**

**Case No. 1782/2012**

**Date of Judgment: 30<sup>th</sup> June, 2014.**

This was a recourse to the Administrative Court of Cyprus against the decision of the National Committee for the Protection of Competition (hereinafter 'the Committee').

The applicant, Mr. Stylianou, was the owner of a private office which was finding work for people, under a relevant license. He filed a complaint to the Committee against the Ministry of Labour and Social Securities of Cyprus, as a competitor in the legal rights of private offices for finding work for people. The basis of his complaint was Section 6 of the Protection of Competition Act of Cyprus, Act 13(1)/2008. According to him, the Ministry had abused its dominant position in the market by offering services to find work for people without charging a fee, in this way acting in unfair competition with him.

The case dealt with other legal matters that do not concern us in the present case note. In what concerns us, the Committee, after examining the matter, took a preliminary, and then a final decision, whereby the complaint was rejected.

The applicant filed for recourse against the said decision of the Committee. On 30th June, 2014, the Supreme Court of Cyprus, in its role as Administrative Court of First Instance, decided on the matter. For the purposes of the present activity, I will focus only on the substance of the competition law argumentation.

At first, the Court found the opportunity to assert the independence of the Committee as an organ instituted by law. It is the authority that protects against the existence of monopolistic entities being in a dominant position and against their acting contrary to the basic principles of European law, which provides for the prohibition, in the European market, of conditions that adversely affect free competition.

With regard to the substance of the matter, the Court pointed out that the complaint of the applicant concerned the fact that the Department of Labour of the relevant Ministry was operating in an

antagonistic manner towards his office, since it was providing services for free, while his office's only revenue was the fee for finding work for people. Moreover, the Ministry prevented access to the list of unemployed people in such a way that the private offices could not compete on equal terms in the free market.

The Court upheld the decision of the Committee, which decided that:

- The applicant had a legal interest in his complaint so as to justify the examination of the complaint on its merits.
- Irrespective of the way in which it is funded, the seeking of profit, or the public interest that correlates to the operation of the Department of Labour, it was an 'undertaking' according to the law.
- By analysis of the meaning of the relevant market for a product, the form and structure of the market, on the basis of facts from the various Departments of Labour, it was decided, pursuant to Section 7 of the Act, that to these departments, a specific mission was imposed by the Public that does not fall under the provisions of the Act. Section 7 of the Act provides, amongst other things, that the provisions of the Act do not apply to undertakings that are obliged to undertake the administration of services of general economic interest or that have the character of fiscal monopoly, to the extent that the application of the said provisions would prevent, legally or factually, the fulfilling of the special mission which was imposed on them by the Public.

The targets of each Department of Labour, including the finding of work for disabled people and other persons with special difficulties, constitute targets that, without the contribution of the Public, meant that these persons would not have access to the job market and to their constitutional right to work. These types of services cannot be left to the private sector, which has profit as its only goal.

- With regard to Section 6 of the Act, analysis was made of the meaning of 'dominant position' and of its abuse. The argument that the free provision of such services constitutes an abuse of dominant position was examined. With reference to European case law, this argument was rejected.

It was pointed out that the Department of Labour has existed since 1945 and operates to provide public services without cost and in an effective way. This operation has not prevented the institution and operation of private offices for finding work for people, nor does the refusal to give access to the list of unemployed people constitute an abuse of dominant position under Section 6 of the Act. Suggestion, nonetheless, was made for the formulation of criteria for such access, without the violation of the protection of private

facts and information about the people on the list. The private offices operate with 50% of the market, even without the above access, with the remaining 50% being served by the Ministry's departments. As a result, no abuse of dominant position could be found.

The Court also referred to its role as an administrative court. It does not act as an appellate court, but limits itself to the examination of the legality of the decisions of the Committee, as in every other administrative recourse.

In Cyprus, private actions concerning violations of competition law are almost non-existent, if I may use this expression. What are normally found are cases before the National Committee for the Protection of Competition and, from those, recourses to the Administrative Court.

What I find interesting in the above case is that the Court reiterated the basic principle that, as an administrative court, it could only examine the legality of the Committee's decision, and could not substitute it with its own decision.

Furthermore, it was said that the exceptions of Section 7 of the Cyprus Act affect the operation of Section 6 and the whole Act. The characterisation of an entity as being an 'undertaking' is independent of its social role. The questions of the exercise of public power and whether or not an entity operates as a financial activity are crucial.

It is, lastly, interesting to note the appreciation that the Court expressed through its judgment for the thorough analysis and detailed examination of all of the relevant aspects of the law by the Committee.

## **2.3 RUTA PETKUVIENE, REGIONAL COURT OF VILNIUS (LITHUANIA)**

### **Brief summary of the facts of the dispute**

On 17th January, 2007, the claimant, the Joint stock company “URBICO”, and the defendant, Nordea Bank Finland Plc, concluded a long-term credit agreement by which the defendant granted to the claimant a credit of more than 21 million euros. In accordance with Clauses 11.3(a)-(f) and (i) of the Credit Agreement, without the agreement of the defendant the claimant did not have the right to do the following: to conclude or allow to exist any pledge, restriction or other encumbrance in respect of its property, assets, incomes or liabilities, to increase its obligations or liabilities to other banks, institutions or persons under credit, surety ship or guarantee or other similar agreements, to terminate its main business and allow any essential changes in the ongoing business to be made where, in the grounded opinion of Nordea Bank Finland Plc, it could make a significantly negative impact on the capacity of the claimant to carry out its liabilities, to carry out a merger, division, separation or other similar changes in the structure of the claimant which could, in principle, make a negative impact on the position of the defendant, to sell, lease, transfer or otherwise assign, in whole or in part, its assets or incomes, except the usual economic activities, to sell, make a donation of, lease or to otherwise assign pledged assets or rights to it to the defendant, to repeatedly pledge or otherwise encumber it, or the rights to it, until the complete fulfilment of the obligations under the credit agreement, to pay dividends, bonus shares, bonuses or other profit payments to employees and other persons, to distribute the claimant’s profits, whereas, in accordance with Clause 11.7, the claimant undertook not to invest in any other companies without the prior agreement of the defendant. For the purposes of ensuring the Credit Agreement, on 17th January, 2007, the Interest Agreement was concluded and also the rights to claim were pledged by the defendant. On 23rd July, 2007, the claimant and the defendant concluded an assignment agreement by which the claimant assigned to the defendant all of its rights arising from the Works and Service Agreements. The claimant filed a claim asking the Court to declare null and void the Credit, Interest, Pledge and Assignment Agreements, and to impose restitution. According to the claimant, the Credit Agreement lead to a concentration about which, according to the Law on Competition of the Republic of Lithuania, the Competition Council had to be notified in advance and its permission had to be received. Since this was not done, the Credit Agreement contradicts the mandatory provisions of the Law and is null and void. The claimant also referred to the Decision of 22nd September, 1997, of the European Commission, which was taken in Case No IV/M.967–KLM/AIR UK.



### **The Summary of the Judicial Proceedings**

Article 10(1) of the Law on Competition prohibits economic entities or controlling persons who participate in concentration from implementing concentration which is subject to notification until the resolution of the Competition Council is passed to allow the completion of relevant transactions. In accordance with Article 10(2) of the Law, all transactions and actions that conflict with Part 1 of this Article shall be held to be invalid and will create no legal consequences.

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

By the Decision of 18th June, 2012, the Vilnius County Court granted the claim. According to the Court, the provisions of this Credit Agreement had enabled the defendant to control the decisions of the claimant bodies. With regard to the systemic analysis of Clauses 20, 54 and 61 of the Consolidated Jurisdictional Notice of 16th April, 2008, of the European Commission, according to Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as “the Notice of the Commission”), the Court concluded that the defendant had acquired sole negative control over the claimant, i.e., the possibility to apply full control on the decisions of the claimant at its sole discretion, because the defendant could veto the decisions of the claimants’ shareholders and management bodies, meanwhile, in accordance with the Law on Companies (hereinafter referred to as “the LC”) and the claimant’s bylaw, the right to make decisions was exceptionally granted to the claimant’s shareholders or management bodies and it had essential and strategic relevance for the activities of the claimant. The Court decided that the Competition Council had to be informed about the concentration of the parties. According to the Court, the provision of Article 12(2) of the Law on Competition, in respect of its content and grammatical arrangement, shall be regarded as mandatory. In case of the violation of the provision, consequences laid down in Article 1.80(1) of the Civil Code shall arise-any transaction or action that is carried out in violation of this regulation shall be null and void. Submitting a notification to the Competition Council is an indispensable condition of the validity of the transactions in question. In the present case, the defendant had not submitted notification and the Credit Agreement shall therefore be declared null and void. The Credit Agreement shall be declared fully invalid because the defendant’s rights, contained in Clause 11.3 (to have the essential influence over the claimant’s decisions), are essential conditions of the Agreement. The Court observed that, in the present case, it is not relevant whether the Competition Council would have issued permission or whether it would have recognised that it was not needed because the mandatory norms of the Law were violated and the Competition Council was not informed about the concentration.

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

On 2nd April, 2013, the Court of Appeal of Lithuania quashed the decision of the Vilnius County Court and dismissed the claimant's action as unsubstantiated. The Judicial Panel explained that the control of concentrations is prior control – a notification about a concentration shall be submitted before it is implemented (Articles 10 (1) and 11(2) of the Law). A concentration may take different forms, one of them being the acquiring of control over economic entities. According to the Law, control over an economic entity, among other things, may be acquired by purchasing the company or part of it, the whole assets of the company, or part of the assets, shares or other securities, voting rights, by concluding agreements, or in other ways (Article 3(14)(2) of the Law). Control is defined as any rights that arise from laws or transactions which entitle a legal or natural person to exert a decisive influence on the activity of an economic entity, including: (1) the right of ownership to all or part of the assets of the economic entity, or the right to use all or part of the economic entity's assets; and (2) other rights which permit the exertion of a decisive influence on the decisions of the bodies of the economic entity, or the composition of its personnel (Article 3(15) of the Law). According to the provisions of the Law, 'decisive influence' shall mean a situation where the controlling person implements, or is in a position to implement, his decisions in relation to the economic activity of the controlled economic entity, the decisions of its bodies, or the composition of its personnel (Article 3(17) of the Law).

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

The Court explained that, with regard to the provisions of the agreement, the claimant retained the possibility to make legitimate and valid decisions independently. In terms of the Law on Companies, the fact that these decisions were not fixed with the defendant, did not make them illegitimate. The defendant had no possibility of forcing the claimant to take specific decisions concerning its economic activities, management bodies or the composition of its personnel; it didn't participate when these decisions were being made; it did not have any actual possibility to exert decisive influence on making them. It can therefore be stated that the defendant acquired neither *de iure* nor *de facto* control of the claimant. The existence of the possibility to terminate the Credit Agreement does not by itself show the decisive influence is acquired by the defendant in terms of the competition law. The conditions of the contested agreement, as well as the other agreements concluded on the basis of this agreement, should be regarded as a factor that protects credit return and risk management. The provisions contained in the Credit Agreement are standard measures that are accepted in global banking practice to limit credit risk, the use of which is justified and is itself not illegitimate, in accordance with Lithuanian law either. By asking for a declaration that the transaction was invalid, the claimant had to prove that the transaction posed obstacles to competition in the relevant market, or that it might weaken, distort or affect

competition (in English a *substantive test*) negatively in some other way. The Court also found that the Decision of 22nd September, 1997, of the European Commission, which was taken in Case No IV/M.967–KLM/AIR UK cannot be relied upon because, unlike the present case, in the case specified by the claimant the companies carried out the same or similar activities, i.e., the carriage of passengers by air, KLM attempted to integrate AIR UK into its group; therefore, over many years operational and financial integration occurred there between them: KLM had shares of AIR UK, their representative was appointed to be a member of the Management Board of AIR UK, the company attended meetings of shareholders and they were present when appointing the Director-General, they had veto right *de facto* concerning all company's business strategic decisions, etc.

### **Comment**

We suppose the most important aspect of this case is the fact, as it was shown, that the measures addressed to ensure financial security are admissible in all cases when they do not affect competition negatively. This means that it is allowable to conclude credit agreements leading to a concentration which is not horizontal (of the same product, the same market level) or vertical (of the same product, different market level) but sort of conglomerate, i.e., where companies participate in a concentration in which neither compete with the other in a relevant market, nor are they related to each other through the same chain of production, distribution and circulation.

## **2.4 HRISTO KRACHUNOV, REGIONAL COURT OF SOFIA (BULGARIA)**

***“ENERGO PRO GRID” vs. Bulgarian Commission for Protection of Competition and “V2M” Ltd.***

- **Decision No. 64/22.01.2014 of the Bulgarian Commission for Protection of Competition**
- **Case No. 2669/14 of the Supreme Administrative Court of Bulgaria (Court of First Instance)**
- **Case No. 10392/14 of the Supreme Administrative Court of Bulgaria (Court of Second Instance)**

Bulgaria has adopted special legislation that is related to the connection of renewable energy producers to the electricity grid. The country is divided into three regions, with one power station operating in each region. Before the construction of an RES station each producer must apply for access to the grid and must conclude a preliminary access agreement with the Energy Regulator. In its turn, the Energy Regulator is obliged to buy the energy that is produced by the RES station at a preferential price.

### **Facts of the case:**

The Commission for the Protection of Competition (“CPC”) received a request from “V2M” Ltd. to constitute a violation of Art.21 Para. 3,4,5 of the Protection of Competition Act and Article 102 TFEU by “Energo Pro Grid” AD. In this request “V2M” Ltd. claimed that the preliminary agreement for the accession of a small photovoltaic power station to Energo Pro’s grid was signed on 12.02.2010, instead of 04.12.2009, which consequently had an impact on the deadlines for the preparation of the investment projects for the power station, which has led to a delay in the issuing of permits for the construction of the power station and the connecting infrastructure. Consequently, this delayed the whole accession process, which caused “V2M” Ltd. pecuniary damages of approximately BGN 20 mln. The Commission for the Protection of Competition issued a decision establishing that “Energo Pro-Grid” AD has violated Art. 21 of Competition Protection Act by abusing its dominant position through delaying the accession process of renewable energy producer to its grid and subsequently precluding new entry to the market. The Commission for Protection of Competition has concluded that this abuse could have the effect of distortion of competition and could have effect on the consumer’s interest and therefore imposed a fine of BGN 266 040 for an abuse of a dominant position.

Ruling of the Supreme Administrative Court-it dismisses/overrules the decision of the Commission for Protection of Competition on the following grounds:

1. When imposing the fine, the Commission for the Protection of Competition took into account the turnover of “Energo Pro- Sales” AD, and not of “Energo Pro Grid” AD, which has a separate legal existence, regardless of the fact that both entities are part of the same holding.
2. No actual abuse occurred during one part of the period that the Commission for the Protection of Competition considered to be relevant to the abuse.
3. In its decision, the Commission for the Protection of Competition did not specify which legal provision of Competition Protection Act was violated and it failed to show under which hypothesis for the abuse of a dominant position the conduct of the offender falls. /The law lists several hypotheses.
4. Absence of abuse-in order to establish an abuse of a dominant position there are three cumulative elements that must be present: 1. The entity causing the abuse must be an undertaking; 2. The undertaking must have a dominant position in the relevant market; 3. There must be unilateral conduct of the undertaking, that, objectively, may have real or potential anticompetitive effects; 4. *(The conduct may cause actual or potential)* damage to the consumer’s interest.
4. According to the Court, in this particular case the legal requirement for unilateral conduct is not met, as during the relevant time period there was an acting legislation that stipulated that any accession to a grid of medium voltage producers must be notified to the “NEC” EAD (National Electricity Company). In order for accession to be executed, an increase in the existing capacity of the transmission line, which is owned by “NEC” EAD, was necessary. It was legally and technologically necessary to conduct a conciliation procedure with “NEC” EAD concerning the conditions for accession. Successful completion of the conciliation procedure concerning the conditions of accession is a standard and obligatory condition. The Commission for the Protection of Competition has incorrectly assumed that during the conciliation procedure with NEC “Energo Pro-Grid” AD had made objections
5. to the proposed preliminary accession agreement in order to delay accession. The Court adopts the view that these objections are normal commercial negotiations on the terms of the agreement and do not constitute the intended abuse of a dominant position.
6. There is a lack of damage to the interests of consumers, since it is well known that increasing the amount of connected power from renewable energy sources and the amount of energy purchased from them at preferential/higher than market/price, are not beneficial to the consumers, who therefore pay a higher calculated final price.

7. The anti-competitive effect was not established in an unarguable manner. The Competition Authority's decision reflects that the negative effects of the delayed accession to the power station occurred on the market for electricity from RES, which is different from the accession market, where EDC has a dominant position. The Court considers it essential that "Energo-Pro Grid" AD is not active on the market for the production of renewable energy and therefore the claimant before the Commission for the Protection of Competition and "Energo-Pro Grid" EAD could not be competitors. According to the legislative framework that was applicable during the relevant time period, the market for electricity production from RES was characterised by the absence of competitive relations between companies that are active in this market. Since the purchase of renewable energy is guaranteed by the existing legal framework, with predetermined prices and a limited amount for the purchase, the Court considers that the Commission for the Protection of Competition has unreasonably concluded that the behaviour of the EDC has had an effect on a market, in which, not only is the claimant not active, but also no competition exists between the participants in this market. RES energy is subject to compulsory purchasing by the end supplier at a preferential price that is regulated by SEWRC. The presence or absence of another participant in this product market does not therefore affect in any way the relationship between the rest of the producers and between the producer and the end supplier.

### **Comment**

The main problem that was solved by the decision is whether, in the determination of the fine, the turnover of the entire holding should be taken into account, or only the turnover of the subsidiary that committed the offence. Another serious question is whether, in a regulated market, such as the market for the purchase of renewable energy, where accession and prices are predetermined; there may be the abuse of a dominant position, which could lead to anticompetitive effects. In my opinion, although the market is regulated, such abuse is possible, as EDC actions can prevent or delay the access of certain producers of renewable energy and connect other producers instead. The producers that are given priority are often related to EDC and, moreover, the possibility of access is not unlimited-new producers of renewable energy that is purchased at preferential prices can access the grid only until a certain percentage of renewable energy (from the total energy produced) is reached.

### **3. BID-RIGGING CARTELS**

#### **3.1. AGOSTINHO SOARES TORRES, LISBON COURT OF APPEAL (PORTUGAL)**

**Portuguese anti-competition Case No. 350/08.8TYLSB.L1**

**a) Defendants: ABBOTT -Laboratories Ltd, MENARINI DIAGNOSTICS, LDa, and JOHNSON & JOHNSON, Ltd. (J & J)**

**b) Administrative body involved: Portuguese National Competition Authority**

#### **I-ABSTRACT:**

Prohibition of concerted practices in prices between pharmaceutical companies consisting of a “distortion in the high” prices of hospital legal procurements, with the intention of causing an undue increase in the prices of the products tendered therein rather than approaching them from those practised in sales in pharmacies.

The Court was convinced of the existence of both restrictive and concerted practices, which were intended to result in uniform pricing for procurement procedures for the acquisition of the product reagent for the determination of the amount of glucose in the blood during the years 2001 to 2004, and where such companies were competitors.

**The key-idea of the court:** To determine whether a concerted practice is prohibited by Article 4 of the LC, will not be necessary when taking into account its concrete effects, where it is evident that this practice is to prevent, restrict or distort competition in the domestic market. It is thus clear that the agreement or concerted practice between undertakings has the object of restricting competition; there is no need to demonstrate the fulfilment of a legal type of adverse effect on competition. In other words, concrete anti-competitive effects will only be determined if it is not possible to determine that the objective is to restrict competition

The logic is that if it considers that certain forms of collusion between companies are, by their very nature, harmful to the smooth functioning of competition. In this category that is restrictive of the competition object there is an underlying idea that, intrinsically, certain elements of agreements or concerted practices between undertakings, associated with the context in which they operate, have a high potential to restrict competition, assuming thus, with great consistency, that there are anti-competitive effects.

## **II- THE CASE**

### **1. First instance Judgment by the Lisbon Commercial Court**

By a judgment dated 01.07.2010, the offence featured was a partially upheld offence, partially concurring with the Administrative Council's decision of the Competition Authority, dated 10.01.2008, convicting the accused as follows:

A) The defendant Abbott Laboratories:

a) For the practice of 27 (twenty-seven) offences that are provided for in Article 2, Paragraph 1(a) of Decree-Law No. 371/93 (the former competition law), individual fines of 100.000,00 (one hundred thousand euros);

b) For the practice of eight (8) offences that are provided for in Article 4, Paragraph 1, point a) of Law No. 18/2003 (further Competition Law) of 11 June, individual fines of 150,000.00 (one hundred and fifty thousand euros);

c) In the single fine of €3.000,000,00 (three million euros) in relation to the legal unification of those fines.

B) The defendant Menarini Diagnostics:

a) the practice of 23 (twenty three) offences that are provided for in the same provision above mentioned of Decree-Law No. 371/93 of 29th October, individual fines €100,000.00.

b) the practice of four (4) breaches of the above mentioned Article 4, Paragraph 1, point a) of Law No. 18/2003 of 11th June, individual fines of 110,000.00 (one hundred and ten thousand euros);

c) A single fine of €2,000,000.00 (two million euros) in legal accumulation of those fines.

C) The defendant, Johnson & Johnson: With a fine of €70,000.00 (seventy thousand euros) for the practice of one (1) offence that is provided for in the above mentioned Article 2, Paragraph 1(a) of Decree-Law No. 371/93 of 29th October.

### **2. Lisbon Court of Appeal's Decision**

Following the appeal to the Lisbon Court of Appeal, the case was settled thus:

The administrative offence proceedings for breach of the *ne bis in idem* principle for the applicant Johnson & Johnson Ltd was dismissed;

The appeals against the sentence by the applicants, Abbot Ltd and Menarini, Lda., were partially



upheld and therefore the ruling:

a) Changed the legal qualification of the facts, incurring each of the defendants in practice only a single offence, to be provided and punished by Artº 4, Paragraph 1a) of Law No. 18/2003 of 11th June (The Portuguese Competition Law at that time) and consequently, the Court ordered the defendant, Abbot, Lda., to pay a single fine of € 3,000,000.00 (three million euros), and the defendant MENARINI Ltd, a single fine of €1,000,000.00 (one million euros).

b) Maintained the conviction of each of the defendants to additional sanction (the publishing of the sentence in a national newspaper)

*P.S:* The sentence on the defendant Menarini was subsequently dismissed after being subject to a prescription declaration from the legal procedure.

Several appeals were brought to the Constitutional Court, but they were judged either to be unfounded or inadmissible.

### **3. Law Provisions**

#### **A) Portuguese Law**

Decree-Law N° 371/93

Article 2

1-Agreements and concerted practices between undertakings and decisions of associations of undertakings are prohibited, whatever form they take, if they have as their object or effect the prevention, distortion or restriction of competition, in whole or in part of the national market, in particular those resulting in:

a) The direct or indirect fixing of purchase prices or sales, or interfering in their determination by the free market, inducing a high or low rate artificially.

Decree-Law No 18/2003 of 11th June

Art. 4

No. 1-Agreements between undertakings, decisions of business associations and concerted practices between undertakings, are prohibited, whatever form they take, if they have, as their object or effect, the prevention, distortion or restriction of competition, either appreciably in whole or part of the national market, in particular those resulting in:

a) the direct or indirect establishment of purchase prices or sales, or interfering in its determination by the free market, inducing either a high or low rate artificially;

## **B) EU Law**

Article 101 of the Treaty on the Functioning of the European Union (the former Article 81 of the EC Treaty)

### **4- THE FACTS OF THE CASE**

Between 2001 and 2004 several Portuguese public hospitals that were located in different parts of Portuguese territory decided to open international tenders for the purchase of test strips for the amount of glucose in the blood.

The companies mentioned (Abbott, J & J and Menarini), among others, such as Roche, Bayer, JMVazPereira Ltd, contributed to several of these contests, presenting proposals for the supply of reagent strips.

Representatives of the defendants met regularly at the APIFARMA (Portuguese Association of the Pharmaceutical Industry) and occasionally at their own facilities.

Such meetings took place mainly within the following groups set up by APIFARMA:

Working Group for Diabetes Mellitus Protocol; Commission Diagnostic Media Specialist (CBSS) and Commission Specialised Hospital Supplies (CEFH).

The meetings of the Working Group took place on dates that have not been fully clarified, but from at least September, 2002, to June, 2004.

The meetings that took place in the CBSS were not on dates that have been fully clarified, but from at least January, 2001, to December, 2004.

The dates of the meetings that took place at the CEFH were not fully clarified., but from at least December, 2001, to January, 2005.

At one of those meetings, which took place at the APIFARMA facilities on 04/06/2001, the representatives of the defendants: Abbott , Menarini, J & J , Roche and Bayer, were present.

At that time, negotiations were underway to review the Co-operation Agreement that was concluded on 14th October, 1998, between the Ministry of Health and other partners for the integrated management of the Diabetes Mellitus Control Programme. This Protocol defined the

prices of blood glucose determination reagents to be practised in pharmacies (retail selling) – and under law provisions by Ministerial Decree.

During this meeting, the discrepancy between prices for hospital contracts and administered prices for such a reagent in the pharmaceutical/outpatient sector were discussed.

Given that the prices charged in the hospital tenders were lower than those charged in the pharmaceutical sector, the discussions included the risk that hospital prices could be recognised as reference prices within the framework of the review.

This meant acting for the future in order to prevent the lowering of prices in the pharmaceutical sector/clinic.

This fear was based on the fact that, in the preparation of the 1988 Protocol, the Ministry of Health had already weighed the consideration of the Blood Glucose Determination Reagent price protocols practised in the hospital tenders as reference prices for the establishment of the same prices for reagent in the pharmaceutical sector.

Further to the meeting of 04/06/2001, these fears and how to prevent falling prices in the pharmaceutical sector were again discussed between the same competitors on other dates, which were not actually clarified, but which were in the period between 2001 and 2004.

Such contacts influenced the prices to be charged in the hospital tenders.

Reagent sales to hospitals account for 15% to 20% of the global sales of 50 reagent strips packaged in the country. The remaining sales, from 80% to 85%, are carried out through pharmacies that sell to the public.

According to information provided by the EDMA (European Diagnostic Media Association), global reagent sales in the country had the following approximate values:

In 2001: €15,497,651; in 2001, €19.682 million; in 2002, €24.393 million in 2003, and €30,471,000 in 2004.

Consequently, the sales to hospitals were:

2001: between €2,324,648.00 and €3,099,530.00;

In 2002: between €2,952,300.00 and €3,936,400.00;

In 2003: between €3,658,950.00 and €4,878,600.00.

The global aforementioned sales were as follows: outgoing European Abbott (rounded to thousands of euros): €2,039,000.00 in 2001, €2,944,000.00 in 2002, €3,972,000.00 in 2003 and €5,343,000.00 in 2004.

Of €2,039,000.00 in 2001:

€1,445,000.00 was reflected in sales in the retail segment and €594,000.00 was reflected in sales in other segments (public and private hospitals, nursing homes, clinics haemodialysis, etc.);

Of €2,944,000.00 in 2002:

€2,535,000.00 was reflected in sales in the retail segment and € 409,000.00 was reflected in sales in other segments (public and private hospitals, nursing homes, dialysis clinics, etc.);

Of €3,972,000.00 2003:

€3,407,000.00 was reflected in sales in the retail segment and €565,000.00 was reflected in sales in other segments (public and private hospitals, nursing homes, clinics, haemodialysis, etc.) and, of these sales, there were €562,448.47 sales to public hospitals, health centres and health sub-regions;

Of €5,343,000.00 in 2004.

€4,415,000.00 was reflected in sales in the retail segment, and €928,000.00 was reflected in sales in other segments (public and private hospitals, nursing homes, clinics, haemodialysis, etc.) and, of these, €576,927.77 of sales to public hospitals, health centres and health sub-regions.

In 2004, Abbott had global turnover of €111,322,177.00.

Menarini had the following global turnover:

in 2003-€11,747,689.34

In 2004-€14,060,111.18

J & J was introduced in 2002 following a global turnover of €99,708,428.40 (ninety-nine million, seven hundred and eight thousand, four hundred twenty-eight euros and forty cents.

Since 1998, Blood Glucose Determination Reagent prices were found to be administered in selling

contracts to the public through pharmacies:

-If the buyer reagent was wearer of the National Health Service (NHS) and presented in the corresponding pharmacy prescription pay Esc.4.410.000 \$ (€ 22.00), caring for pharmaceutical companies the maximum value of €20.95;

In all other cases, the purchaser will pay Esc.6.125 \$ (€30.55), leaving it to pharmaceutical companies, likewise, the value of €20.95.

*Not Proven:* Prices that were established in 2003 for the pharmaceutical sector were influenced by the prices that the defendants had offered in the hospital sector in previous years.

Consequently, the economic benefit obtained by the defendants through the sequence of their behaviour if extended to sales in pharmacies.

Consequently, with regard to sales at pharmacies, the defendants' illicit actions produced their effect from the moment the new 2003 scheme entered into force, these effects lasted for the entire time that the new fixed prices operated.

### **III. COMMENT**

3.1- The most important arguments and the reasons raised by the court and/or contested by the defendants on the anti-competition issues:

The Court found that there was price agreement at the meeting on 04/06/2001 and through other contacts demonstrated the parallelism of prices that was checked throughout the years in question.

However, the accused claimed that this type of illegal concerted practice requires the existence of illicit contacts that have, as their effect or object, an effect on competition and, separately and cumulatively, another essential constitutive element (one that is autonomous and distinct from the existence of illicit contacts) that translates into a parallel behaviour.

According to them, one cannot extrapolate or assume under the second objective element of the type (behaviour parallelism), that there is the existence of the first (existence of illicit contacts) as they are seen fit to result from national and foreign doctrine and jurisprudence of the EU Courts Application of Article 101 of the Treaty on the Functioning of the European Union (former Article 81 of the EC Treaty).

So, the evidence of illicit contacts would result from specific facts, as well as from other objective evidence of such illegal concerted practice (behaviour tracking), which would also have to result from specific facts.

The defendants alleged that the existence of illicit contacts with a direct or indirect nature, is a *conditio sine qua non* for allowing the distinction between the existence of a concerted practice and a simple parallel behaviour, which has nothing illicit about it-see, among many others, the judgments of 07/13/1989Ministère Public/Jean-Louis Toumier ,Case 395/87, § 24, of 8.10.2008,” Schunk and Schunk Kohlenstoff-Technik c. Commission “, Proc. T69/04, § 116 of 14.07.1981” Gerhard Ziichner/Bayerische Vereinsbank AG “, Proc. 172/80, § 12, of 8.7.1999,” hiils AG/Commission “proc. C-199/92 P, § 160 of 12.7.2001, “Tate & Lyle”, proc. T-202/98, § 56, of 12.17.1991, “Hercules Chemicals/Commission”, proc. T-7/89, § 258 -; judgment of the Court of First Instance of the European Communities, “Usines Gustave Boel c. Commission”, Proc. T-142/89 and Case 10/03/1992, “Solvay”, Proc. T-12/89, § 141.

The Court thus did not understand this as being so, and considered that parallel pricing was justified by the presumption that there were other contacts for price fixing and that interpretation was not jeopardising constitutional principles.

This was a conclusion that was extracted from the rules of experience of market behaviour/conditions and through free conviction under the evidence from either the analyses or the circumstances of the case.

The argument was also not accepted by the First and Second Instance Courts and by the Constitutional Court that it was unconstitutional to understand that the plaintiff entity is sufficient to show the parallel behaviour, being the accused the burden of proving that in the meetings held there was no collusion on prices and/or that such parallelism is justified in light of economic rationality criteria.

The Court interpreted Article 43, Paragraph 1, of the Competition Act, in the sense that one should take into account the total turnover of the company in all of the sectors in which they exercise their activities, including those which are not affected by the infringement that is alleged against it. The defendants alleged that the Court *a quo* should have interpreted the abovementioned Article in the sense that one should take into account the company's turnover in the sector in which it is alleged the infringement occurred (*in casu*, the sector of the reagents for the determination of glucose in the blood sold to hospitals).

**3.2-** Other arguments that were exposed related to the question about whether:

Concerted presumption of the withdrawal of the price parallelism subject: it is the burden of the Applicant to prove the lack of concerted practice, which may be virtually impossible and to admit conviction for concerted practice by innocent companies, just because they cannot prove their innocence

It was contended that, following the practice of the European Commission in this area, the reason for the concept of concerted practice relates to the need to expand, in Article 81 of the Treaty, all forms of collusion schemes, so it is not so important to distinguish the agreements, but with the merely parallel behaviour, which, by definition, misses any element of agreement (Vd. Polypropylene decisions and Hercules Chemicals).

While still stressing the criteria for co-operation, these should always be read and interpreted in the light of the general principles of competition, according to which any economic operator must determine independently the policy that he intends to pursue on the market. (Suiker Unie judgments, Züchner, Ahistroem and Deere)

It was further alleged that Community case-law had already had ample opportunity to say that a parallel behaviour may not, by itself, be identified as a concerted practice: The Ahistroem Judgment and, *inter alia*, the observations of the Competition Council.

Another argument on the theme discussed was that when a price cartel is practised, for example, when it has an object and an anti-competitive effect, its illegality type only meets once, understanding that result from the case-law of the Union courts European, concerning the punishment of agreements or concerted practices that violate Para. graph 1 of Article 101 of the Treaty on the Functioning of the European Union ("TFEU -ex Article 81, Para. graph 1), which served as inspiration for the national correspondent.

To decide whether a certain conduct contravenes Article 101 TFEU, one must attend to its purpose in the first place, and only if it is in itself restrictive of competition, to analyse its effects.

Indeed, it was argued that the jurisprudence of the European Union Courts demonstrates that the inclusion of the disjunctive "or" in the legal definition, means that, first, it must be established that the object of the agreement or concerted practice -that is your object, and if it does not have an objective that is restrictive of competition, it will then have to meet its consequences in the market -that is, its effects -in order to determine the existence of an infringement of Article 101 TFEU.

In the case of agreements or concerted practices which take on a cartel nature-and that therefore have an anti-competitive object:-the market effects that such practices originate are valued in accordance with the case law of the EU Courts, in order to determine the duration of the infringement, as well as to determine the severity of it. The reason for the alternative type of construction of the national law in -inspired by Article 101 of the TFEU -is not to create a gap in punishment, since there may exist some practices with an anti-competitive object without their taking any effects.

The Court held that the finding of parallel market conduct may constitute an infringement of the rules of competition, since it can be demonstrated that such parallel conduct arises from an agreement, a concerted practice, or an understanding between the defendants.

It is known that, although Article 101 of TFEU prohibits any form of collusion that is liable to distort competition, it does not prohibit the economic operators from the right to adapt themselves intelligently to the past or present behaviour of their competitors.

However, objectively, it appears that such parallelism, through repeated proposals with similar economic conditions for the supply of reagent strips by the undertakings that are concerned with public procurement and other procedures that are opened by the different NHS Hospitals, is a strong indication that collusion occurred at an earlier stage.

Nevertheless, the contacts between the defendants with a view to price alignment were proven.

**3.3.**-For the company quality setting the court accepted the notion that it regarded as an undertaking any entity that was engaged in an economic activity, regardless of its legal status and the financing method (Judgment Wouters, of the Court of 19<sup>th</sup> February, 2002-Case C-309/99)

On the notion of agreement and concerted practice, the Court welcomed the ECJ Judgment of the teaching of July 14<sup>th</sup>, 1972, in Case No. 48/69 (Imperial Chemical Industries Ltd v Commission of the European Communities).

On the notion of conduct which has as its object or effect the prevention, distortion or restraint of competition, the Court welcomed the Guidelines on the application of Article 81 of the Treaty-Notice 2004/C 101/08, published in the Official Journal of the European Union on 27/04/2004



Finally, the Court concluded that Competition Law punishes agreements, decisions or concerted practices, even if they have not had any effect on competition, and stresses that it is sufficient that the objective thereof has been to prevent, distort or restrict such competition.

**3.4-** In order to justify the qualification of the offences as being multiple or permanent, (i.e., on the question of whether the conduct of the accused was plural or singular or persistent), the Court made the following reflection:

‘Competition law has evolved more recently towards ever less formalistic, reiterating the need to take into account when analysing the object of an agreement or concerted practice between undertakings the particular legal and economic context in which they are located.(cfr *ECJ Case GlaxoSmithKline Services c. 6/10/2009; Case the Court of 4.6.2009 (third section), the C-08, T-Mobile;*)

What occurs, then, is an anti-competitive state that is created by such an agreement or concerted practice, in which the legal rights are affected or tablets, and as long as that lasts, an anti-competitive state that is not cancelled in time to conclude the agreement or formal support for the understanding and the convergence of wills between the companies.

What has become a more specific characteristic of the infringements of competition is precisely the projection in time of the components of their unlawful acts.

In short, we can say that this dimension, which has been so objectified as a lasting state, prevents the determination of the objective, of being restrictive of competition on the fly, i.e., in the isolated moment of the agreement or concerted practices acts, and therefore to be attributed to the offence in one formal nature.

Not understanding it would also be to empty the offence and the legal interest under protection.

Taking into account the characterisation of the normative element on the objective restrictive of competition-which results in the creation of a state in itself is thus adverse to the functioning competitive market, and that the legal worthlessness precisely from the continued production capability of the anti-competitive, affects the infringement in question and was classified as a continuing breach.(*Idem* in the Case “Hercule v Commission”, 1991, decision also known as case “Polypropylene)

### 3.5- *Nemo tenetur*

This was also invoked in the case surrounding the issue of whether the understanding of international bodies on the right to protection for non self-incrimination in the field of antitrust also admits restrictions.

This was referred for judicial argument in the Orkem/Commission Case on the request for information from the undertakings, in research related to anti-competitive practice and in the case of the judgment of 18th October, the Court of Justice, 1989, Commission/SGL Carbon and Other, the Court held, after recalling the content of the Orkem/Commission Judgment (Judgment 2006: that the normative interpretation in question does not contain the unconstitutional restriction of the *nemo tenetur* principle *ipsum accusare*, while the refractive procedure guarantees the accused's defence and the right to a fair trial under counter infractions that are defined in the legal framework for competition.

In the Case Commission/SGL Carbon, The Court held, after recalling the judgment in Orkem/Commission (Judgment 29, 2006)

“(...) Following the Orkem Judgment/Commission, (...) the case law of the European Court of Human Rights which the Community judicature must take into account when interpreting the fundamental rights, as introduced. However, the Court stated in this regard that these developments were not such as to call into question the principles set out in that Orkem/Commission Case.

(...) It does not follow from that judgment that the Commission's investigative powers have been limited with regard to the presentation of documents in the possession of an undertaking subject to an investigation. The undertaking concerned must therefore, if the Commission so requests, provide the delivering of the documents related to the investigation concerned, even these elements that may be used by the Commission to establish the existence of an infringement.

The normative interpretation in question does not contain the unconstitutional restriction of the *nemo tenetur* principle *ipsum accusare* while refractive procedural guarantees the accused's defence and the right to a fair trial under administrative infraction defined in the legal system.

It has also been argued that even if the offences and fines imposed for the purposes of Article 6, Paragraph 1, of the Convention, were or were not criminal (See judgment of 27th September, 2011, the European Court of Human Rights “A. Menarini Diagnostics SRL c. Italie,” Complaint No. 43509/08) and the ECJ Case of July 8th, 1999, “Montecatini SpA c. European Commission“, C-235/92P procedure, was able to recognise that the principle of the presumption of innocence as contained, in particular, in Article 6, No. 1 ECHR, is among the fundamental rights and is recognised under the established case law of the Court of Justice, that is reaffirmed in the preamble of the Single European Act and in Article F.2, the EU Treaty, which are protected in the Community’s legal order.

Given the nature of the offences in question, and the nature and severity of the penalties, the principle of the presumption of innocence applies to the procedures relating to the infringements of the competition rules that are applicable to undertakings and that may result in the imposition of fines or of periodic penalty payments

(V. In this sense, the European Court of Human Rights, Öztürk judgment of 21st February, 1984, Series A No. 73, and Lutz, of 25th August, 1987, Series A No. 123-A).

The EU Court of Justice thus acknowledges that the anticompetitive law sanctions procedure laid down in European Union Law, associated with the violation of competition law rules (Article 101 of the Treaty on the Functioning of the European Union), has a criminal nature for the purposes of Article 6 of the ECHR and, also, we say, for the purposes of Article 2 of Protocol No. 7 – it is also common ground that Article 101 TFEU has a content and sanctions that are analogous to Article 4 of Law No. 18/2003.

### **3.2 ATILA NÉMETH, DISTRICT COURT OF MOSONMAGYARÓVÁR (HUNGARY)**

#### **The Curia of Hungary**

**Case No. Kfv.III.37.690/2013/29.**

(The Curia of Hungary acting as a Court of Revision)

#### **1. Summary of facts:**

The plaintiffs: the “Vasútépítők Pályatervező Kivitelező és Iparvágány fenntartó Kft.”, the “Colas Dunántúli Út- és Vasútépítő Zrt.”, the “Mávépcell Mély-, Magas- és Vasútépítő Kft.” and the “Szentesi Vasútépítő Kft.”, were all companies active in the market for state- and EU-financed railway construction. The defendant “Gazdasági és Versenyhivatal” is the state authority for competition in Hungary.

On 29<sup>th</sup> November, 2004, the general managers and the CEOs of the plaintiffs met at the Hotel Atrium Hyatt in Budapest, and concluded an agreement on dividing between them several forthcoming state- and EU co-financed tenders. They agreed on coordinating their price-offers – on economic and rational standpoints – in order to be able to gain more-or-less equal shares in those projects. There were other meetings also, at which agreements were made on the details so as to ensure the execution of the original cartel-agreement.

The plaintiffs took part in the tenders in question, and acted in the way previously agreed.

#### **2. Summary of the judicial proceedings:**

The Hungarian Competition Authority issued a proceeding on the 20th November, 2007, which started with a “dawn raid” following previous court permission. During this “dawn raid” the authority foreclosed on a memorandum on the first meeting and agreement. Afterwards, the authority obtained a USB-stick that also contained this memorandum, and an e-mail proving that it had been sent to – at least – one other party. The defendant issued a decision on 9<sup>th</sup> June, 2010 (No. Vj-174/2007/332.), ruling that the plaintiffs' actions were capable of restricting competition concerning some of the above-mentioned tenders, and a fine was imposed on the three of them. The authority did not fine Plaintiff No. I., in accordance with its leniency policy, arguing that without the evidence provided by this plaintiff, the proceeding would have failed.

The authority stopped the proceedings against the other 13 companies.

The Budapest-Capital Regional Court – revising the case upon the claim of the plaintiffs – quashed this decision and ordered the authority to repeat its proceeding. It held that the evidence gathered was not convincing, and that the authority unlawfully extended the fine to the business group (it referred to ECJ case-law: C-144/07., C-148/07., C-149/07C- 150/07. and C-154/07 – also).

The Court of Second-Instance overturned this decision, and dismissed the claim against the decision of the defendant. It reasoned that the evidence gathered by the competition authority properly proved the plaintiffs' infringement of the relevant legal regulations and the market-restriction.

### **3. The Ruling of the Court:**

The Curia of Hungary, acting as a Court of Revision, dismissed the claims of the plaintiffs, and upheld the Second-Instance decision.

It dismissed the plaintiffs' reasoning concerning the mandatory participation of the Commission in such proceedings, holding that the notification of participation by the national courts to the Commission is only a possibility during proceedings before the national courts. Moreover, the competition authority had already made such notification previously, during its own proceeding. It reasoned – in detail – that the relevant Hungarian provision regulating this issue runs contrary to Art. 15. Para.1. of EC No. 1/2003, and thus it cannot be applied.

The Curia also dismissed all of the other procedural claims of the plaintiffs, holding that the taking of the evidence during the proceedings was lawful. It reasoned that the taking of evidence fulfilled the criteria set out:

- (a) in the national procedural law, and
- (b) in Art. 6. of the European Convention on Human Rights and Fundamental Freedoms, and in the case-law of the European Court of Human Rights, and
- (c) in the relevant case-law of the European Court of Justice.

The Court held that it was not necessary for it to ask for preliminary rulings from the ECJ, as it has clear and consistent case-law on the standards of proof in cases concerning the infringement of TFEU Art. 101.

The Curia held that the leniency-policy (along with its consequences concerning the sum of the fines) cannot be reviewed by the courts.

It ruled that the relevant market in this case was the EU-market for such construction projects, as the procurement-tenders concerned also had to be announced in the Official Journal of the EU. Among such circumstances, the provisions of TFEU Art. 101 must be applied. The Curia held that the actions of the plaintiffs in question clearly infringed those provisions, as they seriously restricted the relevant market.

In connection with the fines imposed on the plaintiffs by the Competition Authority, the Court held that the amount could exceed the measure set out in EC No. 1/2003, because the actions in question also infringed other domestic rules. It also pointed out that, in the field of fining business groups, the “single economic entity concept” leaves a wide margin of discretion to the authority.

#### **4. Personal comments:**

This case was one of the biggest – if not the biggest – cartel-case in Hungary in recent years. It raises sensitive issues concerning cartel-agreements in the field of state- and EU-financed construction projects.

In addition to its economic policy importance, this case raised a row of procedural issues, like the use of the data collected through the “dawn raid”, and the use of IT-evidence (such as e-mails, and USB-sticks). The Courts also examined the lawfulness of the “dawn raids” in connection with the ECHR, and the case-law of the ECHR. The co-operation between the domestic courts, the Commission, and the ECJ was also in question (TFEU Art.101, and Council Regulation (EC) No. 1/2003).

This case also raised issues concerning the “single economic entity concept”, and the imposing of market fines, taking this doctrine into account.

Moreover, it also related to the leniency policy of the Hungarian Competition Authority, as the case was largely based on evidence that was supported by the general manager of one of the companies that was party to the cartel-agreement.

### **3.3 ECATERINA GRIGORE, CONSTANTA COURT OF APPEAL (ROMANIA)**

**High Court of Justice Judgment no. 2627/04.06.2014**

**Plaintiff: S.C. M. S.A. Participant at public procurement organised by SNTGN Transgaz SA Medias in 2011 (the Contracting Authority)**

**Defendant: National Competition Authority, Competition Council**

**Subject: Horizontal agreement restricting competition by object.**

1. SNTGN Transgaz SA Medias (hereinafter referred to as Transgaz) is a Romanian legal entity owned by the Romanian state through the Ministry of the Economy, Commerce and Businesses, having as its main activity the transport through pipelines, transport, control and international transit of natural gas, research, design in the field of natural gas transport, and the assurance of access, without discrimination, to the national system of natural gas transport pipelines.

During 2009-2011, this legal entity organised a public procurement procedure with the following object: a high-pressure natural gas transport pipeline between SRMP Giurgiu and the Danube left shore and Giurgiu Gas Measuring Station.

In order to allocate the contract, the contracting authority selected an open tender procedure based on “the lowest price” criteria. Seven competitors participated in the public procurement procedure, including our plaintiff and S.C. T.M.U.C.B. S.A., and these two undertakings were suspected of possible agreements through their decision markers.

However, neither of these companies won the bid, the winner being a third neutral party.

By Order 759/29.09.2011, the President of the Competition Council launched an “*ex officio*” investigation, extended by Order 836/01.11.2011, having as its object the alleged infringement of the provisions of Article 5 (1) letter f), of the National Competition Law No. 21/1996 and Art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU) by some undertakings that had participated in the abovementioned public procurement procedure.

After the inquiry, the National Competition Authority established the breach of Article 5(1) letter f) of the National Competition Law No. 21/1996 and the provisions of Art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU) by our plaintiff, SC Moldocor SA, and by

another participant, SC TMUCB SA, consisting of an anti-competitive agreement by participating with rigged bids to a public procurement.

As a penalty, the Competition Council imposed a fine of approx. €500.000 for SC Moldocor SA, a competitor representing 4% of total revenues in 2011, and approx. €2.500.000 for the SC TMUCB SA competitor.

In establishing the fine, the Competition Council took into account the high gravity of the facts and that the infringement was instantaneous.

In this respect, Decision No. 72 from 14th November, 2012, was issued.

2. Both in the First and the Last Court, the main issue discussed was the non-existence of a breach of Art. 5 (1), (f) and Art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU), which was motivated by the lack of an agreement between undertakings in order to rig the bid. In addition, the plaintiff claims that we cannot talk about restraining the competition in a market when neither of these two competitors won the bid.

The claimant alleged that in assessing the facts, the national authorities, contrary to the practice of the European Community, analysed just the object of the agreement and not, at the same time, the effect of an agreement.

The Court of First Instance (the Court of Appeal) and the Last Instance (the High Court) decided that the plaintiff had breached Article 5(1) letter f) of the National Competition Law no. 21/1996 and the provisions of Art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU).

The decision was based on the following arguments:

The public procurement procedure that was organised by Transgaz took place during January-June, 2011, and the anticompetitive agreement was put into action between our plaintiff, Moldocor, and TMUCB. Only a few days before the commencement of the tendering procedure, the TMUCB competitor transmitted financial information from its bid to the other competitor, Moldocor, who took into consideration the unit prices that they offered so as to determine the material costs for its tender proposals. Subsequently, our plaintiff established the unit prices for its own material using a



unitary percentage reduction of 1%, which was applied to its competitor's unit prices. Analysis of the price material from these two competitors demonstrated that these had been correlated.

Three days before the opening of the bids that had been submitted, the Director of TMUCB informed the representatives of Moldocor by e-mail that he was going to send the financial bid that Moldocor was expecting. Competition inspectors raised this e-mail, which had been sent by the Technical Director of TMUCB, from Moldocor's Secretary's Office.

Under Article 5 (1) letter f) of the National Competition Law No. 21/1996,

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 on the Romanian market or only on one part of it, shall be prohibited, especially those aimed at:

f) participating, in a concerted manner, with rigged bids in auctions or any other forms of competitive tendering".

In order to ascertain the scope of Art. 5 (1) of the Act for a practice, it is necessary to fulfil all three of the following conditions:

- a) the existence of at least two undertakings or associations of undertakings;
- b) the existence of an agreement, a decision of an association of undertakings or concerted practices;
- c) agreements have, as their object or effect, the prevention, restriction or distortion of competition on the Romanian market, or a part thereof.

In relation to our plaintiff's claims, both instances analysed whether the condition stated under letter b) in the text above was met to establish beyond any doubt that there was a breach of Art. 5 (1), (f) and Art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU)

The Courts decided that the e-mail retrieved from our plaintiff proved that T.M.U.C.B. and MOLDOCOR had an agreement prior to submitting their bids, through which they had agreed on sending sensitive commercial information regarding the content of their offers. This information was going to be used to draft their own bids in a manner that would allow them to artificially raise their winning chances by distorting the competitive character of the procedure in order to damage the other participants at the procedure. According to the jurisprudence of the European Court of Justice, the competition authority has the right to free appraisal of the proof, and the only relevant criterion is the credibility of the evidence.

This behaviour suffices to demonstrate the existence of an accord between the parties, without the need to raise a detailed joint plan. (in this respect, see the Case of Limburgse Vinyl Maatschappij NV and Other v. Commission, Commission v. Anic Partecipazioni).

Even if neither of these two competitors actually won the bid, if it is obvious that an agreement was intended to restrict, prevent or distort competition, then there would be no need to examine the effects of that agreement. The Court noted the so-called “hard-core” restrictions and cases C-56/64 and 58/64 – Consten and Grunding v. Commission, and rigged bids under Article 101 (1) of TFEU, Case T-29/92 SPO v. Commission, T 9/99 HFB Holding v. Commission. I note also the Case GlaxoSmithKline Services Unlimited, formerly GlaxoWellcome PLC v. Commission, the joined Cases C-501/06P, C-513/06 P and C-519/06 P, Case C-8/08 T-Mobile Netherlands and Other v. Raad van bestuur van de Nederlandse Mededingingsautoriteit.

In the opinion of the Courts, the case under investigation consists of an understanding of bid rigging which automatically falls within the prohibition that is laid down in Article 5(1) letter f) of the National Competition Law no. 21/1996, entering into the category of horizontal agreements that restrict competition by object and, in this case, there is no need to analyse its effects on the market.

The presented case is important in terms of the applicability of the European Court of Justice’s practice by the Romanian courts.

In my opinion, the practice of the European Court of Justice offers answers in cases where legislation can give rise to interpretations that ensure uniform application throughout the European Union.

Statistically speaking, a small number of the decisions of the National Competition Authority are refuted by the courts, which shows a good knowledge and understanding of the EU rules at all levels of the Romanian judicial system.

The public procurement procedure involves specific issues that are reflected in competition, for example, defining the relevant market, and this situation requires a thorough analysis of each individual case, with differentiated solutions in applying the law.

### **3.4 EGIDIJA PUZINSKAITE, VILNIUS REGIONAL COURT (LITHUANIA)**

The applicant, AB Lithuanian Railways, filed a complaint to the Court seeking to annul Resolution No. XXX of 2013-12-23 of the Competition Council and to order the respondent to pay the applicant's legal costs.

In its complaint the applicant explained that on 2012-02-15 it had announced an open tender procedure for the purchase of granite rubble. Tenders were submitted by two companies, UAB M and UAB T.

AB Lithuanian Railways examined the tenders of the said companies, which aroused suspicion because of their similarities. Thinking that the tenderers might have entered into an agreement of a type that is prohibited by Article 5(1) of the Law on Competition, on 2012-06-08 AB Lithuanian Railways requested that the Competition Council verify whether the actions of the tenderers had any signs of a prohibited agreement. Pursuant to Resolution No. XXX of 2012-07-30, the Competition Council started an investigation into the compliance of the actions of the economic entities to the requirements of Article 5 of the Law on Competition.

The circumstances identified during the investigation were set out in the 2013-08-28 report of the Division of Anti-Competitive Agreements of the Competition Council, i.e., that UAB M and UAB T had formed prohibited agreements regarding their participation in the 2011 and 2012 tenders for the purchase of granite rubble which had been organised by the applicant. In the contested Resolution No. XXX of 2013-12-23, however, the Competition Council stated that there was no reason to conclude that UAB M and UAB T, at the time when they submitted their bids for the public tenders organised by AB Lithuanian Railways, were independent competing economic entities in the meaning of the competition law; and that the circumstances regarding the actions of these economic entities during their participation in the public tenders did not form any basis to consider their actions to be prohibited agreements (concerted actions) concluded by separate economic entities. As a result, the respondent terminated the investigation.

The applicant thought that the Competition Council – which had established certain signs of a prohibited agreement in the actions of UAB M and UAB T that made it evident that the companies had disclosed their commercial offers to each other – wrongly terminated the investigation just because, in the opinion of the Competition Council, these economic entities should be considered

to form a single economic unit. The Resolution did not establish that UAB M and UAB T had common employees. This fact was confirmed by the managers of the companies at the 2013-12-10 meeting of the Competition Council. The findings of the investigation that was conducted by the Competition Council provided a different assessment of the Minutes of the meeting than that provided in the Resolution. The Competition Council did not demonstrate that UAB M had an opportunity to exercise a decisive influence on the activities of UAB T. Even if, in its Resolution, the Competition Council had reasonably concluded that UAB M and UAB T were to be regarded as a single economic unit, within the meaning of the competition law, this finding would not have been significant in recognising that they had concluded a prohibited agreement.

Legal regulation of the Law on Public Procurement of the Republic of Lithuania does not prohibit related economic entities (in the meaning of the competition law) from participating in a public tender, but it also obliges them to act independently with regard to a specific public tender, and to compete in a fair and equal manner with other suppliers who are participating in the relevant public tender, thus allowing the contracting authority to select the best tender and to use the funds available for the purchase rationally. Ensuring competition is one of the reasons for the legal regulation of public tenders. Effective and fair competition in public procurement legal relations is ensured on the basis of the principles of equality, non-discrimination, mutual recognition, proportionality and transparency. The assessment provided in the Resolution of the Competition Council is not only inconsistent with the principle of fair and effective competition, because part of the tenders submitted to the contracting authority (in the present case, tenders submitted by companies UAB M and UAB T) would not be competitive, and the contracting authority would not be able to select the best tender transparently, but would also provide the conditions for the abuse of the procurement procedure, for circumvention of the requirements of the Law on Public Procurement Law, and the gaining of undue advantage over other suppliers that are involved in public procurement through the *de facto* submission of alternative tenders, where such submission of tenders will lead to the elimination of another supplier from the procurement procedure. The practice formed by the Competition Council whereby agreements between economic entities which form a single unit in the context of public procurement are not considered to be prohibited agreements, in the meaning of the competition law, would be incompatible with the economic concept of an economic entity.

In its response to the complaint, the respondent, the Competition Council of the Republic of Lithuania, did not agree with the complaint and requested that it be dismissed as unfounded.

In its response to the complaint, the respondent explained that, after assessment of various circumstances related to the management and other connections between UAB M and UAB T, the Competition Council recognised that, in the case examined in the Resolution, these two separate companies (separate legal entities) formed a single economic unit. This circumstance is insufficient to conclude that there was an agreement between these companies and that restricted competition, which was in breach of Article 5 of the Law on Competition, regardless of whether the agreement was concluded for the sake of the bids for public tender or not. The applicant, wrongly claimed that the doctrine of a single economic entity is intended only to ensure the responsibility of the parent company and its subsidiary, and also wrongly claimed that the concept of a single economic unit is not relevant in assessing agreements in the area of public procurement. On the contrary, if it is identified that two separate legal entities, taking into account various connections between them, form a single economic unit, agreements between such legal entities, or concerted actions, cannot be recognised as a breach of Article 5 of the Law on Competition. The respondent notes that during the investigation (prior to the dispatch of the findings [report] of the investigation to the parties), the Competition Council did not have the information that was submitted in the opinion from UAB M and UAB T regarding the findings of the investigation and the accompanying Minutes of the shareholders' meetings and production meetings of UAB T, and also the explanations provided by the representatives of these companies during the hearing, in this case concerning the connections between these two companies. It is thus clear that the findings of the investigation prepared by the Division of Anti-Competitive Agreements of the Competition Council did *not* in any way take into account the above evidence and explanations, as, during their investigation, the administrative staff of the Competition Council did not receive or examine this information.

In their reply to the complaint, the third interested parties, UAB M and UAB T, did not agree with the complaint and requested that it be dismissed as unfounded.

In their reply to the complaint, the third interested parties explained that the applicant incorrectly understood the area of competence of the Competition Council, because in its complaint it essentially sought that the Competition Council would assess compliance with the actions of economic entities in respect to the law on public procurement. The applicant incorrectly defined the group of entities who could enter into a prohibited agreement. According to the case law of the European Court of Justice, prohibited agreements may only be concluded between independent economic entities. Prohibited agreements cannot be concluded between the economic entities which form a single economic unit. The contested Resolution adopted by the Competition Council is thus justified and legitimate. The applicant did not provide the evidence to demonstrate that the

Competition Council incorrectly assessed the actions of UAB M and UAB T and so adopted an unlawful resolution.

The Court rejected the complaint on the following grounds.

The merits of the case are in whether, in its Resolution, the Competition Council reasonably recognised UAB M and UAB T as a single economic unit and, on this basis, it concluded that there was *no* agreement concluded between them that would breach Article 5 of the Law on Competition.

The evidence available in the case confirms that on 2012-02-15 the applicant announced an open tender for the purchase of granite rubble. UAB M and UAB T participated in the tender.

When assessing the qualifications of the suppliers, the applicant found that instead of the declaration of conformity for the product provided for the Lithuanian market in the Lithuanian language, as specified in the tender conditions, UAB T provided the said declaration in English. When the applicant's public procurement committee requested UAB T to verify the data on the qualifications and to provide the required document in the Lithuanian language, it refused to do so without specifying the reasons. The applicant performed the translation of the declaration at its own costs and, on 2012-05-17, the public procurement committee of Lithuanian Railways made a list of tenders in order of priority and awarded UAB T, as the lowest-priced tenderer, a contract.

On 2012-05-23, UAB T refused to sign the contract, and therefore, on 2012-05-25, UAB M, the second supplier on the list, was awarded a contract for the purchase of granite rubble.

When examining the tenders submitted by UAB M and UAB T, the applicant's public procurement committee drew attention to the similarities between the tenders of these suppliers, which, in conjunction with the previously discussed behaviour of UAB T, aroused the suspicion that the tenders were not prepared independently, i.e., that these suppliers had entered into a prohibited agreement in the meaning of Article 5(1) of the Law on Competition.

On 2012-06-08, the applicant requested that the Competition Council verify whether the actions of the said tenderers showed any signs of a prohibited agreement.

Pursuant to its Resolution No. XX of 2012-07-30, the Competition Council started an investigation into compliance with the requirements of Article 5 of the Law on Competition. During the

investigation, the Competition Council additionally, and at its own initiative, examined the actions of UAB M and UAB T in participating in the 2011 public tender for the purchase of granite rubble.

In the contested Resolution, No. XXX of 2013-12-23, the Competition Council terminated the investigation and stated that there were no grounds to conclude that UAB M and UAB T were independent economic entities competing, in the sense of the competition law, when they submitted their bids for the public tenders organised by AB Lithuanian Railways; and that the circumstances concerning the investigated actions of the economic entities during their participation in public tenders formed no basis upon which to consider these actions were prohibited agreements (concerted actions) that were concluded by separate economic entities in the meaning of Article 5 of the Law on Competition.

According to Article 5 of the Law on Competition, all agreements which have the purpose of restricting competition, or which restrict or may restrict competition, shall be prohibited, including agreements to set (fix) the prices of goods or services, share the product market on a territorial basis, according to groups of buyers or suppliers, or in any other way, agreements to fix production or sales volumes for certain goods, as well as the restriction of technical development or investment, etc. Essentially, similar prohibition is laid down in Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter, TFEU), but in order to be able to confirm the breach of Article 5 of the Law on Competition Law (and Article 101 of TFEU), a prohibited agreement must be concluded between at least two economic entities.

According to Article 3(17) of the Law on Competition, an economic entity means an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organisation, or other legal or natural persons which perform or may perform economic activities in the Republic of Lithuania, or whose actions affect, or whose intentions, if realised, could affect, economic activity in the Republic of Lithuania (an economic entity in the competition law is understood to be an economic unit, even if, legally, that economic unit consists of several private or legal entities). So, even legally, separate entities (two or more companies), that are subject to certain conditions, can, under the competition law, be regarded as a single economic unit. If no agreement has been concluded between economically independent entities, the relations within an economic unit cannot be considered to be an agreement or the concerted practices of economic entities, which restrict competition in the meaning of Article 101(1) of the Constitution.

An economic entity must independently decide its own conduct in the market, which was noted in the cases of the European Court of Justice *Corinne Bodson v SA Pompes funèbres des régions lib* and *Imperial Chemical Industries Ltd*.

Accordingly, if separate legal entities, which due to their relationship cannot be regarded as independently operating economic entities in a certain market and are therefore recognised as being a single economic unit, adjust their actions in the market, the adjustment of actions between such legal entities is not considered to be an agreement between competitors who are restricting competition.

Whether, in this specific case, separate legal entities may be recognised as being a single economic unit and therefore cannot be considered competitors, is decided after assessing an entirety of various circumstances that are related to their management and other relationships. For example, it is assumed that a subsidiary and a parent company (100% shareholder) may be regarded as being a single economic unit. The companies can be recognised as being single economic units, although they are not associated by the relations of a subsidiary and a parent, if their shares are owned by the same individuals.

So, having considered all the information about the relationships between UAB M and UAB T, the Competition Council justifiably stated that, in this case, there was no basis to conclude that, when submitting their bids to public tenders organised by AB Lithuanian Railways, UAB M and UAB T were independent, competing entities according to the competition law. The Competition Council identified various connections between UAB M and UAB T (the same shareholders, employees and other circumstances that are related to economic activities: common bookkeeping, both companies have the same registered address, and specialists and certain equipment of UAB M help to solve technical matters for UAB T).

According to the case law of the European Union Court of Justice, agreements made only between independent entities are prohibited. Meanwhile, prohibited agreements between economic entities which form a single unit cannot be concluded. According to the competition law, an agreement will be considered prohibited only if it is concluded between two or more independent economic entities.

Since UAB M is the parent company and UAB T is a subsidiary company, and these companies together seek common interests, the competition law cannot prohibit an agreement between these



companies. An agreement that was allegedly concluded between UAB M and UAB T did not restrict competition in the market and did not cause harm to competitors and consumers.

The Court assessed that, in its complaint, the applicant wrongly claimed that the report stated that UAB M and UAB T formed prohibited agreements in regard to participation in the 2011 and 2012 public tenders for the purchase of granite rubble, fraction 31.5–63 mm., organised by AB Lithuanian Railways, and therefore the Competition Council identified signs of prohibited agreements in the actions of UAB M and UAB T from which it was clear that the UAB M and UAB T disclosed to each other information related to their commercial offers.

In view of all the above considerations, the Court dismissed the applicant's complaint.

### **3.5 GABRIEL STEFANITA, COURT OF APPEAL BRASOV (ROMANIA)**

**Competition Council vs. S.C. Plastidrum S.R.L., S.C. Signature**

**Semnalizare S.R.L., Swarco Heoscont Strassenmarkierung GmbH and Eleftherios**

**Kokkinakis Ltd.; infringement of Article 5 (1) letter f) of the Romanian Competition Law through participation with rigged bids in a public tender.**

#### **1. A brief summary of the facts of the dispute**

In 2006, C.N.A.D.N.R. organised a public procurement procedure in order to allocate a work contract for road bonds on the national roads that are administrated by and subordinated to the seven regional directorates. The analysed facts concern the anticompetitive behaviour of the parties involved that participated at the public procurement procedure for Lots 2 and 6, having as their object the national roads administrated by D.R.D.P. Craiova and D.R.D.P. Iași.

The five parties involved in the investigated anticompetitive practice were organised in two associations in order to participate at the public procurement, as follows: the “Plastidrum Association”, for the undertakings S.C. Plastidrum S.R.L. and S.C. Signature Semnalizare S.R.L., and Swarco Association” for the undertakings S.C. Swarco România S.R.L., Swarco Heoscont Strassenmarkierung GmbH and Eleftherios Kokkinakis Ltd..

The investigative team concluded that the two associations had participated with rigged bids in the auction that was organised by CNADNR in 2006 as, during the public procurement procedure, the two associations did not participate independently, had coordinated their actions and this was reflected in their offers, which were not an expression of real competition.

#### **2. Summary of the judicial proceedings**

##### **DECISION No. 82/13.12.2012**

of the Competition Council, having as its object the alleged infringement of the provisions of Article 5 (1) of the Competition Law no. 21/1996, republished, with subsequent amendments and completions (hereinafter *Law*) and of Article 101 (1) of the Treaty regarding the functioning of the European Union (hereinafter *Treaty*), by S.C. Plastidrum S.R.L., S.C. Signature Semnalizare S.R.L., S.C. Swarco România S.R.L., Swarco Heoscont Strassenmarkierung GmbH and Eleftherios Kokkinakis Ltd., which participated in the public procurement procedure that had been organised

by the National Company of Motorway and National Roads in Romania S.A. in order to allocate the contract ,”*Work of longitudinal, transversal and varried road bonds for national roads administrated by C.N.A.D.N.R.S.A.*”” for lot 2 – Craiova and lot 6 – Iași, with the opening date for bids on the 8th and 9th June, 2006.

**CIVIL DECISION no. 2164/27th June, 2013**, of the Court of Appeal Bucharest, The VIIIth Administrative and Fiscal Section, declined the appeal made by the claimant, SC Signature Semnalizare SRL.

**CIVIL DECISION no. 2870/18th June, 2014**, of the High Court of Cassation and Justice declined the recourse made by the claimant, SC Signature Semnalizare SRL.

### **3. The Ruling of the Courts**

1. Civil Decision No. 2164/27th June, 2013, of the Court of Appeal Bucharest stated an infringement of the provisions of the Art. of Article 1(lit. f) of Romanian Competition Law no.21/1996 and Art. 101(1) of the EU Treaty.

Article 1lit.f:(1) Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, will be prohibited, especially those aimed at:

- f) participating, in a concerted manner, with rigged bids in auctions or any other forms of competitive tendering;

### **Article 101 (ex Article 81 TEC)**

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 PPara. graph 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.

## **2. Grounds for the Courts' rulings**

Co-operation between the two associations started from the end of 2005 through the exchange of documents and sensitive information regarding the behaviour adopted by each association that participated in public procurement procedures that were organised by C.N.A.D.N.R. in 2006;

- The artificial increase of prices submitted by Plastidrum Association for Lots 2 and 6 and winning the two contracts at a higher price than would have been the case had competition not been distorted by the agreement between the two associations;
- The transfer of the public tender contracts to Swarco Association afferent to Lots 2 and 6, signed between Plastidrum and D.R.D.P. Craiova and D.R.D.P. Iași.

The two associations had participated with rigged bids in the auction organised by CNADNR in 2006 as, during the public procurement procedure, the two associations did not participate independently, had coordinated their actions and this is reflected in their offers, which were not the expression of real competition.

The Court found that there was an agreement between two associations of undertakings that distorted the competition by object, and there is no longer any need to a “by effect” analysis. In cases that distort the competition by object, the *Minimis* clauses are also excluded.

#### **4. Comments**

The case mentioned above contains all the elements to indicate prohibitive behaviour in the market. As the law says, within the market all decisions of associations of undertakings which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition within the market shall be prohibited. In this case, the Competition Council proved that there was an agreement between two associations of undertakings that distorted the competition **by object**, as long as the Romanian law constructs a list of agreements that is restrictive by object. So, there was no longer a need for an analytical approach, to reveal the capacity of the agreement to harm competition (the “effect”) approach. So, the Court’s decision characterised the current practice that tends to argue for restrictions by object, which contains a list of practices that are always considered restrictive, eases the burden of proof, as no economic analysis is required and this stresses the difficulty of the defendant to rebut the “object” charge.

The Court also made a statement about the *minimis* exclusion in order to appreciate the impact of the *minimis* agreements (agreements of minor importance), concluding that the *minimis* clause of exclusion should not be applicable in cases of agreements that are restrictive by object.

#### 4. CONCERTED PRACTICES AND DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS

##### 4.1 DIOGO LEITÃO, HIGH COUNCIL OF THE MAGISTRACY (PORTUGAL)

###### CASE N.º 178/09.8TYLSB

**DEFENDANT: A.I.P.L. – Associação dos Industriais de Panificação de Lisboa, lodged an appeal against a decision taken by the Portuguese competition authority («Conselho da Autoridade da Concorrência»), which imposed a fine of € 1,177,429.30.**

###### 1) Brief summary of the facts

- The defendant, a legal entity, is an association whose associates are baking industry companies that operate in four provinces: Lisbon, Leiria, Santarém and Setúbal.
- According to its statutes, the defendant's purpose is to represent its members and defend their interests; it cannot carry on any profitable activities nor pursue, directly or indirectly, any industrial or commercial activities.
- Between 2002 and 2005, the defendant issued and sent several circulars to its associates urging them to *send it a copy of their bread price list and new ones every time prices were updated, so that the Association could control the bread prices charged (by its associates).*
- Following those circulars, a significant number of associate companies – 49 – sent their price lists to the defendant.
- Some of those companies were owned or run by persons who were simultaneously members of the governing bodies of the defendant.
- In the period considered – 2002 to 2005 – the price of the «carça» (the most popular and bestselling type of bread, weighing approximately 45/50 grs, was very similar amongst the companies that complied with the defendant's request.
- The variation of prices also coincided, to a large degree, with an annual rise of 11%.
- This rise was higher than the variation of the prices for bread and cereals in the whole country, as well as the annual rate of inflation.
- The defendant's purpose was to control the bread market, restricting the freedom of action of the companies with access to the price information gathered by the Association.

###### 2) Summary of the judicial proceedings

As soon as the Appeal arrived at the Court (it must be filed with the national competition authority), a hearing was scheduled. Once the hearing – where several witnesses and experts testified – was concluded, a judgment was rendered, confirming the administrative decision.

The defendant appealed against this decision. This appeal was found to be groundless by the Court of Second Instance, although the fine was reduced to €850,000;00.

### **3) Ruling of the Court**

As mentioned *supra*, the Court considered the practice carried out by the defendant to be an infringement of free competition and therefore imposed a fine. Refuting the arguments used by the defence, the Court argued:

- The defendant, being an association of producers, must be considered an undertaking for the purpose of competition law;
- The exchange of information about the prices set by each company represents a concerted practice with the objective of distorting competition;
- Although the relevant market is not concentrated in a small number of companies this might not justify the practice in question, since it did not result in any benefits for consumers.

The Court concluded that it was in the presence of a decision taken by an association of companies which encouraged, established and implemented a system for the, specific (regarding prices), individualised, frequent and updated exchange of information, thus creating obviously artificial conditions for transparency in the market, with the potential for fixing prices and their variations during the years considered.

### **4) Comment**

This case is particularly relevant, first of all because it leads the Court to thoroughly develop the notions of “an undertaking”, “the relevant market” and “the object or effect of distorting competition”. Indeed, the type of person in question cannot be immediately associated with an undertaking, seen as an entity which operates in the market selling goods or services.

The group of companies constituting the defendant association also does not have a dominant position *per se* in the relevant market.

Finally, the illegality concerned is based on a potential loss to the market, in other words, it is not necessary that the illegal conduct has harmed the market or distorted competition.

The decision also places a special focus on the intention of the defendant while it was issuing the circulars. In support of its arguments, the Court adduces some case law from the ECJ, as well as some notices from the Commission. Among them, I would like to mention the following, which I found to be of special interest in the matters dealt with by the decision:

- C-170/83 “Hydrotherm”;
- C-45/85 “Verband der Sachversicherer”;
- Commission Notice on the definition of the relevant market (97/C 372/03);
- C-96/82 “Iaz”;
- Commission Decision 96/438/EC;
- C-194/9 “Thyssen”;
- C-T-35/92 “John Deer”.



#### **4.2 ELITSA STOYANOVA, DISTRICT COURT OF DOBRICH (BULGARIA)**

##### **Decision 657 from 20th January, 2015, in Administrative Case No. 13054-2013, Supreme Administrative Court of the Republic of Bulgaria, IVth Division**

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The proceeding was initiated based on three complaints, filed by “Hornit” Ltd. Sofia, against Decision No. 220 of 1.03.2012 in Case No. CPC-85/24.01.2011 of the Commission for the Protection of Competition in the part of Item. 1, with which it imposed a pecuniary penalty of 48,480 lev; from “Astral Holidays” AD, Plovdiv, in part of the decision, with which it imposed a pecuniary penalty in the amount of 2.8188 million lev and “Bulgarian VIP Travel” Ltd., Sofia, in part under Item. 3, on which was imposed a proprietary sanction of 47 280 lev, for infringement of Art. 15, Para. . 1 LPC as a prohibited agreement and/or concerted practice which aims to prevent, restrict and distort competition by manipulating the procedure for concluding a framework agreement for the award of centralised public procurement *“Ensuring airline tickets for the transport of air passengers and baggage for business trips at home and abroad”*, opened by Decision No. RMF-55/17.09.2010 of the Minister of Finance as a Central Public Procurement Authority. The decision was appealed, because essential constituent elements of art. 15, Para. . 1 of LPC infringements had not been established and proven Para. in setting the number of the sanctions, considerable violations of administrative procedure rules in carrying out the study and the collection of evidence. The defendant is the Bulgarian Commission for the Protection of Competition /CPC/.

##### **I. Summary of the facts:**

With Decision RMF 55/17.09.2010 of the Minister of Finance a public procurement was opened: *“Provision of tickets for the air transport of passengers and luggage for business trips in the country and abroad”* for the executive. Conditions were made with requirements relating to the lists of predefined destinations, the preparation and presentation of the offer price, depending on the classes, and a methodology for the evaluation of tenders was established. The criterion for the evaluation of tenders was: *“the most economically advantageous tender”*. So the Contractor was obliged to offer the lowest prices on the market. It was stated that the Central Public Procurement Authority signed a framework agreement with potential contractors – participants, ranked from first to sixth place, and individual entities would enter into contracts with all of the potential contractors in the framework agreement. The procurement procedure received 11 bids. By a decision, dated

14.01.2011, of the Minister of Finance, ranking participants for potential contractors of the contract: “Argus Travel” Ltd., “Aerotur MM” Ltd., “Hornit” Ltd., “Bulgarian VIP Travel” Ltd., “Astral Holidays” AD, “USIT Colours Bulgaria” Ltd., were declared and defined. The decision for “Elite Travel International Ltd” and “Bulgaria Air” AD was appealed to the CPC. The Commission made a comparison between the financial Parameters of the participants and found in the first category, “Business Class,” a significant number of complete matches between the bids of “Hornit” Ltd., “Bulgarian VIP Travel Ltd” and “Astral Holidays” AD, of between 18 and 27, or from 60- 90 % of the total number of proposals in the category. Furthermore, between the prices offered by “Hornit” Ltd. and “Bulgarian VIP Travel” Ltd. the Commission found fully matching proposals (total 27 matches of 30) and 12 of the proposed prices of “Astral Holidays” AD did not coincide with them. It was a full match between the three companies in relation to the last three digits after the decimal point in the proposed prices. It was also found that the three companies “Hornit” Ltd., “Bulgarian VIP Travel Ltd” and “Astral Holidays” AD, had 13 discrepancies in bids by destination, but concluded that they are all made without prejudicing the last three digits after the decimal point and always to compensate for each other to lead to the same total score. In the second category, “Economy Class 1,” it was established that there was a complete matching for all of the 30 destinations’ bids of “Hornit” Ltd. and “Bulgarian VIP Travel” Ltd, but only 15 of the proposed prices for 30 destinations from “Astral Holidays” AD coincided with the proposals of “Hornit” Ltd. and “Bulgarian VIP Travel” Ltd. It was a full match between the three companies in regard to the last three digits after the decimal point at the price, and the arithmetical average maximum price category. In the third category, “Economy Class 2,” the CPC established that 27 of all 30 destinations’ bids of “Hornit” Ltd. and “Bulgarian VIP Travel” Ltd., but only 14 of the proposed prices for 30 destinations from “Astral Holidays” AD matched and coincided with the proposals of “Hornit” Ltd. and “Bulgarian VIP Travel” Ltd. It was a full match between the three companies in regard to the last three digits after the decimal point at the price, and the arithmetical average maximum price category. In relation to the service fee, CPC made a comparison of the proposals of the participants who qualified and found that four companies-“Hornit” Ltd., “Bulgarian VIP Travel” Ltd., “Astral Holidays” AD and “USIT Colours Bulgaria” Ltd., were offering an identical amount of the service fee for travel in- and outside Europe-29.337 lev (equivalent to 15 euros at the exchange rate of BNB) and respectively received the same number of ranking points-29.337. It was found that two of the companies-“Hornit” Ltd., “Bulgarian VIP Travel” Ltd., participated in a meeting to discuss their participation in the specific contract.

## **II. Summary of the Judicial Proceedings:**

The Commission for the Protection of Competition was approached by two companies: “Elite Travel International” Ltd. and “Bulgaria Air” AD. With the Decision issue No. 984/21.07.2011, the

Commission has cancelled as being unlawful Decision No. RMF-45/17.06.2011 of the Minister of Finance for the ranking of candidates and the selection of subcontractors for the conclusion of a framework agreement for the award of centralised procurement. The Commission imposed penalty payments on the three companies “Hornit” Ltd., “Bulgarian VIP Travel” Ltd. and “Astral Holidays” AD, that were based on a violation of Art. 15 Para. . 1 of the Bulgarian Law for the protection of competition. This rule of law prohibits all types of agreements between undertakings, decisions by associations of undertakings and concerted practices by two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition in the market, such as:

1. to directly or indirectly fix prices or any other trading conditions;
2. The allocation of markets or sources of supply;
3. to limit or control production, trade, technical development or investment;
4. the application of different conditions for the same type of contract with regard to certain partners, thereby placing them at a competitive disadvantage;
5. to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations or additional contracts which, by their nature, or according to commercial usage, have no connection with the subject of the main contract or the performance thereof.

All agreements and decisions under Para.1 are banned as well as being void.

Each of the three companies has appealed to the Supreme Administrative Court for annulment of the Commission decision. In these proceedings the companies – the applicants and the defendant CPC are involved, and as such all interested companies are classified by the decision of the Minister of Finance.

### **III. Ruling of the Court:**

The Supreme Administrative Court decided that the claim by “Astral Holidays” is valid, justified and reasonable. The motivation of the court is based on the reason that “Astral Holidays” AD for all of the destinations, and the four sub-indicators’ evaluation has given different rates in about 50% of cases, without any other direct or indirect evidence of a concerted practice with the other participants in the procedure in defining their (supply) by “Astral Holidays” JSC, may determine the existence of an agreement and/or concerted practices of this company with the other, against which the complaint is lodged. The decision in the relevant part was countermanded.

The applications of the two other companies: Bulgarian VIP Travel” Ltd. and “Hornit” Ltd. are dismissed. For them it was accepted that there is a cartel. Based on a comparison between the two

companies' proposed prices for airline tickets the CPC established the existence of a high degree of similarity (94%) in their offers and in service fee 100% match, which could not be explained solely by the use of the Amadeus System (the booking system for airline tickets) and no other objective factors or indicators that would suggest the achievement of such similarity.

#### **IV. Relevance of the case:**

In its judgment, the Supreme Administrative Court makes the distinction between concerted practices and the usual parallelism that exists between participants of distinct markets with an oligopolistic structure (few players with relatively equal market shares), assuming that this is not unusual as far as the few actors allow in order to monitor changes in others' trading conditions and prices, to comply with these behavioural changes. The Court observed practice SEC on the parallelism of the market behaviour of enterprises, including price parallelism, which, in itself, cannot constitute evidence of the existence of a concerted practice between them, unless another possible explanation for their parallel conduct in the market (Case-C-89/85 Commission) can be identified. In relation to the offences, the Supreme Administrative Court accepted the judgment of the General Court of 6th July. 2000, in the Case Volkswagen/Commission, T-62/98, Recueil, p. II-2707, Paragraphs 43 and 72, the General Court in Case JFE Engineering/Commission, Paragraph 86, Paragraph 179 and the judgment of the General Court of 25th October, 2005, in Case Groupe Danone/Commission, T-38/02, Recueil, p. II-4407, Paragraph 217). In a case where there is a set of outstanding CPC clues that can assess the total qualification for the composition of the infringement (see. The judgment in JFE Engineering/Commission, Paragraph 86, Paragraph 180 and the judgment in Groupe Danone/Commission, Paragraph 218; cf. in this sense, also the judgment in "PVC II", Section 57, Paragraphs 768-778, and, in particular, Section 777. In the area of the meeting of the companies "Bulgarian VIP Travel" Ltd. and "Hornit" Ltd. to discuss their participation in the specific contract, the Supreme Administrative Court accepts that there is evidence of an anti-competitive nature, it is therefore incumbent on these companies to submit evidence, to show that their participation in this meeting was without any anti-competitive intent, clearly demonstrating to its competitors that participation in this meeting was with intentions that were different from theirs. In this connection, the Court refers to the decision of the Cases Huls V. Commission, Paragraph 155; Montecatini V. Commission, Paragraph 181; and Aalborg Portland and Others v Commission Paragraph 81.

#### **4.3 JULIYA RAEVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)**

##### **Association of Bulgarian Insurers and Others vs. Commission for the Protection of Competition**

**Decision No. 576 from 15.07.2008 of the Commission for the Protection of Competition, Case 765/2007**

**Decision No. 14628 from 29.12.2008 of the Supreme Administrative Court, Case No. 10739/2008**

**Final Decision No. 9407 from 13.07.2009 of the Supreme Administrative Court, Case No. 5129/2009**

##### **I. Proceedings before the Commission for the Protection of Competition (CPC)**

The Bulgarian Commission for the Protection of Competition initiated proceedings *ex officio* on the 20th December, 2007, to assess whether a group of Bulgarian insurers had infringed Art. 9 of the Bulgarian Law on the Protection of Competition (repealed) and Art. 81, Para. 1, “a” of the Treaty establishing the European Community (TEC).

Art. 9, Para. 1, Pt. 1 of the Bulgarian Law on the Protection of Competition (repealed) introduces a general prohibition against all agreements between undertakings, decisions by associations of enterprises, as well as concerted practices between two or more undertakings, which have the purpose or effect of the prevention, restriction or distortion of competition within the relevant market, for instance, in regard to the direct or indirect setting of prices or other commercial terms. The infringement of Art. 9, Para. 1, Pt. 1 of the Bulgarian Law on Protection of Competition (repealed) consists of a combination of three elements:

1. agreements between undertakings, decisions by associations of enterprises, as well as concerted practices between two or more undertakings;
2. which have an anti-competitive purpose or effect, and
3. the direct or indirect setting of prices or other commercial terms.

During the investigation, based on the inspection and assessment of the evidence, the Commission identified the parties, the relationships between them, the product and the geographical market and the competitive environment. For the purposes of the study, the relevant product market was segmented into two levels, which were vertically interconnected – the market for the compulsory insurance liability of motorists and the market for insurance intermediation.

The Commission found that on the 15th December, 2007, a group of Bulgarian insurers (most of them members of the Association of Bulgarian Insurers) signed a Memorandum to develop common positions, joint actions, creating favourable conditions for the development of activity for the conclusion of compulsory insurance “Liability” for motorists and for its performance under conditions of fair competition, to protect the interests of Bulgarian society and insurance community (“the Memorandum”).

The geographical market was defined as national. It was assumed that the share of the companies involved in the Memorandum, exceeded 65% of the relevant market.

Some of the Bulgarian insurers refused to sign the Memorandum, arguing that it violated the rules for the protection of competition.

The Memorandum did not take effect due to the refusal of some insurers to sign it. It was found that the Memorandum fixed the minimum sizes for insurance premiums and the maximum amounts of commission for the insurance intermediaries.

According to the Commission, the clauses in the Memorandum for fixing the basic price components were contrary to the concept of the Bulgarian Insurance Code for the establishment of a minimum level for the cost of insurance, and this amounted to the composition of forbidden concerted action. It caused a significant anti-competitive effect resulting in cumulative occurrences in two directions – the violation of effective competitive processes on a horizontal level (between insurers), and a negative effect on competition on a vertical level in the related services market in insurance intermediation.

The Commission found that the Memorandum simultaneously held the marks of an agreement between undertakings and of a decision by associations of enterprises. First, the Commission found that by participating in an anti-competitive agreement the insurers had committed an infringement of Art. 9, Para. 1, Pt. 1 of the Bulgarian Law on the Protection of Competition (repealed) and Art. 81, Para. 1, “a” of the Treaty establishing the European Community. Secondly, the preparation and signing of the Memorandum had particularly been made in the context of the Association, which, in this case, had acted as an intermediary to facilitate the anti-competitive activity of its members, although the responsibility of the Association should also be involved.

The Commission considered that this Memorandum fell within the scope of the hard-core restriction of competition and that there was no basis for the application of Art. 13 and 14 of the

Bulgarian Law on the Protection of Competition (repealed), Art. 81, Para. 3 of the Treaty establishing the European Community and Regulation (EC) 358/2003, providing exemption from the general prohibition of anti-competitive practices.

The Association of Bulgarian Insurers and 14 insurers were sanctioned by the Commission's Decision No 576 from 15.07.2008, for the protection of competition for the infringement of Art. 9, Para. 1, Pt. 1 of the Bulgarian Law on the Protection of Competition (repealed) and Art. 81, Para. 1, "a" of the Treaty establishing the European Community. The total amount of the penalties was BGN 2,470,000. The separate individual sanctions were set according to the market share of each insurer.

The same decision provided for the termination of the infringement.

## **II. Judicial proceedings**

The Commission for the Protection of Competition's Decision No 576 from 15.07.2008 was appealed by the Association of Bulgarian Insurers and 14 Bulgarian insurers before the Supreme Administrative Court of the First Instance, in the part relating to the sanctions and in the part relating to the termination of the infringement.

The Supreme Administrative Court of the First Instance, panel of 3 judges (Decision No. 14628 from 29.12.2008, , Case N 10739/2008,) found the decision of the Commission to be correct.

The Court settled the same facts as they had been found by the Commission and agreed the legal arguments of the Commission.

The Court decided that the elements of the infringement of Art. 9, Para. 1, Pt. 1 of the Bulgarian Law on the Protection of Competition (repealed) and Art. 81, Para.1, "a" of the Treaty establishing the European Community had been implemented:

1. The Memorandum simultaneously held the marks of an agreement between undertakings and a decision by associations of enterprises;
2. The Memorandum had a significant anti-competitive effect, and the Memorandum set the minimum sizes for insurance premiums and the maximum amounts for commissions for insurance intermediaries.

By signing the Memorandum in the form of a declaration of ostensibly legitimate purposes, the insurers actually coordinated and unified the imposition of illegal measures in the pricing of

insurance regarding both its individual components (insurance premiums and commissions for insurance intermediaries), which undoubtedly were likely to seriously weaken, or even liquidate, effective price competition in the relevant market, which expressed the significant anti-competitive effect of the Memorandum. The significant anti-competitive effect was in two directions:– the violation of the effective competitive process on a horizontal level (between insurers), and a negative effect on competition at a vertical level in relation to the related services market in insurance intermediation.

The case therefore dealt with the level of Arts. 13 and 14 of the Bulgarian Law on the Protection of Competition (repealed), Art. 81, Para. 3 of the Treaty establishing the European Community and Regulation (EC) 358/2003, and did not fall within the scope of the rule of exemption to the general prohibition of anti-competitive practices.

According to the Court, the presence of arrangements that went beyond necessary co-operation, as in the case there was the fixing of a unified minimum insurance premium and the unified maximum amount for commission to intermediaries, this did not meet the criteria for exemption and was subject to penalties. Paragraph 10 of the Preamble to Regulation (EC) 358/2003, which states that agreements on insurance premiums are not covered by exceptions, is relevant in this sense.

The Supreme Administrative Court's Decision No. 14628 of 29.12.2008, Case N 10739/2008, was appealed by the Association of Bulgarian Insurers and 14 Bulgarian insurers before the Supreme Administrative Court, Final Instance, in front of a 5 member panel.

Before the Final Instance, one of the insurers applied to the ECJ for a preliminary request in relation to the following questions:

1. Whether Art. 6 of Council Regulation (EC) No. 1/2003 empowers the national court to oversee the implementation of the obligations of the national competition authority (NCA) of Art. 11, Paras. 3 and 4 of Council Regulation (EC) No. 1/2003, to inform the European Commission before or without delay after commencing the first formal measure relating to the investigation of the alleged infringement of Art. 81 and 82 TEC, and no later than 30 days before the adoption of the decision;
2. What is the duration of the period of 30 days in which the European Commission must be informed of the draft of the decision of the NCA within the meaning of Art. 11, Para.4 of Council Regulation (EC) No. 1/2003;
3. Whether the non-application in practice of the prohibited agreement is a mitigating circumstance within the meaning of Art. 23, Para. 3 of Council Regulation (EC) No. 1/2003.



The application for a preliminary request was rejected by the court with the following arguments:

1. According to Art. 6 of Council Regulation (EC) No. 1/2003, national courts have the power to apply Articles 81 and 82 TEC. Articles 81 and 82 TEC govern respectively prohibition of cartel agreements, decisions and concerted practices and the prohibition of abuse of a dominant position concerning the common market. Both provisions are substantive. They do not regulate in any way the judicial control of proceedings before NCA for investigation of alleged violations of these prohibitions. The meaning of the provision is clear, therefore, the request for its interpretation is unfounded.
2. According to the court the European Commission must be informed at least 30 days before adoption of the decision of the NCA. The purpose of this term is to provide the Commission sufficient time to assess whether to apply the Art. 11, Para.6 of Council Regulation (EC) No. 1/2003 by initiation of proceedings for the adoption of the decision under Chapter III and ensure a consistent application of Community competition rules. That term of 30 days is the minimum, not the maximum. The meaning of the provision is clear, therefore, the request for its interpretation is unfounded.
3. The non-application in practice of the prohibited agreement is not a mitigating circumstance within the meaning of Art. 23, Para.3 of Council Regulation (EC) No. 1/2003. The provision refers to the imposition of sanctions by the European Commission, not by the NCA, so it is irrelevant in this case.

The Court of Final Instance found, for the first time, that the NCA had infringed the term of 30 days specified in Art. 11, Para. 4 of Council Regulation (EC) No. 1/2003. According to the Court, this breach was not material, because the European Commission had not initiated proceedings for the adoption of the decision under Chapter III of Council Regulation (EC) No. 1/2003. The failure of the Court of First Instance to collect evidence of compliance within the terms of Art. 11, Para. 4 of Council Regulation (EC) No. 1/2003 did not constitute a material breach of the rules for the judicial proceedings and was not a basis for the annulment of the decision of the Court of First Instance.

The Court of Final Instance agreed the legal arguments of the Court of First Instance and added that such agreements or decisions were illegal in themselves (*per se*), even if they had still not produced a real effect on the market-the non-application in practice of the prohibited agreement or decision was not a mitigating circumstance.

The Supreme Administrative Court, Final Instance, before a 5 member panel (Final Decision N 9407, 13.07.2009, of the Supreme Administrative Court, Case N 5129/2009) found the decision of the Court of First Instance to be correct.

### **III. Comment**

The case presented is a typical example of a cartel with a significant anti-competitive effect which is able to strongly restrict or to destroy price competition on the relevant market, which, in turn, would reflect negatively on the interests of consumers.

Such agreements or decisions are illegal in themselves (*per se*), even if they have still not produced a real effect on the market.

The case is not covered by the exceptions to the general prohibition on anti-competitive practices and it is subject to penalties.

#### **4.4 MAJA VALUŠNIG, COMMERCIAL COURT OF VARAŽDIN (CROATIA)**

**Administrative Court of the Republic of Croatia:**

**Judgment No.: Us-4995/2010-6 -21<sup>st</sup> December, 2011.**

##### **1) Brief summary of the facts of the dispute**

Several plaintiffs: Glas Slavonije d.d. Vjesnik, Večernji list d.d., Novi list d.d., Europapress holding d.o.o. Slobodna Dalmacija d.d., (all publishers of daily newspapers) brought actions against the decision of the defendant, the Croatian Competition Authority: Klasa:UP/I-030-02/2008-01/72, No.: 580-02-010-63-134, 25th March, 2010. before the Administrative Court of the Republic of Croatia, seeking its annulment.

The Croatian Competition Authority, in its decision, concluded that plaintiffs have, through explicit agreement and concerted practice decided at the same time on 1st. and 2nd August, 2010, to increase the price of daily newspapers in the amount of 1,00 Kuna, and by so doing directly fixed the prices of daily newspapers, that they have concluded a prohibited agreement which limits competition in the relevant daily news publishing market in the Republic of Croatia, which represents a breach of the national competition law. In its decision, the Croatian Competition Authority declared their agreement to be void.

The plaintiffs claimed that they did not act together, that they did not conclude a prohibited agreement, that they all increased the prices of their daily newspapers individually, because of the increase in the costs of publishing the daily newspapers, and that it is common in that market to increase the price by one Kuna during the summer, as buyers are less annoyed by the increase in the price if they are on vacation. They claim that there is no evidence that they have, through explicit agreement and concerted practice, decided at the same time on 1st and 2nd August, 2010, to increase the price of daily newspapers by the amount of 1,00 Kuna, and that The Croatian

Competition Authority had based its decision on circumstantial evidences. They claim that the relevant market was not determined correctly by the Croatian Competition Authority, and also that the fact of an increase in the price of the daily newspapers had nothing to do with direct or indirect fixing of the purchase or selling prices, or any other trading conditions; the limiting or controlling of production, markets, technical developments, or investment; sharing markets or sources of supply; and the applying of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. They suggest that the Croatian Competition Authority should have analysed the relevant market, market shares and substitute products, both before and after the increase in the price of the product, and whether the change in price had any negative influence on the market, and that it did not analyse the costs of the production of newspapers properly, for example, it did not take inflation into account. They think that a financial expert should do this. They also demanded a hearing before the Court.

They firmly claim that there was no agreement between them and that they acted in accordance with *llei* and independently decided to increase the price, based on economic reasons. They think that the Croatian Competition Authority based its decision only on the fact that they all increased their prices at the same time, and on an unauthorised statement of the President of the Newspapers Publishers' Association, which he himself later denied, and the fact that the Newspapers' Association did not submit to the Croatian Competition Authority the transcript from the meeting of the Executive Committee of the Newspapers' Publishers' Association, which took place on 4th July, 2008.

Some of the plaintiffs (Glas Slavonije and Novi list) are regional publishers of daily newspapers and they claimed that the relevant markets for them and for the national publishers were not the same.

They also referred to the EU Competition Law and EU competition case law, saying that for the so called "consciously *allel* behaviour "under what are considered to be situations where competitors without individual contact consciously imitate each other e.g., with regard to a leading participant

in the market are not considered to be prohibited, and that in similar cases the EU Court has annulled the decisions of the European Commission.

The Croatian Competition Authority claimed that in a case when competitors directly or indirectly determine the purchase or selling prices, it is unnecessary to prove the actual effects on the market. Namely, any agreement on the prices of competitors is considered to be sufficient indication that there may be a prohibited agreement. The conclusion of such agreements is prohibited for all entrepreneurs, regardless of their market share in the relevant market, and even for companies with a negligible market share, in terms of the regulation of agreements of minor importance. In view of the above, in the present case there was no need to carry out a detailed economic analysis

## **2) Summary of the Judicial Proceedings**

To my surprise, there was no hearing, because there was a hearing before the Croatian Competition Authority and the Court decided that financial expertise is not necessary.

## **3) Ruling of the Court**

The Court upheld the decision of the Croatian Competition Authority and in its decision referred to EU competition case law (cases: *John Deere Ltd. v. Commission* C-7/95 P 1998, *Commerzbank and Others* T-61/02 14. 2004. *Ahiström Osakeyhtiö and Others* C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85-C-129/85,) explaining that despite the fact that undertakings have the right to adjust the existing or anticipated conduct of competitors, there may not be direct or indirect contact between competitors which may affect their behaviour in the market, or through which an undertaking reveals competitor behaviour that it intends to adopt in the market.

## **4) My Personal Comment**

It was interesting for me to learn (since I have no experience in competition law as a judge, since I am a Commercial Court judge, and within our jurisdiction there are only damages claims that are

based on the breach of competition law and, so far, I have not had such a case, and actions against the Croatian Competition Authority are under Administrative Court of The Republic of Croatia's jurisdiction).that Articles 101 and 102 are completely implemented in Croatian national law, and that its words are simply translated in Croatian Competition Law. After I read the Court's judgment, I asked myself if I would have decided in the same way. I especially wondered if I would I have brought the decision without an oral hearing and financial expertise. Another interesting fact is that, today, most of the daily newspapers in Croatia cost 7 Kuna, which is exactly the same increase in price of one Kuna, as it was in the prohibited agreement that was allegedly concluded in 2010.

#### **4.5 TERESA BRAVO, TRIBUNAL OF LISBON (PORTUGAL)**

**Conforlimpa-Multiserviços, SA and Number One-Limpezas Técnicas e Profissionais, Lda,  
Proc. N° 1085/11.0 TYLSB**

**The facts of the case :**

1. In July, 2011, the Portuguese NCA applied to Conforlimpa-Multiserviços, SA and Number One-Limpezas Técnicas e Profissionais, Lda a €253,703.18 and a €62,620.90 penalty relating to 16 violations of Articles 4, No. 1 and 43, No. 1 al. a) and 2 of the Portuguese Competition Law (Lei No. 18/2003) due to unlawful concerted practices and exchanges of information concerning prices in open competition in the public sector.

Both companies were accused that between February, 2006, and November, 2007, they exchanged information regarding prices and the conditions to explore the cleaning departments of several public Portuguese institutions, such as hospitals and universities.

2. Following the end of the administrative proceedings, they both applied to the Court of First Instance in order to obtain an annulment of the NCA's decision and to get a favourable judgment from the Court, claiming that:

- The NCA's decision was null because it lacked a precise description of each infringement and did not contain the grounds for the conviction regarding guilt, the gravity of the behaviour, and the economic benefit gained by the alleged infringers;

**The National Court's Decision**

3. On the 24th July, 2012, the Court of First Instance confirmed the NCA's decision and retained the conviction of both defendants. The Court considered that the defendant's behaviour was unlawful under the Portuguese and the European law because they acted according to a previous strategy and concerted practice in order to win the public competition and to jeopardise the possibilities for other competitors in the relevant market.

In order to clarify the legal concept of "concerted practice", the Portuguese Court made use of the European jurisprudence of the ECJ in the Coats Holdings Ltd. vs. Commission Case, held on the 27th June, 2012.

After examining the documents presented by the NCA, the national court concluded that in the context of 16 different open competitions for the cleaning departments of several public institutions, both defendants had presented similar applications in regard to the contexts and the prices in their applications. The Court concluded that they must have previously shared information on the numbers of workers, numbers of hours, the equipment and the prices they would allocate to the department.

The similarities in their applications made it clear to the Court that the behaviour was forbidden under Article 81°, N°1 of the Treaty, and also under Portuguese law.

### **The Court of Appeal's Decision**

4. In September, 2014, the Lisbon's Court of Appeal confirmed the judgment of the First Instance Court. According to the Portuguese legal system in such cases, the Appeal Court only considers the legal aspects of the case and not the factual grounds, and it cannot change the facts as they were proven by the lower court.

### **Comment:**

This case does not address to us any important legal issues because, from my point of view, the question is very well approached both by the Court of the First<sup>1</sup> Instance and by the Appeal Court. In both judgments, national judges make a rather clear treatment of the competition law issues and they cite European jurisprudence accurately.

Both jurisdictions distinguish between an agreement and a concerted practice that is managed to clearly identify the relevant market and they understood the role of the NCA as being that of an administrative body.

The curious aspect of the case (which drew my attention) is rather the attempt of the defendants to import the legal concepts of criminal law into competition law.

In the appeal, the defendants and their legal advisors tend to forget the particular nature of competition law, they ignored its administrative features and they insisted on the alleged violation of some criminal law principles.



In the Appeal Court's decision, the judges reiterated the urge to face competition law as an instrument of a common market's wider policy in order to implement an optimal level playing field in the EU.

The most important conclusion that I would like to point out is that Portuguese judges are starting to be more aware of the importance of competition law and they seem to know European jurisprudence on this issue rather well.

## **5. VERTICAL AGREEMENTS**

### **5.1 ANA LOVRINOV, MUNICIPAL CIVIL COURT OF ZAGREB (CROATIA)**

**Case note on Euro Rent Sport d.o.o. vs. Croatian Agency for the Protection of Market Competition – Judgment of the High Administrative Court in Croatia Ref. No. Us-12006/11 of March 7th, 2012.**

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

The plaintiff, EURO RENT SPORT d.o.o., took over all of the rights and obligations of the authorised importer and distributor of “Mitsubishi Motors” motor vehicles for the whole territory of Croatia at the beginning of 2010, and thus notified all selling and service centres for “Mitsubishi Motors” vehicles that the termination of the authorisation of the former distributor for “Mitsubishi Motors” vehicles had concluded authorisation for the selling and servicing of “Mitsubishi Motors” vehicles in the whole of the previous seller’s and servicing network.

After the written notification, the new dealer, Euro Rent Sport d.o.o. did not answer numerous oral and written inquiries from the previous distributors for the publication of the criteria that were necessary to enter the authorised network for the selling and servicing of “Mitsubishi Motors” vehicles.

The formerly authorised sellers and servicers therefore notified the Croatian Agency for the Protection of Market Competition, presuming that they were groundlessly being excluded from the sellers’ and servicing network of “Mitsubishi Motors” vehicles, and also asking for a review of the contracts that EURO RENT SPORT d.o.o. had concluded with sellers and services, and whether those contracts were concluded against the provisions of the Law on Market Competition and the regulations on the group exclusion of agreements for the distribution and servicing of motor vehicles. The initiators of the proceedings also asked that the Agency issue a preliminary measure ordering Euro Rent Sport d.o.o. to include the formerly authorised sellers and servicers in the selling and service network, and also to publicise the criteria that were necessary in order to enter the authorised network for the selling and servicing of “Mitsubishi Motors” vehicles.

The Croatian Agency for the Protection of Market Competition issued a decision on October 13th, 2011, determining that Euro Rent Sport d.o.o. had concluded forbidden contracts with dealers – Auto Teskera d.o.o., Auto Kuća Horvat, Morić d.o.o. and Auto Novaković d.o.o., therefore restricting market competition on the markets for selling new “Mitsubishi Motors” motor vehicles, providing the service of repairing and maintaining “Mitsubishi Motors” vehicles, and the distribution of spare parts in the period of time from June 25<sup>th</sup>, 2010, until the day of issue of the

decision, and in the period of time from September 28<sup>th</sup>, 2010, until the day of issue of the decision. The Agency found the concluded contracts void according to Art. 9/2 of the Law on Market Competition. The Agency also ordered Euro Rent Sport d.o.o. to publicise on its web-site, in a visible place, the transparent quality criteria which are the conditions for the acceptance of contractors into the network of authorised distributors for “Mitsubishi Motors” new motor vehicles, providing the service of repairing and maintaining “Mitsubishi Motors” vehicles and the distribution of spare parts. The Agency also ordered the publication of the maximum number of assessed distributors for the current year, and the acceptance of the distributors Auto Teskera d.o.o., Auto Kuća Horvat and Morić d.o.o. (whose contracts with the plaintiff were determined to be void) in the system of authorised dealers for “Mitsubishi Motors” vehicles under the condition that they fulfill the published quality criteria that are determined by the plaintiff, Euro Rent Sport d.o.o. Finally, the Agency ordered the plaintiff to change the provisions in already concluded contracts, which were determined to be void, and to present the Agency with proof that these orders were fulfilled.

The plaintiff filed a claim against the Agency to the High Administrative Court of Croatia, objecting to the lawfulness of the Agency’s decision and stating that, in the matter concerned, they had acted as the authorised distributors for “Mitsubishi Motors” vehicles in the territory of Croatia, and that they were delivering goods to the firm MORIĆ d.o.o., one of the subjects who initiated the administrative procedure against him. The conclusions of the Agency that the plaintiff restricted the market are therefore incorrect, since one of the initiators of the procedure was supplied during the whole period of time being disputed, and the plaintiff proposes that the Court terminate the Agency’s decision.

The plaintiff’s claim was denied.

The Court’s finding was that the procedure before the Agency was correctly conducted, and that the facts of the case were completely and correctly determined and the law correctly applied.

According to Art. 2 of the Law on Market Competition, the scope of the law is on all forms of obstruction, restriction or disturbance of market competition in the territory of the Republic of Croatia, or outside the territory if those acts have an effect on the territory of the Republic of Croatia, unless there are special provisions for certain markets. Art. 8 of the same Law authorises the Agency for the Protection of Market Competition in administrative and competent matters.

According to Art. 35./1 Subsections 2., 5, and 8 of the same Law, the Council for the Protection of Market Competition decides on all matters within the jurisdiction of the Agency, issues administrative acts, determines rules and measures to protect market competition, measures for the prevention of obstruction, the restriction or disturbance of market competition, and other measures for improving the law and politics of market competition in the territory of Croatia. In their assessment of the forms of the obstruction, restriction or disturbance of market competition that may affect trade between Croatia and the European Union, the Council is obliged, according to Art. 70 of the Stabilisation and Association Agreement, signed on October 29<sup>th</sup>, 2001, to apply criteria that have arisen from the correct application of EU competition law.

The Court found that the plaintiff's claim is groundless, since the Agency correctly found that by concluding contracts with several distributors without transparent criteria on the conditions for entering the network for the selling and servicing of "Mitsubishi Motors" vehicles, the plaintiff had restricted the market competition in markets for the selling of new "Mitsubishi Motors" motor vehicles, providing the service of repairing and maintaining "Mitsubishi Motors" vehicles and the distribution of spare parts. The Agency issued its decision after a hearing that was held on April 27<sup>th</sup>, 2011, and the parties had a chance to make statements on all the facts and circumstances that were important in issuing a lawful decision. The Council issued the decision after discussing the matter during its session. The Court found no malfunction in the procedure of the Agency or in the decision of the Agency's Council that was issued.

#### **COMMENT:**

In my opinion, the importance of this case is in the fact that even though the plaintiff claimed that the market was not restricted, since he supplied one of the initiators of the administration procedure during the whole period of time, the Agency found that market restriction occurred, the fact that the plaintiff concluded contracts without transparent criteria for the conditions required to conclude a contract, meant that the restriction of market competition was determined.

If there were no clear rules for entering the desired market that were available to every interested person, there was a restriction of market competition.

The fact that the plaintiff supplied one of the initiators of the administrative procedure does not mean there was market competition, because this supply depended on the plaintiff's will, and not on regular market competition.

At the time of issue of the Agency's decision and the Court's ruling, Croatia was also not a member of the EU (it has been a member since July 1st, 2013), but both the Agency and the Court, in assessing whether there were forms of obstruction, restriction or disturbance of market competition, applied the criteria that would have arisen from the correct application of EU competition law.

## **5.2 ANDREA GOLDSCHMITT, COURT OF FIRST INSTANCE OF WÜRZBURG (GERMANY)**

### **1. Information Concerning the Judgment**

**Higher Regional Court of Schleswig, Germany**

**16 U (Kart) 154/13 – Digital cameras**

**Date of judgment: June 15th, 2014.**

### **2. Facts**

The defendant is a producer of digital cameras. These cameras are mainly distributed via wholesalers or over the defendant's own website. Retailers could sign an agreement with the defendant, which authorised them to sell the products to end customers. Under this agreement, the authorised retailers could distribute the digital cameras in the traditional way or via their own websites. However, they were not allowed to sell the products via internet auction platforms, like "eBay", via internet marketplaces, like "Amazon," or to independent third parties.

### **3. Judicial proceedings**

The plaintiff, which is an association promoting commercial interests, sued against this prohibition. The plaintiff wanted the defendant to be prevented from using this contract clause, because it restrains competition. The Court of First Instance, the Regional Court of Kiel, entered a judgment in favour of the plaintiff. This decision was subject to appeal to the Higher Regional Court of Schleswig.

### **4. Decision**

The Higher Regional Court of Schleswig confirmed the decision of the Regional Court of Kiel. The contract clause used by the defendant, which means that the prohibition against selling goods via internet auction platforms and internet marketplaces does not comply with § 33 GWB and Art. 101 TFEU.

According to the Court, the agreement has the restriction of competition as its object and effect. On the one hand, the access to e-commerce, which is possible only via a handful of platforms, is limited for the contracting parties, the retailers. On the other hand, the possibilities for the consumer are restricted.

They cannot access the products of the retailers via internet auction platforms, like "eBay," or internet marketplaces such as "Amazon". The websites owned by small retailers would certainly be found only by a small group of consumers.

In the opinion of the Higher Regional Court, the contract clause aims to restrict competition. The defendant intends to reduce the pressure on prices.

Furthermore, the defendant wants to increase the chances of selling more products via its own website, which is the first hit in popular search engines.

The restriction of competition is also appreciable, because, as mentioned before, the defendant aims to restrict competition.

The Court did not follow the arguments of the defendant:

According to the Court, it is not necessary to give more detailed explanations or advice on how to use the digital cameras that are sold by the defendant. The average customer, who buys these kinds of products from the internet, rarely needs professional advice. Besides, the defendant does not use a selective distribution system with certifications for authorised retail and wholesale sales. The defendant does not supervise how the digital cameras are distributed via retail.

The Court also did not see a risk in the sale of counterfeit or used products as new ones via internet auction platforms or internet marketplaces. E-commerce is becoming more and more professional and the sale of new products via internet market places by retail traders is increasing.

The Court did not agree with the defendant's argument that he has a protectable interest in deciding how his goods are distributed. Of course, in general, an undertaking can decide how it distributes its products. However, this decision has its limits if competition is restrained. An undertaking can use a selective distribution system (as the defendant did), if the undertaking pursues a certain strategy of distribution and uses this strategy through all means of distribution. In the Court's opinion, the defendant did not pursue such a necessary strategy for distribution.

Finally the Court did not see that the conditions for granting an exemption under Art. 2 VO (EU) Nr. 2790/1999 were present, because the prohibition is a hardcore restriction under Art. 4 b VO (EU) Nr. 2790/1999. It is a hardcore restriction, as the customers, the buyers who may sell the goods, are restricted. According to the Court, the *affected and subjected restriction of customers*, the retailers who may sell the digital cameras, is sufficient to qualify the contracting clause as being a hardcore restriction under Art. 4 b VO (EU) Nr. 2790/1999. It is enough that the retailers cannot reach customers who they could have reached via internet platforms.

The restriction of a certain *exclusive customer group* is not necessary. Here, the Court compares the different language versions of Regulation (EU) Nr. 2790/1999. The Court acknowledges that the English, French and Spanish versions of the regulation only use the word “customers” in Art. 4 (b), and the word “exclusive customer” in the exemption to Art. 4 (b)’s first bullet point. The German version does not make this difference. According to the English, French and Spanish versions, there does not need to be a clear group of customers who can be qualified as “customers who buy only via internet platforms”. The German version of the regulation has to be interpreted in the same way.

## **5. Comment**

The decision of the Higher Regional Court of Schleswig is part of a series of different judgments by German Courts concerning this or similar prohibitions in contract clauses (e.g., Higher Regional Court of Munich; U (K) 4842/08) According to the Higher Regional Court of Munich, the prohibition against selling goods via internet auction platforms or internet marketplaces does not limit the customers in regard to whom the retailers may sell their products. A main condition under Art. 4 (b) (EU) Nr. 2790/1999 is the restriction of a certain *exclusive customer group*. Internet auction platforms are used by all kinds of internet users. Retailers can reach the customers of these platforms via other internet distribution systems also. The contract clause is therefore not a hardcore restriction under Art. 4 (b) (EU) Nr. 2790/1999. Different courts have different ways of interpretation.

It will be interesting to see what the Federal Court of Justice will decide.



### **5.3 FÁTIMA GALANTE, LISBON COURT OF APPEAL (PORTUGAL)**

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

- **Name of the Court of Last Instance: Court of Appeal**
- **Name of the parties/case reference number: Case No. 18/12.0YUSTR**
- **Date of the (final) judgment: 29th January, 2014.**

#### **Background information**

1. Lactogal's business activities are comprised of the production and marketing of milk, dairy products and other food products.

This case was based on dealership agreements for sales and service with about 60 customers who, as a result, are integrated into dairy products' distribution.

2. The Portuguese Competition Authority opened case No. PRC/2010/04, on the basis of a violation of Articles 4, 43 (1), a), and 44 of the Law 18/2003, of 11th June, 2003, ((Portuguese Competition Law).

The Competition Authority concluded that since 2003 the agreements between Lactogal and the customers fulfilled exclusive obligations, such as fixed prices for milk and other dairy products, which had as their object or effect the restriction and distortion of competition, and/or constituted concerted practices.

In conclusion, the Competition Authority condemned Lactogal to pay a pecuniary penalty of €341.098.00, under Articles 4, 43 (1), a), and 44 of the Law 18/2003, of 11th June, 2003, (Portuguese Competition Law).

3. The Court of First Instance, dismissing Lactogal's claims, confirmed the contested decision's finding.

By that decision, the Court found that Lactogal had infringed Articles 4, 43 (1), a), and 44 of the Law 18/2003, of 11th June, 2003 (Portuguese Competition Law).

The Court also agreed that there was an infringement not only of national law, but also of Community law, an infringement of Art. 101 TFEU.

4. Lactogal appealed against this judgment of the Court of First Instance on the basis of understanding that despite the inclusion of clauses in contracts that fixed prices, Lactogal had not

taken steps to ensure observance by their customers of a contractual clause that was intended to restrict competition. The alleged infringement did not occur, since there is no evidence that there was any restrictive effect on competition.

5. The Appeal Court rejected this theory and concluded that the offence occurs independently of the specific production purposes. The illicit fact is the inclusion of clauses that fix resale prices, without more.

Through the decision issued on 29th January 2014, the Appeal Court of Lisbon dismissed the appeal from the Court of First Instance.

### **Ruling of the Court**

The First Instance Court and the Court of Appeal stated that, according to the law, any agreement or concerted practice which would have as an object or as an effect the restricting, impeaching or distorting of competition in the Portuguese market, or in a part of it, is forbidden.

This concerns, in particular, the type of practices which would aim, directly or indirectly, to maintain sale or purchase prices, fees, discounts, increases, as well as any other trading conditions.

Economic agents are therefore entitled to adjust their price according to the market's evolution, yet they must do this independently, and not via gatherings with their competitors.

The Court noted that agreements between competitors to fix prices, limit output or sales, or to share markets or customers. Are equivalent to hardcore cartel offences, which result in criminal prosecution.

### **Comment**

This case is a good example of the application of EU Competition Law by Portuguese Courts in regard to Criminal Law.

In my view, the decisions of the Court of First Instance and the Court of Appeal were correct.

In fact, in order to constitute an agreement within the meaning of Art. 101 of the Treaty, it is sufficient that a provision is the expression of the intention of the parties, without it being necessary for it to constitute a valid and binding contract under national law.

The fact that a supplier may not have taken steps to ensure the observance by his customers of a contractual clause that is intended to restrict competition is not sufficient to remove that clause from the prohibition of Art. 101 (1) of the Treaty.

For the purpose of the application of Art. 101 (1), there is no need to take account of the concrete effects of an agreement if it has as its object the prevention, restriction or distortion of competition within the common market<sup>1</sup>.

1. See judgment of 13th July, 1966, in Joined Cases 56 and 58/64 Consten and Grundig v Commission (1966-ECR 299); and the judgment of 21st February, 1984, in Case 86/82 Hasselblad v Commission (1984-ECR 883).

#### **5.4 NATASA PERSIC BRLEKOVIC, MUNICIPAL COURT OF RIJEKA (CROATIA)**

**Judgment of the Administrative Court of the Republic of Croatia No. Us-13467/2009-6 from 7th April, 2011**

**Decision of the Croatian Competition Authority No. 580-05-09-70-45 of 24th September, 2009,**

##### **Facts**

After the procedure, conducted at the request of the undertaking S. Ltd., the Croatian Competition Authority (CCA) established that the plaintiff, as an authorised distributor and servicer of motor vehicles “L” on Croatian territory, in the period from 28th May, 2007, to 1st February, 2009, did not organise the authorised distribution and service network of motor vehicles “L” in accordance with the Regulation on the block exemption of agreements for the distribution and servicing of motor vehicles, and thus, in that period, they concluded prohibited agreements (described in the operative part of the disputed decision) that limited competition in the relevant market for the provision of repair and maintenance of motor vehicles and the procurement of spare parts.

CCA declared that the contracts that the plaintiff had concluded with a number of undertakings, mentioned in the operative part of the decision, were prohibited agreements, and also declared prohibited the agreement provision of signed contracts that imposed the obligation to authorised service, outside the warranty period, to use only original spare parts, that nullified the provisions of the agreements which were identified as prohibited agreements.

It was also found that the plaintiff, in the period from 28th May, 2007, to December 17th, 2008, when it closed its contracts with the authorised repairer, applied dissimilar conditions, since not all interested undertakings have criteria for admission to his chosen qualitative system for the servicing of motor vehicles “L” publicly available.

In this way, the plaintiff applied criteria in a discriminatory manner and thereby prevented market access to the undertaking S Ltd. for services, sales and finishing, as well as to all of those interested who met these criteria and who are thus placed at a disadvantage compared to their competitors in accordance with Art. 9 of the Law on the Protection of Competition (Art. 101 TFEU).

### **The Arguments of the Plaintiff**

The plaintiff argues that the disputed decision of the Agency is improper and illegal due to procedural violations, incompletely and incorrectly established facts, and the misapplication of substantive law.

In connection with the finding of the CCA that the plaintiff, in the period from 28th May, 2007, to 1st February, 2009, had not organised the authorised distribution and service network of motor vehicles “L”, the plaintiff pointed out as an essential fact that the defendant took the date of 1st February, 2009, as the date by which the applicable agreements and contracts which the plaintiff had concluded with the principal J.A.R.

The plaintiff states that the Agency ignored the documents and all the evidence during the proceedings, which clearly indicated that the plaintiff's principal terminated the distribution agreement and the agreement for warranty service which the plaintiff had concluded, so that his had certainly ended on 1st February, 2008, and the action on 31st December, 2007. This was evident even from the explanation of the disputed decision that the principal J.A.R., on 22nd July, 2008, had sent a letter informing the third party and the plaintiff that plaintiff was no longer the signer of contracts in connection with the purchase and sale of vehicles L. Furthermore, the principal of the plaintiff.

in a letter of 24th December, 2007, repeated in a letter of 20th February, 2008, informed the plaintiff that this applied for any further questions relating to sales and servicing which were addressed directly to the principal subsidiary, C., as well as to conditions for the distribution and servicing of vehicles “L”.

From the above, the plaintiff concludes that it is clear that the principal, J.A.R., at the end of 2007 and the beginning of 2008, had waived any rights to the plaintiff to act in the Croatian market as an authorised distributor and service provider in terms of the organisation of the distribution and service network of motor vehicles L. The plaintiff thus had no legal grounds on which he could organise an authorised distribution and servicing network for motor vehicles “L”, and therefore could not have committed the said violation, as had wrongly been concluded by the CCA.

The plaintiff also points out that in Croatian territory, in the same period, two firms that sold vehicles L were operating and he considers that they should have been taken into account when determining the market size in Croatian territory.

Finally, the plaintiff states that he clearly explained to the undertaking, S. Ltd., that he no longer had the authority to organise the distribution and servicing network, and thus to regulate the

relationship with them, all because of the unresolved status with the principal, J.A.R., which the undertaking, S Ltd., did not want to accept .

The plaintiff particularly noted that in that year, when S Ltd. addressed him for the signing of the contract, he did not sign any new agreement with any other authorised service, but only applied the existing contracts. The reason for this lay in the unresolved status of the plaintiff in relation to the principal, and the plaintiff simply could not give more rights than he had, nor could he in any way affect the organisation of the market.

The plaintiff therefore proposes that the Court annul the contested decision of the Agency.

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

The Administrative Court upheld the impugned decision of the Agency and rejected the complaint. By supporting the decision of the Agency, the Administrative Court said that the facts were correctly and fully established and that the substantive law was correctly applied to the facts found, so that the impugned decision does not violate the Law to the detriment of the plaintiff.

It had been established beyond doubt that the plaintiff, on the basis of distribution contracts, gained the status of authorised importers and distributors of motor vehicles L in the territory of Croatia, and that agreement gave them the authorisation for sales, for providing the servicing and for the procedure of approval in the territory of Croatia. This fact was also found from the statement of the Central Bureau of Measures of 29th May, 2008, which states that an undertaking J.A.R. gave in a letter dated 16th April, 2007, gave permission to the plaintiff for representation before government institutions, the implementation of the consent procedure, the issuing of declarations of conformity to the manufacturer, and the ability to issue certificates for motor vehicles “L” in Croatia. The Agency also examined two letters signed by the plaintiff's principal, from 4<sup>th</sup> and 5<sup>th</sup> February, 2008, and correctly realised that the distribution agreement was completed by 1st February, 2009, because this is clearly written in the statement of the principal, and the Court did not accept the plaintiff's allegations that this date was inadvertently stated by his principal..

Consequently, the plaintiff, in accordance with Art. 19, Paragraph 1 of the Regulation on Motor Vehicles, starting from the date of execution of the distribution agreement, was required to establish a distribution and servicing network for motor vehicles L in Croatian territory, and all distribution agreements and servicing signed with distributors and staff had to be harmonised with the provisions of the Regulation on Motor Vehicles.

So the procedure found that the undertaking, S. Ltd., had repeatedly tried unsuccessfully to contact the plaintiff, but by refusing to communicate, the undertaking, S Ltd., was prevented from joining the authorised servicing system of motor vehicles L and thus the plaintiff limited the number of repairers in the relevant market, what is contrary to Arts. 3, 4 and 5 of the Regulation on Motor Vehicles.

Based on these facts, the Court confirms the decision of the Agency, which had established that the plaintiff, in the period above, had restricted competition in the relevant market for providing repair and maintenance services for motor vehicles and the selling of spare parts, by refusing contact and withholding information about the necessary conditions for obtaining the status of an authorised service center or dealer sales centre for cars L.

### **Comment**

In my opinion, in this case the plaintiff not only infringed Art. 101 TFEU (mentioned Art. 9 (now 8) of the Law on the Protection of Competition), but also Art. 102 TFEU (Art. 12 of the Law on the Protection of Competition). In relation to the undertaking, S Ltd., all of the facts established point to the abuse of a dominant position.

## **5.5 SANDA JEROMELA KURICK, ZAGREB COMMERCIAL COURT (CROATIA)**

**AT Engineering Ltd. v. Robić Ltd.**

**The Judgment of the Commercial Court in Zagreb, P-150/2013 of February 9th, 2015.**

### **1. Brief Summary of the Facts of the Dispute:**

AT Engineering Ltd., from Zagreb, has since 1996 been in a business relationship with a wine manufacturer from Macedonia, VV Tikveš AD. During the business relationship, on 6th February, 2001, they concluded an Agreement to purchase wine, by which VV Tikveš AD pledged to sell wine to At Engineering Ltd., who would purchase it in order to sell it in the Croatian market. The said Agreement assumed the obligation of VV Tikveš AD to protect At Engineering Ltd. from unfair competition in Croatian territory in the case that a third party would try to sell the products of VV Tikveš AD. Furthermore, on 28th August, 2002, they concluded Annex Purchase Agreement No. 07-245, dated 6th February, 2001, which gave AT Engineering Ltd. the exclusive right to sell wines “Tga for South” and “Vitač” in Croatian territory.ć

On 17th April, 2003, AT Engineering Ltd. and VV Tikveš AD concluded an Agreement which cancelled the earlier exclusivity, and allowed users direct purchase of VV Tikveš AD as a wine producer. AT Engineering Ltd. informed its business partners and customers of this on 27th February, 2003.

On 17th March, 2004, Robić Ltd., from Velika Gorica, concluded with VV Tikveš AD an Agreement to purchase wine and brandy. However, they did not contract for Robić Ltd., to have the exclusive right to sell its products in Croatian territory.

### **2. Summary of the judicial proceedings:**

AT Engineering Ltd., in a claim brought on 11th January, 2013, before the Commercial Court in Zagreb claimed compensation for damages against Robi Ltd. in the form of lost profits in the amount of 1 mil Kuna (approx. €130,000.00-a), which is based on the assertion that Robić Ltd. found out about the signed Agreement between AT Engineering Ltd. and VV Tikveš AD and secretly contacted VV Tikveš AD and agreed with them on the exclusive right to import wine into the Republic of Croatia, and this unfairly disabled AT Engineering Ltd. and other customers from being able to buy through direct purchase from the manufacturer. He claims that, contrary to the



Trade Act, Robić Ltd. took over the market which he had been building up for years and had invested in, and unfairly became the exclusive importer of wines “Tga for South” and “Vitač”. Such conduct had resulted in damage to AT Engineering Ltd. in the amount of 1 mil Kuna in regard to lost earnings during the last three years of the importing and sales of the wine. During litigation, AT Engineering Ltd. found out about the Agreement to purchase wine and brandy from 17th March, 2004, and claimed the same amount, but from the date of the conclusion of this Agreement.

At the first hearing on 26th November, 2014, the Court concluded the trial. The Court rejected the evidence proposed by the parties to the hearing of witnesses: Aleksandar Stefanovski on the actions of Robić Ltd., which led to the violation of the Trade Act; the witness Marina Šargač on participation in correspondence between the VV Tikves AD and ROBIĆ Ltd. regarding the injuries described and the hearing of legal representatives of the parties, Trajan Stefanovski and Drazen Robic, on the fact that ROBIĆ Ltd. negotiated download Affairs. The Court dismissed listed evidentiary motions by applying the principle of judicial economy, since written documentation is attached to the case file, and considering that At Engineering Ltd., in their claim, alleged that the actions of Robić Ltd. led to the violation of the Trade Act. The Court also rejected the evidentiary motions for conducting a review using financial expertise in relation to the findings of the amount of damages, since the merits of the claim are doubtful, and evidentiary motions for the official request by the data from the Croatian Institute for Enology on the quantities imported from the wine producers VV Tikves AD by Robić Ltd. in the period realising the import, because the information contained herein At Engineering Ltd. first he must request, and unless it receives the information contained herein, could suggest that the court requested through official channels.

### **3. Ruling of the Court:**

A preliminary question that arose in this process is the question of limitation, which is prescribed by the Trade Act of 2003. In Art. 72. the deadline for the expiry of the right to file a lawsuit in the case of damages caused by prohibited actions of unfair competition expires after one year from the date when the plaintiff becomes aware of the damaging action and the perpetrator (subjective limitation period), but not later than three years from the date of the commission of damaging action (objective limitation period).

The defendant pointed out the objection to limitation under the Trade Act, since the claim was filed on 11th January, 2013, as the claimant found information about the alleged damaging action no

later than 2008 (he referred to a communication via e-mail in July, 2008) and alleged damaging action had taken place during 2003, and no later than 2004.

The court found the expiry of the right to file a lawsuit prescribed by the Trade Act. That conclusion was established by the Court, based on the letter of 21<sup>st</sup> March, 2003, that AT Engineering Ltd. sent to VV Tikveš AD, which shows that AT Engineering Ltd. had already made a statement that the defendant was a dealer who had tried to defame him before the manufacturer VV Tikveš AD. From the transcript of the hearing held on 28th February, 2007, before the Municipal Court in Kavadarci, Macedonia, number: PS 41/04, in the dispute between the plaintiff AT Engineering Ltd. and VV Tikveš AD, which was related to their business relationship in regard to the Agreement to purchase wine of 6th February, 2001, the Annex Purchase Agreement of 28th August, 2002, and the Agreement of 17th April, 2003, it is clear that in the proceedings the witness Zoran Boškov, an employee of VV Tikveš AD, was heard and he stated that VV Tikveš AD allowed the defendant wine imports. Consequently, the plaintiff in 2003, or, at the latest in 2007, already knew that the defendant directly bought wine from VV Tikveš AD, and at the time of the filing of the lawsuit on January 11th, 2013, had thus passed the subjective one-year limitation period. In addition, even if they could, at the earliest, have found out about the actions of the defendant on 5th November, 2011, (although in the case file specified this does not arise) as the day on which the judgment of the Supreme Court of the Republic of Macedonia, Number: Rev-418/2010 (judgment delivered on 16<sup>th</sup>, March, 2011), was given, as the plaintiff claims, this nevertheless means that the claim is out of date, since up to the date of filing the lawsuit more than a year had passed. The objective limitation period of three years from the commission of the damaging action had also passed, since the plaintiff claims compensation for damages from the 17<sup>th</sup> March, 2004, as the date of signature of the Agreement between the defendant and VV Tikveš AD. Consequently, the Court found that the right to file a lawsuit in the case of damages caused by prohibited actions of unfair competition had expired, and so it rejected the plaintiff's claim.

#### **4. Comment:**

In this lawsuit the Agreement between Robić Ltd. and VV Tikveš AD, signed on 17th April, 2003, was concluded after AT Engineering Ltd. and VV Tikveš AD, entered into the Agreement of 17th April, 2003. As AT Engineering Ltd. cancelled the exclusive sales of the wine, any buyer could, including At Engineering Ltd., buy wine from VV Tikveš AD., particularly since the Agreement of 17th April, 2003, is not based on any exclusivity in favour of Robić Ltd. Consequently, At Engineering Ltd. did not prove the fulfillment of general assumptions of liability for damage:

entities that were contractually liable for the damage, the harmful action of pests, damage, causal nexus and illegality, on the basis of the Law on Obligations.

This lawsuit touched on the issue of exclusive distribution that is regulated in the Croatian legislation by the Trade Act and the Competition Act. In accordance with the Trade Act, which was in force until 1st January, 2009, the right to contract exclusive distribution in a certain area between the manufacturer (wholesaler) and distributor (retailer) was prescribed, but, at the same time, the manufacturer can deliver the same goods to other small traders in the area that is set by the Agreement on the condition that these companies do not sell goods in the area defined by the agreement to relate to exclusive distribution. The new Trade Law of 2009 did not regulate exclusive distribution.

The Competition Acts (2003 and 2009) maintained the ban on agreements which have as their object or effect a prevention, restriction or distortion of competition in the relevant market. Exceptions are the types of agreements that contribute to an improvement in the production or distribution of goods and/or services, promoting technological or economic progress, while allowing consumers a fair share of the benefit, in which case, the Croatian Government at the proposal of the Council of Competition shall prescribe the conditions for individual or block exemption. According to the Regulation on Block Exemption, on agreements between undertakings which do not operate at the same level of production or distribution (1994), the supplier may not prohibit any of its exclusive distributors' passive sales (Passive sales means responding to retailer's requests from individual customers who are located in an area where the supplier role is exclusively allocated to another distributor, including the delivery of products to such customers, to the extent that such response is not the result of active sales. Passive sales generated by general advertising or promotion in the media or on the Internet that reaches customers in other distributors' exclusive territories or groups of customers, are a result of technological development and ease of access, and are considered to be a reasonable method of approaching the customers or groups of customers), as such a restriction is considered to be a serious restriction of competition. From the aspect of Croatian legislation governing the protection of free competition, parallel imports of products through passive sales are allowed, regardless of whether the same geographical area already operates under an exclusive distributor for the same type of product. This is a provision which is identical to the provisions in the comparative EU law, the purpose of which is harmonisation with the EU *acquis* and has been taken into Croatia's positive regulations governing competition.

Addressing this issue is particularly important in order to realise the principle of the free movement of goods and services within the EU single market, or the free trade area between the EU Member States.

The Commercial Court in Zagreb, in litigation relating to the protection of market competition, decides on claims for the compensation of damages, while administrative courts decide on the decisions of the Croatian Competition Agency. In practice, the Commercial Court in Zagreb deals with a small number of cases that are related to competition, and that number is increasing along with litigation that is related to the protection of trademark and copyright infringement. One of the factors that is increasing the number of cases on intellectual property is Croatian accession to the EU in 2013. Since Croatia has recently become a member of the EU, the Croatian judiciary will, in the very near future, be dealing with the practice of the European Court of Justice and those preliminary questions that will arise as a result.

## **5.6 SIMONA BACSIN, COURT OF APPEAL OF GALATI (ROMANIA)**

**Decision no.15/2008 of the Romanian Competition Council;**

**Court of the First Instance: Decision No.5117/14.12.2010 of the Court of Appeal, Bucharest;**

**Court of the Last Instance: Decision No.345/ 24. 01.2013 of the High Court of Cassation and Justice**

### **FACTS**

In July, 2005, the Competition Council initiated an *ex-officio* investigation into the Romanian insulin market. In this investigation, due attention was paid to the legal framework and the functioning of the insulin market.

By Decision No.15/2008, the Romanian Competition Council detected a violation of Article 5 a (1) lit. c) of Competition Law No.. 21/1996- *by the producer*, Eli Lilly Export SA (hereinafter referred to as Eli Lilly, a Swiss legal entity, a member of the pharmaceutical international business group, Lilly, with headquarters in Indianapolis, USA) *as well as by its distributors*, SC A&A Medical Ltd. (hereinafter referred to as A&A, Romanian legal entity established in 1994; SC Relad Pharma Ltd. (hereinafter referred to as Relad, part of the Relad group), and SC Mediplus Exim Ltd. (hereinafter referred to as Mediplus, part of a group controlled by a holding company, registered in the Netherlands).

The Authority imposed fines of 3,823,710,36 lei for Eli Lilly, 4,331.908,87 lei for A&A , 26.312.060,59 lei for Relad, and 49.231.049,79 lei for Mediplus sum fine, according to Article 51 of the Competition Law nr. 21/1996.

The competition authority found that the manufacturer, Eli Lilly, and its distributors A&A, Relad and Mediplus, had concluded an anticompetitive agreement.

The anticompetitive agreement had as its objective the sharing of the product portfolio for diabetes belonging to Eli Lilly, in the context of the national tender that had been organised by the the Ministry of Public Health and the National Health Insurance House in 2003 for the acquisition of the human insulin that is necessary for the National Diabetes Programme.

The collusion also intervened in the case of the electronic tenders that were organised by hospitals for the acquisition of human insulin outside the National Diabetes Programme (between 2003 and 2005). The agreement concerning the sharing of the diabetes portfolio had, as a result, eliminated the competition between the three mentioned distributors in relation to human insulin and their analogues which belonged to the manufacturer, Eli Lilly.

In order to prove the existence of the collusive agreement, the competition authority started from a unilateral internal document of Eli Lilly, entitled „Overview”. This was obtained during a dawn raid, which included a description of the situation in the insulin market before the national tender. The document dated from May, 2003. The act also included a presentation of the specific terms of the National Diabetes Programme, scenarios concerning the participation of Eli Lilly’s distributors in the national auction and their favourite scenarios. The probative value of the Overview document, which, together with the other evidence constituted the basis for the competition authority’s decision, was challenged by the parties involved in the agreement, including Mediplus.

### **JUDICIAL PROCEEDING**

The manufacturer, Eli Lilly, and its distributors A&A, and Relad and Mediplus, brought separate actions to the Court for the annulment of Decision No.15/2008, which had been issued by the Romanian Competition Council.

In these three previous cases, the Bucharest Court of Appeal and the High Court of Cassation and Justice upheld the competition authority’s decision considering that sufficient evidence was found in relation to the named agreement.

Moreover, in the case of Eli Lilly, the two instances noticed that the contravention had been adequately sanctioned., while, in the other two cases, the Courts reduced the fine (Decision No. 3282/27.06.2012 of the High Court of Cassation and Justice, Decision No. 2978/7.06.2010 of the High Court of Cassation and Justice, Decision No. 353/25 01.2012 of the High Court of Cassation and Justice.)

In its turn, the distributor Mediplus instituted proceeding for an annulment before the Bucharest Court of Appeal.

In the first instance, the Bucharest Court of Appeal overturned the decision of the national authority, considering that the facts retained by the competition authority were supported only by a unilateral internal document of Eli Lilly, entitled „Overview” built upon with other elements of

presumptions, which were considered not to be enough to prove the agreement between the producer and each distributor ((Decision No. 5117/14.12.2010 of the Court of Appeal, Bucharest).

Subsequently, as a result of the appeal formulated by the Competition Council, the High Court of Cassation and Justice quashed the Court of Appeal's decision, and it essentially approved Decision No.15/2008 of the Romanian Competition Council. (Decision no. 345/ 24 01 2013 of the High Court of Cassation and Justice.)

In the cases brought by the other two distributors, the High Court of Cassation and Justice considered it was also appropriate for Mediplus to hold that there were some attenuating circumstances, for instance, that the agreement was favoured by the conduct of the Ministry of Public Health, and that Mediplus did not hold the quality of the collusion's initiator. These circumstances determined that the Court of Appeal diminish the fine that was applied.

Relevant grounds retained in the decision of the High Court of Cassation and Justice were the following:

While admitting the action and the cancellation of the Competition Council's Decision no.15/2008 concerning the distributor, Mediplus, the Bucharest Court of Appeal essentially found that the facts retained by the competition authority were not supported by the evidence that was furnished.

On the contrary, the High Court of Cassation and Justice appreciated that the participation of the three distributors, including Mediplus, was not the result of an independent decision, but was the result of some coordinated actions having as their purpose, or as a result, the elimination of intra-brand competition.

The investigation issued by the Competition Council made evident the existence of an anticompetitive agreement between the manufacturer, Eli Lilly, and its three distributors. This collusion gave birth to a system of exclusivity on products that worked and had as their effect the reduction of intra-brand competition.

By means of this anticompetitive agreement, the manufacturer, Eli Lilly, allocated to its distributor, A&A, the range of human insulin that is called Humulin; to the distributor, Relad, the range of human insulin analogues, Humalog, and to the distributor, Mediplus, the oral antidiabetic, Actos.

Contrary to the opinion of the First Court, the High Court of Cassation and Justice retained that we should not reject the probative value of the “Overview” document. This act provided the relevant information that, among the possible scenarios concerning the way in which Eli Lilly might have participated, by means of its distributors, in the auction organised by the Ministry of Public Health, the favourite scenario had supposed that there was product sharing between the three distributors (on the basis of the named scenario, the companies had really taken in the market).

According to the High Court of Cassation and Justice, the First Court retained, without reason, that Mediplus had been in a particular situation, given that the manufacturer did not demonstrate this fact. Moreover, the court also noticed that, for Mediplus, the instance could not have applied the conclusions taken in the Bayer-Adalat case. The Competition Council demonstrated that the distributors had had a direct interest in the portfolio sharing of Eli Lilly products.

### **Comment**

This case is related to a vertical anticompetitive agreement on the national public procurement markets and it is relevant because the Last Court quashed the decision of the Court of First Instance and upheld Decision no.15/2008 of the Romanian Competition Council, having a different opinion on the matter of evidence.

The First Instance Court decided that the existence of an agreement cannot be based on what is only the expression of a unilateral policy of one of the parties, as long as the facts retained by the competition authority were supported only by the unilateral internal document of Eli Lilly, entitled “Overview” built upon with other elements of presumptions, which were considered insufficient.

On the contrary, the High Court of Justice considered the unilateral document obtained from Eli Lilly, concluding that the “preferred scenario” for this tender was to divide its portfolio of products between the three distributors, and the adoption of this conduct by the undertakings was enough to prove the vertical anticompetitive agreement .

In my opinion, it is debatable whether there was a joint intention for a specific type of conduct in the market, or whether it was a unilateral intention and the producer had required that the distributors should comply with its new commercial policy as a condition of their future contractual relations. (Bayer/Adalat, Cases-C/01 and C-3/01)



## **5.7 DIMITRA GKOTSI, ADMINISTRATIVE COURT OF TRIPOLIS (GREECE)**

**COUNCIL OF STATE, Judgment No 3123 of 24th September, 2014.**

**MILOPOULOS & SIA Ltd v. Greek Competition Authority and Duty Free Shops S.A.**

### **The Facts – Background to the Dispute**

On 3rd December, 2004, a Greek-based company (I. Milopoulos & Sia Ltd), which mainly imports food (including chocolates) into the Greek market, submitted a formal complaint to the Competition Commission in which it claimed that: a) the Greek-based company Duty Free Shops S.A. (DFS), which is mainly engaged in the retail and wholesale of duty free and duty paid products in customs controlled areas, and, b) a Netherlands-based producer of chocolates, biscuits, etc., (Masterfoods Veghel BV), had committed an infringement of Articles 81 and 82 EC, and Articles 1 and 2 of the National Law (703/1977), mainly by implementing, unfair commercial practices in the relevant market that were aimed at foreclosing I. Milopoulos & Sia from the market for the selling of chocolate products in duty free shops in Greek travel areas (airports, etc.). The complainant claimed that, since 25.1.1993, it had had an excellent co-operation with Masterfoods, with an exclusive clause in their contract of 31.3.1995 that allowed the first company to become the exclusive distributor and representative of the latest Masterfoods products (such as chocolates) in the Greek “duty free” market. In addition, the company alleged that DFS had a dominant position in this market as it owned the exclusive right to run/manage all the duty free shops in the Greek travel market, and thus had the right to sell even duty paid products, such as chocolates. It was also the major customer of the complainant by covering 90% of its sales. I. Milopoulos & Sia also exclusively supplied other foreign companies (e.g., Storck, Petersen and Guylian) with similar products. By 2004, according to the complainant, DFS had persuaded Masterfoods to break the exclusivity clause in the above contract, after spreading rumours that its products arrived in the shops with a delay and, as a result, with a short period to the expiry date, because of I. Milopoulos & Sia’s local distributors’ delay. Consequently, the complainant claimed that its co-operation with Masterfoods ended in June, 2004, and the company was excluded from the relevant market, and also, due to similar conduct by DFS, it lost the exclusionary effects of the remaining contracts (with the companies above, which appeared to hold the remaining market shares and which had decided to come to a direct agreement with DFS, especially after being threatened, shortly before the Athens Olympic Games and the arrival of many travellers, that their joint co-operation would be terminated). I. Milopoulos & Sia counterclaimed that these practices were unlawful, since they

were an abuse of the actual legal monopoly and the dominant position of DFS in the duty free products' market and Masterfoods' dominant position in the chocolate market (25%), in a manner that was identical to the refusal to deal with an existing customer, in order to foreclose I. Milopoulos & Sis, or otherwise to enforce another Greek-based company's position (Germanos S.A., which was the major shareholder in DFS at that time) in the market, above. Meanwhile, after a conventional compromise, between only the complainant and Masterfoods, the Greek Commission Authority rejected (Decision No 364/V/2007) the above complaint in part, by not finding an abuse of DFS' dominant position in the travel market for duty-free products. It regarded the commercial practices, above, and these agreements as "a reasonable business decision", because: a) their genuine objectives were to increase the company's prospects and, as a result, they prevented or limited price increases in the products, b) in the context or the rationalisation of the distribution system, they had no effect on the restriction of competition but on the reduction of costs and prices; etc) this did not constitute a discrimination policy against the complainant as long as the ending of their co-operation was objectively justified, having as its genuine objective only the protection of its business interests through not using "middlemen", which also appeared to be beneficial to the consumers.

### **Judicial Proceedings**

The battle began in the Greek High Court in 2007 and DFS intervened as a third party, and, at the end of a lengthy trial, it was held, in 2010, that the above practices and agreements did not definitively constitute an abuse of a dominant position. I. Milopoulos & Sia then appealed to the Greek Council of State.

### **Ruling of the Court**

The Council of State dismissed the appeal by holding, *inter alia*, that: a) the commercial policy of DFS to buy the products directly from the manufacturers, was proven not to be either the purpose or the effect of the other agreement with the Germanos company. b) According to the circumstances of the case, it was not necessary, as it was irrelevant, to examine the allegations of the appellant concerning the definition of the relevant market and the dominant position of DFS, since even if it were accepted that the only competitors to the appellant in the retail market were the airlines and shipping companies whose travel routes have Greece as a departure point, and that the crucial affected market was only the Greek wholesale market for chocolates that were for sale exclusively in the Greek travel market, even then, the practice at issue would not be abusive. c) It is a different issue that, if, on the contrary, the Competition Commission and the High Court had accepted that the practices were abusive, then, only in that case, would it be necessary to previously verify the definition of the relevant and affected markets, the structure, function and dominance of

the anti-competitive company, d) The modernisation of a company's internal procedures, and the development, in this context, of a system that facilitates the movement of goods between the central warehouse and the branches of an enterprise, even a dominant one, does not in itself, in principle, or even indicate, types of anti-competitive practices, nor does it fall under competition law, unless there is a direct or reflective anti-competitive object or effect which transforms the structure in such a way that it forecloses a hypothetical competitor from the supplies or the producers (especially small ones) in a higher market. Correspondingly, the free choice of a business, even if a dominant one, of its supply sources among several competitors, would constitute, in principle, anti-competitive conduct only under the same exceptional circumstances that are outlined above. e) Moreover, a question of “objective justification” can only be considered in relation to conduct which, in principle, falls within the scope of Article 102 EC and the relative national provisions. In this case, however, it was held that the only damage claimed was, primarily, the loss of the appellant's own business profit (and, secondly, the business interests of other intermediaries/distributors) due to the loss of a major customer, so as to enforce an intra-brand competitor, while that loss is considered to be inherent to the commercial risks of a competitive market. f) The actual effects on small retailers had not been demonstrated in the complaint and thus could not be examined in relation to the contested decision. Moreover, the appellant did not actually contest that there was an anti-competitive policy, but that there was a loss of its own commercial interests, damage entailed by the fact that, as stated, the services offered within the wholesale market were no longer necessary to DFS.

### **Comment**

In general, this is a follow-up to previous case law from the ECJ in the context of dominant abuse and unfair agreements/policies, although it introduces a more flexible interpretation, which deviates from existing national case law, by trying to: a) avoid the examination of the existence of a relevant market or dominant position when the practice itself does not constitute an anti - competitive policy, or when there is no matter that relates to the actual effects on other parties, b) justify a commercial policy only within the scope of the rationalisation of the company's internal system and the reduction of prices by not using “middlemen” or other distributors, c) take into account the alleged damage itself. However, it seems (indirectly) not to follow closely the recent ECJ case law where, in order to investigate an anti-competitive agreement or practice that is at issue, it is not required to take into consideration the absence of any actual impact of the infringement on the market or the consumers (Judgment of the General Court, 12.6.2014, Case T-286/2009, INTEL, point 1630).

## **5.8 JUAN SELLES FERREIRO; HIGH COURT OF GALICIA (SPAIN)**

### **The Analytical Framework: The Regulation and the Guidelines on Vertical Restraints.**

The contracts analysed in this case regulate the relations between a wholesale operator and a retail distributor. They are, therefore, purchasing agreements for goods or services that have passed between companies that operate at different levels in the production or distribution chain. These are so called “vertical” agreements.” The conditions imposed in the framework of these agreements are so called “vertical restraints”, and thus the analysis, from the point of view of the preservation of fair competition in the vertical relations established between P O (Petrol Operators) and the owners of S S (Service Stations) and their scope in this case, must be analysed within the regulatory framework that is defined by the Regulation (CE) No. 2790/1999 of the Commission, which was issued on 22<sup>nd</sup> December, 1999, and the application of Section 3 of Article 81 of the Treaty establishing in the European Community categories of vertical agreements and concerted practices (the Regulation), and by the Commission Notice on the Guidelines on Vertical Restraints that establishes the application criteria for Regulation. (2000/1 C 29/101 [(The Guidelines)]).

The Regulation establishes, in Article 2, that the agreements or concerted practices entered into between companies, each of which is operating, for the agreement proposes that it operates, at a different level in the production or distribution chain and which is related to the conditions under which the parties may purchase, sell or resell certain goods or services (“vertical agreements”) and that accomplished together with the requirements that were established by Article 81 3 of the Treaty of the European Community, shall be exempted from the interdictions contained in Article 81 1 of the Treaty of the European Community. Article 4 of the Regulation states that:

“The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties. (Emphasis added).

This interdiction from determining the sale prices, even if indirectly, follows the principles of the European Commission in considering the determination of prices as a particularly serious restriction. This seriousness is literally expressed in paragraph 47 of the Guidelines, where the kind of test to evaluate whether some kind of conditions are imposed by the producer, together with additional measures, thus turning the maximum, or recommended, prices into determined prices, is described.

“(47) The hardcore restriction set out in Article 4 (a) of the Block Exemption Regulation concerns resale price maintenance (RPM), that is agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network who deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause. The same indirect means and the same “supportive” measures can be used to make maximum or recommended prices work as RPM. However, the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM.” (Emphasis added)

The Guidelines use a unique Section, 2.8, in which some “orientation to evaluate the cases located over the level of 30% of the market share, and the cases of withdrawal of the exemption by blocks” is offered. Such orientation is exposed in the following paragraphs:

“(226) The possible competition risk of maximum and recommended prices is firstly that the maximum or recommended price will work as a focal point for the resellers and might be

followed by most or all of them. A second competition risk is that maximum or recommended prices may facilitate collusion between suppliers.

(227) The most important factor for assessing possible anti-competitive effects of maximum or recommended resale prices is “the market position of the supplier”. The stronger the market position of the supplier, the higher the risk that a maximum resale price or a recommended resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market. Under such circumstances the practice of imposing a maximum resale price or recommending a resale price may infringe Article 81 (1) if it leads to a uniform price level.

(228) The second most important factor for assessing possible anti-competitive effects of the practice of maximum and recommended prices is the market position of competitors. Especially in a narrow oligopoly, the practice of using or publishing maximum or recommended prices may facilitate collusion between the suppliers by exchanging information on the preferred price level and by reducing the likelihood of lower resale prices. The practice of imposing a maximum resale price or recommending resale prices leading to such effects may also infringe Article 81 (1).“ (Emphasis added).

In view of the above, it is deduced that determining the maximum, or recommended, prices is an undertaking that takes advantage of the exemption granted by the Regulation, provided that that price is not equivalent to a fixed, or minimum, selling price. In these circumstances, it must be decided if the practices carried out by the P O in their trade relationship with the S S can be considered: (1) to be factors that influence directly or indirectly the fact that the maximum/recommended price actually operates as a fixed price, and (2) whether those factors are “under the control of the parties”. In other words, it must be decided if, based on the investigations of this case, we must deduce that the fixed, or minimum, price is a result of pressure by, or incentives from, any of the parties.

In the same vein, the Court of Justice of the European Union, in its Judgment Reference for a Preliminary Ruling C 279/06 Tobar vs Cepsa 11/ 09/08, in its Paragraph (70) has said that :

“It follows that it is necessary to ascertain whether the fixing of the maximum sale price does not remain, in reality, a fixed or minimum sale price, account being taken of all the contractual obligations and the conduct of the parties in the main proceedings.

It is for the referring court to examine whether that authorisation made it genuinely possible for the reseller to lower that sale price, taking account the actual effect of all of the clauses of the contract at issue in the main proceedings, in their economic and legal contexts. In particular, it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the service-station operator, threats, intimidation, warnings, penalties or incentives.”

In the same vein, the more recent judgment to a Reference for a Preliminary Ruling C-260107, issued on 2<sup>nd</sup> April, 2009, says in Paragraph (84) that “contractual clauses relating to the retail prices are eligible for block exemptions where the supplier restricts himself to imposing a maximum sale price or to recommending a sale price and where, therefore, it is genuinely possible for the reseller to determine the retail price. On the other hand, such clauses are ineligible for those exemptions where they lead, directly, or by indirect or concealed means, to the fixing of a retail price, or the imposition of a minimum sale price, by the supplier. It is for the national court to determine whether such obligations constrain the reseller, taking account of all of the contractual obligations in their economic and legal contexts, and of the conduct of the parties to the main proceedings. “

It is deduced from these judgments that the theoretical possibility of reducing the maximum/recommended price is admitted, but it does not automatically become an “actual” possibility, but the reality, or better said, the “feasibility” of reducing the maximum/recommended price shall be evaluated taking into account the rest of the contract’s clauses, as well as the economic and legal contexts in which the parties involved operate. This ground is exactly what is behind the Resolutions of Execution of Judgment that were issued by the Fair Competition Court on 17<sup>th</sup> July, 2006, and 4<sup>th</sup> May, 2007, in the cases 490/00 Repsol and 493/00 Cepsa, that the discount charged to the sales commission is a formal possibility which is communicated to the owners of Service Stations, but the actual effectiveness of this possibility must be determined. This is what this resolution analyses.

### **The Factors that Influence the Indirect Determination of the Price.**

As this case developed a number of facts were proven. The Investigation Division (I D) consider these facts to be factors which indirectly cause the maximum/recommended price to act as a fixed price.

The first of these facts regards the way the P O determine the purchase price (or selling price) of fuel to the owner of the service station. That is, the price that the P O receives from the owner, or which is the same thing, the amount that the P O must receive with no regard to the

possibility of making a discount that is charged to the sales commission. The difference between a so called commission agent and a firm retail seller with a fixed discount is formal rather than substantial, since, in some cases, this purchase price is determined by taking into account two reference parameters that are under the control of the P O: the reference price and the commission/discount. The reference price matches the maximum/recommended price, and each P O fixes it as “the mean mode of the retail prices for the consumers of the service stations in its competitive environment “ or in such a way that when the retail seller applies to these reference price “ the gross margins and commissions that other significant suppliers in the market have been obtaining, and in good faith, from the same products and in the same geographical or commercial area “ the final price in the market lets him obtain such commissions through retail sale.

Both of the two criteria above are based on the link between the maximum/recommended price in each service station and the maximum/recommended price for service stations in the same area. According to the first criterion it is explicit, and according to the second, implicit. With the second criterion, the P O tells the owner of the service station that the purchase price will be fixed so that he will obtain a retail price from the consumers, even after adding all the margins or commissions in the area (it is deduced that everyone knows them), and this will allow him to obtain those commissions. Obviously we can deduce that, using this method, the consequent retail price to the customer must be a competitive one, or otherwise the service station will not sell its products and will thus not obtain any commission. The price will be competitive if it is no higher than prices in the area, and therefore if, in the contract, the P O commits itself to fixing some maximum/recommended prices which the owner considers to be competitive, and which will allow him to obtain the same level of commission as his competitors. The incentive for the owner of the service station will be to apply the maximum/recommended price. For this reason, this system of price formation produces an obvious disincentive for the service station owner to differ from the maximum/recommended price through the application of discounts charged to his own commission/margin.

The defendants plead that fixing the maximum price according to the competitors' prizes in the same area is completely legal and it is competitive behaviour for the economic operators. In this regard, even if, in principle, it may seem logical that the reference prices and the maximum/recommended prices are brought closer, or that they are identical in practice, when it is applied homogeneously by the three main operators in the country, this produces an undesirable alignment of the effects of the existence of the conditions for a genuine competition in prices, which is absolutely necessary in a market with the distinctive characteristics of the market being analysed in this case.



Even with no claim or any type of retaliation being made by the P O, the managers of the service stations carry the prices of the stations located in the influence area, that is, the competitive environment of the station. These prices are communicated to the flagship operators, although this price cannot actually be demanded by contract.

Obviously, the effect that the recommended prices are linked to those effectively practised in the different areas of influence is to that the incentive faced by the operator and the retail seller is reduced in order to differ from the current prices in the area. In other words, although the existence of some of the contracts that are singularly considered with this characteristic would not, in principle, be a problem for the incentives to determine the prices, the large proportion in each of the networks and the parallel effect that results from being present in the three main distribution networks has a decisive influence on the incentives and will hugely ease the alignment of the current prices that are practised in each of the areas of influence.

This means of fixing the purchase prices has effects within and among brands. First of all, the fact that the P O commits itself, through a contract with the owner of the service station, to fixing the reference prices in such a way that when the retail seller applies the commissions that apply in the area to these reference prices, he can reach a competitive price in the area, produces an obvious disincentive to the owner of the service station to reduce the final price at the expense of his commission. Indeed, if the owner of the service station perceives that the maximum/recommended price proposed by the P O makes him a competitive operator in his area, there is no place to be even more competitive by giving up a part of his commission income, excepting the possibility that the owner of the service station considers that the price reduction would stimulate the demand in such a way that the increased sales would compensate for the unitary losses of commission. Although it will depend on several factors, such as the area's location, in such a market, mature and with little elasticity to the price, the incentive to differ from a maximum/recommended price which guarantees the owner of the service station the same level of gains as his competitors, for the expectation of a weak or null gain if he reduces the price, is really small. Secondly, when it is a homogeneous product, with only a few operators in the competitive environment, with market entry barriers and transparency in the prices, and when the changes in prices is made every week, this way of determining the reference prices produces an alignment in prices in the competitive environment. In other words, we are in a market in which all the operators fix their prices, monitor those of their competitors and every week have the option to adjust their deviations in respect of those of the others. This game, if repeated, leads to a balance in which everyone fixes the same price. The competition among the brands is in that way reduced.

In addition, in an asset structure like the structure of this market, where service stations of the same brand, but owned by different distributors, compete, this system for fixing the purchase price, is exclusively under the control of the P O, and it is an effective instrument for disciplining the owners of the service stations who would like to reduce the prices. If a service station reduces the final prices charged by his commission, the other service station will have to do the same or face a loss of clients. In any case, they will see their benefits reduce, due to the lower price that they will have to fix so as to avoid losing sales, or the loss of sales, if they do not reduce the prices. In this situation, the P O could discipline the service station which began the price reduction by increasing their purchase price so that it would be impossible for them to reduce the final price charged only to their commission. Alternatively, the P O can reduce the service station's purchase price for its brand in the competitive area relevant to the service station that has reduced the final price charged to its commission, so that whoever decides to reduce it will receive a lower commission, while his competitors will receive the same commission, applying the same retail prices to the consumer, and making who ever was the first to reduce the prices lose the competitive advantage obtained through his strategy.

In this market, the alternative to fixing the purchase prices which operate in this market is contained in the schemes of a firm sale with prices that are linked to international prices. In this case, the purchase price is referred to a price that is not under the control of the P O, as is the case with contracts for re-sale that are indexed to the international prices, the so called Platts contracts. The P O faces gains that are linked to international prices, so these gains will depend on the gap between international prices and its costs. The P O adds to this an amount that is agreed with the owner of the service station (spread, according to Proven Fact 4). This amount is neither linked to the international prices nor to the retail prices for the customer. Meanwhile, the service station's owner fixes the retail price for the customer and thus his gains will depend on the difference between the Platts prices (plus the spread) and the retail price for the customer. If there is no determination of maximum prices, the owners of the service stations have the formal and substantial capacity to fix the retail price to the customer and the P O has no legal capacity.

The combination of fixed maximum prices with purchase prices is also linked to the Platts prices that, although it will be implicit that there is a margin for the owner of the service station (the difference between the Platts price and the maximum price), the formal and substantive capacity of fixing the retail price for the customer will be shared and will introduce such transparency into the system that it would prevent its use to discipline those service stations that would like to establish true and fair price competition.

## **6. ABUSE OF DOMINANCE**

### **6.1 GEORGIA KORFIOTI, DISTRICT COURT OF NICOSIA (CYPRUS)**

**Case No. 612/2009, Akis Ioannou v. National Committee for the Protection of Competition  
Judgment delivered on 23<sup>rd</sup> September, 2010.**

The case was a recourse that was filed by the Applicant, Mr. Akis Ioannou, in the Administrative Court of Cyprus, against the decision of the National Committee for the Protection of Competition (hereinafter called “The Committee”).

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

The Applicant was an importer of ophthalmological goods and machinery through a company named A. Ioannou Medicare Ltd., and also the owner of the company called Forum Optical Ltd., and a shareholder in the company called Ofthalmos Laser Center Ltd. According to the Applicant, the last company was incorporated at the beginning of 2005 due to an order placed for specialised laser machinery to correct certain eye abnormalities.

On 1<sup>st</sup> February, 2006, the applicant and his companies, filed a written complaint to the Committee against Aktis Limited, for a possible violation of Articles 4 and 6 of the Protection of Competition Act 13(I)/2008 and, more specifically, for an abuse of its dominant position. The complaint was filed with regard to the reduction in prices made by Aktis Limited with the purpose, as the Applicant argued, of completely eliminating the provision of services by him and his related companies.

Aktis Limited was registered on 19<sup>th</sup> July, 1994, by 17 shareholders who were all ophthalmologists and members of the Cyprus Ophthalmology Company, and mainly dealt with the provision of a license to ophthalmologists for use, for a specified fee, of the machinery and premises of the Company, and to carry out operations to correct eye abnormalities.

#### **The Committee**

After examining the Applicant’s complaint, the Committee decided the following:

1. Aktis Limited is an undertaking within the meaning of Article 2 of the relevant legislation.
2. The Applicant and his company, Ophthalmos Ltd., had the right to file a complaint against Aktis Limited.

3. With reference to the Announcement of the European Commission (97/C 372/3), the relevant market was that dealing with the use of laser machinery for the correction of eye abnormalities.
4. Aktis Ltd. had a dominant position in the market and, as a result of this, the Committee examined possible abuse of that position.
5. It was held that Aktis' Ltd.'s behaviour did not constitute an abuse of dominant position by unfair pricing and the Committee dismissed the application.

### **The Recourse Proceedings**

Following the Committee's decision, the Applicant filed an application in the Supreme Court of Cyprus in order to seek its annulment. On 23<sup>rd</sup> September, 2010, the Supreme Court of Cyprus, in its role as the Administrative Court of First Instance, decided on the matter. It is important to note that upon the hearing of the recourse, the Supreme Court was dealing with the legality of the decision of the Committee and was not acting as an appellate court.

During the recourse proceedings, the Applicant argued, *inter alia*, that the Committee's decision was illegal and not in compliance with the relevant legislation. After examining the case in light of Article 6 of Act 13(I)/2008, Judge Photiou dismissed the recourse. The Court upheld the Committee's decision and noted, with reference to *Hoffman La Roche v. Commission* (1979) ECR. 461) and *Compagnie Maritime Belge Transoports SA* (Judgment of ECJ C-395/96 and C396/06 dated 16<sup>th</sup> March, 2000), that having a dominant position in the relevant market is not illegal. What is illegal is the exploitation and abuse of that position.

In the present case, the Applicant did not satisfy the Court that Aktis Ltd. had abused its dominant position because the evidence before the Committee showed that it did not reduce its charges to doctors, but the doctors reduced their charges for the services offered to the patients.

## **6.2 LIDIYA TOMOVA, COUNTY COURT OF SHUMEN (BULGARIA)**

**Judgment/Decision/ of the Supreme Administrative Court /SAC/ No. 4136/26.III.2013 in Administrative Case/Adm. Case/No. 2323/ 2013, five-member panel/**

### **Information concerning the Judgment**

- Decision No. 1780/ 20.XII.2011 of the Bulgarian Commission for Protection of Competition in Case No. KZK-191/2011;
- Judgment/Decision/ of the Supreme Administrative Court /SAC/ No.12529/10.10.2012 in Administrative Case /Adm. Case/ No 1379/ 2012 IV.o./of a three-member panel/;
- Judgment/Decision/ of the Supreme Administrative Court /SAC/ No. 4136/26.III.2013 in Administrative Case /Adm. Case/ No. 2323/ 2013,/ five-member panel/

### **The Parties**

Parties in the case before the Commission for the Protection of Competition are:

Appellant: Balkan Holidays Services Ltd., Sofia, is the petitioner, as defined in Article 38 of the Competition Protection Act. The company conducts its business activity in 7 hotels and manages restaurants and hotels.

Respondent /the Defending Party/: “Musicautor”, Sofia, a company of composers and authors of literary works related to music, and music publishers for the collective management of copyrights i.e., it is an organisation for the collective management of copyrights in the territory of the Republic of Bulgaria /OCMC/.

The parties in the cases before the 3 and 5-member panels of the Supreme Administrative Court /SAC/under Art.153 Para.1 of the Administrative Procedure Code /APC/ are: the disputing-Balkan Holidays Services Ltd., Sofia; the organisation that issued the administrative act, the Competition Protection Commission/CPC/, as well as all interested parties, officially established as defined in Art. 154, Para.1 of the APC.

The APC gives no definition of the term “interested party”, but the judicial practice derives its definition from the order of Art. 15 of the APC, which states that a subject of administrative law is an institution, people and organisations whose rights and lawful interests are, or could be, infringed by the administrative act or by the court decision, or to whom rights and obligations may emerge. For this reason, in the “Musicautor” case, Sofia is also an interested party.

**Facts:**

The debatable ground is the violation of the rules of competition and, particularly, the abuse of a dominant position, as defined in Art.21 of ZZK.

“Musicautor” is an organisation for the collective management of copyrights in the territory of the Republic of Bulgaria /OCMC/ and it seems to be the only one in the country that can gather compensation for the authors of music and texts in relation to the public performance of musical and literary works.

There is another organisation that protects the rights of performers and producers – Prophon.

The appellant, Balkan Holidays Services Ltd., Sofia, states that “Musicautor” practices compulsory contracts that are concluded with hotel managers under the pretext of being the sole organisation that cannot provide for legal use of music works, and in doing the company asks for excessive prices, according to a unilaterally defined rate. The monetary compensations have increased and they do not comply with the situation in Bulgaria. Such activities are an abuse of a dominant position, as defined in Art. 21 of ZZK. It also stresses that the company has not breached the Copyright and Related Rights Law /ZAPSP/ as it carries out activities in the field of tourism and the possibility to use radio and televisions programmes in the hotels and restaurants that it owns and manages, is based on its right to be a user of those services. It is emphasised that no public performance of the musical works is organised but the guests in the hotels and restaurants are given the opportunity to watch/ listen to television programmes if they want to.

The respondent “Musicautor”, Sofia, considers that there is no abuse of a dominant position and that it is not breaking the law.

In the course of the proceedings, that aimed to establish any breaches of Art. 21 of ZZK, the first step is to correctly define the respective market – both that for the product and the geographical one, as defined in Par. 1, Item 15, “a” and “b” of DR of ZZK, where the probable violation was made. Determining the market is a precondition for analysing the availability, or the lack, of a dominant position in the respective market on the part of the company being investigated. The major rule is that the antitrust authority must prove the existence and establish all prerequisites for the presence of a dominant position.

-By virtue of § 1, Item 15 of the Supplementary regulations of ZZK “a relative market” consists of “a product market” that includes all of the goods and services that could be considered interchangeable in relation to their characteristics, functions and price, and to “a geographical market”, including a certain territory where the respective interchangeable goods or services are offered, and in which the competition conditions are the same, but are different from those in neighbouring regions.

-According to the Supreme Administrative Court /SAC/five-member panel, the CPC and 3-judge-panel, or the SAC, have correctly defined the relevant market-for the product, as well as the geographical one, the field of competition, and the place of the parties in it.

-The product and geographical market for the appellant: Balkan Holidays Services Ltd., Sofia, is that it conducts business activity in 7 hotels, and it manages restaurants and hotels in the national territory, and this includes the use of the musical works and TV programmes that the firm provides to its clients.

-The product market for the respondent “Musicautor”, Sofia, is the collective management of copyrights, i.e., it is an organisation for the collective management of copyrights in the territory of the Republic of Bulgaria /OCMC/ and seems to be the only one in the country that can gather compensation for the authors of music and texts, for the public performance of musical and literary works. The services provided by “Musicautor”, Sofia, give the right for public performance of works of music to people carrying out restaurant and hotel activities in places of accommodation and catering and in entertainment establishments. The geographical market is the national one.

There is another organisation that protects the rights of performers and producers – Prophon.

-According to Art. 20 of ZZK, the dominant position of an enterprise is a position that may prevent competition in the relevant market, based on the enterprise’s market share, financial resources, possibilities for accessing the market, the technological development and economic relations with other undertakings, as these make the enterprise independent from its competitors, suppliers and customers.

-The SAC has accepted as an irrefutable fact that “Musicautor “is a company with a dominant position in the relevant national market, as defined in Art. 20 of ZZK. This is an organisation for the collective management of copyrights in the territory of the Republic of Bulgaria

/OCMC/ and seems to be the only one in the country that can gather compensation for the compensations for the authors of music and texts for public performance of musical and literary works. All of the people using the works of authors are to conclude civil contracts for the services provided by Musicautor – giving the rights to public performance of works of music to people carrying out restaurant and hotel activities in places of accommodation and catering and entertainment establishments.

- In this case, the prohibition of abuse of a dominant position, under Art. 21 of ZZK, is applicable to the conduct of “Musicautor”.

-Enterprises abuse the dominant position when their actions aim at preventing, restricting or destroying competition.

-The abuse of a dominant position, under Art. 21 of ZZK, includes four elements under conditions of cumulation:

1. the term “enterprise” for the agent;
2. a dominant position in the relevant market;
3. anti-competitive conduct of the enterprise that is able to cause a real or potential anticompetitive effect, i.e., to prevent, restrict or destroy competition, and
4. harming the interests of the consumers.

By virtue of § 1, Item 7, of the Additional orders of ZZK “an enterprise” is every physical, legal or non-personified entity/formation carrying out business activities, regardless of its legal and organisational form. In this case, the respondent is a legal entity, the provider of a service that is offered against payment. Consequently, the company exhibits all characteristics of an enterprise, under ZZK.

In order for the examined conduct of the dominant enterprise to fall within the scope of the prohibition of Art. 21 of ZZK, a real or potential anti-competitive effect should be demonstrated. The effect must be related to preventing, restricting or destroying competition, as well as harming customers.

The SAC, 5-judge panel found that the respondent did not abuse his dominant position on the relevant market because some of the prerequisites of Art.21 of CPA were missed.



SAC considers, in this particular case, that the conduct of the respondent must conform to the special market regulation that is in effect at the moment, namely the regulations of the Copyright and Related Rights Law /ZAPSP/.

All firms using the works of authors are to conclude civil contracts for the services provided by “Musicautor”, Sofia, giving the rights to public performance of works of music to people who are carrying out restaurant and hotel activities in places of accommodation, and in catering and entertainment establishments.

Concluding a contract is free, and it is based on negotiations regarding the multiple concessions, that are explicitly specified in Musicautor’s tariffs, which have been endorsed by an order of the Minister of Culture since 25<sup>th</sup> March, 2011..

The compensation received is allocated for payments to the bearer of the rights/the author of the music work/and for administrative expenses with no profit.

Art. 18, Par. 2 of the Copyright and Related Rights Law /ZAPSP/ lists the actions that are to be considered as use, and some of them are “public performance or display of a work” /Item 3/ and “transmission or relay of a work through a cable” Item 5.

In order to have a legal public performance, a contract concluded with Musicautor should be in place, though this does not exclude contracting operators who are to deliver television and radio programmes/ through cable or land dispersion/ as the price for delivering the signal to the radio and television sets does not include the author’s compensation for the public performance of the protected work.

The five-people panel of SAC does not share the arguments of the cassation appellant that its position in relations in the relevant market is improperly determined as a user of the work protected, for which a legal obligation to conclude a contract to concede the right of use is in place, instead of being viewed as a consumer, since the signal for transmitting the works is given by a cable operator, who is supposed to settle the relationships for granting copyrights.

In referring to ZAPSP, the 5-member panel of the CAC emphasised that:

According to the legal definition of “a user of a work”, this user is a physical and a juridical person /publishers, theatres, organisers of concerts, radio and television organisations, cable operators, catering and entertainment establishments, and others that bring the work to the

knowledge of readers, viewers and listeners, either directly or through other people-distributors.

The conclusion can be drawn that Balkan Holidays Services Ltd., Sofia, and the other legal entities that are carrying out similar business activity though realising a subsequent use of musical compositions, by means of radio and television receivers, carry out the sound screening of hotels or establishments with pieces of music via radio and television receivers, which is therefore the public performance of these works, and so requires the consent of the bearers of the copyright, or of an organisation that is authorised by the authors. For this reason, as, in carrying out public performance, these hotels and establishments appear to be users and not consumers of the service, and they should therefore obtain preliminary written consent for live public performance, or for a recorded one; for a wireless transmission, or for the cable relay of musical or literary works, that have been made public.

The consent is made by concluding written contracts that are based on the Tariff of the organisation for the collective management of copyrights.

-The notion that the abuse of a dominant position has two forms:

1. exclusionary/ strategic/ abuse, and
2. exploitative abuse that is recognised in our national competition law, as well as in the precedent practice of the Court of the European Council /CEC.

The first form reveals a single behaviour that aims to eliminate the competitive enterprises from the market, to set barriers to potential competitors' entry into the market, or to limit the possibilities for the actual competitors in the market to exert an effective competitive pressure on it. It is obvious, in the present case, that the conduct of the respondent does not show any of the above mentioned actions, since it does not go out into the market.

The second form of abuse of a dominant position aims to benefit from its customers, or clients, in a way that would not be possible if an effective competition were in place in the market. The Court considers that this second definition of an abuse, given by the CEC, is also not applied in this particular case.

SAC's 5 member panel also notes that the prohibited conduct, under Art. 21 of ZZK, with regard to its effect. can be divided into two groups:

A conduct that excludes the competitors in the market/structural/abuse – damaging both current and potential competitors, and exploitative abuse – which causes damage to people, that depends on the dominant enterprise for the delivery and use of the particular service.

The existence of an actual or potential competition for the dominant enterprise in the relevant or collateral market is a prerequisite for the rise of an abuse of the first form.

During the period investigated, "Musicautor" happened to be the only organisation for the collective management of the copyrights of the authors of musical compositions in the relevant market, and there is no reason for the appearance of another company with the same field of activity to be expected. Moreover, "Musicautor" does not personally, or through other people, carry out restaurant or hotel activities and therefore does not exhibit a competitive attitude towards the appellant.

This is why the SAC has considered it necessary to direct its investigation towards the assessment of whether there is evidence for an exploitative abuse that, actually or potentially, may directly harm the legal interests of people conducting restaurant or hotel activities, as one of the categories of users of works of music, making public performances is Balkan Holidays Services Ltd. SAC has referred to the practice of applying the national competition law, and the right to competition in the European Union /EU, which says that there is an abuse of a dominant position if the price of the product is groundlessly high or low. According to the practice of CPC, the process of proving the groundlessness of the prices is made by comparing the price to the prime cost of the product, or by the market comparison approach.

The SAC has analysed the issue in regard to whether the Musicautor tariff has passed this, while keeping to objective and clear criteria and considering the market situation. These tariffs conform to the place where the object is, to its category and the type of establishment, to the working period during the year, the number of places, number of beds, number of visitors, and all of these, along with the concessions, that are provided for in the tariff, are contracted after negotiations between the two parties.

The CPC and the courts have found the inapplicability of the first approach "prime cost" as the character and method with which to form the tariff – compensation, collected for the authors and the administrative expenses of the activity; and because no benefit is earned and a margin between the prime cost and the benefit cannot be defined.

They have therefore used the method of comparison as the criterion for assessing the tariff, and they have reached the conclusion that the tariff rates are economically justified, are chosen by Musicautor based on the market situation, and are determined on the average price rate in 6 countries in different financial situations and standards, as the tariff prices of Musicautor definitely do not exceed them and are in compliance with the market situation in the Bulgarian national market.

So, the five-people panel of SAC considered that the complaint of the cassation appellant, that the price suggested for the service provided was not based on a market principle, to be ungrounded. The five-people panel of SAC found the reference of CPC and the three-people panel of SAC to Section 5, Par. 2 of the Supplementary regulations of the Copyright and Related Rights Law, to be lawful and correct. That paragraph gives the possibility to define the particular compensation, subject to agreement in cases where the use of the work is contracted by organisations for the collective management of rights. When the parties have the possibility to reach an agreement about the particular price, considering favourable and unfavourable factors, it cannot be argued that the responding company imposes groundlessly high prices, thus abusing its dominant position.

The general conclusions of the decisions of the five-people panel of SAC are:

The broadcasting of a musical composition in a restaurant or a hotel is public, as defined in Art.18, Par 3 of ZAPSP; and thus its author is to receive compensation. Broadcast or transmission/ relay by cable is regulated by the order of Art. 18, Par. 3 of ZAPSP, and, based on this, the cable operator is obliged to settle copyrights, but he cannot transfer the right of public use of the work that is protected.

Art. 58, Par. 1 of ZAPSP says that consent for public performance, live or recorded, for broadcasting by wireless, or retransmission by cable, of musical and literary works which have already been made available to the public, shall be provided in writing by the author or by a duly authorised organisation for the collective management of copyrights, which shall negotiate, collect and pay the compensations due. This is why, when following the legal framework provided by ZAPSP, the invitation to conclude a contract under Art. 58, Par. 1 of ZAPSP, sent by the organisation for the collective management of copyrights – Musicautor -- to the user, broadcasting the particular work-Balkan Holidays Services Ltd.-- does not represent an abuse of a dominant position under Art. 21 of ZZK. This is the only way to settle the rights of the author to receive the compensation due to them for the public performance of the work, in a case where there is no written consent given by the authors of the works performed.

Regarding these conclusions and findings, the five-people panel of SAC sustains the decision appealed, which was made by the three-people panel of SAC.

The decision is final.

### **My Personal Comment**

This case is interesting due to its narrow connection with the applied orders of ZZK and those of European Union Competition Law, more specifically Arts. 101 and 102 of the Functioning of the European Union Treaty. Besides, the case in question is an example of how the application of quoted/ cited/ legal terms in the competition law area may protect copyrights. The problem with copyright protection is widely discussed in European Union legislation. These rights are subject to protection by special national laws i.e., the Copyright and Related Rights Law /ZAPSP/ in the Republic of Bulgaria. The current case is an interesting example of the interaction and relationship between the norms of the competition law and the copyright law.

### **6.3 MALIN MALMSTRÖM, MARKET COURT (SWEDEN)**

#### **Information concerning the ruling**

- **Name of Court of Last Instance: Market Court**
- **Name of parties: Bring CityMail Sweden AB v. Posten Meddelande AB**
- **Case reference number: MD 2011:14**
- **Date of ruling: June 8th, 2011.**

#### **Legislation**

According to Chapter 2 Article 7 of the Swedish Competition Act (2008:579) any abuse by one or more undertakings of a dominant position on the market is prohibited. This legislation is modelled after Article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 82 of the EC Treaty).

According to Chapter 3 Article 1 of the Swedish Competition Act, the Swedish Competition Authority (SCA) may require an undertaking to terminate an infringement of the prohibitions laid down in Chapter 2 Article 7 or Article 82 in the Treaty.

Chapter 3 Article 2 of the Swedish Competition Act contains the provision that if the SCA decides in a particular case not to impose such an obligation pursuant to Chapter 3 Article 1, the Market Court may do so at the request of an undertaking that is affected by the infringement.

#### **Background**

Posten Meddelande AB (Posten) as the former postal services monopoly in Sweden provided distribution of addressed mail to all households and businesses in Sweden. CityMail Sweden AB (CityMail) provided distribution in Stockholm, Gothenburg, Malmö and on the island Gotland, which represented more than half of the country's postal addressees. Posten offered a rebate policy which rewarded high-volume contracts. CityMail held that the rebate scheme was likely anti-competitive in light of Posten's strong market position and the rebate scheme's tendency to reduce competition, as it would force CityMail to considerably lower its prices.

CityMail initially filed a complaint against Posten with the SCA accusing Posten of abusing its dominant position contrary to Chapter 2 Article 7 of the Swedish Competition Act. The SCA followed the methodology in the Commission's Article 102 Guidance Paper and applied an equally efficient competitor test where the entirety of the available discounts is allocated to the contestable segment of the market to determine whether in that segment the dominant firm had engaged in predatory pricing conduct. The SCA concluded that under the equally efficient competitor test, the rebates did not appear to create a substantial foreclosure risk.

Having failed to convince the SCA, CityMail then brought a successful action before the Market Court.

### **Facts of the Dispute in the Market Court**

The alleged abuse consisted of Posten's application of a loyalty rebate scheme where Posten's customers who performed certain pre-sorting, in accordance with Posten's specific criteria, received a discount of up to 0,02 Euro per item for volumes above 300 000 items. Volumes below 300 000 received no discount.

CityMail also offered a rebate system for high-volume contracts if the customer performed certain pre-sorting of mail. CityMail claimed it incurred an illegal foreclosure effect when the company competed with Posten for shipment contracts ranging 300 000 to 600 000 items. The foreclosure effect arose because Posten alone delivered mail in some parts of the country in combination with the retroactive rebate, i.e., that it was based first at 300 000 items and covered all shipments throughout the country. CityMail claimed that it was forced to offer customers unreasonably low prices that were below cost for customers to split their shipping between CityMail and Posten. City Mail was not able to compete in a profitable manner.

Posten, for its part, argued that the current rebate itself was allowed. Furthermore, no unlawful foreclosure arose, partly because the price CityMail was forced to offer to compete for the contracts was over CityMail's long-term average marginal cost and thus provided the company profitability (equally effective competitor analysis). In addition, only a very limited part of the market potentially could be foreclosed.

## **Ruling of the Court**

The Market Court held that the relevant market was the market for large shipments of mail in Sweden and that Posten upheld a dominant position.

Regarding the degree of Posten's dominance in the market the Court concluded that Posten not only was the former legal monopoly in the postal sector, Posten also had a market share of about 85 percent. Furthermore CityMail was the only competitor on a market characterised by small margins why the competitive situation was considered fragile.

The Court then concluded that the impact was limited, only affecting customers that qualified for the rebate for large shipments of mail but that the customers in question were key customers since these contracts stood for a relatively large proportion of the total volume of mail. According to Posten's calculations contracts for shipments of 300 000 items or more stood for 15 percent of Posten's total volume of economy-mail.

CityMail estimated that about 30 percent of the company's customers had shipments that were eligible for Posten's rebate, and therefore, CityMail felt forced to compensate those customers to match Posten.

Based on evidence presented in the case, the Court found that it was unclear to what extent Posten's rebate actually had affected individual customer's behavior and CityMail's pricing in individual cases. The Market Court held that it was clear that the rebate served to prevent customers from purchasing services from CityMail or to force CityMail to squeeze their margins.

The Market Court then stated, with reference to the European Commission's decision of the 13<sup>th</sup> June, 2009, COMP/C-3/37.990, Intel and the Commission's Guidance paper article 3, that since the Guidance Paper should not in all its parts be seen as an expression of current regulation and given previous case law, it was not necessary to carry out an equally efficient competitor test as provided for in the guidance, to determine whether Posten had abused its dominant market position.

Instead, in an overall assessment – which took into account the special responsibility Posten had as the dominant undertaking – the Market Court found that the rebate Posten applied had a foreclosing effect which tended to impede competition. Accordingly, Posten had to show that the rebate was financially justified and did not go beyond what was necessary to achieve the potential benefits of it.

Posten contended that the rebate was introduced upon request from customers and lead to significant efficiency gains. The Court then held that the fact that a rebate was imposed upon customer request lacked relevance and that efficiency gains are apparent when a customer takes on



cost-relieving action. What instead was of relevance was the actual structure of the rebate in question in the light of market conditions.

Posten then argued that the discount had the current threshold because according to their cost estimates it was only at volumes of 300 000 items or more that Posten could be sure to in average make a big enough saving to justify the rebate. It was unclear to the Market Court how Posten had reached to its conclusion and stated that Posten had failed to refute CityMail's argument that the same effect would occur for the average postal delivery station at a threshold of 150 000 items applied to half of the total market. Thus, Posten had not shown that alternative constructions of the rebate could have reduced the foreclosing effects or had been unachievable for practical or policy reasons.

Finally the Court held that, as previously stated, the rebate scheme tended to lead to anticompetitive foreclosure and that Posten had to show that the structure of the rebate was financially justifiable and did not go beyond what was necessary to achieve the benefits of the rebate. The Court then found with regard to the aforementioned that Posten based upon the submitted evidence, had not met its burden of proof in this regard. The Market Court therefore found that Posten by imposing the rebate had abused its dominant position contrary to the prohibition in Chapter 2 Article 7 of the Swedish Competition Act.

The Market Court then stated that the facts of the case were such that Article 102 TFEU should apply to the procedure and that the Court's application of Chapter 2 Article 7 in the Swedish Competition act was consistent with Article 102 TFEU.

### **Comment**

In this case the Market Court applied a form-based, traditional analysis of the rebate scheme and concluded, with reference to European case law, that loyalty rebate schemes are presumptively unlawful unless strict cost-based.

About a year after this case the ECJ tried a similar case, C-209/10 Post Denmark (2012) ECR I-0000. In this case, the ECJ appears to endorse the view of the Swedish Competition Authority that the equally efficient competitor test should be applied to a wide range of pricing conduct. It is therefore interesting to see if the Market Court will change case law in this area.

## 6.4 TATYANA ZHILOVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)

### The Autumn Technical Fairs in Plovdiv, Bulgaria

#### Case Note One:

The Association for Fair and Exhibitions' Services v. "International Fair Plovdiv" AD (Plovdiv Fair)

Decision 555/20.05.2010 of the National Authority CPC (Commission for the Protection of Competition)

Decision 4410/2013 of the Supreme Administrative Court

Decision 15456/2013 of the Supreme Administrative Court, Large Chamber.

**Subject:** Abuse of dominance by "International Fair Plovdiv" AD (Plovdiv Fair), expressed as pricing abuse by means of margin squeezing and the imposition of unfair trading conditions during the Autumn Technical Fairs in 2009.

#### Findings:

1. Technical fairs are the largest and most prestigious exhibitions. They require large exhibition grounds. "International Fair Plovdiv" AD is the owner of the *Faircity* in the town of Plovdiv, that is, the only ground in Bulgaria where large-scale international exhibitions can take place. Participation at the Technical Fair is organised in accordance with the General Terms and Conditions for Participation, and the Services Tariff.

Plovdiv Fair provides exhibitors with the rental of indoor and/or outdoor exhibition areas. Maintaining a stand and a built structure for the entire indoor exhibition area is mandatory for the exhibitors.

If Plovdiv Fair is hired to design and build the structure, the exhibitor shall pay a price for "*renting an exhibition structure*", as in the Tariff.

If an outside construction company is hired by the exhibitor to provide the exhibition structure, it is obliged first to conclude a contract with Plovdiv Fair, so that Plovdiv Fair can grant it the "*rights of construction*" and the "*certification of the detailed designs*" for a Tariff set fee. Only then can the outside company offer the exhibitor the "*construction of the exhibition structure*" service.

2. For construction companies that specialise in design, construction, and the installation of exhibition stands and structures, access to the *Faircity* of the Plovdiv Technical Fair is essential, as they realise about 50% of their annual volume of business there.

So in product terms, the following relevant market is formed by:

- The Upstream Market - regarding the access of the construction companies to the Autumn International Technical Fair
- The Downstream Market – regarding the retail services provided to the exhibitors

Geographically, the market, above, covers the *Faircity* territory and can therefore be defined as being regional.

Plovdiv Fair and the construction companies are in a vertical provider-customer relationship in the relevant market.

3. Price squeezing by means of profit margin squeezing (the Commission for the Protection of Competition (CPC) carried out the Margin Squeeze Test)

The exhibitors have two options regarding the retail service:

- To rent a stand and structure directly from Plovdiv Fair, opting for the “*renting of the exhibition structure*” service;
- To hire an external company to provide a “*construction of the exhibition structure*” service.

The comparison between the two services leads to the conclusion that the same elements are included in both, that is: the use of the structure; installation and dismantling; daily cleaning; security costs; electricity and water. The “*renting of structure*” retail service offered by the Plovdiv Fair therefore has the same cost structure as the “*construction of structure*” service that is offered by external companies. Exhibitors receive and pay for the same retail service. For the exhibitors, the two options are completely interchangeable, since the result is the same: the exhibitor gets a stand and a built structure for his goods for the duration of the fair.

In the General Terms and Conditions and the Tariff, a fairly high fee is set for the wholesale services, the “right of construction” and the “certification of the detailed designs”, which are eliminatory as to the access of external companies to the Fairground. These fees lead to the squeezing of the retail service margin for the external companies, so they become less competitive. To make a profit, they have to raise the retail price of the service that they offer to the exhibitors.

**Legal Conclusions:**

Being the owner of the Faircity, Plovdiv Fair has a natural monopoly in the upstream market-granting access to the Faircity by providing the “*right of construction*” and the “*certification of the detailed designs*” services. By unilaterally determining the access conditions, therefore, “International Fair Plovdiv” affects the competitive structure of the related market.

In practice, the external construction companies with which Plovdiv Fair competes on the downstream market (to provide structures to exhibitors) are dependent on it, as it determines the conditions of access to that same market.

“International Fair Plovdiv” aims to push competitors out of the retail market through its high prices for access to the Faircity, and to eliminate the market as a whole by directly offering the exhibitors (end users) lower retail prices. Plovdiv Fair therefore guarantees itself more favourable conditions than those offered to the other service providers on the market.

Imposing unreasonably high wholesale prices is a form of abuse of dominance, which makes it possible to distort the competitive environment in the relevant market.

Furthermore, the market conduct of Plovdiv Fair breaches consumer interests, since the end users’ choice of service provider is limited, due to the unfair and anti-competitive practice that is exercised by the Fair.

The CPC found, that the “*construction of exhibition structures*” was a service provided in the absence of a real competitive environment, which lead to the damaging of the interests of consumers by limiting their choice. An abuse of dominance was established as a fact. Plovdiv Fair was sanctioned.

The Supreme Administrative Court, acting as the Court of First Instance, confirmed the decision of the National Competition Authority. The ruling of the First Instance Court was confirmed by the Large Chamber of the Supreme Administrative Court.

**Comments:** This case is the second to establish the abuse of dominance of the “International Fair Plovdiv” by margin squeezing and the imposition of unfair trading conditions relating to the construction of exhibition stands and structures. The first case regarding the Autumn Fair was in 2008, and was based on the same facts. This makes it clear that the sanctions, provided for in the national Protection of Competition Act, are not effective.

## 6.5 ARI WIREN, MARKET COURT (FINLAND)

### *The Finnish Competition and Consumer Authority (FCCA) vs. Valio Oy [The Valio Case]*

The Market Court: Decision June 26, 2014, MAO: 467-468/14 (Case numbers 458/12/KR and 36/13/KR); appeal pending at the Finnish Supreme Administrative Court (SAC)

Interlocutory decision by the SAC August 19th, 2014, T:2442 (Case Number 2553/3/14)

Two web links (both decisions in Finnish):

<http://www.finlex.fi/fi/oikeus/mao/2014/20140467>

(Decision 26.6.2014, The Market Court)

<http://www.kho.fi/fi/index/paatoksia/muitapaatoksia/muupaatos/1408442208444.html>

(Interlocutory Decision 19.8.2014, Finnish Supreme Administrative Court)

### **Background Information and Introduction**

*The parties in the administrative proceedings, the fresh milk markets in Finland*

1. Valio Oy is a Finnish limited company (Ltd.). The owners of this limited company (Valio) are co-operative societies (co-operatives). These co-operatives were formed by Finnish dairy farmers. The co=operatives are also owned by Finnish dairy farmers.
2. Valio is the main producer of Finnish dairy products, including fresh milk. Valio purchases the milk that is required for its fresh milk production from the co-operatives. The co-operatives collect their milk from the dairy farmers, who are members of the co=operatives. Until 2008, competition in the fresh milk market was limited. In 2008, the market share of Valios' main Finnish competitor, the limited company Arla Ingman Oy Ab (since May 2nd, 2014, the company's name is Arla Oy, in what follows, Arla) was approximately 24 per cent. The combined market share of the smaller regional dairies (co-operatives and companies) has varied between 12 and 15 per cent of the total market.
3. Approximately 80 to 90 per cent of the fresh milk produced in Finland is sold to Finnish food retailers. The Finnish food retail market is highly concentrated, also. There are two major retail chains (the K-Group and the S-Group). These two retail chains have a very

high combined market share of the retail trade.<sup>6</sup> Valio has had sufficient capacity to act as the main supplier of fresh milk and other dairy products to both of these major retail chains. The Finnish dairies and the retail chains normally enter framework agreements relating to the purchase of milk each year. The quantities sold, and the prices paid for them, are normally negotiated three times a year.

4. Arla tried to enter administrative proceedings at the Finnish Market Court, and claimed to have the status of a party in the proceedings, or as an intervener. The Market Court rejected Arlas' claims.<sup>7</sup>

5. The Finnish Competition and Consumer Authority (in the following FCCA) handed out a decision on December 20<sup>th</sup>, 2012 (Case number 478/14/2010).<sup>3</sup>

In the decision of December 20<sup>th</sup>, 2012, the FCCA held that Valio was in a dominant position in the production and wholesale market of fresh milk in Finland. Moreover, the FCCA found that Valio had abused this position during the period March 1<sup>st</sup>, 2010, to December 22<sup>nd</sup>, 2012. The abuse of a dominant position consisted of selling fresh milk to retail chains (especially the S-Group) at prices that were below the average variable costs (in the following AVC). This case is thus a classic example of predatory pricing, according to European Competition Law. In fact, it is the first such Finnish case of which I have any knowledge.

6. According to the FCCA, the prices charged by Valio could not cover the AVC for the production and sale of basic varieties of fresh milk. In addition, the FCCA found that the reason for these price reductions were a strategic decision made by the top management of Valio. The idea behind the decision was to give up profits in order to prevent Valios' main competitor, Arla, from importing Swedish unprocessed milk into Finland, thus gaining a very significant market share. After (re)gaining the market share, Valio's plan was that, in the future, the prices of milk could be raised to the level that had existed before the entry of Arla (Foods) to the fresh milk market. According to the FCCA, the exclusionary effect of the pricing was stronger because of the conditional price reductions that were offered to the S-Group retail chain, which were based on purchase volumes. These reductions caused increasing losses to Arla. On the basis of the documentary evidence that was gathered by the FCCA, and the findings based thereupon, the FCCA prohibited Valios' abuse of its dominant position. The FCCA also made a proposal to the Finnish Market Court that the Court would impose a penalty

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<sup>6</sup> In 2013, the market share of S-Group was 45.7 per cent, and the market share of the K-Group 34.0 per cent.

<sup>7</sup> See also Paragraph 36, *infra*.

payment (an administrative fine) of EUR70 million on Valio. Valio denied any wrong-doing and appealed the decision by the FCCA, claiming that the company had not abused its dominant position.

### **First Pricing Period of 2010, Reductions in Milk Prices**

The FCCA found that Valio had decreased the prices of basic variety fresh milk in 2010, following the loss of some important customers to Arla. During this period of time, Arla had been gaining market shares that were earlier owned by Valio. These market gains were based on the fact that Arla, a subsidiary of the multi-national dairy group Arla Foods, started to sell fresh milk on the Finnish market, fresh milk that had been produced from unprocessed milk imported from Sweden. Apart from Arla, there are only certain smaller regional dairies that compete with Valio on the Finnish market.<sup>8</sup>

This case of predatory pricing started, in the first place, based on the competition between Valio and Arla. The aim of both companies was to be able to supply fresh milk to the main Finnish retail chain, the S-Group, during the year 2010. The S-Group is a nation-wide Finnish co-operative. The members of the S-Group are, in turn, independent regional entities. The central chain, the S-Group, negotiates the prices on behalf of the whole retail chain, the whole of S-Group. The regional entities, however, make the final decisions regarding the purchases.

8. When the prices were agreed on for the first pricing period, in 2010, three regional entities of the S-Group had changed their main supplier of fresh milk products from Valio to Arla. After these changes, Valio reduced its milk prices for all customers. This happened during an ongoing pricing period (one of three yearly pricing periods). According to the decision handed down by the FCCA, these price reductions were significantly higher than the normal changes to the wholesale fresh milk prices that are under discussion during pricing negotiations.

9. Due to the price reductions, even Arla was forced to reduce its milk prices. Arla remained as a 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 and specific amount of litres. At this time, Arla also reduced its prices, but managed to slightly increase the prices without changes to its supply volumes.

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<sup>8</sup> The decision of the FCCA is an annexe to the The Market Court's decision June 20<sup>th</sup>, 2014.

### **Year 2011-Increased Production Costs vs. Proposed Price Reductions**

10. At the beginning of the year 2011, both Valio and Arla raised their fresh milk prices due to increased production costs. At the end of the year 2011, Valio, however, offered new price reductions to the S-Group, despite the fact that the price paid by Valio to its producers for unprocessed milk had increased. The offer to reduce the prices was conditional, subject to an increase in the volumes purchased.. According to the Valio offer to the S-Group, while also maintaining the existing volumes, the prices of the milk would have slightly increased. As a result, in order to maintain the fresh milk product supplies to the S-Group for the remainder of 2011, Arla had to withdraw its own proposal, which had been to increase its fresh milk prices.

### **Brief Summary of Facts and the Decision of the Competition Authority**

12. The FCCA found that, after the reductions, the prices for milk that were charged by Valio no longer covered the AVC for the production and sale of basic varieties of fresh milk. In addition, the FCCA found, based on the documentary evidence, that the reason for the price reductions was a strategic decision that was made by the top management to give up profits in order to prevent Arla Ingman from importing Swedish unprocessed milk to Finland, and thus gaining a very significant market share. After this recoupment of market share, the prices would have been raised to the level that existed before the entry of Arla into the market. According to the FCCA, the exclusionary effect of the pricing was increased due to the conditional price reductions that were offered to the S-Group, based on purchase volumes. These reductions caused increasing losses to Arla.

13. As stated in Paragraph 7, *supra*, the FCCA prohibited Valios' abuse of a dominant position. The FCCA made a proposal to the Finnish Market Court for a penalty payment (an administrative fine) of EUR70 million.



## **Market Court Proceedings and Decision of the Market Court**

14. The Finnish Market Court handed down the Court's final decision on 26<sup>th</sup> June, 2014<sup>9</sup>. This decision is the most significant single Finnish case concerning the abuse of a dominant position. The penalty payment (administrative fine) of €70 million is the highest payment passed by the administrative courts for a violation of Finnish national competition legislation. While the case was decided according to national legislation, the decision stands firmly on the shoulders of EU Competition Law.

16. The Market Court held that the restriction of competition by Valio's actions also had an effect on trade between European Union member states, since the restrictions by the dominant company made it more difficult for other companies to enter the Finnish market for fresh milk products. The Market Court held, in its decision, also, that the restrictions were partially targeted at a competitor from another EU member state, and at the import of raw milk. On these grounds, the Market Court applied Article 102 TEU, together with national competition law. The Market Court applied the criteria of predatory pricing that were laid down in the AKZO case<sup>10</sup> (The AKZO test) as follows.

- \* prices below AVC are presumed to be predatory, and
- \* prices below average total costs (ATC) are predatory if they are proved to be part of a plan to eliminate a competitor<sup>11</sup>

17. The Market Court went on to cite a large number of other CJEU judgments in its decision. The decision of the Market Court took almost a year to write and hand down after the main proceedings in the case. It is very long, and partly difficult to analyse, due to confidentiality issues and the complicated (Finnish) language that is used in the decision.

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<sup>9</sup> Final decisions of administrative courts in Finland are decisions (in Finnish, päätös), not judgments (in Finnish, tuomio). Arla was formed by the merger of a Finnish limited dairy company, Ingman Foods Ab, into the multi-national group, Arla Foods.

<sup>10</sup> AKZO Chemie BV v. Commission, C-62/86; EU:C:1991:286, See the AKZO case, including the AKZO-test Alison Jones and Brenda Sufrin, *EC Competition Law. Text, Cases and Materials. Third Edition*, Oxford University Press, 2008 pp. 447-453, Richard Whish (2009) *Competition Law, Sixth edition*, Oxford University Press. pp. 732-733, Kirsi Leivo, Timo Leivo, Hannele Huimala & Mikko Huimala (2012): *EU:n ja Suomen kilpailuoikeus, 2. Painos*. pp. 802-806.

<sup>11</sup> The Market Court stated, in its decision, that it was not necessary for the FCCA to show intent to foreclose to conclude that Valio's pricing behaviour was predatory. Furthermore, it was explicitly stated that intent could be presumed, since these prices did not cover the variable costs. Despite this conclusion, the Market Court examined in detail the evidence submitted for Valio's intent.

### **The Case at the Finnish Market Court**

18. Valio appealed the FCCA decision and contested the decision on many grounds. These grounds included the following.

- \* the definition of the relevant market
- \* the existence of a dominant position
- \* the pricing at below cost
- \* the character of Valios' volume-based rebates
- \* the assessment of the effects of its behavior, and
- \* the fine proposed by the FCCA (EUR70 millions).

### **Definition of the Relevant Market**

19. Valio argued that the relevant product market and the geographical market should be defined more broadly than in the FCCA's decision of December 20<sup>th</sup>, 2012.

20. Valios' point of view was that the relevant product market consisted of all liquid milk products, instead of just the basic variety products. In Valio's view, the demand should have been evaluated from a retail wholesale perspective, instead of from a consumer perspective.

21. In the view of the Market Court, the product market, basic fresh milk, was defined in the correct way by the FCCA. According to the Market Court, the retail stores do not have much power to shift consumer demand from one liquid milk product to another. According to the Market Court, there is little or no substitution between basic fresh milk and other liquid milk products, including cream or lactose-free milk. This is due to the different purposes of use of the various dairy products. Supply substitution is affected by constraints in the supply of fresh milk from dairy farmers, and in manufacturing capacity. As for the geographical market, Valio's main argument was that the relevant market should be Southern Finland, instead of all of Finland, since there have been significant milk imports from Sweden, and Swedish milk has been popular in the region.

22. The Market Court stated that the FCCA had correctly defined the geographical market as Finland, because major dairies and food retail chains mainly negotiate on a nation-wide basis. On the other hand, the relevant market is not wider than Finland, since the market share for imported milk has been small. The Court also stated that the possibilities to expand milk imports to Finland are small, mainly due to the fact that fresh milk is not very easy to preserve, but also due to transport costs by sea, and to consumer preferences. According to the Court, there has been no direct import of fresh milk by the retail chains themselves during the period under investigation (2010-2012).

### **Valios' Dominant Position in the Finnish Fresh Milk Market**

23. The Market Court accepted the reasoning of the FCCA as to the dominant position. The Market Court stated that Valio's market share had exceeded 50 per cent during the entire period in question. The market share had declined, though. The market share of Arla was approximately 24 per cent in 2008. Since then, Arla's market share increased until 2010, when it reached approximately 30 per cent. During the years since 2010, Arla's market share has balanced out at around 30 percent. The market share of the smaller regional dairies has been between 12 and 15 per cent.<sup>12</sup> What is interesting in the Market Court's decision is that the Court also noted that Valio annually purchases 86 per cent of all of the raw fresh milk that is produced in Finland. The price Valio pays to its own suppliers is affected by the company's overall sales to customers. According to the Market Court, it is possible for Valio to increase the price paid for raw fresh milk on the basis of revenues that are generated by other products. Valio is obliged to sell a certain quota of the fresh milk it purchases to its competitors, but the competitors must, in effect, pay a price that corresponds to the price that Valio pays. Furthermore, Valio's competitors must, in effect, pay to their own suppliers a price that is slightly higher than the price paid by Valio, in order to prevent losing their suppliers to Valio. Further issues that have strengthened Valio's market position have included its own distribution systems, strong brands and broad product categories.

25. The Market Court has stated that a dominant position was presumed, due to Valio's high market share, unless there are some exceptional circumstances that suggest otherwise. The fact that Valio's market share had been declining did not affect this evaluation. Valio tried, in vain, to claim that its market power was limited by international competition, and by the real negotiating power of the (two) main retail chains. Valio also tried to argue that the barriers to entry into the fresh milk market were not high. The Market Court stated that it failed to find sufficient supportive evidence for these claims.

26. Valio claimed that its business: trading with basic variety milk products, had been profitable during the period in question (2010-2012), and that the rebates were given to customers in order to meet the competition (from Arla). According to Valio, the volume rebates were quite lawful, on the basis of the efficiency gains from each customer. Valio's main argument regarding the pricing at below cost was that the price for raw milk that Valio pays to its producers, is not a variable cost, and the FCCA had thus based its calculations on false assumptions. Valio argued that the price it pays to its own producers is partly a fixed cost, since the company has an obligation to purchase all of the raw milk produced by its suppliers, and the purchase volumes do not vary depending on the

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<sup>12</sup> See also Paragraph 2, *supra*. In 1994, Valios' market share in the Finnish fresh milk market was approximately 90 per cent, in 1995, approximately 80 per cent, and in 1996, approximately 70 per cent. See the Finnish Supreme Administrative Court's decision, SAC 1998:65. According to the information published by the earlier Finnish Competition Authority, Kilpailuvirasto, in 2000, Valio had already had a dominant position in the Finnish fresh milk market in 2000, with a market share of more than 70 per cent, <http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?sivu=tied/t-2000-19>

volumes that are further processed by Valio. All this was due to Valio's ownership structure, which is based upon co-operatives that are owned by dairy farmers. According to Valio, the price paid to its suppliers also includes profits, in addition to costs. and does not depend on the volumes of milk produced.

27. The FCCA had stated that while cost calculations are normally made using the costs of the company that is accused of predatory pricing, in Valio's case, the criteria were fulfilled by using the prices paid by Valio's competitors for raw milk. The FCCA stated that Valio's costs were based on its significant market power and its operating principles, rather than on the company's production efficiency. Regardless of this, the FCCA had used the prices of raw milk paid by Valio in order to evaluate the prerequisites for the operation of an equally efficient competitor.

28. According to the FCCA, competitors must set their prices at a level that covers the costs of the quota of raw milk that competitors are entitled to purchase from Valio. In the opinion of the FCCA, this was required in order to be able to operate profitably in the market. As a result of this approach, the FCCA stated that it was not relevant whether the price that 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 of the milk produced, because, in all events, these costs are variable costs for equally efficient competitors to Valio.

29. The Market Court accepted the FCCA's approach. The Court noted, also, that it is not possible to determine the possible amount of distributed profits in the price for the raw milk that Valio pays to its suppliers.

30. Valio had also argued that the price of raw milk should be regarded as avoidable costs. Even this argument was rejected by the Market Court.

31. Although the Market Court had already stated that Valio's prices were below the company's AVC, the Court addressed the issue of the company's intention to also eliminate its competitors. The possibility for Valio to recoup its losses was also addressed, even if it is not necessary to prove this in order to establish predatory pricing. Both the intention to eliminate competitors, and the possibility of recoupment, were proven, mainly by use of Valio's internal documents.<sup>13</sup>

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<sup>13</sup> The Market Court found that Valio's top management had made a strategic decision in February, 2010, to drop the wholesale prices of fresh milk significantly, so as to foreclose competition in the Finnish market. This finding was based on e-mail correspondence and internal documents found during the FCCA's inspections. According to the Market Court, the evidence showed that the purpose of the price cuts was to make the importation of (Swedish) milk unprofitable for Arla, so as to increase Valio's market share, and thereafter to raise the prices back to a higher level. See also Paragraph 6, *supra*. 10 The

32. Valio had argued that it had only met the competition from Arla, together with other justifications for its conduct. Valio had argued that it had only defended itself against Arla's aggressive pricing in order to avoid bigger losses. These losses would have been caused had Valio lost its market share and sales volumes. Since it had an obligation to buy all the raw milk produced by its suppliers, it could not profitably use the raw milk bought in the short term for other products than the basic milk variety. The Market Court stated that Valio had not proven that the company could not accommodate its raw milk purchases to the demand for its own products, and those less profitable products would have been its only option. It was also not proven, that the initiative for the company's pricing, below AVC, had come from its customers or competitors. The price reductions, which were unusual both for their size and for their timing, were not deemed reasonable and proportionate.

33. When determining the amount of the penalty payment (the administrative fine), EUR70 million, The Market Court took into account, among other issues, the duration, scope and seriousness of the restriction, the approximately EUR2 billion annual turnover of Valio, and the fact that Valio had already been found guilty of abusing its dominant position in November, 1998. The Market Court did not take into account any potential (future) claims for damages against Valio by its competitors, when determining the level of the penalty payment.

#### **Further Proceedings, Private Enforcement, Other Procedural Matters**

34. At present there are six more cases pending at the Helsinki District Court. In these cases, Arla and five other dairy companies have claimed compensation for damages caused by the predatory pricing of Valio. Arla has claimed EUR58 million (Case Number L 14/46120) while four other, smaller, dairy co-operatives; Osuuskunta Maitomaa, Osuuskunta Satamaito, Osuuskunta Maitokolmio, and Ilmajoen Osuusmeijeri, together with one small dairy company, Juustoportti ILO Oy<sup>14</sup>, have claimed a total of EUR43.6 million (Case Numbers L 14/54043, L 14/54044, L 14/54046, L 14/54061 and L 14/54062). The statements of claim and summons have been served to Valio, but Valio has thus far filed no statements of defence to the Helsinki District Court. It seems that the dairy companies started these proceedings in order to avoid any threat of breaches of limitation periods.

35. According to Section 20 of the Finnish Competition Act (No 948/2011), the right to compensation shall expire if the action for damages has not been instituted within ten years of the

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decision in question, against Valio, was handed out by the SAC on November 11<sup>th</sup>, 1998, SAC 1998:65 (Case Number 3842/1/97), <http://www.finlex.fi/fi/oikeus/kho/vuosikirjat/1998/199802498>.

<sup>14</sup> Osuuskunta = co-operative, Maito = milk, Juusto = cheese, Osuusmeijeri = Dairy co-operative

date on which the violation occurred (in the Valio case, between 2010-2012), or in the case of a continuous infringement, within ten years of the date on which the violation ended. 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 in the matter becomes valid.<sup>15</sup>

36. There is a tendency in Finnish Competition Law to be ready for flexible solutions in order to guarantee compliance with EU law. One example of this tendency is the decision of the Supreme Administrative Court (SAC) on 29<sup>th</sup> October, 2013,<sup>16</sup> SAC 2013:170. The SAC dismissed Arla's appeal against the interim decision of the Market Court as being inadmissible. In doing this, the SAC quoted, among other sources of law, CJEU case law (Cases Courage and Manfredi), together with Article 47 of the EU Charter of Fundamental Rights. Arla had claimed the status of a party, or an intervener, during in the (administrative) proceedings between FCCA and Valio at the Market Court. The Market Court had rejected these claims by Arla. In the interim decision, the Market Court held that Arla's interests could be sufficiently protected, as the Court provided Arla with an opportunity to be heard.

37. A decision based on Valio's appeal against the final decision of the Market Court of June 26<sup>th</sup>, 2014, cannot realistically be expected earlier than the summer of 2016. On August 19<sup>th</sup>, 2014, the Supreme Administrative Court ordered, on Valio's demand, that payment of the fine (the penalty payment) must be postponed while the case is pending at the SAC.<sup>17</sup>

38. Valio has been very critical while commenting on the decisions handed down by the FFCA and the Market Court.<sup>18</sup> The FFCA has tried to meet this critique on its Internet site.<sup>19</sup>

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<sup>15</sup> The Competition Act entered into force on 1<sup>st</sup> November, 2011, see Section 50 (3) of The Competition Act. According to earlier legislation, Section 18a of The Act on Restraints of Competition (480/1992), the limitation period was five years, see e.g., Toni Kalliokoski ja Pirita Virtanen: Kilpailuoikeudellinen vahingonkorvaus asfalttikartelliratkaisun valossa, Defensor Legis 1/2013 pp. 29-46, especially pp. 37-39 (in Finnish)

<sup>16</sup> 13 <http://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2013/201303403> (Case Number 2534/3/13), see also Katri Havu: Private Enforcement of EU (Competition) Law-Remarks and Outlooks Regarding the Intertwinement of EU and National Law, University of Helsinki, Faculty of Law. Legal Studies Research Paper Series. Paper No 29 (paper can be downloaded without charge at <http://www.ssrn.com>).

<sup>17</sup> Interlocutory decision of the SAC August 19, 2014, T:2442 (Case number 2553/3/14) <http://www.kho.fi/fi/index/paatoksia/muitapaatoksia/muupaatos/1408442208444.html>

<sup>18</sup> See e.g. <http://www.dairyreporter.com/Manufacturers/Fresh-milk-antitrust-fine-costly-decision-for-consumers-and-Valio>.

<sup>19</sup> See <http://www.kkv.fi/Ajankohtaista/Tiedotteet/2014/kkv-nakokulmia-valio-paatokseen/>

## 6.6 DORIEN BRUGMAN, DISTRICT COURT OF ROTTERDAM (NETHERLANDS)

**Chipshol Holding B.V. vs ACM (Dutch Competition Authority)**

**Rechtbank Rotterdam 21 November 2013 (ECLI:NL:RBROT:2013:9069<sup>20</sup>)**

**Abuse of Dominance; Reference to Promedia-Case (T-111/96<sup>21</sup>)**

### **The Facts**

1. Chipshol (the complainant) owns land plots in the area directly around Schiphol Airport.

In 2011 Chipshol issued a complaint against Schiphol Airport at the Dutch National Competition Authority (*Autoriteit Consument en Markt*, ACM) regarding the abuse of dominance by Schiphol Airport (more specifically: by Schiphol Real Estate B.V., a fully owned subsidiary of *Luchthaven Schiphol NV*; hereafter together referred to as “Airport Schiphol”). Chipshol stated that Schiphol Airport continuously hinders its attempts to develop and exploit its real estate, by using its contacts at government bodies (province, municipality, ministries) and by taking part in some partnerships with government bodies from which Chipshol is excluded. More specifically, Schiphol Airport interferes in governmental and legal procedures on urban planning with the sole objective of hindering Chipshol. By doing this, Chipshol is being deprived of its possibilities to develop and exploit real estate in the Schiphol area.

2. In this case note I will not elaborate on the facts. Just one example to make it more clear what the case is about: Chipshol complained about Schiphol Airport intervening in the urban planning procedure for Chipshol’s application for a building permit, which was necessary to exploit the “*Groenenbergterrein*”, one of its land plots. These procedures resulted in the decisions of governmental bodies, allegedly prompted by Schiphol Airport, which blocked the possibility to exploit this land.

3. Schiphol Airport’s position is a particular one. On the one hand, Schiphol Airport (by her real estate subsidiary) is a private undertaking, like Chipshol, owning a considerable amount of land

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<sup>20</sup> <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2013:9069>.

<sup>21</sup> <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd6e06909e3c484ed1959b84f23d5d791c.e34KaxiLc3qMb40Rch0SaxuPb3z0?text=&docid=44050&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=712948>.

around Schiphol, and protecting its private, commercial interests. On the other hand, Schiphol Air Airport runs an airport, and for this purpose it also protects public interests, e.g., aviation interests, like maintaining a safe situation around Schiphol and securing the possibilities of expanding Airport Schiphol in the future by preventing real estate development in some areas (e.g., land earmarked for the construction of a fifth runway) . So, when Schiphol Airport issues objections against building plans from another company, like Chipshol, the question is whether this is for public/aviation reasons (the interest of the Airport), or for commercial/private reasons (preventing a competitor from developing real estate in a commercially interesting area).

4. Chipshol's complaint about the abuse of dominance by Schiphol Airport is only the most recent step in a series of legal cases between Chipshol and Schiphol Airport. It all started with the acquisition of agricultural land by Chipshol in the late 1980s in the then expanding Schiphol area. Several governmental procedures on urban planning, interfered in by Schiphol Airport, followed by legal cases, blocked Chipshol's plans to develop the area and build real estate. The conflict between Schiphol Airport and Chipshol even led to a criminal case on two judges of the District Court of The Hague, who were prosecuted for perjury. Both judges were finally acquitted by the Court of Appeal.

### **The Judicial Proceedings; the Decision of the ACM**

5. By its decision of 20<sup>th</sup> August, 2012, the ACM rejected the complaint of Chipshol.

The ACM interpreted the complaint as a complaint on the abuse of dominance (as stated in Article 24 of the Dutch Competition Act; the equivalent of Article 102 TFEU) by influencing government decisions and procedures and initialising legal procedures, with the consequence that Chipshol, as the main competitor, was excluded from the market for aviation-concerned real estate development. As a starting point for assessing the case, the ACM took the general doctrine, as laid down in the *Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings*<sup>22</sup>, that the aim of enforcement activity should be to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare. The term 'anti-competitive foreclosure' is used to describe a situation where the effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking, whereby the dominant undertaking is likely to be in a

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<sup>22</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF>.



position to profitably increase prices to the detriment of consumers. The conduct of a dominant undertaking can be objectively necessary if it produces substantial efficiencies which outweigh any anti-competitive effects on consumers. In this context, the ACM will assess whether the conduct in question is indispensable and proportionate to the goal that is allegedly pursued by the dominant undertaking.

Subsequently, the ACM stated that it is doubtful whether influencing government procedures can be seen to be abusive in the first place, as governmental bodies are themselves responsible for their decisions, and as they are able to examine the situation themselves.

To be able to assess Schiphol Airport's activities in this specific case, the ACM chose to use the framework that was laid down in the *Promedia* case<sup>23</sup>. In this case, the question was raised about whether the fact that an undertaking with a dominant position in a particular market brings legal procedures against a competitor in that market, may constitute an abuse within the meaning of (then) Article 86 of the Treaty. In this case, the Commission laid down two cumulative criteria (see para. 55), according to which, to be abusive, it is necessary that the action:

- (i) cannot reasonably be considered to be an attempt to establish the rights of the undertaking concerned, and can therefore only serve to harass the opposite party, and
- (ii) it is conceived within the framework of a plan whose goal is to eliminate competition.

6. After examining the activities in dispute at Airport Schiphol (by studying files, undertaking interviews, etc.) the ACM concluded that there was no proof of abusive behaviour by Airport Schiphol. The question about whether Airport Schiphol thus had a dominant position in the relevant market, could be left unanswered.

Chipshol brought an appeal against ACM's Decision at the District Court of Rotterdam, which is the administrative court in the Netherlands that is competent to judge the decisions of the ACM in the First Instance.

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<sup>23</sup> See above (footnote 2)

### **Ruling of the Court**

7. The District Court of Rotterdam had to assess the lawfulness of the decision of ACM. The Court came to the conclusion that ACM assessed the case correctly by taking as a starting point that influencing governmental procedures is, in principle, legitimate. Only in very particular circumstances can it become abusive. Furthermore, the Court found that, arguably, the case should be considered as a kind of “unmeritorious litigation”, as described in the Promedia-Case. As the examination of ACM was sufficiently accurate, and led to the conclusion that there was no abuse, the appeal was rejected.

Chipshol appealed to the Trade and Industry Appeals Tribunal (in Dutch: *College van Beroep voor het Bedrijfsleven (CBb)*). This appeal is still pending.

### **Topics Discussed**

8. On the one hand, this case, on the Dutch equivalent of Article 102 TFEU, is rather specific. The allegedly abusive conduct-interfering in governmental procedures and initialising legal procedures on urban planning procedures-with (allegedly) the (sole) goal to exclude your competitor, who wants to develop real estate-was a case not seen before in case-law.

For ACM and the Court, it was thus a challenge to find a ‘framework’ that helped to assess this kind of conduct. As described above, ACM proposed to use the framework of the Promedia-Case, and the Court approved that approach.

9. The Promedia-Case regards legal procedures in the common sense (a legal conflict, between two parties). As the Court emphasises in Promedia (para. 60), the ability to assert one’s rights through the courts, and the judicial control which that entails, constitutes the expression of a general principle of law which underlies the constitutional traditions that are common to the Member States, and which is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4th November, 1950. As access to the Court is a fundamental right and a general principle to ensure the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty.

The case described above is different to the extent that it also relates to governmental procedures (an administrative procedure, starting with public participation, which lead to the decision of a

governmental body, after which the parties which disagree can lodge an objection and, finally, start a legal procedure). Does that make a difference to assessing the case, as ACM (and the Court?) seems to suggest? The question is whether everybody should have the fundamental right, even more than starting a legal procedure, to participate in a governmental administrative procedure. Isn't it the responsibility of the governmental body to ensure the democratic legitimacy of its own decision-making? This topic was discussed in the working group.

10. Furthermore, we should note that in the Promedia Case, the compatibility of the two cumulative criteria that was suggested by the Commission, is not challenged by Promedia (see paragraphs 57-58). The Court thus only examined whether the criteria had been applied in the right way. So, this question remains: what about those criteria? Could we ourselves, think of better criteria? Should they be stricter or looser (or different) than those from Promedia? On the other hand, this case focuses on some general points of interest. Similar cases with similar questions could surface everywhere, where large companies with public 'tasks' and private interests try to protect their position in the market. This position, at the intersection of public and private interest, in a (partly) regulated market, raises many interesting questions, about essential facility doctrine, state aid, cross-subsidies, and also, in this specific case, on the abuse of dominance, by influencing governmental procedures. The special position of the 'public' player in the private market (airports, ports, rail way companies, etc.) bears a risk of abusing this special position.

11. Although discussion on these kinds of interesting subjects will probably be a never ending story, the legal conflict between Chipshol and Schiphol Airport seems to have reached the last stage, as Chipshol's strategic land in the Schiphol area is for sale now. Anyone interested? <sup>24</sup>

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<sup>24</sup> <http://www.chipshol.com/about-chipshol.html>.

## **6.7 ELISABETH SUNDLÖF, MARKET COURT (SWEDEN)**

### **Information Concerning the Judgment**

- Name of the Court: The Market Court-Name of the parties: Uppsala Taxi 100 000 AB versus Swedavia AB and EuroPark Svenska Aktiebolag-Case Reference Number: MD 2011:28-Date of the judgment: November 23<sup>rd</sup>, 2011.

### **Legislation Concerning Competition and Primarily Abuse of a Dominant Position**

1 The Swedish Competition Act and the EU competition rules, contain two main provisions: prohibition against anti-competitive co-operation, and prohibition against the abuse of a dominant position. The Swedish rules are a blue copy of Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU). Chapter 2, Article 7 of the Swedish Competition Act states that the abuse of a dominant position is forbidden.

2 According to Chapter 3, Article 1 of the Swedish Competition Act, the Swedish Competition Authority may impose an undertaking to terminate an infringement of any of the prohibitions that are laid down in Chapter 2, Article 1, or Article 7 of the Swedish Competition Act, or Articles 101 or 102 in TFEU.

3 However, if the Swedish Competition Authority decides, in a particular case, not to impose such an obligation pursuant to Chapter 3, Article 1, in the Swedish Competition Act, the Market Court may, under Chapter 3, Article 2 of the Swedish Competition Act, do so at the request of an undertaking that is affected by the infringement.

4 Article 2 in Chapter 3 can only be found in the Swedish Competition Act and it has no counterpart in the EU-competition rules.

### **Background**

5 This case concerns fees for pre-booked taxis at Arlanda Airport, the largest airport in Sweden. It is located approximately 42 kms. from Stockholm city centre and about 36 kms. from Uppsala.

6 In March, 2010, a new traffic lane system for taxis was introduced at Terminal 5, the largest terminal at the Airport. This is referred to as the “seven lane system”. Swedavia, a state owned company, which handles the airport, decided, later in 2010, to procure a “new service”, for ordering the taxi cars in the different lanes. The contract to manage this was won by EuroPark.

7 The “new service” system meant that taxi companies wishing to operate at Arlanda airport must pay a service charge of 35 SEK, excl. VAT, each time a taxi vehicle passed the entrance to the taxi parking lot.

8 In early 2011, Swedavia introduced two different fees for pre-ordered taxis. A fee of 25 SEK, excl. VAT, was used for normal services if the customer had pre-ordered a taxi. The normal services enabled the customers to queue at a service counter at the terminal and there report that he or she had pre-ordered a taxi. The driver could then pick up the customer at the service counter.

9 If a customer wanted the driver to meet him or her with a sign at the arrival hall, there was a high level of service fee. This fee consisted of the normal service fee of 25 SEK, excl. VAT, as well as one extra fee of 25 SEK, excl. VAT, totalling 50 SEK, excl. VAT.

10 Uppsala Taxi claimed that the company had, for about thirty years, been meeting customers who had pre-ordered a taxi, when they arrived at Arlanda airport, without charging extra. They considered themselves not to be in need of Swedavia's and Euro Park's administrative services.

11 Uppsala Taxi meant that Swedavia and EuroPark had abused their dominant position and made a complaint to the Swedish Competition Authority, which in this case decided not to handle the case.

12 Uppsala Taxi then brought the proceedings to the Market Court against Swedavia and EuroPark. The claim

13 Uppsala Taxi wanted the Market Court to impose on Swedavia, together with EuroPark, or on another performer who performs similar tasks to EuroPark, under penalty of two million SEK, to cease introducing or charging fees for pre-ordered taxi services in the form of a charge for normal service fees, and a high level of service fees, or other equivalent or similar fees.

### **Cause of Action**

14 According to Uppsala Taxi, Swedavia and EuroPark held a dominant position in the relevant market, the market for the provision of a queue system for taxi vehicles at Arlanda Airport. They meant that this market consisted of two submarkets, the market for introducing a queue system for taxis at the airport, and the market for operating a queue system for taxis at the airport.

15 The introduction of the fees constituted an abuse of a dominant position in the form of excessive pricing, unfair contract terms, or tying in the violation of Chapter 2, Article 7, and Article 102 of TFEU.

16 Uppsala Taxi held, in Court, that it was very important for customers travelling to Uppsala to be able to pre-order a taxi. This was because it was difficult to find a taxi driver who was interested in driving to Uppsala. Instead they wanted to drive south to Stockholm. It was also important for Uppsala Taxi to be able to handle pre-ordered taxi cars in order to plan their traffic so that costs could be kept down, while also reducing their environmental impact.

17 Since Uppsala Taxi previously did not charge for the service of picking up the customer at the arrival hall, the new charges of Swedavia and EuroPark led to a corresponding cost for Uppsala Taxi and, by extension, to the taxi company's customers.

18 In Court, Uppsala Taxi claimed that Swedavia and EuroPark had not shown that charges were cost-justified.

19 Swedavia held that the use of the lane system came into force on 23<sup>rd</sup> March, 2010, and that the system had previously been examined by the Market Court in a judgment, MD 2011: 2. However, that system did result in two main problems: an inefficient traffic flow, and congestion in the arrivals hall. To ensure the effectiveness of the “seven lane system”, Swedavia had to ensure that the service for pre-ordered taxi cars did not block the flow in “the seven lane system”. In order to do so, the new procedures were introduced.

20 Swedavia claimed that the introduction of new procedures were neither excessively priced, nor did they contain unfair contract terms, and it was not unlawfully binding. It was, at least objectively, justified, and Swedavia had not abused a dominant position.

21 EuroPark held that the company was completely controlled by Swedavia, in terms of the pre-ordered counter fees. EuroPark was not dominant in the current market. The fees were not excessive; it did not have unfair terms, nor was it unlawfully binding. EuroParks' profit margin was marginal. No foreclosure effect, in the meaning of competition law, have arisen.

### **The Market Court**

22 The Court found that the relevant market consisted of a market for the provision of a queuing system for taxi vehicles, as the Court had found in two previous cases concerning lane systems for

taxis at Arlanda Airport. It also found that Swedavia had the responsibility to operate and manage the airport, and thereby it had the ability to control access to the airport's infrastructure for the transport of persons to and from the terminal area. EuroPark had undertaken to see that the system worked.

23 The Court found that Swedavia and EuroPark had a jointly dominant position.

24 In the light of the findings of the case, and in view of the limited space available at Arlanda Airport, the Market Court noted that the purpose of the introduction of a procedure concerning the service to pre-order taxis and to charge a fee for a service desk, a normal service, was to streamline the flow of taxis at the airport. The Court found that this did not constitute unfair contract terms.

25 Regarding the collection of the high level service fee, it lacked the required connection with the pre-ordered taxi. It had not been satisfactorily shown that the fee increased efficiency and lead to shorter waiting times, thereby increasing satisfaction among both the taxi companies and the customers. It could not be excluded that problems might be solved in some other way. The Court considered it unfair to impose on Uppsala Taxi the high level service fee. According to the Market Court, both Swedavia and EuroPark had abused their dominant position, in the form of unfair contract terms.

26 Concerning excessive pricing, the Market Court found that there was insufficient evidence to conclude that the conditions, about which Uppsala Taxi had made a complaint, might be regarded as excessive pricing. Finally, regarding the issue of being bound, the Market Court considered that there was nothing that showed that illegal binding was in hand.

27 The Market Court also found that Article 102 TEUF should apply, and that the application of the Court of the Competition Act was consistent with Article 102 TEUF. The application of Article 102 thus led to the same results as an application of Chapter 2, Article 7.

## **Conclusion**

Where, and how, the taxi companies could pick up taxi customers, were of great importance, and the competition at the airport between the different taxi companies had been intense. The Market Court had tried lane systems at the airport twice before.

In this case, Uppsala Taxi had difficulties in proving excessive pricing. In this respect, the Court referred to the circumstances of the case, and to United Brands, and the criterion in that case for

reviewing excessive pricing. According to the European Court of Justice, a price is excessive if “it has no reasonable relation to the economic value of the product”. This can be determined by a twofold test: it should be shown that (i) the price-cost margin is excessive, and (ii) the price imposed “is either unfair in itself or when compared to competing products” (Paras. 250-252).

1 The Judgment of the Court, of 14th February, 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, Case 27/76.



## **7. COMPETITION LAW ENFORCEMENT IN THE NETWORK INDUSTRIES**

### **7.1 CASSANDRA LANGE, CENTRAL COURT OF APPEAL (NETHERLANDS)**

#### **Case Note on UPC Nederland BV vs Gemeente Hilversum (C-518/11)**

##### **The twilight zone of private enforcement of competition law**

**“Ruling sheds more light, but is not the beacon of light necessary for an effective private enforcement of competition law”**

##### **1. Introducing the case**

On 7 November 2013, the Court of Justice of the European Union (EU) handed down its judgment in UPC Nederland BV vs Gemeente Hilversum (C-518/11). The case concerned a reference for a preliminary ruling brought before the Court of Justice EU by the Amsterdam court of appeal (ECLI:NL:HR:GHAMS:2011:BT6548). The questions regarded whether under EU law a municipality could intervene in a telecommunications operator's freedom to fix tariffs, by relying on a tariff clause from a previous sale agreement.

##### **2. Key facts**

Before 1996, the municipality of Hilversum ("Municipality") had entrusted the cable television network activities on its territory to its own cable operator. In 1996 it sold its operator to UPC's predecessor due to the liberalization of the EU telecommunications sector through the 'New Regulatory Framework' (NRFc). In the sale agreement the Municipality reserved to itself powers with regard to the pricing of the basic cable package offered through a tariff clause, which allowed for only limited annual adjustments of the tariffs paid by the inhabitants of Hilversum. The Municipality has held UPC to this clause for a number of years, despite previous attempts from UPC to increase the tariff. Those attempts were successfully stopped by the Municipality in the Dutch courts.

### **3. Preliminary questions**

In 2005, UPC initiated legal proceedings about the tariff clause, claiming that it was incompatible with EU law. In line with the previous judgements, the court in Amsterdam dismissed UPC's application to declare the tariff clause void. On appeal, the appeal court in Amsterdam asked the Court of Justice EU several preliminary questions, most notably:

- (i) whether the Municipality had the power under the NRF to intervene in the fixing of tariffs in order "to protect the public interest";
- (ii) whether the duty of sincere cooperation precluded the Municipality from applying the clause;
- (iii) whether article 101 TFEU is a provision relating to public policy, that a national court must apply of its own motion;
- (iv) whether the tariff clause is in essence a hardcore restriction, which is automatically void as stipulated in artikel 101(2) TFEU;
- (v) to what extent does the penalty of invalidity under article 101(2) TFEU allow for some latitude in terms of time?

### **4. Answers by the Court of Justice EU**

In its judgement, the Court of Justice EU only answered the first two questions:

- (i) The NRF established National Regulatory Authorities ("NRAs") responsible for regulatory intervention such as tariff restrictions. In the Netherlands, this task was given to the (former) Independent Post and Telecommunications Authority. Since the Municipality is not a NRA, the Court of Justice EU concluded that it does not have the power to intervene directly in retail tariffs in respect of services falling under the NRF.
- (ii) The duty of sincere cooperation precludes a municipality from relying on a contractual tariff clause, which restricts the supplier's freedom to set tariffs. In accordance with this duty, the Municipality should have ensured that the regime established by the NRF was effective and should have avoided taking any measures contrary to it. By insisting on the continuous application of the tariff clause and thus restricting UPC's ability to set tariffs, the Municipality contributed to an infringement of the NRF rules.

## **5. Analysis**

This ruling sheds more light on the twilight zone of private enforcement of competition law:

- First of all the Court of Justice EU ruled that a public authority is also bound by its duty of sincere cooperation (Union loyalty) when acting as a private undertaking (as the Municipality stated in this case). This duty of sincere cooperation can preclude a public authority from invoking a private undertaking's contractual obligation to guarantee a particular public interest. It could potentially have far-reaching implications for both public authorities and private operators. The former may have to find new ways of guaranteeing their public interests when dealing with private parties. The latter are possibly no longer bound by certain contractual obligations towards public authorities. Although this ruling specifically concerns the telecommunications market, its implications could potentially also be felt in other markets that have been subject to the combination of privatization and sector regulation at EU level.
- The Court of Justice EU distinguishes difference between UPC's application to annul the tariff clause and UPC's application to declare that the Municipality may no longer rely on that clause.
- In this ruling the Court of Justice EU gives clarity only on the latter matter. From the expiry of the deadline for the implementation of the NRF (on 25 July 2003) on, the Municipality is precluded from intervening directly in retail tariffs. In doing so, the Municipality contributed to an infringement of the rules of the NRF, which do not impose such a restriction on suppliers of electronic communications services but, on the contrary, stress the freedom to set tariffs, subject to specific restrictions which may, on the basis of market analysis and under precisely determined procedures, be set by (only) NRAs. Question remains how to determine from which date the Municipality is liable for damages? From the 25th of July 2003 and onwards? Or does it depend on action taken by UPC hereafter?

This ruling could have been a beacon of light in the Twilight Zone of private enforcement of competition law, if the court had also answered the remaining questions posed by the Amsterdam appeal court. Unfortunately the Court of Justice EU remains silent on these topics:

- The answer to the question, whether article 101 TFEU is a provision relating to public policy and should therefore be applied of its own motion (iii), is not evident in the Netherlands and remains unresolved.
- According to the Court of Justice EU the question, whether the tariff clause should be annulled, is a matter of national law (point 57). The court doesn't explain why. If the sanction of article 101(2) TEU is applicable, the tariff clause is automatically void, regardless of national law.

This is the case when the tariff clause is considered to be a hardcore restriction (iv). This question also remains unresolved.

- The scope of article 101(2) TFEU, and whether the voidness of 101(2) can be limited in time, remains a question (v).
- An other question involves connecting the dots between the telecomregulations (NRF rules) and the EU competition law in general. According to the NRF-rules, EU competition law should be applied within the NRF. What is the meaning of decisions of the European Commission and the NRA, taken in a specific case within the NRF about (not applying) priceregulating measures, in a civil procedure about a tariff clause in an agreement? This is an important issue in civil proceedings.

## 6. Final judgement

On 4 november 2014 the Amsterdam court of appeal (ECLI:NL:GHAMS:2014:4543) ruled that the Municipality could no longer invoke the tariff clause against UPC as of 25 july 2003 and after because of infringement of the NRF. This constitutes a tort against UPC and therefore the Municipality is liable for damages, to be decided on in a later procedure.

## **7.2 DENITSA SLAVOVA, VARNA REGIONAL COURT (BULGARIA)**

**Decision No. 1795/28.12.2011 of CPC/Commission for Protection of Competition – National Competition Authority/, Case No. CPC-828/2011 r.**

**Decision No. 9169 from 1.07.2014, SAC /Supreme Administrative Court/ on Adm. Case No. 1222/2012, the IV division, Rapporteur - Judge Svetoslav Slavov.**

**Decision No. 15276 of 16/12/2014, SAC/Supreme Administrative Court/ on Adm. Case No. 12180/2014, the 5-member panel, Rapporteur-Judge Albena Radoslavova**

**Decision No. 1795/28.12.2011 of CPC/Commission for Protection of Competition – National Competition Authority, Case No. CPC-828/2011 r.**

Proceedings before the CPC were initiated at the request of the “Eastern Telecommunications Company” AD/ETC, in which allegations of misconduct on the part of the “Bulgarian Telecommunications Company” AD/BTC were exposed, resulting in an unjustified refusal to retain a contractual relationship and the implementation of the decisions of the Commission for the Regulation of Communications, namely, the unilateral and unlawful termination of the interconnection of public electronic communications networks between the “Bulgarian Telecommunication Company” and the “Eastern Telecommunications Company”, dating from 19.04.2010.

The applicant is a public operator that provides electronic communications services through the fixed telecommunications network. In this capacity, ETC signed contracts with other public operators offering electronic services, both fixed and mobile, including BTC, to connect to its mobile network thus enabling subscribers using its network to make calls to subscribers of other public operators. Providing service “termination” from BTC is a prerequisite for access to its subscribers, including the termination of calls that are generated outside the territory of the Republic of Bulgaria.

On 25.02.2011 the contract for interconnection between ECT and BTC was unilaterally terminated by the defendant. The reason for this termination, BTC states, was that during the period 24.01.2011-11.02.2011, there were numerous cases when traffic from numbers that are not numbers of Bulgarian Numbering Space were identified as being national, although, obviously, there is a termination of international traffic in BTC’s mobile network from ETC’s numbering space. Applicant determined the allegations of the defendant as being unproven. Claims that the

defendant is charging for termination in its mobile network, depending on the origin of the traffic, and prices for calls from the ETC network withing the BTC mobile network are much higher than those when the call originates from subscribers to international networks.

With a view to all of this, ETC argues that the unilateral termination of the connection between the two operators is unfounded and, as such, is an unjustified refusal to continue the established contractual relationship. As BTC is an operator with a significant market share in the communication services's market, this puts the defendant in the case into the position of committing an abuse of dominant position, resulting in ETC's being put into a situation of failure to carry out its business andalso telecommunications,or the elimination of ETC from the telecommunication market, because the procedure for signing a new contract takes about six months, which is sufficient time for the company to be eliminated from the market.

The defendant, BTC, claims that there was an infringement of the contract between the two parties' artificially generated traffic, which was notified to ETC, demanding that this behavior to be suspended. Once the ETC does not preclude a breach, the contract between the parties was terminated.

In its judgment, CPC takes into account the following:

For the purposes of the proceedings that were initiated, it was found that the affected market is the market for the provision of voice services to the subscribers to fixed electronic telecommunications networks, in which ETC and BTC are in competition, as the product that they provide to their customers is completely interchangeable.

Voice service is the quality transfer of voice, in real time, between two endpoints, each of which belongs to a certain public electronic telecommunications network. The service is provided by companies that are the operators of public electronic networks to subscribers with whom they have a contractual relationship. Subscribers to all public telecommunications electronic networks can make calls to each other, as public telecommunications companies are legally required to provide interconnection between their networks. The type of network-fixed or mobile, determines the type of voice service.

Markets for the provision of voice services through fixed networks cover the territory of the country, as provided for in accordance with their licenses, both of the electronic communications networks in the case have national coverage, i.e., the geographical market is the national one.

The actual composition of the abuse consists of three main elements: undertaking, a dominant position on the relevant market, and anticompetitive conduct.

### **Enterprise**

It was found that BTC is a company that provides electronic communications services, develops business and, undoubtedly, falls within the legal definition of “enterprise”.

### **Dominance**

Subscribers to different networks can connect with each other and are able to make calls when there is an interconnection between networks. All of the operators of public electronic communications networks are legally required to implement interconnection between their networks, so as to provide its subscribers with access to the subscribers of other operators. This service is paid for by the operator of the network, when the subscriber has made a call. The described characteristics of the market show that the termination service, provided by a mobile or fixed operator, is not interchangeable with the service termination on the network of another mobile or fixed operator, as each network, whether mobile or fixed access can only offer this to its own subscribers, it follows that each operator has a dominant position within the meaning of Art. 20 of the CPA/Competition Protection Act, in view of its network, as there is no possibility of substitution between the networks when making calls. It is therefore assumed that BTC is the undertaking that is in a dominant position on the market for terminating traffic in its own networks – both mobile and fixed.

### **Anticompetitive Behaviour**

The decision pointed out that the central issue between the parties is whether or not ETC has artificially generated traffic in order to prove the violation of contract that has been alleged by BTC. It is stated that, as the suspension of interconnection is provided as a contractual opportunity for the right party in the signed contract, the question on whether there was a lawful termination of the relationship between the parties, is a problem in contract law, and any ruling should be made by the competent civil court.

On the basis of what has been stated above, the CPC draws the conclusion that the data in the file does not allow for a reasoned conclusion on the implementation of anti-competitive behavior, and found that no breach of Art. 21 of the CPA/Competition Protection Act is made by the “Bulgarian Telecommunication Company”.

**Decision No. 9169 from 1.07.2014, SAC /Supreme Administrative Court/ on Adm. Case No. 1222/2012, the IV division, Rapporteur - Judge Svetoslav Slavov**

The decision of the Supreme Administrative Court is based on analysis of national competition law and, in particular, on the provision of Art. 21 of the CPA. The stated provision prohibits companies with a monopoly or a dominant market position, as well as two or more undertakings in a collective dominant position, to prevent, restrict or distort competition in the relevant market and thus affect the interests of consumers through their behaviour, by:

1. directly or indirectly imposing prices for the purchase or sale, or other unfair trading conditions;
2. limiting production, trade and technical development to the prejudice of consumers;
3. the application of different conditions for the same type of contract with regard to certain partners, thereby placing them at a competitive disadvantage;
4. concluding contracts subject to acceptance by the other parties of supplementary obligations, or concluding additional contracts which, by their nature or according to commercial usage, have no connection with the subject of the main contract or the performance thereof;
5. unjustified refusal to supply goods, or to provide an actual or potential customer, to preclude its business

The decision of the Court shares the Commission's findings that the company is an undertaking, in a dominant position within the meaning of Art. 20 of the CPA. According to this Article, the dominant position of an undertaking which, in view of its market share, financial resources, opportunities for market access, technological level and business relations with other enterprises, may hinder competition in the market, since it is independent of its competitors, suppliers or buyers. In this sense, the termination service provided by a mobile or fixed operator is not interchangeable with the service termination on the network of another mobile or fixed operator, as each network, whether mobile or fixed, provides access only to its own subscribers, of which it follows that each individual operator, including BTC, has a dominant position within the meaning of Art. 20 of the CPA, in view of its network, as there is no possibility for substitution between the networks when making calls.

However, SAC accepted that CPC has committed substantial violations of the administrative procedural rules, consisting of not studying the possible forms of abuse of a dominant position, listed in Art. 21 Pts. 1-5. The Court holds that the unilateral suspension of the provision of services, due under a contract for the interconnection of public electronic communications networks No. 27186/ 19.04.2010, signed between BTC and ITC, and the subsequent termination of the same on 25.02.2011, is wrongly evaluated only in terms of an unjustified refusal to supply goods, or to provide it to an actual or potential customer, so as to preclude its business. The same should be



considered to be and unfair condition of trade and to apply different conditions for the same type of contract with regard to certain partners, thereby placing them at a competitive disadvantage. These are forms of abuse of a dominant position within the meaning, respectively, of Art. 21 Pt. 1 and Pt. 3 of the CPA. The argument in this regard is that, although the conduct in process is a contract stipulated one, the market power of BTC is able to allow the company to provide unfair terms in its contracts – namely, unilateral termination under certain assumptions which, at present, are questionable. From another perspective, the application of different terms for the same type of contract to certain partners, thereby placing them at a competitive disadvantage, also had to be examined by the CPC in connection with that termination of the interconnection. Next it has to be determined whether BTC applies such clauses in other interconnection agreements, as well as whether it takes actions similar to the ones in process under similar conditions.

Next, during the administrative proceedings, it was proven that BTC, after the termination of Contract No. 27186/19.04.2010., refused to subsequently contract with ETC.

Based on the foregoing, the Court finds that the decision of the CPC should be repealed, and the Case should be returned to the Commission for the Protection of Competition so as to carry out a new assessment that is in compliance with the Court's reasoning.

**Decision No. 15276 of 16/12/2014, SAC/Supreme Administrative Court/ on Adm. Case No. 12180/2014, the 5-member panel, Rapporteur-Judge Albena Radoslavova**

The decision of the 5-member panel of the SAC confirms the decision of the 3-member panel, sharing the same motives, and it explicitly states/on the plea of BTC, that it is initially alleged by the ETC that BTC is abusing a dominant position in the form of directly or indirectly imposing prices, or other unfair trading conditions, within the meaning of Art. 21 Pt. 1 of the CPA, and in the form of the application of different commercial conditions for the same type of contract with respect to certain partners, thus putting them at a competitive disadvantage-Art. 21 Pt. 3 of the CPA, which allegations should be discussed by the CPC.

**Personal comment:**

I chose this case because I found it interesting in regard to the approach to a dominant position. This approach is the same in the decisions of the CPC and SAC. There are also different interpretations of the facts in the case from the National Competition Authority and the Supreme Administrative Court, with results for the scope of the applicable law. There is also an issue that I think should be discussed in the decisions of the SAC, but it is not: escaping the problem by transferring the problem of contract law.

### **7.3 ROSA PERNA, REGIONAL ADMINISTRATIVE COURT OF LAZIO (ITALY)**

#### **ICA Decision 9.5.2013-Wind-Fastweb/Conducts Telecom Italia**

**Società Telecom Italia Spa v. Autorità Garante della Concorrenza e del Mercato (ICA)-Case No. 6374-2013**

**The Regional Administrative Tribunal of Lazio 8.5.2014, No. 4801.**

#### **1. Introduction**

The present case concerns a recent, major controversy that resulted from a huge fine (one of the highest ever applied by the ICA, and the second highest imposed on Telecom) imposed on an incumbent operator of electronic communications for the abuse of a dominant position in the form of “vertical foreclosure”, i.e., the elimination of competition in a downstream market.

The case is relevant since it pertains to two types of conduct: “refusal to deal” and “margin squeeze”, -by which the exclusionary and abusive behaviour of a firm reveals itself, and the abuse of a dominant position is the focus of our Seminar.

It is a topical case, because the First Instance decision, which rejected all the claims of Telecom, has just been confirmed by the Appellate Judge (Council of State, VI, 15.5.2015, n. 2479).

Besides, considering that the types of conduct in question have been implemented in a regulated market, the case is also interesting, as it poses the question of the delicate relationships between antitrust law and sector regulation, both, furthermore, being of European derivation.

Finally, it is interesting to recall that the case has raised bitter controversy and a decision of the ICA, and the TAR judgment that is upholding it has undergone some criticism with regard to an alleged lack of a true and genuine economic analysis underlying the ICA decision.

#### **2. Proceedings Before the Italian Competition Authority**

**2.1** On May 9<sup>th</sup>, 2013, the Italian Competition Authority (ICA) imposed a fine of €104 million on the incumbent Italian telecommunications operator, Telecom Italia (Telecom), for abuse of a dominant position that is aimed at excluding competitors from the downstream markets for voice communications and broadband internet access services, in violation of Article 102 of the Treaty on the Functioning of the European Union (TFEU).

The ICA opened formal proceedings on June 23<sup>rd</sup>, 2010, following complaints lodged by Telecom's competing operators, Wind and Fastweb, who had reported allegedly anticompetitive behaviour that had been implemented by Telecom, concerning:

- (i) an unjustifiably high number of rejections issued to competitors regarding the activation of wholesale services, known as "KO", and a failure to update the databases required for the development of the activation orders;
- (ii) a policy of deep discounts for access fees relating to offers on the traditional narrowband line (POTS and ISDN) which were targeted at business customers in areas where it is supplied with local loop unbundling.

Following the start of the investigation, some competitors and other entities were allowed to intervene in the proceedings, in view of their concrete interest in participating.

On December 11<sup>th</sup>, 2012, a Statement of Objections was served by the ICA on Telecom, accusing the incumbent operator of having hindered the expansion of competitors in the downstream markets for access to the fixed network, voice telephony services and broadband internet by means of the two kinds of conduct that had already been indicated by competitors in their initial complaints.

**2.2** At the outset, Telecom argued that the investigation had been conducted without a proper adversarial principle in relation to the competition concerns that were brought forward by the competing operators.

**2.2.1** On the merits, Telecom pointed out-following the rejection in March, 2012, of the commitments offered by Telecom – that it had repeatedly invited the Authority to a constructive discussion on the findings of the preliminary investigation.

Telecom also asked for a special hearing due to the exceptionally long duration of procedure, which meanwhile was likely to affect the organisational and investment decisions necessary to the incumbent operator for the fulfillment on the part of specific regulatory obligations.

Furthermore, Telecom, holding that the Statement of Objections did not contain enough information to allow a complete refutation of the allegations made in it, with specific regard to the individual items of cost and price that were quantified by the offices of the Authority, pointed out that it had already submitted requests for clarification, also highlighting the need to access the details of the calculations made by the Authority in order to verify the quantification of individual cost items.

**2.2.2** The central point of Telecom’s briefs was the argument that the presence of a pervasive regulation – relating to the conduct investigated – did not justify the Authority’s intervention. In particular, Telecom argued that the evaluations of the results of the investigation were incompatible with the rules of the industry, and with the numerous investigations conducted by the Italian Telecommunications Regulatory Authority (“AgCom”) and by the Telecom Supervisory Body, according to which, during the reporting period:

- (i) with respect to the KO, the exterior and interior delivery procedures were considered to respect the principles of equal treatment and non-discrimination; and,
- (ii) with respect to margin squeeze, the prices charged by Telecom to business customers were higher than the costs of production and thus were replicable.

**2.2.3** With reference to KO, Telecom reiterated how the provision and supply process, and Telecom’s conditions of wholesale access services were conducted within the scope of the framework of the functional separation of the access network, which was spontaneously proposed by Telecom in 2008 and was approved by AgCom with Resolution no. 718/08/CONS, based on the principle of “equivalence of output”, which ensures the equivalence of the final results of the processes of supply, in terms of equal treatment between the OLO and the retail divisions of Telecom. Telecom therefore held that the management of KO is regulated in detail, and that the Telecom Supervisory Body had repeatedly ruled out the existence of unlawful conduct by Telecom.

**2.2.4** As to margin squeeze, Telecom claimed the full replicability of the prices charged, highlighting how the firm would constantly set its trade policy in compliance with the applicable regulatory framework, repeatedly receiving express approval from AgCom for the pricing and discounts applied. As a result, in the opinion of Telecom, the Statement of Objections would propose assessments that contrasted with the applicable testing regulations and the price estimates for the costs of Telecom that were quantified and periodically updated in the period and that were considered by AgCom.

**2.2.5** Another argument made by Telecom was that the submission of the same conduct to a divergent evaluation by the ICA would also be contrary to the general principle of *ne bis in idem* that is valid for all public interventions, given that, pursuant to Article 4, Protocol. 7, ECHR, even the mere opening of a second assessment procedure entails a breach of that principle. According to Telecom, with regard to the same facts, the ICA's assessments overlapped those made by AgCom, who considered the conduct to be compatible with the principles of equal treatment and non-discrimination, yet drawing antithetical conclusions, although they were acting on the basis of

regulations with the same substantial objective, i.e., guaranteeing equal treatment and non-discrimination.

Telecom further highlighted that the conduct under investigation did not amount to a “severe” breach of Article 102 TFEU, with the result that no sanctions could be imposed on Telecom under Article 15, Paragraph 1, of Law No. 287/1990. Finally, Telecom claimed the existence of numerous circumstances that mitigated its responsibility.

**2.3.** The duration of the infringement that was taken into account by ICA lasted from 2009 to 2011. Concluding the investigation procedure on May 9<sup>th</sup>, 2013, the ICA confirmed that Telecom had conducted two forms of anticompetitive abuse:

(i) A “constructive” refusal to grant physical access to its telephone and broadband network. The network was deemed to be “essential” for competing operators who were active in the downstream market for telecommunication services in order to provide those telecommunication services to end-users.

(ii) A margin squeeze, by means of a selective application of large rebates to business clients who were operating in areas supplied with an unbundling local loop (“ULL”).

**2.3.1** With regard to the first exclusionary conduct, the ICA held that Telecom intentionally denied, or hindered, access to its wholesale services, including ULL and wholesale line rental (“WLR”) by issuing an unjustifiably high number of refusals for the activation (or delivery) procedures that were required for network access services by alternative operators. To this purpose, the Authority individuated a series of conducts that substantiated the abusive behaviour:

- the number of rejections for activation requests from OLOs was much more elevated than the number of denials opposed by Telecom for its own internal commercial divisions; in particular, the delta number of rejections was extraordinarily high, if one considers only refusals that were due to technical and administrative reasons;
- the activation process delivered for its own internal divisions was substantially different from that provided for the OLOs’ request for access to Telecom’s wholesale services: Telecom’s internal divisions directly interacted with Open Access (Telecom’s separate network division), while the OLOs’ interact with a different division, i.e., National Wholesale Services (“NWS”), which, after a first formal and administrative check, would transfer the OLOs’ request to Open Access; the result of this was that the external process counts on an additional “check point”, if

compared to the internal process, which increases the possibility for the OLOs' requests to be denied or delayed for formal or administrative reasons.

- in the case of insufficient network resources, the OLO's request was immediately denied, while the request from Telecom's internal divisions was only suspended until the requested network resource became available. This asymmetric treatment put the OLOs at a disadvantage. If compared to Telecom's internal divisions: the former receive a technical KO and would have to apply again for the same activation request, losing, *de facto*, the priority acquired in the "waiting queue"; while the latter are placed in a "privileged" standby position, maintaining their priority for access to the requested resource when it became available.

As an effect, the ICA held that, through all these types of conduct, Telecom realised a system of technical boycotting which necessarily lead to an increase in operating and administrative costs for the OLOs, as well as to a loss of credibility towards the end-users, with the consequence of an unavoidable tarnishing of their competitive capacity in the downstream markets for both voice and internet telecommunication services.

**2.3.2** As to the margin squeeze abuse, the ICA held that Telecom had applied an aggressive pricing policy with respect to business customers who were based in the ULL areas, which are those where the level of competition pressure is higher. More precisely, following the *ad hoc* "marketing guidelines" that provided for minimum and maximum discount thresholds, Telecom made a selective recourse to large discounts for ULL business clients on the access component of retail offers, and this was deliberately aimed at making it impossible for an "as efficient competitor" to replicate them.

In this respect, the ICA held that Telecom itself would not be capable of providing retail telecommunication services to business customers in ULL areas at the established retail prices, without incurring a loss, if the cost for the access component were to be the same as that applied to alternative operators. Indeed, the price applied by Telecom to the 'selected customers' (in the case of the application of the maximum level of discounts for the access component that were provided by the "Marketing Guidelines"), this would always have been below the total network and commercial costs that were incurred by an "as efficient" alternative operator.

In the ICA's opinion, the maximum discount level put forward in the marketing guidelines represents an index of the potential aggressiveness of Telecom's pricing policy, and it is therefore at this potential level that one should evaluate the exclusionary capacity of the incumbent's commercial strategy.

**2.3.3** In regard to the quantification of the fine, the ICA calculated the amount by considering the two different types of conduct separately. It applied a fine of approximately EUR88.2 million, for the 'constructive' refusal to supply, and approximately EUR15.6 million for the margin squeeze abuse. In both cases, the ICA took into account the aggravating factor of recidivism (i.e., 1-10% above the basic amount of the fine) and the mitigating factor of financial loss (i.e., 0-30% less). It should be pointed out that, only for the first type of conduct, the ICA also considered as a mitigating factor Telecom's activities to improve the external delivery procedure (i.e., 20-30% less).

### **3. Proceedings before the regional administrative tribunal of Latium**

**3.1** Telecom opposed the ICA's final decision and filed a claim before the Administrative Regional Tribunal of Latium ("TAR"), making a number of complaints, which were widely and extensively argued.

**3.1.1** In brief, it firstly put forward that the conduct attributed to it was imposed by the industry regulatory discipline and that, for this reason, the ICA had invaded areas that were covered by the regulation of the telecommunications industry and so this infringed the principle of *ne bis in idem*, without regard for the regulatory framework and assessments of AgCom.

Telecom then articulated a number of complaints relating to the procedural violations of the right to defence, which were related, in particular, to the blocking of access to the documents used by the claimants, the compression of the time for the proceedings, and the discrepancies between the Statement of Objections and the final decisions that were taken as a result of the investigation.

**3.1.2** On the KO,<sup>1</sup> Telecom challenged the ICA's argument, considering it inadequate to prove the existence of discrimination towards OLO, as it was based only on data that mirrored the number of orders discarded, and disregarding the analysis of the actual activation processes. In particular, Telecom argued that information provided by the ICA on the number of discarded orders was not significant, since it incorrectly aggregated heterogeneous situations.

**3.1.3** Telecom also claimed that findings which led to the second allegation, the one concerning margin squeeze, were inaccurate, and contested as erroneous the ICA's methodological approach, which did not demonstrate that the difference between the retail prices charged to end customers and the wholesale prices charged to competitors was such that it would not cover the costs of those competitors in order to allow them to provide the services in question in the downstream market.

**3.2** All those pleas were contradicted by the ICA.

**3.2.1** First, the ICA noted that, according to well-established case law, the relationship between the antitrust and regulation sectors was not considered in terms of exclusion, but of complementarity.

So, the ICA must take regulation into account as the framework within which the operators operate, even though this does not prevent the ICA from carrying out an independent evaluation of their conduct. The European Commission, in the Deutsche Telekom case, expressly stated that the applicability of competition rules was not excluded in all of the cases in which the regulations leave open the possibility for undertakings to adopt autonomous conduct that is designed to obstruct, restrict or distort competition, thus confirming the existence of a dual control: which are antitrust and regulatory.

**3.2.2** As for Telecom's complaints on the Case's merits, the ICA remarked that, given Telecom's failure to refute the undeniable difference in treatment, which favoured its sales divisions, the incumbent went into detail about the technical aspects, and proposed methodological solutions as alternatives to those adopted by the ICA in its assessment, thus implying a judicial review on the merits of the case, which would go beyond the limits allowed to the Court.

### **3.3 The ICA Decision was Upheld by the TAR.**

**3.3.1** In its decision, the Court confirmed the ICA's evaluation and took the view that there did not exist the alleged conflict between the measures applied to combat the abuse of a dominant position and the regulatory framework of the sector, and that there was therefore no conflict between the contested Authority's ordering and assessment of competence, as expressed by AgCom, although it was admissible that an intervention for the protection of competition and a regulatory initiative, as these would have different aims and perspectives, might bring different conclusions.

In any case, the Court clarified, the EU directives on the liberalisation of electronic communications services (Directive 2002/21 EC "Framework Directive", and Directive 2002/19 EC "Access Directive"), and the national legislation that transposes them, which is contained in Legislative Decree No. 259/2003 (the Electronic Communications Code), have imposed precise obligations regarding the access and use by competitors to certain network resources, which was specifically aimed to promote competition and to protect the interests of newcomers and, as a result, of consumers, and they have implemented the principle of non-discrimination between the internal and external activities, so that firms with significant market power, which were also active in the downstream markets of one of the essential infrastructures, do not distort competition to the detriment of third parties.

**3.3.2** The TAR also held that the abusive behaviour regarding the high number of KOs was objectively demonstrated by the ICA. The Court recalled that, following the Community's guidance, in order to have an actual refusal on the part of a dominant undertaking, 'constructive



refusal' is sufficient, clarifying that constructive refusal could, for example, take the form of unduly delaying, or otherwise degrading, the supply of the product, or involving the imposition of unreasonable conditions in return for the supply (Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings).

To this end, the TAR disregarded the attempt made by Telecom to meticulously atomise the abusive conduct at hand, and to reconstruct it as a variety of initiatives that did not have an independent anti-competitive nature; then the Court recalled the constant guidance of the administrative judges, who considered a series of consistent circumstantial pieces of evidence to be sufficient to prove the existence of an antitrust infringement, and appreciated the huge amount of data that had been gathered during the investigation of the case.

**3.3.3** The TAR further considered the above complaints relating to the practice of margin squeeze in order to hinder the competitive pressure on the ULL markets, which was open to competition from new entrants.

Telecom's argument, on this point, was refuted in the first place by the Commission's decisions relating to the telecommunications markets, in which the existence of a margin squeeze was determined in light of the fact that the difference between the retail prices charged by the vertically integrated incumbent to end-users and the wholesale prices, which thus constitutes an abuse of a dominant position when it is insufficient to cover the specific costs that competitors bear, in order to provide the same services in the downstream markets.

**3.3.4** Telecom's argument criticising the use, by the Authority, of a benchmark relating to merely hypothetical and potential prices, was rebutted, as the Court considered that the contested conduct was able to undermine the economic capacity of an "as efficient" competitor and, therefore, this action falls within the scope of Art. 102 TFUE when affecting, as in this case, intra-Community commerce.

More specifically, following the arguments made by the ICA, the TAR considered the provision of large rebates to business clients made in an *ad hoc* "marketing guidelines", which had been circulated amongst Telecom's agents to be used for the supply and delivery of the service, decisive; then the Court appreciated the results of the investigation in revealing the application of the aforesaid guidelines from January, 2008, until July, 2011, and emphasised the outcome of on-site inspections in recovering contracts that were stipulated by Telecom with important business clients and applying the planned discounts, and, in some cases, even bigger ones.

In conclusion, TAR held that the ICA had operated under an established procedure that was in line with previous EU decisions, and determined that the discount policy had been effectively pursued by means of the Marketing Guidelines.

#### **4. Final Remarks**

**4.1** The present case is an example of the limited role played by the economic analysis of facts and of effects in the assessment of abuses of dominance.

It has been said that the ICA and the national courts usually consider it sufficient to show that the contested conduct tends to restrict competition, or that it is capable of having anticompetitive effects on the basis of an abstract analysis, without carrying out a comprehensive economic assessment of the impact of the practice, in some cases coming to apply “*per se*” rules.

In reference to the second type of conduct that was sanctioned, to establish whether there had been a margin squeeze, the ICA did not use as a benchmark the average prices that were actually charged at the retail level, nor did they use the individual offers that were addressed to different customers, but the prices resulting from a hypothetical simultaneous application of the maximum discounts provided for by Telecom’s price lists for the different types of narrowband access service.

In other words, the ICA seemed to find a “potential” abuse, consisting of the margin squeeze that might have occurred had the incumbent’s commercial units applied the maximum discount level provided for by the price lists. It is also relevant to notice that the notion of price abuse is difficult to reconcile, not only with the more economic approach that was introduced by the Guidance, but also by the principles established by the ECJ in *Post Danmark*, according to which the granting of discounts to certain customers cannot be considered *per se* unlawful, since it is necessary to analyse the relationship between prices and costs, and the possibly exclusionary effects of the contested conduct.

**4.2** From another point of view, the delay in the transition to an effects-based approach results in a very limited scope for the analysis of possible efficiencies in abuse cases, under Article 102.

It has been recalled that the Commission’s Guidance on exclusionary conduct (24<sup>th</sup> February, 2009) has realised the attempt to insert into abuse of dominance cases a test that is akin to the one provided for under Article 101 (3).

Nevertheless, the doctrine continues, the developments in the analysis of unilateral conduct and of efficiencies at the EU level, which has been confirmed by the ECJ (even though this has lately been

dropped in the “Intel Case”), have not yet had a relevant impact on Italian administrative and judicial practice, which still focus their attention on a formal and traditional approach.

As a consequence, as in the case at hand, firms tend to focus their defences on finding an exclusionary practice instead of alleging efficiencies.

#### **7.4 ELENA ROSALINOVA, SOFIA DISTRICT COURT (BULGARIA)**

The decisions of the Bulgarian Competition Authority are subject to appeal before the Supreme Administrative Court. In March, 2014, the Bulgarian Competition Authority imposed pecuniary sanctions on “Galis” and “Transkom” for abuse of a dominant position on the market, and rendered the termination of the infringement. “Galis” and “Transkom” initiated an appeal before the Court.

According to the Bulgarian Law on Motor Transport, and By-Law 33, the public transport of passengers is carried out according to a regional or state transport scheme that was adopted by the Minister of Transport. Additionally, there is a requirement that the carrier is granted a license. Carriers of public passenger transport are obliged to use only those bus stations designated by order of the Mayor of the regional community. The Mayor of the Bulgarian city, Rousse, issued an order that bus carriers operating in the area of public transport are obliged to use the bus station that is owned by “Transkom”. All the bus carriers should use this station as an initial, terminal or way station. Otherwise the bus carriers are subject to administrative sanction. In the city there are two bus stations, but only this one is owned by “Transkom”, and can be used on the Mayor’s order for the purposes of public transport for long distances and international destinations. “Transkom” concluded a contract and let the bus station to “Galis”, which began to collect taxes from the bus carriers for the use of the bus sectors on the station.

The National Competition Authority and the Supreme Administrative Court found this practice abusive and not in compliance with the rules of fair competition i.e., Article 21 of the Law on Competition Protection, which reiterates the meaning of Article 102 of the Treaty on the Functioning of the European Union and bans the abuse of a dominant position.

The Supreme Administrative Court declared that the Bulgarian Competition Authority has lawfully defined the relevant market. The legal framework entitles the owners of bus stations to grant bus sectors, for a consideration, to the bus carriers.

The Supreme Administrative Court, as well as the competition authority, found that the method of pricing for the service led to an abuse of a dominant position, by “Galis” and “Transkom”, on the market of public transport. All the conditions and the costs for the service were imposed in a unilateral manner by “Galis” and “Transkom”. The National Competition Authority made an analysis of the pricing method for the service, the “use of the bus sector”, which was cited and approved by the Court. The cost of the service used by “Transkom” is based on a formula that

depends on the price for the ticket, which is set by the bus carriers. The second model for price-formation that is used by “Galis” consists of a fixed price-list.

Notwithstanding the difference between the two methods, they use a common approach to the pricing of the service, presuming as a basic criterion the scale of the distance made by the bus carrier, regardless of whether the bus station is the initial, terminal or way station. This approach doesn’t take into account the real cost of the service, the “use of the bus sector”, especially the expenses that had to be committed for the support of the bus sectors and the bus station. The Supreme Administrative Court stated that the price of the service is not related to the trip’s length at all. This method of pricing undermines the rules of fair competition, as it gives rise to discrimination among the bus carriers, who pay different taxes for the same service.

Likewise, the undertakings “Transkom” and “Galis” allocated a subsidy to those bus carriers carrying out public transport on short distances and thus affected the consumer’s rights.

The Court ruled that there was a breach of competition law, precisely as an abuse of a dominant position under Article 21 § 1 and 3 of the Bulgarian Law on Protection of Competition, which reads as follows:

“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. apply to certain partners dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage.”

The undertakings “Galis” and “Transkom” enjoy a dominant position on the market because the bus station that is in their possession is the only one designated as being the initial, terminal or way station for the bus carriers operating in the area of international transport and/or the state transport scheme.

The position of the competition authority, upheld by the Court when measuring the amount of the pecuniary administrative sanction regarding “Transkom”, is that the duration of the infringement aggravates the responsibility of the undertaking and determines a higher rate for the pecuniary sanction.

**Comment:**

This court ruling has significant relevance for the matter if there is a segmented market that is determined by the type of the transport scheme, because under the national legislation there are state, regional and municipal transport schemes. The Supreme Administrative Court has stated that the different types of transport schemes set up by the national legal act don't represent a segmented market. Without referring for a preliminary ruling to the ECJ, the Supreme Administrative Court ruled that despite the availability of different transport schemes that were laid down by the law, the existence of competition between the carriers, respectively, the rules of fair competition, and especially the rule of Article 102 of the Treaty on the Functioning of the European Union, are not excluded without announcing the detailed reasoning behind this conclusion. However, it is a controversial question if there is a segmented market in the area of public transport, and if the Bulgarian sector legislation is in compliance with the rule of Article 102 of TFEU.

In the second case, *Viacom*, the ECJ held that an answer to the question of whether there has been an abuse of a dominant position presupposes the determination of the relevant market by a national competition authority. The National Competition Authority and the Supreme Administrative Court used a narrow approach, by excluding from its scope the operators of the second bus station. The argument was that these operators were restricted by order of the mayor to offer only transport services over short distances and within the region of the community. §8 of the Commission's notice on the definition of the relevant geographic market describes this as follows:

“the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.

The transport services of the undertakings, regardless of which bus station they use, belong to the same relevant market. For instance, clients who use international transport services can choose, or refuse, the direct transport service offered by the firm which uses the bus sector at the bus station that is owned by “Galis” and “Transkom”, and to prefer an alternative itinerary. This is the, so-called, demand substitution. However, the Supreme Administrative Court was reluctant to discuss that point.

## 8. THE PRIVATE ENFORCEMENT OF COMPETITION LAW

### 8.1 GORIUS HANNO, REGIONAL COURT OF KAISERSLAUTERN (GERMANY)

**CDC – Regional Court of Düsseldorf, Judgment of 17th December, 2013, 37 O 200/09 (Kart) U.**

1. In the majority of civil cartel procedures the enforcement of a claim is statistically the responsibility of the competitors or direct customers of the cartel members, in the form of so-called *Stand-Alone* actions.<sup>25</sup> As in US law, these plaintiffs are not the so-called *Efficient Enforcers*, as a damage and thus an action incentive for the direct customer is often excluded<sup>26</sup> as a result of so-called Cost-Plus treaties, or other economic dependencies. The attempts made in the past to concentrate the claims of direct customers and thus to achieve a more effective prosecution, is of elementary importance.

2. Substantively, especially in the field of cartel tort law, a concerted assertion of a multitude of individual claims has until now taken place with the aid of an assignment model that has been developed and applied, amongst others, by *Cartel Damages Claims S.A. (CDC)*, a public limited company established under Belgian law. The company's purposes consist only in acquiring, concentrating and enforcing the individual claims of entrepreneurs who have suffered damage as a result of national or international cartel law violations.<sup>27</sup> In the context of the so-called cement cartel, the CDC has prosecuted the claims of 36<sup>28</sup> injured cement producers by means of the objective consolidation of actions according to section 260 ZPO,<sup>29</sup> which it has acquired for a purchase price consisting of a fixed price of 100 Euros, as well as a variable price that depends on the amount of the successfully enforced claim,<sup>30</sup> which have then been assigned to it.<sup>31</sup> Apart from a fee, it also received a stake in the compensatory damages amount judged in case of success for

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<sup>25</sup> Activity report of the German Bundeskartellamt 2009/2010, BT-Drs. 17/6640, p. 49.

<sup>26</sup> BGH NJW 2012, 928, 930.

<sup>27</sup> LG Düsseldorf, 34 O (Kart) 147/05 – Cement Cartel, Margin No. 5 et seqq.

<sup>28</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 14.

<sup>29</sup> ZPO = Zivilprozessordnung = German Code of Civil Procedure.

<sup>30</sup> The purchase prices varied between 65 and 85 percent of the claims to be realised, by which the CDC was conversely entitled to a "contingency fee" of 15 to 35 percent, OLG Düsseldorf, judgment of 14th May, 2008, – VI-U (Kart) 14/07, U (Kart) 14/07, Margin No. 31.

<sup>31</sup> LG Düsseldorf, 34 O (Kart) 147/05 – Cement Cartel, Margin No. 8.

the judicial assertion of the claims.<sup>32</sup> Otherwise, the CDC has committed itself to paying for the remaining legal and court costs.<sup>33</sup>

3. At first, the Regional Court of Düsseldorf validated the CDC model, which is called “claim pooling” and makes the collective sharing of risks possible,<sup>34</sup> for an interlocutory judgment to be admissible. In doing so, it opposed the argumentation of the defendant cement producers, who considered the action both due to a too unspecified demand for relief and to an insufficient locus standing in for the plaintiff, which they believed was already inadmissible. According to the reasons for the interlocutory judgment, the demand for relief, which was not broken down with regard to the single claims, was accessible to the Court’s estimation according to Sec. 287 ZPO and was sufficiently specified by it.<sup>35</sup> The CDC’s capacity was also therefore not to deny, because there were no preconditions for the voluntary representative action in this specific case, because the CDC sued in its own name, beyond their ceded, own rights.<sup>36</sup> The appeal against the interlocutory decree before the Higher Regional Court of Düsseldorf remained unsuccessful.<sup>37</sup> The appeal on points of law was not granted. The appeal against the denial of leave to appeal was rejected by the German Federal Court of Justice.<sup>38</sup>

4. After an eight-year duration for the proceedings, the action of the CDC has now been rejected as being unfounded.<sup>39</sup> On this, the Court has, first and foremost, based its decision on the voidness of the assignments of the claim according to Sec. 134 BGB<sup>40</sup> in connection with Article 1 Sec. 1 (1) Sentence 1 of the German Law on Legal Counselling (old version), as well as on Sec. 138 BGB. The CDC’s course of action was in relation to businesslike debt collection, which had been subjected to the reservation with regard to granting permission according to Article 1 Sec. 1 (1) Sentence 1 RBerG<sup>41</sup> (old version) until 30th July, 2008, at which time the necessary permission had indisputably not been given.<sup>42</sup> With the coming into force of the RDG<sup>43</sup>, the CDC had thereupon successfully enrolled for the performance of collection services, according to Sec. 10 (1) No. 1 RDG<sup>44</sup>, but the subrogations which took place after that time were, according to Section 138 BGB,

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<sup>32</sup> OLG Düsseldorf, VI-U (Kart) 14/07, U (Kart) 14/07, Margin No. 63.

<sup>33</sup> von Dietze/ Janssen, KartR, Margin No. 641.

<sup>34</sup> von Dietze/ Janssen, KartR, Margin No. 641.

<sup>35</sup> LG Düsseldorf, 34 O (Kart) 147/05 – Cement Cartel, Margin No. 102 et seqq.

<sup>36</sup> LG Düsseldorf, 34 O (Kart) 147/05 – Cement Cartel, Margin No. 112.

<sup>37</sup> OLG Düsseldorf, VI-U (Cartel) 14/07, U (Cartel) 14/07.

<sup>38</sup> BGH, GRUR-RR 2009, 319.

<sup>39</sup> LG Düsseldorf, 37 O 200/09 (Kart) U.

<sup>40</sup> BGB = Bürgerliches Gesetzbuch = German Civil Code.

<sup>41</sup> RBerG = Rechtsberatungsgesetz = German Law on Legal Counselling.

<sup>42</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 73.

<sup>43</sup> RDG = Rechtsdienstleistungsgesetz = German Legal Services Act.

<sup>44</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 99.



unethical and thus void.<sup>45</sup> As a statement of reasons, the Regional Court of Düsseldorf referred to the rule on the even distribution of the cost risk among the parties to a case,<sup>46</sup> which was violated by the cessions' embodiment and the distribution of the litigation risk connected with it between the assignor and the cessionary, and consequently between the cement-receiving companies and the CDC.<sup>47</sup>

5. It is worth noticing that the Regional Court of Düsseldorf referred to the statement of the plaintiff which it had effected in connection with the petition of the adjustment of the amount in dispute according to Section 89a GWB<sup>48</sup>.<sup>49</sup> According to this, the CDC had not been in a position to fulfill the entitlements to costs of the defendants in the case of defeat.<sup>50</sup> Consequently, the CDC was used under unethical behaviour as an impecunious party in the litigation within the claim pooling.<sup>51</sup> The judgment of the Regional Court of Düsseldorf therefore gives the standard for unethical behaviour applied *in casu*, according to Sec. 138 BGB, the character of a *conditio diabolica*, as with the Regional Court of Düsseldorf's Order of 27<sup>th</sup> September, 2005, the CDC's petition for the adjustment of the amount in dispute was then rejected according to Section 89a GWB.<sup>52</sup> According to its own pleading, the CDC was, even in the case of an amount in dispute of only 30 million Euros at the beginning of the action, not in a position to discharge the liabilities incurred as a result of the cost ruling.<sup>53</sup>

#### Comment:

Antitrust enforcement can only be efficient and sufficiently deterrent in an understanding to prevent infringements from the beginning, if there is a high probability of disclosure through the approaches of both public and private enforcers, and if the amount of the fines to be expected exceeds the expected surplus being generated by the antitrust infringement, only then does the incentive to behave legally arise.

In Germany, antitrust enforcement is mainly assured by the Federal Cartel Office in Bonn, North Rhine-Westphalia. There is no significant number of so-called stand-alone actions, or of so-called follow-on-actions that are initiated by private claimants. Furthermore, there is no considerable

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<sup>45</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 101.

<sup>46</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 106.

<sup>47</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 101.

<sup>48</sup> GWB = Gesetz gegen Wettbewerbsbeschränkungen = German Antitrust Act.

<sup>49</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 115.

<sup>50</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin no. 101.

<sup>51</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 103.

<sup>52</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 25.

<sup>53</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 23, 116.

criminal prosecution of infringers, respectively, of individuals behind the antitrust infringement. In particular, there is no imprisonment to be feared, as there is in the US.

With the judgment of the Regional Court of Düsseldorf affirmed by the Higher Regional Court of Düsseldorf<sup>54</sup>, private enforcement in Germany is more than ever at stake. The CDC and the “model of assignment” failed. Presently, there is no incentive to sue, not even for competitors, who are considered as “efficient enforcers”. Furthermore, there is an unpredictable cost risk in the case of a dismissal of the action due to the unpredictable risk of further joinders, as, according to the German Federal Rules of Civil Procedure, the defeated party has to bear the costs of the adversary interveners, supporting the adversarial party (loser pays principle). *In casu*, the Higher Regional Court Düsseldorf fixed the value of claims for the calculation of the refundable attorney’s fees of the interveners supporting the defendant equally to the value of claims in relation to the court fees. In spite of the possibility to do so, a reduction was not granted.

Both the judgment of the Regional Court of Düsseldorf and the Appeals judgment have to be considered to be strong statements against private enforcement, in general, even though the representatives of antitrust enforcement *ex officio*, namely the Federal Cartel Office, consider private enforcement to be the necessary completion of their own work, as they perceive their own approaches to be insufficient. Nevertheless one can hardly help thinking that the CDC judgments manifest a significant fear of abuse concerning private antitrust enforcement, precluding a more courageous decision. That’s why the reasoning appears to be inconsistent.

If the jurisdiction is supposed to apply another standard within the decision about the presentation of the constituent fact of the offence of a “serious threat of the economic situation by a charge with the legal costs of the total amount in dispute” according to Sec. 89a of the German Antitrust Act, and in accordance with the precedent of the Regional Court of Düsseldorf as, in view of the judgment of the violation of morality of the cession, according to Sec. 138 BGB, due to the impecuniosity of the party and the related violation of the rule for the even distribution of the cost risk among the parties.<sup>55</sup>

It is highly questionable and in view of the amount involved in the dispute under discussion – related to a practically irrational cost risk for the assignee if there is a modification of the assignment model, as suggested by the Regional Court of Düsseldorf, in the form of an increased overburdening of the risk of the legal costs to the assigners,<sup>56</sup> then this bears the jurisdiction’s

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<sup>54</sup> OLG Düsseldorf, VI-U (Kart) 3/14, U (Kart) 3/14 .

<sup>55</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 106.

<sup>56</sup> LG Düsseldorf, 37 O 200/09 (Kart) U, Margin No. 125.

examination criteria if it comes again to a filing of action. Hence, a concerted action for a multitude of injured, direct customers, in the case of mass claims according to Cartel Law by the judicatory interpretation of the law concerning court costs – under violation of the basic right to access to justice according to Art. 2 (1) GG<sup>57</sup> in conjunction with the rule-of-law principle according to Art. 20 sec. 3 GG<sup>58</sup> – is now nearly impossible. For the present, the assignment model is a failure and a filing of action by prosecution companies that are organised under private law, regardless of their type of company, is, in future, considerably impaired.

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<sup>57</sup> GG = Grundgesetz = German Constitution.

<sup>58</sup> BVerfG, NJW 2006, 136, 137.

## **8.2 INESE BELICKA, REGIONAL COURT OF ZEMGALE (LATVIA)**

### **PKL Flote Ltd v. Freeport of Riga Authority**

#### **Facts**

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

The Competition Council adopted a decision on March 24th, 2009, on imposing a fine in the amount of €64029 and legal obligations on the Freeport of Riga Authority for abuse of a dominant position that hindered competition in the market for towboat services in the Freeport of Riga. The Competition Council established that, after purchasing its own towboats and starting its economic activity in the market for towboat services in the Freeport of Riga, the Freeport of Riga Authority had abused its dominant position against the other market player – a supplier of towboat services – PKL. The violation took place as blocking and impeding PKL to provide towboat services in the Freeport of Riga by setting unreasonable requirements, as well as by not allowing PKL to provide towboat services to its customers. Freeport of Riga Authority has thus created unreasonable advantages for itself in comparison to the other supplier of towboat services.

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

The Administrative Regional Court upheld the decision of the Competition Council. The judgment of the Administrative Regional Court was appealed in the Supreme Court and the Supreme Court upheld the judgment of the Administrative Regional Court.

PKL Flote Ltd submitted a claim against the Freeport of Riga Authority in the Riga Regional Court (civil court) for damages in the amount of 2,101,167 euros and with interest of 204,231 euros. The largest part of the amount of the damages consists of lost profit as a result of the abuse of a dominant position by the Freeport of Riga Authority.

The claimant presented the above mentioned decision of the Competition Council as evidence in the civil case.

The Riga Regional Court rejected the claim, stating that the claimant cannot use the decision of the Competition Council as evidence in civil proceedings and the claimant must provide the Court with sufficient evidence to prove that the Freeport of Riga Authority abused its dominant position and therefore it caused damages to the claimant.

The Civil Chamber of the Supreme Court (Appeal Court) reversed the judgment of the Riga Regional Court and ruled that the Freeport of Riga Authority was responsible for the damages and rewarded PKL Flote Ltd with damages, interest and court costs for a total amount of 98,178 euros.

The Civil Chamber of the Supreme Court stated in its judgment that the abuse of the dominant position by the Freeport of Riga Authority was proved by the final judgment in the administrative case, with which the decision of the Competition Council was upheld.

The Judgment of the Civil Chamber of the Supreme Court was appealed to the Supreme Court, and the Supreme Court initiated Cassation Court proceedings. The judgment of the Supreme Court, in this case, will likely be delivered within a year.

## **Comments**

According to Article 21 of the Competition Law, a person who has incurred losses due to a violation of this law is entitled to seek compensation for losses from the violator and also the interest that is due, set by law. Upon a request by the claimant, a Court may, at its discretion, set the amount of the compensation.

The claims regarding the damages are adjudicated according to the Civil Procedural Law.

Neither Civil Procedural Law nor Competition Law state that the decision of the Competition Authority or the Judgment of the Administrative Court regarding this decision can be used as evidence in civil cases regarding the claims for compensation for the damages arising from infringements of the Competition Law.

On the other hand, the possibility that the Court in a civil matter may reach the opposite judgment to those of the Administrative Court and the Competition Authority on the matter of whether the defendant has infringed the competition law may hinder the effective enforcement of competition law, judicial protection and the restitution of the infringed rights – claims to compensate with damages for loss suffered due to another individual's violation of the competition law.

This problem is now solved by Article 9 of the Directive 2014/104/EU of 26<sup>th</sup> November, 2014, as the respective amendments will be implemented in Civil Procedural Law.

### **8.3 LUKA BERNARD, DISTRICT COURT OF LJUBLJANA (SLOVENIA)**

**Name of the Court:** District Court of Ljubljana – Commercial Department

**Case:** Euromedia MB d.o.o. v. Pošta Slovenije d.o.o. (No. VIII Pg 3468/2009)

**Date of the Judgment:** 18<sup>th</sup> September, 2014.

#### **Facts**

Euromedia MB (the plaintiff) is a small distributor of unaddressed mail (brochures, guides, etc.), which holds its own distribution network for distribution in larger cities (urban areas) and uses the distribution network of Pošta Slovenije (the defendant) for the distribution of unaddressed mail in rural areas. The defendant is a public postal operator (also active in the monopoly segment) and its network covers the whole territory of the Republic of Slovenia.

The plaintiff brought a stand-alone damages action alleging abuse of a dominant position contrary to Article 9 of the Prevention of the Restriction of Competition Act (“the Act”; this is the national equivalent of Article 102 TFEU). The plaintiff alleged that the defendant abused its dominant position through five different courses of conduct. Firstly, the defendant engaged in a predatory pricing strategy, with prices for its customers set well below the costs needed to cover the distribution scheme. Secondly, the plaintiff accused the defendant of price discrimination on orders performed on the plaintiff’s behalf (i.e., in rural areas that were not covered by the plaintiff’s own distribution network) *vis-à-vis* deliveries that the defendant had made for its own customers, thereby placing them at a competitive disadvantage. Thirdly, the defendant misused the existing home delivery network (i.e., the universal service network) for the distribution of unaddressed mail. Fourthly, the plaintiff accused the defendant of making the conclusion of contracts subject to the acceptance by the plaintiff of supplementary obligations, without connection with the subject of such contracts. According to the plaintiff, these obligations include the disclosure of information about the customers of the plaintiff for part of the distribution in rural areas. Fifthly, the defendant allegedly engaged in conduct that was contrary to the NCA’s commitments’ decision. Following the plaintiff’s allegations, the conduct resulted in a lower market share that would be counterfactual (approximately 1% instead of 25%→30%→33%→30%→34%→38% from 2004 until 2009, according to their business plan) and therefore estimated damages in the amount of 8,400,000.00 EUR.

#### **The Ruling of the Court**

The District Court rejected the claim in its entirety having held the plaintiff’s allegations to be insufficient for further elaboration (the action was deemed inconclusive/incomplete and therefore

the plaintiff had failed to meet its burden of persuasion<sup>59</sup>). In the view of the Court, the plaintiff had not established a *prima facie* case regarding the allegations of the abuse of dominance and also damages. Since the plaintiff had not met its burden of persuasion, the Court rejected the claim (8,400,000.00 EUR) without engaging in the full evidence taking procedure.

One should bear in mind that the plaintiff alleged five separate and different abusive practices, on one hand, but it claimed damages as a result of the defendant's illegal conduct jointly in terms of lost profit, due to the inability of the plaintiff to gain a greater market share. At the outset, the Court emphasised the possibility of subsuming all factual allegations of abusive conduct under the so-called "*as efficient competitor test*". The latter enables the plaintiff to join all alleged facts, which separately may not even be decisive, into a coherent recrimination directed against the defendant. In so doing, the plaintiff should be able to show that the varieties of the defendant's conduct make it impossible as an efficient competitor to survive on the market. Since the plaintiff has not presented facts and evidence in that manner, the Court also further elaborated each of the claimed abusive conducts in isolation.

Regarding the predatory pricing allegations, the plaintiff sought to obtain (through a Court Order) contracts that the defendant had had with its own largest customers (approximately 17 of the largest firms) in order to prove predatory pricing (prices below the appropriate measure of costs).<sup>60</sup> Firstly, the Court explained the similarities between the doctrines of predatory pricing and primary line price discrimination in such a way that the latter is a strategy that is aimed at foreclosing on a dominant undertaking's competitors by targeting important customers (i.e., predatory pricing in a portion of sales).<sup>61</sup> Even though the factual data, which enables conformation or dismissal of a suspicion of predatory pricing, are in the dominant undertaking's possession, the Court did not order the defendant to present the data. According to civil procedural rules, the party is obliged to assert (at least in broad terms) which data the Court shall order the other party to present. The defendant defined contacts that it sought to obtain very precisely, on one hand, while, on the other hand, it disregarded the assertion of the aspect of the realisation of the bulk mail business and, even more importantly, it completely omitted the cost aspect. Accordingly, the Court deemed the plaintiff's request for disclosure to be insufficient. Moreover, judicial file data revealed that the plaintiff had imposed very similar, or sometimes even lower, prices than those of the defendant in

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<sup>59</sup> The *burden of persuasion* requires that a party provide relevant statements of facts. On the other hand, the *burden of proof* requires that a party provide relevant evidence (documentary evidence, witnesses, etc.) to prove facts when they are disputed by the other party.

<sup>60</sup> Quoted *AKZO* case (C-62/86).

<sup>61</sup> Quoted *Post Danmark* Case (C-209/10).



the same period. After all, both parties gained profit according to their financial data. Finally, the plaintiff had even failed to explain -- even indicatively (e. g., via indirect evidence) which data roughly indicate the presence of predatory pricing on the market (i. e., an explanation of “why the prices are too low...”).

The other four allegations seemed much more trivial in comparison to the first. The Court rejected the theory of a secondary line injury (secondary line price discrimination). It reasoned that the plaintiff and the dominant undertaking’s customers are not in mutual competition. The case was about the foreclosure of the incumbent’s competitor (the plaintiff; i.e., horizontal foreclosure) and not about the competition between the defendant’s customers and the plaintiff (in a downstream market, thereby placing one of them at a competitive disadvantage). Similarly, the Court also rejected allegations about the misuse of home delivery network. It explained that the very fact that the defendant uses the established network (i.e., the “postman” network) for the delivery of unaddressed mail, as well as for the distribution of mail under the universal service obligation, could not in itself establish the abuse of dominance. Consequently, if the plaintiff intended to invoke the issue of illegal cross-subsidisation, the Court noted that these allegations might have been dealt with within the predatory pricing accusation. Indeed, the plaintiff could have shown that the prices for bulk mail were insufficient to cover the incremental costs incurred (predatory pricing claim under the procedural conditions, set out above). It is obvious that any accounting profit derives from the cross-subsidisation practice of the dominant undertaking. Fourthly, the allegations about supplementary obligations, in the form of the required disclosure of the plaintiff’s customer information (e.g., the names of the customers) were mostly illogical. Namely, the defendant obtains data about the plaintiff’s customers when taking over the bulk mail in order to distribute it in rural areas. Furthermore, the unaddressed mail was not packed in an envelope, and thereby the data about the customers could be seen at first sight. Importantly, the data about the issuer of the bulk mail also incurs the Consumer Protection Act. Finally, the allegations about the incumbent’s breach of the commitments’ decision, were not concrete enough to elaborate on them further.

In addition, the Court also deemed the damages calculation to be imprecise, not supported by facts and partly illogical, and therefore insufficient to engage in damages calculation via a Court appointed economic expert. The plaintiff grounded his *but-for* scenario on his unrealised business plan that was, in the opinion of the Court, excessive and not supported by additional facts and evidence (sufficiently explained and robustly selected comparative market, etc.), based on which it would be reasonable to derive the possibility of the realisation of such a plan. It was undisputed, that the plan had never been realised before the defendant’s conduct took place.

The Judgment of the District Court was upheld by the Appellate Court of Ljubljana, Case No. V Cpg 58/2015 (Date of the Judgment: 20<sup>th</sup> March, 2015).

### **Comment**

This case has raised several important substantive and procedural issues. Since the latter are more or less connected with the national procedural rules, let us focus on the former aspect. The Court invoked the possibility of using the ‘*as efficient competitor test*’ as a general standard for the abuse of dominance. This is especially important in situations where the dominant undertaking has presumably undertaken a composed conduct to foreclose on a rival. If the theory of harm is about the exclusion of an ‘as efficient’ rival, this test can discharge the party from adjusting the facts under more form-based, case specific rules. It thus enables the presentation of facts (alleged abuse) in a coherent way, without subsuming them under the specific rules (according to older more form-based case law) and so to prevent the possibility of, so-called, category shopping.

The Court tried the case (whether the plaintiff had established a *prima facie* case), even if not explicitly, but also from the point of view of the *effects* of the alleged abuse. If the plaintiff imposed prices that were even lower than those of the incumbent, and, in spite of all that, gained a profit according to their financial data, the danger of consumer harm will not exist.

The case was decided on the national competition rules, because the facts of the case did not support a finding of the effect on trade between Member States. Nevertheless, the Court interpreted the national competition law in line with the EU case law (and referred extensively to that case law) and thereby sought to prevent the inconsistent application of competition law(s) in comparable situations.

#### **8.4 SAŠA KRAJNC, DISTRICT COURT OF LJUBLJANA (SLOVENIA)**

**Case Note:-Judgment of the Higher Court in Ljubljana No. I Cpg 708/2013 OF 21<sup>st</sup> November, 2013**

##### **The Parties, Facts of the Dispute and the Plaintiff's Claim**

The parties in the dispute before the Court of First Instance (District Court of Ljubljana) were two major Slovene telecommunication companies. The defendant was the first telecommunication company founded in Slovenia in 1995. It is also the proprietor of the only copper lines network in the country. Other telecommunication companies, which were founded later and now operate in Slovenia, the plaintiff among them, are therefore, at least to some extent, dependent on access to this network and to the services of the defendant. The plaintiff is a telecommunications company, founded in 2004, which, in order to offer its services to clients, relies on a contractual relationship with the defendant. The plaintiff claimed that the defendant had indeed abused its dominant position in the Slovene telecommunications market (or its relevant segment in this dispute-the VDSL market) through the breach of contractual and non-contractual obligations towards the plaintiff, in the form of limiting the access of the defendant to the copper network and thereby hindering him from using it. The plaintiff claimed that he sustained material and non-material damages due to the actions of the defendant, which constitute an abuse of a dominant position. He demanded damage compensation in the total amount of 129.6 million EUR, which included direct loss (*damnum emergens*), ceased profits (*lucrum cessans*) in the period from the 1.10.2005 to the 30.6.2006, and expected future ceased profits.

##### **1. The Judgment of the Court of First Instance**

The District Court in Ljubljana dismissed the claim as unfounded for numerous reasons, the most important being that the plaintiff did not meet his burden of persuasion (with reference to the statements) and the burden of proof (with reference to the evidence). In its appeal against the judgment, the plaintiff claimed, that the Court had confused both categories of procedural burdens and did not establish the factual truth in the matter.

##### **2. The Judgment of the higher Court**

The Higher Court upheld the judgment of the Court of First Instance. The case is currently awaiting the decision of the Supreme Court on the plaintiff's claim for revision.

## **2.1 Procedure in Competition Law Cases and the Legal Grounds of the Claim**

The Higher Court held that protection against the restriction of competition must be both real and effective, as must be the possibilities for defence against such accusations.<sup>62</sup> As for the establishing of the material truth, the Court had no such obligation, as it only follows the stated facts. Under Slovene law (Act on the Prohibition of Restriction of Competition; ZPOmK) the abuse of a dominant position is prohibited, and the breaching party is liable for damages. The Court stated that it was not impossible for a single act to have no effect on competition, because it was too insignificant to affect it, but that the sum of such acts could potentially limit competition. In this regard, it makes no difference if the act is the result of a breach of the party's contractual or non-contractual obligations, as the law does not distinguish among them. Yet, in order to claim compensation in the form of ceased profits, the plaintiff must reveal the required data, which enables the evaluation of his actual profits and of his hypothetical profits in order to calculate the difference between them, which is the ceased profit. This compels the plaintiff to state his actual income and expenses and to provide an evaluation of his hypothetical income and expenses, had the abuse of a dominant position not taken place.

## **2.2 The Burden of Persuasion**

The burden of providing the relevant statements and necessary evidence was on the plaintiff, as the defendant pointed out numerous times during the procedure, yet he failed on both accounts. The plaintiff relied on the data, which was contained within two damage evaluation reports by two evaluating companies, which he provided. These reports, in the opinion of the Court, constituted only statements, but were not sufficient evidence of the plaintiff's actual income, which could only be derived from his accounting documentation. The plaintiff did provide an estimate of his hypothetical profits, yet failed to state his actual gained profits, one of the essential components of the equation. Neither did he provide the necessary data on his market share and the number of his clients, which would enable a mathematical calculation of his profits. These lacking statements constituted a failure to meet his burden of persuasion, which could not in any case be compensated through providing the necessary evidence (which the plaintiff, in any case, also failed to do). The Court pointed out, that neither it, nor the opposing party, and not even an appointed expert witness, could therefore provide even a rough estimate of the plaintiff's actual income, as no absolute numbers could be derived from the statements of the plaintiff and the two damage evaluation reports that were provided. This alone was reason enough to dismiss this claim.

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<sup>62</sup> In this regard it also stated that the legal documents to which the plaintiff referred (draft guidelines of the European Commission and draft of the Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union), were not binding and could, as such, only be regarded as informative legal acts.

Further, the Court reasoned that such an evaluation could not be made even within the scope of Art. 216 of the Slovene Civil Procedure Act (ZPP), which allows for the full discretion of the Court in the evaluation of damages in cases, where those cannot be established with a level of complete certainty. Yet even for this rule to be applicable, the party must provide some ground facts, which justify its claim, at least to some degree, as the Court cannot make a wholly arbitrary (“rule of thumb”) decision.

### **2.3 The Burden of Proof**

Aside from the burden of persuasion, the plaintiff also failed to meet his burden of proof, as he put forward a series of inadequate pieces of evidence.

Firstly, the viewing of the accounting documents at the premises of the plaintiff, as the submission of these documents to the Court would “additionally increase the volume of the case file”. The plaintiff did not even state how many documents needed to be submitted<sup>63</sup>, for the Court to even consider such a proposition. In any case, the law only enables the submission of written documents to the Court and not their viewing, and therefore the proposal of the plaintiff had to be overruled.

The second proposal was the submission of the documents at the summoning of the Court. The plaintiff insisted that it was the obligation of the Court to call upon him to submit the documents, yet the Higher Court reasoned that this was the sole obligation of the plaintiff, without being called upon. The Court also rejected the reasoning of the plaintiff, that the data in question constituted a trade secret, as the plaintiff provided no evidence for such a statement. It could also not be expected to keep this data confidential from the opposing party, as their defence depended on their knowing all the facts in relation to the accusations against them. Although the German Courts allowed a so called ‘procedure *in camera*’ (where the opposing party is completely excluded from the evidential procedure), such proceedings were not eligible in this case, as it was the information of the plaintiff himself which was to remain a secret, and not the information which the plaintiff demanded be disclosed by the opposing party, as was the case in the German proceedings. As the ZPP has no provisions for handling trade secrets in a civil procedure, the proposal of the plaintiff had to be declined.

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<sup>63</sup> In his Appeal he finally stated that there would be 5.5 million documents on his income and 42.000 documents on his expenses.

The Court also deemed inappropriate the plaintiff's proposals to question witnesses, as they could not substitute for the lack of the plaintiff's statements regarding the extent of the damages suffered by the plaintiff. The same was true of the appointment of an expert witness, which was also declined. The Court further declined the plaintiff's motion, which asked to question the experts who provided the two damage evaluation reports, as the reports clearly stated, that the data for the reports was provided by the plaintiff, and thus the reports were not actually founded on any of the actual accounting documentation of the plaintiff.

### **3. Comment**

This judgment is an interesting example of procedural issues which arise within competition law case. Even if the relevant market and actual abuse of the dominant position are established (which in itself is complicated enough), raising the burden of proof regarding the damages claimed can prove tricky. The parties will often also be reluctant to disclose the information required to justify the damages claim, as it may strike at the very core of their business transactions-a predicament which procedural rules have yet to tackle appropriately.

## **8.5 TOBIAS PESCH, HAMBURG COURT OF APPEAL (GERMANY)**

### **List of Cases**

#### **1) German Cases**

**Bundesgerichtshof, Urteil vom 18. November 2014, KZR 15/12 – Calciumcarbid-Kartell  
II**

**Oberlandesgericht München, Urteil vom 9. Februar 2012-U 3283/11 Kart**

**Landgericht München, Urteil vom 13. Juli 2011-37 O 20080/10**

#### **2) ECJ Cases**

**Siemens, C-231/11 P to C-233/11 P, EU:C:2014:256.**

**Areva, C-247/11 P to C-253/11, EU:C:2014:257.**

### **Introduction**

Article 11 (1) and the principle of joint liability in the area of private enforcement of competition law. If co-infringers C Article 11 (5) of the recent EU Directive on Competition Law damages claims<sup>64</sup> establish the principle of joint liability in the area of the private enforcement of competition law. If co-infringers C-1, C-2 and C-3 form a cartel that harms their buyer, B, by charging him supra-competitive prices, B would have the option to sue company C-1 for the total harm that he suffered, even if he mainly bought from companies C-2 and C-3. In turn, company C-1 could try to recover from C-2 and C-3 the compensation which it had to pay company B. In the wording of Recital 37 of the aforementioned directive:

„A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more than its share of compensation. The determination of that share as the relative

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<sup>64</sup> Directive 2014/104/EU, OJ L 349, 5.12.2014, p. 1–19.

responsibility of a given infringer, and the relevant criteria, such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.

The case I am presenting concerns a similar issue arising from the public enforcement side of competition law: If several co-infringers are held jointly liable for a fine by DG Competition, is it possible for one of the companies to (partially) reclaim the fine from their co-infringers?

### **The Facts**

The case concerns civil litigation arising from DG Competition's infringement decision in the calcium carbide cartel in July, 2009<sup>65</sup>. In this infringement decision, two companies, which shall be referred to as the Claimant and the Defendant-according to their roles in the latter civil trial – were held to be jointly liable for a competition law fine.<sup>66</sup> This is the timeline according to the DG Competition's decision:

April, 2004: Defendant commences its involvement in the cartel.

August, 2004: Claimant acquires Defendant, holding 100% of its shares.

November, 2006: After some sales of shares, Claimant is still holding 57% of Defendant.

January, 2007: Cartel is ended.

July, 2007: Claimant sells all of its shares in Defendant.

July, 2009: DG Competition holds Claimant & Defendant jointly liable for a fine:

Defendant, as a result of its own involvement in the cartel.

Claimant was presumed to have exerted a decisive influence on the Defendant as its subsidiary (Akzo-Doctrine).

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<sup>65</sup> Commission Decision *C (2009) 5791 Final* of 22<sup>nd</sup> July, 2009.

<sup>66</sup> The facts concerning the corporate structures involved have been simplified, without introducing any material changes.



January, 2014: Upon appeal by Claimant and Defendant, the General Court basically upheld DG Competition's decision<sup>67</sup>, only reducing the size of the fine.

Claimant did not appeal any further, the appeal of the Defendant to the European Court of Justice is still pending.<sup>68</sup>

Claimant paid around 50% of the fine, for which Claimant & Defendant are jointly liable, to the EU Commission, while Defendant gave a bank security.

### **Judicial Proceedings in the Civil Court**

In parallel to the judicial review of the fining decision, Claimant started civil proceedings against Defendant to recover a contribution for the fine it had to pay under joint liability. Both companies are domiciled in Germany and were amicable to resolving the matter under German law. The Court of First Instance in Munich (LG München)<sup>69</sup> and the Appellate Court in Munich (OLG München)<sup>70</sup> held that Claimant cannot recover any losses from Defendant.

The Courts decided the case under § 426 (1) of the German Civil Code (BGB), which is the German standard rule for internal compensation between two parties which are jointly liable to a third party. The wording of § 426 (1) BGB can be translated as follows:

(1) The joint and several debtors are obliged in equal proportions in relation to one another unless otherwise determined.

Contrary to the misleading wording of § 426 (1) BGB, German case law very rarely just falls back on spreading compensation “in equal proportions”, rather, it is the duty of the judges to assess the individual circumstances of each case and to find a just distribution of liability.

Applying this standard, the OLG München decided that Claimant cannot recover any contribution from Defendant due to the following factors:

The court held that the Claimant fully received the economic gains of the competition law infringement of the Defendant, since in the Parent – Subsidiary relationship, the Claimant either

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<sup>67</sup> Judgments ECLI:EU:T:2014:23 and ECLI:EU:T:2014:27.

<sup>68</sup> Case C-154/14 P.

<sup>69</sup> LG München I-Urteil vom 13. Juli 2011-37 O 20080/10.

<sup>70</sup> OLG München-Urteil vom 9. Februar 2012-U 3283/11 Kart.

benefitted by receiving profits from the Defendant directly through profit sharing or indirectly, through the increase in value in its shares in Defendant.

-The Court held that it was not necessary to establish if the cartel made gains, and questions of causality or fault for the cartel's behaviour are irrelevant.

Afterwards, the Claimant further appealed the case to the Bundesgerichtshof (further abbreviated as BGH), which is the highest German court in civil matters.<sup>71</sup>

### **Ruling of the Bundesgerichtshof**

Firstly the BGH referred some questions to the European Court of Justice<sup>72</sup> for a preliminary ruling. These mainly concerned whether the distribution of the fine was really a question of national law and whether it was for the national courts, and not the EU Commission, to determine this. These questions had basically been answered in the Siemens<sup>73</sup> and Areva<sup>74</sup> Cases, which is why the BGH could withdraw the request for a preliminary ruling.

According to the Siemens Case, the relationship between the contributions is a question of national law and DG Competition has neither the obligation nor the right to establish the relative responsibility of the co-infringers that are held jointly liable for a fine.

1. Following this line of reasoning, the BGH applied the German rule § 426 (1) BGB – as the Appellate Court did-but this Court came to different conclusions: Claimant being the parent company does not automatically lead to the conclusion that it should have to bear the cartel fine in its entirety. Instead, it is up to the Courts to consider the circumstances of the individual case and to determine the responsibility of the parties to the competition infringement.

Since this assessment requires further determinations of fact that the OLG München had not yet made, the BGH referred the case back down to the OLG München, where it is still pending.

2. Nevertheless, the BGH's judgment contains a lot of useful further legal analysis, which I will try to summarise below:

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<sup>71</sup> Formally, Judgments of the Bundesgerichtshof can still be appealed to the German Constitutional Court, but only for specific violations of Constitutional Law.

<sup>72</sup> Case C-451/13.

<sup>73</sup> C-231/11 P to C-233/11 P, EU:C:2014:256.

<sup>74</sup> C-247/11 P to C-253/11, EU:C:2014:257.

2.1 Considering the sharing of contributions under § 426 (1) BGB, the BGH held that one first has to analyse whether a contract existed between the parties in regard to the distribution. This could be in the form of an explicit contract, for instance, a settlement between the parties about the question of distribution. However, concluded contracts about the distribution would also suffice, for example, if Claimant and Defendant had concluded a profit-and-loss sharing contract-which is a construct in German corporate law, whereas the profits of the subsidiary company have to flow to the parent company – this would exclude any liability of Defendant.

In the present case, no contract of this kind existed between Claimant and Defendant.

2.2 The BGH required a really detailed assessment, among the factors to be assessed by the Court should be:

- The role of each co-infringer in the cartel. As a general rule, a possible violation of a supervisory duty by Claimant during the Parent-Subsidiary relationship with Defendant would generally not constitute a defence for Defendant against Claimant's compensation claims.
- The economic success of the cartel needs to be determined if, and to what amount, there were cartel gains or other indirect advantages.
- The economic capacity of the co-infringers and the respective volumes of sales of the cartellised goods

2.3 The German Federal Cartel Office ("Bundeskartellamt") filed an "*amicus curiae*" brief, arguing that the liabilities under § 426 (1) BGB between the parties should be spread "in equal proportions" here. The main argument behind this line of reasoning seemed to be that it would not be conducive to effective public enforcement of competition law if a company could recover the fine from the co-cartellants in certain situations.

The BGH did not agree: While it agreed in principle that the effect on public enforcement is a factor to consider, and that § 426 BGB should not lead to a party recovering 100% of their fine, it did not see it as necessary, in this case, to spread the compensation between the parties 50:50, and it did not agree that this should be the general rule in these types of cases.

2.4 The fact that Claimant sold Defendant at some point does not lead to a requirement for the Court to determine if Claimant received an indirect benefit from the cartel's behaviour (i.e., higher profits of Defendant, leading to a higher sale price flowing to Claimant). This

should only concern the relationship between Claimant and the acquirer of Defendant, and it would only have to be considered in a post M&A dispute between these two parties.

### **Analysis of Relevance of the Judgment**

In my opinion, civil judges in competition law cases have to perform a really difficult balancing exercise: On the one hand, to find a correct judgment one would like to precisely determine and assess all the facts that might theoretically be relevant in an individual case. On the other hand, in civil law jurisdictions, as in Germany, where each party has to prove that the facts are beneficial to its position and disclosure regimes as evidence, are rather limited. This might raise insurmountable procedural hurdles, in the way of evidence, for the concerned party. In the case of competition law damages claims, the recent EU directive generally tries to address this problem, for example, according to Art. 17 (1) of the Directive, national judges are to be empowered to estimate the amount of harm to the claimant.

Cases of the type presented here – co-infringers fighting with one another about their share of liability – offer up a second balancing exercise: Balancing the right to compensation of a cartel member with the effectiveness of the public enforcement of competition law.

It is said that the mark of genius is “to make everything as simple as possible, but not simpler”. In this fashion, I find the approach of the Bundesgerichtshof in this case very convincing. While the detailed assessment of the relative roles of Claimant and Defendant in the cartel that are required by the BGH is certainly very complex, the outright denial of any compensation for Claimant due to its status as a Parent company, which the OLG München seemed to imply, is hard to justify.

While the argument of Defendant, –that it should be determined whether the Claimant received an indirect cartel benefit via the acquisition prize when it sold its shares in the Defendant to a third party, has a certain dogmatic appeal. It seems almost impossible to adequately determine this in a trial between Claimant and Defendant. This is why I agree with the BGH's solution (See 2.4) that this will be a question for a separate trial between Claimant and the acquirer.

Furthermore, while the effect on the public enforcement of competition law should be kept in mind in these types of cases, using a very general rule (See 2.3), like the equal sharing of compensation, hardly seems appropriate.

## **8.6 DAEM WERNER, COMMERCIAL COURT OF BRUSSELS (BELGIUM)**

### **The European Union v Otis, Kone, Schindler and ThyssenKrupp**

#### **Judgment of the Dutch speaking Commercial Tribunal of Brussels of 24th November, 2014.**

On 24th November, 2014, the Dutch speaking Commercial Tribunal of Brussels dismissed the European Union's claim for damages against four elevator and escalator manufacturers, on the basis of overpricing the installation and maintenance contracts for EU buildings for lack of proof of damages.

The manufacturers were previously condemned for infringements of Article 81 of the CC Treaty (now Article 101 TFEU).

The Commission imposed, with its decision of 21st February, 2007, (COMP/E-1/38.823), an €992 million fine on Kone, Otis, Schindler and ThyssenKrupp, for having participated in bid-rigging cartels for the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands from 1995 to 2004.

The companies were accused of having allocated tenders and other contracts with the aim of dividing up the European market. The Companies unsuccessfully appealed the decision before the European Courts.

On 20th June 2008 the European Union launched an action before the Brussels Commercial Tribunal as a private plaintiff seeking around €6 million in damages. The European Union alleged that it, as an owner or occupant of buildings with elevators and escalators that are supplied and maintained by the four cartel members, had paid an overcharge as a result of the cartel.

Answering a request of the Brussel Tribunal of 18th April, 2011, the ECJ confirmed by its preliminary ruling of 6th November, 2012 (C/199/11) the ability of the European Union to bring a damage claim, where the Commission itself has made the cartel decision.

The ECJ explains that although the national court is bound by the Commission's findings of anti-competitive conduct, the national court alone will decide whether there are damages, and whether there is a direct causal link between that conduct and the damages suffered.

With its judgment of 24<sup>th</sup> November, 2014, the Brussels Commercial Tribunal dismissed the claim, as the European Union had not provided sufficient evidence that it had actually suffered any damage.

The Tribunal examined the claim under Belgian Tort Law, emphasising that the claimant is required to give a plausible – not merely hypothetical – proof of its damages.

The Tribunal cited also the European Commission's own cartel decision of 2007, acknowledging that it would be impossible to ascertain what the contracts would have cost without the cartel, as a support for rejecting the claim.

The European Union argued that the Tribunal should apply a presumption that the cartel had caused damages in line with Article 17(2) of the EU Directive on antitrust damages actions. However the Tribunal decided that this Directive wasn't yet applicable under Belgian law.

The Court also rejected the European Union's request for the appointing of an expert to assess the damages, as there were serious doubts about the existence on any damage.

The outcome of this case would probably have been different had the EU Directive on antitrust damages actions already had been implemented in Belgium.

Article 17 of this directive stipulates:

1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm, if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.
2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.
3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

This directive was signed into law on 26th November, 2014. Member states still have 2 years to implement it in their national legal system.

By initiating this action the European Union clearly aimed to also encourage the private enforcement of EU competition law in civil courts by the consumers and competitors who had been harmed. The judgment highlighted some of the practical difficulties of bringing an antitrust damages claim under existing law and the usefulness of the Directive on antitrust damages actions

The European Union has appealed the judgment.

## 9. UNFAIR COMPETITION

### 9.1 IVA KARIN SIPEK, COMMERCIAL COURT OF ZAGREB (CROATIA)

#### **Case: Kraft Foods Schweiz Holding GmbH v. KRAŠ d.d.**

The Kraft Foods Company is the second largest food and drink manufacturer in the world. It has business interests in 70 countries, and sells its products in 155 countries, with yearly revenue of US\$42 billion. It is the owner of a large number of world known brands of food products, such as Milka, which is one of the most known chocolate brands in Europe and which has been produced since 1901, and which has been sold in its lilac coloured wrapper on the Croatian market for decades.

Kraft Foods is the holder of International Trade Mark No. 644464, which has been protected in Croatia since 1995, and which is registered before the State International Property Office. It is protected in regard to products in Class 30 of the International Classification of Products and Services. This, concretely, relates to chocolate and products containing chocolate. The trademark in this Case consists of the lilac colour *per se*.

Kraft Foods argues that market research showed that 89.9% of consumers in Croatia spontaneously connect the lilac colour with MILKA products. This represents an extremely high percentage of recognition, and also demonstrates that the claimant's lilac coloured wrapper has acquired a very high percentage of distinction in Croatia in relation to the products for which it is protected.

It claims that the lilac colour of the packaging is unique, and that it is not common, necessary nor functionally dependant to use that colour on packaging, and that the claimant gained an exclusive right to use that colour in regard to products that are the same, or similar, to those for which it is registered.

Kraš is a Croatian company that produces confectionery (*konditor*) products and it competes with Kraft Foods in the field of the production and sales of those products because they are offering their products to the same consumers in the market.

Kraš is selling Mentol Bonbons (without sugar) in a lilac coloured packaging that is almost identical to International Trademark No. 644464, which is registered for products in Class 30 of the International Classification, meaning chocolate and chocolate products.



Kraft Foods issued a claim against the Kraš Company claiming that they had Kraš has infringed its trademark (International Trade Mark No. 644464) and claimed it had been involved in unfair trading.

Kraft Foods argued that by placing the Mentol Bonbons in such a packaging Kraš is breaching the Trademark Act and infringing their international trademark, which protects the lilac colour *per se*.

It is also argued that Kraš is using the lilac colour for bonbons without sugar, which is also within the scope of protection, and that Kraft Foods has around 50 Milka products, including Milka dietary chocolates, containing no sugar (Milka Diet Alpenmilk and Milka Diet Hazelnut), in the Croatian market as well as many other confectionery products, including chocolate bonbons that could easily be replaced with bonbons of other kinds.

Kraft Foods argues that by using the lilac colour on the KrašŠ product, the packaging is against good business practice, due to the fact that the consumers recognise Milka products because of the lilac coloured packaging, further to which that same colour is *per se* protected. Kraft Foods argue that KrašŠ has no justification for the usage of an almost identical colour on the packaging of its products, and that that colour is not usual in the production of sweet products, nor is it necessary or functional. The Kraš packaging could mislead consumers and make them think that Mentol candies are those of Kraft Foods, or that it is placed in the market upon its approval, and is thus using the reputation that its products have in that same market. Kraft Foods also argues that Kraš is not only using an almost similar lilac colour on the Mentol candy packaging, but their product is also marked with a picture of white mountain tops in the background, which figurative element is also used, together with the lilac colour on Milka products, showing the intent of Kraš to use Kraft Foods' products' reputation in Croatia and therefore shows the bad faith of Kraš.

On the other side, Kraš argues that the most famous brand of chocolate in Croatia is Kraš, and not Milka, Kraš being one of the most prestigious and noble brands in Croatia, that it is absolutely the most famous confectioner and is the leader in the market, being the best manufacturer of sweets and chocolate. Kraš does not dispute that Kraft Foods has registered International Trademark No. 644464 for the lilac colour *per se*, but indicated that the trademark is registered only for chocolate and products containing chocolate, and not for bonbons. It also argued that their Mentol product is sold on the market in three colours: green, purple and blue, and that the lilac colour is not a distinctive content of the Mentol product, but only directs the customer to a particular characteristic of the product. It argues that the purple colour of the Kraš product – Mentol, without sugar, refers to a specific characteristic of that product and does not relate to the distinction of the brand in the

market, and that only 7% of customers buy the purple colour Mentol Bonbons, and therefore that colour is not the reason that consumers buy it, but the product in the Case. Kraš uses the purple colour for Mentol Bonbons, without sugar, so it can make it easier for a specific group of persons, those with health problems, and those who are not allowed to consume sugar, to find the product on the shelves. It also argues that all products are marked with the Kraš trademark and that a different purple is used on their Mentol product, and thus there is no possibility of misleading consumers in regard to the product and the manufacturer. Kraš states that Kraft Foods also has dietary products, making no distinction of those products, showing that consumers that buy products without sugar are paying special attention while shopping and do not decide on a superficial observation basis. Kraš argues that the creative solution for the Mentol packaging has the Velebit mountain shown dominantly, with the original slogan ‘Freshness of the Mountain Tops’, and that the Milka product has mountain tops on a small part of the packaging, and these are covered with cows, thus indicating that the product contains Alpen cows’ milk. Kraš therefore argued that it had not violated the Trade Act.

Kraft Foods claimed that the fact that it is a competitor to Kraš, and taking into account that Kraš doesn’t argue that the lilac colour is protected, it has behaved contrary to trade customs and carries out unfair trading by mostly using the lilac colour on its packaging for the Mentol Bonbons.

The provisions of the Trade Act (Article 64) consider as unfair trading especially advertising or the supplying of goods and services by quoting information or using terms which use the reputation of another merchant, his products or services, or the products of another merchant, as well as selling goods with marks, information or an appearance that creates, or could create, confusion in regard to the source, method of production, quantity, quality or any other distinctive feature of the goods.

The Commercial Court in Zagreb, as a First Instance Court, declined the claim, stating that there had not been an infringement of Kraft Foods’ trade mark, and therefore Kraš is not using a differential character, or the trade mark’s reputation, by placing on the market Kraš Mentol Bonbons, without sugar, nor does it damage the differential character or the reputation of the International Trademark No. 644464, consisting of the lilac (purple) colour *per se* and that, therefore, Kraft Foods is not validly arguing that Kraš is infringing general rules on the protection of competition, meaning the provisions of the Trade Act.

The High Commercial Court of the Republic of Croatia partially confirmed the First Instance Court’s decision in regard to the Competition Law, confirming that Kraš had not committed an act of unfair trading by using the lilac colour on the Mentol Bonbons’ packaging, but it overruled the

judgment in regard to the trade mark infringement, and ruled that Kraš had infringed the protected international lilac colour trade mark.

The Appeal Court stated that Kraš had neither objectively nor subjectively had the reason or intent to use the reputation of Kraft Foods by using the lilac colour on the Mentol packaging in the market, as in Croatia Kraft Foods is the leading brand in regard to the reputation and quality of its chocolate and chocolate products and, therefore, that Kraš had not traded unfairly towards Kraft Foods by using the lilac colour on the packaging of its Mentol sugarless bonbons.

The final decision in regard to trademark infringement is to be made by the Supreme Court.

## **9.2 JOVITA EINIKIENE, DISTRICT COURT OF VILNIUS (LITHUANIA)**

**Plaintiff – Limited Liability Company UAB “SDG”**

**Defendants-Limited Liability Company UAB “Verslo aljansas”, natural persons (former employees) G. Laškovas, G. Laškovė**

There were third parties (former employees) and the National Competition Council, an institution providing an opinion

### **SUMMARY OF THE FACTS**

The parties in the case are competitors.

The main spheres of the plaintiff's activities are: business consulting, training, health and safety of employees, labour law, fire safety, civil protection, environmental protection, professional risk assessment and evaluation, engineering services, ISO standards implementation.

The Defendant's company is engaged in the same activities. It was founded in 2009, but activities began in 2011. G. Ls-the sole defendant's shareholder and director – was the former director of the plaintiff. G. Lė, the wife of G. Ls, is the manager of the defendant's Staff and Projects Department, earlier she was the head of the plaintiff's territorial unit.

After the employment of G. Ls and G. Lė at the plaintiff's company was terminated, approximately at the end of November, 2010, the contracts with the biggest and permanent clients were terminated with the plaintiff too. Moreover, during the period January and February, 2011, 8 of the plaintiff's employees and, later, 4 of the plaintiff's employees were attracted to the defendant's company.

The main ground of the claim was that G. Ls and G. Lė were engaged in the commercial secrets of the plaintiff because of their former employment. They knew the plaintiff's clients, the assortment of services, prices, etc. confidential information, which the defendant's company had used for unfair commercial practice. Moreover, both the structure and the territory of the activities of both companies were the same. The real activity of the defendant's company began after two natural persons had left the plaintiff's company. Finally, the plaintiff's income was reduced on the basis of such unfair competition. Plaintiff claimed for material damages in the form of lost profit.

The main statements of the defendants, in response to the claim, were the following: the employees from the plaintiff's company were not attracted; the list of confidential information was not approved until 16<sup>th</sup> December, 2010, after the employment of the natural persons (defendants) has already been terminated, therefore, the defendants were not obliged to keep the plaintiff's confidential information secret; the contracts and the conditions of the contracts with the clients were not the same. Moreover, the main arguments were that there was free competition and the laws allow for the establishment of companies working in the same sphere. The clients decided to terminate contracts with the plaintiff by their own free will and to search for better contract conditions. So, the actions of the defendants were normal competition practice and didn't cause any harm or loss to the plaintiff.

#### **SUMMARY OF JUDICIAL PROCEEDINGS**

<b>JUDICIAL PROCEEDING</b>	<b>DATE</b>	<b>RESULT</b>
Beginning of the process	31 August, 2012	Case/claim was brought before court
First Instance Court Kaunas District Court Judgment Ref. No. 2-450-199/2013	11 June, 2013	Claim was rejected  Plaintiff didn't prove the causal link between the loss of income and the defendant's actions and that these actions were made intentionally to harm the other company
Appeal Court Kaunas Regional Court Judgment Ref. No.2A-87-555/2014	14 March, 2014	Judgment of the First Instance Court was repealed (annulled), action partly satisfied, defendants were declared jointly liable for damages
Cassation Supreme Court Judgment Ref. No. 3K-3-24-421/2015	6 February, 2015	Judgment of Appeal Court was repealed and the case was returned to the Appeal Instance for rehearing (re-examining)
Appeal Court Kaunas regional court	Pending...	

## JUDGMENT OF SUPREME COURT

Nevertheless, the Supreme Court accepted the evaluation of the facts presented by the Appeal Court, the case was returned for rehearing on the basis of improper material law, the wrong calculation of the damages, implementation and diverging courts' practice. The Court pointed out that case law on unfair competition law began in 2005 and now the court case law (practice) on the calculation of damages has been changed. Now, damages are considered as the pure profit received from general income, excluding the taxes, extraordinary losses and expenses. Moreover, it was stressed that damages cannot be limited by a one year period. A one year period, as provided for in Competition Law Article 16 Paragraph 4, prohibiting the disclosure or usage of the confidential information after employment is terminated, doesn't mean the limitation of damages during the same period. The definition of damages is described in Civil Code Article 6.249, not in a *lex specialis* Competition Law. In a *lex specialis* we can find only the definition of unfair competition, unfair commercial practice that is considered to be an unlawful act. So, damages can be considered to be a loss of income, and the burden of proof falls on the plaintiff. The judgment of the Appeal Court was therefore annulled. Damages were calculated as the sum of the prices of all the terminated contracts. During the rehearing process the lost pure profit must be established. The supposed income, which could be received by the claimant if the contracts with clients were not terminated, is not a sufficient criterion.

Besides, the Supreme Court made some rules on the substance of such cases, evidence evaluation and the burden of proof. It was said that the labour contracts of the defendants were terminated without substantial reason, and there were new contracts made with a competitive entity just after the previous termination. Such actions have to be considered to be unfair competition actions, especially when this practice of the employees' migration from one entity to the same other was detected in the same period of time. So, the competitive entity has gained an advantage from such migration, by comparing the situation with that which previously existed. The fact that there was not a confirmed list of confidential information could not be a reason for the rejection of the claim and the basis from which not to defend such secret internal information. This type of cases has specific argumentation. Usually, we have only indirect evidence. We have to take into account this peculiarity, otherwise it would be impossible to prove the damages on the basis of the disclosure of confidential information for unfair competitive actions, etc. We cannot raise the burden of proof too high, and do not defend the injured entity from the infringement of the fair competition law. The possibility for defendants to act successfully in the market was determined by the exploitation of the resources created by plaintiff.

## COMMENT

In this case, the Supreme Court summarised its former rulings on the unfair competition law, the calculation of damages and the confidential information. It was finally stressed that damage to the lost income stands only for pure profit that was not received from unfair commercial practices, e.g., confidential information usage. It was interesting that, in this case, the Competition Council provided an opinion on the unfair competition act, suggesting to the Court that it established not only the fact in relation to the proposal for employees to leave the plaintiff's company and to terminate employment after that, but to establish that the actions of the defendants were made on purpose to gain some profit, or to cause harm to the other company. So the Highest Court opened a window for more claims relating to unfair competition actions. Moreover, the great need for financial experts is going to increase in order to establish pure profit/loss.

## RELATED NATIONAL LAW (with links to the original language and the available translation into English):

1. Constitution of the Republic of Lithuania, particularly Art. 46  
<http://www3.lrs.lt/home/Konstitucija/Konstitucija.htm>  
translation-[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=21892](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=21892)
2. Law on Competition, particularly Art. 15, a list of unfair competitive practices is laid down  
[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=465354](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=465354)  
Translation of earlier version (Art. 16)  
[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=85566](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=85566)
3. Code on civil procedure, particularly Art. 1, On general competence courts' jurisdiction and *lex specialis* rule, Art. 178-179, 185 On evidence, burden of proof  
[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=493990](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=493990) (no official translation)
4. Civil code, particularly Art. 6.249, On assessment of damages  
[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=493999](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=493999) (no official translation)

### **9.3 LIJANA VISOKAVICIENE, DISTRICT COURT OF VILNIUS (LITHUANIA)**

#### **The Essence of the Case**

The claimants: the “Baltic Music” company and Theater Mogul BV, filed the claim against the defendant, the “Baltic Advertising Projects” company, for dishonest competence. The issue had arisen between the parties in relation to the possession of the title “Cavewoman”. The claimant alleged that the defendant had the intent to compete dishonestly. The claimants stated that the “Baltic Music” company had collaborated with the Dutch company “Theater Mogul BV” at the beginning of 2005. Theater Mogul BV was the owner of the rights of the creation of the comedy “Caveman”, as it had produced the comedy “Caveman”. This show had become especially successful and popular in Lithuania. The claimants pointed out that simultaneously to “Caveman”, “Cavewoman” based on E.J.P.’s response, had to be produced. The claimants reported this in the press on 27th March, 2006. The directors and actors of the show “Caveman”, including K.S., had known about the plans. K.S. later expressed an interest in producing the play. On 22nd March, 2006, the claimants noticed that the defendant had registered the internet addresses [www.cavewoman.lt](http://www.cavewoman.lt) and [www.cave.lt](http://www.cave.lt) on 17th March, 2006. On 27th March, 2006, the claimants found out from K.S. that he intended to produce a new play with the defendant. The new play, which would be written by Lithuanian writer S.P., was also to be called Cavewoman. The claimants argued that the defendant’s actions amounted to acts of dishonest competition.

#### **Judicial proceedings**

The Regional Court of Vilnius found that the defendant’s actions, such as the registration titles of internet addresses [www.cavewoman.lt](http://www.cavewoman.lt) and [www.cave.lt](http://www.cave.lt), the use of the compound “Cavewoman”, which was the same as the title of the show, the use of the image of the cavewoman, which imitated the picture (logo) used by the defendant in advertising the show, “Cavewoman”, were prohibited acts of dishonest competition. The Court also abolished the registration of the titles of the internet addresses [www.cavewoman.lt](http://www.cavewoman.lt) and [www.cave.lt](http://www.cave.lt), and prohibited the defendant from either using the title “Cavewoman” or the image (logo) of “Cavewoman”, which had imitated the production by “Theater Mogul BV”. In respect of the dishonest acts of competition, the Court of the First Instance pointed out that there should be two essential conditions which would show that the defendant’s operations might amount to dishonest competition. Firstly, it would be necessary to determine the relationship between the subjects involved in the business or professional activity. The Court found that the claimant “Baltic Music”, and the defendant, were rivals because they had operated in the



same area of business and the market, had engaged in essentially the same activity, *id est*, the activity of a theatre which was a commercial nature, from which both had been deriving a profit, as well as the staging and production of the events and shows. As such, they were both prohibited from carrying out any dishonest acts of competition. Secondly, it should be stipulated that such acts of a rival would be performed with the aim of competing, and by having performed such acts, the reputation of other subjects is used. By performing other dishonest acts, such as misleading consumers, rivals have a deliberate purpose: to become a competing subject. Having examined the acts committed by the defendant, and his behaviour, the Court found that the defendant had performed dishonest acts of competition with the aim of competing and exploiting the reputation of the other subject (the claimant “Baltic music”).

The Court of the First Instance found that, according to the written evidence in the present case, the claimant, “Baltic music”, on 27th March, 2006, submitted a statement to the press in which it publicly announced that, having co-operated with Theater Mogul, which had produced the very popular show, “Caveman”, in October, 2006, the public would be invited to the première which was adapted from the play “Cavewoman”, written by the South African writer E.J.P. In addition, it was found that the claimant first had the idea for its show at the end of 2004, whereas, the defendant had only planned its show after the popularity of “Caveman” was seen. The plan to produce the show, “Cavewoman”, was confirmed at the end of 2005, and the premiere was to take place in Autumn, 2006. This statement was publicly spread and articles were written during the period from 27th March, 2006, to 1st April, 2006, and were published on different internet, on the network and in the press. These articles drew attention to the fact that the same organisation that had produced the show, “Caveman”, intended to produce “a female” response. The show, “Cavewoman”, was based on the play by E.J.P. At essentially the same time, from the beginning of April, 2006, various mass media statements were made that K.S., who had directed and acted in the show, “Caveman”, had the intention of producing the monoproduction, a comedy about a woman, in response to “Caveman”. It stated that the play was written by the Lithuanian writer, S.P., and that K.S. had had the idea to produce this comedy of gender relationships about a year and a half earlier. Later, the promotional campaign of the show “Cavewoman”, which was written by S.P., was commenced. People were keen to buy tickets and the image (logo) of Cavewoman was used in advertising. It was announced that the première of the show would be happening on 14th-15th June. Based on the evidence in the case, the Court found that K.S. had been aware of the intentions of the claimant to produce the show, “Cavewoman”, which was written by E.J.P. The Court pointed out that although K.S. had known about the intentions of the claimants to produce “Cavewoman”, as he had seen the enormous popularity and tremendous success of “Caveman”, he had decided to co-operate with the defendant to produce identical titles, forms and subjects to the

play, “Cavewoman”. The Court stipulated that the defendant had already entered into an agreement with the director, K.S., about the production and adaptation of the show, “Cavewoman”, after the announcement of the information relating to the intentions of the claimants to produce the show, “Cavewoman”, based on the play by E.J.P. The witness, S.P., testified during the hearing that he had received a request to write a play concerning women’s relationships with men from the defendant, and the defendant had specified that it required the title “Cavewoman”. The witness stated that the title was not created by him. Having regard to the above mentioned circumstances of the case, the Court pointed out that the use of the word “Cave” in the title of the show was indispensable for the defendant and K.S., as it would provide associations with the show, “Caveman”, and that would ensure the success and the popularity of the newshow. Having considered the above, the Court stressed that the society could be misled into thinking that the show, “Cavewoman” was the continuation of the show, “Caveman”. The Court pointed out that other titles were deliberately not used in order to exploit the reputation of “Caveman”, the show which belonged to the claimants. According to written evidence, the Court found that when the defendant started advertising the show, “Cavewoman”, different companies and organisations applied to the claimant, “Baltic music”, to show the show, “Cavewoman”. These facts confirmed that an ordinary viewer expected the show “Cavewoman” to be the continuation/ response to “Caveman”, and to be produced by the same producer and director. The Court found that the defendant had used the image (logo) of “Cavewoman” in press statements and in advertising the show, “Cavewoman”, on a website created on behalf of defendant. The image used was found to be essentially identical to the picture (logo) of the claimants. In this case, an expert report was produced which concluded that the graphic conception of the defendant’s show, “Cavewoman”, had been identical to the picture (logo) that was used by the claimant’s “Cavewoman” show, due to the use of identical essential details and colour. The experts stipulated that the only differences were representational, and not essential details. For this reason, it was found that the visual entirety of the logo might mislead the consumer. Having examined all the material submitted to it, the Court found that the defendant had performed unlawful dishonest acts of competition and had infringed the requirements of Competition Law. For these reasons, the Court abolished the registrations of the titles of internet addresses [www.cavewoman.lt](http://www.cavewoman.lt) and [www.cave.lt](http://www.cave.lt), and had prohibited the defendant from using the title “Cavewoman” and the picture (logo) of Cavewoman.

### **Court of Appeal**

The defendant lodged an appeal with the Court of Appeal. The Court of Appeal dismissed the applicant’s appeal and upheld the decision of the First Instance Court. The Court accepted the

conclusions of the First Instance Court and pointed out that K.S. had already known about the intentions of claimants to produce the show, “Cavewoman”, based on the play by E.J.P. As the direct participant (director and actor) of the show, “Caveman”, he had also known about the commercial success thereof and the likely income. K.S. was bound by the Copyright agreement to produce and adapt the single performance “Cavewoman” on 19th April, 2006, according to the defendant’s script. The Court stressed that the defendant had exploited the commercial success of the show “The Caveman”, which was produced by the claimants, as well as the claimant’s reputation, and had chosen a title for their show, which all consumers would associate with the claimant’s show “Caveman”. The Court reiterated that the defendant, by its conduct had strived to mislead the viewer, having forced him to think that the show was the continuation of the show “Caveman”, and thus had ensured a large audience and high income. The Court stressed that, according to the practice of the Supreme Court, the aim of the security against dishonest competition is not only a defence of the interests of rivals, but also includes the defence of consumers. In this respect, the Court pointed out that in the present case, the fact that the consumers had been misled was confirmed by the data of the population survey under which the majority (62 %) of the population thought that the titles of the shows, “Cavewoman” and “Caveman”, were similar, an absolute majority (80 %) of those who had seen the performance, “Caveman”, thought that its title was similar to the title of the show, “Cavewoman”,. More than half the respondents who had seen the show “Caveman” thought that the content of the performance was related to the content of the show “Cavewoman”. According to this data, the Court found that the defendant had not needed to put any special effort into to producing the popularity of the show “Cavewoman”, since the majority of the viewers who had seen the show “Caveman” had wished to see the show “Cavewoman”, which was produced by the same director, in the same forms and in the same spaces. The Court pointed out that the defendant, through using the claimant’s show and of its reputation, had received economic benefit.

### **The Supreme Court**

The defendant lodged a Cassation Appeal with the Supreme Court. The Supreme Court noted that, according to the Court’s case-law, the list of acts of dishonest competence, which is defined by the domestic Competition Law, is not exhaustive. The Court accepted the conclusions of the Lower Courts and pointed out that having wished to find the acts of the defendant to be dishonest competition, it was not decisive to establish the similarity of the marks used because, in this kind of cases, it is indispensable to reveal if it was intended by the committed act to compete dishonestly, having, through exploited the reputation of a rival in a certain area. The Supreme Court pointed out

that the object of copyrights is not required to have a distinctive indicator but such an object should distinguish itself by its characteristic originality. If the sign is not the object of the copyright, or an industrial property, it is used in such a way that the reputation of the marks is used, such usage could be admitted as an act of dishonest competition. In the light of the above mentioned, the Court found that, in the present case, the use of the defendant's title, "Cavewoman", had caused confusion among potential viewers and through having the purpose of giving the impression that it was the continuation of the claimant's show, "Caveman", and this entailed acts of dishonest competition. With regard to such circumstances, the Court found that the defendant had directly sought to exploit the success of the rival due to an increase in the popularity of the show. The Court concluded that the defendant had chosen such ways and means to present their idea, which had infringed the rights and legitimate interests of the claimants as the reputation of the show, "Caveman", had been dishonestly used by the defendant.

#### **9.4 MAJA JOSIPOVIC, COMMERCIAL COURT OF ZAGREB (CROATIA)**

##### **Commercial Court in Zagreb**

**CASE 75. P-311/2010.**

**KOLNOA d.o.o., Zagreb v. Magnat d.o.o., Osijek**

##### **Facts:**

In this lawsuit, the plaintiff stated that he was an importer, distributor and seller of the mechanical lock lever called CTL 60 Construct/Mul-T-Lock Interactive Cylinder Inside, and that the defendant is an importer, distributor and seller of a competing product, called Defend-Lock. He pointed out that the director and founder of the defendant Hrvoje Zujic on 17th May, 2005, in an interview published in “Večernji List”, entitled “Duped Customers Blockades” offered a series of untruths about the plaintiff, his business and the products that plaintiff sells on the market, and also pointed out that, in an unlawful manner, the competitive product that the defendant offered on the market. Furthermore, from 16th September, 2005, the defendant began transmitting letters in which he invited business partners of the claimant to suspend co-operation with the claimant and to invite them to co-operate with the defendant. The plaintiff said that, in this way, the defendant had violated good business practices and this had the characteristic of unfair competition under Art. 41, Paragraphs 3 and 5 of the Trade Law. He suggested that the Court award him an amount of HRK 100,000.00 for material damage, in the form of lost profit and defamation. He also stated that the manufacturer Constructor A & D Plus srl had sold the anti-theft mechanical locking lever on the Croatian market, with the plaintiff as the importer, and that the mechanical locking lever called ‘Construct’ is produced in the Czech Republic, with the approval of the company Mult-T-Lock Ltd. in Israel. In the present case, therefore, there was no counterfeiting of the mechanical transmission lock, nor any deception of the public, as the defendant mentioned in the article, and there were also allegations that the plaintiff was selling the mechanical block transmission under a false name, which were untruthful. It is believed that the defendant presenting the false allegations tried to advertise his product and to introduce him as the importer of mechanical blocks and so to attract the business partners of the plaintiffs. The plaintiff submitted in evidence accounting records, from which it shows that, over the period between 2000 and 2008. The plaintiffs traffic grew until 2005, and from the publication of that newspaper article, traffic began to decline in such a way that in the next three years the turnover fell from HRK 7,089,923.93 to HRK 3,706,503.64. In order to restore the reputation he had built over 15 years of business in the Croatian market as a leading trader of the mechanical interlock lever, he had a lot of financial costs caused by publishing denials of the false allegations of the defendant in the electronic and the print media .

The defendant, in response to a lawsuit, contested the claim and emphasised that the interview in the newspaper article was not given by the defendant, but by Hrvoje Zujčić, an electrical engineer from Osijek, as an individual, not as a legal representative of the defendant. He disputed that, in the same interview, a competing product was emphasised, and said that in this article the defendant's company and his product were not listed. He also disputed that he had uttered any false fact and that he had in any way hurt the reputation and honour of the plaintiff, and that he had just warned, through a letter addressed to the business partners of the plaintiff, that the plaintiff was deliberately deceiving his customers and end consumers. Consequently, it is considered that the intention of the defendant was not to hurt good business practices and to achieve the characteristics of unfair competition, but, on the contrary, to draw attention to the misleading advertising of the plaintiff, which is in the public interest. It was considered that the plaintiff did not prove the cumulative fulfillment of all the prerequisites for the damages.

#### **Course of the Proceedings:**

It is disputed between the parties that the defendant uttered untrue facts in the article and so violated the honour and reputation of the plaintiff and caused material damage to him (a loss of profit).

The review of the article, which was entitled "Duped Customers' Blockades", which was published on 17th May, 2005, in the *Vecernji List* (sheet 5 of the file) showed that Hrvoje Zujčić, an engineer from Osijek and an importer of the mechanical transmission lock, gave an interview in which he stated that the plaintiff, as an importer of the Mul-T-Lock, imports the mechanical block from the Czech company called Construct Construct CTL 60, which sells it under the name of the Mul-T-Lock, but that it was a Czech construction which only incorporates a cylinder from the Israeli company Mul-T lock. Are the customers intentionally misled into believing that they are buying a product from known Israeli companies and, in fact, it's about an untrusted Czech product, to which the Czech police still gave a good safety evaluation in 1997.

In its ruling, the Court said that the interview in the article was given by Hrvoje Zujčić, but that in this article he shows that his company imports a competing product, the Defend Lock. In the opinion of the court, therefore, it's not like the interview that Hrvoje Zujčić gave as an individual.

In relation to the issue of whether the defendant in the present article presented false claims in relation to the product of the plaintiff and thereby caused the plaintiff damage, the Court found that the plaintiff did not prove this, and merely stated or suggested evidentiary motions. Namely, the

plaintiff being entitled to compensation for damages must be the general assumption of liability for damages: as being the result of the harmful action of pests, damage, causal nexus and illegality. According to the Court, the plaintiff did not prove all of these conditions for the damage. The plaintiff did not prove that the defendant presented false facts in the article, but if he would prove that there would be a harmful action. Still, the plaintiff would then be required to prove the damage (and the amount of damage) and a causal link between the harmful act and the damage, due to which the damage occurs as a result of harmful acts.

Since the plaintiff did not prove the assumption of liability for damages, the Court found that the plaintiff's groundless claim was unfounded.

**Comment:**

Perhaps the most important aspect of this judgment is that the Court gave clear instructions about what must be proven in order to obtain damages for unfair competition. In most cases, the plaintiff cannot prove his allegations or has failed to submit adequate evidence.

## **9.5 TINA JAKUPAK, COMMERCIAL COURT OF ZAGREB (CROATIA)**

**ALDI EINKAUF GmbH & Co, Mullheim/Ruhr, Germany v. GETRO d.o.o. Sesvete, Croatia**

- **Judgment of the First Instance Court: Commercial Court of Zagreb no. P-2238/2001-48 delivered October 16th, 2006.**
- **Judgment of Second Instance Court: High Commercial Court of Republic of Croatia no. PŽ-603/07-4 delivered on January 13th 2011**

### **Facts:**

The plaintiff, a German company, sued a Croatian company for trademark infringement and other forms of unfair competition. This was private litigation about the abuse of trademarks in unfair competition:

1. On April 4th, 2001, the Commercial Court of Zagreb received the civil action /law suit from the plaintiff from Germany: Aldi Einkauf GmbH & Co, Mullheim/Ruhr, against the defendant from Croatia: Getro d.o.o. Sesvete. The plaintiff claimed an affirmation of the abuse of their name and trademark, the prohibition of using the name and trademark, the annulment of the trademark at the Croatian State Intellectual Property Office registered by the defendant, accusing the defendant of unfair competition. In the civil action /law suit the plaintiff claimed that the defendant was using his name and trademark, Aldi, in a fraudulent, deceptive way in a trade practice that is prohibited by law. The plaintiff claimed that he couldn't get trademark protection in Croatia from the Croatian State Intellectual Property Office, because the defendant already had it and was deceiving consumers by using a trademark which was very similar, and almost identical, to the plaintiff's. He /the plaintiff described the trademarks.

2. In a defence statement, the defendant contests and denies the allegations. The defendant accented that he had registered the trademark, ALDI, at the Croatian State Intellectual Property Office. The defendant replied to the accusations that the trademark ALDI was known in Germany, but not in Croatia.

3. The plaintiff, ALDI EINKAUF GmbH & Co, owns and operates a chain of discount grocery stores in Europe, the United States, and Australia. The company's products include food,



alcoholic drinks, electrical products, kitchenware, toys, clothing, and flowers. The company was founded in 1948 and is based in Essen, Germany.

4. The defendant, GETRO d.o.o., is the first chain of cash&carry stores, and owns and operates a chain of supermarkets in Croatia. The company established the first brand in Croatian territory: Getro. The company was founded in 1989, and it is based in Sesvete, Croatia.

5. The Paris Convention for the Protection of Industrial Property is one of the first multilateral treaties to protect intellectual property. It addresses patents, marks, and unfair competition, whether or not this related to marks and related industrial property, trade names in the context of unfair competition, but not to copyright.

### **Rulings:**

6. The Commercial Court held a trial on these claims and found the defendant liable.

As for the unfair trade practice claim (under the Paris Convention-Articles 6bis and 8 and 10bis), the Court found that social media, the migration of the population from Croatia to Germany (workers), and *vice versa* (tourists), are important marketing tools, although the trademark, Aldi, is unknown to Croatian people, and held that taking away the followers of the 'German' trademark, Aldi, and diverting them to the 'Croatian' trademark, Aldi, was an unfair trade practice.

As to the registration of the trademark, the Court found that the defendant conducted it in '*mala fide*'- bad faith, and had made this fraudulent deception, both intentionally and maliciously (Croatian Trademarks Act-Official Gazette No 173/2003 and Joint Recommendation Concerning the Provisions on the Protection of Well-Known Marks, which was adopted by The Assembly of the Paris Union for the Protection of Industrial Property and The General Assembly of the World Intellectual Property Organisation). The Croatian Court applied the First Council Directive 89/104/EEC of 21<sup>st</sup> December, 1988, to approximate the laws of the Member States relating to trade marks, although Croatia, at that time (2006), was not a European Union Member State, because Croatia signed the Stabilisation and Association Agreement (put into effect on February 1st, 2005) and the Court applied part of that legal frame which relates to the protection of the competition rules (Article 70.).

In that perspective, the Court concluded that the defendant had breached good commercial practice (Article 70. Croatian Commerce Act –Official Gazette No. 11/96, etc.) since he had registered the

trademark in bad faith and, on the grounds of the Commercial Act, the defendant is prohibited from putting in commercial goods and services with the Aldi trademark.

On the unfair competition infringement claim, the Court found the defendant liable when he used the Aldi name in advertising and offerings. In this way, he also infringed the trademark and the registration proceedings of the national office.

Among the factors that the Court had to consider, in determining whether there was the likelihood of confusion, is whether there has been any actual confusion among the members of the consuming public. In this case, the Court found that the evidence that the plaintiff had submitted, which referred to actual confusion, was substantial. The Court rejected the defendant's arguments.

7. The defendant filed an appeal against the judgment of the Commercial Court of Zagreb, The High Commercial Court of the Republic of Croatia, delivered its judgment on January 13<sup>th</sup> 2011, Thus upholding the First Instance Court's decision that the defendant's conduct was in part unfair, and was against good business manners, when he registered a verbal and figurative trademark identical to the plaintiff's, which wasn't previously protected in Croatia. The High Commercial Court of the Republic of Croatia partially altered the judgment of the Commercial Court in the part that considered the prohibition of commercial goods and services and the prohibition against using the trademark, Aldi, because the Croatian State Intellectual Property Office has to decide prior to that Court's judgment.

### **Comment**

The case presented is relevant to understanding the private enforcement of competition law. One wonders whether the plaintiff was really trying to assert some form of unfair competition or trademark infringement. These judgments are also relevant to the competence/jurisdiction of the Croatian courts and to other state offices. We should bear in mind that this case was one of first cases before the Croatian courts that related to competition law. This judgment is also significant for analysing the overlapping of the national acts/laws, the international acts/laws and the EU law, which all of the courts have to enforce and implement into the judgment to resolve the case. Legislation is easy to propose, but difficult to wind up.

This case offers a good example about how companies (and their competitors) should be aware of the way their brands appear in social media and among the populations of the different member states. Evidence of actual confusion is a powerful tool for a trademark plaintiff (and a potentially

damaging one for a trademark defendant). Smart companies will ensure that they remain aware of how their marks and overall brand identity are being put forward.

The larger perspective of this judgment and its main guidance is in the function of its protection of consumers and of fair competition.

## **10. LIST OF PARTICIPANTS ENTRANCE FOR JUDGES 2015**

- MICHAEL AMBIZAS, DISTRICT COURT OF NICOSIA (CYPRUS)
- SIMONA BACSIN, COURT OF APPEAL OF GALATI (ROMANIA)
- INESE BELICKA, REGIONAL COURT OF ZEMGALE (LATVIA)
- LUKA BERNARD, DISTRICT COURT OF LJUBLJANA (SLOVENIA)
- MARTA BORGES CAMPOS, COMPETITION COURT (PORTUGAL)
- TERESA BRAVO, TRIBUNAL OF LISBON (PORTUGAL)
- DORIEN BRUGMAN, DISTRICT COURT OF ROTTERDAM (NETHERLANDS)
- KSENIJA DIMEC, COUNTY COURT OF RIJEKA (CROATIA)
- JOVITA EINIKIENE, DISTRICT COURT OF VILNIUS (LITHUANIA)
- SYLVIA EVERS, COURT OF APPEAL ARNHEM-LEEWARDEN (NETHERLANDS)
- LINCOLN STUART FRANKES, DISTRICT COURT OF AMSTERDAM (NETHERLANDS)
- FÁTIMA GALANTE, COURT OF APPEAL OF LISBON (PORTUGAL)
- DIMITRA GKOTSI, ADMINISTRATIVE COURT OF TRIPOLIS (GREECE)
- ANDREA GOLDSCHMITT, COURT OF FIRST INSTANCE OF WÜRZBURG (GERMANY)
- ECATERINA GRIGORE, COURT OF APPEAL OF CONSTANTA (ROMANIA)
- GORIUS HANNO, REGIONAL COURT OF KAISERSLAUTERN (GERMANY)
- TINA JAKUPAK, COMMERCIAL COURT OF ZAGREB (CROATIA)
- MAJA JOSIPOVI, COMMERCIAL COURT OF ZAGREB (CROATIA)
- URŠKA KEŽMAH, DISTRICT COURT OF MARIBOR (SLOVENIA)
- GEORGIA KORFIOTI, DISTRICT COURT OF NICOSIA (CYPRUS)
- ELEFThERIA KONSTA, COURT OF TRIKALA (GREECE)
- HRISTO KRACHUNOV, REGIONAL COURT OF SOFIA (BULGARIA)
- SAŠA KRAJNC, DISTRICT COURT OF LJUBLJANA (SLOVENIA)
- SANDA JEROMELA KURICK, COMMERCIAL COURT OF ZAGREB (CROATIA)
- CASSANDRA C.W. LANGE, CENTRAL COURT OF APPEAL (NETHERLANDS)
- DIOGO LEITÃO, HIGH COUNCIL OF THE MAGISTRACY (PORTUGAL)
- ANA LOVRINOV, MUNICIPAL CIVIL COURT OF ZAGREB (CROATIA)
- MALIN MALMSTRÖM, MARKET COURT (SWEDEN)
- DUBRAVKA MATAS, HIGH COMMERCIAL COURT (CROATIA)
- ATTILA NÉMETH, DISTRICT COURT OF MOSONMAGYARÓVÁR (HUNGARY)
- ROSA PERNA, REGIONAL ADMINISTRATIVE COURT OF LATIUM (ITALY)
- NATASA PERSIC BRLEKOVIC, MUNICIPAL COURT OF RIJEKA (CROATIA)
- TOBIAS PESCH, HAMBURG COURT OF APPEAL (GERMANY)

- RUTA PETKUVIENE, REGIONAL COURT OF VILNIUS (LITHUANIA)
- EGIDIJA PUZINSKAITE, REGIONAL COURT OF VILNIUS (LITHUANIA)
- JULIYA RAEVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)
- ELENA ROSALINOVA, DISTRICT COURT OF SOFIA (BULGARIA)
- JUAN SELLES FERREIRO, HIGH COURT OF GALICIA (SPAIN)
- IVA KARIN SIPEK, COMMERCIAL COURT OF ZAGREB (CROATIA)
- DENITSA SLAVOVA, REGIONAL COURT OF VARNA (BULGARIA)
- AGOSTINHO SOARES TORRES, COURT OF APPEAL OF LISBON (PORTUGAL)
- GABRIEL STEFANITA, COURT OF APPEAL BRASOV (ROMANIA)
- ELITSA STOYANOVA, DISTRICT COURT OF DOBRICH (BULGARIA)
- ELISABETH SUNDLÖF, MARKET COURT (SWEDEN)
- LIDIYA TOMOVA, COUNTY COURT OF SHUMEN (BULGARIA)
- MAJA VALUŠNIG, COMMERCIAL COURT OF VARAŽDIN (CROATIA)
- LINDA VINKALNA, ADMINISTRATIVE COURT OF APPEAL (LATVIA)
- LUKIINA VISMANN, COUNTY COURT OF HARJU (ESTONIA)
- LIJANA VISOKAVICIENE, DISTRICT COURT OF VILNIUS (LITHUANIA)
- MARIO VUKELIC, HIGH COMMERCIAL COURT (CROATIA)
- REINA WEENING, COURT OF APPEAL OF LEEUWARDEN (NETHERLANDS)
- DAEM WERNER, COMMERCIAL COURT OF BRUSSELS (BELGIUM)
- ARI WIREN, MARKET COURT (FINLAND)
- TATYANA ZHILOVA, ADMINISTRATIVE COURT OF SOFIA (BULGARIA)

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