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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 2016
Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti

European University Institute

Robert Schuman Centre for Advanced Studies

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(ENTraNCE)

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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:
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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 Judges 2016). 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 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; Article 101 TFEU; Article 102 TFEU; Reg. 1/2003; judicial training, national judges

Table of contents

1. INTRODUCTION	1
Giorgio Monti and Pier Luigi Parcu	1
2. SCOPE OF APPLICATION OF COMPETITION LAW	11
2.1. Carlos Manuel Gonçalves de Melo Marinho (The Lisbon Court of Appeal)	11
2.2. Martin Baran (The Prešov District Court)	14
3. PROCEDURAL ASPECTS OF COMPETITION LAW ENFORCEMENT	17
3.1 Olympia Kosta (Court of Athens)	17
3.2. HELENE KARLSSON (SWEDISH MARKET COURT)	20
3.3. MANTHOS MATTHEOU (District Court of Paphos)	24
3.4. POLONA KUKOVEC (SLOVENIA SUPREME COURT)	28
3.5. RON STAM (DUTCH ADMINISTRATIVE HIGH COURT FOR TRADE AND INDUSTRY)	31
3.6. Marie Baker (Irish High Court)	33
4. HORIZONTAL AGREEMENTS AND BID RIGGING CARTELS	37
4.1. SOFIA MARAVELAKI (ATHENS ADMINISTRATIVE COURT)	37
4.2. SANNA ANTTILA (TURKU COURT OF APPEAL)	40
4.3. ESZTER TAMÁSI (HUNGARIAN OFFICE FOR THE JUDICIARY)	43
4.4. STEFAN SCHLOTTER (GERMAN MINISTRY OF JUSTICE)	45
5. VERTICAL RESTRAINTS	46
5.1. JELENA ČUVELIAK (ZAGREB COMMERCIAL COURT)	46
5.2. ANNE MARIE WITTERS (BRUSSELS COMMERCIAL COURT)	49
5.3. PETYA STOILOVA (SOFIA ADMINISTRATIVE COURT)	52
6. DECISIONS OF ASSOCIATIONS OF UNDERTAKINGS AND FACTORS FACILITATING CONCERTED PRACTICES	57
6.1. PIETRO SPERA (COURT OF GENOA)	57
6.2. OLLI WIKBERG (FINNISH MARKET COURT)	61

6.3. DALIA VISINSKIENE (LITHUANIAN SUPREME ADMINISTRATIVE COURT).....	64
6.4. ALENKA BERGER ŠKRK (SLOVENIA SUPREME COURT)	71
7. ABUSE OF DOMINANCE.....	73
7.1. DAVID RAMSJÖ (SWEDISH MARKET COURT)	73
7.2. MIRA RAYCHEVA-SHEKERDZHIEVA (BULGARIAN SUPREME ADMINISTRATIVE COURT)	76
7.3. MARGET HENRIKSEN (HARJU COUNTY COURT).....	81
7.4. Mafalda Correira (Braga Court of Commerce)	83
8. THE PRIVATE ENFORCEMENT OF COMPETITION LAW.....	85
8.1. MIEKE DUDOK VAN HEEL (AMSTERDAM DISTRICT COURT).....	85
8.2. CHRISTINA FARCAS SURPANU (BUCHAREST TRIBUNAL).....	89
8.3. NATALIE SWALENS (BRUSSELS COMMERCIAL COURT).....	91
8.4. LIJANA VISOKAVICIENE (THE VILNIUS DISTRICT COURT).....	95
8.5. IKO NÕMM (THE TALLINN COURT OF APPEAL).....	98
8.6. Anže Ozimek (The Ljubljana District Court).....	101
8.7. IVANA MLINARIĆ (THE CROATIAN HIGH COMMERCIAL COURT).....	103
9. THE INTERACTION OF COMPETITION AND REGULATION IN THE TELECOMS INDUSTRY	106
9.1. EWA STEFANSKA (THE WARSAW COURT OF APPEAL).....	106
9.2. ELSKE BOERWINKEL (THE GELDERLAND DISTRICT COURT).....	108
9.3. EVA VIHAR KRANJEC (THE LJUBLJANA DISTRICT COURT).....	113
10. UNFAIR COMPETITION AND STATE AID LAW.....	117
10.1. EVA CERÓN RIPOLL (THE SPANISH GENERAL COUNCIL FOR THE	117
10.2. ENRIQUE GABALDÓN (THE SPANISH CONSTITUTIONAL COURT).....	119
10.3. ELENA ROSALINOVA (THE SOFIA DISTRICT COURT)	123
10.4. VLADIMIR BEREZOVSKIJ (THE VILNIUS DISTRICT COURT)	125
11. LIST OF JUDGES WHO ATTENDED ENTRANCE FOR JUDGES 2016.....	129

1. Introduction

Giorgio Monti and Pier Luigi Parcu

Introduction

This collection of case notes is the result of the final workshop of ENTraNCE for Judges 2015, held at the European University Institute in June 2016. During the workshop, national judges presented and discussed a representative judgment from their jurisdiction. This is the sixth such workshop. We find this a fruitful way of allowing judges to exchange their views on a number of procedural and substantive issues, and we hope this informal judicial conversation can be the catalyst for further discussions among judges in other instances.

The case summaries and notes are assembled on an annual basis so that they may serve as an open access repository in English language of how national courts are handling competition law disputes. They serve as a snapshot of the use of EU Law principles in the national courts, and how decentralized enforcement is faring among the courts.

The purpose of this introduction is to summarise each case note briefly as a guide for the reader so as to provide a concise roadmap of the issues that are addressed in greater detail by each case note.

1. Scope of application of competition law

Judge Goncalves de Melo Marinho (section 2.1) presents us with a case of vital importance for the relationship between EU competition law and other rules of law. The dispute arose when the claimant (i.e. a shareholder in a company) took legal action against the defendant company and challenged the company's accounts. The claimant wished to obtain certain information from the defendant, to verify the truthfulness of the claims made. In this dispute that involved national company law primarily, the defendant argued that he was unable to share certain information about prices and profit margins with the claimant because they were competitors; the sharing of information could be seen as an agreement restrictive of competition.

Two issues arise: first as the national court rightly noted, if a practice restricts competition under EU Law, then the supremacy of EU Law means that the practice is unlawful even if authorized under national law. Second, the assessment of whether the exchange of information between two parties does indeed infringe Article 101 required more reflection and it seems the court was too quick to agree with the defendants that the provision of information could restrict competition. In fact the case required a balancing exercise between shareholders rights and competition law, when a minority shareholder is also a competitor.

The case law provides that one should first explain why a certain exchange of information may be harmful (e.g. facilitating collusion) and then explain whether the nature of the information received suggests that the effect is plausible. On the facts, we are not told whether the claimant and defendant dominate the market or whether there are other market players. Moreover, the information is only provided by one party to another. Thus, it is not clear in which way the sending of this information would be anti-competitive. Furthermore, the value of information in time tends to decay rapidly. Nevertheless, special caution should be given to price and internal transfer prices, information that are very delicate from a competitive point of view. Indeed, as Judge Goncalves de Melo Marinho opines in his case note, the judgment seems to make it difficult for a firm to be a shareholder of a competitor and this seems to be in tension with the general right to exercise a commercial activity.

Judge Baran's case note (section 2.2) shows how a more clear theory of harm can be denoted. In this case three banks withdrew their services from a foreign client (Ackenta) that was offering services

in competition with them. The Slovak Competition Authority was able to detect the anticompetitive effects of the concerted refusal to deal and to explain why this excluded a competitor, to the disadvantage of consumers. Apparently, the foreign competitor did not have a regular license to operate in the country, but the court argued that, if this was a problem, it is for a public authority not for private firms' agreements to enforce the law.¹

2. Procedural aspects of competition law enforcement

Judge Costa reports on the issue of limitation periods (section 3.1). The specific case appears to present a clear violation of competition law by a dominant firm that uses also restrictive agreements to stop competition in pumice sale both in Greece and Italy. The unusual aspect of the case is that the Hellenic Competition Commission decided to issue a decision ten years after the infringement had come to an end. It is not clear what the motivation was behind such belated action: the conduct in question related to loyalty rebates, so it does not appear to be a novel legal issue where the Commission might have felt the need to clarify the law for others. The difficult issue that the Greek administrative courts had to face was the absence of a limitation period in the national legislation applicable at the time. The ruling of the Supreme Administrative Court draws on the case law of the European Court of Human Rights and on EU competition law to determine that a limitation period must exist, on the basis that parties require legal certainty and that there was no justification for an action to be launched a decade after the last alleged infringement. The judgment is largely of historical interest for the specific issue, but it is a relevant reminder that a number of procedural matters require resolution and that national judges have multiple sources of supra-national law to draw upon to help determine how to devise effective procedural protection.

Judge Karlsson (section 3.2) reports on a judgment on the rights of a competition authority to review electronic files that it has seized, *ASSA AB v. Swedish Competition Authority*. On the facts, the Swedish NCA had seized all the documents on the hard drives of the undertakings under investigation and had moved this copy to their offices. These had been examined to check for a specific infringement. Subsequently the NCA wished to review the electronic files in its possession again, for a different infringement, and submitted an application to the Stockholm District Court, which was opposed by the undertaking. The District Court, replying on judgments from the EU courts agreed that a second look at the files was justified, but this was overturned on appeal by the Market Court which took the view that as a matter of constitutional law the undertakings had a right to object, because they had originally only consented to hand over the data on the basis of another allegation. New legislation in Sweden clarifies the right of the NCA to review information that is stored digitally in the premises of the NCA, but Judge Karlsson takes the view that this does not alter the validity of this judgment, by which the NCA may not examine the documents again, on different grounds, absent the undertakings' consent.

Judge Mattheou (section 3.3) reports on *Cyprus Telecommunication Authority v. Commission for the Protection of Competition*. The procedural issue at play was whether the appellant should provide the complainant (a firm known as Primitel, who had made the complaint that led to the competition authority's decision under appeal) a file that included confidential information. It appears that Primitel was taking an active role in the litigation. The administrative court of Cyprus held that on balance the complainant was entitled to a version of the submission that included confidential information, by balancing respect of confidentiality with the need for transparency in legal procedures. The Court relied on British precedents to illuminate the role of transparency and also sought support from the judgments of the CJEU. As Judge Mattheou rightly notes this approach is interesting but a tad

¹ The issue was referred to the CJEU for preliminary ruling. Case C- C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* (2013) ECLI:EU:C:2013:71.

abstract: it might have been also helpful for the court to have explored whether the facts at hand were really needed by Primitel.

Judge Kukovec (section 3.4) reports on a judgment of the Supreme Court of Slovenia that overturns a finding of infringement of the national competition authority with respect to a finding of bid-rigging. The appellant in this case failed on procedural claims, but succeeded on two substantive issues. First, the appellant showed that it did not have the economic pre-requisites to bid for the tenders that had been issued. Accordingly the appellant argued, and the court agreed, this company was unable to participate in an agreement or concerted practice to rig these bids. While hypothetically the appellant could have made a bid jointly with another market player, this was held by the court to be too speculative. Second, the court held that the national competition authority (NCA) had not explained why Article 101 should apply because it had not shown the way in which trade between Member States was affected. The NCA did not explain its claim as to why the cartel would deter bids from undertakings based in other Member States. However, this last element may appear somewhat at contrast with the low level test often applied even by the European Commission to assess the applicability of Article 101.

Judge Stam (section 3.5) reports on Eleven flour manufacturers from the Netherlands, France, Belgium and Germany v. The Netherlands Authority for Consumers and Markets (ACM). In this case the dispute concerned a request by the appellants to obtain the leniency file from the NCA. The NCA was reluctant to hand it over for the same reasons that were noted by the CJEU in *Pfleiderer*.² In other words, that making the leniency statement easily public would undermine the NCA's leniency policy. The Dutch court however ruled otherwise and held that the rights of the appellants to plead their case properly took precedence over the leniency policy of the NCA. This is an important ruling, which will be of assistance in many jurisdictions where balancing between competing interests in these cases will remain vital.

Judge Baker (section 3.6) brings us a hub and spoke cartel where collusion among dealers was coordinated by a trade association. Her annotation is particularly valuable because in Ireland such infringements bring criminal penalties. This judgment (*DPP v. Duffy and Duffy Motors (Newbridge) Ltd*) is important because of the detailed discussion of the policy arguments for criminalization that the judge explores in details. While in this instance the sentence was suspended, the judgment signaled willingness by the judiciary to follow up with custodial sentences in future cases.

3. Horizontal Agreements

Judge Maravelaki (section 4.1) discusses an appeal against a cartel decision, which was unsuccessful, largely because the appellants queried a number of fairly clear provisions of antitrust law as applies to cartel conduct. Five Greek milk companies meet to share geographical market and control prices, the meeting was clearly anti-competitive. It is consolidated jurisprudence that even a single meeting is sufficient and there is no question to gauge effects in case of such a hard-core violation. The obvious lesson here is that parties should avoid appealing unless they have some proper grounds where they feel the probability of success is high – in cases where the collusion is so self-evidently anticompetitive, the better grounds of appeal are normally procedural, as the substantive law on hard-core cartels is now well settled, as demonstrated by the copious reference to CJEU judgments by the court. An interesting element to remark in this case is the fact that in an agreement by object the duration of the cartel has by definition no bearing on the measure of the fine.

Judge Anttila (section 4.2) discusses a bid-rigging case in tenders for public property, where the main difficulty for the NCA and the court was in apportioning responsibilities among a group of companies, and whether the parent firms were liable for an infringement of the subsidiaries. The

² C-360/09, *Pfleiderer AG v Bundeskartellamt* (2011) ECLI:EU:C:2011:389.

court's ruling that the parents were not responsible sounds a little surprising given that these were small undertakings and only few people were involved in the actions of the companies. However, it seems that the main issue was lack of evidence for the court to judge the appropriate relationship between the firms that directly orchestrated the bid rigging and those who owned these firms.

Judge Tamási (section 4.3) reports on one of the biggest cartel cases in Hungary in recent years. Five tenders for university systems were altered by an agreement involving IBM, SAP and another local company. These companies together were even able to affect the tenders' contents. Fines were applied because these were severe and well documented violations. As in other cases of bid rigging it was not necessary to define the relevant market when the agreement concentrates on a specific tender. The learned judge notes how bid rigging cases are treated as very severe infringements of competition law and that the application of national competition law follows closely the principles set out by the CJEU in interpreting the prohibition in Article 101 TFEU.

Judge Schlotter (section 4.4) identifies an issue that has plagued the German antitrust system. Simplifying matters somewhat, in the German legal system it is relatively easy for parties to avoid paying an antitrust fine by reconstituting the company that was found liable for an infringement in a new company. A 55 million € fines, like in this case, may well cause a restructuring of a company to escape previous responsibility. In the judgment under review, the Federal Constitutional Court tried to put a stop to this practice when the applicant in the case (Melitta Europe) was the legal successor of Melitta Kaffee: on the facts, the new entity continued the same business as the successor so it could not escape the fine imposed. However, it appears that some corporate restructuring techniques can still allow undertakings to avoid paying a fine and the legislator is considering ways of closing this loophole: in July 2016 the Bundeskartellamt set out a proposed amendment to the competition act to address this issue.

4. Vertical restraints

Judge Čuveliac (section 5.1) reports on a resale price maintenance case taken by the Croatian competition authority. There are two striking aspects of this case. First, that the competition authority imposed a fine on both the manufacturer and the distributor of the goods. This is unlike most cases taken by the European Commission where the fine is normally imposed only on the party that set the restrictive clause, and not on the party who accepts it. Moreover, fairly heavy fines were imposed notwithstanding the fact that the agreement had not been implemented! The reason given by the NCA and accepted by the court was that the fine was to serve as a general deterrent mechanism. With respect, this approach seems a little extreme taking into consideration that the adverse welfare effects of resale price maintenance are ambiguous.³

Judge Stoilova (section 5.3) also reports on a resale price maintenance case. Again here, given the ambiguous welfare effects of these kinds of clauses one wonders why the Bulgarian competition authority is prioritizing this kind of case and whether it has a deterrence strategy in mind when selecting these cases.

Judge Witters discusses the termination of an agreement between a motorbike manufacturer (Ducati) and a dealer/repairer, DD Bikes (section 5.2). The DD Bikes had been selling and repairing Ducati motorcycles for many years. Once the dealership was terminated, DD Bikes requested that Ducati supply it with parts and allow it to carry on as a repairer, but Ducati refused. The dealer took the issue to court. It transpired that Ducati would only allow persons to act as repairers if they also sold the bikes. At first instance, the court took the view that there was both an agreement restrictive of competition (Ducati was tying the sale of bikes to repair services) and an abuse of dominance (Ducati

³ For a discussion see the US Supreme Court in *Leegin v PSKS* 551 US 877 (2007).

dominant in the aftermarket for its spare parts). On appeal, only the abuse of dominance portion was upheld because the court took the view that there was no agreement between Ducati and DD Bikes.

There are two concerns with this case. First, on the question of an agreement, it is possible to say that the effect of the Ducati sales policy with respect to the other dealers/repairers in Belgium is to foreclose market access to the repair market, therefore, a dealer/repair company can seek a remedy even if it is not party to a pre-existing agreement with Ducati. Second, on the abuse of dominance, it should be recalled that the Court in *Volvo v Veng*, on similar facts was much more cautious and required some detailed reflection before ordering the owner of spare parts to supply them to a dealer.⁴ The secondary market power issue, in fact, appears economically much more nuanced than it shows in this clear-cut decision.

5. Facilitation of collusion

Judge Spera (section 6.1) discusses a case that follows from the liberalization of the legal profession where the Italian competition authority found that the Italian Bar Association had attempted to circumvent such market opening by restricting competition in two ways: by controlling the fees lawyers charged and by limiting the capacity of lawyers to advertise. It allegedly did so by issuing two circulars on its website to guide its members. Lawyers realize an economic activity and, therefore, are undertakings under competition law, their association is an association of undertakings, and its circulars may be restrictive agreements. On a close review of the facts the Administrative court discovered that the circulars that the bar association had made available regarding the fees on its website were put up in error and that it was probably clear to all viewers of the website that this was an error. Moreover, the court found that there had been no enforcement of this circular. Nonetheless, the circulars limiting advertising could reasonably be taken to be describing the association's policy and they were found to restrict competition. As Judge Spera rightly remarks, the reaction of the bar association is a typical reaction of those whose protected market is opened to competition, and it is wise for competition authorities to enforce competition law actively in the years immediately following liberalization.

Judge Wikberg (section 6.2) discusses a case about the Finnish Bakery Federation and its price recommendations, which appeared to be attempts to facilitate collusion in the retail price of bread. The Federation recommend all bakeries to raise their prices in the face of costs increases. However, a contemporaneous VAT diminution made difficult to actually raise the prices, but obviously even a concert not to diminish prices may be a serious infringement. The market court agreed that the practice constituted a decision of an association of undertakings. There are two interesting aspects of this judgment: the first relates to the question whether each annual price recommendation was a separate infringement (which on the facts would have meant that some of the claims against the Federation would be time barred) and here the national court makes ample reference to the principles established by the CJEU. A second issue which may be discussed more on the appeal which is pending at this time is how far the competition rules apply to labor markets and if this exclusionary rule is applicable on the case at hand. As judge Wikberg notes, this is not the first time an association of self-employed workers has been challenged, and it remains to be seen if this issue is addressed on appeal.

Judge Visinskiene (section 6.3) shows us that occasionally a new, small and energetic competition authority, like the one in Lithuania can be the pioneer in certain economic sectors. The Eturas judgment is the first time a competition authority and the CJEU addressed collusion facilitated by on-line platforms. The issue at stake is an email sent by a website administrator to all tour operators on the platform suggesting a restriction to maximum 3% of the discount which all tour operators, whose trips could be booked through the website, could apply. The national competition authority thus had

⁴ Case 238/87, *Volvo v Erik Veng* (1988) ECLI:EU:C:1988:477.

evidence that Eturas appeared to have started a discussion which would facilitate collusion and evidence of collusive conduct in the pricing on the website. It concluded that there were sufficient elements to condemn.

On appeal, the court made a reference to the Court of Justice, whose approach was to suggest that the matter required cautious handling.⁵ First, the Court held that the presumption of innocence was a principle to be taken into consideration when assessing whether the travel agents could be deemed to have applied or even read the email communication. One can presume that members of a cartel hear information from others when they sit in the same meeting, but it is harder to make such a presumption with the method of communication used here. For instance, a rebuttal based on electronic behaviours would be acceptable, like not opening of the message. Second, the Court took the view that even if a party could be deemed to know of Eturas' plans, it could still publicly distance itself from this collusive attempt and that to do so one must not communicate the wish not to follow the suggested prices to everyone. It sufficed either to communicate this to Eturas, or indeed by systematically departing from the terms of the agreement. The matter is now back with the national court whose judges will have to look closely about how to apply national procedures to cartel standards. This case is an important reminder that while the substantive law has been broadly harmonized, procedural rules have not been harmonized and it may be that these affect the outcome of cases across the EU.

Judge Škrk (section 6.4) considers a bid-rigging case among pharmaceutical firms in some markets for prescription drugs in Slovenia. Four wholesalers used to offer the same price on prescription and non prescription items, they were condemned by the NCA for bid rotation and the first court confirmed, the Supreme Court confirmed that this was a violation by object and that the existing public regulation did not allowed or covered the agreement.

This judgment is interesting because of the unusual regulatory background whereby the maximum price for the goods is fixed by a state agency and so prices are negotiated under the umbrella of that maximum price. It is also important to note how the court here, similar to other national cases, requires more evidence of an effect on trade between Member States before allowing the NCA to apply Article 101 TFEU.

6. Abuse of Dominance

Judge Ramsjö (section 7.1) brings up a privately litigated case which has some similarities to the Google saga: *Pizza24 Nordic AB v. OnlinePizza Norden AB*. Both companies offered a service whereby consumers could order a pizza on their platform from any of the pizzerias that subscribed to the platform. Pizza24 alleged that OnlinePizza was the dominant platform and that it threatened the pizzerias that used it that it would cease to deal with them if they also utilized another platform. The main issue at trial was whether the market had been defined correctly. The Market Court was not satisfied that the claimant had brought enough evidence to exclude the possibility of a wider market (e.g. on-line sale of all kinds of prepared food) or indeed whether on-line sales were a distinct market. The case illustrates clearly the importance, but also the costs, of private litigation and probably also witness the fact that it is not best suited for settling novel issues.

Judge Raycheva-Shekerdzhieva (section 7.2) discusses a set of agreements between the dominant natural gas supplier and its customers. What is interesting in this annotation is the different construction placed on the contract terms by the national competition authority and the Supreme Administrative Court at first instance on the one hand, and the Supreme Administrative Court of second instance on the other. While the former took the view that the agreements were abusive in requiring information from the customers, and in authorizing unilateral termination by the dominant firm in certain circumstances, the highest court noted that this kind of conduct was a normal way of

⁵ Case C-74/14, *Eturas and others v Competition Council of the Republic of Lithuania* (2016) ECLI:EU:C:2016:42.

doing business having regard to the market context. The highest court placed much emphasis on the likely effects of the agreements and did not find the risk of harm to the downstream firms.

Judge Henriksen (section 7.3) presented a case that addresses monopoly pricing. Here the Estonian court had an occasion to clarify that the scope of national competition law includes not only exclusionary practices, but also prices that harm consumers directly. It is the kind of case that the European Commission does not take often but it is to be expected that national competition authorities would be more keen observers of excessive pricing as these are more likely to be affecting solely local markets.

Judge Correria (section 7.4) discusses a monopoly holding exclusive broadcasting rights for Portuguese Football League. The complaint was that it discriminated between the downstream broadcasters. Much of the litigation here focused on whether the discrimination was justified by the differences between the broadcasters, or whether it had no economic justification.

7. Private Enforcement

Judge Van Heel (section 8.1) discusses the duties of national courts in a follow on damages claim, related to an air cargo cartel on fuel surcharges and commissions discounts, where the Commission decision has been appealed to the General Court. The damage claim was opened in the Netherlands and other countries while the commission Decision was under appeal by KLM and others. This annotation is important because the Amsterdam court of appeal specifies that in this scenario the judge has a discretion whether to stay proceedings. Moreover the court took this opportunity to explain the kind of information that it needed from the defendant to be persuaded that the action should be stayed, which includes details of the points of appeal and the defenses it wishes to plead. On the facts, the litigation continued because the defendants did not contest the matter further, but the appeal to the General Court was successful.⁶ However the Commission's decision was annulled on a technical matter, so the next difficult question for the national court is whether to continue the trial on certain points (e.g. applicable law) or stay proceedings pending a fresh decision. This illustrates the pitfalls of a litigation system where the claimants are likely to be out of pocket for a considerable time. A possible consolation is that interest payments may make the final award quite lucrative.

Judge Farcas Supranu (section 8.2) discusses a follow on action in the Romanian courts where the claimant relied on a decision of the national competition authority. In the market for advertising mail, the Romania post, allegedly in a dominant position, gave rebate schemes only to one company. The discrimination begins to tip the market, and other companies asked for damages after the competition authority condemned the discriminatory rebate as abusive. The report indicates that much of the debate in this case rested on the standard of proof and on how the claimant may show a causal link between the unlawful discrimination by the dominant firm and the losses sustained by the claimant.

Judge Swalens (section 8.3) reports that similar difficulties affected the Commission in its lawsuit against Otis in the follow-on damages claims arising from the cartel that the Commission had penalized.⁷ At first instance the Commission's action was dismissed for lack of evidence of a causal link between the wrong and the loss. On appeal, the court explored issues of discovery, discussing what documents may be secured by the parties to afford the plaintiff the possibility of proving the loss it suffered. It remains to be seen how the court will rule.

Judge Visokaviciene (section 8.4) discusses a case of unfair competition, where the defendant is alleged to have lured some of the plaintiff's employees to work with it and has obtained business secrets and contracts. The plaintiff sought damages for the loss of business this caused. The report

⁶ Case T-28/11, *Koninklijke Luchtvaart Maatschappij NV v European Commission* (2015) ECLI:EU:T:2015:995.

⁷ Case C-199/11, *European Commission v. Otis and others* (2012) ECLI:EU:C:2012:684.

notes how the matter was handled under Lithuanian civil law and the methods for assessing damages in these kinds of case. It is interesting to remark the difference between compensation rules in competition and in trade secrets or so, as in the second case the profit of one is the loss of the other, while in competition the picture normally is much more complex and nuanced.

Judge Nõmm (section 8.5) discusses a case where a lawsuit about the excessive prices charged by the holder of an essential facility in the telecommunications market was settled successfully. The Estonian court established the key elements for a damages claim and explored the various legal options available to the plaintiff. The court established that leasing a cable conduit is different from leasing a line or other electronic communication services, but that, in any case, a wrong or poorly regulated price can be abusive (based on *Deutsche Telekom* CJEU precedent)⁸. In the end, the parties transact and the plaintiff that was asking the restitution of the rise in price apparently got a significant part of it. It is perhaps surprising that the matter was settled, given that normally it is very difficult for plaintiffs to prevail in excessive pricing cases, as some of the other case notes in this working paper suggest.

Judge Ozimek (section 8.6) notes another damages claim, this time against the incumbent telecoms operator for exclusionary tactics taken against a new entrant. Being a complex stand alone case, as with many such cases, the court was reliant on economic experts for a number of technical matters, such as defining the relevant markets, calculating costs for the purposes of determining whether there was a margin squeeze and assessing the losses incurred by the plaintiff. One aspect the learned judge notes here is the scarcity of economic experts in a small State like Slovenia, making it sometimes hard to obtain independent advice. One wonders how far this is an issue that the European Union could address, by facilitating the identification of independent experts across the Union.

Judge Milnarić (section 8.7) takes us to a different market, and again to the difficulties of litigating a stand-alone case. The plaintiff operated a pharmacy and she alleged that she was forced to shut it down as a result of abusive conduct by an upstream supplier. She had tried to rely on a decision of the Croatian competition authority but the abuse that had been established by the NCA predated the plaintiff's loss. The plaintiff litigated without legal assistance and did not manage to establish the elements necessary to sustain a claim. Also this example confirms the high difficulty of litigating stand-alone cases.

8. The Interaction of Competition Law and Regulation in the Telecoms Industry

Judge Stefanska (section 9.1) comments on a somewhat unusual case, where an internet service provider objected to a customer's terms for installing internet services. The customer was a housing association and the view was taken that this customer held a dominant position in their buildings. This is, to put it mildly, a somewhat eccentric market definition. As the judge notes, this is probably an issue that might be best resolved by sector-specific regulation which likely also explains why it is that the home owner has to assist the internet service provider.

Judge Boerwinkel (section 9.2) reports on an important Dutch case (*UPC v. T-Mobile and KPN*) where The Hague Court of Appeal had occasion to explore in detail the question of excessive pricing. The judgment is important for considering the relationship between *ex-ante* price regulation and price abuse under antitrust law. As the judge makes clear in her discussion, what prices may be deemed adequate by the regulator is not the same matter as what prices are unfairly high as a matter of competition law. Regulation and competition act in different moments and with different hindsight.

Judge Kranjec (section 9.3) discusses a case of discriminatory termination rates where the defendant charged a higher rate for international calls than domestic ones. The claim failed and what

⁸ Case C-280/08, *Deutsche Telekom AG v European Commission* (2010) ECLI:EU:C:2010:603.

this case shows, in common with those above, is the steep burden that the plaintiff faces in demonstrating that prices are unfairly high – in this case an economic expert was called to explain the working of the market and this appears to have been vital in explaining why the conduct in question was not restrictive of competition.

9. Unfair Competition and State Aid Law

Judge Cerón Ripoll (section 10.1) comments on a tax exemption that Spain wished to grant to a state owned enterprise that was active in the market for shipbuilding. The question referred by the domestic court to the CJEU was whether this tax exemption constituted state aid.⁹ The CJEU replied by setting out the conditions for assessing tax relief under Article 107(1) TFEU, and the Spanish court then found that the tax break was indeed state aid on the facts. It must be recalled that most tax exemptions constitute State aid, since any selective tax break can only be treated as valid if there is an objective reason for preferential tax treatment.

Enrique Gabaldón (section 10.2) discusses a case that tests the borderline between EU law and national law. The dispute arose when Spanish TV operators objected to a law requiring them to invest a certain amount of their profits into producing European films and a percentage of that into producing Spanish language films. The aim was the preservation of national culture, but the parties did not agree to this constraint. The challenge to this rule under State aid law failed because the resources did not come from the State (following the well-established rule in *Preussen Elektra*).¹⁰ The parties also considered that the national law was contrary to other provisions of European Union Law as well as contrary to Spanish Constitutional Law. As the case note makes clear, the case is pending, and it not impossible that the measure, while authorized under EU Law, is finally found to infringe national law, in particular Article 38 of the Spanish Constitution which guarantees freedom of enterprise.¹¹

Judge Rosalino (section 10.3) discusses misleading advertising. The tricky aspect of these cases is that the defendants try and take advantage of consumers by advertising in such a way that the consumer's expectations are greater than what the defendant offers in reality. Here the advertising campaign suggested that all goods on sale were discounted by a significant amount; hidden discreetly in the advertisement was a qualification that the discounts were only applicable to selected goods. However, the consumer did not have a reasonable chance to become aware of this, consequently the NCA imposed a fine on the advertiser.

Judge Berezovskij (section 10.4) discusses another case of unfair competition – here the issue is unlawful poaching of employees and trade secrets. This is a matter that is often dealt with exclusively under national law, and the case at hand afforded the national court an opportunity to clarify the rules applicable. One issue that might arise in subsequent litigation is how far these unfair competition rules may effectively be found to run counter to EU Law.

10. Conclusion

A number of general themes emerge from these case notes. The most important one in our view is that national courts are contributing to the development of EU competition law in a significant manner. This is because a number of issues are likely to come up at national level before they are tested by the EU Commission, interesting instance in the cases we summarized are discussions on the seizure of economic data or the facilitation of collusion by platforms. In these settings national courts can

⁹ Case C-522/13, *Ministerio de Defensa and Navantia SA v Concello de Ferrol* (2014) ECLI:EU:C:2014:2262.

¹⁰ Case C-379/98, *PreussenElektra AG v Schleswag AG* (2001) ECLI:EU:C:2001:160.

¹¹ Case C-222/07, *Unión de Televisiónes Comerciales Asociadas (UTECA) v Administración General del Estado* (2009) ECLI:EU:C:2009:124.

provide useful answers for all jurisdictions. This is so in particular because the national courts will strive to secure a balance between effective enforcement and fundamental rights, especially in issues of procedure. Other national courts should consider these judgments persuasive. In other instances national courts can help in developing the case law of the CJEU on particular kinds of abusive conduct, like refusals to deal in the Dutch case noted above (section 5.2) or cases of excessive pricing that have a marked local dimension but can find a wider interpretation and definition.

National courts have also revealed that a searching inquiry will be made of whether an effect on trade exists before concluding that EU Law will apply in parallel with national law. The level of the test may appear to be more accurate or restrictive than what is traditionally done by the European instances. National courts will also be vital in shaping private enforcement, and the judgments under review reveal that a number of procedural matters will require clarification even after the implementation of the Damages Directive.¹²

It is encouraging to see that NCAs often prioritize the right kinds of cases (e.g. bid rigging or exclusionary practices by former monopolies), but this is balanced by the fact that some agencies still seem to take too aggressive a stance against vertical restraints on which economic reasoning about the welfare consequences is more divided.

Finally, the cases have brought up a further issue for the EU Commission to consider: in small jurisdictions the number of experts that are able to testify is limited (see section 8.6 where this issue came up clearly). It may thus be hard to find an expert for both sides, or to be certain of impartiality. Might an EU-wide grouping of experts be generated so that these may move freely across courts? This might also facilitate further convergence in economic reasoning and ultimately in legal standards.

¹² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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. OJ L-349/1, 5.12.2014.

2. Scope of application of competition law

2.1. Carlos Manuel Gonçalves de Melo Marinho (The Lisbon Court of Appeal)

Court: Court of Appeal of Guimarães (PORTUGAL)

Court Case: case n. 1/08.0TBVNC.G1

Date: 20-11-2012

Keywords: Annulment of a shareholders' decision; competition; rights to information; EU Law.

1. "T., AG", a company with headquarters in Germany, came to a Portuguese First Instance Court asking, against two other companies, "D., S.A.", (DMP), with headquarters in Portugal, and "D.. ESPAÑA, S.A." (DME), with headquarters in Spain:

- a. for the annulment of the shareholders' decision that approved the First Defendant's Annual Report and Accounts for 2006;
- b. for an order imposing on the same Defendant the provision, without limitations, of the information requested by the Claimant in the general assembly of 27.11.2007;
- c. the awarding of an indemnification to be paid by the second Defendant, corresponding to the difference between the amount that the Claimant received as profit sharing and the sum that they would have received if the accounting had not been changed.

2. To support its request, it said that:

- a. the Claimant is a minority shareholder, so cannot control or participate in the management of the first Defendant;
- b. even if being positive, the profits of that Defendant didn't seem to correspond to the real volume of its businesses;
- c. such a situation created the need for an analysis by a specialised company, which showed that it was accounted as in prior years there would be a correction of €102,919.00 related to adjustments under the pricing policy; and the Defendant was asked for a justification and details of these adjustments. The information was refused on the grounds that the Claimant company was in direct competition with the Defendant for the same products and in the same market (the parties compete in the same market niche – the manufacture of steering wheels and airbags – and comprehend two of the three largest suppliers of this type of car parts); the first Defendant asks for prices that are different from the market prices in commercial relations with the second Defendant, which grants special advantages to this Defendant and causes damage to the Claimant.

3. In its opposition, the Defendants said that they had given to the Claimant all of the the information requested, except that related to pricing, because this is a matter that cannot be revealed, especially to a competing undertaking like the Claimant. In possession of the information requested about the process of price formation, the Claimant could easily supersede the prices of the Defendants, thus taking for themselves the awards under tendering procedures. Moreover, the provision of that information violates the principles and rules of competition law.

4. A judgment was given which dismissed the action as unproven, acquitting the Defendants from the requests formulated by the Plaintiff.

5. Disagreeing, the Claimant entered an appeal asking to see the judgment repealed, submitting that the present case was not intended to prevent behaviours of any kind, but rather to judge the violation of the rights to information of the shareholders, pursuant to the Portuguese Commercial Code, where the provision of information requested by the shareholder can only be legitimately withheld if its supply may cause serious harm to the company or to another associated company, or lead to a breach

of the secrecy that is imposed by law. Nevertheless, even if this case were to deal with questions of competition law, the Court did not carry out a detailed technical analysis that might support the conclusion that the actual act of providing the information that was requested by the Applicant might imply a restrictive measure of competition; the application of Article 81 of the EC Treaty (now Article 101 of the TFEU) cannot, in any way, be defined in an abstract and automatic way, requiring instead a detailed analysis of both the subject of the agreement and of its capacity to restrict competition. It is up to the Court to verify, taking into account the above indicated criteria, whether an exchange of information about the past, considering the peculiarities of the case, may have an important impact on the future performance of the company. It would not be possible to draw any conclusions on the cost structures of the Defendant from the information requested, taking into account the constant changes in the market and the technological developments. Final prices depend on many variables and factors that are specific to each company, to which must be added additional costs that remain unknown. Purely historical information (that is, information covering more than one year) lacks strategic utility for businesses and does not fall within the scope of Article 81 paragraph 1 of the EC Treaty.

6. The Defendants responded to the appeal, sustaining their previous positions and opposing arguments put forward by the appellant, especially noting that in a market with the characteristics of the one in which the Applicant and the Defendants operate, revealing detailed information about transfer pricing is an anticompetitive practice, since it would reduce the risk to the Applicant in the tender for supplies, to the detriment of the normal operation of the market and effective competition. The degree of historicity of information depends on the market and its characteristics; what matters is that the exchange of information can have an effect on existing or future competition conditions.

The recent or historical nature of the information should be assessed with some flexibility, taking into account the extent to which data becomes obsolete in the relevant market.

7. The pleas in law and the legal grounds for the decision, referred to Articles 21(c), 288, 290(2) and 291(6) of the Portuguese Commercial Company Code, Article 4(1), 5, 6 and 7 of the Law no. 18/2003, Article 81 and 82 of the EC Treaty (now Articles 101 and 102 of the TFEU), Articles 3(1) and 15(1) of the Regulation (EC) 1/2003, the opinion of the European Commission of 05.08.2010 and the Communications of the European Commission from 27/04/2004 and 14/01/2011.

8. The case-law evoked in the decision under analysis was: the CJEU judgments on cases no. 6/64, *Costa vs. ENEL*, 41/69, *ACF Chemiefarma*, 48/69, *Imperial Chemical Industries Ltd ., C-7/95*, *John Deere Limited*, and the judgment of the Court of First Instance (Fourth Chamber), cases nos. T-202/98, T-204/98 and T-207/98 of 12 July 2001, *Tate & Lyle plc*.

9. The Court of Appeal decided that:

- a. the corollary of the principle of loyalty that emerges from the commitment of Member States to the European Community, the principle of the primacy of EU law over national law, precluded an application of national law that is incompatible with the law of the European Union;
- b. the Articles 101 and 102 of the TFEU are intended to protect competition in the market, preventing companies from restricting competition between themselves, or in relation to third parties, by coordinating amongst themselves;
- c. thus, an exchange of information that can be considered as a concerted practice that is capable of affecting trade between Member States, which is prohibited by Article 101 of the TFEU; and given the primacy of European Union law, this prohibition prevails over domestic law and makes inoperative the right to information claimed by the shareholder, a company that, in the market, is a competitor of that trading company;
- d. the file on transfer pricing contains accurate information on production costs, so whoever has access to it also gets access to information on the margin that is practised by that company; thus, given the confidentiality of this information and its essential importance to the company's

activity, it is legitimate to prevent a shareholder who is also a competitor from having access to such information.

10. This decision justifies the following comment: this judgment is relevant since it makes an adequate affirmation of the primacy of EU Law, it shows and protects the superior degree of the interests that lie behind the EU competition rules and states that the shareholder's rights to information are not absolute, which occurs regardless of its motivation. With the same adequacy, it draws a flexible notion of the historical character of the information, declaring that the historicity depends on the characteristics of the market. In interpretative terms and for the effects of the application of Article 101 of the TFEU, it shows that major difficulty can emerge at the level of the subsumption of the access to corporate information in the context of the mere exercise of a right to the legal notion of agreement “between undertakings, decisions by associations of undertakings and concerted practices” because, here, the share of information is not wilful and consensual, but it is obligatory by law. On the other side, it raises questions: these result from this judgment that a company acting in the same market cannot ever be a full rights shareholder? Is this against the right of the free exercising of a commercial activity?

2.2. Martin Baran (The Prešov District Court)

Defendant: The Antimonopoly Office of the Slovak Republic

Court of the First Instance: The Regional Court Bratislava

Court of the Second Instance: The Supreme Court of the Slovak Republic

Court of First Instance: September 28th, 2010.

Date of the judgment of the Court of Second Instance: May 22nd, 2013.

Type of proceedings: review of the decision of the National Competition Authority

Brief summary of facts of the dispute

The Antimonopoly Office of the Slovak Republic initiated administrative proceedings in the matter of agreements restricting competition in the area of a common market in providing bank services in the territory of the Slovak Republic on the ground of a complaint lodged by a private company. By its decision, imposed on three big banks in Slovakia they were each fined €3,197,912 on the grounds of documents and other proofs that were gathered by the Office, which established the infringement of Article 101 Par.1 TFEU/ ex. Article 81 TEC/.

Every bank provides, with the licence of the Slovak National Bank, cashless purchasing and sales of foreign currencies to their clients, who need to have a current account in the bank, due to the cashless character of the transaction. The currency conversion is included in the service at the exchange rate announced by the bank. Of course, there is a possibility for some clients to make an agreement with their bank about an individual exchange rate, if the condition of having a higher amount of money is fulfilled. The so-called “dealing” division of the bank is responsible for the operation. Non- banking subjects with the licence of the Slovak National bank for cashless purchasing and sale of foreign currencies can provide the same operations, but they need to have bank accounts in the same bank as their client, due to the enhancing of their business and in order to make it easier.

The Czech based company AKCENTA CZ, as a non- banking company, provided services for clients on the cashless foreign exchange market. Their services were normally used by companies such as travel agencies, trading companies, and others who did their cashless financial transaction in more countries and in more currencies, with a better rate of exchange than that offered by a bank. The big advantage for this business was in having current accounts in the same bank as the client and company, due to the fast transfer of money and no further fees.

In comparison to bank services, the services of the company AKCENTA CZ were provided to all clients, regardless of the amount of their turnover or due to other restrictions --for example, the minimum money transaction in a bank was Sk500,000 – €16,500, and the services were much cheaper, which was very important for their target group – small and medium enterprises. The Czech National Bank granted a licence for AKCENTA CZ to provide cashless transactions, and the company opened current accounts in more banks in Slovakia with the aim of providing its services in Slovakia too.

In September and October, 2007, the three banks terminated their agreements in relation to current accounts with AKCENTA CZ by notice, and the bank current accounts of the company were cancelled. The company filed a petition to the Antimonopoly Office of the Slovak Republic, which launched the investigation of the case. All three banks were asked about the issue, but their answers were too vague and they refused to accept an agreement on the termination of accounts. They alleged unjustified business by the complainant, because they had a licence only from the Czech National Bank. More information was not published as this is a bank secret. The Antimonopoly Office realised inspections at the banks’ premises of all three banks and the findings, especially e-mail communications between bank clerks, clearly showed that during the period prior to the cancellation

of the accounts of the complainant a personal meeting was held with the aim of restraining the complainant as a direct competitor. Two other banks were investigated for similar conduct also, but the findings were insufficient to establish the restriction of competition and no measures were taken against them

Summary of the administrative and judicial proceedings.

Administrative proceedings

The Antimonopoly Office of the Slovak Republic issued a decision imposing a fine in the total amount €9,593,736 in the banking sector for restraining competition. This was imposed on the grounds that the three banks made a collective agreement about the cancellation of the current accounts of a competitor with the aim of excluding him from competition. The decision was upheld by the Council of the Office, which decided on appeals and review decisions in administrative proceedings on November 19, 2009.

Judicial proceedings

The first judicial organ involved in the proceedings was The Regional Court, Bratislava. The Regional Court revoked the decision of the Council of the Office on the ground that the facts of the case weren't established satisfactorily. The Court stressed that the company, AKCENTA CZ, runs a business on the territory of the Slovak Republic without the licence of the Slovak National Bank and its organisational element in Slovakia was cancelled, so they run a business without permission, thus he couldn't be a competitor in the relevant market for bank institutions. A competitor, pursuant to the relevant law, must be an entity which runs a business lawfully in the relevant market. The activities of AKCENTA CZ were illegal, so the banks were entitled to adopt measures leading to the elimination of these activities. As for the alleged internal meeting of the banks' representatives, this meeting wasn't held with the aim of making an anticompetitive agreement, but to protect their clients from financial harm caused by non-banking subjects, as had happened previously. The scope of the relevant market wasn't proven, so the share of the complainant in that market couldn't be defined satisfactorily. The Antimonopoly Office of the Slovak Republic (henceforth the defendant) appealed the judgment to the Supreme Court.

Ruling of the Court

The Supreme Court of the Slovak Republic, as the appellate court, held in favour of the defendant and quashed the judgment and dismissed the suit. The reasoning behind the decision stated that it was proven beyond reasonable doubt that a co-ordinated procedure existed among the three banks to terminate the current accounts of AKCENTA CZ, and they had an agreement promising not to open new accounts for this company. The aim of the procedure was to gain clients from AKCENTA CZ. The Court pointed out that if the company took part in a meeting of an anticompetitive character with others companies, then it has the burden of proof to prove that his participation had no anticompetitive character and other participants were informed about its different reasons for participating at the meeting so openly, so that his participation couldn't be understood as implied consent with the initiative. The company must openly and clearly disagree with the initiative, and the companies that participated must show, in an obvious way, their termination of the initiative. The bank didn't meet the burden of proof in this case. The allegations of the banks, that the aim of their behaviour was to protect their clients from the unauthorised business of AKCENTA CZ, were not proven in the file. The unauthorised business of a company is entitled to be controlled and punished only by the competent organ of public control, not by a private company. The Court stressed that the imposed fine amounted

to 0.55 % of the turnover of the bank, and it was imposed at the level of the minimum scale allowed by the law.

Personal comment

This case, from my point of view, is relevant because the Court followed the ruling of the ECJ in the preliminary request. The question referred for the preliminary ruling was raised by The Supreme Court of the Slovak Republic in another case, but the matter of the case was the same as in the pending case, because it was the case of another participant in the same anticompetitive agreement. Both cases were pending at the same time. The Court stayed the proceedings until the ruling of the ECJ. By its questions, the referring Court was asking whether Article 101 TFEU should be applied to companies that had agreed on a restriction of competition against a company, which allegedly did business in the relevant market without a valid licence, when the licence is obligatorily stipulated by national law. The ECJ held that this fact has no impact on the evaluation of the behaviour of participants in a cartel agreement. In the light of the ruling of the ECJ, the Supreme Court stated that the banks' defence in relation to the illegal business of AKCENTA CZ is not relevant for the valuing of their conduct. It was obvious from the judgment, that the national judges had very strictly followed the ECJ ruling, which is very important in order to unify decisions in this area of law across Europe. The ruling of the ECJ was decisive to a different interpretation of the matter if compared with the ruling of the Court of the First Instance.

3. Procedural aspects of competition law enforcement

3.1 Olympia Kosta (Court of Athens)

Council of State ΣΤΕ 1976/2015 (Supreme Administrative Court of Greece):

Administrative Court of Appeal of Athens 3793/2012

Name of the parties: “ELSIMET S.A” “LAVA S.A” AND “The HELLENIC COMPETITION COMMISSION of Greece – (HCC)”

Facts

The case came about when Elsimet S.A –the complainant – who was denounced in the year 1995 to the National Competition Authority of Greece (Hellenic Competition Commission- HCC) that “Lava SA” continuously violated Articles 85 and 86 of the European Community Treaty, and that the national law no. 703/1977 (the competition law that was in force then, with provisions equivalent to 101, 102 TFEU). The investigation of the case began ten years later, and the recommendation for this case took place in 2010 and the decision in 2011.

Decisions of the HCC and ruling of the courts

The Hellenic Competition Commission (HCC) enacted decision 517/VI/2011 and found that Lava SA had infringed Articles 1 and 2 of Law no. 703/1977 and Articles 85 and 86 EC, which were in force at the time, by abusing its dominant position in the market for sales of pumice stone and by giving discounts to its clients in order to force them to buy almost all of its products. Most of the infringements took place in the years 1994 and 1995. HCC took the view that “Lava S.A” prevented, directly or by giving discounts, all of the Greek Competitors to its mother company “Hercules S.A”, from exporting pumices to Italy, and that through its contracts it forced all other Greek distributors to export all the quantities it gave them only to Hungary and to Sweden. This behaviour led to the withdrawal from the Italian Market of all Greek competitors to “Hercules S.A”. HCC also found that LAVA SA had also committed an infringement of Article 85 EC by providing its customers with discounts in order to force them to buy both large quantities and almost all of its products, and to prevent them from buying from other competitors from abroad.

LAVA SA argued during the procedures that HCC had no authority to impose any fines or to conclude on the infringements and submitted a limitation objection under Article 25 of Regulation 1/2003 and under Greek law. It claimed that, according to the Greek case law, a reasonable time for action against companies could be no more than five years from the infringement, and that HCC violated (in this case) the principle of legitimate public confidence. This was due to the long period of time that had passed. HCC overruled those objections and found that no limitation period was, then, settled by Greek Law, and that the limitation periods provisions of Regulation 2988/1974, were about only European competition law provisions. After finding the above mentioned infringements proven, HCC forced Lava S.A to cease them and also issued a recommendation to the accused company to omit such conduct, threatening to impose fines in the case of the continuation of those infringements. HCC took into account that a long period from the commission of the offences had passed, and that this product (pumice and wash stones) was no longer produced in Greece, and therefore found it appropriate not to impose any fines and just to make recommendations.

Against that decision, Lava SA lodged an appeal to the Administrative Court, claiming among other things, that the right of the Competition Commission to impose fines and to declare the Community offences had been undertaken in the five-year limitation period that is found in Article 25 of Regulation 1/2003. The National Competition Authority should also have acted within a reasonable

time, which could never pass the five years from the commission of the offences, as required by the safety-run, the protected trust and the principles of timely and direct management. They also stated that the timing of a 5 year limitation is provided by the new Greek Competition Law 3959/2011, with equivalent provisions to Article 25 of Regulation 1/2003.

The Administrative Court of Appeal (number of decision 3793/2012) held that the question of the limitation of the powers of national authorities, when they were called upon to apply them in an anticompetitive practices case that goes beyond the national and also the Community's competition rules, are left to the responsibility of Member States, in accordance with the general principle of institutional and procedural autonomy, which governs the actions of the competent administrative authorities when imposing penalties for infringements of the Community's general provisions. In no. 703/1977, which was in force at the relevant time, no limitation provision was included, while the five-year limitation period that is laid down in Article 42 of L. 3959/2011 (GG 93 t. A), is occupied only with the infringements committed before the entry of this law into force, ones which were not pending before the Competition Committee (Article 50 Section 6) and that this distinction is constitutionally legitimate and is not contrary to the principle of equality, as the appellant claimed. The Competition Commission, should therefore, in compliance with the principle of equivalence, observe the principle of a reasonable period, which (reasonable period) is estimated according to the circumstances of each case. Where there is a failure, however, this principle is relevant to the validity of the administrative procedure and to the decision, but only where it is established that the undue delay has had an impact on the ability of companies to defend themselves effectively, otherwise it simply implies a reduction in the amount of fines (T. 305 / 94 6. 122, C-238/99 6. 173, T-213/00 6. 321, C-113 / O4 6. 47-48, C-185/95 6. 48-49, 141-142). In this case, as above, given its complexity, its importance, and the behaviour shown by the parties, the Court found that the proceedings before the Commission lasted beyond a reasonable period. However, it found that it has not been proven that this delay had affected the rights to a defence of the appellant, and also that the appellant merely claims vaguely that, for the above reason, it was impossible to find all those documents which confirmed their allegations and which proved that they did not commit the infringements. HCC also based its decision on data produced by the appellant (Minutes of meetings between representatives of the undertakings). In view of all of these, the Court concluded that the Competition Commission in the contested decision found the offences to be legally proven and limited itself - without imposing fines - a) to address to the applicant recommendation for omission of such behaviour in the future and b) to threaten to fine in case of repeating that behaviour.

-Then Lava SA lodged a request before the Supreme Administrative Court (Council of State) to set aside decision No. 3792/2012 of the Administrative Court, claiming that, according to Article 25 Regulation 1/2003 and Regulation 2988/1974, and according to the principles of legal certainty, of the stability of legal situations, according to legitimate expectations, of lawfulness and good administration, the infringements were time- barred and therefore the decision of the HCC was illegal.

The Council of State, with decision no. 1976/2015, underlines that the principle of legal certainty, which is enshrined both in the Greek Constitution and in primary Community law as a general principle, requires, in particular, the clear and predictable application of competition law and that all provisions must be observed all the more strictly in the case of rules that are liable to entail financial consequences, (see CoS 144/2015, CoS 2034/2011, DEP 4/2013, DEC 8.12.2007, C-409/04, Teleos, 45-48, DEC 16-9-2008, C-288/2007, Isle of Wight Council 47). As the Court underlined, the principle of legal certainty requires, in particular, that the position of the operator, having regard to his rights and obligations *vis-à-vis* the national authority, must not be open to challenge indefinitely and that, consequently, a limitation period must be applicable to proceedings, for the attribution of infringements and for the imposition of any of the discriminatory measures identified as applying to the operator. In order to fulfill its function of ensuring legal certainty, that period must be fixed in advance (see C 201/2010, C 202/2010 Ze Fu Fleischhandel and Vion Trading, Para. 32), and be sufficiently predictable by the person concerned (ECR 9.1.2013, 21722/2011 Volkov v. Ukraine, Para.

136-140 ECR 3.3.2015, 12655/09, *Dimitrovi v. Bulgaria*. Paragraph 45-46, 56). Such a limitation should be reasonable and should permit effective control of compliance with the rules, without, however, encouraging any inaction by the Competition Commission, but it also should not leave the operators a long period of legal uncertainty and the risk of not being able to defend themselves properly against all categories after a long time period. It is therefore, as the Court underlined, not consistent with the principle of legal certainty that Law no. 703/1977 failed to predict a limitation period in relation to violations of Articles 1 and 2 of this law or of Articles of 81 and 82 of European Community Treaty. Further, in a case such as this, infringements of Articles 1 and 2 of Law 703/1977 and Articles 85 and 86 of the European Community Treaty are attributed to the Appellant, the limitation rules set out in Regulation 2988/1974 should “by analogy” be applied. Such an application could have been sufficiently provided for by a prudent and diligent operator (see C 201/2010, C 202/2010 *Ze Zu Fleschhandel* and *Vion Trading*, paragraph 35). and after all of those, the Council of State held that between the time of cessation of the temporally last infringement (31-12-1995) and the period of the beginning of the investigation of this case by the Competition Commission, which could interrupt the limitation period, a decade elapsed, a much longer time than the five years under the Art of Regulation 2988/74, which was in force then, and since the contested decision of HCC took place in 2011, well beyond a decade (after the last offence) the contested decision is illegal and must be annulled. On those grounds, the Council of State annulled the decision of the Court of Appeal and also the decision of the HCC.

Comment

- We can see the diverging interpretations of the limitation provisions on competition law by HCC and the Greek courts and the implementation of the limitation provisions in Competition Law by the Council of State, as above mentioned, and we should notice that the Council of State implemented European Competition Law procedural provisions “by analogy” to a Greek case without asking for a preliminary ruling from the ECJ.

-We should also notice that, in this case, it was not investigated by the courts (probably because there was no such an argument from the parties) if the HCC had a legitimate interest in adopting the contested decision (see Article 7 of Regulation 1/2003) despite the long period that had passed, for example the interest of discouraging other companies to adopt the same anticompetitive behaviour, the interest in clarifying the legal situation, the interest to enable the injured parties to bring matters before a civil court. It is true that HCC, in the contested decision, did not demonstrate a legitimate interest in finding that *Lava SA* had anticompetitive behaviour, but this was not investigated by the Court.

Finally we must point out that there is no doubt that the limitation period was introduced in Competition Law provisions to insure legal certainty (see second recital in the preamble or R 2988/1974 and Paragraph 31 or the preamble of R 1/2003) and that legal certainty was not always the case in many Member States.

3.2. HELENE KARLSSON (SWEDISH MARKET COURT)

ASSA AB v. Swedish Competition Authority

Relevant national legislation

Chapter 5, § 3 Swedish Competition Act

The Stockholm District Court may, on application by the Swedish Competition Authority, decide that the Agency may conduct an investigation of a company to determine whether it has infringed prohibitions that are included in Chapter 2. 1 § or 7 § or in Article 101 or 102 TFEU, if:

there is reason to believe that a violation has occurred,

The company does not comply with an obligation imposed pursuant to § 1, Paragraph 1, or there is otherwise a risk of evidence being withheld or tampered with, and

The importance of the action taken is sufficient to outweigh the interference or other inconvenience caused to those affected by the measure. Act (2010: 642).

Chapter 5, 6 § Swedish Competition Act

When the Competition Authority conducts an investigation it has the right to:

- a) examine the books and other business records;
- b) take copies of or extracts from the books and business records;
- c) ask for oral explanations on the spot, and
- d) have access to premises, land, means of transport and other areas.

Facts of the dispute

In a decision of 15th November, 2012, the Stockholm District Court upheld in the Swedish Competition Authority's application for permission to conduct a survey of ASSA AB and AB Copiax to investigate whether these companies had breached the rules of Chapter 2 § 7 of the Competition Act and Article 102 TFEU. The suspected infringement related to a margin squeeze on sales of the ASSA ABLOY security products and volume commitments and conditional discounts in the customer agreement with Swedish locksmiths.

With the support of the decision the Swedish Competition Authority conducted a site survey of ASSA and Copiax, where digital materials were mirrored (which means that the hard drive is picked out of the user's PC and "mirrored", and thus a so-called image file is created. This image file is an exact copy of the original hard drive and contains the so-called metadata, i.e., information about when a document was created, by whom, etc.).

The Swedish Competition Authority had subsequently submitted a new application to the Stockholm District Court with a request to conduct a new investigation of the digitally stored material which the Competition Authority had obtained in the site investigations of ASSA and which they, with the company's consent, had moved to their premises. ASSA AB opposed the Competition Authority's request, arguing, *inter alia*, that it was contrary to the prohibition of so-called "Fishing expeditions" and the right to defence.

Ruling of the national courts

The Stockholm District Court (Case A 842-14)

The Stockholm District Court first found that the national courts are obliged to ensure the effectiveness of EU law and that this obligation extends to the rights of defence (Canal Plus 2948/08 and T289/11 *Deutsche Bahn and Others v Commission*). The question that the Stockholm District Court had to decide on was whether the Competition Authority had the right to use the information collected during a site survey for a particular admitted infringement, in order to justify an application for investigation of the digitally stored material from the site investigation in order to examine assumptions about another infringement of competition law. The District Court referred to the issue that had arisen in Case T-289/11, where the Commission, in the context of a site survey, found documents suggesting a different competitive conduct than that which was the subject matter of the investigations. The Commission then launched a further investigation, which led to a second and a third inspection decision. The companies argued, *inter alia*, that the Commission had infringed their rights of defence in that the second and third inspections were based on information that had been unlawfully obtained during the first inspection. The General Court stated that “*it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty*” (Paragraph 125). According to the General Court “*The fact that the Commission once obtains documents in a given matter does not confer such absolute protection that those documents cannot be requested under statutory powers in another matter and used as evidence. Were it otherwise, undertakings would have an incentive, when a first matter is investigated, to give all the documents providing evidence of another infringement, thereby forearming themselves against any prosecution in that respect. Such a solution would go beyond what is required to safeguard professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market*” (Paragraph 127). The General Court dismissed the applications from the companies entirely.

The Stockholm District Court noted that the case had been appealed to the European Court of Justice and concluded that the Swedish Competition Authority was not precluded from relying on information of which they coincidentally became aware during the site survey of ASSA AB, where data indicated behaviour contrary to the competition rules. The Competition Authority could, with the support of such data, according to the District Court, request to be allowed to conduct an investigation under Chapter 5 of the Swedish Competition Act.

Then came the District Court to examine whether the conditions for an investigation decision otherwise existed, and they concluded that there was reason to believe that a violation had occurred, there was a risk that evidence would be withheld or distorted, and that the investigation met the requirements of proportionality. The District Court therefore decided that the Swedish Competition Authority had the right to conduct an inquiry into digitally stored material gathered during site investigation, to investigate whether the company had breached competition rules in certain respects.

The Swedish Market Court (Case A 3/14)

ASSA AB appealed against the Stockholm District Court decision to the Swedish Market Court and asked the Swedish Market Court to reject the Swedish Competition Authority's claim for an extended investigation.

The Swedish Market Court began by noting that the Competition Authority, provided that the conditions in Chapter 5. § 3 were met, had the right to conduct a site survey and examine the books and other business records and take copies of them, or extracts thereof. The court went on and noted

that the framework for the site-investigation is determined by the object and purpose of the Court's decision on the investigation.

The Market Court noted that the Swedish legislator had stated that the issue of the legal regulation of, *inter alia*, review of electronically stored information in the Competition Authority's premises should be further investigated. The Market Court found that an investigation is such an intervention against a company that the requirements of the principle of legality must be met. The principle implies a strict interpretation of burdensome regulations and a broad interpretation cannot be justified with reference to, for example, the purpose of an investigation. The Market Court then made a comparison with the national rules for house search, which requires the explicit support of the law, and considered that an investigation by the Swedish Competition Authority, which, in fact, constituted a violation of fundamental rights and freedoms, required qualified constitutional support. The Court went on and stated that the provision in Chapter 5 § 3 of the Swedish Competition Act refers in its wording to the investigation of a company, on the company premises. The Swedish Market Court did not consider that this meant that the Competition Authority was allowed to take a copy of, or a mirrored, hard drive for inspection of their premises. However, this had occurred in several cases where the company concerned had agreed to it. That a company gives its consent to the data being moved to the Competition Authority's premises for the given survey does not, in the Court's view, mean that the consent also includes a survey relating to other infringements. Such an order would mean that the company could not foresee the consequences of giving consent and would thus be in breach of a fundamental requirement for legal certainty. In conclusion, the Swedish Market Court found that there was no legal basis for the Competition Authority's request to investigate the electronically stored information of which they had previously taken care, and that ASSA had not agreed to such an inquiry. In addition, the Court noted that there was no risk that ASSA would withhold or distort the evidence, since the company had no control over the material that was held by the Swedish Competition Authority. The Swedish Market Court therefore set aside the Stockholm District Court's decision and dismissed the Competition Authority's application.

My personal comment

I think this case is relevant because it is an appeal judgment where the Swedish Market Court annuls the decision of the Stockholm District Court. The case concerns the question about what possibilities a National Competition Authority have to make investigations from material obtained in the past in order to find evidence of new violations. The issue has been raised before the General Court and the European Court of Justice in the case C-583/13 P *Deutsche Bahn and others v European Commission*. The Stockholm District Court has, in its assessment, relied on the General Court's judgment and held that the Competition Authority had the right to rely on data that the Authority by chance learned of during the site survey of ASSA AB, when the information indicating behaviours that were contrary to the competition rules.

In the appeal case C-583/13 the European Court of Justice, in their judgment, which was notified after the judgment of the Stockholm District Court but before the judgment of the Swedish Market Court, held that the judgment by the General Court and the second and third inspection decisions by the Commission should be set aside on the grounds of infringement of the rights of the defence. However, this decision was based on the conduct of the Commission when it informed its officials of the existence of a new complaint before the first inspection. The judgment does not therefore give complete guidance on the question with which the national courts had to deal.

The Swedish Market Court did not refer to the judgment in C-583/13 P at all, but settled the issue with the support of Swedish competition law and with regard to the protection of fundamental rights and freedoms, and came to a different conclusion than the Stockholm District Court.

In my view, the decision by the Stockholm District Court seems to be more in coherence with the case-law of the European Court of Justice concerning the powers of the Commission. However, the Swedish Market Court has focused on the fact that that Swedish legislation did not support the actions taken by the Swedish Competition Authority and this is something to which the Stockholm District Court didn't give any special consideration in its decision.

It might be noted that the Swedish legislation has been amended, with effect from 1st January, 2016, so that it now specifically provides that the National Competition Authority may review electronically stored information at their premises, if the company under investigation agrees that the information is transferred to the Competition Authority. However, this clarification would not, in my view, change the impact of the Swedish Market Court's decision in such a way that the Competition Authority may examine materials relating to an infringement other than that specified in the earlier decision, at least not when the company opposes such an investigation.

3.3. MANTHOS MATTHEOU (District Court of Paphos)

Cyprus Telecommunication Authority

v.

1. Commission for the Protection of Competition

2. The Republic of Cyprus, through the Commission for the Protection of Competition

Case No. 741/2013 of the 30th November, 2015

Summary of the Facts of the Dispute

In this case, the Commission for the Protection of Competition, which is the National Competition Authority of Cyprus (hereinafter the “Commission”) imposed a fine on the Cyprus Telecommunication Authority (hereinafter “Cyta”) because it was found that Cyta had infringed Section 6 (1) (a) and (c) of Law No. 13(I)/2008 for the Protection of Competition (hereinafter the “relevant legislation”).

As provided by the above-mentioned Section, any abuse by one or more undertakings of a dominant position within the internal market, or in a substantial part of it in respect of a product, shall be prohibited, especially if it affects or may affect, first, the direct or indirect fixing of unfair purchase or selling prices or any other unfair trading conditions and, second, applying dissimilar conditions to equivalent transactions, thereby placing certain undertakings at a competitive disadvantage.

The case concerned a complaint that was filed to the Commission by Primetel Ltd (hereinafter “Primetel”) against Cyta, for the alleged infringement of Section 6 (1) (c) of the relevant legislation as a result of the discriminatory pricing applied to the detriment of Primetel, and for the alleged infringement of Section 6 (1) (a) as a result of the imposition of unfair prices. The basis of the complaint was the contract signed between Cyta and Primetel for the acquisition of rights of use in capacity in an undersea cable system for a period of 12 years.

The Commission evaluated all the evidence before it and unanimously decided that Cyta had infringed Section 6 (1) (a) of the relevant legislation by concluding that Cyta held a dominant position in the relevant market for the available capacity that could potentially be sold to a telecommunications operator in Cyprus. The Commission reached this conclusion by taking into account the general financial position of Cyta as a telecommunications organisation, the fact that since its establishment Cyta has been operating in a monopolistic protected environment, the existence of the high legal and economic barriers to dumping submarine cable systems, the available capacity that could be purchased by an operator in Cyprus, and the absence of an alternative route and of an alternative submarine-capable systems controlled by other telecommunication operators.

The Commission held, in its decision that, the time at which Primetel had required the above mentioned international capacity from Cyta was crucial and was highly important to Primetel. Primetel at that point had just entered the retail market for broadband services, having Cyta as its main competitor, while, at the same time, Cyta was Primetel’s supplier for inter-connection services, unbundled access to the local loop and international capacity through the submarine cable systems. In relation to the above-mentioned facts, the Commission concluded that Cyta, by taking advantage of its dominant position in the supply of international capacity when compared to other competitors within the market, imposed significantly high prices on Primetel for the supply of international capacity, thus hindering Primetel’s possibility of charging lower prices for the services for which Cyta was charging its own customers.

Considering all the above, the Commission, with regard to the nature, duration and gravity of the infringement unanimously decided to impose on Cyta a fine of €295.277.00.

Summary of the Judicial Proceedings

Cyta filed a recourse to the Administrative Court of Cyprus (hereinafter the “Court”) against the decision of the Commission. This case note is not made in relation to the examination of the substance of the recourse against the decision of the Commission. Instead, the case note refers to a rather interesting procedural point that arose during the hearing of the case. The actual hearing of the recourse involved the filing of, and service on other parties of the written submissions to the Court. Cyta had served on Primetel its written submission to the Court, from which it had hidden or deleted, or not included, certain matters and facts which Cyta claimed constituted confidential information. Primetel had filed an application with which it petitioned the Court to issue an order through which Cyta would reveal to Primetel all of the facts that Cyta claimed constituted confidential information. Both Cyta and the Commission filed an objection to the application that was made by Primetel.

The Procedure before the Court

The Court referred to the arguments presented by the lawyers representing both parties to the recourse (i.e., Cyta and the Commission) as well as the interested party (i.e., Primetel).

It is rather interesting to briefly state these arguments.

The basic position put forward by Primetel was that Cyta arbitrarily, and without having previously obtained the permission of the Court, decided to file and serve on Primetel a written submission from which it had deleted or not revealed, or not included, allegations or facts which it claimed consisted of confidential information, whereas these allegations and facts were given to the Commission. Primetel was thus not in a position to adequately promote its arguments or to put forward its defence in relation to allegations of which it was not aware, and, as a result, a state of inequality was created amongst the litigants, while the invocation by Cyta of business or professional secrecy cannot outweigh Primetel’s right to defence or its right to a fair trial. Furthermore, it was put forward as an argument, that in accordance with the case law of the General Court of the European Union, the Commission cannot decide on its own which documents may be deleted or not discovered, nor decide which part of the administrative file for the case may or may not be useful for the defence of an interested party.

The position of Cyta was that the application was premature, because nothing had been set before the Court which had not also been given to both Primetel and the Republic of Cyprus. It was argued that there is certain information which is not accessible, and this includes business secrets and internal deliberations of the Commission. Primetel had no status in the substance of the investigation of the Commission because this was carried out in relation to Cyta, while Primetel, even though it had filed a complaint, was not placed in the position of a prosecutor, but was merely in the position of an interested party. If the interested party were to be allowed to have access to professional secrets this would lead to an abolition of secrecy and confidentiality. Even though Primetel, as the interested party in the recourse, also has a right to be heard, the correctness of the decision of the Commission would be promoted by the Republic, which had access to the relevant information both through the file of the Commission and from the decision file. Furthermore, the Commission had already decided that the information which was requested was confidential, without this decision having been challenged in the proper manner as an independent executory administrative act within the time limit set by the Constitution of the Republic of Cyprus (hereinafter referred to as the “Constitution”).

The position of the Commission was that even though there was no legislative framework in relation to the matter in issue nonetheless the Court had inherent power within the context of the court procedure to accordingly decide, by issuing the necessary directions for the correct administration of

justice. The Commission called upon the Court to balance, on the one hand, the principle of the confidentiality of information, which includes professional secrets and which is protected by the Courts of the European Union and, on the other, the right to a hearing (i.e., *audi alteram partem*). It reminded the Court that Primetel had been present throughout the administrative procedure and was aware that the confidential information had not been given to it and yet they raised no objection, even though it accepted that this did not stop the interested party submitting its application to be provided with the information. Even though the Commission accepted that all the information would have to be revealed to the Court, it called upon the Court to place emphasis on the protection in relation to the confidentiality of business secrets, and drew the attention of the Court to the possibility that if such confidential matters were revealed during the procedure before the Court, this might affect the effective implementation of the rules of Competition Law causing businesses to become reluctant to provide information to the Commission.

The Ruling of the Court

The Court concluded that there was insufficient reason not to approve the application made by Primetel, and further stated the following. The Court had the right to have before it all the matters, information and facts which had led to the taking of a decision. This right springs from the simple fact that, constitutionally, the Court is the only institutional organ that has the right to issue a judgment to solve the dispute placed before it. Access to the Court is safeguarded by the Constitution and its judgments have to be reasoned. The right to such access causes and imposes corresponding obligations on litigants. It is not possible to conceal facts and information which are necessary for the determination of the dispute before the Court. The Court cannot perform its task in a vacuum of information or on the basis of inadequate information.

The Commission had acted on its own by asking Cyta whether it wanted, in the publication of its decision, to delete or leave out any information. However, Cyta could not assume that on its own initiative it did not have to reveal the information that it deemed to be confidential, particularly without obtaining beforehand the leave of the Court. The Commission, by asking Cyta which information it did not want to be revealed, had acted on the basis of its statutory obligation under Section 33 of the relevant legislation (i.e., the duty of secrecy for the protection of business secrets and confidential information). However, the relevant legislation does not refer to court procedure and it cannot have any consequence on the transparency of judicial procedure and, in particular, in relation to the maintenance of the equality of arms between the litigants. The Court pointed out that Primetel, by placing emphasis on its role as a litigant, had correctly pointed out that it was unacceptable for certain facts to be made known to the rest of the litigants but not to the interested party. In relation to the protection given by the law of the European Union in relation to cases examined by a National Competition Authority, the Court stated that this does not necessarily affect the procedure before the Court. The Court referred to the fact that the Republic had not made any special provisions in relation to the procedure before the Court in respect of matters of confidential information within the context of competition law. It considered that such a provision was necessary so as to balance the two principles which, *prima facie*, seem to be contradictory: firstly, the protection of industrial and other confidential information and the principle of transparency, which ought to govern the procedure before the Court. It concluded that since no such provision had been made for a recourse against a decision of the Commission, then the same procedure would be applied as in any other recourse to the Appeal Court, in accordance with Article 146 of the Constitution. The argument, put forward by Cyta, that the application was premature, was rejected, while emphasis was placed on the principle of the equality of arms between the litigants. The argument that Primetel was aware of the concealment by the Commission of confidential information was also rejected, and since this had not been challenged, Primetel was estopped from doing so before the Court, by a reminder that the concealment of information was done within the context of the judicial procedure. Reference was made by the Court to the case *Akzo Chemie BV, C-53/85*, stating that it does not solve the matter of what is to be

considered as the proper procedure before the Court. The Court referred to the principle that documents which contain commercial secrets cannot be revealed to the complainant, examined in the Akzo case, as well as to other authorities such as *Pfleiderer A. G. v. Bunderskartellamt*, C-360/09, and *Varec SA v. Etat Belge*, C-450/06, and placed emphasis on the fact that the Varec case involved procedure before a Court and that it recognised that the principle of *audi alteram partem*, which involves, as a general rule, the right of access to facts and observations submitted to the Court and then to express an opinion accordingly. The Court observed that this was in agreement with the time-honoured common law position whereby the principles of the transparency of the judicial process and the right to freedom of expression and taking a stance are undoubtedly recognized, and it referred also to the cases of *A v British Broadcasting Corporation* [2014] 2 All ER 1037 and *British Broadcasting Corporation v Roden* (2015) W. L. 2190724. The Court acknowledged, by reference to the Varec case, that the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned, which has been filed with the body responsible for the review. It also quoted Paragraph 52 of the same case, where it is stated that the principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the parties' rights to defence in the dispute in the case of judicial review, or of a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial. The Court stated that in balancing the various criteria and factors involved, the overwhelming principle is that of securing a fair trial, and it accordingly ordered the filing of a new written submission by Cyta in which there would be included the facts and information omitted from the written submission already filed.

Personal Comment as to the Relevance of the Case

To begin with, I must confess that the judgment was very interesting in relation to the confidential information involved and the balance that had to be attained between maintaining the secrecy of such information and the right to a fair hearing for Primetel. However, in my opinion, the interpretation given by the National Court in relation to European Union Law in the field of competition law overlooks the emphasis that is placed on maintaining professional secrecy and, in fact, the approval of the application was granted without in any way examining whether or not the information to be revealed, or part of it, ought to be revealed for the purposes of attaining a fair trial. In other words, even though reference is made to various principles in relation to confidential information, these do not seem to be applied to the facts of the case, of which one can only assume the Court was aware. I am also concerned as to whether the analysis outlined in the Varec case was correctly applied to the issue before the Court, not so much as a matter of principle as such, but strictly in relation to the apparent necessity of an inquiry into the facts that Cyta was called upon to reveal, and whether the revelation of all or part of them was necessary so as to actually carry out the exercise of the balance of the various factors involved so as to attain the overriding aim of maintaining the right to a fair trial.

3.4. POLONA KUKOVEC (SLOVENIA SUPREME COURT)

Decision of the Supreme Court of the Republic of Slovenia: G 22/2012 from the 11. 2. 2014

The National Competition Authority (NCA) decided that sixteen undertakings had breached Article 6 of Slovene competition law (ZPOmK-1) and from 1st May, 2004, onwards, also Article 81, now Article 101 TFEU, by agreeing to (or by establishing consorted practice in regard to) attribute projects of construction and repair to highways, connecting roads and other objects of the national plan for constructing highways in the Republic of Slovenia, of handing in manipulated offers to the public procurement procedure in regard of the ordering party, the Undertaking for Highways in the Republic of Slovenia (DARS) and before handing in offers they exchanged information in regard to the prices they offered, which represents a competition restricting practice /concered practice between undertakings involved with conditions for acting in the market, the aim or goal of which is the distortion or restriction of competition in the Republic of Slovenia. All concerned undertakings were prohibited from any further agreement or concerted action and it was ordered that they publish the decision of NCA on their web pages.

Undertaking X challenged the decision of the NCA in front of the Supreme Court claiming that there had been a breach of procedure and that the material law has not been applied correctly. It suggested that the Court repeal the decision of the NCA or annul it and brought the case before the NCA for retrial.

The Supreme Court partly annulled the decision of the NCA, in that part that refers to the claimant, for the violation of Article 6 of ZPOmK-1 for the period from 17. 10. 2005 - 10.3.2010, and in part also where the claimant was found to be in violation of 101 TFEU, and they reversed the case before the NCA for retrial.

Reasons:

1. Procedural aspect

The claimant disputed the way the NCA conducted the investigation of the claimant's premises. Namely, during its investigation of the premises the NCA allegedly breached the informational privacy of the claimant's employees as is stated in Article 37 and Article 38 of the Slovene Constitution. The investigation itself allegedly breached Article 36 of the Slovene Constitution. Furthermore, the procedural rights of the claimant were allegedly breached, because the NCA did not enable a hearing of the claimant.

The Court held that the claimant did not specify concretely enough the private correspondence of employees, for which it held that it should not be investigated by the NCA, but it was, and on this basis the incriminating data had been gathered against the claimant. In the Court's view, the claimant did not manage to prove this. For no specified document, electronic correspondence or note of his employees did the claimant allege that it has been gathered by the NCA in contravention of the claimant's constitutional rights. The Court added that the status of private correspondence is not already obtained by the fact that it has been created by the employee. From this circle, business correspondence is exempted, as it belongs to the claimant and not to the employees of the claimant.

Furthermore, the Court explained that although the Slovene Constitutional Court held, in its decision U-I-40/12-31 from the 11. 4. 2013, that the first sentence of the first paragraph of Article 28. of ZPOmK-1, in so far as it allows the NCA to conduct an investigation without a court order.in contravention of the Constitution, the Act nonetheless still empowers the NCA to conduct investigations, but the Court has to weigh whether the NCA breached the Constitution while enacting

the law. This means that in the light of the Constitutional Court's decision, the investigation that was itself conducted by the NCA is not automatically unconstitutional or unlawful.

In regard to the alleged breach of contradictory procedure, because the claimant was not heard by the NCA the Court explained that this right was fulfilled by the NCA because it enabled the claimant to file a written defence against the allegations.

2. In regard to the restrictive practice

The first paragraph of Article 6 of ZPOmK-1 refers to the agreements between undertakings, whose aim or effect is to restrict, prevent or distort competition in the territory of the Republic of Slovenia. The Article implies that the notion of an undertaking encompasses an undertaking which acts on the market, and it is thus in its power to restrict, prevent or distort competition. An agreement between undertakings that do not participate in the market can, on the contrary, have no effect on competition in the market. The claimant stated that due to the lack of references it did not fulfill all of the necessary conditions so as to be able to independently participate in the competitions issued by DARS. The Court held that whether the claimant fulfilled the conditions of DARS was relevant, because the conditions laid down the parameters of those undertakings that could take part in the public competition and compete in terms of price and quality of service. An undertaking that did not fulfill the requirements of DARS, could not act in the specific market that the NCA did not define in its decision. Articles of the Slovene Public Procurement Act enable agreements between offerers. An undertaking, taking part in a public procurement competition can refer to the capacities of other undertakings, no matter what business relationship they have towards such an undertaking, when this is appropriate. In such a case an undertaking must prove that it will, because of co-operation with another undertaking, have the means that are necessary for carrying out the public project. As a proof, a written agreement among such undertakings can be presented. At a single, specific competition more undertakings can agree among themselves to participate in the competition jointly. The Court held that this must also apply even more in regard to an undertaking that is incapable of taking a place in the competition independently. Within the frame of such an agreement among undertakings there are undoubtedly elements of the joint offer, such as the offered price, as well as the participation of undertakings in the joint offer.

The NCA claimed that joint offers can present a breach of competition at single public procurement competitions if the same pattern of behaviour can be established over a longer period of time. The Court held that such a view cannot hold in this concrete case. Although the Court left open the possibility of a breach of competition rules in regard to the agreement among undertakings, of which one is not capable of independently taking part in the competition, just the abstract possibility of such a breach does not suffice. What is needed is normative concretisation which is based on facts. The NCA did not make such a concretisation that would »incriminate« the claimant. As the NCA did not establish whether the claimant fulfilled the requirements of DARS, or at what point in time it was incapable of taking part independently in the competition, and this information would shed a light on the position of the claimant in the alleged cartel agreement, the decision of the NCA had to be annulled and sent back for retrial.

3. Application of Article 101 of TFEU

In regard to 101 TFEU, the claimant said that the findings of the NCA did not give a sufficient basis for drawing conclusions on cross border influences on the competition. The NCA stated that foreign companies were restricted in the competition (through offering their services) as they would have to compete against a whole group of Slovene companies. What did competing against the group of Slovene companies imply? The NCA did not answer this.. If it were the aim of the cartel agreement to raise the price on the public competition, then, the court held, would foreign companies find it easier to compete, as they would be able to offer a very competitive (and realistic) lower price. The Court

found in favour of the claimant, since the NCA;s decision did not offer a satisfactory explanation to uphold that there had been a breach of Article 101 TFEU.

Conclusion

I regard the case relevant as it deals with a judgment by a Supreme court which annulled the previous NCA decision. It also represents a judgment which considered an alleged breach of European law.

3.5. RON STAM (DUTCH ADMINISTRATIVE HIGH COURT FOR TRADE AND INDUSTRY)

Case numbers: 14/581, 14/583, 14/585, 14/587, 14/589, 14/590, 14/591, 14/592, 14/593, 14/594, 14/595, 15/206, 15/207, 15/208, 15/209, 15/210

Decision pursuant to Article 8:29(3) of the Dutch General Administrative Law Act in the cases of:

Eleven flour manufacturers from the Netherlands, France, Belgium and Germany v. The Netherlands Authority for Consumers and Markets (ACM)

Course of the proceedings

ACM has submitted the confidential version of several case documents and, with reference to Article 8:29 of the General Administrative Law Act ('the Act'), has stated that only the Court may examine these documents.

This decision pertains to the transcriptions of the oral statements provided by the leniency applicants which have been recorded under numbers 31, 33, 35, 80, 102, 111, 129 and 138.

Findings

1. Under Article 8:29(3) of the Act, the Court decides whether the refusal to allow examination, or a limitation on allowing examination, of documents is justified.

2. In rendering this decision, the Court must balance the interests. On the one hand, it is important that the parties have equal access to information that is relevant to the appeal and that the Court has all the information necessary to dispose of the case in a proper and careful manner. On the other hand, the publication of certain data may disproportionately harm the interests of one or more parties, while the ACM also has an interest in ensuring that, in the future, it receives the information, including competition-sensitive data, which it needs to carry out its responsibilities properly.

3. Moreover, because this case relates to a punitive sanction, the guarantees in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) apply in any event. As the case law of the European Court of Human Rights (ECtHR) makes clear, the defence is entitled in principle, under Article 6.1 of the ECHR, to examine all of the relevant evidentiary material. Still, this right is not absolute. Other interests may be in opposition to it, such as national security, protection of others' fundamental rights and the confidentiality of investigation methods. In appropriate cases, these interests must be weighed against the defence's interests (ECtHR, 26th March, 1996, *Doorson v Netherlands*, No.54/1994/501/583, NJ 1996, 741, Paragraphs 69-70; ECtHR, 1st February, 2000, *Rowe and Davis v United Kingdom*, No. 28901/95, BNB 2000, 259, Paragraphs 60-62).

4. The ACM argues that limiting the examination of the transcriptions of the oral leniency statements is necessary in order to ensure the success of its leniency programme. If the companies concerned were to have a copy of the transcriptions, it would, the ACM contends, be relatively easy for third parties to request these documents from them and to rely on these in respect of the leniency applicants (in, for example, civil actions for damages). The leniency applicants have specifically requested leniency on the condition that copies of the transcriptions will not be furnished. The ACM is afraid that if the companies concerned were to obtain a copy of the transcriptions then this would keep potential leniency applicants from making a leniency request. In addition, the parties who were not requesting leniency were able to take note of the content of the statements. Although they were not

allowed to make copies of the transcriptions, they were permitted to reproduce the content, by, say, transcribing the transcriptions.

5. The Court notes that the oral leniency statements play a major role in the evidence for the violations that are asserted by the ACM in relation to Article 6 of the Dutch Competitive Trading Act and Article 101 of the Treaty on the Functioning of the European Union. Given this major role, the interest in being able to put forward a proper defence must be given great weight in the balancing of interests in the case to be conducted here.

6. In the Court's opinion, the success of ACM's leniency programme deserves less weight in this case than the interest in being able to put forward a proper defence. The parties not requesting leniency are aware of the content of the leniency statements and the involvement of the leniency applicants in the violations asserted by ACM can also be inferred from other, non-confidential documents, so that, in the Court's view, the interest in limiting examination of the transcriptions is relatively minor here. While the Court is cognizant of the measures which ACM has taken to compensate for the interest which the fined companies have in conducting a proper defence, the Court believes that the interest asserted by ACM is not sufficiently compelling to justify limiting the examination of the documents in this case. The request will therefore be denied.

7. The Court will send the transcriptions recorded under the numbers 31, 33, 35, 80, 102, 111, 129 and 138 back to ACM. ACM must submit these documents and must, within two weeks after this decision is sent, send a new version of these documents to the Court and the other parties. Should ACM not submit one or more documents, the Court may draw the conclusions which it deems appropriate. The Court further points out that the oral leniency statements recorded under numbers 31 and 33 which were furnished to the Court were not entirely complete, as several passages or pages were missing from them.

Decision

The Court hereby:

- decides that the limitation on allowing examination of the transcriptions of the oral statements provided by the leniency applicants recorded under numbers 31, 33, 35, 80, 102, 111, 129 and 138 is not justified;
- orders that the documents referred to under the previous dash be sent back to ACM;
- asks ACM to send a new version of the documents concerned to the Court and the other parties within two weeks of today's date.

3.6. Marie Baker (Irish High Court)

DPP v. Duffy and Duffy Motors (Newbridge) Ltd

[2009] IESC 208

[2009] 3 I.R. 613

Introduction

I have chosen this case for a number of reasons. The first is its importance in the context of the enforcement of competition law in Ireland. It was the first case involving a criminal conviction for a breach of Irish competition law where the judgment was reported. An earlier decision by the same judge, in *DPP v. Manning*, had not been published.

Secondly, it gives a clear indication of the seriousness with which the Irish Courts take the breach of competition law, and anticompetitive practices in general.

Finally, McKechnie J. set down a clear marker that the next person before the Court would face a custodial sentence.

I should, in addition like to set the case in context, in terms of its place in the chronology of events. The Act which established the process was the Competition Act 1991, which has now been superseded by the Competition and Consumer Protection Act 2014, which, among other things, provided for the merging of the old Competition Authority and the National Consumer Agency.

The first sentences were not handed down under the 1991 Act until 2008, beginning a period of activity on that front. In 2008, James Durrigan was sentenced to three months imprisonment (suspended) and his company, James Durrigan & Sons Ltd., was fined a total of €20,000. Later that same year, another motor dealer, Ravensdale Trading Ltd., trading as Jack Doran Motors was fined €20,000 and one of the directors in the company, Jack Doran, was given a three month sentence which was again suspended.

In March, 2009, we see the instant case (more anon) and then, in April, 2009, another member of the Citroën Dealers Association, Jim Bursey, was sentenced to fifteen months imprisonment (suspended) with a fine of €80,000, and his company, Bursey Peppard Motors Ltd was also fined €80,000. Over 2009, various other members of the CDA cartel were before the courts and the companies received fines and the individuals involved, suspended prison sentences. The matter came to a head, however, in November, 2009, Mr. Bursey came before McKechnie J. due to his failure to pay the fines imposed earlier. He was sentenced to twenty eight days imprisonment for contempt of court. Mr. Bursey thus earned the unwelcome notoriety of being the first person to serve a prison sentence arising out of a breach of Irish competition law.

Moving to 2011, we see KcKechnie J., now in the Supreme Court, delivering a judgment with which Murray C.J. and O'Donnell J concurred in a case held in Galway Circuit Criminal Court, wherein he can be said to have shown the support of the Irish judiciary for the effective enforcement of competition law. The severity of the sentence imposed by Judge Groarke following the decision of the Supreme Court once again showed that, even in the Lower Courts, they take the matter of breaches of competition law very seriously. It is in this context and this light that we should view McKechnie's decision in *DPP v. Duffy and Duffy Motors*.

The facts

In this case, the DPP brought charges against six Citroën dealerships and seven individuals who were either officers or directors of those dealerships. It was alleged that they had agreed to fix prices in

relation to the sale of Citroën cars and to do so in breach of competition law. The DPP also charged the Secretary of the Citroën dealers Association ("CDA") and it was alleged that he had aided and abetted the price-fixing by the dealerships.

The CDA was made up of members who were authorised Citroën dealers throughout Ireland. Among its other functions was the setting up of a scheme designed to achieve set prices by influencing a number of factors:

- Setting the maximum permissible discounts to be offered by Citroën dealers.
- Establishing a recommended price list for new vehicles.
- Setting delivery charges and accessory prices.
- Setting the prices to be offered for cars traded in and the sale of secondhand stock and,
- Setting prices for cars to be exported.

The CDA, having met and agreed these 'factors', the said factors would then be circulated to all of the dealers within the organisation, by the Secretary. Furthermore, to monitor compliance with these pricing agreements, the CDA used the services of 'mystery shoppers' to check the actual prices being negotiated with customers by the individual dealers. If the 'mystery shopper' found a dealer acting outside of the agreement, it was reported to the CDA and the dealer would then be fined €1,270 (the equivalent of £1,000).

The scheme came to the attention of the Competition Authority when a dealer/member of the CDA was fined for non-compliance and came forward as a 'whistle-blower'. The Authority questioned Mr. Duffy, who had played a significant role in the CDA, as its Treasurer. In this capacity, he attended most meetings and authorised payments from the CDA, ironically including the payments made to the 'mystery shoppers'.

Proceedings

The DPP commenced proceedings against Mr. Duffy and his company, of which he was a director. The alleged breach was behaviour contrary to s.4(1) of the 1991 Act and s.2 of the 1996 amending Act, namely "entering into an agreement which had as its object the prevention, restriction or distortion of competition" He was also charged on the basis of being a director of a company which had entered into such an anticompetitive agreement. He pleaded guilty on both counts.

The part of the judgment given by McKechnie J. which is of the most interest to us is his treatment of cartels and his approach to custodial sentences for breaches of competition law. He devoted seven paragraphs of his judgment (Paras. 22 to 27) to setting out the nature of cartels. He noted that they can be either formal or informal, with most providing for some form of penalty mechanism for non-compliance. He especially noted the absence of a clear definition of a cartel at Para. 22:

"Cartels involve a group of competitors who for self gain agree to restrict their individual business freedom and follow a common course of conduct on the market. They can be used for all forms of anticompetitive behaviour but are particularly attracted to price fixing, restricting output/limiting production, bid rigging and market allocation".

He went on to describe cartels as "hard core" breaches of competition law, and as "involving odious practices" which, because of their anticompetitive nature, destroy the incentives to compete, put customers off buying or shopping around, and put prospective competitors off from entering the market. This therefore, has a negative impact on the economy of a country. He continued to echo his stern criticism of cartels by describing them as "offensive and abhorrent", not only because they are prohibited, but because they are inherently wrong.

Sentencing

He began his discussion of sentencing by separating Ireland and the UK from the EU regime, where a custodial sentence was impossible, even for the most serious breach of competition law. He listed some of the arguments from *Faull & Nikpay*, in which the Commission had rejected mitigating factors against the imposition of penalties for breaches of EU competition law:

- the fact that no benefit arose from the cartel, nor any economic disadvantage suffered due to participation in a cartel;
- the fact that the cartel made a positive contribution to the economy; and
- the fact that the cartel was designed as a defensive measure against “distortions of competition” caused by others was no ground to allow “the main players of a given market segment to take concerted private actions regarding the prices they charge to their customers in order to compensate... for [other's] ‘dumping strategies’”;
- the fact that customers may accept a practice which is contrary to competition rules does not make such a practice lawful;
- the fact that the offence is a first offence does not amount to a mitigating factor;
- the fact that a company terminates such illegal behaviour before any intervention by the Commission does not merit any particular award; and
- arguments that the cartel evolved from initial discussions of lawful matter and gradually drifted into unlawful activities, have been rejected.

Instead, McKechnie J. chose to follow the line adopted by the English Courts in *R v. Whittle, Alison and Brammar* [2008] EWCA Crim 2560, where Hallett L.J set out a list of non-exhaustive considerations in relevant cases:

- the gravity and nature of the offence;
- the duration of the offence;
- the degree of culpability of the defendant in implementing the cartel agreement;
- the degree of culpability of the defendant in enforcing the cartel agreement;
- whether the defendant's conduct was contrary to guidelines laid down in a company compliance manual; and
- mitigating factors, for example, any co-operation the defendant may have provided in respect of the inquiry or whether or not the defendant was compelled to participate in the cartel under duress.

In turning to Ireland, McKechnie J. argued strongly for custodial sentences, principally to serve as a deterrent, and certainly not out of any vindictiveness. He noted that fines play a significant role in the criminal law, but that unless they were severe and had a severe impact, they were not sufficient as a deterrent. He explained at Para 37:

"In these respects I would agree. Competition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place."

He then went on to consider whether it would be appropriate to punish both the firm and the individual, two separate legal entities, yet both guilty of the offences. He relied on the judgment of Hardiman J. in *DPP v. Roseberry Construction Ltd* [2003 4 I.R. 338], wherein he stated that as the legislation provided for penalties in the form of fines and/or custodial sentences, it was clear that competition offences could be committed by both persons, natural and corporate. He argued that such an approach made perfect sense, as otherwise manoeuvring could set the entire sanctions provisions at naught.

Put simply, there were two options available, fines and imprisonment. He indicated that a Court would normally address the fine first and consider a custodial sentence only where the fine was likely to be unpaid, or where the fine would have little deterrent. His own preference was for a mixed type of

sentence and he reiterated his comments in Manning, where he gave his reasons for favouring custodial sentences in cases involving cartels:

“[A] sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly... Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations against, and quite frequently against their employers. Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent and finally, the imposition of the sentence for the type or category of persons above described can carry a uniquely strong moral message.”

In applying those principles to the circumstances in this case, he had to have regard for the earlier sentencing in others of the CDA cartel cases, and in view of this he imposed sentences which were consistent with the earlier cases. He sentenced Mr. Mr. Duffy to six and nine month in prison respectively, with a fine of €50,000 and he fined Duffy Motors €50,000.

Concluding comments

The significance of Duffy is that McKechnie J. set out some very important guidance for future prosecutions in cartel cases. Some commentators were disappointed and were critical at the time because of the extent of the punishment, a mere fine and a suspended sentence. It did however, as I mentioned earlier, set down a clear and unambiguous marker that future similar breaches were likely to result in imprisonment, actual imprisonment, rather than a suspended sentence. It was clear therefore, that competition law offences would not be punished lightly. Indeed subsequent legislation removed the option for the application of the Probation Act in relation to competition cases.

I will conclude with a short quotation from David McFadden (*The Private Enforcement of Competition Law in Ireland*, Hart Publishing, 2013):

"To the businessman, 'prison is the inferno'. This is a powerful endorsement of the criminal sanction as a deterrent to individuals. This view also has support today in Ireland. In the recent cartel case of DPP v. Duffy, McKechnie J. gave a detailed judgment on sentencing in hard-core price-fixing cases.... Regarding the role of deterrence in the criminal justice system McKechnie J. commented that 'while there is no place in the criminal justice system for either vengefulness or vindictiveness, there is for deterrent'."

It sums up admirably the significance of the decision in this case.

4. Horizontal agreements and bid rigging cartels

4.1. SOFIA MARAVELAKI (ATHENS ADMINISTRATIVE COURT)

Fine from the Greek Competition Authority for infringement of Article 1 Para. 1 of law N.703/1977 and Article 81 Para. 1 of the EC Treaty {Article 101 (1) TFEU}.

The infringement consisted of participation in an agreement for price-fixing and the distribution of sources of supply in the market for cows' milk. It was based on the law's provision that any agreement or concerted practice between undertakings which have as their object the restriction, prevention or distortion of competition, irrespective of its results, is forbidden.

The undertaking has lodged an appeal before the Administrative Court of Appeal in Athens. The Court of Appeal decided that there was an infringement of the competition law provisions and that the undertaking was lawfully fined. The market data, cited by the infringer, did not exclude it from temporary partnership with its rivals, in order to achieve (anticompetitive) common goals and objectives. The fine was reduced by the Court of Appeal.

The infringer applied for the cassation of the Appeal Court Decision before the Conseil d'Etat. The application was rejected. As far as the criteria for the determination of the fine were concerned, the Conseil d'Etat decided that there was no issue with a further reduction of the fine, based on the criterion of the duration of the infringement, since the infringer was attributed only with participation in an anticompetitive agreement and not with the implementation of this agreement in practice.

Facts

On May 31st, 2004., the five milk zone managers of the five largest industries in dairy products operating in the Greek territory, members of the Federation of Greek Industries for Dairy Products, met in a hotel in Larissa (a big city in central Greece). They agreed that the main axes of their companies' strategy in the next period, included, *inter alia*

- a) preventing the movement of milk producers between the industries for dairy products and making an effort to hold dairy prices in Greece and to reverse the upward trends,
- b) deciding to establish a regular group, formed by the milk collectors from these five companies, which would meet regularly in order to monitor the developments and to plan joint actions that are aimed at ensuring the quality and competitiveness of Greek milk, and
- c) assigning the realisation of the next meeting for the end of July, 2004. All of the representatives of these companies participated in the decisions taken, without any prejudice. This behaviour was considered by the Greek Competition Authority to be participation in an agreement for price-fixing and the distribution of sources of supply in the market for cows' milk, in breach of Article 81 Para. 1 of N .703/1977, as well as the corresponding provisions of Article 81 Para. 1 of the EC Treaty {Article 101 (1) TFEU}. The fine was €3,168,806,01

The undertaking tried to annul the Decision of the National Competition Authority or, at least, to reduce the imposed fine, by lodging an appeal before the Administrative Court of Appeal in Athens. The Administrative Court of Appeal decided that at the "Larissa meeting" there had indeed been an agreement among competing companies which involved the price-fixing of the market price for milk and the prevention of the movement of milk producers. This agreement, since it was aimed at determining market prices and the distribution of supply sources, had as its effect the restriction and distortion of competition, i.e., the creation of conditions of competition which did not correspond to the normal conditions of the market in question, in breach of the above mentioned law provisions, given that the agreement in question might indirectly affect intra-Community trade.

There was an application for cassation before the Greek Conseil d'Etat (Supreme Administrative Court of Greece-Court of Cassation), which was rejected. In particular, the Supreme Administrative Court referred to its own case law, as well as the case law of the Courts of the European Union, in its ruling, and accepted that any agreement or concerted practice between undertakings which have as their object the restriction, prevention or distortion of competition (with the additional condition that the agreement may substantially affect trade between Member States), is forbidden, regardless of the results (Conseil d'Etat 2365, 2007/2013, 2780/2012, ECJ decisions of 08-07-1999, C-49/92 P Commission v Anic Partecipazioni, CRS. 99 and 122-124, of 20-11-2008, C-209/07, Beef Industry Development Society Ltd etc., CRS. 15-16, of 07-02-2013, C-68/12, Sporitela Slovenska, CRS. 17), or non-application of the agreement (Conseil d'Etat 2365, 2007/2013, 2780/2012, ECJ decision of 11-07-1989, C-246/86 Belasco and others v Commission, CRS. 15) or if the agreement has a legitimate purpose (Conseil d'Etat 2365, 2007/2013, ECJ of 20-11-1 2008, C-209/07 Beef Industry Development Society Ltd ., CRS. 21 of 04-06- 2006, C-551/03 P, General Motors BV v Commission, CRS 64, T-49/02, Brasserie Nationale, etc., v Commission, CRS 85.) Furthermore, in order to have an "agreement", within the meaning of the same provisions, the Supreme Court accepted that the undertakings concerned must have expressed their joint intention to behave on the market in a certain way (Conseil d'Etat 2365, 2007/2013, 2780/2012 ECJ decisions of 15-07-1970, 41/69 ACF Chemiefarma v Commission, CRS. 112, and of 29 October 1980, 209/78, etc., Van Landewyck and others v Commission, CRS 86, judgment of 26-10-2000, T-41/96 Bayer v Commission, CRS. 67), with no care as to the form of expression at that joint intention (Conseil d'Etat 2365, 2007/2013, 2780/2012, ECJ decisions in ACF Chemiefarma case, CRS. 112, and Van Landewyck, CRS. 86) and without being necessarily an agreement that constitutes an obligatory and valid contract, in accordance with the national law (Conseil d'Etat 2365, 2007/2013, 2780/2012, ECJ decision of 11-01-1990, 277/87 Sandoz Prodotti Farmaceutici v. Commission, CRS13).

Determination of fine

According to Article 9 N.703/1977 (as amended with Article 4 N.2296/1995 and Article 16 N.3373/2005), if the Competition Authority finds a breach of Para. 1 of Articles 81 and 82 of the EC Treaty, it may a) ... b) ... c) ... d) ... e) ... f) impose fines on undertakings, or associations of undertakings, which participated in the infringement. 2. The imposed or threatened fine, according to the previous paragraph, can reach fifteen percent (15%) of the gross revenue of the business, of the current or the previous usage of the infringement. In determining the amount of the fine, the gravity and duration of the infringement must be taken into account. "Within the meaning of that provision, the Supreme Court decided that the duration of the infringement constitutes a statutory criterion for the determination of the fine, but in a case like this, where the infringement consists in participation in an agreement with an anticompetitive context, the criterion of the duration of the infringement cannot be implied, since what was critical was the existence of the agreement, regardless of its duration. So, there was no further reduction of the fine.

Notes

By object/effect approach in the light of Article 101(1) TFEU.

The mentioned restrictive agreement had a harmful effect on consumer welfare. There is a likelihood, a probability, of a harmful effect. This means, there is an assessment of the effect of restriction in the light of economic conditions and a counterfactual analysis.

The duration of the infringement is not taken into account as a criterion, in order to reduce the fine, since the infringement consists in the participation in an agreement with an anticompetitive context and not in its implementation.

The national Supreme Administrative Court refers to previous ECJ case law and to its own case law, in its ruling.

4.2. SANNA ANTTILA (TURKU COURT OF APPEAL)

Market Court, Finland 28.2.2013 no 69/2013

The Supreme Administrative Court 23.8.2013 no 2629

The Finnish Competition Authority (The Finnish Competition and Consumer Authority) vs. Asunto-Väylä Ltd. , CSC Consulting Service Centre Ltd., , Hansatalot Ltd., , Kiinteistö Ltd., Rovakartano and Sata-Väylä Ltd.

Introduction

This case is about judgments by the Finnish Market Court and The Supreme Administrative Court on infringements of national competition law. The bid rigging cartel took place in Rovaniemi in 2006 and 2009. In 2009, the City of Rovaniemi asked the Finnish Competition Authority (FCA) to investigate the actions of several undertakings that had been taking a part in tenders. In 2011, the FCA took its claims to the Market Court.¹³ The Market Court made its ruling in 2013. The penalty payments were imposed on two of the five undertakings. The judgment was also about the liability of the other three undertakings. The City of Rovaniemi appealed to the Supreme Administrative Court, but, according to the ruling, it did not have a right of appeal.

The FCA's claims and grounds

The FCA claimed that the Market Court imposes a penalty payment on undertakings that infringed the national Competition Act¹⁴ as follows:

- 1) Asunto-Väylä Ltd., Kiinteistö Ltd., Rovakartano and Sata-Väylä Ltd., jointly and severally an amount of €50.000,
- 2) CSC Consulting Service Centre Ltd., an amount of €15.000, and
- 3) Hansatalot Ltd. and Kiinteistö Ltd. and Rovakartano, jointly and severally an amount of €30.000.

At the time the Asunto-Väylä Ltd. was owned by Sata-Väylä Ltd. and the Kiinteistö Ltd. Rovakartano. Hansatalot Ltd., was a subsidiary of Kiinteistö Ltd., Rovakartano. According to the FCA, Sata-Väylä Ltd. and Kiinteistö Ltd., Rovakartano, had liability for the actions of Asunto-Väylä Ltd., and Rovakartano for the actions of Hansatalot.

According to the FCA, the undertakings had infringed the Competition Act by restraining competition through prohibited means. The undertakings had made an agreement to fix the purchase prices on two different tenders: the Tenders of the Health care District of Lapland in 2006, and the City of Rovaniemi in 2009, both tenders for property. The Deputies of the undertakings Asunto-Väylä, CSC and Hansatalot had co-operated in both cases. The tenders had been made partly by the same persons and they all had information about the other undertakings' tenders. The undertakings that had made the highest tenders, had withdrawn these tenders to make other undertakings tender become the

¹³ At the time, the applicable law was the former Competition Act, which was based on Articles 81 and 82

¹⁴ The Competition Act, Chapter 2, Section 5, based on Article 101 (formerly 81): Prohibited restraints on competition between undertakings (1) All agreements between undertakings, decisions by associations of undertakings, and concerted practices by undertakings which have as their object the significant prevention, restriction or distortion of competition, or which result in a significant prevention, restriction or distortion of competition, shall be prohibited. (2) In particular, agreements, decisions, or practices which: 1) directly or indirectly fix purchase or selling prices or any other trading conditions;- -,

highest tender. Due to the procedure, the price of the property was €150.000 lower in 2009, and €51.000 lower in 2006.

Prohibited co-operation in the 2006 case, according to the FCA: meant that the tenders of the Asunto-Väylä and the CSC had been made by same person; the tenders had the same appearance; the tender from Hansatalot was precisely €100.000 higher than the tender from Asunto-Väylä, and the tender of the CSC was precisely €50.000 higher than the tender by Hansatalot.

Prohibited co-operation in the 2009 case, according to the FCA

The tenders from Asunto-Väylä and the CSC had been made by same person; conversations and an email between those persons who participated in the tender; the tender by Hansatalot had been €51.001 higher than the tender by Asunto-Väylä and the tender from CSC was precisely €51.000 higher than the tender by Hansatalot; the Procedural in 2009 was in line with the tender in 2006.

The FCA claimed that a penalty payment should be imposed on the undertakings, because the bid rigging cartel had infringed the Competition Act. According to the FCA, the bid rigging cartel is one of the severest means with which to restrain competition. The cartel had targeted publicly funded operations, like healthcare. This took place in only one city in Finland, so it was geographically concise and also the value of the properties was almost €5 million.

All the Undertakings contested the claims presented.

The Market Court Proceedings and the Judgment of the Market Court

The Market Court offered its judgment in 2013. According to the Market Court, Asunto-Väylä Ltd. and CSC Consulting Service Center Ltd. had infringed the Competition Act by bid-ridding, and it therefore imposed a penalty payment on both undertakings: Asunto-Väylä Ltd. € 40.000 (€20.000 and €20.000s) and the CSC €3.000 (€1.500 and €1.500). The other claims were dismissed.

According to the Market Court, in 2006 and 2009 Asunto-Väylä and CSC had discussed the tender prices, or at least the facts affecting the prices, and they prepared the tenders together. There was no evidence against Hansatalot. The actions of Asunto-Väylä and CSC were seen to be a contract between the undertakings or were, at the least, a uniform procedure, and with this behaviour the undertakings had removed the competition between them. The Market Court deemed these actions to be prohibited restraints on competition between undertakings.

The Market Court stated that there were two separate infringements, one in 2006 and the other in 2009. The infringements were not deemed to be minor,¹⁵ because the geographical conciseness, and even though the infringements occurred within a relatively short time period. The amount of the penalty payment for Asunto-Väylä was calculated by their turnover for the year 2008, not the year 2009, because the undertaking did not have any turnover in 2009.¹⁶

The other issue in the judgment was that the owners of Asunto-Väylä, Sata-Väylä and Rovakartano were responsible for the actions of Asunto-Väylä.¹⁷ Legal praxis¹⁸ has stated that EU competition law

¹⁵ The Competition Act Chapter 3, Section 12: A penalty payment shall be imposed on an undertaking or association of undertakings that infringe the provisions of Articles 5 or 7, or Article 101 or 102 of the Treaty on the Functioning of the European Union, unless the conduct shall be deemed to be minor or the imposition of the penalty payment otherwise unjustified in respect of the safeguarding of competition.

¹⁶ The Court referred to joined cases T-456/05 and T-457/05 and the case T-410/09

¹⁷ The claims against Hansatalot were dismissed, so there the court didn't make a statement on the liability of the parent company.

and legal praxis must be taken into account when considering a penalty payment to an undertaking by actions of another undertaking.

The Market Court referred to joined cases C-628/10 P and C-14/11 P¹⁹ and T-314/018²⁰ and stated that even though the same people had mastery in the undertakings there were no co-operated actions *de facto* and Sata-Väylä and Rovakartano did not have a joint and several penalty imposed upon them due to Asunto-Väylä's action.

The Judgment of the Supreme Administrative Court

The City of Rovaniemi appealed to the Supreme Administrative Court. In the appeal, it claimed that Hansatalot Ltd. should also have a penalty payment imposed upon it for its actions. The Supreme Administrative Court deemed that the City of Rovaniemi was not a party to the case and it did not have a right of appeal.²¹ The Court ruled the appeal inadmissible, without considering its merits, on the grounds that it was in default of procedural requirements.

Comment

The relevance of this case lies in the liability of the other undertakings. The undertakings had the same people in charge of them, but still the Market Court ruled that the owners of Asunto-Väylä were not responsible for the actions of Asunto-Väylä. The ownerships and relations are not explained completely above, but there were only a few people involved in the case. The main thing that led to the appeal being dismissed was the lack of evidence. In such cases it is probably hard to find solid evidence. It does not automatically mean that the undertakings co-operated *de facto*, even though the same people pulled the strings.

The ruling of the Supreme Administrative Court is also relevant. The City of Rovaniemi started the case, but in the end it was not a party to the trial.

(Contd.) _____

¹⁸ The Supreme Administrative Court 2009:83.

¹⁹ Judgment of the Court (Grand Chamber) of 19th July, 2012 — Alliance One International Inc., Standard Commercial Tobacco Co. Inc v Trans-Continental Tobacco Leaf Corp. Ltd , European Commission and European Commission v Alliance One International Inc., Standard Commercial Tobacco Co. Inc., Trans-Continental Leaf Tobacco Corp. Ltd. .

²⁰ Judgment of the Court of First Instance (Third Chamber) of 27 September 2006. Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities. Competition - Agreements, decisions and concerted practices - Sodium gluconate -Article 81 EC - Fine - Liability of the parent company for the unlawful conduct of an association without its own legal personality - Article 15(2) of Regulation No 17 - Rights of the defence - Exculpatory documents - Principle of proportionality - Obligation for state reasons..

²¹ Administrative Judicial Procedure Act Chapter 2, Section 6: Any person to whom a decision is addressed or whose right, obligation or interest is directly affected by a decision may appeal against the decision..

4.3. ESZTER TAMÁSI (HUNGARIAN OFFICE FOR THE JUDICIARY)

The Curia of Hungary

Case No. Kfv.III.37.072/2013/15.

Plaintiffs:

No.1 International System House Kft.

No.2 SAP Hungary Kft.

No.3 International Business Machines Corporation Magyarország Kft.

Defendant:

Hungarian Competition Office (Gazdasági Versenyhivatal, GVH) – the state authority for competition in Hungary

1. Summary of the facts

Five public procurement procedures were published by five of the Hungarian universities between 24th February – 3rd May, 2004, separately. The subject of the public procurement procedure was the preparation of integrated economic systems and in some cases – parallel with or in itself – the preparation of clinical informatics systems.

The defendant (the Hungarian Competition Office) found in its decision that the plaintiffs, together with the five universities, prepared an arrangement that was able to restrict competition through a concerted practice, in order to increase their chance of winning with parallel entries and - in the case of two of the universities - they even influenced the preparation of the texts of the tenders.

As a result of the infringement, the defendant imposed the following competition fines on the plaintiffs: HUF 130.000.000 on Plaintiff No.1., HUF 690.000.000 on each of Plaintiffs No.2 and No.3.

The plaintiffs performed their contest separately for this decision.

2. Judgment of the Metropolitan Court of Budapest

The Metropolitan Court altered the decision of the Hungarian Competition Office and reduced the fines imposed as follows: HUF 117.000.000, in the case of Plaintiff No.1, and HUF 620.000.000 for each of the Plaintiffs No.2 and No.3.

In its judgment, the Metropolitan Court highlighted that the affected market was the five economics and control systems, and the medical informatics system for the procurement was published by the five universities.

The Court also articulated that the agreement between the plaintiffs was clearly made in relation to public procurement procedures and contained parts that directly targeted the sharing of the market among themselves.

It was declared also that in order to state the sharing of market it is not necessary that all the competitors take part or that the sharing is successful, but an agreement targeting these results is sufficient.

Each of the plaintiffs, and also the defendant, appealed against this judgment.

3. Judgment of the Metropolitan Court Of Appeal

The Metropolitan Court of Appeal approved the judgment of the First Instance.

It was declared by the Court of Second Instance that, in this case, five separate markets were affected, i. e., the whole of the public procurement represented different markets.

The Court of Second-Instance highlighted that the behaviour of the plaintiffs targeted the cartel so as to share the market and in this regard it was not necessary to investigate the affected market and the share of the plaintiffs in this.

The participants cannot be acquitted from the prohibition of forming a cartel, even if their participation in the market is low, since the sharing of the market is seriously restricted and distorts the competition, as declared by Hungarian law.

It was emphasised by the Court of Second-Instance that the prohibition of the limitation of competition was harmed by the cooperation of the plaintiffs in targeting the mutual winning of the tenders by the universities. The plaintiffs coordinated their behaviour in order to exclude other competitors, and they made their steps into the market based on this cooperation.

All the plaintiffs asked for a revision of this decision.

4. Judgment of the Curia of Hungary

The Curia stated that the applications for revision are insufficiently substantiated.

According to the standpoint of the Curia, all the courts dealing with the case investigated and stated the facts in the necessary depth and, in the opinion of the Court, the statement of facts was clear and a correct legal conclusion was reached.

In its sentence the Curia made it clear that among the plaintiffs an agreement targeting the sharing of the market was found, and this cooperation resulted in the minimising of the competition. It is thus a serious restriction of competition.

Based on the above mentioned facts, it is clear that a common accord that certainly restricted the competition was developed.

In order to point out the violation of the prohibition of restriction of competition it was sufficient to prove that behaviour distorting and restricting competition was found.

5. Personal comments

This case was one of the biggest cartel cases in recent years.

It raises sensitive issues regarding state financed public procurement projects.

For me, it is important that the process of the whole procedure behaviour that distorts and restricts competition is sufficient to point out the violation of the relevant rules. It is also important that, in this sense, the Hungarian national law is in strict harmony with European law (Article 101 (1) TFEU).

4.4. STEFAN SCHLOTTER (GERMAN MINISTRY OF JUSTICE)

Court: Bundesverfassungsgericht (Federal Constitutional Court) 1. Senat 2. Kammer

Date: August 20th, 2015.

File number: 1 BvR 980/15

Type of decision: Order of rejection

1st. Instance: OLG (Regional Court of Appeal) Düsseldorf, Febr. 10th, 2014, Az: V-4 Kart 5/11 OWi

2nd. Instance: BGH (Federal Court of Justice) January 2nd; 2015, Az: KRB 39/14

The German Federal Constitutional Court refused to hear the complaint that was brought by Melitta Europa GmbH & Co. KG (“Melitta Europe”) as the legal successor of its former affiliate, Melitta Kaffee GmbH (“Melitta Kaffee”), against several court decisions confirming fines imposed on Melitta Europe, despite its restructuring.

The FCC thus confirmed the Federal Court of Justice’s (FCJ) position, according to which a new entity is “identical” to a cartel infringer – and is consequently liable for cartel infringements that are perpetrated by their predecessor – not only once such an entity continues (virtually) unchanged with its predecessor’s business, but also if its assets include, in an undiminished form, the assets of the cartel infringer.

According to the Federal Constitutional Court, this approach does not infringe constitutional principles (“*nulla poena sine lege*”). The imposition of fines on successor companies can thus be based on Section 30(1) of the German Act on Misdemeanors without infringing constitutional boundaries.

The Court confirms, that Section 30 (1) of the German Act on Misdemeanors can be applied, and this is where a lay person should view the new company and the old as being the same undertaking. Fining the new entity is congruent not only with the literal meaning of this Section, but also with its statutory purpose.

This decision is important as it gives leeway to the legislator to bring the German system in line with the EU system as to the liability of restructured enterprises.

5. Vertical restraints

5.1. JELENA ČUVELIAK (ZAGREB COMMERCIAL COURT)

Case No.: the High Administrative Court of the Republic of Croatia, Ref. No UsII-4/15 of July 16th, 2015.

Case: Narodni trgovački lanac d.o.o. and Kraš d.d. vs. CCA of December 3rd, 2014 .

Class: UP/I 034-03/2013-01/016

Case: CCA v Kraš d.d., Zagreb and Narodni trgovački lanac d.o.o., Sesvete

The Croatian Competition Agency established, in the course of the proceedings, that the agreement between the undertakings Kraš and Narodni trgovački lanac (NTL), that was in force for almost four years, from October, 2010, to July, 2014, contained restrictive provisions involving resale price maintenance. The sanctions imposed by the CCA amount to more than 2, 5 million Kuna. Namely, under the sales agreement, Kraš and NTL agreed upon minimum resale price maintenance in accordance with which the distribution chain NTL was not allowed to sell Kraš' products below the agreed price. Otherwise, Kraš was entitled to refuse to supply and NTL might have lost its extra bonuses.

Facts of the case

In the case Class: 031-02/11-01/012, the Croatian Competition Agency (CCA) conducted market research into food, beverages and sanitary products' distribution in the Republic of Croatia for 2010 in which it asked the undertakings that were active in this market to communicate to the CCA particular documents. Among other undertakings, the undertaking, Kraš d.d., with its seat in Zagreb, Ravnice 48 (Kraš), was also requested to communicate with the CCA and give it copies of its commercial agreements with its major trade partners.

It was established in the analysis of the documentation received that it contained strong indices that certain provisions of the sales agreement between Kraš and the undertaking Narodni trgovački lanac d.o.o., with its seat in Sesvete, Soblinec, Soblinečka 55 (NTL), contravene the Regulation on Block Exemption that was granted to undertakings that were active at different levels in the production or distribution chain (OG 51/04), and the Regulation on Block Exemption is granted to certain categories of vertical agreements (OG 37/11) and so thereby constitutes a prohibited agreement within the meaning of Article 8 of the Competition Act (OG 79/09 and 80/13).

On the basis of the above indices the CCA issued a procedural order, UP/I 034-03/13-01/016, opening the proceeding against Kraš and NTL on 23rd May, 2013, to assess whether the provisions that were being challenged were contained in the said sales agreements and constitute a prohibited agreement within the meaning of Article 8 of the Competition Act.

Following the proceeding, the Competition Council, in its 23/2014 session, held on 3rd July, 2014, within its powers under Article 30 of the Competition Act, found that the undertakings Kraš and NTL had concluded a prohibited agreement that had as its object or effect the prevention, restriction and distortion of competition within the meaning of Article 8 Paragraph 1 Item 1 of the Competition Act. The duration of the infringement was defined to cover the period from 1st October, 2010, to 3rd July, 2014.

Namely, the Competition Council established that Article 6 Paragraphs 1, 4 and 5 of the sales agreement for 2010 which was concluded between Kraš and NTL on 12th July, 2010, and Article 6 Paragraphs 1, 4 and 5 of the sales agreement for 2012, concluded between the same undertakings on 2nd July, 2012, contained provisions that committed NTL not to sell the products supplied by Kraš

beneath the price that was set out in the Kraš' price list that was in force, and provided for retaliation in the case that NTL did not comply with the agreed minimum resale price maintenance. These restrictive provisions constitute a hardcore restriction of competition, which is prohibited under Article 9 Paragraph 1 Item a) of the above mentioned 2004 Regulation on vertical agreements, which was in force until 7th April, 2011, and Article 9 Paragraph 1 Item a) of the 2011 Regulation on vertical agreements. In other words, it constitutes a prohibited agreement under Article 8 Paragraph 1 Item 1 of the Competition Act.

With respect to the sales agreement for 2009, which was concluded on 18th May, 2009, which contained identical competition concerns, the Competition Council found it was applied in its entirety before 1st October, 2010, that is to say, before the 2010 Competition Act entered into force, bringing new powers to the CCA. It was thus the view of the Competition Council that the provisions of the 2010 Competition Act which is now in force could not be applied to the sales agreement for 2009, nor could any sanctions be imposed for the infringements committed in the period when the 2003 Competition Act was in effect.

Following a separate proceeding involving a definition of the level of fines, the Competition Council, in its 48/2014 session held on 3rd December, 2014, established the conditions for the imposition of fines and other relevant circumstances for setting their level. When setting the level of fines the Competition Council took particularly into account the fact that, in this concrete case, the prohibited agreement produces, or may produce, effects in the territory of the Republic of Croatia between undertakings that do not operate at the same level of the production or distribution chain, whereas the challenged provisions have been introduced in the said agreements at the Kraš' initiative. The Competition Council took into account also the fact that, in practice, the infringement had actually not been committed.

Acknowledging all of the mitigating and aggravating circumstances with respect to both parties to the agreement, the Council found that the mitigating factor was that the provisions concerned had not been applied in practice and despite the presence of the prohibited agreement, the parties to the agreement otherwise observed the competition rules. No aggravating factors were established, either for Kraš, or for NTL.

Taking what has been said above into account, including all the circumstances of this case, pursuant to the set criteria, the CCA imposed a fine on Kraš in the amount of 1.560,600 Kuna and on NTL in an amount of 1.022,000 Kuna. It is the opinion of the CCA that the fines imposed are adequate for the said infringements, at the same time they produce a preventative effect on the participating undertakings, but also act to produce a deterrent effect, which should keep other undertakings from any further infringements of competition law in the form of restrictive agreements.

Ruling of the High Administrative Court of the Republic of Croatia

Against the decision of the Croatian Competition Agency undertakings, NTL and Kraš filed a claim and the High Administrative Court of the Republic of Croatia (Ref. No UsII-4/15 of July 16th, 2015.) dismissed the claim made by the undertakings NTL and Kraš.

The Court finds that in the proceeding concerned the facts of the case were correctly and completely established, that the substantive law was correctly applied, and that no breach of procedural rules was committed. In the assessment of the Court the defendant had taken all of the relevant facts and circumstances of the case into account when imposing the fine that is defined in the fine setting procedure, including the long duration of the infringement, and provided a detailed explanation of its decision, which this Court accepts.

Comment

Perhaps the most important aspect of this entire case on a prohibited agreement is prevention. Agreeing on a minimum resale price (resale price maintenance) constitutes a hardcore restriction of competition that is prohibited under competition rules, with no exception, even where such a restrictive provision is not applied in practice. Concretely, the supplier imposes a restriction on the seller to freely set the prices, which directly affects the interests of the final consumer.

In this particular case, the CCA did not find evidence that the prohibited provisions had been applied in practice. However, given that they had been repeatedly incorporated into three subsequent contracts and that they had been in force for almost four years, Kraš was in the position to impose them at any time and to stop the supply to NTL and deprive them of their extra bonuses.

5.2. ANNE MARIE WITTERS (BRUSSELS COMMERCIAL COURT)

Ducati North Europe BV v/ DD Bikes BVBA case number 2010/AR/3351 Decision of the Ghent Court of Appeal of 1st October, 2014.

Brief summary of the relevant facts and of the procedural background of the dispute

Ducati is responsible for the production and the sales of Ducati motorcycles and accessories in Northern Europe. DD Bikes was an authorised dealer and repairer of Ducati motorcycles for 22 years. The agreement between Ducati and DD Bikes was not laid down in writing. According to DD Bikes, 95% of its activities were related to the sales or repairs of Ducati products.

On 26th October, 2007, Ducati terminated the contract granting DD Bikes a notice period which (after discussion) was extended until 31st December, 2008. DD Bikes formally requested to be granted, after the expiry of the notice, the status of an authorised repairer of Ducati motorcycles, so as to keep the right to use the official Ducati logo, to order components and spare parts under the same conditions as other authorised repairers and to carry out repairs covered by the two-year warranty that is applicable to Ducati motorcycles. However, Ducati refused to grant such status, arguing that only authorised Ducati dealers would be admitted as authorised repairers. As a result, DD Bikes filed a complaint for unfair commercial practices before the Commercial Court of Dendermonde (in fact, before the President of the Commercial Court, seeking in essence a cease and desist order).

In its November 3rd, 2010, judgment, the Commercial Court in Dendermonde (ruling in the First Instance on the merits) noted that the repair of Ducati motorcycles was not part of the same market as the sale of Ducati motorcycles and that, unlike the market for the sale of motorcycles, the repair market was brand-specific. The Commercial Court also found the brand-specific market for after-sales services to be national in scope. The Commercial Court then ruled that Ducati's distribution system could not benefit from the Vertical Agreements Block Exemption (as Ducati's market share in the after-sales market exceeded 30%), or from an individual exemption under Article 101(3) of the **Treaty on the Functioning of the European Union** (hereafter referred to as "TFEU"). According to the Commercial Court, Ducati unnecessarily forced repairers to also be dealers, in order to be considered as authorised Ducati repairers. Ducati also foreclosed competition from repairers who were not authorised dealers, notably by refusing to apply the two-year warranty on motorcycles repaired by repairers who were not Ducati dealers, and by limiting access to technical information, specialised tools, parts and accessories to authorised dealers (independent repairers could only purchase parts and accessories from competing authorised dealers/repairers at a significantly higher price). As a result, the Commercial Court found this system to constitute an anticompetitive agreement prohibited by Article 101 TFEU and Article IV.1 of the Belgian Economic Law Code ("Wetboek Economisch Recht" hereafter referred to as "WER").

In addition, the Commercial Court of Dendermonde noted that Ducati was dominant in the market for after-sales services for Ducati motorcycles in Belgium. It stated that the owners of Ducati motorcycles are likely to use the services of authorised Ducati repairers and original Ducati spare parts for various reasons, including the fact that the quantitative number of independent repairers is limited. After finding Ducati to be dominant in the market, the Commercial Court found that Ducati's decision to only allow its authorised dealers to become authorised repairers constituted an abuse of its dominant position, since it prevented independent repairers from competing effectively with official Ducati repairers.

The Commercial Court (in the First Instance) ordered Ducati to cease / end its refusal to grant DD Bikes the status of an authorised repairer of Ducati motorcycles.

Ducati appealed this judgment before the Court of Appeal of Ghent, which partially upheld the judgment of the Commercial Court.

Summary of the judicial proceedings before the Court of Appeal of Ghent

In its judgment of 1st October, 2014, the Court of Appeal followed the Commercial Court's reasoning on the definition of the relevant market. However, the Court of Appeal disagreed with the Commercial Court as regards the infringement of Articles IV.1 of the WER and 101 TFEU. According to the Court of Appeal, DD Bikes had not established that Ducati's refusal to grant DD Bikes the status of an authorised repairer was based on an agreement between Ducati and its authorised dealers or repairers. Ducati's refusal to admit DD Bikes to its authorised repairers' network therefore constituted unilateral behaviour, which falls outside of the scope of Articles 101 TFEU and IV.1 of the WER.

However, the Court of Appeal confirmed the existence of an abuse of Ducati's dominant position in the Belgian market for after-sales services for Ducati motorcycles. Firstly, the Court found Ducati to be dominant in this market, and noted that independent repairers could not exert any countervailing market power owing to the limitations applied to the manufacturer's warranty and the restricted access to parts, specific tools and technical information. Then the Court stated that although companies are in principle free to choose their business partners and how to dispose of their own property, dominant companies, such as Ducati, cannot refuse to sell a product - or sell it under unreasonable conditions - in a way that restricts competition. According to the Court, Ducati had abused its dominant position by preventing DD Bikes from directly obtaining, from Ducati, and under the same conditions as Ducati dealers, the motorcycle parts, equipment, technical information and tools that are necessary to repair Ducati motorcycles. As a result, DD Bikes could not effectively compete in the market for the maintenance and repair of Ducati motorcycles.

Ultimately, the Court of Appeal found that Ducati's conduct did not have an effect on trade between Member States since DD Bikes was only active in the Dendermonde region of Belgium and, as a result, it ruled that only the Belgian competition rules, and not Article 102 TFEU, should be applied to the present case.

Ruling of the Court

The Court of Appeal, in essence, ordered Ducati to enable DD Bikes to repair and maintain Ducati motorcycles under competitive conditions by supplying it with technical information, specialised tools, software and parts, on the same terms as authorised dealers, and imposed a periodic penalty payment of €1,000 per day (with a maximum of €200,000) in the case that Ducati failed to do so.

Personal comment

The case is very interesting for several reasons, and certainly because the Commercial Court of Dendermonde requested assistance from the European Commission on the interpretation of competition law rules. In an interim decision of 28th January, 2009, the Commercial Court of Dendermonde raised a number of questions to the European Commission, to which the European Commission replied by a letter of 17th November, 2009, as follows (this is an unofficial summary in English of the main replies by the European Commission to the questions which were formulated in Dutch) :

- Whether the Commission has a procedure pending in relation to the behaviour with which the case in hand is concerned, to which the answer was that this is not the case.
- Whether the setting up of a selective distribution network by Ducati has such a nature as to have an appreciable effect on trade between the Member States. The Commission reiterated the conditions for an appreciable effect on trade between the Member States from the relevant

Commission Guidelines and stated that it is for the national court to determine whether these conditions have been fulfilled in the concrete case at hand.

- How the relevant product market should be defined, and what the impact on the application of the Vertical Block Exemption Regulation 2790/1999 would be. The Commission stated that it had not yet taken a position on the definition of the relevant market at issue in its own decisions and that it is for the national court to come to such a definition in the context of the specific case at hand. It furthermore explained the application of the market share threshold from the BER.
- Whether the selective distribution network of Ducati qualifies for an individual exemption. The Commission gave general guidance on factors that could be taken into account, leaving the specific assessment of the case to the national court.
- Questions on the qualification of certain conditions of the selective distribution network as qualitative or quantitative conditions. The Commission gave general guidance on the distinction, leaving the specific assessment of the case to the national court.
- Whether or not Ducati has a dominant position in the relevant market, and whether or not it has abused such a dominant position. The Commission gave general guidance on factors that could be taken into account, leaving the specific assessment of the case to the national court.

Moreover, this is an excellent illustration of (a particular form of) private enforcement, whereby a former dealer gains the right to be supplied with information, tools and parts, in the same way and according to the same conditions as authorised dealers, on the basis of the competition law rules.

There are some authors who question the definition of the relevant market and the calculation of the market share by the Court of Appeal and who request a more thorough economic analysis in relation to the potential abuse of Ducati's dominant position in the Belgian market for after-sales services for Ducati motorcycles.

5.3. PETYA STOILOVA (SOFIA ADMINISTRATIVE COURT)

Star JSC – producer of sunflower oil and the distributor “Trade and Tourism” JSC v. Commission for Protection of competition

Decision No. 844 from 11.07.2013 of the Commission for Protection of Competition, Case N633/2012

Decision No. 5873 from 29.04.2014 of the Supreme Administrative Court – First Instance (three member panel), Case No. 11185/2013

Decision No. 11427 from 30.09.2014 of the Supreme Administrative Court – Second Instance (five member panel), Case N8662/2014

I. Summary of the facts

In September, 2004, a contract was signed between two Bulgarian companies: the producer “Star“ JSC and the distributor, “Trade and Tourism” JSC.

It was signed under the General terms and conditions for sale of "Star" JSC, with which the distributor was familiar and which they accepted, certified by the signatures of both parties. Under the contract, "Star" was obliged to sell to the distributor, “Trade and Tourism”, bottled sunflower oil, by giving the latter the exclusive right to distribute the full range of types of bottled oil produced by “Star” in the territory of Bulgaria. The distributor would sell goods purchased from "Star" to third parties, on its behalf and at its expense, not engaging the seller legally. The distributor had no representative rights with regard to the seller. “Trade and Tourism” were obliged to comply with the pricing policy and the recommended selling prices that was set by the seller's price list. The seller, "Star", had the right to change prices and, in the case of a change, he should notify the distributor in writing with 7 days’ notice. This notice should be sent by fax. The ownership of the goods received by the distributor was transferred to him on payment of the full cost, including related interest and penalties if there were any. Under The General Terms and the conditions for sale of "Star", the distributor might not sell to a third-party products below the officially announced price that was the seller’s policy, this obligation applied to all of retail outlets of the distributor.

In January, 2009, a new distribution agreement with altered clauses in Section IV "Rights and obligations of the distributor”, was signed between “Star” and “Trade and Tourism”. The obligation of the distributor, when selling bottled oil to third parties, to implement the "recommended selling prices set by the seller's price list" was repealed, but, in Point 14, the new contract provided that when selling the products to a third party, the distributor "is obliged to adhere to the pricing set by the seller." The seller was entitled to change the prices. In the case of change, it was obliged to inform the distributor in writing with 7 days’ notice. This notice should be sent by fax or e-mail.

The Bulgarian Commission for the protection of competition initiated proceedings *ex officio*, after an analysis was made of the competitive environment in both of the interrelated markets for the production and trade of sunflower oil in the domestic market.

The Commission for the Protection of Competition, in its Decision № 844 of 07.11.2013, case № CPC-633/2012, decided that "Star" and "Trade and Tourism" had committed an infringement under Article 15, Paragraph 1, Item 1 of the Law on the Protection of Competition, which was expressed in a prohibited vertical agreement which, by its ordering, prevents, restricts or distorts competition in the market for bottled sunflower oil for final consumption in the national territory, by establishing fixed and minimum resale prices. The Commission imposed on "Star" JSC and "Trade and Tourism" JSC fines, respectively, for "Star," this amounted to 85 673 Levs, and "Trade and Tourism’s" fine amounted to 76 154 Levs.

II. Judicial proceedings

The two sanctioned companies appealed the Decision of the CPC before the Supreme Administrative Court of the Republic of Bulgaria - three member panel as a First Instance.

In its appeal, "Star" pointed out that the contractual relationship between the two companies lacks an anticompetitive purpose, and / or effect, on the market of bottled sunflower oil for final consumption in the national territory, and their behaviour was wrongly classified in the hypothesis of Article 15 Para. 1 p. 1 of the LPC. It is claimed that the prices agreed are recommendatory and not binding under the agreement. The CPC, according to the claim, did not take into account all of the extenuating circumstances, and thereby wrongly determined the amount of the penalty. "Star" pleaded for the CPC decision to be cancelled, or alternatively it asked that the fine be reduced, bearing in mind all the extenuating circumstances.

In "Trade and Tourism's" appeal arguments are developed in such a direction that the contractual relations between the two companies did not affect or influence the other participants in the product market for bottled sunflower oil, since there is no agreed and fixed resale prices. It is argued that the amount of the fine is excessive and does not correspond in proportion to the infringement. It was also alleged that the CPC failed to consider all of the mitigating circumstances. This applicant also pleads against the CPC's decision, which found that "Star" and "Trade and Tourism" had committed an infringement under Article 15, Paragraph 1, Item 1 of the Law on the Protection of Competition, resulting in a prohibited vertical agreement being entirely repealed. Alternatively, a reduction of the sanction imposed by the CPC was requested.

The Supreme Administrative Court – First Instance found that the complaints were procedurally admissible but were essentially unfounded.

The Supreme Administrative Court - Second Instance found the decision of the First Instance Court to be correct and upheld it.

III. Ruling of the Court

According to the Court, the CPC carried out a comprehensive, complete and objective investigation of the case, resulting in the clarification of the relevant facts in the dispute. The parties were given the opportunity to give opinions and to file requests, to submit evidence and to become acquainted with the materials of the case. The Commission's decision is correct and properly reasoned, including the application of the methodology for the individualisation of the seriousness of the offence and the amount of the sanction.

The Court considers that the Bulgarian Commission for the protection of competition has defined the relevant market, which appears to be affected by the above - mentioned distribution contracts between "Star" and "Trade and Tourism" in its decision. Within the meaning of §1, Point 15 of the Supplementary Provisions of the Bulgarian Law on the Protection of Competition, the "Relevant market" shall consist of:

- (a) the "Product market" --including all goods or services which could be accepted by consumers as being interchangeable in respect of their characteristics, intended use and price;
- (b) the "Geographical market" -- including a specific territory on which the corresponding interchangeable goods or services are offered, and on which the conditions of competition are the same, while differing from those in neighbouring areas.

The Court of First Instance consider legitimate and well-founded the conclusions of the Commission for the protection of competition that, in this case, the relevant product market should be defined as the trade in bottled sunflower oil for final consumption, while the affected market is limited to the vertical agreements (distribution agreements) between the supplier-manufacturer of bottled sunflower oil and

the buyer (distributor) in the wholesale market, whose business is focused on the realisation of the product in the retail market. Properly, the Commission defined the geographical market as being national, as evidenced by the signed distribution contracts, "Trade and Tourism" performs trade services throughout the country.

The CPC, says the Court, has correctly identified the relevant period of action for the agreements between "Star" and "Trade and Tourism", covering the period from the signing of a distribution agreement in 09.2004 until the termination of the contractual relations between "Zvezda" and "Trade and Tourism" on 17.12.2009. The Court accepted as being unfounded the objections in the complaints that the contractual relationship between "Trade and Tourism" and "Star" lacks an anticompetitive purpose and / or effect upon the market for bottled sunflower oil for final consumption within the national territory and the behaviour of the two companies as held under the hypothesis of Article 15 Para. 1 P. 1 of the Law on the Protection of Competition /LPC/.

With the provision of Article 15, Para. 1 of the LPC it is established that there is a general prohibition on all types of agreements between undertakings and decisions by associations of undertakings, as well as the concerted practices of two or more undertakings that have, as their object or effect, the prevention, restriction or distortion of competition in the relevant market, such as those which:

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

According to Para. 2: any agreements and decisions referred to in Paragraph (1) shall be null and void.

In order to implement the ban under Article 15, Para. 1 of LPC it is necessary to establish the cumulative existence of all of the elements of the provision:

- the parties to the proceedings must have the quality of " undertakings,";
- the existence of an agreement and / or concerted practice between the parties, and
- that there is an anticompetitive effect that represents, as its object or effect, the prevention, restriction or distortion of competition.

The Court agrees that, in this case, the three constituent elements of Article 15 Para. 1 p. 1 of the CPA are evident for the following reasons:

- According to §1, Pt. 7 of the Additional Provisions of the CPA: "Undertaking" shall mean any natural person, legal entity, or unincorporated entity which carries out economic activities, regardless of its legal and organisational form. In this case, "Star" produces and sells bottled refined sunflower oil and "Trade and Tourism" operates activities for the wholesale / distribution of bottled refined sunflower oil/, which by their nature are economic activities. Consequently, "Star" and "Trade and Tourism" constitute undertakings within the meaning of § 1, Item 7 of the AP of LPC.
- The term "agreement between undertakings" within the meaning of the CPA covers all forms of agreement or understanding between parties in relation to their market behaviour. According to European practice (Case T-7/89 SA Hercules Chemicals NV v Commission [1991] ECR II- 1711, Case T-41/96 Bayer AG v. Commission [2000] ECR II- 3383, Case

28/77 Tepea Bv v. Commission [1978] ECR 1391, etc.), in order for an agreement to be established, the matching desires of at least two undertakings should exist. Agreement may have any form or name, but what matters is its essence. It may be written or oral, signed or unsigned, named or unnamed, can be objectified in a document that has a different name, can be highlighted and implied in the activities of businesses as being their specific line of conduct on the market. In this case, there was a signed contract for the distribution of bottled refined sunflower oil between the parties. General Terms and Conditions and Annexes in which they both have expressed their will to conduct a certain market behaviour and, in particular, to implement a certain price policy. In these agreements the parties have reached a mutual understanding of their market behaviour and therefore these are agreements between undertakings within the meaning of Article 15 of the CPA.

- The last item that is relevant to Article 15, Paragraph 1 of the LPC: is the agreement in its purpose or effect, likely to be able to cause certain anticompetitive effects by preventing, restricting or distorting competition because of the very nature of the agreement or in view of its result. It should be pointed out that an anticompetitive effect may consist in their businesses aim of restricting competition between them, and in its actual restriction (i.e., a certain anticompetitive effect to appear on the market - both real and potential). In this sense, agreements which have as their object, directly or indirectly, the fixing of prices, the allocation of markets or customers, or limiting production and sales, always have as their object the restriction of competition between companies. Their potential for damage to market relations and consumer interests is so strong that when there are such agreements, they need not to have been actually performed by participants and/or have given rise to a certain result being banned by law. Vertical agreements for fixing prices may be expressed in terms of fixing resale prices or of a minimum resale price at which the distributor or dealer can provide certain goods or services on the market, depriving themselves from the opportunity freely and independently to determine the prices of products to customers under the effects of natural market forces and pressure from competitors.

The parties thus voluntarily draw back from the risk of effective competition by replacing it with the agreement concluded between them. The very fact that there is denial of competition concerning the main element of a trade policy, namely, pricing, means that both companies primarily waive competition with each other. This in itself, in terms of competition law, is a violation, which aims to prevent, restrict or distort competition in the relevant market, without requiring the occurrence of any particular result. In this sense European practice is established (Joined Cases 56 and 58/64 Consten and Grundig v Commission [1966] ECR 299; Jointed Cases 56 and 58/64 Consten and Grundig v. Commission [1966] ECR 299; Case C- 199/1992 P, Huls AG v Commission [1999] ECR I-4287; Joined Cases 96-102, 104, 105, 108, 110/82, IAZ International Belgium v Commission [1983] ECR 3369).

The Second Instance of the Court, in its decision, confirms that the anticompetitive object is one of the two alternatives unlawful consequences to which we have referred, whose presence is sufficient proof of the infringement of the general prohibition, without having to prove also that there was an anticompetitive effect. Moreover, an anticompetitive object, within the meaning of the general prohibition, may exist even if the undertakings involved in the prohibited agreement are not aware of it and do not realise that they infringe the general prohibition. The practice of the EU Court of Justice is quoted in this sense: Case 246/86 BELASCO v. Commission. The final court instance founds lawful the argument of the defendant in cassation, that when implementing the competition law what matters are not the subjective intentions but the objective nature of the contracts and the potential effect that they are able to produce in the relevant markets that are affected.

IV. Comment

The case presented is a typical example of a prohibited vertical agreement between producer and distributor which is able to restrict and destroy price competition in the relevant market, which in turn would reflect negatively on the interests of the consumers of bottled sunflower oil. The agreements of the kind presented are illegal in themselves (*per se*), even if they have still not produced a real effect in the market. The case is therefore not covered by the exceptions from the General Prohibition of Anticompetitive Agreements, Decisions and Concerted Practices, which is regulated by Bulgarian law, and which cannot be defined as being an agreement of minor importance, so it is an ordinary case and is thus subject to penalties.

6. Decisions of associations of undertakings and factors facilitating concerted practices

6.1. PIETRO SPERA (COURT OF GENOA)

Introduction

The Law 4/8/2006 started the liberalisation of freelance professions in Italy, and this included the profession of private attorney. Before this Law there was a strict system of tariffs and various other limitations, for instance, about commercial advertising and law firms in the form of limited companies.

After a long process, the matter is now regulated by Law 31/12 2012 n. 247 which, among other things, states:

- Article 13: the fees can be freely agreed between client and attorney;
- Article 10: the attorney is allowed to advertise his/her legal business.

The decision of the Antitrust

1. On 19/11/2012 the Italian Antitrust Authority learned that on the website of the Italian Bar Association (IBA) an old circular, n. 22-C/2006, had been published since 2008.

This circular contained a questionable interpretation of the new rules about the liberalisation of professions, and of tariffs in particular: the circular states that disciplinary matters can be more restrictive than ordinary laws. The consequence is that – even if from a legal point of view the minimum tariffs stated in the old professional law were no longer binding (from a deontological point of view), however, the agreement between a lawyer and his/her client about a fee under those minimum charges set could be illicit/unfair, because compensation that is ridiculously low is offensive and goes against the dignity of the profession.

The Antitrust asked for information. The IBA answered that the publication on the website of this old circular (y. 2006) was a mistake, and it would be moved to the section of the website about the History of the Legal Profession.

2. Additionally, on 28/5/2013 the Antitrust discovered that the IBA had published, on its website, an opinion (no. 48 of 11/7/2012), in which they stated that the promotion of a legal business/firm on a website that specialised in advertisements could be subject to disciplinary action.

3. Based on these facts, in July, 2013, the Antitrust started an investigation that aimed to verify if the two mentioned acts – Circular 2006, about minimum fees, and opinion 2012 about the advertising of business – constitute violations of Article 101 TFEU.

In 2014, after the investigation, the Authority deemed that those acts were “decisions by association of undertakings which restricted the competition among professionals (101 TFEU)”. The Authority also believed that the two Acts were a part of a unique plan, which aimed to limit the economic freedom in the market of private attorneys. At the end, the Authority sanctioned the IBA with a fine of 913.000 €.

The complaint/appeal of the IBA to the Administrative Court

The IBA challenged the decision of the Authority before the Administrative Court in Rome. The complaint was based on the following major reasons:

1. The Authority wrongfully applied Article 101 of TFEU;
2. The circular and the opinion of the IBA did not fall into the provision of Article 101;
3. The Authority did not have the power to judge the acts of the IBA;
4. The decision about the fees did not impose minimum mandatory prices;
5. As for commercial advertising, lawyers may advertise their business through websites, but they cannot utilise a system where a broker intermediates between the professional and the client (as in the present case);
6. The sanction (€913.000) was too high.

We will now briefly discuss the reasoning and the decision of the Administrative Court, starting with the circular n. 22-C/2006 which is related to the minimum fees.

The decision of the Court (1/7/2015) on the Circular (fees)

1. On the wrongful application of Article 101, according to the IBA, the same IBA cannot be qualified as an “association of undertakings” under Article 101 because the IBA is a public body.

The Court took into consideration Italian Competition Law and the precedent decisions of the ECJ (18/7/13 C-136/12). According to these principles:

- “agreement between undertakings” and “decisions by associations of undertakings and similar bodies” are equivalent (under 101) and no intention to earn profits is required: public bodies are not excluded;
- Additionally, the concept of an “undertaking” for the purpose of EU antitrust law, includes any entity engaged in an economic activity, that is to say, any activity that offers goods or services in a given market, regardless of its legal status and the way in which it is financed: the profession of an attorney is therefore included.

As a consequence of this definition, since the profession of lawyers is included, the IBA can be considered to be an “association of undertakings” under Article 101.

The first reasoning of the NLC was then rejected.

2. The second defence of the IBA was that the circular of the IBA did not fall into the provision of Article 101 because it did not set up fees for lawyers services.

The Court referred to the definition under letter a) in Article 101: “directly or indirectly fixing selling prices”. According to the Court, a wide interpretation of this definition includes all the decisions that could affect the freedom of a professional in deciding the price at which s/he offers his services, as in this case.

This second argument was therefore also rejected.

3. With a further defence, IBA argued that the sanction applied by the Authority had essentially the nature of a criminal sanction. However, the Authority did not have the power to apply criminal sanctions because its structure did not separate the investigative role and the adjudicative role, concentrating both the functions into the same body. This structure would then affect the impartiality of the Authority itself and violate Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union.

This argument was not shared by the Court.

Indeed, it is true that the Antitrust Authority concentrates the investigative and the adjudicative functions into the same body. However, the solid jurisprudence of the ECHR states that in a case where an administrative body issues penal sanctions, what really matters is the possibility for the defendant to challenge such a decision before an independent judicial body.

This is indeed what happened in the specific case:

- the IBA appealed the decision of the Authority before the Administrative Court;
- the decision of the Administrative Court can be further appealed before the State Council (Consiglio di Stato);
- both Courts are fully independent, impartial, judicial bodies, in which a full right of defence is effectively guaranteed.

4. The further defence of the IBA referred only to the publication (in 2008) of the circular (issued in 2006) about the fees (not that about advertising, which will be discussed later).

According to the IBA, in fact, the circular about the fees did not impose any minimum mandatory prices because when the document was published (in 2008), the circular was already abrogated (in 2007) by another decision with different content.

The Court indeed shared with the defence with the following arguments:

- it is undisputed that the 2006 circular was published after 2007, that is to say, when the 206 circular had already been abrogated, and it was credible that that publication was caused by a mistake – no matter whether this was committed by the IBA or by the company which runs its website –. The reason for that publication was thus not with the intention of imposing a limitation on the economic freedom of lawyers;
- this conclusion was confirmed by the fact that, after 2007, no disciplinary proceedings were ever initiated against any lawyers for requesting fees under the old minimum tariffs.

The decision of the Court about the opinion of the IBA (commercial ads)

1. With reference to opinion no. 48/2012 about commercial advertising, according to the IBA lawyers may advertise their business through a website, but they cannot use a system where a broker acts as an intermediary between the professional and the client (as – according to the IBA – happened in the actual case).

The Antitrust deemed that the IBA's opinion constitutes a violation of Article 101 TFEU because it prevents lawyers from the possibility of advertising their business, reducing competition in the market. Additionally, the Authority denied that the website where the ads were published acted as a broker between the lawyer and the client.

In the appeal, the IBA presented a number of grounds. The major ones were:

- its opinion was not binding;
- its opinion was not public, it was only internally released after a request from a local branch of the IBA;
- the website effectively acted as a broker between the lawyer and the client;
- the fine was too high.

On the 1st complaint, the fact that the opinion of the IBA was not binding was not relevant. Indeed, it is clear that the opinion of the IBA, even if not binding, in fact discourages a lawyer from the intent of advertising his/her business.

On the 2nd complaint, again, the fact that the opinion was not public was not relevant. Indeed, what really matters is the capacity of the act to restrict competition, and the capacity of the opinion to restrict competition among lawyers was undisputable.

On the 3rd complaint, it was not true that the website acted as a broker between the lawyer and the client. In fact, the service provided by the website was that same service that any newspaper or magazine can provide to any professional who wants to advertise his/her business: a public space where the description of a business is shown to a public of potential clients.

The appeal against the decision of the Authority that related to the opinion on advertising was then rejected.

In the end, the Court granted only the appeal against the decision of the Authority about the circular on fees.

As a consequence, the Court ascertained that the violation of Article 101 by the IBA did not start in 2008 (with the publication of the circular about the minimum fees), but in 2012 (with the publication of the opinion on advertising).

As a further consequence, the 4th complaint about the size of the fine (about € 913.000) was partially granted.

The case was therefore sent back to the Authority for new consideration of the sanction. In November, 2015, the Authority re-determined the sanction to about € 513.000.

Conclusion

The case is relevant because it is about the application of Article 101 to a public body, like the IBA.

The Court's reasoning is also interesting: the concept of an "undertaking", for the purposes of EU antitrust law, includes any entity that is engaged in an economic activity, regardless of its legal status and the way in which it is financed.

The profession of an attorney is therefore an "undertaking", and the IBA should consequently be qualified as being an "association of undertaking".

This case also shows how it is difficult to establish a culture of competition – in Italy, but I think it is the same in most of Europe, at least in continental Europe – and how the idea of a transparent market and an efficient economic contest among professionals is still far from being accepted and, perhaps, even from being understood.

6.2. OLLI WIKBERG (FINNISH MARKET COURT)

The Finnish Competition and Consumer Authority's proposal to the Market Court (24th June, 2015, Dno. 831/14.00.00/2010)

The Market Court's decision, Finnish Competition and Consumer Authority v The Finnish Bakery Federation (29th February, 2016, Decision No. 121/16, Dno. 2015/414)

The Market Court imposed fines on the Finnish Bakery Federation for forbidden price recommendations

Introduction

The Finnish Bakery Federation (FBF) is a trade association that was established in 1900 to represent the professional and economic interests of bakery proprietors and businesses in Finland. FBF engages in lobbying to improve the general operating conditions and status of the bakery industry, to promote bread culture and cooperation between industry actors, as well as looking after the interests of its members in relation to employment contracts. The members of the FBF decide on its activities. The organisation's highest decision-making organ is the Annual General Meeting, where members can exercise their power. The AGM elects a chair and a deputy chair for the Board of Directors, while the other Board members are elected by the Council, which oversees the activities of the Finnish Bakery Federation and sets the operational guidelines to be followed.

There were about 700 bakeries in Finland in 2010. Most of the companies were very small, with not more than five employees. Only two of the bakeries, Fazer Leipomot Oy and Vaasan Oy, were big, with over 1,000 employees. The members of the FBF (about 300 bakeries, including Fazer and Vaasan) had a market share of 2/3 of the relevant market.

The facts

The FBF had published press releases, newsletters to members, and the editorials of the *Leipuri* (Baker) magazine, which contained information regarding increased costs and recommendation that the increased costs be moved into the prices of the relevant products. In 2007, 2008 and 2010 FBF brought up the need to raise the prices of bakery products on a national scale. It simultaneously encouraged its members to raise their prices by 10 to 20 percent. The need and the level of the mentioned rises in prices were given to the public by a percentage in using either a range or price increases or exact levels of price increases that were informed by information given to the members of the FBF.

In its autumn, 2008, newsletter the FBF made some estimations regarding the need to raise the prices, but it also stated that the increasing of the prices of bakery products between early 2009 and spring/autumn 2010 would be extremely difficult due to the upcoming decrease in the VAT percentage for grocery products. The VAT percentage for grocery products was lowered from 17 to 12 percent on 1st October, 2009. At the same time, the editorials of the *Leipuri* magazine dealt specifically with the pricing of certain bakery products (especially of rye bread) and opened the price level and its profitability to question. It was clearly stated that "too low prices would spoil the products", and asked "who will buy such a cheap product?" The speeches held at the annual meetings of the FBF also dealt with the same matter. Although the FBF didn't act as openly, as they had earlier in promoting the raising of prices, it still broached the need to raise the prices and the profitability of the pricing of certain products in 2009 and 2010. It thus tried to affect pricing in 2009, and in 2010 also. The last recommendations were made in 2010. According to the proposal of the Finnish Competition and Consumer Authority (FCCA) the violations of the Competition Act lasted from 2007 to 2011.

The procedure

It was the annual meeting of the FBF in autumn, 2010, which drew the FCCA's interest to the case. The FBF had noted the press release of the FBF, which was published during the annual meeting. The press release dealt with the low profitability of bakery products and stated that the pressure to raise the prices was great. Soon afterwards, the investigation of the FCCA began. The two big bakeries, Fazer and Vaasan, were informed in spring, 2015, that they were no longer part of the investigation. On 24th June, 2015, the FCCA submitted a proposal to the Market Court for a €55.000 penalty, payable by the FBF. According to the law, the maximum penalty is 10 percent of the turnover of an undertaking or association of undertakings. Where an association is concerned, turnover also includes income from the actual operations and membership fees.

The proposal is based on the unlawful price recommendations that the Federation gave its members between 2007–2010. In its proposal, the FCCA refers both to the Competition Act (4 §) and to Article 101 (TFEU).

The oral hearing of the case in the Market Court started on 27th November, 2015. During the hearing the FCCA adjusted the proposed penalty sum to €41.855, based on the actual turnover of the FBF of 2014, which was €418.558.

The FBF firstly rejected the proposal of the FCCA and, secondly demanded that the Market Court should impose a lower penalty.

The decision of the Market Court

On 29th February, 2016, the Market Court imposed a €15.000 penalty on the FBF's unlawful price recommendations, made between 2007–2011. According to the Market Court's decision (No. 121/16) and press releases, newsletters to members and the editorials of the *Leipuri*, the magazine of the Finnish Bakery Federation contained recommendations whose purpose was to raise the prices of bakery products on a national scale. The Market Court considered that the recommendations for price increases are, by nature, a serious restriction of competition.

The decision of the Market Court refers extensively to the case law of the CJEU. When considering the object or effect of preventing, restricting or distorting competition, the Court referred to judgments of the CJEU, like *Expedia*, C-226/11, EU:C:2012:795, Para 36; *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, Paras 25 and 26; *ING Pensii*, C-172/14, EU:C:2015:484, Para 32; *CB v Commission*, C-67/13 P, EU:C:2014:2204, Para 52; *Maxima Latvija etc.*, C-345/14, EU:C:2015:784, Paras 17 and 18, and *Allianz Hungária Biztosító etc.*, C-32/11, EU:C:2013:160, Paras 37 and 38.

The Market Court had, among other things, to decide if the conduct of the FBF met the requirements of the concept of a "single, overall agreement". The FBF argued that the infringements were separate and therefore the claimed infringements of 2007 and 2008 were time-barred, because of the period of limitation. The Court again referred to both national and European case law (judgments of *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C: 2012:778, Para. 41 and *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, Paras. 81 and 82) and discovered that the conduct of the FBF lasted continuously from 2007 to early 2011. It was stated that, despite the fact that the "language changed" in 2008, it was still a question relating to the recommendations that had as their object the raising of prices. The Court didn't accept the view of the FBF regarding the separate infringements.

The FBF also argued that the conduct led to the benefits mentioned in the Competition Act (5 §) and Article 101(3) (TFEU). The Market Court rejected this argument and stated that the FBF had not proved evidence to fulfill the requirements set forth in the law. The FBF had not shown any convincing argument or evidence to the FCCA. The Competition Act (5 §) and Article 101(3) (TFEU) didn't apply.

As a result, the Market Court decided that the FBF had, as a trade association, given forbidden price recommendations. The purpose of the press releases, newsletters to members, and the editorials of the *Leipuri* magazine was to raise the prices of bakery products on a national scale. The conduct was also found to have had an effect on trade between member states (especially trade that related to Sweden and other countries in the Baltic area) which meant that there was also an infringement of Article 101 (TFEU), in addition to Competition Act (4 §). The two biggest bakeries, Fazer and Vaasan, in particular, operate both in Sweden and in the Baltic states. The value of the exports (€56 m.) and imports (€260m.) in 2010 was also noted.

The decision of the Market Court is not yet final. Both the Finnish Bakery Federation and the Finnish Competition and Consumer Authority decided to appeal against the decision of the Market Court before the Supreme Administrative Court. It could easily take one or two years before we see the final decision on the case.

The judgment in question is interesting in many ways. Firstly, it concerns forbidden price recommendations given by a trade association. This is not the first case in which the FCCA has addressed violations of the Competition Act committed by a trade association. The FCCA has previously addressed violations of the Competition Act committed by the Finnish Hairdressers' Association and the Finnish Association of Appliance Service Centres. It is interesting to note that the Finnish Competition Act does not apply to agreements and concerted practices that are related to the labour markets (2 §). This has not, however, stopped the FCCA from applying the provisions of the Competition Act to an Association like the FBF, or the Finnish Hairdressers' Association. The judgment is also of interest because of the question that relates to the maximum penalty level and to consideration of whether there was a single, continuous infringement, as discussed in the judgment. It will be very interesting to see the opinion of the Supreme Administrative Court that relates to these questions in the future.

6.3. DALIA VISINSKIENE (LITHUANIAN SUPREME ADMINISTRATIVE COURT)

Case No I-765-331/2013 of Vilnius Regional Administrative Court

Eturas' UAB, Freshtravel' UAB and twenty-three other companies, as well as Lithuanian travel agencies versus the Competition Council of the Republic of Lithuania (hereinafter – the CC)

A decision of the CC imposed fines for participation in an anticompetitive concerted practice that resulted in the restriction of the maximum level of discounts that are applicable to bookings made via the common on-line system

Facts of the case

Eturas is the holder of exclusive rights to, and the administrator of, the online travel booking system E-TURAS (hereinafter - the E-TURAS system). The system is controlled by a single administrator and it may be integrated into the individual websites of travel agencies which have acquired a licence from Eturas. The standard licensing contract with Eturas does not contain any provisions which would allow the administrator to alter the pricing of the services provided by travel agencies using the system. In 2010, the CC launched an investigation, on the basis of the information received from one of the users of the E-TURAS system, stating that the travel agencies that were distributing organised tours were coordinating among themselves the discounts which were offered to consumers purchasing tours online via the E-TURAS system. The investigation established that some time prior to the alleged restriction, the director of Eturas sent an e-mail to several travel agencies asking them to vote on a reduction of discount rates from 4% to 1% - 3%. While there is evidence in the case-file that one of the travel agencies concerned received this e-mail, no evidence exists as to whether other travel agencies either received or responded to it. On 27th August, 2009, at 12:20 pm, a technical restriction was set into the E-TURAS system limiting to 3% the discounts available for online bookings. This was preceded by the following system notice ('the system notice of 27th August, 2009') which appeared, earlier on the same date, in the 'Information Notices' field of the E-TURAS system:

'Following an appraisal of the statements, proposals and wishes ... expressed by the travel agencies, we will enable online discounts in the range of 0% to 3%, to be chosen individually ... For travel agencies which offered discounts in excess of 3%, these will automatically be ... reduced to 3%. ...'.

Later, during the investigation, the director of Eturas stated that such a notice was sent to all of the travel agencies which used the system. The possibility of offering additional discounts to individual clients (e.g., by offering a loyalty discount code) was not restricted. The investigation further established that the majority of travel agencies which applied a discount rate above 3% before 27th August, 2009, thereafter decreased the discount rate to 3%. Several travel agencies had, however, already offered a lower discount rate before 27th August, 2009, and they continued to apply the same lower rate. Some travel agencies did not offer services via E-TURAS before 27th August, 2009. Some of the other travel agencies concerned did not sell a single tour via E-TURAS over the period under investigation. After 27th August, 2009, the websites of eight travel agencies displayed advertisements concerning a discount of 3% on the travel packages offered. When a booking was made, a window appeared indicating that the travel package chosen was subject to a discount of 3%. The investigation carried out by the CC established that, as a result of the technical modifications made to the E-TURAS system following the dispatch of the message at issue in the main proceedings, although the travel agencies concerned were not prevented from granting their customers discounts greater than 3%, they were nevertheless required to take additional technical steps in order to do so.

Decision of the CC and proceedings before the Vilnius Regional Administrative Court

In its decision of 7th June, 2012, the Competition Council found that 30 travel agencies, as well as Eturas, had participated, between 27th August, 2009, and the end of March, 2010, in an anticompetitive concerted practice, by limiting the level of discounts that were applicable to bookings made on-line via the E-TURAS system. According to the CC, the concerted practice started on the date on which the message at issue in the main proceedings, concerning the reduction of the discount rate, appeared on the E-TURAS booking system, and the systematic limitation of that rate in the operation of that system was implemented. The CC considered that the travel agencies which used the E-TURAS booking system during the period in question, and which had expressed no objection, were liable for an infringement of the competition rules, since they could reasonably assume that all the other users of that system would also limit their discounts to a maximum of 3%. It inferred from this that those agencies had informed each other of the discount rates which they intended to apply in the future, and had thus indirectly — by way of implied or tacit assent — expressed their common intention with regard to conduct in the relevant market. It concluded that the conduct of those agencies in the market in question was to be treated as constituting a concerted practice and held that, although Eturas was not active in the market in question, it had played a role in facilitating that practice.

The CC took the view that the travel agencies, as prudent economic operators, should have been aware of that restriction from the moment the systematic limitation of that rate in the operation of that system was implemented. The CC considered that the travel agencies which used the E-TURAS system during the relevant period, and which had expressed no objection, were liable for the infringement. Those agencies could reasonably assume that all other users of the system would also limit their discounts to a maximum of 3%. They had therefore informed each other of the discount rates which they intended to apply in the future and thus indirectly – by way of implied or tacit approval – expressed their common agreement with regard to conduct in the relevant market. It further noted that such conduct on the part of the travel agencies in the relevant market was to be treated as constituting a concerted practice. In fact, the CC thus applied the presumption that the travel agencies which received the notice knew, or should have known, about the restriction. The CC held that although Eturas was not active in the relevant market, it played a role in facilitating the infringement. The CC therefore found that Eturas and the travel agencies concerned had infringed Article 101(1) TFEU, as well as Article 5 of the Law on Competition of Lithuania, and imposed fines (more than €1.5 million). The travel agency which provided the CC with the information about the infringement was granted immunity from the fine under the leniency programme.

The applicants, Eturas and the travel agencies, challenged the decision of the CC before the Vilnius District Administrative Court. By its judgment of 8th April, 2013, the First Instance Court found in favour of the respondents (the CC). The Court, in the main, upheld the arguments of the CC as regards the infringement of Article 101(1) TFEU and Article 5 of the Law on Competition, but reduced the fines for certain applicants.

Proceedings before the Supreme Administrative Court of Lithuania and referral to the ECJ

Both the applicants and the CC lodged an appeal with the Supreme Administrative Court of Lithuania (hereinafter – the SAC). The applicants, Eturas and the travel agencies, contended that they did not engage in concerted practices within the meaning of Article 101(1) TFEU or national law. The travel agencies concerned claimed that their intention to reduce discounts was not established, and that the technical restriction was a unilateral act by Eturas. Some applicants claimed not to have read the system notice. Due to the system's low importance – the income from tours sold via E-TURAS representing just a fraction of their total revenue (e.g., 0.12%, 0.2% or 0.0025%) – the travel agencies did not monitor it closely. They explained that they used the system because of its convenience for online sales, the absence of any alternative systems on the market and the prohibitive cost for the

development of their own online systems. In principle, discounts were not restricted, since the travel agencies maintained the possibility of applying additional loyalty discounts to individual clients.

The CC contended that the E-TURAS system served the applicants as a tool for coordinating their actions and eliminated the need for meetings, as the conditions of use of the system enabled them to reach a ‘concurrence of wills’ on discount restrictions without the need for direct contact. Failure to oppose the discount restrictions is equated with their tacit approval. The E-TURAS system functioned under uniform conditions, and was easily recognisable on the websites of the travel agencies, which contained information on the applicable discounts. The travel agencies did not object to the restriction imposed and, thus, made it clear to each other that they were applying limited discounts, thereby eliminating any uncertainty as to the discount rates. The applicants were obliged to be circumspect and responsible and they could not ignore or disregard notices concerning the practices affecting their economic activities.

The SAC had doubts about the correct interpretation of Article 101(1) TFEU, in particular, in regard to the allocation of the burden of proof for the purposes of applying that provision. By the order of 17th January, 2014, the SAC decided to stay the proceedings and referred the following questions to the Court of Justice of the European Union (hereinafter – the ECJ) for a preliminary ruling:

‘(1) Should Article 101(1) TFEU be interpreted as meaning that, in a situation in which economic operators participate in a common computerised information system of the type described in this case, and where the Competition Council has proved that a system notice on the restriction of discounts and a technical restriction on discount rate entry were introduced into that system, it can be [presumed] that those economic operators were aware, or must have been aware, of the system notice introduced into the computerised information system and, by failing to oppose the application of such a discount restriction, had expressed their tacit approval of the price discount restriction and, for that reason, may be held liable for engaging in concerted practices under Article 101(1) TFEU?’

(2) If the first question is answered in the negative, what factors should be taken into account in the determination of whether economic operators participating in a common computerised information system, in circumstances such as those in the main proceedings, have engaged in concerted practices within the meaning of Article 101(1) TFEU?’

It seems from the order, that the SAC had raised doubts about what factors are capable of establishing the participation of the travel agencies concerned in a horizontal concerted practice in the digital environment. The SAC noted that, in the present case, the principal piece of evidence supporting the finding of an infringement, produced by the CC, were the sending of a systemic note and the establishment of the technical restriction – thus, a mere presumption that the travel agencies concerned read, or should have read, the message at issue, and that they should have understood all of the consequences arising from the decision concerning the restriction on discount rates on bookings. In that respect, the SAC pointed out that the presumption of innocence applies in the context of punishing infringements of competition law, and it indicated its doubts about the possibility of finding that the travel agencies concerned committed an infringement solely on the basis of the first of those presumptions, particularly since some of those agencies denied having any knowledge of the message at issue in the main proceedings, whereas others sold their first travel package only after the technical modifications had been made or, indeed, did not make any sales at all through the E-TURAS booking system. The SAC acknowledged that the travel agencies using the E-TURAS booking system knew, or ought to have known, that their competitors also used that system, as a result of which it might be considered that they were obliged to act with care and diligence and, accordingly, could not disregard the messages that they received. The Court noted that some of the agencies fined by the CC admitted having had knowledge of the content of the message at issue in the main proceedings. The SAC sought to establish whether, in the circumstances of the case before it, the mere sending of a message concerning a restriction of the discount rate could constitute sufficient evidence to confirm, or to raise a presumption, that the economic operators participating in the E-TURAS booking system knew, or

ought to have known, about that restriction, even though some of them claim not to have had any knowledge of it, some did not change the actual discount rates applied and others did not sell any travel packages at all via the E-TURAS system during the relevant period. The SAC indicated that this aspect was decisive in reviewing whether or not the CC had established sufficient facts to conclude that there was an infringement and to determine the moment from which the duration of the infringement should be calculated. It is apparent from the reasoning of the challenged decision that, in establishing the infringement, the CC relied mainly on the existence of the system notice of 27th August, 2009. In fact, the CC thus applied the presumption that the travel agencies which received the notice knew, or should have known, about the restriction.

The SAC took the view, that, on the one hand, it was possible to maintain that the applicants used the E-TURAS system together with their competitors and, therefore, were obliged to act with care and pay attention to the notifications sent via the system. Some admitted to having known about the discount restriction and having observed that restriction in practice. Bearing in mind the clandestine nature of anticompetitive practices, proof based on a system could perhaps, in the light of all the circumstances of the case, be considered sufficient. On the other hand, infringements of competition law are subject to the presumption of innocence. In the present case, there was no evidence that the applicants had actually read the system notice and realised that it represented a concerted anticompetitive action that would be implemented by all of the users of the system.

The ECJ delivered preliminary ruling on 21st January, 2016, (case C-74/14) and provided the answers to the questions posed by the SAC:

(1) Article 101(1) TFEU must be interpreted as meaning that where the administrator of an information system, that is intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped, and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators might have — if they had been aware of that message — been presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities, or other evidence to rebut that presumption is adduced, such as evidence of the systematic application of a discount exceeding the cap in question.

(2) It is for the referring court to examine — on the basis of the national rules governing the assessment of evidence and the standard of proof — whether, in view of all the circumstances before it, the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.

The ECJ started by recalling its case-law, according to which each economic operator must determine independently the policy which it intends to adopt in the common market. Such a requirement of autonomy thus strictly precludes any direct or indirect contact between economic operators of such a kind that it either influences the conduct in the market of an actual or potential competitor, or reveals to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting in the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question. The ECJ recalled that passive modes of participation in the infringement, such as the presence of an undertaking at meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion that is capable of rendering the undertaking liable under

Article 101 TFEU, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.

Then, as regards the allocation of the burden of proof, the ECJ noted that under Article 2 of Regulation No. 1/2003, in any national proceedings for the application of Article 101 TFEU, the burden of proving an infringement of Article 101(1) TFEU is to rest on the party or the authority alleging the infringement.

On the one hand, the ECJ pointed out, that Article 2 of Regulation No. 1/2003 expressly governs the allocation of the burden of proof, that regulation does not contain any provisions on more specific procedural aspects. It does not contain any provision in relation to the principles governing the assessment of evidence and the standard of proof in national proceedings for the application of Article 101 TFEU. In that regulatory environment, the ECJ recalled its case-law national procedural autonomy, the principles of equivalence and effectiveness.

The ECJ noted also the existence of the presumption of a causal connection between a concertation and the market conduct of the undertakings participating in the practice, according to which those undertakings, where they remain active in that market, take account of the information exchanged with their competitors in determining their conduct in that market, as part of EU law.

The ECJ noted that the principle of effectiveness requires, however, that national rules governing the assessment of evidence and the standard of proof must not render the implementation of EU competition rules impossible or excessively difficult and, in particular, must not jeopardise the effective application of Arts. 101 and 102 TFEU, and that, in most cases, the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules

On the other hand, the ECJ stressed that the presumption of innocence is a general principle of EU law. In the case at issue this means that the presumption of innocence precludes national courts from inferring, from the mere dispatch of the message at issue in the main proceedings, that the travel agencies concerned ought to have been aware of the content of that message. Still, the presumption of innocence does not preclude the national court from considering that the dispatch of the message at issue in the main proceedings may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message from the date of its dispatch, provided that those agencies still have the opportunity to rebut it. The ECJ noted that national courts cannot require that those agencies take excessive or unrealistic steps in order to rebut that presumption. The travel agencies concerned must have the opportunity to rebut the presumption that they were aware of the content of the message at issue from the date of that message's dispatch, for example, by proving that they did not receive that message, or that they did not look at the section in question, or did not look at it until some time had passed after that dispatch.

As regards the participation of the travel agencies in a concerted practice within the meaning of Article 101(1) TFEU, the ECJ pointed out that under that provision the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct in the market and a relationship of cause and effect between the two, and also that the case at issue in the main proceedings is characterised by the fact that the administrator of the information system at issue sent a message concerning a common anticompetitive action to the travel agencies participating in that system, a message which could only be consulted in the 'Notices' section of the information system in question, and to which those agencies did not expressly respond. Following the dispatch of that message, a technical restriction was implemented which limited the discounts that could be applied to bookings made via that system to 3%. Although that restriction did not prevent the travel agencies concerned from granting discounts greater than 3% to their customers, it nevertheless required them to take additional technical steps in order to do so. The ECJ took the view that those

circumstances were capable of justifying a finding of a concertation between the travel agencies which were aware of the content of the message at issue in the main proceedings, which could be regarded as having tacitly assented to a common anticompetitive practice, provided that the two other elements constituting a concerted practice were also present.

However, the Court stressed that if it cannot be established that a travel agency was aware of that message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the system at issue, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action.

Finally, the ECJ dwelt on the issue of how travel agencies may distance themselves from anticompetitive practice. The Court noted that in a case such as that at issue, which does not concern an anticompetitive meeting, public distancing or reporting to the administrative authorities are not the only means of rebutting the presumption that a company has participated in an infringement; other evidence may also be adduced with a view to rebutting that presumption. The Court pointed out that, in particular circumstances such as those at issue, it cannot be required that the declaration by a travel agency of its intention to distance itself be made to all of the competitors that were the addressees of the message at issue in the main proceedings, since that agency is not in fact in a position to know who those addressees are; national courts may accept that a clear and express objection sent to the administrator of the E-TURAS system is capable of rebutting that presumption. Besides, in regard to the possibility of rebutting the presumption of participation in a concerted practice by means other than public distancing or reporting it to the administrative authorities, the ECJ noted that the presumption of a causal connection between the concertation and the market conduct of the undertakings participating in the practice could be rebutted by evidence of a systematic application of a discount exceeding the cap in question.

It should be noted that, at the time of writing the presentation, no final judgment had been adopted, and the case is still pending before the SAC (Case No A-97-858/2016).

Comment

Given that it is one of the first ECJ judgments concerning the sharing of on-line platforms and possible implications from the point of view of establishing a concerted practice among undertakings, the ECJ judgment is important and interesting from several different perspectives.

First of all, from the perspective of public enforcement and adjudication, it clarifies the boundaries between the presumption of innocence and the effectiveness of EU law. The ECJ makes it clear that despite the existence of national procedural autonomy (and the burden on national courts to evaluate evidence on the basis of national procedural rules that are subject to the principles of effectiveness and equivalence), the presumption of innocence is a part of EU law and is applicable in this context. This principle thus has implications for the distribution of the burden of proof. From the point of view of the distribution of the burden of proof, the finding of the ECJ, that in such on-line environment an anticompetitive concerted practice may not be inferred from the mere dispatch of the „system“ message, i.e. – this fact is not enough to establish that the travel agencies concerned ought to have been aware of the content of that message, besides, the Court made it clear that if it cannot be established that a travel agency was aware of a message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the system at issue, is of particular importance. In practice, this means that in order to establish an anticompetitive concerted practice the competition authorities will be forced to undertake a deeper investigation and to gather evidence pointing to the fact that undertakings knew about the restriction, in order that the authorities can establish concertation among undertakings.

From the point of view of corporate behaviour, the judgment explains how undertakings may distance themselves from anticompetitive practice in order not to be held liable for it. It seems that the

ECJ took into account the specificities of the on-line business and provided for more flexible rules if compare, for example, with the rules on membership in associations, etc.

It is apparent from the judgment that those undertakings that were aware of the content of the system notification might distance themselves by different means. First of all, a presumption of the participation of a given undertaking in a concerted practice may be rebutted by its publicly distancing itself from that practice, or by reporting it to the administrative authorities. Still, given the specificities of the situation, it may not be required that an undertaking distances itself in the eyes of all other addressees, a “clear and explicit objection” addressed to the system administrator would be sufficient to rebut the presumption. Finally, differently from the Advocate General Szpunar, the Court admitted that distancing may be shown by conduct in the market, provided that it is “systematic”: and, thus, evidence of a systematic application of a discount exceeding the cap in question would be enough to rebut the presumption of participation in the concerted practice.

6.4. ALENKA BERGER ŠKRK (SLOVENIA SUPREME COURT)

Supreme Court Decision No. X Ips 234, delivered on 16th April, 2015.

(Case on public enforcement of Article 101 TFEU and national competition law)

1. Legal Context

The market for medicines in the Republic of Slovenia (hereinafter: Slovenia) is highly regulated, especially for “prescription drugs”. In Slovenia, the pricing of medicinal products is regulated by the Medicinal Products Act and falls under the competency of the Agency for Medicinal Products and Medical Devices of the Republic of Slovenia (hereinafter: JAZMP), while their financing from public revenues is regulated by the Health Care and Health Insurance Act, and it falls within the competency of the Health Insurance Institute of Slovenia. JAZMP is the national authority that is responsible for the pricing of medicinal products for human use that are financed from public revenues. The procedures for medicinal product pricing are based on the provisions of the Medicinal Products Act and the provisions of the Rules on the Pricing of Medicinal Products for Human Use. The maximum allowed prices (MAP) of medicinal products are formulated on the basis of the value of the manufacturer’s element of price plus the wholesaler’s margin. However, a general provision of Article 95 of the Medicinal Products Act stipulates that “the prices of medicinal products shall be formed freely according to the market conditions, except for the cases stipulated herein”.

2. Facts

In several public tenders set up by “public pharmacies” as contracting authorities, four pharmaceutical suppliers (wholesalers) perpetually offered identical prices for almost all products, although the primary selection criteria were determined on the “lowest price offer”. Their final offers were thus practically identical. It is important to note that on the list of the “offered product” were not just medicinal products but also other products which could be freely obtained in grocery stores (cosmetics, childcare products, etc.). Moreover, in various tenders, these four undertakings abstained from participating in tenders in which another of the four suppliers was also participating, or else they only participated via a joint bid. Finally, in the subsequent contractual phase of the public procurement proceedings, they all offered various discounts and rebates.

3. Procedure before the NCA and the Administrative Court

After the investigation, the Slovenian Competition Protection Agency (hereinafter:CPA) concluded with the assessment that these practices constituted a violation of Article 6 of the Competition Act and of Article 101 TFEU. The condemned concerted practices were characterised as price-fixing, market sharing and collusive tendering (bid rotation) in public procurement procedures that were conducted by public pharmacies. On the basis of different forms of written evidence, the CPA established that infringers exchanged information between themselves on matters such as pricing practices, discount policies and market sharing strategies.

The Administrative (High) Court, under judicial review, rejected the arguments of the plaintiffs (the alleged infringers) and confirmed the CPA’s decision. However, with regard to the alleged error in law (misuse of Article 101 TFEU), it partially granted the appeal and remitted the case to the CPA for a re-assessment. In the reasoning, the Administrative Court adjudicated that the CPA, in applying Article 101 TFEU, failed to establish the element of an appreciable effect on trade between Member States. Against the High Court decision (which, in part, confirmed the CPA’s findings and decisions on the infringement of Article 6 of the Competition Act), the four wholesalers lodged an appeal.

4. Supreme Court Decision

As to the points of law, the Supreme Court emphasised that although the maximum allowed price (MAPs) of medicinal products for human use were, in effect, determined by the competent authority for medicinal products, the Medicinal Products Act should not be interpreted in such a way as to establish a system of fixed prices for all medicinal products. Moreover, the Medicinal Products Act should be interpreted as enabling medicinal product providers, payers and buyers, to negotiate prices that would be below the set MAPs. With regard to other “products”, the Supreme Court referred to the general provision of the Medicinal Products Act, that prices of medicinal products should be formed freely according to the market conditions. In this legal context, the Supreme Court reaffirmed that the wholesalers' practices constituted restrictions of competition “by object”, so it was not necessary to establish anticompetitive effects. Moreover, the Supreme Court rejected the explanation of merely “parallel behaviour” of the undertakings under the highly regulated price system. It took a stand that scrutinised practices were a clear case of prohibited concerted practices under Article 6 of the Competition Act. In the assessment, if the adduced evidence was capable of demonstrating the existence of “concerted practices”, the Supreme Court stressed the importance of clear, written records on the exchange of price information. Since the Supreme Court was dealing with issues of national competition law, it did not decide to refer the (proposed) preliminary questions to the CJEU. The revision was rejected.

5. Comment

This decision is a landmark “national competition law decision” in the pharmaceutical sector. It is important to note that this sector is highly problematic (also) in Slovenia. Arguably, therefore, under further sector inquiries other agreements that hinder competition could be discovered.

It is interesting that the Supreme Court, in its reasoning, cited CJEU case law extensively, although the dispute was formally in the domain of national competition rules. It would also be interesting to follow the subsequent CPA decision of the alleged infringement of Article 101 TFEU. Perhaps in that context the Supreme Court would be prepared to stay the proceedings and to refer the matter on some issues to the CJEU.

7. Abuse of dominance

7.1. DAVID RAMSJÖ (SWEDISH MARKET COURT)

Information concerning the judgment

- Name of the Court: The Market Court (Sweden)
- Name of the parties: Pizza24 Nordic AB (Claimant) vs. OnlinePizza Norden AB (Defendant)
- Case reference number: MD 2015:1²²
- Date of the judgment: February 10th, 2015.

Legislation

According to Chapter 2, Article 7 of the Swedish Competition Act (2008:579)²³ 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 any of the prohibitions laid down in Chapter 2, Article 7, or Article 102 of the TFEU.

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

Pizza24 Nordic AB (Pizza24) provided customers – i.e., restaurants offering home delivery services (mainly pizzerias) – with an Internet online ordering system for pizza/restaurant food, acting as a middle-man between Pizza24's customers (restaurants, etc.) and its end users. Through a web interface, the end user could access the online ordering system, choosing which food to order from a particular restaurant/pizzeria, and pay for the food directly to Pizza24. After deducting a certain commission fee from the affiliated restaurant, Pizza24 would then pay the rest of the amount for the ordered food to the affiliated pizzeria/restaurant and forward the order to a computer terminal placed at the restaurant's facility. The pizzeria/restaurant, having received the order from Pizza24 through the computer terminal, in its turn delivered the fast food directly to the end user.

OnlinePizza Norden AB (OnlinePizza) offered a similar service to pizzerias/restaurants as Pizza24. To OnlinePizza's customers – i.e., restaurants and pizzerias – OnlinePizza furthermore applied an agreement which included certain conditions stating that it was not prohibited for the restaurant to cooperate with a competitor to OnlinePizza. If, however, the restaurants initiated cooperation with a competing business, OnlinePizza reserved the right to immediately end the cooperation with the restaurant.

Pizza24 claimed that OnlinePizza abused its dominant position by applying the aforementioned condition in the business agreements with restaurants that were affiliated with OnlinePizza. Pizza24 initially filed a complaint against OnlinePizza with the SCA, who decided not to act on the complaint. Pizza24 then brought an action before the Market Court.

²² <http://www.marknadsdomstolen.se/Filer/Avgöranden/Dom2015-1.pdf>

²³ <http://www.konkurrensverket.se/globalassets/english/competition/the-swedish-competition-act.pdf>

Facts of the dispute in the Market Court

Pizza24 argued that OnlinePizza was a dominant actor in the Swedish market for providing online ordering systems for pizzerias with home delivery or, alternatively, the market for online ordering systems for restaurants in general, with home delivery. By applying the said condition in OnlinePizza's business agreements, Pizza24 claimed that the restaurants were prevented from cooperating with OnlinePizza's competitors, since a number of restaurants were already affiliated with OnlinePizza.

On the subject of defining the relevant market, Pizza24 had referred to two different market calculations relating to financial statements for companies supplying restaurants with online ordering systems. One calculation was based on statistics that related the market for online ordering systems for pizzerias with home delivery for the year 2013, stating that OnlinePizza practically held over 90 percent of the market share. The alternate calculation, relating to the market for restaurants in general using online ordering systems which provided home delivery, stated that OnlinePizza held more than 85 percent of the market share.

OnlinePizza contested the claim, and they argued, on their part, that the company did not hold a dominant position and that the relevant product market could not be limited merely to such online ordering systems/platforms, such as that used by OnlinePizza or Pizza24. OnlinePizza further challenged the market calculations provided by Pizza24, arguing that the relevant market was difficult to determine, but, under all circumstances, this should at the least be determined by the ordering of food online in general. OnlinePizza further held that their agreement with OnlinePizza's customers (restaurants) did not include any exclusivity undertaking.

The Ruling of the Court

The issue in question in the Market Court was whether Pizza24 had fulfilled their burden of evidence and whether they had provided sufficient investigation through which to determine the relevant product and geographical market, showing that OnlinePizza held a dominant position in that market.

First, the Market Court emphasised that the party who claims that a certain conduct by a competitor is in conflict with the Competition Act has the burden of evidence in this regard. This burden of evidence, furthermore, has to be supported by an investigation showing how the relevant market is defined and has to be robust in the sense that an additional investigation will not affect the evidence value of the first investigation presented.

In its reasoning for determining the relevant product market, the Market Court noted, with extensive references to the Commission's Relevant Market Notice²⁴ and the *Michelin* judgment²⁵, that a relevant product market comprises of all those products and/or services which are regarded as being interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The exercise of a market definition consists of identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of the geographical location of the suppliers.

The Market Court went on to conclude that additional factors – which can be relevant for the assessment whether there exist any possibilities for substitution in the product market – include product characteristics and its intended use, factors other than the product characteristics and pricing that effect the customer's choices and whether the demand side has any distinctive features. For this assessment, such relevant factors may include evidence of previous examples of switching, consumer preferences, trade barriers and the costs to consumers of switching to possible substitute goods, and

²⁴ Definition of the Relevant Market, OJ 1997 C 372/5

²⁵ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*

price discrimination that may have occurred. The Market Court further stated that in order to determine the relevant product market, the submitted investigation must sufficiently clarify any possible demand substitution for the affected restaurants.

However, the investigation presented by Pizza24 was relatively scarce and it did not include any detailed investigation of market conditions, including what owners of pizzerias and restaurants take into account when considering whether to provide a service for ordering food for consumption elsewhere. The investigation, for example, neither revealed the types of restaurants that provide special services for the ordering of foods, nor what types of ordering services restaurants have that offer such kinds of services, nor how the food is distributed when it has been ordered through services of this kind.

The Market Court finally concluded that the investigation presented by Pizza24 did not sufficiently clarify how the market was defined. It was therefore not possible to rule out, with a sufficient degree of certainty, that the relevant product market was broader than Pizza24 had argued. Pizza24 had therefore not proven that the product market was limited to the market for companies providing online ordering systems for pizzerias with home delivery, or to online ordering systems for restaurants. Consequently, the Market Court dismissed Pizza24's claim upon its merits.

Comments

The case illustrates the rules of evidence that are related to the issue of defining the relevant product market and shows the importance of a substantiated investigation, in particular when it is objected that the product market does not constitute a clearly defined and uniform market. With extensive referral to the Commission's Relevant Market Notice, the Market Court, in its judgment, further emphasises what kind of evidence may be used in order to establish the relevant market.

7.2. MIRA RAYCHEVA-SHEKERDZHIEVA (BULGARIAN SUPREME ADMINISTRATIVE COURT)

Decision No. 1054/29.07.2014 of the Bulgarian Commission for the Protection of Competition;

Decision No. 7131/16.06.2015 on case no. 11 271/14 of the Supreme Administrative Court of Bulgaria (First Instance Court);

Decision No. 10 524/12.10.2015 on case no. 9059/15 of the Supreme Administrative Court of Bulgaria (Second Instance court).

Facts of the case

Bulgargaz EAD (single trade joint-stock company) is a company whose entire capital belongs to the Bulgarian State. According to Article 39, Paras. 1 and 43(1) of the Energy Act (EA), it is the sole provider of natural gas in Bulgaria and it possesses a license to carry out this activity for a term of 35 years, which expires in 2041.

Bulgargaz EAD receives its natural gas supplies from the Russian company Gazpromexport Ltd. According to the contract that is binding for both companies, Bulgargaz EAD, as buyer, is obliged to indicate the quantity of natural gas it will buy for a specific period of time (e.g., in the course of a year). Irrespective of whether the negotiated quantity becomes the subject of an actual transaction, the buyer owes the price to the seller ("take-or-pay" clause).

Pursuant to Article 21 of EA, the Bulgarian Energy and Water Regulatory Commission has key powers in regulating the activities in the energy sector, amongst which is to carry out price regulation in the cases provided for in EA. The prices approved by the Energy and Water Regulatory Commission are binding on Bulgargaz EAD, as far as contracts with clients from the domestic market are concerned.

Sofiagas EAD, Overgas North EAD, Overgas West AD, Overgas South AD and Overgas East EAD (the Applicants) are all providers of natural gas, each of them in a different region of the country. They receive and transport natural gas from a certain regulatory gas station to the final customer.

The share of the above-mentioned companies in the natural gas market in Bulgaria is around 50%, as far as the deliveries to the final customers are concerned. Bulgargaz EAD is the sole provider of natural gas to the regulatory stations.

Each of the above-mentioned companies had a valid one-year contract for the delivery of natural gas with Bulgargaz EAD (the duration is in accordance with the established practice concerning the public natural gas provider's customers). The contracts in question were all valid for 2010 and were due to expire on 31st December, 2010.

On 2nd August, 2010, Bulgargaz EAD sent a letter with identical contents to all its clients, including Sofiagas EAD, Overgas North EAD, Overgas West AD, Overgas South AD and Overgas East EAD. The letter set forth new conditions for the conclusion of contracts in 2011, namely, that clients were obliged to fill in applications to the contract (Applications 1 and 2) stating the quantity of natural gas to be consumed, on a monthly and quarterly basis, over the course of the next year. Additional documents that are relevant to certain technical parameters, such as the quantity and quality of the gas, were also required; and these included "The characteristics of the gas cargo", "Data", "Background (basic) data with regard to the possibilities for work in cases of a black-out or the restraint of the gas supply". The information had to be provided to Bulgargaz EAD both in tabular and written form by 1st October, 2010. The letter explicitly stated that the delivery of natural gas would be carried out solely on the basis of the provision of the required documents.

The Ancillary Agreement provided for a unilateral termination of the contract by Bulgargaz EAD in the case of: legislative changes concerning the public delivery of natural gas; changes in the requirements for conveying natural gas; changes in the requirements for the delivery of natural gas; or any other changes in the factors that are relevant to the conditions in which natural gas supply is carried out. The Contract also provided for a written 45-day prior notice in the case of unilateral termination. It also provided for a 10% "take-or-pay" clause in relation to any quantity of natural gas that was contracted for but not received.

In response to the proposal from Bulgargaz EAD, Sofiagas EAD, Overgas North EAD, Overgas West AD, Overgas South AD and Overgas East EAD lodged a complaint against the possibility of the unilateral termination of the contract by the provider. Bulgargaz EAD rejected the objections on the grounds that the domestic regulatory body – the Energy and Water Regulatory Commission – had approved two decisions that declared it inadmissible for Bulgargaz EAD to incur losses - "take-or-pay" clauses, sanctions, etc., as a result of its failure to properly fulfil obligations arising from the contract with the external provider, due to the fault of the obligations of its contractual counterparties in the internal market.

During the negotiations on the Ancillary Agreement, Bulgargaz EAD changed some of the disputed clauses. It accepted that the unilateral termination of the contract by the buyer was also possible under the same conditions, i.e., with a 45-day prior written notice. Bulgargaz EAD also withdrew the clause that provided a 10% "take-or-pay" clause for quantities of natural gas that were contracted for but not received.

On 23rd December, 2010, Bulgargaz EAD, and all the above mentioned companies, signed contracts that were in accordance with the substance of the contractual agreement that was proposed by the provider. The terms of the contracts was by the end of 2011.

In August, 2011, Bulgargaz EAD's clients received letters proposing that a new additional agreement be signed with identical contents to that signed the previous year. By the end of November, 2011, new contracts were signed between the natural gas public provider and the companies, and these re-created the clauses from the previous year. After signing the contracts with Bulgargaz EAD, each of the companies included analogical clauses in their respective contracts with the final consumers.

Decision of the Bulgarian Competition Authority

In 2014, Sofiagas EAD, Overgas North EAD, Overgas West AD, Overgas South AD and Overgas East EAD appealed directly to the Commission for the Protection of Competition (the Commission) by lodging a complaint against Bulgargaz EAD on the basis of a suspected violation of Article 21, Paras. 2, 4 and 5 of the Protection of Competition Act – abuse of a dominant position.

In particular, the complaints related to:

- Limiting or controlling the production, trade or technical development to the detriment of consumers (Para. 2);
- Making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or according to normal commercial usage, have no connection with the object of the main contract or with its performance (Para. 4);
- Refusing without a valid reason to deliver any goods or to provide any services to existing or potential customers in order to impede their business operations (Para. 5).

In its decision the Commission held as follows:

Bulgargaz EAD has a dominant position in the use of natural gas. The Commission took into consideration the existing domestic licensing regime for the public supply of natural gas and the fact

that Bulgargaz EAD is the sole licensed natural gas provider. The Commission also assessed the fact that Bulgargaz EAD constituted an "enterprise" within the meaning of Para. 1.7 of the Additional Provisions of the Protection of Competition Act and thus its activities fell within the scope of Article 21 of the Protection of Competition Act.

What is essential in the case is that Article 102 of the Treaty on the Functioning of the European Union (TFEU) is not applicable since the consumption of natural gas in the country is under 1% (in relation to the one in the European Union).

According to the Commission, Bulgargaz EAD acted in a manner that constituted the abuse of a dominant position because all of the companies that wanted to sign a contract for the delivery of natural gas with the public provider were obliged to fill in detailed fact sheets on the monthly quantities of needed gas. Moreover, the failure to submit this information could serve as a reason to refuse gas deliveries.

The Commission also concluded that there was another infringement of the law in so far as the Additional Agreements laid down as prerequisites for a unilateral termination (cancellation) of the contract not only legislative changes, but also the relationships of the public provider with its counterparts outside the country or with those who provide the transition of natural gas. The Commission accepted that the above-mentioned prerequisites were not related to the behaviour of any of the parties and should not give grounds for the termination of the contract.

According to the Commission's decision, the unwillingness of Bulgargaz EAD to lead a normal negotiation process when signing the new contracts should also be regarded as an infringement, especially as the company had been maintaining that in the case of a lack of the full acceptance of all the proposed conditions, no contract should be signed. In the Commission's view, this infringement could be qualified as being one of a "procedural" nature.

As an argument in favour of the existence of infringements of the substantive law, the Commission pointed out that the Ancillary Agreements introduced unequal treatment among parties who should be treated equally. The Commission highlighted the fact that the contracts unlawfully included different prerequisites for the termination of their effect for the opposite parties.

Proceedings before the Supreme Administrative Court

1. Bulgargaz EAD appealed the Commission's decision before a three-member panel of the Supreme Administrative Court (the Court). In its judgment, the Court decided to leave the Commission's decision as it stood, ruling that the conclusions that the company was an enterprise with a dominant position on the domestic natural gas market and, as such, should not act in a way that might prevent, limit or distort competition and thus affect consumers' interests, were accurate. The Court stated that the Commission had correctly defined the relevant market, its structure and its mechanism for functioning.

The Supreme Administrative Court considered that the other complaints against the Commission's decision. It decided that they were manifestly ill-founded, including the complaint that each of the applicants was pursuing a similar activity (supply of natural gas to final consumers). According to the First Instance Court, what was important in this case was who had the right to carry out natural gas deliveries on the territory of the Republic of Bulgaria and to transport the gas to the relevant regulatory gas stations from where other participants in the market, applicants included, received gas in order to deliver it to the final consumer.

The Court agreed that the actions of Bulgargaz EAD constituted a violation of Article 21, Para. 1 of the Protection of Competition Act, in so far as the company had imposed unfair trade conditions on its counterparts. In the Court's view, these conditions were: the possibility for the unilateral termination of the contract due to circumstances that are outside the parameters of the contract; the lack of a

reciprocal clause enabling the buyer to terminate the contract unilaterally; the buyer's obligation to provide information regarding the quantities and a delivery date in tabular and written form; the 10% "take-or-pay" clause for any quantity of natural gas that was contracted but not received.

The Court disagreed with Bulgargaz EAD's assumption that the new terms had been accepted without any challenge from an overwhelming number of clients other than the applicants. It stated that, in so far as the latter carried out around 50% of the total amount of all natural gas deliveries to the final customer, the effect on their interests was important for the normal functioning of the market.

The First Instance court rejected the assertions of Bulgargaz EAD that no violation of the rights of the applicants could be proven. These assertions were based on the statement that the disputed clauses were reproduced also in the applicants' contracts which were signed with the final consumers. The Court accepted that the applicants had no dominant position in the market and the rules that were applicable to the public provider should not be considered applicable to the applicants.

The First Instance court also rejected the applicant's allegation that there was no lack of exploitative abuse, based on the statement that, irrespective of the changed clauses in the contracts, Bulgargaz EAD had not made excessively high profits. The Court found this argument irrelevant because, in this particular case, the effect of on trade from Bulgargaz EAD's side was irrelevant. According to the Court, the reason for this is that the natural gas market has the characteristics of a regulated market whose aim is laid down in legislation.

With its judgment the First Instance Court concluded that the Commission's decision was procedurally and substantially lawful.

2. An action for annulment was brought by Bulgargaz EAD against the decision of the three-member panel of the Supreme Administrative Court to a five-member panel of the same Court. The company disagreed with the Court's finding of a violation of Article 21 of the Protection of Competition Act.

The highest court instance accepted that the First Instance Court properly established the factual side of the case, but its conclusions regarding the violation of the substantive rule of National Competition Authority were unwarranted.

The Supreme Administrative Court, five-member panel, as Second Instance, further elaborated that the conclusions in the contested decision concerning the relevant market, the mechanisms for its functioning, and the conclusions about the existent dominant position of Bulgargaz EAD, were accurate. The Court pointed out, however, that the additional agreements and introduced changes did not constitute an abuse of a dominant position (the imposition of unfair trade conditions, in particular).

The Court pointed out that the changes proposed by the additional agreements with Bulgargaz EAD's clients were dependent on changes that related to the public delivery of natural gas, to the conditions of its transportation, or on changes in the legal framework. According to the Court's ruling, any of those changes, even though they were not imminently connected with the contracts at issue, were closely related to any delivery of natural gas and to the necessity for its guarantee.

According to the Court's ruling, the provided possibility for unilateral termination of the contracts arose from obligations that occurred on the basis of entirely different contracts between the public provider and third parties. As a result, they could not constitute abuse of a dominant position because their aim was to guarantee the seamless delivery of natural gas. As an additional argument, the Court emphasised that an analogical possibility – for the unilateral termination of the contracts under certain conditions – was also provided to Bulgargaz EAD's clients.

In its judgment, the Court pointed out that the requirement to provide the expected natural gas consumption in a tabular, or in any other form, could not be considered to constitute an abuse of a dominant position. According to the Court, this requirement was a form of commitment toward an international provider and corresponded to the requirements of the relevant natural gas market. The

Court elaborated the thesis that the provision of information of this kind could neither harm the interests of the counterparties, nor distort the competition.

The Second Instance Court finally concluded that any of the proposed changes in the contracts with the Bulgargaz EAD clients refers to all clients without exception - a fact that predetermines not only the lack of significant change in the relevant market, but also the lack of increase in the gas prices in the profits of the public provider.

A special place in the Court's motives was given to Case 85/76 Hoffmann-La Roche & Co. AG v. Commission of the European Communities, which the domestic court found to be relevant to the present case, accepting that the behaviour of Bulgargaz EAD did not hinder the existing level of market development, and did not harm the competition, and that the measures undertaken by the public provider were no different from those typical in a normal market.

On these grounds, the appealed judgment was annulled and another judgment was pronounced on the merits of the case in which the Commission's decision was also annulled in all its parts.

Comment:

The case is a good example of the fact that competition law can provoke many contradictory theses – that of the National Competition Authority, that of the First Instance Court and that of the highest Court Instance.

I think that the case is a good illustration of the necessity to safeguard the rights of the consumers of a given service or goods. Even in the case of a certain divergence from the standard trade practice, in the case of posing atypical conditions predetermining the continuation of the delivery of a certain service or of goods, this could not be defined as being an infringement as long as the rights of the final consumers are not infringed.

7.3. MARGET HENRIKSEN (HARJU COUNTY COURT)

Estonian Competition Board vs AS Eesti Telefon

Judgment of Estonian Supreme Court

Case no. 3-3-1-66-02

1. AS Eesti Telefon is an undertaking that provides a national telephone service and has a dominant position in Estonian market. On the 24.04.2001 the Estonian Competition Authority made a decision, in which it was found that AS Eesti Telefon had committed an offence in relation to unfair pricing practices and the imposition of conditions, which consisted of the implementation of price increases for domestic call services. AS Eesti Telefon had implemented a price increase at an average of 26.9 % for national telephone services. With the same decision, Eesti Telefon was made to implement lower prices on the basis of fair pricing, traditional proportions between prices and the consumer price growth rate and between acceptable return on equity at the level of the economy, including those that competed with other countries with similar markets. Since the prices had increased on the previous occasion on 1st October, 2000, the average price increase for the last six months would thus be 73.7 per cent. According to § 14 of the Estonian Competition Act any direct or indirect abuse by an undertaking, or several undertakings, of a dominant position in the goods market is prohibited by directly or indirectly establishing or applying unfair purchase or selling prices or by other unfair trading conditions. The Estonian Competition Authority found that the price increase applied by Eesti Telefon was undertaken by taking advantage of its dominant position. Additionally, the Estonian Competition Authority found that the dominant position of a company is also regulated by the Telecommunications Act, under which the Communications Board shall exercise state supervision.

2. AS Eesti Telefon submitted a complaint to the Administrative Court, asking the Court to cancel the decision of the Competition Board. The Administrative Court upheld the appeal. The Competition Authority then brought the appeal to the Court of Appeal. The Court of Appeal dismissed it and left the Administrative Court's decision unchanged, on the following grounds: It was found that, according to § 14 of the Estonian Competition Act, AS Eesti Telefon has the opportunity to harm competition but, in practice, this has not happened. Furthermore, it was pointed out that harm in completion can occur only to undertakings and not to individuals. Accordingly, it was pointed out that the imposition of unfair prices without being affected by another undertaking's activities in a product market does not constitute an offence within the meaning of § 14 of the Estonian Competition Act. The Competition Authority filed cassation to the Supreme Court of Estonia. The Supreme Court upheld the appeal, cancelled the decision of the Court of Appeal and sent the case back to the Administrative Court for a new revision of the case.

3. The Supreme Court found that it is considered to be an abuse of a dominant position, and that it is prohibited under the competition law when the undertaking establishes unfairly high prices for goods. The provisions of the Competition Act apply to a company with a dominant position in the telecoms sector, which is governed by the Telecommunications Act. The Competition Authority is competent to exercise state supervision on pricing over a company which has a dominant position, although the Communications Board has jurisdiction of supervision of the pricing of telephone services. The §16 of the Competition Act prohibits the imposition of unfair prices by the dominant undertaking regardless of other operators. A dominant company has already undermined the competition and cannot fully play its role in order to protect the market's participants. The state can tolerate such a restriction of competition only if it simultaneously prevents the abuse of a dominant position. According to the Competition Act the subject of the Act is just the company. However, free competition does not mean the freedom for one operator to compete with another operator, but it also means the right of the buyer of a product or a service to be free from the dictating of the terms of a contract by the seller. The task of the Competition Act is to protect both individuals and the public interest from the distortions of competition. If a telecommunications network operator or

telecommunications service provider has a market share of at least 40 per cent of a particular telecommunications service market's turnover, the activities of that undertaking are regulated also by the Competition Act. The Communications Board has the right to take an injunction against the operator to stop the implementation of the rate if the fee does not meet the requirements of the Act. The Communications Board and the Competition Authority thus have a responsibility to cooperate, and they must avoid conflicting decisions.

4. Comment: Perhaps the most important aspect of this case is that here the Supreme Court has dealt for the first time with substantive restrictions of the activities of an undertaking with a dominant position. The Supreme Court found that in the presence of an undertaking with a dominant position we cannot talk about damaging competition as an abstract phenomenon. In that case, the competition has been harmed anyway. The direct or indirect abuse of dominant position does not therefore mean that the activities of another undertaking are damaged. The state is committed to protecting the consumers of the goods from the company with a dominant position. Among other things, the state needs to avoid the imposition of unfair prices. The Supreme Court has thoroughly explained, in this decision, what is meant by unfair prices. The standpoint provided that the profit of the company with a dominant position should not be too high, is particularly remarkable.

7.4. Mafalda Correira (Braga Court of Commerce)

Portuguese Competition Authority vs. Sport TV Portugal, SA

Cabovisão, SA (dedicated to broadcasting by cable and satellite, and the exploitation of electronic communications) placed a complaint against Sport TV, SA (an undertaking dedicated to the production, direction and commercialisation of TV entertainment, in the sports area), which retained the monopoly of broadcasting rights for the main sport events, namely, the matches of the Portuguese Football League.

The complaint was based on the discrimination against the different cable broadcasting operators, which was consubstantiated in an abuse of dominance. This undertaking is paid monthly by the broadcasters who subscribe its services.

The price is established by taking in account several factors:

- Recommended sale price (PVR);
- Number of subscribers;
- The ranking of each client; and
- The minimal penetration rate (TPM), complemented by the minimal absolute number concept (NAM).

The price paid monthly to Sport TV was found by multiplying the PVR by the numbers of subscribers, and then applying a discount according to the ranking. The NAM variable was introduced only for new contracts, leaving the existing ones untouched. The NAM applied to each client from January, 2006 to December, 2010.

The Portuguese Competition Authority (NCA) considered that the defendant, Sport TV, had violated Articles 6; 4,1,c) and e), 42; 43,1,a); 44; 45,1,a) of Law 18/2003, of 11/06, and that their conduct was likely to affect trade between Member States, thus violating Article 102 TFEU (Any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it shall be prohibited as being incompatible with the common market, insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (...) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage).

The NCA sentenced the defendant to pay a €3.730.000 fine, and to publish an extract of the decision in the Portuguese Official Journal (DR) and in a nationwide newspaper.

The defendant appealed to the Tribunal da Concorrência, Regulação e Supervisão, which decided that there had been violation of Articles 6,1 and 3,a); 4,1,e) and 43,1,a) of Law 18/2003, of 11/6, and sentenced Sport TV to pay a €2.700.000 fine (value calculated by the use of Law 19/2012 – The New Competition Law, which is more favourable to the defendant).

The Court considered that the defendant, a TV channel that specialises in sports, working under the logic of pay tv, abused its dominant position, throughout the years 2005-2011, by defining discriminatory conditions, for providing the same service to the clients who bought the broadcasting rights of the defendant's TV contents.

Sport TV established different prices for the same contents, according to the final number of clients that each of the purchasing channels has (applying discounts to the channels with more clients, in theory, but this did not reflect the real number of clients, due to the use of “minimal quotas” – TPM and NAM - Market Penetration Rates, and Absolute Minimal Numbers), and the technology used (which has penalised the channels with the most advanced technology, since 2007).

In summary, the Court came to the conclusion that the defendant's clients (who are a part of the distribution contracts) didn't obtain due compensation for the loss of independence, which is caused by integration into the commercial promotion of the supplier, which supports narrow or negative margins of profit. This action caused a distortion of the market, by benefitting the larger and older broadcasting company, in contrast with smaller, more recent ones. For instance, ZON had to reach a TPM of 17-21%, while other smaller companies had to reach at least 29 %.

Unhappy with this ruling, Sport TV appealed to the Tribunal da Relação de Lisboa.

This Appeal Court decided to maintain the ruling of the First Instance Court.

In summary, it defined the defendant's action as being an abuse of its dominant position, due to the fact that they held 100 % of the sports broadcasting rights, establishing discriminatory prices or services with the intention of restricting competition.

The defendant argued that the imposition of "minimal quotas" (market penetration rates – TPM, and Absolute Minimal Numbers – NAM) was intended to increase subscriptions, and not to manipulate the market.

However, as the Appeal Court decided, by not valuing the real number of the clients of each company, but, instead, the market penetration rate inside each company's market, the value obtained was variable, and so this placed the clients in different categories. These categories were not related to the real and effective numbers, but to fictitious ones.

This imbalance was worsened through the introduction of another item that was used to calculate the fee – the technology used. As the defendant did not support the costs of broadcasting with newer technology, the difference in cost should be reflected in the price stated, but this wasn't the case.

This decision is not yet final, since Sport TV placed an appeal with the Tribunal Constitucional, last September, and this is still pending.

Personal comment

This case is of extreme importance in Portugal since it relates to a true example of the abuse of a monopoly that may be classified as exclusionary as it was meant to safeguard the undertaking's dominant position, and to facilitate the subsequent exploitation of dominance.

The national courts have decided to sentence the defendant by using the National Competition Law, which reflects TFUE Article 102.

The criteria used in this Article are the same as those in national law, and they were applied with the rulings, namely, the undertaking concept, and the intention of safeguarding the undertaking's dominant position, and facilitating the subsequent exploitation of dominance.

European Court Jurisprudence was also used throughout the decisions so as to define an abuse of dominance, its elements and effects.

8. The Private enforcement of competition Law

8.1. MIEKE DUDOK VAN HEEL (AMSTERDAM DISTRICT COURT)

AIRCARGO CARTEL (or not?)

Equilib Netherlands B.V. v. Koninklijke Luchtvaart Maatschappij N.V. and several other airlines (hereinafter: "KLM et al.")

Judgment of the Amsterdam Court of Appeal

24th September, 2013.

Case no.: 200.109.253/01 (ECLI:NL:GHAMS:2013:3013)

1. The facts

On 9th November, 2010, the European Commission announced in a press release (IP/10/1487) that it had imposed fines on eleven airlines, including KLM, et al. (with the exception of Lufthansa) totalling €799,445,000 due to their involvement in an international cartel involving air cargo services in the period from December, 1999, to February, 2006 (and that Lufthansa had received complete immunity from fines under the leniency programme). In its decision (hereinafter: the Decision) the infringement of competition law was described as follows:

“The contacts on prices between the airlines that were concerned initially began with a view to discussing fuel surcharges. The carriers contacted each other so as to ensure that worldwide airfreight carriers imposed a flat rate surcharge per kilo for all shipments. The cartel members extended their cooperation by introducing a security surcharge and refusing to pay a commission on surcharges to their clients (freight forwarders).

The aim of these contacts was to ensure that these surcharges were introduced by all the carriers involved; and that increases (or decreases) in the surcharge levels were applied in full and without exception. By refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers. Such practices are in breach of the EU competition rules.”

KLM, et al., lodged an appeal against the Decision with the General Court of the European Union (EU) in good time and (*inter alia*) applied to the Court to annul the Decision.

In the case before the national courts, the parties disagreed as to whether this follows from the judgment of the Court of Justice of the European Union (“ECJ”) of 14th December, 2000 (case C-344/98, Masterfoods) and the consequent case-law and regulations that these proceedings must, or may be, stayed at this stage, given that the validity of the Decision is the subject of an appeal for nullification that is pending before the Courts of the Union. According to Equilib, the proceedings may not be stayed. KLM, et al. submitted that the proceedings must be stayed.

2. The proceedings

Amsterdam District Court (Court of First Instance)

In a writ dated 30th September, 2010, Equilib summoned KLM, Martinair and Air France to appear before the Amsterdam District Court and applied to the District Court to declare, put briefly, that they had acted unlawfully under the applicable law, against the injured parties listed in an annexe, by participating in a cartel that is outlined in the summons, and that they are jointly and severally liable for the damages caused to those injured parties, and to order them to compensate, jointly and

severally, for those damages and to pay, jointly and severally, the costs of the proceedings. Equilib submitted that the injured parties had assigned their claims to it.

In a writ of 24th December, 2010, KLM, et al. added seventeen other airlines as third parties. Equilib amended its claim in the sense that it based its claims on the Decision.

KLM, et al., subsequently filed a number of motions, amongst which (to the extent relevant for this case note) was a motion to stay the present proceedings until the Decision is irrevocable.

The District Court stayed the proceedings until the Decision, or the decision of the Courts of the Union, had acquired the force of *res judicata*. The District Court, *inter alia*, found as follows in that regard (at Para. 4.10):

“The Masterfoods judgment, Article 16 (1) of the Regulation and the Commission Notice aim to preclude a national court from giving a decision that runs counter to a Commission decision which is not yet irrevocable. It is up to the national court to decide (...) whether the proceedings should be stayed earlier than the point at which a judgment can be given. This Court finds that this weighing of interests at this stage of the proceedings means that the hearing of the case will be stayed now, pending the final decision of the EJC on the appeal against the Decision. In this regard, with due observance of the requirements of the due process of law, it is relevant that a discussion of the merits of Equilib’s accusations is not possible at this stage. Essentially, Equilib had not based those accusations on any specific submissions of fact, other than that, according to the Decision, KLM, et al., had participated in a cartel. In making its accusations, Equilib places reliance on the binding evidential value of the Decision. However, the entire Decision has been challenged before the General Court and, accordingly, does not yet have the force of *res judicata*. A discussion of the merits would therefore, at this stage, in fact amount to an exchange between the parties of presumptions and expectations about the outcome of the proceedings before the EJC. With a view to the requirements for due process, KLM, et al., cannot be required to conduct the discussion in this manner. The proceedings will therefore be stayed.”

The District Court also presumed that the judgment of the EJC regarding (*inter alia*) the specific nature, duration and scale of participation in the cartel (end of Para. 4.10) is relevant to an assessment of the unlawfulness of KLM et al.’s actions. According to the District Court

“it is not only relevant whether, in a general sense, KLM, et al., participated in a cartel, but also and particularly what KLM, et al., actually did, and in what places, in what manner and during which periods, with regard to which services and shipments, and what possible consequences that may have had for the various injured parties. As opposed to the submissions of KLM, et al., Equilib has not sufficiently explained that, given the legal dispute in the appeal lodged by KLM et al., the judgment of the EJC is not relevant to the assessment of these aspects.”

Amsterdam Court of Appeal

In a summons dated 5th June, 2012, Equilib lodged an appeal against the judgment of the Amsterdam District Court to stay the proceedings.

3. Judgment of the Court of Appeal

The Court of Appeal considered as follows.

It does not appear from the text of the Masterfoods judgment, and its various language versions, that the national court must stay the proceedings in all of the cases in which one of the parties has brought an action for the annulment of the underlying decision of the Commission in national proceedings. Nor does this follow from the rules that were subsequently introduced by the Council and the Commission. According to the Masterfoods judgment (at Para. 55), it is for the national courts to decide whether to stay the proceedings until a definitive decision has been given in the action for annulment, or in order to refer a question to the ECJ for a preliminary ruling.

Article 16(1) of Council Regulation No. 1/2003 also appears to proceed from this same presumption. This Article provides that the national courts must avoid giving decisions that would conflict with a decision of the Commission, or with a decision contemplated by the Commission, and to that end may assess whether it is necessary to stay the proceedings. That discretion is limited, as stated in the Masterfoods judgment (at Para. 57), to the situation in which the outcome of the dispute depends on the validity of the Commission's decision, as the national courts cannot give a decision that runs counter to the Commission's decision.

In the Court of Appeal's opinion, it is therefore only mandatory to stay the national proceedings in cases where the national proceedings turn on questions of fact or of law, the answers to which depend on the validity of the Commission's decision. The Court of Appeal finds, moreover, that it can only be concluded that the answer to such questions depends on the validity of the Commission's decision in cases where the validity of such a decision is reasonably in doubt. In that sense, a stay of proceedings therefore requires reasonable doubt in relation to the validity of the Commission's decision.

The Court of Appeal also refers to the view taken by the Advocate-General, P. Cruz Villalón, as set out in his opinion of 26th June, 2012, which accompanied the Otis judgment (at Para. 52):

“Therefore, if the District Court had doubts regarding the validity of the decision and, furthermore, noted that the decision is *sub iudice* before the Courts of the Union, staying the national proceedings would avoid any risk of conflict between the decisions given by the Courts of the Union and the Belgian Court.”

The Court of Appeal ruled that when one party relies on a Commission decision in support of its claims it is for the other party, who disputes the validity of that decision and who would like to stay the proceedings:

- a. to demonstrate that it has brought the action for annulment in good time;
- b. to explain that it reasonably opposes the Commission's decision in the proceedings before the ECJ;
- c. to submit the defence that it wishes to raise in the follow-on proceedings so that the national court can assess if, and to what extent, the assessment of that defence depends on the validity of the Commission's decision.

Based on the documents and the explanations given, the national court can subsequently decide if, and to what extent, the proceedings must be stayed. This will do justice, on the one hand, to the interests of the claimant in precluding unnecessary delays in exercising its claims for compensation for the damage suffered by the competition law infringement and, on the other, the interests of the defendant in limiting the costs of raising a defence against those claims, as long as the validity of the Commission's decision is not irrevocable.

4. Personal comment

Once the statements of defence had been filed and KLM, et al., no longer pleaded that the proceedings should be stayed completely, in view of the judgment of the Amsterdam Court of Appeal, the Amsterdam District Court (further to the suggestions of the parties) decided to continue the proceedings with the debate (to the extent that was possible) between the parties, and the assessment of the Court on the questions of applicable law, the statutes of limitation, and the validity of the assignments to Equilib. On 22nd July, 2015, the Court ruled, in an interim judgment, that Equilib had to provide further data and information in order to substantiate its claims.

According to the Court's provisional assessment, this information should include:

- a matrix of the most important flight routes, with reference to the period, the country of departure and the country of arrival (e.g., in 1999, x flights between Germany and France, y

flights between Germany and Italy, z flights between the Netherlands and England; in 2000, x flights between Germany and France, etc.);

- the Airlines which carried out the flights on these flight routes;
- the forwarders concerned, and the manner in which they passed on the fuel surcharge to their customers. ,

Before this information was provided to the Court and the debate between the parties had been completed in their written statements, on 16th December, 2015, the General Court of the European Union annulled the Decision (see *inter alia* KLM v. European Commission, case T-28/11). In its decision(s), the Court emphasises, first of all, that the principle of effective judicial protection requires that the operative part of a decision which is adopted by the Commission, finding infringements of the competition rules, must be particularly clear and precise, and that the undertakings that are held liable and penalised must be in a position to understand and to contest that imputation of liability and the imposition of those penalties, as set out in the wording of the operative part.

The Court notes that the national courts are bound by the decision that is adopted by the Commission, and, consequently, the meaning of the operative part of that decision must be unambiguous. In particular, the national courts must be in a position to understand the scope of that infringement and to identify the persons who are liable, in order to be able to draw the necessary inferences as regards claims for damages that are brought by persons harmed by that infringement.

Likewise, the Court points out that the wording of the operative part of a decision that finds an infringement of the competition rules is such as to establish the mutual rights and obligations of the persons concerned.

In the present case, it is apparent from an overall reading of the grounds of the Decision that the Commission describes a single cartel, constituting a single and continuous infringement in relation to all of the routes that are covered by the cartel, and in which all of the carriers at issue participated. Those carriers, in the context of a single overall plan and by means of a single network of bilateral and multilateral contacts, allegedly coordinated their behaviour in relation to the development of the fuel and security surcharges and the payment of commissions on those surcharges to the freight forwarders with which they worked. That coordination is said to have taken place at a worldwide level, and therefore simultaneously affected all the routes that are referred to in the Decision.

However, the operative part of the Decision refers to either four separate single and continuous infringements, or to just one single and continuous infringement, the liability for which is attributed only to the carriers which, as regards the routes mentioned in Articles 1 to 4 of the Decision, participated directly in the unlawful conduct that is referred to in each of those Articles, or were aware of the collusion on those routes. The Court therefore finds that there is a contradiction between the grounds of the Decision and its operative part.

Furthermore, the Court notes that the grounds of the Decision are themselves not entirely internally consistent. Indeed, those grounds contain assessments which are difficult to reconcile with the existence of a single cartel that covers all of the routes that are referred to in the operative part, as described in those grounds.

The question now arises: can we continue the follow-on proceedings that have been initiated in the national courts (in the Netherlands, Great Britain and Germany) and, if so, how? The assumption that there had been an infringement of competition law (a cartel), as described in the Decision, is gone. The Amsterdam District Court has instructed the parties in the Equilib-case (and in other cases that are pending before this Court) to inform the Court of the effect of the judgment of the General Court on the national proceedings. The Court is expecting the written statements of the parties on 30th March, 2016.

8.2. CHRISTINA FARCAS SURPANU (BUCHAREST TRIBUNAL)

Name of the court of First Instance: The Bucharest Tribunal

Name of the Appeal Court: The Bucharest Court of Appeal

Names of the parties:

- **Claimant: Mailers Serv SRL**
- **Defendant: The Romanian National Post Company (Romanian Post)**

Date of the First Instance judgment: December 19th, 2014.

Date of the appeal judgment: October 30th, 2015.

The case opposing Mailers Serv SRL and Romanian Post is an interesting litigation, not only because the Court of Appeal awarded damages for prejudice that is said to have been caused by an abuse of a dominant position, but also because the effect of the anticompetitive behaviour manifested in a different market than that where the dominant position existed. In fact, the Romanian Post Company has a monopoly in the national market of advertising mail²⁶ and, between 2005 and 2009, its market share exceeded 90%. Its anticompetitive behaviour had instead adversely affected the companies who were competing in the market for direct marketing services. This litigation also reflects the different views of the national courts on the force of the NCA's decision in a private proceeding, on the principle of the harmonious interpretation of the national law in the light of Directive 2014/104/EU, and on the proof of the causality in a private enforcement action.

Facts

1. Since April 18th, 2005, Romanian Post applied a new rebate scheme for its customers in the market for advertising mail. The rebates were standardised and were offered to all customers on the same publicly available terms. They applied to periods of one year.

2. Mailers Serv SRL is a small company which provides direct marketing services to its customers. In order to deliver the advertising material (catalogues, mailers and fliers), the company has to buy services for advertising mail from Romanian Post. Those services are resold to its own customers.

In 2005, Mailers Serv SRL signed a contract with Romanian Post on the terms that are applicable to everyone. The contract was renewed annually until 2011.

3. At the same time, Romanian Post concluded a similar contract with a competitor of Mailers Serv, Infopress. This contract stipulated a superior rebate if compared to those that are publicly offered (5% more for each rebate threshold). The parties applied these contractual clauses until 2009. Between 2005 and 2009 the Infopress's market share increased steadily compared with those of its competitors.

4. Following a complaint from Mailers Serv and other competitors, NCA decided that Romanian Post's decision to apply preferential rebates to Infopress was discriminatory and it represented an abuse of its dominant position in the market for advertising mail that distorted the competition between its customers. The NCA concluded that such conduct had infringed Article 102 TFEU and Article 6.1. c, of the Romanian Competition Law. In December, 2010, the NCA thus imposed a fine on the Romanian Post Company.

5. In 2011, Romanian Post appealed the NCA's decision to the administrative section of the Court of Appeal and, after a detailed procedure, the Court delivered its judgment in December, 2013, reducing the fine imposed by the NCA. That judgment was appealed by the NCA, and in April, 2015,

²⁶ The advertising mail is the delivery of advertising material to recipients of postal mail.

the Supreme Court reversed the judgment delivered by the Court of Appeal and upheld the NCA's decision.

6. Whilst the Administrative Court proceedings were ongoing, Mailers Serv started an action for damages against the postal company. Mailers Serv sought to receive as compensation for its material loss, the difference between the rebates that were unlawfully applied to Infopress and the rebates applied to the rest of the competitors, the claimant included. The claim was presented in July, 2011, before the Bucharest Tribunal and it was based on the NCA's decision which was delivered in 2010.

7. In November, 2011, the Tribunal decided to stay the action for damages until the end of the administrative proceedings. Mailers Serv appealed that decision before the Court of Appeal, and by a judgment delivered in April, 2012, the Court of Appeal obliged the Tribunal to continue the procedure on the ground that the NCA's decision is not the only evidence that could be produced by the claimant in an action for damages.

8. The Tribunal ordered an expert to quantify the damages. Apart from the expert witness and NCA's decision, Mailers Serv only presented its first contract with the postal company. Based on the evidence presented, in December, 2014, the Tribunal dismissed the action for damages, arguing that the claimant did not prove that the conditions of the tort liability were met.

9. Mailers Serv appealed the judgment and, in October, 2015, after the end of the administrative proceedings, the Court of Appeal reversed the judgment and awarded partial damages of those sought by the claimant. The postal company was obliged to pay compensation for the damages produced between July 14th, 2005, and August 1st, 2009. The Court of Appeal reasoned that the prejudice was proved by the expertise that was called on in the First Instance, and the facts, the defendant's culpability, and the causal link were all proved by the NCA's decision, which was now definitive.

10. Romanian Post appealed before the Supreme Court the decision that obliged it to pay damages and the first hearing is scheduled for October, 2016.

Comment

Perhaps the most important and intriguing aspects of this litigation are the appreciation of evidence and the standard of proof that has been used by the Court of Appeal. Although, in principle, is undeniable that a discriminatory treatment applied to customers may generate damages for those customers who were not privileged, it is also true that the causality has to be proved and could not simply be deduced from the NCA's definitive decision.

In this particular case, the claimant alleged that the harm suffered is represented by the difference between the illegal superior rebate that was conceded to its competitor and the common rebate, and asked to be compensated for this difference between the rebates applied to the deliveries it had sent. However, by seeking such compensation, the claimant wanted, in fact, to obtain for its own profit the same treatment from the postal company that had previously been judged to be illegal and anticompetitive by the NCA and the Administrative Courts.

8.3. NATALIE SWALENS (BRUSSELS COMMERCIAL COURT)

The decision of the Brussels Court of Appeal of October 28th, 2015, in the European Commission versus KONE, Otis, Schindler and ThyssenKrupp.

In a decision of February 21st, 2007, the European Commission fined KONE, Otis, Schindler and ThyssenKrupp, manufacturers of lifts, escalators and elevators, for an amount of €992 million, for an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU).²⁷ The Commission found that the manufacturers had made an agreement to:

- (i) allocate public tenders between themselves and other contracts for the sale, installation and servicing of elevators and escalators;
- (ii) not to compete with each other; and
- (iii) had exchanged commercially sensitive information. All this took place in Belgium, Germany, Luxembourg and the Netherlands from 1996 to 2004.

On December 20th, 2008, the Commission filed a claim for damages before the Brussels Court of Commerce²⁸ and against the cartel participants, on behalf of the European Institutions. The European Institutions felt they had suffered losses due to the cartel, because of higher prices in agreements on calls for tenders for maintenance and the modernisation of their equipment during the infringement period. The Commission asked that the contracts for Belgium and Luxemburg with the manufacturers, based on the established fraud, be declared null, and they claimed damages of about €9 to €11 billion (depending on the method of calculation). Subsidiarily, the Commission asked for a provision of €5 billion and the designation of an expert for advice on the exact amounts.

In a first phase, the Court of Commerce referred two preliminary questions to the Court of Justice of the European Union in relation to the authority of the Commission to represent the European Institutions, and the right to a fair trial, as the Commission based its claim on its own earlier decision about the cartel practice. The Court of Justice stated, in its decision of November 11th, 2012, that only the Commission could (and should) represent the European Institutions in trials, and that access to justice could not be denied to the Commission for its claim, as any party should be able to seek damages to guarantee the effective enforcement of competition law. The Court of Justice saw no infringement of Article 47 of the Charter of Fundamental Rights or to Article 6 of the European Treaty on Human Rights in the action of the Commission for damages that were based on its own decision.

On November 24th, 2014, the Brussels Court of Commerce dismissed the claim.²⁹ The Court applied (classic) Belgian tort law, as in Article 1382 of the Belgian Civil Code, which requires proof of a harmful event, of damages, and of the fact that the harmful event was the cause (or one of the causes) of those damages (the link of causality). Under Belgian civil and procedural law, the “burden of evidence” of these three elements is on the claimant (Article 1315 of the Belgian Civil Code and Article 870 of the Belgian Code of Procedure). As the decision of the Commission established the infringement of Article 101 TFEU, only the damages and the link of causality had to be proven. The Belgian Judge is bound by the Commission’s decision; which is a result of European law,³⁰ but which has also been a principle of national, Belgian law since 1971 (the Franco-Suisse Le Ski case).³¹

²⁷ COMP/EI/38.823-PO Elevators and escalators February 21st, 2007, C(2007) 512.

²⁸ Rechtbank van koophandel te Brussel, since 2014 the “Nederlandstalige Rechtbank van koophandel te Brussel”.

²⁹ Discussed in: J.Marcos Ramos and D. Muheme, The Brussels Court judgment in Commission v Elevators manufacturers, or the story of how the Commission lost an action for damages based on its own infringement decision, *European Competition Law Review*, 2015, 384.

³⁰ Article 16.1 of the Council Regulation (EC) No 1/2003 of 16th December, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, about Uniform application of Community competition law: “When national Courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty, which are

The Court of Commerce found that the Commission did not provide sufficient evidence of real and certain damages that had been suffered due to the cartel. The Court felt that bid-rigging does not necessarily lead to higher prices, especially when the cartel does not represent a monopoly. In this case, the cartelists had 70 per cent of the market, so that the Court believed that the other 30 per cent of the players could still compete for maintenance contracts. The Court of Commerce cited a report of the Commission itself, which stated that the actual effect of the cartel was difficult to measure, “because it is, in particular, not known if and how many other projects were subject to bid-rigging, nor how many projects may have been subject to allocation between cartel members without there being a need for contacts between them.” The Court of Commerce also found that the Commission did not establish that it lost the serious chance of lower prices for the maintenance contracts.

After this decision of the Court of Commerce, which is essentially based on the lack of evidence, the Commission tried to acquire more elements about the real and exact damages. In appeals before the Brussels Court of Appeal, the Commission therefore asked for a preliminary decision about the documents that the defendants could submit to the Court. The decision of the Brussels Court of Appeal of October 28th, 2015, did indeed order the manufacturers to produce documents.

The Commission based its claim on the production of documents, firstly on Article 19.3 of the Belgian Code of Procedure, which enables parties to ask the judge, at any phase of the procedure, to take a preliminary measure. This preliminary measure can be a provisional organisation of the relations between parties, or, as in this case, a decision concerning the evidence. Often expertise is requested about facts or technical matters.

Here, the Commission filed for a measure of enquiry consisting of an order to the cartelists manufacturers to produce certain documents, based on Article 877 of the Belgian Code of Procedure. This order can be given by the judge if he feels that there are reasons to believe that the defendant (or a third party) has those documents available. The party that asks for the order is not required to prove that the defendant does possess the documents, but must convince the judge of the existence of serious, consistent and precise presumptions to that effect. Furthermore, s/he must show that there is reason to suppose that these documents contain evidence of the relevant facts. It is clear that Article 877 tends to facilitate fact finding and evidence relating to a party in a situation of inequality of access to certain facts and documents, but it cannot allow a “fishing expedition”. This is especially true where privacy, confidentiality and/or intellectual property may be concerned. It is to be noted that Directive 2014/104 contains rules about disclosure of evidence in actions for damages under national law for infringements of competition law that are not yet transposed.³²

The decision of the Brussels Court of Appeal that I discuss in this note, dealt only with this preliminary question.

The Court opened by stating that its decision on the preliminary question on the production of documents does not imply any decision on the merits of the case itself. On the contrary, as the requested measure tends to enable the production of possible evidence, the Court does not take a position about the existence of damages nor about the link of causality. At this stage of the procedure, the Court does indeed judge only at first sight (“*prima facie*”). In this, the decision is much like the “*kort geding*” of Article 584 of the Belgian Code of Procedure, literally, a short lawsuit, where the President of the Court takes provisional measures on urgent matters. A difference may be that the President does not hear the substance of the matter and that his decision is not binding for (another) judge that hears the suit that is at the heart of the matter, whereas the Court, after judging the

(Contd.) _____

already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

³¹ Belgian Court of Cassation, May, 27, 1971, Arr. Cass. 1971, 959.

³² Articles 5 to 8 of the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law.

preliminary matter, will have to offer an opinion on the substance. Moreover, the judge who allowed a measure under Article 19.3 cannot change his opinion, since he may have shown his motivation when writing his decision on the grounds of the case. A decision on Article 19.3 of the Belgian Code of Procedure can, for that reason, be felt by the parties involved to be a prediction of the future outcome. This explains why the cartel manufacturers, in this case, produced every possible argument against the measure the Commission sought to obtain. In its opinion on the preliminary measure, the Court calls indisputable only the fact of the cartel as established by the decision of the Commission of February 21st, 2007. This allows the Court to consider the order to produce the relevant documents under Article 877 of the Belgian Code of Procedure in relation to the need to guarantee the effectiveness of the enforcement of competition law. According to the Court of Appeal, it is normal that, in the case of the cartel here, relevant information was not available in a symmetrical way between parties, since the cartel was hidden.

The Court feels that the documents that the Commission indicated may be relevant (although the actual relevance will be clear only after communication). This is the case for:

- A. the confidential version of the decision of the Commission of February 21st, 2007, which is limited to well indicated parts in relation to the Belgian market. This is also true for
- B. documents from the Commission's investigation file to which the documents in (A) refer. The Court considers that these documents may make clear how the cartel operated.

Referring to the same report as the Court of Commerce, the Court of Appeal cites the Commission where it says that the actual effect of the cartel was difficult to measure, but emphasises that the Commission also says there that the infringement of Article 101 TFEU was serious, and it must have had an effective impact on the market. This brings the Court of Appeal to conclude that – at first sight – the execution of the cartel agreement must have had an impact on the Belgian market, and that this impact implies losses for participants in this market.

On this, the Court of Appeal adds that, under Belgian law, if damages cannot be calculated exactly, the judge can decide on a fair amount. This is relevant, since the Commission will not be able to prove definitively, and with exact figures, what would have been the situation without the cartel. The Court of Appeal refers to the link of causality under Belgian law, where the claimant has to prove that the damages would not have occurred had the fault not existed. Real evidence on this hypothetical situation is, of course, impossible, but the Court of Appeal says the documents asked for may contribute to a better understanding of the influence of the cartellists, and of their cartel, on the market, and to making it possible to estimate the damages.

The Court of Appeal understands that this measure is not disproportionate, and there seems not to be an easier, faster or cheaper means of enquiry. In this the Court of Appeal refers to Article 875bis of the Belgian Code of Procedure, which urges the judge to be restrictive in his choice of measures of enquiry. The argument of the manufacturers that is based on confidentiality was dismissed for the already mentioned reason of the effectiveness of European competition law. The Court of Appeal points out that European Union law refers to the national judge and his/her national law for a decision about claims for damages from infringements of competition, abiding with the interests of European competition law. Confidentiality must not prevent claimants for damages from infringements to competition law obtaining access to documents that relate to a leniency procedure. Furthermore, the information in the documents is more than 10 years old, whereas 5 years is generally regarded as meaning that such documents have lost their confidentiality.

Neither can the manufacturers complain, says the Court, about a loss of privacy (Article 8 of the European treaty of human rights), because any loss of reputation would be the sole effect of their own acts in organising and executing the cartel agreement.

Conclusion

To me, it is interesting to see how European competition law and European institutional law contribute to a solution of the case under national law. The case is indeed essentially a problem of Belgian tort law, judged by a competent Belgian judge, but the decision of the Commission provides essential elements in this judging. In its decision, the Court of Appeal respected the classic Belgian theory of the priority of International and European law. The decision of the Commission on the elevator manufacturers' cartel not only constituted for the Court of Appeal the fact of the tort, but also a presumption of causality between the tort and the principle of damage.

Indeed, one cannot say that the cartel meant a serious infringement on Article 101 TFEU (as stated by the Commission) also and maintain that it did not have an influence on the market. This is confirmed in Article 17.2 of the Antitrust Damages Directive of 2008, which was not yet applicable in this case.³³ This reasoning brought the Court of Appeal to sustain the preliminary claim of the Commission to produce documents. It seems improbable to me that in a later decision on the heart of the matter the Court of Appeal will refuse to accept that the European institutions must be suspected of having suffered losses, and that the amount of these losses cannot be calculated exactly, and that they therefore must be accorded in fairness. I am thus looking forward to a final decision from the Court of Appeal which will hold an effective enforcement of competition law.

³³ Article 17.2 of the Directive 2014/104/EU of November 6th, 2014, 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: “ It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption”.

8.4. LIJANA VISOKAVICIENE (THE VILNIUS DISTRICT COURT)

The claimant company, “SDG”, brought a civil action for damages caused by unlawful competition against the defendants, G.L. and G.L., the company “Business Alliance”, the third parties - S.Z., E.R., V.S., S.Š., J.B., B.K., G.K., R.J., A.V., R.Š., D.Š., G.M., the institution providing a conclusion – The Competition Council. The claimant claimed €30.000 damages from the defendants plus, 5 percent of interest and costs. The claimant argued that the main areas of his activity were business consultations, training, the safety and health of employees, labour law, fire security, civil security, the environment, the investigation of professional risk and its evaluation, engineering facilities, the installation of ISO standards. The claimant stressed that the defendant offered the same services, mentioning that the structure and areas of his activities were similar to the claimant’s. The claimant pointed out that the company “Business Alliance” was set up in 2009. However it had not carried out any commercial activity until the beginning of 2011, when the defendants, G.L and G.L., left and started working at “Business Alliance”. The sole shareholder and general director of the company, “Business Alliance”, was the defendant, G.L., who had formerly been the director of the company, “SDG”. His spouse, G.L., who had formerly been the director of the company, “SDG”, of the Department of Kaunas, started running “Business Alliance”. The defendants, G.L. and G.L., persuaded a lot of SDG’s employees to leave the company and to start working at “Business Alliance” and some employees were lured away by them. According to the claimant, the defendants had also benefited from the commercial (manufacturing) secrets of the company, “SDG”, and its clients’ data. In addition, defendants had entered into agreements with the former clients of the company “SDG”¹ and had competed dishonestly with it. As a result, the company, “SDG”, suffered damages. The claimant pointed out that while the defendants had been performing their duties in the company, “SDG”, they could obtain the data on the claimant’s clients, as well as the prices of services, and they learnt about other clients from the employees who had been lured away. The claimant stated that the defendants had used all of the information of the company, “SDG”, as they were heads of the company and the information had been later used to develop the entity in order to gain profit. In the view of the claimant, the above mentioned information had been appropriated and used by the defendants unlawfully. Due to the large migration of employees to the company, “Business Alliance”, in January and February, 2011, the claimant suffered a loss of approximately €13.000 in income. Due to the unlawful actions of luring away the employees and clients of the company, “SDG”, the claimant suffered approximately €30.000 of damage.

By the judgment of 11th June, 2013, the Kaunas District Court dismissed the claim. It held that at the time the company, “Business Alliance”, was established on 7th April, 2009, the defendant, G.L., was not a director of the company, “SDG”. The Court pointed out that as the company “Business Alliance” had been searching for employees through the Labour Exchange, the media and on the internet, this implied that the employees who were working in the claimant’s company and who migrated to “Business Alliance” had not been lured away by the defendants unlawfully. The Court considered that the list of commercial secrets of the company, “SDG”, was only confirmed on 16th December, 2010, and then the defendants were dismissed from the company, as well as the claimant, having adopted the order for the list of commercial secrets did not stipulate any order for the usage of that information, did not appoint any persons responsible for the usage of commercial secrets, and as did not determine the rules for the protection of secrets. For these reasons, the Court found that the claimant neither made official, nor preserved, the information properly, which, in the view of the claimant, constituted a commercial secret and could be considered to be confidential, inaccessible publicly, unknown to the third parties, and which would have an apparent value. Under these circumstances, and after the examination of the agreements with clients, the Court found that the agreements of the two companies had not been identical. Their form and the style of their preparation were different, whereas the appraisals (tariffs) of payment were similar. As regards the contracts, the Court noted that the former clients had terminated contracts with the claimant in good faith and according to the law and agreements, and the former clients entered into the contracts with the

company “Alliance of Business” at their own will. These actions were in compliance with the Civil Code. The Court concluded that entities have the freedom to utilise honest competition and the law does not prohibit the setting up of enterprises of a similar profile.

By a judgment of 14th March, 2014, the Kaunas Regional Court revoked the decision of the First Instance and delivered a new judgment which satisfied the claim in part. The Court awarded the claimant €16.500 in damages from the defendants. The Court found that the defendants had performed dishonest actions in relation to competition, as prescribed by the Competition Law. In the Court’s view, the termination of the Labour agreements by an initiative of the employees simultaneously, rather than through cooperation breached *de facto*, between the parties, employment in the defendant company, “Alliance of Business”, by assessing the nature of both companies, confirmed that the willingness of the employees to terminate agreements with the claimant had been influenced by the dishonest actions of the defendants. According to the Court, these dishonest actions had occurred as a result of the claimant’s employees encouraging the termination of agreements with the claimant and then entering into the agreements with the claimant’s direct competitor. As the major part of the defendant’s employees were former employees of the claimant, the Court found that the defendant had obtained a competitive advantage after he employed the employees of the competitor.

As regards the disclosure of commercial secrets, the Kaunas Regional Court stressed that the absence of the list of commercial secrets should not be absolute. The Court assessed the provisions of the Competition Law and the fact that the list of commercial secrets of the company, “SDG”, was confirmed by the order of the General Director of the company, “Business Alliance”, on 16th December, 2010. The employees of “SDG” had been introduced in written form and were warned about unlawful usage of commercial secrets. The Court stressed that all of the information on the commercial secrets of the claimant was known to the former Director, G.L. Under these circumstances, the Court found that the information on commercial secrets (the data about clients, contracts, the forms of commercial proposals) had been transferred to the defendant’s company, “Business Alliance”, and were used for the daily activities of the company. In the light of the foregoing, the Court pointed out that the possibility of the defendant successfully operating on the market was based on resources that were created by the claimant. In the present case, the Court found that the competitive environment of the claimant had obviously deteriorated in the same specific segment of the market in which the defendants had also acted. For these reasons the Court acknowledged that the claimant had suffered loss. On the basis of the above-mentioned facts, the Court found that the value of contracts reflected the damage suffered by the claimant. Bearing in mind the value of the contracts, the Court came to the conclusion that the value of the contracts amounted to the damage suffered by the claimant, which had been influenced by the dishonest competition of the defendants. The Court found that the claimant had entered into both long term and termless contracts with eleven companies. If these contracts had not been terminated, the claimant would have received €16.500 in income.

By a final judgment of 6th February, 2015, the Supreme Court of Lithuania overturned the decision of the Appellate Court and remitted the case for re-examination to the Appellate Court. The Court noted that the findings of the Appellate Court related to actions relating to dishonest competition by the defendants which were found. The dispute arose only in respect of damages. In this context the Supreme Court had to ascertain the appropriate level of compensation for the damages, since they were caused by the actions of dishonest competition (the luring away of employees and taking advantage of commercial secrets). In the present case, the Supreme Court analysed the relevant law and practice. The Court noted the international law and, more specifically, the provision “Dishonest Competition” of The Convention of Paris “For the security of industrial property”, and in the provisions “The security of commercial secrets” of the Agreement on Trade - Related Aspects of Intellectual Property Rights (the TRIPS agreement). These documents did not stipulate any view as to the quantification of damages. The Chapter “Civil and administrative process and remedies for damage compensation” of the TRIPS agreement Article 45 “Compensation for damages” stipulates

that courts have a right to require the offender to compensate the possessor, and the compensation should be sufficient for the infringement of intellectual property, as the offender knows, or has serious grounds to assume, that he has infringed the right, despite the fact that the offender has already performed an unlawful activity. According to the mentioned Article, the State is able to authorise the courts to recover the profit or to compensate for plausible damages, even if the offender does not know, or have the serious grounds on which to assume that s/he has performed an unlawful activity. The Court observed that the provisions of the TRIPS agreement were of a minimal standard for members of the State, and thus the different regulation for compensation for damage could be envisaged in national law.

The Court noted that EU members have not had a general stance on the 29th April, 2004, Directive (2004/48/EB) of the European Parliament and Council for the protection of intellectual property, on whether it has to be applied (and to what extent) to commercial secrets also. The proposal of the Directive for the protection of non-disclosed practical experience and business information (commercial secrets) against unlawful receipt, usage and disclosure (COM/2013/0813 final-2013/0402 (COD) (hereafter – the Directive proposal) was issued. According to the Article 13, “The compensation for damage” of the Directive proposal, which had enshrined the requirement for Member States to guarantee that competitive judicial authorities having received an application by an aggrieved party should require the offender who had known, or should have known, that they had received, disclosed or used the commercial secret unlawfully, to compensate for the damages to the possessor of the commercial secret and these damages should be in compliance with factual damage. In addition, the Article stipulates that competitive judicial authorities, having determined the amount of the damage, should consider all the factors as negative economic effects, including the loss of profit by the aggravated party as well as the entire amount of the profit that was received dishonourably by the offender.

The Supreme Court pointed out that the national Lithuanian law had no prescribed special provision in relation to compensation arising from the dishonest actions of competition. In this respect, the provisions of the Civil Code were applied. The Supreme Court started forming the practice due to compensation for damage caused by dishonest competition, and it had stated that one of the criteria for the calculation of damages might be the loss of revenue which could be proven by the claimant. The views of the Supreme Court were developed further in jurisprudence through the clarification that loss of revenue ought to be understandable in these circumstances as (non-received) pure profit, which should be proven and be considered to be awarded damage. According to the Court, the entire loss of income should not be claimed as it was profit from which expenses had not been deducted. The Court noted that taxable profit is received once expenses are deducted from the entire income (receipts). The Court stressed that taxable profit does not constitute the entire loss of revenue as damages. According to the Income Tax Law, pure profit is gained by deducting the income tax from this amount. Accordingly, the pure profit is the part of the received general income minus the expenditure of financial activity, particular losses and paid taxes.

In the present case, the Appellate Court decided that the value of the contracts had been deemed to be damages incurred by the claimant due to the dishonest competition of the defendants. In the view of the Supreme Court, the conclusion of the Appellate Court had been unfounded for the following reasons: *firstly*, the damages for loss of revenue should be considered to be pure profit. *Secondly*, the Appellate Court should determine the amount of damages according to the criteria of pure profit, but not in respect of the forecast incomes which the claimant would have received (perhaps) if the mentioned contracts had not terminated with the claimant and had entered into contracts with the defendant company, “Business Alliance”. The Court thus found that the criteria applied for the calculation of damages by the Appellate Court did not comply with the practice of the Supreme Court, and the amount of damages awarded with regard to the findings of the Appellate Court, could not be deemed to be proven.

8.5. IKO NÕMM (THE TALLINN COURT OF APPEAL)

1. On 31st March, 2009, Aktsiaselts Starman filed an action against Elion Ettevõtted Aktsiaselts with Harju County Court and demanded the return of €381,818.20 which were acquired without a legal basis and through interest on arrears. Alternatively, the plaintiff demanded compensation for damage and interest on arrears.

Pursuant to the circumstances of the case, the defendant owns over 95% of the cable conduit situated on the territory of Estonia, which the defendant leases to other communications undertakings for the provision of electronic communications services. The plaintiff leases cable conduit from the defendant, as it needs this to compete in the electronic communications services market. Other communications undertakings do not have any other options in order to provide their services, except for the defendant's cable conduit network. The plaintiff has concluded written cable conduit lease contracts with the defendant.

The cable conduit, which belongs to the defendant, is an essential facility within the meaning of § 15 of the Competition Act, and thus the defendant has a dominant position in the market as a provider of cable conduit rental services, wherefore it has to take into account, in its activities, the restrictions arising from the Competition Act. Among other things, it is prohibited to abuse the dominant position of an undertaking in the market.

Before 1st February, 2006, the plaintiff paid rent to the defendant for the cable conduit in the amount of 81 cents per meter for the installation of the cable. Starting from 1st February, 2006, the defendant established new rental rates, which were significantly higher than the uniform price had been thus far. In addition, several extra charges were established. Accordingly, the rent of the cable conduit built before 2006 increased nearly 20%, and the rent of cable conduit built after 2006 increased nearly 40%. As of 1st January, 2008, the defendant established again a uniform rent of 67 cents per linear metre of installation.

The plaintiff is of the opinion that the price list which was applicable from 1st February, 2006, until 1st January, 2008, was in conflict with the Competition Act and was therefore void. The defendant has to return the rent relating to the part exceeding the rent pursuant to the price list which was applicable before 1st February, 2006. The defendant has acquired €381,818.20 without a legal basis. In addition, the defendant has to pay to the plaintiff the interest on the arrears in the amount of €78,74.83 and interest. Alternatively, the defendant asked to order the plaintiff to pay compensation for damage in the same amount together with interest.

2. The defendant opposed the action. According to their objections, special rules apply in electronic communications, primarily regulations No 312 and No 313 of the Government of the Republic, which have been passed pursuant to § 205 (2) of the Electronic Communications Act and § 53 (6) and § 51 (7) of the Telecommunications Act, which regulated the leased line and interconnection services and established the methodology for the calculation of charges. The provisions of the Competition Act do not therefore apply to the defendant.

3. Harju County Court agreed with the defendant and dismissed the action by their judgment of 5th November, 2012.

4. Tallinn Circuit Court upheld, by its judgment of 18th April, 2013, the judgment of the Harju County Court.

5. The Supreme Court annulled the judgments of the lower courts due to incorrect application of substantive law, and sent the case for a new hearing.

The parties are not arguing over the fact that, during the disputed period, the defendant was an undertaking in control of an essential facility within the meaning of § 15 of the Competition Act, or over the fact that the Communications Board had designated, by Directive No 1-3/04/269 of 29th

November, 2004, the defendant as an undertaking with significant market power in the territory of the Republic of Estonia for the year 2005 in the market of telephone services, leased line services and interconnection services.

Pursuant to § 15 of the Competition Act, an undertaking is deemed to be in control of an essential facility if it owns, possesses or operates a network, infrastructure, or any other essential facility which other persons cannot duplicate or for whom it is economically inexpedient to duplicate, but without access to which, or the existence of which, it is impossible to operate in the goods market. In conjunction with § 13 (1) and (2) of the Competition Act, the undertaking in control of an essential facility has a dominant position in the market. Pursuant to § 16 (1) 1) of the Competition Act, any direct or indirect abuse by an undertaking of their dominant position in the goods market is prohibited, including directly or indirectly establishing unfair purchase or selling prices, or other unfair trading conditions. Pursuant to § 18 (1) 1) of the Competition Act, an undertaking that is in control of an essential facility is required to permit other undertakings to gain access to the network, infrastructure, or other essential facility, under reasonable and non-discriminatory conditions, for the purposes of the supply or sale of goods.

During the disputed period, electronic communications were regulated by the Telecommunications Act and, pursuant to § 3 (17) of the Telecommunications Act, the interconnection of telecommunications networks were technical and logical connection in a manner that allows the provision of telecommunications services to the users who have access to the connected telecommunications networks. Pursuant to § 2 (6) of the Telecommunications Act, the interconnection service was defined as being the telecommunications service which consists of the interconnection of two telecommunications networks, and the conveyance, switching or transmission of signals between these networks. The Telecommunications Act did not contain the definition of a leased line service, but it did provide the definition of a leased line. Pursuant to § 3 (16) of the Telecommunications Act, a leased line means a connection for the non-switched transmission of signals between two points in the telecommunications network, which may be accompanied by the auxiliary systems that are necessary for the efficient use of the technical parameters and management opportunities of the route.

The Supreme Court found that leasing the cable conduit is not a leased line service within the meaning of § 3 (16) of the Telecommunications Act, nor an interconnection service within the meaning of § 3 (17) of the Telecommunications Act. Accordingly, Regulations Nos 312 and 313 of the Government of the Republic do not apply to the rent which the defendant, as the undertaking in control of an essential facility, demanded from other communications undertakings for the use of the cable conduit that is necessary for the installation of communications cables. Granting the use of the cable conduit that is necessary for the installation of communications lines is not comparable to granting the use of communications lines, or to the establishment of a connection between telecommunications networks.

Even if the legislation regulating the communications establishes the rules for sector-specific pricing for some service types, these rules cannot be in conflict with competition law. The establishment of unfair prices cannot be justified by relying on sector-specific rules or the decisions of the administrative authorities.

An undertaking in a dominant position in the market, within the meaning of § 13 (1) of the Competition Act, is not allowed to abuse its position pursuant to § 16 (1) of the Competition Act, including by directly or indirectly establishing unfair purchase or selling prices, or other unfair trading conditions, even if it is subject to sector-specific rules and special rules have been established for it for pricing. The same follows from Subsection 2 of Article 102 of the consolidated version of the Treaty on the Functioning of the Union (see also e.g., the judgment of the Court of Justice of 14th October, 2010, in case No C-280/08 P, *Deutsche Telekom vs European Commission*).

The Supreme Court explained its thoughts on the first alternative ground set out in the plaintiff's claim, i.e., unjust enrichment, that if the price increase is in conflict with the rules of fair pricing that

are prescribed in the Competition Act, the price increase, as the defendant's unilateral act, is void, and the defendant is required to return the money on the basis of unjust enrichment. If the defendant delays the repayment of money, the plaintiff has the right to claim interest on arrears, and this right is provided by law.

As is evident from the statement of the claim that the defendant increased the price, relying on the contract concluded by the parties, which presumably contains standard terms, the County Court has to assess, on its own initiative, whether the defendant has relied on standard terms when demanding the charge from the plaintiff, and whether this standard term is applied in a case where the defendant is relying on the standard term. The standard term is void if this, taking into account the nature, content, manner of conclusion, interests of the parties and other relevant circumstances, unreasonably damages the other contracting party, in particular, when the balance of rights and obligations arising from the contract has been significantly damaged by the standard term, to the detriment of the other contracting party.

The Supreme Court stated, with respect to the second alternative ground set out in the plaintiff's claim, i.e., the claim for compensation for damage, that § 78 of the Competition Act prescribes that proprietary or other damage caused by acts prohibited by the Competition Act shall be subject to compensation by way of civil procedure. The provision of the Competition Act does not constitute an independent basic norm for compensation for damage, but it merely repeats the general principle of compensation for damage.

In order to enforce the claim, based on the general composition of delict, the plaintiff has to prove the defendant's act, the damage, the causal link between the defendant's act and the damage, and the unlawfulness of the act. If the plaintiff has proved that the defendant caused unlawful damage to the plaintiff, the defendant is relieved from liability if the defendant proves the absence of guilt. Upon filing the claim for compensation for damage, the plaintiff has relied on § 1045 (1) 7) of the Law of Obligations Act, pursuant to which the causing of damage is unlawful if the damage is caused by behaviour which violates a duty that arises from law.

The causing of damage by the violation of a duty that arises from law is not unlawful if the objective of the provision which the tortfeasor violates is other than to protect the victim from such damage. Consequently, upon reviewing the matter, the County Court must discover, while addressing the plaintiff's claim relative to the tort law, whether the objective of § 16 (1) 1) and § 18 (1) 1) of the Competition Act is to protect the person who has entered into the transaction with an undertaking that is in control of an essential facility against an unreasonably high service price (including the rent) as the damage.

6. As a result of a new hearing, the parties reached an agreement through which the defendant had to pay to the plaintiff €235,000 in damages.

7. The judgment is relevant since it addresses the establishment of competition law by private enforcement. The judgment refers to European Union law and the judgment of the Court of Justice. The judgment is also relevant, since it shows the compatibility of Estonian law with the competition law of the European Union, and therefore the possibility of adjudicating on the cases without any problems, primarily on the basis of national law. The position of the Supreme Court is also of fundamental importance, so that § 78 of the Competition Act, which stipulates that proprietary or other damage caused by acts prohibited by the Competition Act shall be subject to compensation by way of civil procedure, does not constitute an independent basic norm for compensation for damages, but merely repeats the general principle for compensation for damage.

8.6. Anže Ozimek (The Ljubljana District Court)

Case: TUŠMOBILE d.o.o. v. TELEKOM SLOVENIJE d.d. (no. IV Pg 2122/2007)

Date of the Judgment: 13th February, 2015.

1) Brief summary of the facts of the dispute

The parties are telecommunications companies. The defendant is the first Slovenian telecommunications company (incumbent). It is also the proprietor of the only copper network lines in the country. Other telecommunication companies, which were founded later, and the plaintiff is among them, are therefore, at least to some extent, dependent on access to this network and also on the services of the defendant.

The plaintiff brought a stand-alone damage action which alleged the abuse of a dominant position contrary to Article 9 of the Prevention of Restriction of Competition Act ("the Act"; the national equivalent of Article 102 TFEU). The plaintiff alleged that the dominant position was abused by preventing competitors entering the market, denying entrance to the defendant's network and wholesale services. The plaintiff demanded realised loss, ceased profits and future loss. He alleged:

- 1/ a margin squeeze (CS/CPS services and granting internet services over bitstream),
- 2/ unequal treatment in comparison with the defendant's subsidiary (bitstream internet services), and
- 3/ rejecting the infrastructure access for VPN-IP/MPLS, which was possible for the defendant's subsidiary. The plaintiff claimed the damages in the amount of €28,176,227.00

2) Summary of the judicial proceedings

It was a civil procedure with a larger scale of submissions. The Court had to acquire experts' opinions from the economics and telecommunications fields, to determine the relevant market and the scale of the damages. There was no need to examine a large number of the proposed witnesses.

3) Ruling of the Court

The Court granted the plaintiff's request on a smaller scale, granting him €1,709,000.00. The Court ruled in accordance with the Act and not with TFEU, while there was no cross border impact.

Firstly, the Court analysed telephone market and concluded that the defendant had a dominant position in the wholesale market for the transmission and conclusion of calls. The National Communication Agency (the Agency) determined that the defendant had a significant market power in that market. The parameters of the market determination by the Agency were substantially equivalent to the competition law determination of the relevant market. The abuse of a dominant position was conducted by means of margin squeeze. With the help of an economics expert the Court determined that the difference between wholesale costs and retail prices was too small for competition to enter into the market. The method to determine the damage was the margin squeeze test, which is based on a loss that the plaintiff made on a minute's call, while the defendant's price was impossible for the plaintiff due to the margin squeeze. It was concluded that the suffered damage was €50.000.

The next market to consider was the broadband internet service for consumers, where there are three markets to analyse:

- i) retail broadband internet access,

- ii) Local Loop Unbundling (LLU process of allowing multiple telecommunication operators to use connections from the telephone exchange to the customer's premises), and
- iii) wholesale bitstream access.

The Court concluded that the defendant had a dominant position in the retail broadband internet service market with a 50 % market share, while other competitors had less than a 10 % share each. The proportion remained the same, even with new competitors or the expansion of the market. The expert calculated that there was no abuse of dominant position on the LLU market, while there was no negative margin between the wholesale costs and the retail price. In accordance with the broadband access market the Agency concluded that the defendant had a significant market power in it. The parameters of market determination by the Agency were substantially equivalent to the competition law determination of a relevant market. The Court concluded that unfair practice was conducted by non-price discrimination (favourable notifications to the subsidiary about system upgrades, denial of using plaintiff's own modems, while this was possible for the defendant's subsidiary, different malfunction reparation period and the denial of using an application for consumers to test if their connectors were suitable for broadband access). The expert calculated that there was also a margin squeeze on the broadband access market, because the difference between the wholesale price to enter the bitstream services and the retail broadband price was too small. The expert calculated that the realised loss, lost profits and future losses was €1.550.0. It was calculated as the difference between the loss in a *de facto* scenario and a hypothetical profit in a hypothetical scenario (compared with EU 27).

The last abuse of a dominant position, which was part of the judgment, was the unequal treatment of the plaintiff in granting h VPN-IP/MPLS on broadband internet access. It was concluded that the plaintiff was disabled from using more VRN channels, which was possible only for the defendant's subsidiary. In consequence, they were unable to enter the market of business customers and to develop their own added value. The estimated damage, determined with judicial discretion, was €109.00. The expert was not able to calculate the damage precisely, due to questionable assumptions.

4) Personal comment

The defendant is the incumbent in the Slovenian telecommunications market. Other telecommunications companies, such as the plaintiff, were mainly dependent on the defendant. As was decided in this case in some cases, the defendant abused his dominant position.

The definition of a dominant position was, in some cases, based on the decision of the National Communication Agency. The agency would consider the same aspects for a dominant position as those defined in competition law, so there was no reasonable argument not to follow its conclusions.

While the Slovenian telecommunications market is not big, and there are few proper economic experts, and even those that are, are connected with one of the parties. In Slovenian civil procedure the expert is appointed by the court. After an expert opinion is given, parties often oppose the opinion and the expert him/herself, for being close to one of the parties. In this procedure the parties agreed on an expert from abroad, one that is proposed by the judge in advance. Due to the competition dispute's nature, it is often difficult to precisely determine loss and lost profits. In such cases, like the case being presented case too, the damages were determined by the expert's calculations and judicial discretion. Methods of calculating damage required simplification, due to a large amount of relevant information that had to be considered. In some cases the expert could not calculate the damage, due to questionable assumptions, but the Court decided to grant the plaintiff and determined the damage in accordance with the *ex aequo et bono* principal.

8.7. IVANA MLINARIĆ (THE CROATIAN HIGH COMMERCIAL COURT)

The Claimant, Ljiljana Hrnjak of Zagreb v. the Defendant 1. Medika d.d. of Zagreb, and 2. Ljekarne prima Pharma, Split

Introduction

By a judgment of the Commercial Court in Zagreb, the Claimant's claim was rejected. Hrnjak had asked for payment of HRK 500 000 with the legal interest on arrears and the costs for Court proceedings. The Claimant owns a private pharmacy in Zagreb, which discontinued its business on 28th February, 2001. The Claimant asserts that she had suffered damage due to the First Defendant's infringement of competition rules by abuse of its dominant position in the relevant market, and this was established by the decision of the Croatian Competition Agency of 29th September, 2000, and due to the fact that the Second Defendant was unlawfully established in the immediate vicinity of the Claimant, by which the Claimant has also been damaged. Pursuant to the Agency's decision, the First Defendant distorted free competition by abusing its dominant position in the relevant market, by applying dissimilar business conditions to equivalent transactions with particular pharmacy shops, placing them thereby at a competitive disadvantage in the market, in such a manner that the First Defendant has granted longer terms of payment to some pharmacies, depending on their founders. The First Instance Court established, by assessing the presented evidence, that there is no relationship of cause and effect between the harmful act of the First Defendant that has been established by the aforementioned decision of the Competition Agency, and the damage (material and non-material) which the Claimant asserts having been caused to her, and the fact that the First Defendant founded the pharmacy (of the Second Defendant) in the vicinity of the Claimant. Due to the aforementioned, the Court has therefore given a decision that none of the conditions provided by Art. 154 of the Civil Obligations Act have been fulfilled on damage liability.

Against the Decision of the Commercial Court in Zagreb, the Claimant has lodged an appeal.

From the decision of the High Commercial Court of the Republic of Croatia:

The Claimant initiated this proceeding for compensation for damages, which she claims to have occurred due to the fact that the First Defendant abused its dominant position in the market, which caused the damage by loss of profit, the costs of closing down her pharmacy, and by the fact that the Second Defendant (the founder of which is the First Defendant) was unlawfully established in the immediate vicinity of the Claimant, thereby also causing her damage.

A Decision of the Croatian Competition Agency (hereinafter: the Agency) is enclosed in the file, establishing thereby that the undertaking, Medika d.d., has distorted free competition by an abuse of its dominant position in the relevant market by applying dissimilar business conditions to equivalent transactions with particular undertakings (pharmacies), such that the Defendant has been granting longer terms of payment for some undertakings (pharmacies) depending on their founder. Furthermore, the decision indicates that the abuse of the dominant position of the First Defendant lasted permanently from the day of submitting the request to the Agency on 11th March, 1999, to the day of the passing of the Decision on 29th September, 2000 (Sheet 8 of the file).

However, in this proceeding, the Claimant was not requesting damage compensation from those times when she was doing business with the First Defendant (until mid-1997), prior to the Agency's decision sanctioning abuse of dominance by the First Defendant (from 11th March, 1999 to 29th September, 2000). The Court of Appeal stated, in its decision, that in this case, it should be established by this proceeding whether the First Defendant, conducting its business with the Claimant, had been abusing its dominant position in the market, thus bringing the Claimant into a disadvantaged

competitive position in the market. Due to the aforesaid, in order to establish the preconditions of damage liability, as a previous issue, the whole market and the acts of all the market participants should be analysed, in order to establish the situation of competitiveness in the market, in regard to a possible distortion of market competition in this market, as a consequence of which the damage occurred, and the Claimant attempted to remedy this through a Court proceeding. As the Claimant has ceased to conduct business with the First Defendant in 1997, in this proceeding, she should have proved a connection of causality between the abuse of the dominant position of the First Defendant which was established by the Agency's decision, a (possible) disadvantaged position in the market and the damage occurred because of it. Namely, the existence of a competent authority's decision on the abuse of a dominant position of the First Defendant in this proceeding, within the meaning of the provision relating to the burden of proof, requires from the other party (the Claimant) presentation of the facts and suggests that evidence is presented that by infringing competition rules, established in the said decision of the Agency of 29th September, 2000, the Claimant has suffered damage.

The Court of Appeal established that the Court of First Instance correctly assessed the findings and the expert witness for finances and bookkeeping's report, as well as the verbally given explanations in relation to the fact that the abuse of the dominant position of the First Defendant, which was established by the Agency's decision, lasted from 11th March, 1999, to 29th September, 2000, so after that the Claimant (in 1997) had already discontinued her business with the First Defendant; and the fact that the Claimant had no expenses for financing shorter terms of payment, because she had discontinued the ordering of medicinal products from the First Defendant, and the Claimant was not in possession of any business records for the period for which she claimed the compensation for damages. Further, the expert witness for finances and bookkeeping's report states that there is no information on whether the Claimant, after the termination of her business with the First Defendant (in mid-1997) had been purchasing products from other suppliers and under what conditions. The Court of Appeal deemed that the Court of First Instance had clearly explained its conclusion on the indicated fact in the meaning of provisions for the burden of proof. Furthermore, neither had the business of the Second Defendant executed any influence upon the business of the Claimant. Namely, this fact is a clear consequence of the report of the expert witness for marketing, who found that there is no causal connection between the closing down of her pharmacy and the opening of the Pharmacy Prima Pharm (here: the Second Defendant), being brought by the Court of First Instance into a relationship with the provisions of the *Ordinance on terms and conditions for determination of area in which pharmacy shops are to be founded*, which provisions did not include a certain obligatory distance between pharmacies. Due to the aforementioned, the Court of Appeal confirmed the decision of the Court of First Instance.

Comment

Competition in the market may be distorted in many ways, out of which those distortions that are relevant in cases of compensation for damages are classified in one of two groups of actions: those which are caused by the implementation of prohibited agreements and those that constitute an abuse of a dominant position. In the protection of subjective rights, in the case of violation of competition rules, the Croatian legal order has the following means of protection:

1. to declare a contract null and void;
2. to request a prohibition or discontinuation of unlawful behaviour;
3. the imposition of an interim measure, and
4. a request for compensation for damages.

The Competition Act states that in damage claims proceedings that occurred due to an infringement of Croatian and EU competition rules, the Commercial Courts have jurisdiction in First Instance proceedings. The said provision is a consequence of the general subject matter competence of

commercial courts, which is stipulated by Art. 34 Paragraph 9 of the Civil Procedure Act, and the High Commercial Court of the Republic of Croatia decides on the appeal against the decisions of the Commercial Court.

The Croatian Competition Act indicated that undertakings that have infringed the provisions of this Act, or of Arts. 101 or 102 of the Treaty on Functioning of the EU, shall be responsible for the compensation for damages incurred by such infringements. For such acts (compensation for damages) the general rules of extra-contractual damage liability are valid, as stipulated by the Civil Obligations Act, and before the Court they are to be proven to be consistent with the general regulations that are stipulated by the Civil Obligations Act. Action for damages in antitrust infringement proceeding, and the issue of the unlawful acts of the defendant, may appear to be a prejudicial issue, as this is an independent legal entity, which may be able to be substantially resolved, as a major issue before the Competition Agency. Claimants in actions for damage proceedings that are due to antitrust infringements may initiate a proceeding before a Court (seeking compensation for damages) irrespectively of the previous decision of the Agency. However, in cases when there is no decision by the Agency on the distortion of competition rules, it should be indicated that action for damage proceedings are very complex, particularly those that are related to the evidence procedure, as they require a complex factual and economic analysis. In independent proceedings, the burden of proof is on the claimant, who must prove the unlawful acts of the counter party (distortion of competition rules), which is extraordinarily expensive, because in these cases, the market analysis of a certain industry must be conducted, with expert witness research that is very expensive. In these proceedings, the Court may not rely on the Agency's findings, which is the main difference between private enforcement proceedings (actions for compensation for damages) and those that follow the Agency's decision. As in the present case, the Claimant was not represented by an attorney, and has not used all the possibilities of proof, because of which the court of First Instance rejected her claim as being ungrounded. In antitrust damages actions proceedings that are preceded by a decision from a competition authority, the competent court would be bound by the non-appealable and legally valid decision of the Agency, if the decision concerned is directed at an undertaking that appears as a defendant in a compensation for damages proceeding, and even though there are the same unlawful acts.

The relevant provision of Article 1046 of the Civil Obligations Act defines damages as being a reduction of someone's property (simple damage), the prevention of its enlargement (foregone revenue), and the injury of a personal right (non-property damage).

9. The Interaction of competition and regulation in the telecoms industry

9.1. EWA STEFANSKA (THE WARSAW COURT OF APPEAL)

Case note on:

Towarzystwo Budownictwa Społecznego Wrocław spółka z o.o. we Wrocławiu v. Prezes Urzędu Ochrony Konkurencji i Konsumentów [2014]

Abuse of a dominant position (based on the national competition law that runs parallel to Article 101 TFUE)

1. Telekomunikacja Internetowa Sp. z o.o. we Wrocławiu (the internet service provider) applied to Towarzystwo Budownictwa Społecznego Wrocław spółka z o.o. we Wrocławiu (the social housing association) for the conclusion of an agreement allowing it to assemble the telecommunications installation in the association's buildings, with the aim of providing internet services. The Development of Telecommunications Networks and Services Act (national law) provides an obligation for the owners of a building to conclude a contract within 30 days after the request of a provider. The social housing association offered to the new provider conditions that were less advantageous than had been previously granted to its competitors. In particular, the association required payment for access to the premises after completion of the installation and demanded immediate removal of the installation in the case of total loss of customers. The internet service provider disagreed to such disadvantageous conditions and reported the situation to the President of the Office of Competition and Consumer Protection (the national competition authority).

2. On 29th March, 2013, the President of the Office of Competition and Consumer Protection adopted a decision concluding that two of the practices of the social housing association constituted unfair competition and abused a dominant position, and it imposed on the association a financial penalty of 17.383,34 PLN (about €3.850). The competition authority alleged the infringement of Article 9 (1, 2 p 5) of the Act on Competition and Consumer Protection (national competition law), which provides that limiting competition and abusing a dominant position on the relevant market means a violation of the law. In the opinion of the Authority, the association held a dominant position in the local market (City of Wrocław) by making available its owned buildings for the assembling of telecommunications installations with the aim of providing internet services.

3. The social housing association brought an appeal against the decisions of the national competition authority and claimed that, in the contested decision, the relevant market had been badly defined. The applicant alleged, in particular, that a properly defined relevant market should cover the local market (City of Wrocław) to make available buildings for the assembling of the telecommunications installation, with the aim of providing internet services, but not only those buildings owned by the association. In such a case the complainant wouldn't hold a dominant position in the relevant market and couldn't be fined. The association claimed also that its behaviour should be governed by another Act (the Development of Telecommunications Networks and Services Act) and it shouldn't be fined on the basis of competition law.

4. On 21st October, 2014, the Court of Competition and Consumer Protection in Warsaw (the Competition Court) partly amended the decision of the national competition authority, reducing the imposed financial penalty to 15.645 PLN (about €3.475) and, in other section it also dismissed the appeal. According to the Court, the relevant market was properly defined by the Authority because it should be considered rather narrowly. It pointed out that the applicant is not justified in claiming that the relevant market should cover not only wired but also wireless access for the buildings. It explained that these two methods of providing internet are not close substitutes and, for purchasers, they have different characteristics.

5. The Court didn't agree with the applicant's point of view that, because of the principle of freedom of contract, the association shouldn't be forced into concluding unfavourable contracts. It indicated the existence of the doctrine of 'essential facilities', which it may be appropriate to apply in this case. Under this doctrine, a monopolist owning 'a facility essential to other competitors' is required to provide reasonable use of that facility, unless some aspect of it precludes shared access. The basic reasons for a legal claim under this doctrine are: the control of an essential facility by a monopolist; the competitor's inability to, practically or reasonably, duplicate the essential facility; the denial of the use of the facility to a competitor; the feasibility of providing the facility to competitors. According to the Court, the association didn't prove that the refusal to deal was objective and non-discriminatory.

6. Because of an amendment to the Development of Telecommunications Networks and Services Act, on 16th December, 2012, the requirement for free access to the premises after the completion of the installation by the internet provider was abolished. In such a case the Court decided that the association had terminated one of the infringements and it amended the decision of the national competition authority reducing the financial penalty that had been imposed.

7. The social housing association brought an appeal against the judgment of the Competition Court and claimed that, in the contested verdict, the relevant market had been badly defined. The complainant claimed also that its behaviour should be governed by another Act (the Development of Telecommunications Networks and Services Act) and it shouldn't be fined on the basis of competition law.

8. On 10th February, 2016, the Court of Appeal in Warsaw dismissed the appeal. According to the Court the relevant market was properly defined by the Authority and by the Competition Court. The complainant held a dominant position in the relevant market and had abused this dominant position, thus limiting competition on that market. It explained that the existence of special provisions and Acts concerning the obligations of the building owner does not exclude the application of the rules provided in competition law.

Comment: In my opinion, the most interesting aspect of the case presented is the relationship between the competition law and the law relating to the facilitation of the telecommunications networks and services' development. The existence of special provisions and Acts relating to the obligations of the building owner does not exclude the application of the rules that are provided in the competition law. The use of the 'essential facilities' doctrine that specifies when the owner of an 'essential' facility must provide access to that facility at a reasonable price, is also important.

9.2. ELSKE BOERWINKEL (THE GELDERLAND DISTRICT COURT)

Application for the concept of abusively high pricing to Mobile Terminating Access (MTA) tariffs

Case note by Elske Boerwinkel on:

- Rotterdam District Court, July 3rd, 2013, *UPC v. T-Mobile and KPN*³⁴
- The Hague Court of Appeal, March 3rd, 2015, *UPC v. T-Mobile and KPN*³⁵

1. In one of the rare cases concerning the abuse of a dominant position that reached the Dutch civil courts which deal with (alleged) excessive pricing, the judgments to be discussed below provide an example of the application by these national judicial bodies of the European Court of Justice (ECJ)'s two-tiered test for the establishment of abusively high pricing, which was first developed in *United Brands*.³⁶

Background and facts of the case

2. The case concerns the prices charged by mobile network operators (MNO's), in particular, the former Dutch incumbent KPN and its competitor T-Mobile, to telecom and internet service providers, in this case UPC, for providing interconnection services enabling telephone communication between the users of the MNO's mobile network and the users of the land lines offered by service providers like UPC. The prices for these interconnection services, the so-called Mobile Terminating Access or "MTA" tariffs, were higher in the period 2005 – 2010 than they are at present. These tariffs have been the subject of consecutive "market analysis decisions" issued by the Independent Post and Telecommunications Authority ("*OPTA*", currently, but not during the period at issue here, part of the Netherlands Authority for Consumers and Markets, which also encompasses the Netherlands' National Competition Authority) and of rulings by the Administrative High Court for Trade and Industry (*College van Beroep voor het bedrijfsleven*, hereafter referred to as "CBb").

3. OPTA's market analysis decisions sought, to put it briefly, to regulate the wholesale markets for mobile termination by imposing set MTA-tariffs. Without going into the specifics of the various OPTA decisions and CBb rulings (which are based on administrative law, and, in particular, the Telecommunications Act), it is, for the purpose of the civil cases to be discussed here, important to note that since all consecutive OPTA MTA tariff regulating decisions with regard to the period 2005-2010 were successfully appealed to the CBb, it was clear at the time of the Rotterdam District Court's judgment, which is discussed here, that the MTA tariffs charged by the MNO's, had, ultimately, not been subject to *ex ante* regulation during the period in question.³⁷ This does not mean, however, that the market analysis performed for those decisions and rulings that are concerned is irrelevant to the present case.

4. OPTA's and CBb's market analysis was carried out with a view to, *inter alia*, the question of the level at which the MTA tariff ceilings should be imposed in order to overcome the competition problems (potentially resulting in an inefficient retail price structure) that were perceived by OPTA.

³⁴ ECLI:NL:RBROT:2013:5992

³⁵ ECLI:NL:GHDHA:2015:405

³⁶ ECJ in case 27/76, *United Brands v. Commission*, [1978] ECR 207 [1978] 1 CMLR429.

³⁷ In its final ruling of August 31st, 2011 (ECLI:NL:CBB:2011:BR6195), the CBb, after concluding that the MTA tariffs set by OPTA in its latest decision could not be upheld, took matters into its own hands by setting the MTA tariff itself, effective from September 1st, 2012. This does not, however, affect the MTA tariff situation during the period at issue here. The CBb ruling in question has been discussed in a case note by a former ENTrANCE participant, H. Kerkmeester, which is included in the draft 2014 ENTrANCE Working Paper.

One of the cost price methodologies considered, and eventually opted for, by OPTA was the so-called “pure BULRIC” method, BULRIC being short for *Bottom-Up Long-Run Incremental Costs*. The pure BULRIC cost orientation method only allocates the incremental (i.e., the additional) costs of providing a termination service and it does not allow for a mark-up for the non-incremental fixed costs that are borne by the MNO’s (unlike the so-called “plus BULRIC” model, which was advocated as a basis for tariff regulation by some MNO’s). The pure BULRIC method was recommended by the European Commission in its 2009 Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.³⁸ In his ruling dated November 5th, 2010, in summary proceedings that were instigated by (among others) KPN and T-Mobile, with a view to obtaining a preliminary injunction for the duration of the appeal procedure against OPTA’s second MTA decision. The President of the CbB held that, should OPTA have imposed an MTA tariff ceiling that was based on the BULRIC tariff calculated in its second MTA decision, the resulting MTA tariff would not have been considered unlawful by the CbB.³⁹

5. UPC, a telecom service provider offering fixed telephone services to its customers in the Netherlands, had concluded agreements with both T-Mobile⁴⁰ and KPN (hereafter also jointly referred to as “the MNO’s”) relating to the provision of mobile terminating access services, enabling the telephone calls initiated by UPC’s land line customers to be routed to numbers connected through the MNO’s mobile telephone networks (hereinafter referred to as “the agreements”). The agreements included the MTA tariffs to be paid by UPC in consideration of these services. The tariffs paid by UPC, in accordance with the agreements during the 2005-2010 period, were higher than the pure BULRIC tariffs.

Judicial proceedings in two instances

6. Through the civil procedures against KPN and T-Mobile,⁴¹ which were in the First Instance brought before the Rotterdam District Court, UPC sought repayment of the MTA tariff that they had paid to the MNO’s, insofar as it exceeded the BULRIC tariffs, plus compensation for the (additional) damage it allegedly incurred by having to pay an MTA tariff higher than the BULRIC tariffs. UPC based its claims on the doctrines of undue payment, unjust enrichment and “reasonableness and fairness”, as well as the Dutch law equivalent of the tort “breach of statutory duty”. For that purpose, UPC argued that the MNO’s had abused their dominant position in the market for interconnection services (and thereby infringed Article 102 TFEU and its Dutch competition law equivalent, Article 24 of the Competition Act) by charging (and forcing UPC to agree to) prices for the services provided to UPC, which were higher than those permitted by the Telecommunications Act and/or the Competition Act. Its claim that the MTA tariffs charged by the MNO’s were abusive was based solely on the aforementioned regulatory decisions and on CbB rulings concerning the BULRIC methodology.

7. After the Rotterdam District Court had dismissed its claims in their entirety, UPC appealed to the Court of Appeal of The Hague where, as it had in the First Instance, the debate between the parties also centred to a large extent on the question of whether the MNO’s had abused a dominant position as is prohibited by Articles 102 TFEU and 24 of the Competition Act. A novel basis for its claims, which was brought forward by UPC in the appeal, was that KPN and UPC had not only abused their dominant position but had also infringed Article 6 of the Competition Act and Article 101 TFEU by concluding covenants (in which the other MNO’s active in the Netherlands also participated) with regard to the MTA tariffs.

³⁸ OJ 2009 L 124/67.

³⁹ ECLI:NL:CBB:2010:BO3594

⁴⁰ More accurately: T-Mobile’s contractual predecessor.

⁴¹ The two procedures were conducted jointly and resulted in a single judgment.

Rulings of the Courts

8. The Rotterdam District Court commences its assessment of the case by stressing the fact that the amounts paid by UPC to the MNO's during the period at issue are in accordance with the agreements and that, since OPTA's attempts at *ex ante* regulation of MTA tariffs had all failed, the parties were, in principle, free to agree on tariffs. It goes on to find that this freedom to set rates is not without limit and that a party which possesses a dominant position acts unlawfully if it charges an abusively high tariff in contravention of Article 102 TFEU and/or Article 24 of the Competition Act, in which case a civil court may, the absence of any regulatory intervention notwithstanding, order the said party to pay damages or restitution on the basis of tort law or unjust enrichment.

9. The Court then sets out the premise that, for the purpose of obtaining such damages or restitution, the plaintiff, with whom the burden of proof lies, needs to properly substantiate with facts its claim that the tariff in question is, in fact, abusively high. This, the court ultimately rules, UPC has not done, and therefore it did not allow UPC to furnish any (further) evidence, by expert opinion or otherwise, for its claim that the MTA tariffs charged by the MNO's were abusive. This conclusion is reached in the following way.

10. Firstly, the Court assumes, for the sake of argument, that the MNO's have a dominant position in a relevant market for the provision of interconnection services in the Netherlands (which had, predictably, been contested by the MNO's). It then refers to the ECJ's case law on the abuse of dominance through excessive pricing, and, in particular, to its judgment in *United Brands*, from which it follows, according to the Rotterdam District Court, that in order to determine whether a tariff is abusively high one should first examine whether the difference between the tariff and the underlying costs is excessive and, if so, whether the tariff is unfair in comparison to the economic value of the service rendered. The excessive character of the tariff is established objectively by determining the size of the profit margin. The Court points out that UPC has failed to put forward any reasoned argument as to the profit margin that was realised through the MTA tariffs, but has based its claim that the MNO's have abused their dominant position solely on the administrative decisions and the rulings of OPTA and the CbB concerning the BULRIC-system. The BULRIC system, however, is intended to impose on market parties, in advance, a reduction in their tariffs, which is considered desirable from a policy point of view; it is, according to the Court, not suitable for determining, after the event, whether tariffs already paid were abusive. There is a margin between the economically sound minimum at which tariffs can be set (BULRIC) and the maximum at which a tariff may be set (just) without being abusive. Making use of this margin results in extra profit, but it does not follow that doing so amounts to an abuse of dominance. The abuse of dominance requires that profits have been made which are out of all proportion, but there are no concrete indications that this was the case. The Court adds that there are also not any other indications that the tariffs were abusive, since

- a) the facts submitted by the parties make clear that the tariffs charged by the other MNO's that are active on "the Dutch market" were set at the same level as those of KPN and T-Mobile, and
- b) the Netherlands was somewhere in the middle bracket pricewise, if one compares the MTA tariffs charged throughout the EU during the relevant period.

11. The Court's ruling that the abuse of dominance was not established lead to the conclusion that the MTA tariffs paid by UPC found their justification in the agreements, and hence to the dismissal of UPC's claims.

12. The Court of Appeal starts its assessment by quoting extensively from *United Brands*. It also, like the Rotterdam Court, stresses UPC's obligation to furnish *prima facie* evidence of an abuse of dominance.

13. The first argument brought forward by UPC in appeal was that, by examining its allegation of an abuse of dominance solely on the basis of the "excessive pricing" doctrine that was laid down by

the ECJ in *United Brands*, the Rotterdam Court had applied too-narrow a criterion. UPC argued that the tariffs charged by the MNO's, though not excessive, were so high that they enabled the MNO's to obtain economic advantages that they would not have had in a situation of normal competition, and they were therefore nevertheless abusive. According to UPC, these advantages, apart from the higher tariffs themselves, consisted of cross-subsidisation of the MNO's own customers in the form of

- a) free or cheaper mobile phones,
- b) lower rates for mobile telephony, and
- c) attractive call bundles without distinction between calls to mobile and fixed telephone numbers.

The Court of Appeal rejected this argument. It held that in relation to the general rule that to establish abuse of dominance through unfair pricing that the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap benefits which it would not have had in a situation of normal and sufficiently effective competition must be ascertained. This has been refined by the ECJ in *United Brands* for a specific case where the alleged abuse consists of charging too high a price, into the more specific rule that high prices only constitute an abuse if the price is excessive, in the sense that it bears no reasonable relation to the value of the service rendered. Insofar as UPC's arguments must be taken to mean that prices do not need to be excessive to be abusively high, they fail on these grounds. If the price is merely high, but not excessive, there is no abuse, regardless of the purpose for which the profit realised thereby is used, be it dividend payments, the forming of reserves, or, as in this case, investment in a form of cross-subsidisation.

14. The Court of Appeal also did not agree with UPC that it follows from the ECJ's judgment in *Ahmed Saeed*⁴² that, in addition to applying the two-tiered test prescribed by *United Brands*, it should carry out a *separate* assessment on the basis of the principles that underlie the sector-specific regulations for the telecoms sector. The "interpretative criteria" to be derived from these regulatory principles are no more than a sector-specific elaboration and interpretation of the proportionality requirement that is laid down in §252 of *United Brands*, according to the Court of Appeal.

15. UPC's complaint that the Rotterdam Court had wrongfully taken the size of the profit margin as being the measure for determining whether the MTA tariffs were abusive was dismissed by the Court of Appeal, on the grounds that it follows from *United Brands* that the excessive character of a price can be determined by comparing the selling price with the cost price, and thus determining the profit margin, and that other conceivable methods of determining disproportionality will be needed, mainly when determination of the cost price poses major difficulties, which is not the case here. The Court of Appeal furthermore points out that the Rotterdam Court had taken into account the fact that a comparison between MTA tariffs charged in other EU Member States had not yielded any indication that the rates charged by the MNO's had been excessive, and that the MNO's had not suggested any other methods for determining the abusive character of these tariffs.

16. The foregoing led the Court of Appeal to conclude that, in the present case, the assessment on the basis of Articles 102 TFEU / 24 CA is limited to determining whether the tariffs charged are excessive/disproportionate, and that this should be done only on the basis of the profit margin. The Rotterdam Court was therefore justified in limiting its assessment as it did.

17. As far as the BULRIC tariffs, as a measure of the excessiveness/abusiveness of the MTA tariffs, are concerned, UPC argued that the BULRIC tariffs are considerably higher than both

- a) the minimum price for which terminating services may be offered on an economically sound basis, and

⁴² ECJ 11 April 1989 in case 66/86, ECLI:EU:C:1989:140, in particular §43.

- b) the actual costs. The Rotterdam Court had therefore ruled on unsound grounds that the BULRIC method was not suitable as a means for the *ex post* assessment of abusiveness, according to UPC. This line of reasoning was also dismissed by the Court of Appeal, simply by ruling that UPC had not substantiated its claim that pure BULRIC, on which its arguments are based, and which only includes incremental costs (but not the costs of the fixed telephone network), reflects the actual cost of providing the termination services that are at issue. Since UPC had – even in appeal – not brought forward any (other) substantiated argument on the actual costs that were faced by the MNO's, it is not possible to determine the profit margin enjoyed by them through the MTA tariffs, which lead to the conclusion that the alleged excessiveness and abusiveness of the MTA tariffs was not established. All of UPC's claims founder on this verdict.

17. The alleged infringement of Article 101 TFEU / 6 CA was not examined by the Court of Appeal, as it was not brought forward by UPC before the oral hearing and during the appeal procedure, which was considered too late under civil procedural law.

Comment

18. Although the Court of Appeal of The Hague had applied the ECJ's two-tiered test from *United Brands* previously, in a case concerning docking dues charged by the Port of Rotterdam⁴³, this seems to be the first case where Dutch civil courts, and especially the Court of Appeal, really concern themselves with questions on its interpretation and (exclusive) applicability.

19. Particularly noteworthy is the decisiveness with which the Court of Appeal – apparently without even contemplating seeking a preliminary ruling from the ECJ – infers from *United Brands*, and categorically states, that high prices can only ever be considered abusive if they are excessive in the sense that they are disproportionate to the economic value of the service or product paid for. This shows that the ECJ's judgment in its iconic "Banana case", which is best known for its usefulness as a wonderfully easy-to-explain and evocative example of market definition (whatever economists may think of "babies and old people" as a distinct market for fruit!), has not lost its usefulness as clear and succinct guidance on other elements of competition law also, even after almost fifty years.

20. It is also interesting to note the distinction made by the Courts, in both instances, between the goals of *ex ante* price regulation in a newly liberalised market, and the *ex post* assessment of the abusive nature of prices and the ramifications of this distinction for the usefulness of the BULRIC method, which is sanctioned by OPTA and the CBB, as a means for assessing abusiveness, which UPC seems to have failed to recognise. What it boils down to, it seems to me, is that UPC has, while preparing its arguments in the present case, lost sight of the fact that, while obliging undertakings with a significant market position to offer a service without making a profit may be appropriate from a regulatory point of view (as the CBB ruled with respect to BULRIC), it does not follow that they are therefore prohibited from making a profit by competition law. Through its exclusive reliance on the decisions and rulings concerning BULRIC, UPC also apparently neglected, even in the Second Instance, one of the main principles of civil procedural law: the obligation to substantiate a claim with facts. Its offers to submit expert opinions as evidence may be passed over by the Court because it had failed to elaborate which were the facts (pointing towards abusiveness in accordance with the two-tiered test) it wished to prove. Due to this, the questions as to whether the MNO's did have a dominant position between 2005 and 2010, and whether the MTA tariffs were indeed excessive, will likely remain unanswered, as UPC has exhausted the last instance where a court of law may rule on the facts.

⁴³ Judgment of June 1st, 2010, ECLI:NL:GHSGR:2010:BM6398

9.3. EVA VIHAR KRANJEC (THE LJUBLJANA DISTRICT COURT)

CASE NOTE - JUDGMENT OF THE DISTRICT COURT OF LJUBLJANA⁴⁴, No. IV Pg 4477/2012 OF 19.12.2014

1. The parties, facts of the dispute, the plaintiff's claim and the defence

1.1. The parties

The plaintiff, A. is a company providing telecommunications services between telecommunications operators. It has a contractual relationship with several foreign operators in relation to the between-network connectivity. The operators forward to the plaintiff the traffic (in this case, mobile voice calls) which start in their network and end in the network of the defendant, with whom the plaintiff also has a contractual relationship.

The original defendant, M., was a subsidiary of the company, T., which is a former monopolist in the telecommunications market and, at the time, was still the biggest telecommunications operator in Slovenia in the fixed lines telecommunications market. Its subsidiary, M., had the biggest market share in the mobile telecommunications market. During the process of this trial the company, T., had merged with the original defendant, M., so the trial continued against the company, T.

1.2. The plaintiff's claim

The plaintiff explained that the operators of the outgoing-voice call-network pay the plaintiff the agreed contractual payment for its services (per minute of traffic). The plaintiff forwards the voice calls from their network to the network of the other operator, in this case, the defendant's network. The defendant ends the incoming voice calls and charges the plaintiff a fee per minute for the forwarded traffic. The call to the defendant's network user can only be ended by the defendant, therefore, the plaintiff claims that the defendant is a 100% monopolist in the market for ending voice calls for its users, regardless of whether the calls ending in its network have their origin in Slovenia (national voice calls) or in another country (international voice calls, both EU-origin and out of EU origin).

The essence of the plaintiff's claim is that, in the time period from 2006 until 2009, national and EU price regulation covered the ending of both national and international voice calls. The fee that the defendant charged the plaintiff in that time period should therefore have been equal for both types of calls. The defendant, however, charged the plaintiff more for the voice calls of international origin than for national voice calls until September 2009.

The plaintiff was seeking damages in the amount of €1,502,242, 49, as the difference between the higher fees that were charged for ending international calls and the lower fees for ending national calls, which, in the plaintiff's opinion, should be charged at that rate. The claim was founded on several grounds:

- a) the Defendant's breach of sector regulation, the legislation of the EU and the regulation Acts of the national regulatory agency – APEK⁴⁵;
- b) An abuse of a dominant position (breach of ZPOMK-1⁴⁶);

⁴⁴ Court of First Instance in Slovenia.

⁴⁵ APEK is the Slovenian National Regulatory Agency for Post and Electronic Communications.

- c) Anticompetitive behaviour (breach of ZVK⁴⁷);
- d) On other contractual grounds (Articles 35. and 45., 190. and 443. OZ⁴⁸).

1.3. The defence

The defence was on the grounds that:

- a) The price of ending voice calls was not regulated in the given period, so there was no breach of sector regulation, the legislation of the EU or the regulation Acts of APEK;
- b) Different fees for ending national and international voice calls are not an act of anticompetitive behaviour; and c) There was no abuse of a dominant position because the market for ending voice calls in the network of the defendant is not a relevant service market.

2. 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 there was no price regulation for both types of voice call ending at that time (that is, until September, 2009) neither in Slovenia, nor in the EU, and the defendant did not abuse his dominant position. The plaintiff also did not meet his burden of persuasion (referring to the statements) and burden of proof (referring to the evidence) on other grounds.

3. The plaintiffs' appeal

The plaintiff appealed against the judgment in February, 2015. The case is currently awaiting the decision of a Higher Court on the plaintiff's appeal.

4. Facts of the case and the Court's decision

4.1. Facts admitted by both parties

The contract on inter-network-connectivity between the parties was signed on 29.6.2006 and with this contract the higher fee for ending international calls was agreed between the parties. After the APEK's Regulations Act, No. 38294-9/2009-3 dated 24.9.2009 (in continuance of the text: APEK Act 2009) was issued, the defendant started charging the plaintiff equal fees for ending both international and national calls. Most telecommunications operators at that time had a practice of charging different prices for fees for ending national and international calls.

4.2. The facts as identified by the Court in the evidence procedure, and the Plaintiff's lack of burden of persuasion and burden of proof

a) There was no breach of sector or EU regulation, no breach of APEK's regulatory acts

From the Regulations Acts that APEK issued in the time period from 2006 to 2009, the Court found that there was no compulsory price regulation for the ending of international voice calls, neither on the EU level, nor on the national level. At the EU level, it was only recommended that there should be no

(Contd.) _____

⁴⁶ Prevention of the Restriction of Competition Act; Ur. l. RS, št. 36/08 and following changes.

⁴⁷ Protection of Competition Act; Ur. l. RS, št. 18/93 and following changes.

⁴⁸ Obligations Code; Ur. l. RS, št. 83/01.

difference in fees. The prices for ending both types of calls were regulated and equalled with the APEK Act 2009, and the defendant was charging equal fees for both types of calls from that moment onwards. The plaintiff's statement about why a point of inter-network connectivity, based in Slovenia, would transform a call from an international to a national call was also not explained by the plaintiff. It was also not proven by the plaintiff that, in this particular time period, the defendant would have been charging equal fees for ending both types of call to other operators who had been ending calls in the defendant's network.

APEK Act, No. 3824-14/2007-3 dated 13.4.2007 (APEK ACT 2007) equalled the ending of voice calls that have their origin on a fixed network and those that originated from mobile network. Calls forwarded by the plaintiff were from both mobile and fixed networks and cannot all be regarded as calls from a fixed network, since the plaintiff was not registered for service on a fixed location at that time. The plaintiff should also have differentiated calls for a period up to 01.9.2007 so as to show whether the defendant had or had not properly considered both types of call, but failed to do this (lack of persuasion and lack of proof).

b) There was no abuse of a dominant position

The Court appointed an expert witness from the economics field to determine the relevant services market for the ending of international calls between September, 2006, and September, 2009. The expert witness discovered that the defendant was acting independently, if compared with other participants in the market, but that the national and international calls were not a part of the same market, since they cannot be substituted. The expert witness also discovered that the middleman, i.e. the plaintiff, has absolutely no market power, because all of the changes in prices are passed up the chain to the foreign operator. As the price of the outgoing call is paid for by the end user - the caller - the end user who is being called has no economic interest in finding another alternative operator, There is therefore no substitutability on the demand side,. There is no other alternative to ending the calls made by the defendant's network's users other than to end them in the network of the defendant, M. Since the relevant geographical component of the market is the territory of the Republic of Slovenia, the expert witness concluded that in the given matter the relevant services market is the market for ending international calls in the network of the defendant, M.

Regarding the state of the competition on each level, the expert witness analysed the passing on of the prices for call ending into the prices of the middlemen operators. In a case where the plaintiff would want to raise its prices to operators so as to make a profit, the operators would have found other middlemen operators, so the plaintiff would be left out of the traffic. The middlemen are picked by the operators at an "auction", which means that the costs of forwarding calls is almost the same as the cost of ending calls. This means that the competition is the greatest between middlemen operators, but, on the other hand, the defendant is the most independent in the chain, since it is the only one that can end calls into its network and can therefore determine the prices for that independently. Since the expert witness reached the conclusion that the ending of national and international calls were two separated markets at the time, the Court ruled that there was no abuse of a dominant position, since different prices for the ending of international and national calls are not part of the same market.

c) There was no anticompetitive behaviour

The Court ruled that the plaintiff did not meet the required burden of persuasion, since his claims were completely general, and he did not give any facts that would give all of the elements that are required with the general clause from Article 13/(2) ZVK.⁴⁹ The Court also stated that charging different prices for different services is a typical market category and that being so, it is a part of the competition law.

⁴⁹ Article 13/(2) ZVK: „Anticompetitive behaviour is an act of a company operating in the market, which is contrary to good business practices and which causes, or threatens to cause, damage to other market participants. “

5. Comment

The respective judgment shows how important it is for the plaintiff to be able to provide the Court with enough facts and proof. Many of the grounds on which the damages had been sought in this case, have been rejected by the Court, mostly on the ground that the plaintiff was unable to meet the required burden of persuasion and the burden of proof. It also shows that not all acts of formerly monopolist companies, or their associated companies, which disable other participants in the market from making (bigger) profits, are due to breaches of the competition law.

10. Unfair competition and State aid law

10.1. EVA CERÓN RIPOLL (THE SPANISH GENERAL COUNCIL FOR THE

THE IMMOVABLE PLOT!

- **Request for a preliminary ruling — Competition — State aid — Article 107(1) TFEU — Concept of ‘State aid’ — Property tax on immovable property — Tax exemption).**
- **Case C-522/13, REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado**

Contencioso-Administrativo No 1 de Ferrol (Spain), made by decision of 12th April, 2013, received

at the Court on 1st October, 2013,

- **Judgment of 9.10.2014- Case C- 522/13**

1. As money makes the world go round, NAVANTIA is an undertaking that is wholly owned by the Spanish State, and has a domestic market, NAVANTIA is the strategic industrial base of the Spanish Navy, and therefore our company has a vocation to invest in technology and innovation and to be the driver of naval activity in Spain. Thanks to NAVANTIA’s competitiveness and its core values, the company has received orders from the navies of foreign countries (such as Australia, Norway, Malaysia, Chile, Venezuela, India, Thailand, Egypt, etc.).

NAVANTIA owns a shipyard that is located in the territory of the Concello de Ferrol, covering an area of 932 348 m². In accordance with an agreement concluded on 6th September, 2001, the Spanish State, as owner of the plot of land on which the shipyard stands, made it available to NAVANTIA by transferring the rights of use in return for a payment of €1 per year (‘the 2001 Agreement’).

The property tax on that plot of land, which amounted to €590,308.77 for the year 2010, was levied by the CONCELLO DE FERROL for the financial years prior to 2008. In accordance with Article 61(1)(d) of the Law of 2004, the property tax is payable by the Spanish State, as the owner of that land, and given that only the rights of use has been transferred to NAVANTIA. Under the 2001 Agreement, the Spanish State has to pass the amount of that tax on to NAVANTIA and, accordingly, it is NAVANTIA which must ultimately bear the tax burden. With respect to the financial year 2008 and following years, the SPANISH STATE and NAVANTIA applied to the Concello de Ferrol, on the basis of Article 62(1) (a) of the Law of 2004, for an exemption from the property tax payable for the land on which the naval shipyard is established. That application was refused. The refusal was contested before the competent courts and it is that dispute which is the subject of the main proceedings.

2. By a judgment of 22nd October, 2012, the Tribunal Superior de Justicia de Galicia (Supreme Court of Justice for Galicia, hereafter, TSJG) set aside an earlier judgment of the Juzgado Contencioso-Administrativo No 1 de Ferrol (Court for Contentious Administrative Proceedings No 1, Ferrol; or ‘the Referring courthereafter, JCA) of 25th November, 2011, dismissing the action brought before it, since the TSJG held that it was necessary to grant the tax exemption sought. The case was therefore referred back to the JCA.

3. Then, the JCA found that since the exemption would be granted through public resources to a Company owned by the State, it would be capable of distorting, or threatening to distort, competition. The Referring Court found that NAVANTIA would have a selective advantage and be privileged in the shipbuilding business, since their budget would be lightened and, on the contrary, this would produce a loss of income for the CONCELLO DE FERROL.

3. Under those circumstances, the Juzgado Contencioso- Administrativo N° 1 de Ferrol (JCA) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling and to ask, in essence, whether, under a proper construction of Article 107(1) TFEU, the exemption from property tax of a plot of land belonging to the State and made available to an undertaking whose capital is wholly State-owned, which produces, from that plot of land, goods and services that may be traded between Member States on markets that are open to competition constitutes state aid that is prohibited by that provision; taking note that the Court is not called upon to consider whether it is compatible with Article 107 TFEU for a Member State to make a plot of land available to a private undertaking for a token price.

4. According to the settled case-law of the Court, for a measure to be categorised as ‘aid’, within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled (see, to that effect, the judgment in *Commission v Deutsche Post*, C-399/08 P, EU:C:2010:481, Paragraph 38, and the case-law cited).

5. Accordingly, for a national measure to be categorised as state aid within the meaning of Article 107(1) TFEU, there must, firstly be an intervention by the State or through State resources; secondly, the intervention must be liable to affect trade between Member States; thirdly, it must confer an advantage on the recipient (judgment in *Commission v Deutsche Post*, EU:C:2010:481, Paragraph 40, and the case-law cited); and fourthly, it must distort, or threaten to distort, competition (judgment in *Commission v Deutsche Post*, EU:C:2010:481, Paragraph 39, and the case-law cited).

6. On those grounds, the Court (Seventh Chamber) ruled: Under a proper construction of Article 107(1) TFEU, the exemption from property tax of a plot of land belonging to the State and made available to an undertaking whose capital is wholly State-owned, which produces, from that plot of land, goods and services that may be traded between Member States on markets that are open to competition may constitute state aid that is prohibited by that provision. It is for the Referring Court, however, to determine whether, in the light of all the relevant evidence in the dispute before it, assessed by reference to the interpretative guidance provided by the Court of Justice of the European Union, that tax exemption is to be categorised as state aid within the meaning of that provision.

7. **Comment:** Thinking out loud, how did the JCA interpret this? After searching for a while, I succeeded in finding the judgment that was rendered 8th January, 2015, by the Referring Court, which set aside the action brought before it that applied by the SPANISH MINISTRY OF DEFENCE and NAVANTIA, separately, calling upon the meaning, in the light of the Article 107(1) TFEU, and, accordingly, to the jurisprudence of the Court of Justice (C- 399/08, C- 6/12, C 71/09, C- 76/09, C- 78/08, C- 80/08, among others) and concludes (FD4°) saying that “(...) Applying the previous pronouncements to the present subject, [the Court] must conclude by pointing out that we are facing a public measure through an exemption of property tax for NAVANTIA, of whose activity, besides military defence, it is more than its half of their volume of business.” Finally, I share my thoughts and agree with Judge Pablo Álvarez López, as he expressed it in the FD6°, that NAVANTIA cannot be the beneficiary of the exemption sought, since that exemption would be granted through public resources to a company that is owned by the State and this would mean that such a judgment would enable it to be capable of altering competition.

10.2. ENRIQUE GABALDÓN (THE SPANISH CONSTITUTIONAL COURT)

STATE AID IN FAVOUR OF THE CINEMATOGRAPHIC INDUSTRY OF A MEMBER STATE

1) Summary of the facts of the dispute

The Spanish Government's Royal Decree number 1652/2004 of 9th July, 2004, which approved the Regulation governing compulsory investment for the pre-funding of European and Spanish cinematographic feature films, short films, and films made for television.

This Royal Decree put into effect part of the Spanish legislation in the field of television and cinematography. In essence, these provisions imposed on television operators the obligation to earmark each year 5% of their operating revenue from the previous year for the funding of European cinematographic films and films made for television. 60% of that funding had to be used for productions whose original language was any one of the official languages of Spain. The aim of Royal Decree 1652/2004 was to resolve certain uncertainties arising as a result of the legislative amendments that had previously been introduced, such as how to calculate the turnover of television operators and how to calculate the amount earmarked for acquiring European cinematographic productions.

The Decree also refers to the Community's legal framework: Council Directive 89/552/EEC of 3rd October, 1989, on the coordination of certain provisions that are laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, and this was amended by Directive 97/36/EC of the European Parliament and of the Council of 30th June, 1997.

2) Judicial proceedings

On 16th September, 2004, the Unión de Televisiones Comerciales Asociadas (Union of Associated Commercial Television Companies) brought a contentious administrative action before the Spanish Supreme Court, in order to annul the Royal Decree. The applicant considered that the Royal Decree and the Articles of the national laws on which it was based, ought to be set aside, due to the fact that they all infringed a number of the provisions of the Spanish Constitution and also certain provisions of European Union law.

According to the the Spanish legal system, in those cases relating to a general provision that has been adopted by the Consejo de Ministros (Council of Ministers), it is for the Sala de lo Contencioso-Administrativo (Chamber for Contentious Administration) of the Supreme Court to rule on direct actions, as the Court of First and Last instance, reviewing the lawfulness of the acts of the Government. By virtue of the principle of supremacy, in the course of that legal review, the Supreme Court consistently takes EU law as a ground for review.

It is important to note that the applicant submitted a further plea in its application, demanding a reference for a preliminary ruling to be submitted to the Court of Justice. Having heard all the parties concerned in the procedure, the Supreme Court decided to refer the following questions to the Court of Justice, pursuant to Article 234 EC (now Article 267 TFEU):

A) Does Article 3 of Council Directive 89/552/EEC of 3rd October, 1989, on the coordination of certain provisions that are laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30th June, 1997, permit Member States to impose on television operators the obligation to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television?

B) If the reply to the previous question is affirmative, is a national measure which, in addition to laying down the pre-funding obligation referred to above, reserves 60% of that compulsory funding for original Spanish-language works compatible with that directive and with Article 12 EC, taken in conjunction with the other special provisions to which that Article refers?

C) Does an obligation that is imposed by a national measure relating to television operators, to the effect that the latter must earmark a percentage of their operating revenue for the pre-funding of cinematographic films, where 60% of that amount must be earmarked specifically for original Spanish-language films, the majority of which are produced by the Spanish film industry, amount to state aid in favor of that industry within the meaning of Article 87 EC?

3) Ruling of the Court

In its judgment, the Court (Second Chamber) of 5th March, 2009, in Case C-222/07, considered that, by its first and second questions, the Referring Court had asked whether the Directive and, more particularly, whether Article 3 thereof, and Article 12 EC, were to be interpreted as meaning that they preclude a measure that is adopted by a Member State, such as that at issue in the main proceedings: requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television, and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State.

The Court noted that the Directive does not contain any provision governing the extent to which a Member State may require television operators to earmark part of their operating revenues for the funding of European cinematographic films and films made for television, or those whose original language is one of the official languages of that Member State. Pursuant to Article 3 (1) of the Directive, the Member States remain free to lay down more detailed, or stricter, rules with regard to television broadcasting bodies that are under their jurisdiction. Nevertheless, when exercising that right, they must respect the fundamental freedoms that are guaranteed by the EC Treaty. Finally, the Directive does not completely harmonise the rules relating to the areas which it covers, but it lays down minimum rules for broadcasts which emanate from the European Community and which are intended to be received within it. It follows that, irrespective of whether the measure adopted by a Member State, such as the measure at issue in the main proceedings, is in an area covered by the Directive, the Member States retain, in principle, the jurisdiction to adopt such a measure, provided that they respect the fundamental freedoms guaranteed by the Treaty.

Consequently, the answer to the first and second questions is that the Directive and, more particularly, Article 3 thereof and Article 12 EC must be interpreted as meaning that they do not preclude a measure that is adopted by a Member State, such as the measure at issue.

The third question posed the problem of state aid.

The Court considers that by its third question, the Referring Court asks, essentially, whether Article 87 EC is to be interpreted as meaning that a measure adopted by a Member State, such as the measure at issue in the main proceedings, constitutes State aid in favour of the cinematographic industry of that Member State.

On that question, the Court reminds us that, in accordance with settled case-law, classification as aid requires all the conditions that are set out in Article 87 EC to be fulfilled, that is to say, first, there must be intervention by the State, or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient and, fourth, it must distort, or threaten to distort, competition (Case C 280/00 *Altmark Trans* and *Regierungspräsidium Magdeburg* [2003] ECR I 7747, Paragraphs 74 and 75, and the case-law cited).

More particularly, it is clear from the case-law of the Court that only advantages that are granted directly or indirectly through state resources are to be considered aid within the meaning of Article 87(1) EC. The distinction made in that provision between aid that is granted by a Member State and aid that is granted through state resources does not signify that all of the advantages granted by a state, whether financed through state resources or not, constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the state and those that are granted by a public or private body that is designated or established by the state (Case C 379/98 *PreussenElektra* [2001] ECR I 2099, Paragraph 58 and the case-law cited).

It is not apparent that the advantage given by way of a measure that is adopted by a Member State, such as that at issue in the main proceedings, to the cinematographic industry of a Member State, constitutes an advantage granted directly by the state, or by a public or private body designated or established by the state.

Such an advantage is the result of general legislation requiring television operators, whether public or private, to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television.

Furthermore, since a measure adopted by a Member State, such as the measure at issue in the main proceedings, applies to public television operators, it does not appear that the advantage in question is dependent on the control exercised by the public authorities over such operators (by analogy, Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others v Commission* [1988] ECR 219, Paragraph 37).

Consequently, the answer to the third question is that Article 87 EC must be interpreted as meaning that a measure adopted by a Member State, such as the measure at issue in the main proceedings, does not constitute state aid in favour of the cinematographic industry of that Member State.

After that, the Spanish Supreme Court adopted the resolution of December 9th, 2009.

In that resolution, the Supreme Court decided that it would still not rule on the procedure, but would refer the questions to the Spanish Constitutional Court, asking for a preliminary ruling pursuant to the constitutionality of the second subparagraph in Article 5 (1) of Law 25/1994 of 12th July, 1994, transposing into Spanish law the Council Directive 89/552/EEC of 3rd October, 1989, on the coordination of certain provisions that are laid down by Law, Regulation or Administrative Action in Member States that relate to the pursuit of television broadcasting activities. This is precisely the amendment that imposed on television operators the obligation to earmark each year 5% of their operating revenue from the previous year for the funding of European cinematographic films and films made for television.

The Supreme Court considers that it will have to rule according to the judgment of the Court of March 5th, 2009, but will also have to analyse the constitutionality of the Decree that is being challenged.

According to the Supreme Court, imposition by law inversions (on revenues, not benefices) to private companies is a limitation to their liberty, liberty that is guaranteed by Article 38 of the Spanish Constitution.

Unfortunately, there is still no decision from the Constitutional Court.

4) Personal comment

From the perspective of European Law, the Court sustained the creation of a legal framework for the exceptions to the free movement of services in order to support audiovisual production in the EU, which can be achieved by means of an obligation to contribute to investment in European production.

The Court appreciated that there was a restriction on several fundamental freedoms that are guaranteed by the Treaty: freedom to provide services, freedom of establishment, the free movement of capital, and the freedom of movement for workers. Nonetheless, the Court considered that such a restriction may be justified when it serves to address reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues, and does not go beyond what is necessary in order to attain it.

By contrast, the Court established that the kinds of aids to the cinematographic industry that are the object of the procedure were not an advantage that was granted directly by the state or by a public or private body that is designated or established by the state, but is the result of general legislation requiring television operators, whether public or private, to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television.

The ruling of the Spanish Supreme Court, after the judgment of the European Court, highlights two important questions from recent years:

- 1) The position and relationships between the High Courts of Justice of the Member States and the Court of Justice of the European Union. After the judgment from the Court, in a preliminary ruling, it is still possible to challenge before the Constitutional Court any national law that transposes European law.
- 2) The exceptions to the general prohibition of state aids.

Furthermore, in my view, the position of the European Court in excluding from the state aids those obtained through private funding but which are imposed by law, means it is not easy to place in the frame of a general interdiction of state aids.

10.3. ELENA ROSALINOVA (THE SOFIA DISTRICT COURT)

Misleading Advertising: “Praktiker” case

Misleading advertising is a form of unfair competition under the Bulgarian Law on the protection of competition. In 2014, the National Competition Authority initiated proceedings against “Praktiker” – the owners of a chain of stores of the do-it-yourself (home improvement) type. Briefly, the facts are the following:

In the autumn of 2013 the chain of do-it-yourself stores, “Praktiker”, launched an advertising campaign announcing it with the slogan: “- 22 % off everything”. The company used different types of advertisements to spread the promotion. They used a TV and radio spot to make the offer popular among the customers. On the radio spot, the promotion was announced as “-22 per cent off everything from 17th to 23rd November” with no additional information about the general conditions of the offer. The radio spot was broadcast 1,196 times on various radio stations all over the country.

The TV spot presents an image of the logo of the company, “Praktiker”, and the text “-22% off everything”. On the bottom of the screen a text message appeared that passed across the TV screen with high velocity, so it is impossible for the human eye to read its content. The text is accessible only if the “pause” function is applied, provided that the TV device is set up with this available. The spot was broadcast 168 times on the channels that are managed by one of the national TV media, BTV. If the pause function is used the text message warns customers that the rebate is not applicable to stocks, to other promotional Articles and couldn’t be added to other rebates.

The advertisement was also promoted on the web page and web store of “Praktiker” via the World WideWeb. The promotion and the rebate “-22 % of everything” are indicated on the web page with a banner. To be informed about the conditions of the promotion and the specific restrictions for its application, the average customer has to click on the banner and to be redirected automatically to a space reserved for the general condition of purchase.

On site, in the stores, the promotion was made public with big posters in front of the store entrances and on big boards inside the store. The posters and the boards illustrating the promotion didn’t contain information about the general conditions of the offer and the restriction on the range of items to which it is applicable. The internal company policy and the market strategy of the company implement the use of different colours to indicate the difference between Articles that are included in a promotional offer and that are on sale, on the one hand, and those with regular prices, on the other. The colours of the board and of the labels vary: for stocks being sold at regular prices big white boards are used, and small yellow labels are put on the stand. Items with permanently low prices are indicated by big yellow boards and small yellow labels in a red frame. Promotional items, other than those with a permanently low price, are indicated by big red boards, and there are small red labels on the stand. All of these stocks are excluded from the promotion “-22 % of everything”, as well as stocks. The National Competition Authority and the Supreme Administrative Court observed that the average customer could be easily misled regarding both the value of the stock and the reductions in prices pointed out by the boards and labels in different colours but, at the same time, the customer is deprived of prior information about the significance of each colour and its correlation with the price of the stock. To be aware of the general conditions of the offer “-22% of everything” and the substance of the coloured labels and boards, the customer has to consult the general conditions on the web page or to solicit information from the staff in the store, which presumes diligence that he is not obliged to undertake, according to the principles of good trade practices. A similar observation was made by the Supreme Administrative Court about the text on the TV spot, which was produced at high velocity and which impedes the customers from reading it, namely, that the customer is not obliged to use the “pause” function on the TV to make the text visible, and this is all the more true, given that not all TV devices are furnished with this function.

Article 33, Par. 1 of the Bulgarian Law on the Protection of Competition defines misleading advertising as “any advertising which in any way, including its presentation, deceives, or is likely to deceive, the persons to whom it is addressed or whom it reaches and which, by reason of this, is likely to affect their economic behaviour or, for these reasons, damages or is likely to damage a competitor.” The Law on the Protection of Competition outlines three supplementary criteria about the misleading character of advertising:

1. the characteristics of the goods and services, such as: their availability, appearance, execution, composition, method and date of manufacture of the goods or provision of the services, usage expiration date, ways of usage, quantity, geographical and commercial origin, the results to be expected from their use, the results and substantial features of tests or checks that are carried out on the goods or services;
2. the price or the manner of its formation and the conditions on which the goods are supplied and the services provided;
3. data about the advertiser or the advertising agency, such as: name or trade name, address or seat; address of management; property; industrial and intellectual property rights; awards or distinctions.

In the present case, “Praktiker”, the Supreme Court stated that the advertising is treated as misleading because it has become public and reaches the customers and can, generally, mislead a significant sector of them. The advertisement is *prima facie* misleading with its message “-22 per cent off everything” which induces the delusion among customers who would logically associate the reduction of 22 percent with all the products that are offered in the Praktiker stores. The broadcast advertisement lay particular stress on the phrase “on everything” which attracts the attention of the customers and reflects on their perception and, finally, on their choice. The Court underlined that the price is one of the most important features of products in determining the consumer’s demand. The Court reiterates the conclusion of the Bulgarian Competition Authority of a breach of the rules of fair competition that is based on an imperative prohibition of misleading advertising. This activity is contrary to good faith business practices and harms fair competition, and it may also cause damage to competitors by exerting an influence on customers’ conduct.

The relevance of the “Praktiker” case is in the complex nature of the rights that are affected by the infringement – both the rules of fair competition and consumers’ rights. According to Article 6 of Directive 2005/29/EC of 11th May, 2005, concerning unfair business-to-consumer commercial practices in the internal market, and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), “commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”. As a resumé, the conditions are so attractive that the average consumer takes “a transactional decision that he would not have taken otherwise”, i.e., if he were aware of the mere conditions of the deal. The Commission on Consumer Protection also imposed a pecuniary sanction on “Praktiker” for the infringement of consumers’ rights, which was defined as misleading commercial practice.

10.4. VLADIMIR BEREZOVSKIJ (THE VILNIUS DISTRICT COURT)

Case note on:

Joint stock company (hereby referred to as - JSC) “AUTO EXPRESS” vs I.B. and JSC “TIROLA”

Vilnius District Court Judgment No. 2-1322-431/2014, of 20th June, 2014

Lithuanian Court of Appeal Judgment No. 2A-183-516/2015, of 16th April, 2015

Lithuanian Supreme Court Judgment No. 3K-7-6-706/2016, of 5th February, 2016

1. This case deals with the interpretation and application issues relating to material legal norms regulating unfair competition and the repayment of damages. A civil claim due to damages that were related to the revealing of a trade secret, as well as actions relating to unfair competition, was submitted and based on Article 1.116 of the Civil Code (hereby referred to as – the CC), legal norms regulating civil liability owing to the competition law, and the above mentioned code.

2. Article 15 of the Law of the Republic of Lithuania on Competition stipulates a ban on unfair competition. Paragraph 3 of Part 1 of this Article prohibits any actions that are contrary to fair commercial practice and good custom when the said actions may compromise another legal entity's opportunities to compete, including ... the use, transfer or publication of any information that constitutes another legal entity's trade secret, without the consent of this legal entity ... Part 4 of the Article stipulates that persons who become aware of a trade secret due to an employment relationship or other contractual relationship with a legal entity, may use this information within no less than one year after the termination of the employment relationship or other contractual relationship, unless the law or the contract provide otherwise.

3. In this case, the dispute started between JSC “AUTO EXPRESS” and I.B., as well as JSC “TIROLA”, because the latter attempted to gain unfair competitive advantage illegally through trade secret infringement. The plaintiff, JSC “AUTO EXPRESS”, asked for €185,469 of damages to be paid by the defendants, I.B. and JSC “TIROLA”, and in addition the interest and litigation costs. The plaintiff indicated that the company was established on 3rd March, 2011, and the defendant, JSC “TIROLA”, on 22nd August, 2011. The activities of the companies are the transfer of cargos and logistics. The defendant, I.B., worked in the plaintiff's company as a sales manager from 21st September, 2011, to 15th March, 2012. She got to know the confidential information list, the management system for quality and the environment. She also signed confidentiality provisions, regarding the secrecy of the company's trade, in the employment agreement (Items 9.4., 9.5.), on 21st September, 2011. The plaintiff used the above mentioned measures to protect the company's confidential information. While working in the company, the defendant, I.B., disposed of the information about the plaintiff's clients, cargos, the nature of orders, transfer prices, etc. This information is considered to form part of the plaintiff's trade secretx.

4. The defendant, I.B., started working at the defendant's, JSC “TIROLA”, on 16th March, 2012, which then developed unfair competitive activity, i.e., while using the plaintiff's trade secrets she provided analogous services for the clients of the plaintiff. For this reason, there was a decrease in the number of the plaintiff's orders, as well as a fall in income from the clients A. K., Holwest Est OU, Hoi-Con GmbH, Perosha, Wal-mar, Globalply, DLH A.S., Interplus Services Ltd ., the S.C. Esprit Group, PFMK OOO, Technostar, Skipline Procesing OU, Biuro Handlowe GAMA, UAB Baltic tube services, Renox Sp.j., SC GalakoMert SRL, Diatomitovskij Kombinat OOO, Blockmile, Impuls GmbH, Skinest Baltija, EKO-HIT, Izopol, DLH Sverige AB, Mobel Sirche, Interkozha, Ziraks, DLH Nordisk, ACT Ltd ., S. A.

During a 6 months period, while the defendant, I.B., was working at JSC “AUTO EXPRESS”, the plaintiff received €546 043 of income (from 21st September, 2011, to 15th March, 2012). When the

defendant, I.B., left the company, the income was only comprised of €272 849 (from 16th March, 2012, to 15th March, 2013). In this way, the defendants, while taking common illegal actions, caused €1,181,484 EUR of damages to the plaintiff (€819,236 of non-received income and €362,247 EUR of income received by the defendant, JSC “TIROLA”). The plaintiff thus asked for €185 469 of damages to be awarded.

5. On 20th June, 2014, the Vilnius Regional Court reached a decision and did not satisfy the claim. It then divided the litigation costs. The Court of First Instance indicated that there were no grounds for the information about the JSC “AUTO EXPRESS”’s clients being considered to be trade secrets. The court claimed that the trade secrets defined by the plaintiff do not correspond to the provisions of Article 1.116 of the CC, because the plaintiff defined the trade secret as everything related to the organisation and management of work.

The Court stated that the following issues were not proven:

- the defendant, I.B., revealed the trade secrets of the plaintiff, JSC “AUTO EXPRESS”;
- the duties of the defendant, I.B., that were fulfilled at the defendant’s, JSC TIROLA, had a competitive preference over JSC “AUTO EXPRESS”;

The Court indicated that the employment agreement on behalf of the defendant, I.B., did not deal with longer than a one year period (Paragraph 4 of Article 15 of the Competition Law, which states that an employee can make use of the information that is related to his work no sooner than a year after his dismissal). The decrease in the income does not prove the fact that the defendant, I.B., had revealed the trade secrets and provided analogous services for the clients of the plaintiff, because this circumstance is significant only when deciding upon the amount of damage caused.

No non-competition agreement was concluded between the plaintiff and the defendant, I.B., and therefore the provision of similar services to the same clients cannot serve as a basis for the satisfaction of the claim. As the companies of the plaintiff and the defendant operate in a narrow market, both can carry out commercial transactions with the same market participants.

6. JSC “AUTO EXPRESS” appealed the Court’s decision to the Court of Appeal. After the hearing, which took place on 16th April, 2015, the Court of Appeal overruled the previous Court decision and delivered a new judgment, whereby the claim was satisfied in part and the defendants were jointly ordered to pay €49,989.15 Eur in damages, which amounts to 5%, and the litigation costs, which were divided between them.

On 16th April, 2015, upon examining the case as part of the appellate proceedings, the panel of judges of the Civil Division of the Court of Appeal of Lithuania voided the decision that had been issued on 20th June, 2014, by the Regional Court of Vilnius and adopted a new decision whereby the claim was satisfied in part and the defendants were jointly and severally ordered to pay €49,989.15 in damages, and annual interest of 5% on the amount awarded by the Court from the date the proceedings were initiated until the full execution of the judgment, and the litigation costs were distributed accordingly.

The Appellate Court ruled that the list of information that comprises the plaintiff’s trade secrets meets the provisions of Article 1.116 of the Civil Code. The plaintiff had formulated the particular basis behind her demand – namely, that the information about her clients was divulged to the defendant, UAB “Tirola”, and was used by the said legal entity in an illegal manner. While working as a sales team leader, I. B. possessed detailed information that pertained to the plaintiff’s clients (their names, addresses, persons to be contacted on their behalf and their contact details, transportation routes and methods, solvency, and so forth).

The expertise of the plaintiff’s company in the market for the services in question was greater than that of the defendant’s company, UAB “Tirola”. The trade secrets had been legitimately transferred to the plaintiff by another company, named UAB “Autostarto Grupe”, which belonged to the same

group. The other defendant is a company that began to perform economic and commercial activities to a far greater extent after I. B. was employed by them.

Immediately after terminating the employment contract with the plaintiff, or, to be more precise, on the following day, the defendant, I.B., was employed by the company's competitor.

Taken separately, the fact that I. B. left the company to work for a competitor does not constitute a breach of the relevant legislation and does not incur civil liability, since she had not signed a non-competition agreement.

The defendant, UAB "Tirola", contacted the plaintiff's clients and offered them to cooperate on the grounds that it could offer more attractive terms than the plaintiff. The defendant took over those of the plaintiff's clients who were the most solvent and used to place a large number of orders; at the same time, no attempt was made to attract clients on the blacklist. After I. B. left to work for the defendant UAB "Tirola", the extensive cooperation between many of the clients and the plaintiff was reduced to a minimum, or else ceased altogether, while the clients who had not cooperated with the defendant, UAB "Tirola", before began to do so in quite an extensive manner.

The transfer of the orders from one company to the other, as well as the tendency to do so, indicate that the changes in question were not accidental, and were determined by an opportunity to use the information that constituted another legal entity's trade secrets and which had previously been made available.

The systematic overlap in the established factual circumstances leads one to the conclusion that the trade secrets had not only been disclosed, but had also been used.

The panel of judges did not agree with the method proposed by the plaintiff for calculating unreceived revenue (the plaintiff considers losses to include any lost revenue) because there is no evidence that such revenue could reasonably have been expected.

7. On 5th February, 2016, the enlarged panel of seven judges of the Civil Division of the Supreme Court of Lithuania issued an order that amended the decision issued on 16th April, 2015, by the panel of judges of the Civil Division of the Court of Appeal of Lithuania with respect to the joint and several award of the damages from the defendants and the distribution of the litigation costs.

The panel pointed out that trade secrets are objects of industrial property. As with any other objects of this property, trade secrets are an important instrument in relation to competition on the market. Part 1 of Article 1.116 of the Civil Code defines the subject of a trade secret and it provides the criteria for information to be classified and stored as a company's trade (industrial, commercial) secret.

Moreover, the panel provided some further clarification on the explanations that the Court of Cassation had given in previous cases regarding the peculiarities of data protection actions that are aimed at maintaining a trade secret, pointing out that: *'the measures intended to maintain a trade secret may not be too burdensome for private economic or commercial activity, or require a disproportionate amount of financial, human and other resources'*. The more valuable the information that constitutes a specific trade secret, the more extensive an action the proprietor must take to protect this information in order for this protection to be recognised as reasonable. The panel also stated that information about an entity's clients may be deemed a trade secret if this information possesses all the formal attributes of the latter: value, confidentiality, and the need for reasonable protection. If this be the case, it can be recognised as a trade secret and can be protected accordingly (see: order issued on 22nd May, 2015, by the panel of judges of the Civil Division of the Supreme Court of Lithuania in civil case Nr. 3K-3-317-916/2015).

The Court decided that on 21st September, 2011, the appellant, I. B., and the plaintiff, UAB "Auto Express", signed an employment contract under which the appellant was accepted for a position as a sales group manager. Paragraphs 9.4 and 9.5 of the employment contract set forth the employee's obligation to protect the company's trade secrets both during and after the employment relationship.

The client database that belonged to UAB “Auto Express” was password-protected, so the company had sufficient technical data protection for the data that was deemed to be a trade secret. The Court agreed with the Appellate Court’s decision, in that the information on the plaintiff’s clients met the requirements laid down in Part 1 of Article 1.116 of the Civil Code to the extent where it would be considered a trade secret. The obligation not to disclose any of the information that was deemed to be part of the plaintiff’s trade secrets was not limited to any particular term, therefore the legal provision which stipulates that this obligation is to last at least for one year was duly applied (Part 4 of Article 15 of the Law on Competition).

The appellant, UAB “Tirola”, employed the appellant, I.B., and several of the plaintiff’s other former employees, and knew that they were familiar with the plaintiff’s trade secrets and used the latter for business purposes, that is, in order to compete with the plaintiff.

The Court pointed out that, first and foremost, Part 4 of Article 1.116 of the Civil Code differs from Paragraph 3 of Part 1 of Article 15 of the Law on Competition in regard to the entities that are subject to the respective regulations – Part 4 of Article 1.116 of the Civil Code applies to all entities, whereas Paragraph 3 of Part 1 of Article 15 of the Law on Competition applies only to independent economic entities. Secondly, these legal regulations are to be demarcated depending on whether or not there is an aim to compete – if there is no such aim, only Article 1.116 of the Civil Code shall apply, but if said aim is present, Paragraph 3 of Part 1 of Article 15 of the Law on Competition shall also apply. In the present case, therefore, the civil liability of the appellant, I. B., is to be assessed according to the provisions of Article 1.116 of the Civil Code, while that of the appellant, UAB “Tirola”, is to be assessed both according to Article 1.116 of the Civil Code and ,Article 15 of the Law on Competition.

The damages are manifested as the plaintiff’s loss of revenue and thus the corresponding unjust enrichment on the defendant’s part.

The Court decided that the unreasonable amount of revenue not received by the plaintiff (€24 186.58), which corresponds to the extent of the unjust enrichment, is to be awarded from UAB “Tirola”, which had received this profit. The remaining unreceived revenue that made it impossible to determine the separate elements of the obligation (€25,802,57 (€49,989.15 €24,186.58) is to be awarded from the defendants jointly and severally.

Comment: This is a final cassation judgment in which the enlarged panel of seven judges of the Civil Division of the Supreme Court introduced some clarification on the complex question of the interpretation and application of data protection in the area of competition law and the repayment of damages.

11. List of judges who attended ENTraNCE for Judges 2016

- 1) Ilze Amona, Riga Administrative Regional Court (Latvia).
- 2) Sanna Anttila, Turku Court of Appeal (Finland).
- 3) Marie Baker, High Court (Ireland).
- 4) Martin Baran, District Court of Pre (Slovakia).
- 5) Maria Barbosa, Lisbon Appeal Court (Portugal).
- 6) Alenka Berger Škrk, Supreme Court (Slovenia).
- 7) Elske Boerwinkel, District Court of Gelderland (Netherlands).
- 8) Eva Cerón Ripoll, Council for the Judiciary (Spain).
- 9) Jelena Cuveljak, Zagreb Commercial Court (Croatia).
- 10) Werner Daem, Brussels Commercial Court (Belgium).
- 11) Mieke Dudok Van Heel, District Court of Amsterdam (Netherlands).
- 12) Cristina Farcas Surpanu, Tribunal of Bucharest (Romania).
- 13) Enrique Gabaldon, Constitutional Court (Spain).
- 14) Carlos Manuel Gonçalves de Melo Marinho, Lisbon Court of Appeal (Portugal).
- 15) Marget Henriksen, Harju County Court (Estonia).
- 16) Ágnes Hódy, National Office for the Judiciary (Hungary).
- 17) Enik Kádárkuti, Budapest Regional Court (Hungary).
- 18) Helene Karlsson, Swedish Market Court (Sweden).
- 19) Laura Konošonoka, Administrative Court of Appeal (Latvia).
- 20) Olympia Kosta, Court of Athens (Greece).
- 21) Hristo Krachunov, Sofia Regional Court (Bulgaria).
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- 49) Lijana Visokaviciene, District Court of Vilnius (Lithuania).
- 50) Olli Wikberg, Finnish Market Court (Finland).
- 51) Anne-Marie Witters, Brussels Commercial Court (Belgium).
- 52) Lauma Paegkalna, Riga Administrative Court of Appeal (Latvia).

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