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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 2017
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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EUI Working Paper **RSCAS** 2018/52

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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 EU competition law. The training is organised by 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 programme can be found at: <http://www.eui.eu/Projects/ENTRANCE/Home.aspx>

Each working paper includes the case notes written by the national judges participating in one edition of ENTraNCE for Judges. In the context of the training activities, each judge is requested to summarise and comment on a national judgment that is related to the field of competition law. This working paper thus aims to increase the understanding of the challenges that are faced by the national judiciary in enforcing national and EU competition law in the context of the decentralised regime of competition law enforcement that was 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 2017). The training programme was organised by RSCAS between November 2016, and October 2017, 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. This working paper thus aims to increase the understanding of the challenges that are faced by the national judiciary in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement that was introduced by Reg. 1/2003.

Keywords

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

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1. Introduction

This working paper contains the case annotations presented at the final ENTRANCE workshop on 7-9 September 2017. The judgments reported in this collection cover a wide range of practices across the fields of competition law and state aid. Below the reader will find a brief summary of each judgment, placing some of the more significant cases in a wider context.

Looking at the judgments as a whole, there are two striking features in the competition law judgments. First, compared to when the first case notes were published in this collection in 2011, we find that some judges are now more exacting in requiring that national competition authorities (NCAs) tell a convincing theory of harm when condemning restrictive business practices. The judgment in *Cartes Bancaires*, in particular, seems to have been very influential in this respect, see for example *Mladinska Knjiga Trgovina Ltd v Slovenia NCA* (section 4.1.) and *FMS Software and FMS v. Latvian NCA* (section 6.3). In addition, we also see that a number of national courts are uncomfortable with the existing rule that resale price maintenance (RPM) agreements in vertical relations are automatically deemed unlawful (e.g. *Asseco Business Solutions v Polish NCA*, section 6.2), and find ways of allowing such practices – how long will it be before the CJEU is called to task to rethink its approach to this issue?

The second feature is in relation to procedures: a number of the judgments apply the teachings of Regulation 1/2003 to help the interpretation of national procedures (e.g. *Cyprus Telecommunications Authority v Commission for the Protection of Competition*, section 3.1 and *Lithuanian Chamber of Auditors v Lithuanian NCA*, section 4.3). This is a little unusual since national procedures need not follow those of the EU: national procedural autonomy requires that these procedures are effective in protecting EU rights, but it need not follow that NCAs should have procedures analogous to those of the Commission. It might be that national courts consider that Regulation 1/2003 sets out best practices for the application of competition law and are thus seen as helpful in filling gaps in national legislation.

The state aid law judgments show the difficulty caused by an unusual procedural design. There are two salient features that may be identified in the cases: both are well known already. The first is that many claims are made by firms who are asked to pay taxes and use state aid law as one of the legal mechanisms to try and avoid paying the tax because, it is claimed, the tax is in some way selective (see e.g. *Dun Laoghaire-Rathdown County Council v. West Wood Club Limited*, section 7.4). Perhaps a notable feature of some of the cases below is that some national judges are now happy to determine whether the measure constitutes state aid on their own, and feel sufficiently confident to apply the judgments of the ECJ on the matter.

The second feature of the cases has to do with the existence of parallel, interdependent procedures at the Commission and at the national courts. In particular, the long time it takes for the Commission to resolve certain cases hampers the role of national courts in safeguarding the rights of plaintiffs. Statements made by the Commission about the state aid aspects of a particular case pending a final decision are seen as particularly unhelpful by national courts. A particularly useful discussion of the difficulty of dialogue between Commission, ECJ and national courts is found in the *Lubeck Airport* saga (section 9.2). While in competition cases private enforcement is finding its way as an effective complement of public enforcement, in state aid the situation remains clearly unsatisfactory. Some fundamental reforms are needed if private enforcement of state aid is to complement public enforcement in such a way as to provide an effective system of enforcement.

Procedural issues

Judge Hajdinova (*Siemens v Slovak NCA*, Section 2.1) discusses a judgment where the issue at play was whether a fine may be increased on appeal, or whether the general legal principle found in the Slovak Republic, disallowing an increase in the penalty on appeal in criminal procedures, is to be applied in the field of competition law. The Supreme Court held, following principles derived from the case law of the ECtHR and CJEU, that the scope of application of fundamental rights protection for ‘hard-core

criminal law offences' does not apply to competition law cases, holding that an appellate court may raise the fine set by the National Competition Authority. This is aligned with the position under EU Law, where the General Court is able to increase a fine on appeal.¹ Whatever the fundamental rights merits may be, there is some good practical sense in allowing appellate courts to reconsider the fine upwards for often cartel members raise several weak points on appeal, and a risk that a fine may go up can lead to parties considering the strength of their likelihood to win on appeal more closely.

Judge Rodin and Judge Crnogorac (*Croatian Society of Orthodontics v. Croatian Competition Agency*, Section 2.2 and 5.1 respectively) both discuss a case about the relationship between competition law and sector-specific regulation. They note how the national court excluded the application of competition law in favour of the sector regulator which had the power to fix minimum prices for dental services. This is the kind of case where perhaps NCAs can consider applying their advocacy powers and ensure that the sector regulator is made aware of the benefits of competition when setting out regulatory standards that are probably designed to safeguard quality care. Alternatively, a more hard-line approach for an NCA would be to apply Article 4(3) TEU, read jointly with Article 101 TFEU and challenge the statutory scheme as having cartel-like effects. It would then be for the Court to assess the degree to which the statutory scheme provided a procedure whereby the minimum price was set in such a way that the public interest is safeguarded or whether it merely facilitates collusion.

Judge Constantinou (*Cyprus Telecommunications Authority v Commission for the Protection of Competition*, section 3.1) discusses a long-running saga of a refusal to deal case where the NCA accused the dominant player of denying access to facilities essential for a rival to enter the telecommunications market. The dominant firm appealed against successive decisions which were vitiated by procedural failures (regarding the composition of the NCA) and when a properly constituted NCA imposed a fine the applicant appealed on the basis that the action was now out of time. At the time of writing the Supreme Court has held that the action was not time barred. Interestingly the national court referred to Article 25 of Regulation 1/2003 in an attempt to align national procedures with those of the Commission. The case also shows that in refusal to deal cases NCAs should be able to act more quickly and one wonders whether interim measures could be used more frequently to ensure market access to rivals especially in markets that move as quickly as those of electronic communications.

Judge Gonçalves de Melo Marinho (*Public Prosecutors' Office v NOS Communications*, section 3.2) discusses a challenge against a decision of the national telecommunications regulator who had found that some telecoms operators had to facilitate number portability when consumers wished to switch provider and it required that providers in breach of the Portability Regulation should make payments to the providers to which consumers wished to switch. The appeal was brought to the constitutional court in an attempt to test how far the regulator's powers to impose such fines were legitimate under the Constitution. The Court draws a distinction between the procedural guarantees available for hard-core criminal offences and the types of administrative offences found in the regulatory framework and upholds the imposition of the penalties, noting how the remedies serve to ensure portability by their deterrent effect, thus benefiting consumers.

Restrictive Practices

Judge Ugarte Oterino (*Envelopes Cartel*, Section 2.3) discusses a judgment where the key infringement was an export cartel whereby all national producers of envelopes created a single company for export which coordinated sales outside of the European Union. It appears that much of the discussion focused on whether there was an agreement among the market actors, but an issue which does not appear to have been explored is whether EU Law applied at all since the effects of the agreement were to be felt outside of the European Union. As the ECJ recalled in *Javico v. YSL*, a distribution agreement relating to states

¹ However it has done so rarely, see Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* ECLI:EU:T:2007:380, where the fine was increased from €34.97m to €35.02m.

outside of the EU need not necessarily impact trade between Member States.² That the national court here was faced with a restriction by object should not make a difference to the assessment of the effect on trade.

Judge Dekleva (*Mladinska Knjiga Trgovina Ltd v Slovenia NCA*, section 4.1) reports on a bid rigging case where suppliers made joint bids. The judgment is important because the national court applied the reasoning of *Cartes Bancaires* and inquired as to whether the facts revealed harm to competition. The court found that the NCA had not worked hard enough to establish any restrictive effect of the agreement, for example it noted that there wasn't enough evidence to show a price increase and it did not analyse the extent to which the use of joint bids (which is allowed by the national public procurement rules in specific cases) could be justified. These findings are intriguing, for they blur the line between object and effect cases. By introducing an analysis of effects (whether prices go up, whether collusion may be justified) into an object analysis one has to wonder whether the category of agreements restrictive by object is going to shrink so much that it no longer exists.

Judge Oana (*OMV Petrom v. Romanian NCA* section 4.2) discusses a cartel in a shrinking market. The undertakings sold petrol designed for cars without catalytic converters. The users of these cars were diminishing and so was demand for the specific type of petrol these cars need. Rather than compete for this shrinking group of customers the suppliers colluded to reduce output. The appellants were unsuccessful in their claims that the decision was vitiated by flaws in the procedure and in the substantive assessment of the facts of the case. This is a fairly straightforward infringement but it is illuminating that as with the judgment discussed just above (section 4.1) the court engaged in an analysis of the relevant market to test how far the agreement would indeed yield harm to consumers.

Judge Einkiene (*Lithuanian Chamber of Auditors v Lithuanian NCA*, section 4.3) reports on an anticompetitive decision of an association of undertakings that set fees for certain services provided by auditors members of the association. An interesting aspect of the judgment is the reference made to Regulation 1/2003 to justify the imposition of a fine on the association and liability for that fine on the members. With respect, it is not clear why reference to Regulation 1/2003 should inform the application of national procedural law – perhaps the provisions in Regulation 1/2003 are seen as the correct benchmarks for effective enforcement?

Judges Galante and Lobo (sections 5.3 and 5.4 respectively) report on the OTOC case which is about anticompetitive tactics by the association of chartered accountants to reserve to its members certain lucrative markets for training professionals. The judgment is important for clarifying the role that associations of undertakings can play in coordinating anticompetitive conduct, in this case by excluding potential competitors. Judge Lobo's annotation also remarks how the court had evidence of the adverse anticompetitive effects: some professionals that had attended other training courses which were not authorized by OTOC withdrew from these courses when they found out that the credits they gained were not recognized by OTOC: here is a clear exclusionary impact that harmed competition between service providers.

Judge Valkadinova (*Bulgarian Construction Chamber Cartel*, section 5.5) reports on the Bulgarian NCA's decision against a cartel facilitated by the applicant who established recommended prices for building projects by its members. A significant aspect of this case is that the prices set were not obligatory but the NCA and the court on appeal noted that this did not mean that the price lists could have no anticompetitive impact, for it hampered the independent setting of prices specifically by reducing the uncertainty about competitors' likely behaviors.

² Case C-306/96, *Javico v YSL* ECLI:EU:C:1998:173.

Vertical Restraints

Judge Petrova discusses an agreement between a producer of refined oil (Biser Oliva, section 6.1) and its distributors fixing retail prices (in antitrust jargon an RPM agreement). What is remarkable about this judgment is that, applying solely Bulgarian competition law on the grounds that there was no effect of trade, the court rules that the RPM agreement is not anticompetitive *inter alia* because of the modest market share of the producer. As is well-known, under EU competition law, RPM is restrictive by object. It is thus refreshing to see a national court using economic expertise to establish that a producer with a market share of 5% is free to engage in RPM if he wishes to do so, given that this is unlikely to harm consumer welfare in what is most likely a market in which it faces fierce competition.

Judge Dominiak (*Asseco Business Solutions v Polish NCA*, section 6.2) also presents a case where the manufacturer of computer software fixed the price at which retailers may sell its products. At the time of writing the Court of Appeal has ruled quashing the decision of the NCA – as with the previous judgment, the national court is unimpressed with classifying RPM agreements as restrictive of competition without any analysis of the market. How long before the CJEU reconsiders its stance on this issue?

Judge Amerika (*FMS Software and FMS v. Lativan NCA*, section 6.3) also reports on a judgment which has been affected by the more economics-oriented approach. The facts were that a software manufacturer's agreement with its dealers provided that each dealer who begins to negotiate a contract with a potential client should inform the manufacturer of the negotiation. If the potential client agreed, then other dealers would be forbidden from contacting the client. The NCA was rightly suspicious of this clause for it seemed to prevent intra-brand competition. However, the national court ruled that more analysis is required to test whether the agreement was harmful. First, it noted that the potential client had to consent to negotiating only with one dealer, and this could well prevent the arrangement from limiting intra-brand competition. Second, it may also be that this arrangement is efficient because the software has to be tailor-made for each client so that a consumer may prefer dealing with only one supplier with whom to discuss the specifications. This shows how national courts are becoming exigent of the need for NCAs to have a convincing story of why an agreement should restrict competition.

Judge Panocha (*Roland Polska sp. z o.o. v Polish NCA*, section 6.4) discusses another RPM agreement in the context of a selective distribution network managed by the applicant. The RPM agreement dealt specifically with on-line prices. Evidence was unearthed that Roland Polska monitored prices and threatened dealers with termination if they did not comply. The NCA and Court concur in finding an infringement – this judgment stands in contrast to the more analytical approach of some other judgments in this collection (sections 6.1, 6.2 and 6.3) but this difference might be motivated by the concern a number of NCAs seem to have that online sales markets are a starting distributive channel that should be protected and promoted.

Stefan Schlotter discusses the *Deuter* case (section 6.5) which raises a highly topical issue relating to e-commerce: how far a manufacturer can restrict the sale of its products via on-line marketplaces (i.e. the likes of Amazon). In this case Deuter manufactures high quality backpacks, and has a selective distribution network of dealers who may sell on-line on their website, and wished to prevent these from selling also via on-line marketplaces. The court in this case held that under the Metro I criteria a ban on on-line marketplaces could be justified because it allows the manufacturer to ensure that the quality of on-line sales was maintained, and it also added that consumers would otherwise be induced to consider on-line marketplaces as authorized retailers when in fact Deuter had no contractual relationship with them. This judgment is in line with the subsequent judgment in *Coty*, reflecting a good understanding of the economics of vertical restraints, which are harmless unless inter-brand competition is hampered.

Judge Soares Torres discusses a case brought by the Portuguese NCA against distribution agreements forbidding passive sales outside the geographical market assigned to a number of distributors (section 6.6). The main issue for discussion in this case was how far it was possible to apply EU competition law and how to determine an effect on trade between Member States. However, one thing that appears not

to have been considered is what difference the application of EU law would have made. It is not clear whether the parallel application of EU and national law (required by Article 3 of regulation 1/2003) actually makes any meaningful difference. In this case for example, the agreement was condemned as restricting competition. The original intention behind Article 3 was to prevent national competition law interpretations that would diverge from what was decided under Article 101, but one wonders if there is now sufficient convergence that this alignment occurs spontaneously.

State Aid

Judge Baker (*Dellway Investments Limited & Ors v. NAMA & Ors*, section 7.1) discusses an important Irish judgment where the state aid point was ultimately not determinative. In brief, NAMA is Ireland's bad bank, designed to purchase non-performing loans from Irish banks. Its operation constitutes state aid (through it the state gives banks funds they would not be able to get otherwise) but this was authorized by the Commission to secure the financial stability of the Irish financial market. The claimants were persons whose loans were acquired by NAMA but who considered that their loans were not bad loans and they should not have been purchased by NAMA. The Supreme Court ruled that NAMA should have given the parties whose loans it obtained a right to a hearing and this sufficed to dispose of the case. On the state aid point the Court ruled that NAMA's acquisition of these loans did not appear to offend against the decision to authorize state aid, and so there was no state aid granted which would go beyond the terms of the Commission state aid decision.

Judge Gkana comments on Judgment 533/2016 of the Council of State (section 7.2) where the court discussed the appropriate basis for calculating interest in a state aid recovery procedure. The judgment is important for the close reading of EU Law sources and the attention paid by the Council of State in distilling which EU Law sources are binding on the national court. It reveals an interesting tension between the national court's duty to apply the national law as it sees fit and the duty to cooperate with the EU: under the former simple interest would be calculated, since statements by the Commission about compound interest were not (at the time of the Commission decision) binding, while under the latter interest would be compounded to ensure state aid recovery is effective. The judgment shows the difficulties in balancing effectiveness in the respect of European rules with the application of national procedures.

Judge Helm (section 7.3) comments on a state aid decision made by the Estonian State Aid Authority, where the national court had to consider the extent to which the aid had an incentive effect – on the facts it found that the beneficiary had already begun the work for which it sought state aid, a clear indication that the state aid had no impact on the commercial decisions of the beneficiary. The court recalls also the duty on the beneficiary to ensure that state aid rules are respected.

Judge Noonan (*Dun Laoghaire-Rathdown County Council v. West Wood Club Limited*, section 7.4) discusses a dispute where the plaintiff sought to avoid the payment of certain rates to the defendant local authority on the basis that this payment was state aid. The argument was that both it and the local authority provided sports facilities and thus any rates paid by the plaintiff would subsidise the work of the local authority on the same market. This claim appears fairly far-fetched as there needs to be evidence that the funds obtained are hypothecated to the local authority's competing activities. What is striking however is the court's reluctance to engage with the state aid arguments, suggesting a much more limited scope for national courts than that which the Commission would wish to see.

Judge Dirvonas (section 8.1) looks into a similar type of claim. State aid was granted before the Commission decision authorizing the aid, and some of the funding for the state aid was funded by a levy on certain firms in the energy sector. One of them sought restitution of the funds it had paid. Much of the judgment hinges on issues of whether the claim fell foul of the limitation periods, and it reveals the complex legal issues that arise when states do not comply with the standstill obligation in Article 107(3).

It leads one to ask whether better deterrent mechanisms could be devised and made available to courts to secure compliance with state aid law.

Judge Doina (section 8.2) discusses a state aid claim by the would-be beneficiary of state aid. The Romanian state had obtained approval for a state aid scheme for 10 years whereby certain undertakings would be able to apply for an exemption to pay certain fees (specifically undertakings had an obligation to buy green certificates and the state aid would exempt them from this duty). The plaintiff applied to secure this exemption and claimed that it was granted later than he expected with the result that he paid certain fees that should have been exempted. The issue for the national court was how far the plaintiff was justified in expecting to benefit from the scheme earlier in time. The national court makes reference to the decision of the Commission as a basis for determining the starting date of the beneficiary's entitlement. This is an unusual damages claim which, as with the cases discussed previously, does not fit into the kinds of damages claim that the Commission would like to see.

Judge Grassellini (section 9.1) takes us through the complicated and politically delicate measures taken in 2008 to rescue Alitalia. She notes both the manner in which the national courts were able to justify an exemption from the application of merger rules by reference to wider public policy considerations and the manner by which the Commission analysed the state aid components, oddly not requiring a repayment of certain loans which were identified as unlawful state aid.

Judge Weinzierl (section 9.2) discusses the saga of alleged state aid by Lubeck Airport. This is an exemplary example of how the intermingling of EU and national procedures working in parallel can yield a worrisome ten year gap between the commencement of proceedings and their final conclusion. This is not atypical of similar cases (see e.g. the *CELF* saga). The case is also typical of many similar cases where a regional authority decides to offer inducements to certain airlines for use of its airports. In this case the plaintiff (Air Berlin) complained that the inducements offered by Lubeck Airport to a competing airline (Ryanair) were unlawful state aid. The importance of the judgment is in revealing the tension between the view of the CJEU (according to which national courts should be tough enforcers of EU state aid law) and the view of the national court (according to which it cannot jump to conclusions about state aid cases in a situation where the Commission is still assessing whether the measure in question constitutes state aid). As is made clear in the annotation, national judges feel some unease at the demands placed upon it by EU Law. Matters are not rendered any easier by the slow pace of Commission procedures.

Judge Palligiano (section 9.3) discusses the judgment in *Lgv S.r.l vs Ministero delle Infrastrutture e dei Trasporti*. This is another instance where the presence of an incentive effect was discussed in the case of an aid scheme. The litigation was about whether or not the would-be beneficiary had already made certain investments before the aid scheme was approved, which would deny its capacity to benefit from state aid.

Judge Federico (section 10.1) discusses the important case of *Marras v. Regione Sardegna*. The plaintiff (acting as an undertaking) had obtained a mortgage at a favourable rate because this was subsidized by the Region. That subsidy was later found to be unlawful state aid by the Commission, with the result that the bank renegotiated the mortgage. Marras sought damages from the Region because he claimed that but for the subsidy he would not have taken on the mortgage so that the extra costs should be borne by the Region as damages. The impact of the claim would thus be that one relies on a breach of EU Law to secure that very same benefit that the breach of EU Law had conferred on the beneficiary. Indeed, the Supreme Court held that Marras was not the type of plaintiff that the rules on state liability sought to protect – competitors, not disappointed beneficiaries, should be the parties legitimately bringing damages claims.

Judge Czap (section 10.2) discusses the detailed manner with which the Hungarian Supreme Court engaged with the ECJ judgments to determine how to apply the concept of selectivity to measures that were implemented in the wine sector, with certain wine distributors complaining that authorization fees which they had to pay were used to grant selective advantages to Hungarian wine producers. On the

facts the national court finds that the fees were not hypothecated to the benefits and so did not clearly constitute state aid.

Judge Maravelaki (section 10.3) presents a similar case. the gist of the dispute is that a private TV broadcaster complained at having to pay a fee to use the spectrum, while the state TV broadcaster was exempted from paying a similar fees. Here the Greek court took the view that the claimant could not use state aid law to seek a reimbursement of the fee because the funds it paid to the state were not then used to grant a selective advantage to other beneficiaries. This is a correct application of the principles established by the EU courts, but one wonders if this may somehow undermine the possibility of stimulating private actors to keep in check state activities that grant anticompetitive assistance to certain undertakings.

Judge Tainhas (section 10.4) also discusses levies fixed on wine producers designed to promote the industry. This is another instance where there is an overlap of competences: the Commission reviewing the scheme as a whole, while the national courts addressing the question over whether certain measures were de minimis and thus outside the scope of the TFEU.

Judge Stoyanova (section 11.3) discusses the grant of an exclusive right in the market for the delivery of pensions in Bulgaria. This case is ongoing and raises questions on the application of the notion of services of general interest and whether the Altmark criteria are fulfilled.

Judge Antal (section 11.4) considers litigation between a software firm and the state. The state had initiated a tender and required that all tenderers use the software of a rival to the plaintiff. It is not clear why the plaintiff insisted on using state aid law for basing its claim, since it appeared that the funding was going to come from the tenderers and not the state. This seems to be a case about the failure to use public procurement rules and possibly the application of EU internal market law would have been more useful.

Unfair competition

Judge Angelov (section 11.1) discusses the Tuna Fish Cans imitation case, where a Bulgarian company took unfair advantage of the design of a popular brand of canned tuna from Italy. This case is decided exclusively on the basis of national law. Judge Janas (section 11.2) instead looks at how unfair competition law applies in the relationship between a supplier and a distributor and how Polish law has been interpreted to address exercises of buyer power.

While the first two judgments are fairly standard, Judge Belicka (*K.V and others v ADENTA* section 3.3) discusses a damages claim in the context of acts of unfair competition where the court gave an innovative reading of the rules. The allegation was that the defendant had wrongly appropriated the goodwill and equipment of the plaintiffs to establish its own dental business. What is interesting about this case is that the national courts discussed how far the acts of the defendant impacted competition because the defendant's business only started after the plaintiff had closed its business. While the Court of Appeal focused on the absence of overlap in the activities of the two undertakings as evidence that there was no actual competition, and so no infringement, the Supreme Court focused on the potential competition that could arise between the two businesses, and that the relevant question was how far ADENTA, in preparing to enter the market, had denied the plaintiff the possibility to compete by securing its assets. This judgment is significant because both courts try and 'import' ideas from antitrust law (here the question of actual/potential competition) into the field of unfair competition law, where such economic rigour is often lacking.

Conclusion

The judgments reported here were presented and discussed in small workshops. The idea of these discussions is to allow judges to trade ideas about how to best handle cases, and it is hoped that these informal conversations for a can help foster a common sense of how to best handle competition cases. The greater confidence with economic ideas, the close consideration of fundamental rights and the sophisticated manner in which the case law of the ECJ is handled by national judges point to a growing culture of competition among the judiciary.

In any case, the use of European substantive law, and sometimes also of European procedural principles, like the ones contained in Regulation 1/2003, from one side, but also the capability to originally interpreter the facts of the cases in view of local circumstances and economic rationality from the other, witness an increasing enrichment of the vital relation between national courts and the enforcement of European competition law.

2. Scope of Application of EU Competition Law

2.1. Jeannette Hajdinova (Regional Court of Bratislava)

Supreme Court of the Slovak Republic

Judgment No. 3 Sžhpu 1/2013 of 9th June, 2015.

Siemens AG vs. Protimonopolný úrad SR (National Competition Authority)

Facts

The Plaintiff and other undertakings signed a QC-Agreement (a horizontal cartel agreement) on 15th April 1988, under which they coordinated their conduct in the relevant production market and in the selling of gas-insulated-elements (switchgears) of 72 kV and more, by:

- price fixing,
- the sharing of markets,
- the allocation of quotas and the maintenance of the respective market shares,
- the mutual limitation of licence agreements with third parties, and
- collusive conduct in public procurement,

from 1st March 1991, to 30th April 2004, (i.e., before the accession of the Slovak Republic to the European Union). The Defendant – Protimonopolný úrad SR – as the Second Instance National Competition Authority (NCA) -- increased the fine that was imposed by 40%: the First Instance authority imposed a fine of €1,659,695.94 and the NCA increased it to €2,987.450. The NCA considered the previously imposed fine to be insufficient and considered aggravating circumstances, such as the Plaintiff's active role in mediation between the undertakings concerned, the formulation of the QC-Agreement in the distribution of mobile phones with codes, and the paying of the expenses for their calls.

The conduct of the Plaintiff and the undertakings that were collaborating were also the subject of the European Commission's decision No. COMP/F/38.899 of 24th January 2007, and led to a fine of €396,562,500, which was imposed upon the Plaintiff (Siemens AG). The European Commission ruled on the case under the former Art. 81 of the Treaty (Art. 101 TFEU) and the Slovak NCA initiated the administrative proceedings and ruled on the case under the domestic Competition Act; both of which imposed a fine upon the Plaintiff for an identical horizontal cartel agreement.

Decision

The Regional Court in Bratislava set aside the NCA's decision imposing a fine of €2,987,450 upon the Plaintiff (Siemens AG) for the cartel agreement. The only reason for setting aside the Defendant's decision was that it was in breach of the *in peius reformation* principle.

The Supreme Court's task was to examine whether there was a breach of the *in peius reformation* principle, or not, and beside this the Supreme Court dealt with the *ne bis in idem* principle due to two proceedings that were pending with the Commission and with the NCA, which were based on identical issues of fact and time. The Court had to test also the application of EU competition law in this case, because the administrative offence was committed before the accession of the Slovak Republic to the European Union.

As to the *ne bis in idem* principle, the Regional Court and the Supreme Court followed the Court of Justice's decision in Case C-17/10 of 14th February 2012, which dealt with the *ne bis in idem* principle in an identical case. The Court of Justice ruled that the provisions of Article 81 EC and Article 3(1) of Council Regulation (EC) No. 1/2003 must be interpreted as meaning that, in the context of a proceeding

initiated after 1st May 2004, they do not apply to a cartel which produced effects in the territory of a Member State which acceded to the Union on 1st May 2004, during periods prior to that date. The opening by the European Commission of a proceeding against a cartel under Chapter III of Regulation No 1/2003 does not, pursuant to Article 11(6) of Regulation No. 1/2003, read in combination with Article 3(1) of the same regulation, cause the competition authority of the Member State concerned to lose its power by the application of national competition law, in order to penalise the anti-competitive effects that are produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the European Union. The *ne bis in idem* principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted were not designed to penalise the said effects. The Supreme Court thus decided that the NCA had the power to penalize the Plaintiff for his anti-competitive conduct in the territory of the Slovak Republic. Moreover, there was no breach of the *ne bis in idem* principle.

The Supreme Court tested the *in peius reformation* principle from a historical and systematic point of view. In the first Administrative Proceedings Code No. 8/1928 Coll (passed during the first Czechoslovak Republic) the *in peius reformation* principle was explained in Art. 81 Para. 2, that in relation to a case with no public interest, the appellate administrative authority is bound by the appeal and is entitled to reverse the decision on the failure of the appellee only when it reviews decision under the appeal of the other party. In the assessment of the applicability of penal policy principles in the administrative proceedings, the Supreme Court bore in mind the Engel criteria that arise from the ECHR case law (judgment in the case of Engel et al. vs. Netherlands, Application No. 5100/71, 8th June 1976): the classification of conduct in domestic law, the nature of the offence and the severity of the penalty that the person concerned risks incurring. As to the first, an administrative offence relating to an anti-competitive agreement is not defined as a crime under Slovak law (the Supreme Court drew attention to the ECHR judgments in cases of Nestle St. Petersburg et al. vs. Russia, Application No. 69042/01, 3rd June 2004; Lilly France S.A. vs. France, Application No. 53892/00, 3rd December 2002). The second, anti-competitive agreement has to be deemed to be the most serious type of breach of competition rules under the national and the European law. As to the third criteria, it is necessary to assess the sanction that can be imposed and not the one imposed by the decision. Nowadays, under the Slovak constitutional rules, domestic Administrative Proceedings Code³, Art. 6 of the Convention, Art. 2 Par. 1 of Protocol No. 7 to the Convention and Art. 36 Para. 1 of the Declaration of Fundamental Rights and Freedoms it is not possible to follow penal policy principles without assessing any other circumstances in the field of competition law. A sanction imposed on the subject under the provisions of competition law has a preventative function, not only for the participant, but also for other undertakings.

The *in peius reformation* principle cannot be applied in every case without any other circumstances and without assessing the nature of the case; on the other hand, it is not possible to exclude it more generally in the field of competition law. However, if this principle is not explicitly mentioned in the Administrative Proceedings Code, it is necessary (by using an analogy) to interpret the *in peius reformation* principle, neither in contravention with the rights of individuals nor with the values protected by public interest. The Supreme Court emphasised the opinion of the Advocate General, Eleanor Sharpston, in Case C-272/09-P (KME Germany AH et. al. v. Commission): “*if the fining procedure in the present case thus falls within the criminal sphere for the purposes of the ECHR (and the Charter), I would none the less agree that, in the words of the judgment in Jussila, it ‘differ[s] from the hard core of criminal law; consequently, the criminal-law guarantees will not necessarily apply with their full stringency.’*” The Supreme Court also referred to the decision of the Court of Justice in

³ Under Art. 59 of Administrative Proceedings Code appellate administrative authority is entitled to assess all circumstances of the case and take the evidence and then impose a fine.

the joined cases T-101/05, T-111/05 BASF AG a UCB SA v. Commission, where the Court increased the fine imposed in the cartel case.

Under these circumstances and the case law of the ECHR and the Court of Justice, the Supreme Court overruled the Regional Court's decision and dismissed the complaint of the Plaintiff against the NCA's decision as being inadmissible.

Comment

This decision is an important one if compared with administrative offences committed outside the scope of competition law. Generally, the Slovak Courts respect the *in peius reformation* principle and other penal policy principles in administrative proceedings. However, the competition law field can be deemed to be an exception of thus, thus increasing sanctions in the Second Instance proceedings may be possible.

2.2. Mirella Rodin (Municipal Court of Rijeka)

High Administrative Court of the Republic of Croatia

Croatian Society of Orthodontics v. Croatian Competition Agency

Number and date of the judgment: No: UsII-70/14-6, 5.3.2015.

Brief summary of the facts of the dispute

An article in Croatian newspapers said that the lowest price in almost all branches of the private health care system is determined by the chambers, but, in the case of orthodontics, the lowest price for services has not been prescribed. Among orthodontists there is an agreement about the lowest prices, so as not to cause unfair competition for each other.

This article came to the attention of the Croatian Competition Agency, which commenced an *ex officio* procedure. The Agency found that the "Dental Services Price List - Minimum Costs" and the lowest prices charged by dental technicians are published on the official web site of the Chamber. The Croatian Society of Orthodontics (hereinafter: CSO) published an act entitled the "Minimum Price List of Orthodontic Services" on their website, which includes the prescribed minimum prices for 12 services that are provided by orthodontists, which are not specified in the Price List of the Chamber.

According to the Statute of the CSO, CSO membership is voluntary and has 75 permanent members who are engaged in orthodox activities in the territory of the Republic of Croatia.

The Agency decided that the CSO breach the provisions of the Croatian Competition Act because the document: "Minimum Price List for Orthodontic Services", which was effective in the territory of the Republic of Croatia between September 24th, 2010, and October 9th, 2013, (when the CSO removed it from the Internet site) was a prohibited agreement. The Agency explained that this is a price fixing agreement which is a "hard core" breach of competition law and had as its object the prevention, restriction or distortion of competition. For that reason, it was not necessary to prove the anti-competitive effects of such behaviour on the market. The provisions for block exemptions and agreements of minor importance are also not applicable. So, the Agency pronounced the Minimum Price List for Orthodontic Services *ex lege* null and void and fined the CSO 150,000.00 Croatian Kuna.

Summary of the judicial proceedings

The CSO, as the Plaintiff, brought an action against the decision of the Croatian Competition Agency before the High Administrative Court of the Republic of Croatia seeking the annulment of that decision.

The Plaintiff stated that the Minimum Price List document was not a prohibited agreement, because it was merely a proposal that was sent to the Croatian Chamber of Dental Medicine, and it was never applied. The proposed minimum price list was not therefore aimed at distorting competition, nor had it had any consequences in the relevant market. The Plaintiff also pointed out that it is not an undertaking, because it is not an economic entity, but is a professional association, which does not have the goal of achieving profit, but of educating and providing scientific and professional training. Further, the CSO claimed that orthodontists did not, in any way, directly or indirectly, express that they had accepted that document, so it was not an agreement which would oblige them to give their services at the suggested prices.

The Ruling of the Court

The High Administrative Court accepted the claim and annulled the decision of the Agency. It stated that the area of dental health care is regulated by a Dental Care Act, which is a special law. According to that Act, the Chamber adopts a price list for dental services, in which it defines minimum prices. The Court argued that only the Chamber has the competence to carry out expert supervision, and if it establishes a breach of the law provisions in the field of health care, it is obliged to report this to the Inspection of the Ministry of Health. So, the Court didn't accept the opinion of the Agency that the Minimum Price List was a prohibited agreement in accordance with the Croatian Competition Act. Furthermore, the Court noted that the Minimum Price List was not applied, nor could it apply, because only the Chamber can define the lowest prices for dental services. Charging for those services below the minimum price is subject to sanction in accordance with special regulations. If the Plaintiff breaches the provisions of Law on Dental Health Services, the Chamber is therefore exclusively competent in taking measures and preventing such conduct. A document of this type thus does not have a binding character, nor can it be applied, since doctors of dental medicine are obliged to comply with the minimum price list that is provided by the Chamber. In view of the foregoing, the Court is of the view that the Minimum Price List in question, could not have the aim or effect of distorting competition in the relevant market.

Personal Comment

In my opinion, the most interesting aspect of this case is the relationship between competition law and the special rules which prohibit "unfair competition" between professionals, such as lawyers, medical doctors in private practice, and other such persons, for which their chambers, according to the law, have the right to set prices or minimum prices for their activities.

Here, the High Administrative Court applied the principle "*lex specialis derogat legi generali*", but with some doubt, it did this in a situation where there was no prescribed price list for the type of services in question from the Chamber. The Court took a view that, even in a case where there are no prescribed minimum prices from the Chamber, the Chamber is exclusively competent to undertake the surveillance of activities in the field of dental care, including reporting breaches to the Inspectorate of the Ministry of Health. In this way, the Court gave the advantage to the self-regulatory system and to the Inspectorate of the Ministry of Health, and not to the Croatian Competition Authority, to inspect and prevent illegal price fixing agreements in the field of dental care. The question is thus whether the Court can, for these reasons, exempt an association of orthodontists from the competition rules.

2.3. Luis Manuel Ugarte Oterino (Court of Madrid)

UNDERTAKINGS AGREEMENTS AND RULES ON COMPETENCE. THE LIMITS

The Ruling of the Supreme Court of Spain (TS), Room of Administrative Affairs, 3rd Section, of 20/04/2017, (Cassation 3251/2014), which overturned the ruling of the National Audience (AN), Room of Administrative Affairs, 6th Section, of 25th June, 2014, in the action of annulment by the enterprise ADVEO GROUP INTERNATIONAL, S.A. (formerly UNIPAPEL, S.A.), that left the sanction of the National Competition Authority, on the infringement of Article 1 of the Spanish Act on Competition, 15/2007, of 3rd July, and Article 101 of the Treaty on the Functioning of the European Union TFUE, about an agreement to export envelopes, without effect.

I.- Brief summary of the facts of the dispute

The HISPAPPEL company was formed with the aim of exporting envelopes to third countries, so-called white envelopes, surplus envelopes from the production of its shareholders, all manufacturers of envelopes, which were removed from the Spanish market to avoid a reduction in their prices, according to the deal and to the agreed transfer prices that were adopted.

The leading manufacturers of paper envelopes in Spain, in percentages similar to the market share they owned at the time, which meant more than 90% of market share, owned share capital in the company.

Subsequently, some of the share holding companies became part of multinational groups or were acquired by other companies, which were also HISPAPPEL shareholders.

In early 2011, the shareholders of HISPAPPEL had a total estimated share of the market which amounted to more than 80% and after the instruction of the sanction procedure, only one was a controlling shareholder of HISPAPPEL, since it held 89.88% of the shares.

II.-Summary of the judicial proceedings

The National Audience (AN), Room of Administrative Affairs, ruling of June 25th, 2014, allowed the action of the mercantile ADVEO GROUP INTERNATIONAL, S.A. (formerly UNIPAPEL, S.A.) against the decision of the National Competition Authority from October 15th, 2012, which imposed a fine of €2.013.468, for violation of Article 1 of Article 1 of the Spanish Act on Competition, 15/2007, of 3rd July, and Article 101 of the Treaty on the Functioning of the Union European TFUE, of an agreement for the export of envelopes.

The AN, according to the interpretation made of Article 1 of the Spanish Act on Competition and Article 101 of the Treaty on the Functioning of the European Union, said that neither the “constituent Hispapel rules nor the agreements adopted in her womb», by all the partners, “constitute a restrictive practice of competition» as they were aimed at achieving the entry into markets of partners who did not have individual access, and prohibition or a coercion mechanism, direct or indirect, to the free initiative of the partners to operate, did not exist as they were not competitors in the relevant markets.

The Ruling of the Supreme Court TS overturned that from the National Court (AN) and considered that there was an infringement but a reduction in the penalty had to be applied.

The TS considered that the First Instance Court had inadequately interpreted Article 1 of the Spanish Act on Competition and Article 101 of the Treaty on the Functioning of the European Union, as the main companies operating in the market of the manufacture, distribution and marketing of envelopes in Spain formed a holding company in order to apparently promote the export of the surplus production of envelopes paper to non-EU markets, but that, in the development of the activities of the

commercialization of such products, it acted as a cartel, coordinating the actions of the partners in order to share the market and set prices, which evidences anti-competitive behavior.

The TS considered that the *de minimis* rule – the absence of effects on the intra-Community European market and the low impact of adopted agreements - was not applicable, because it was sanctioned as an anti-competitive behavior by its object and according to the entirety of the collusive agreements that were adopted to restrict competition in the market for the export of envelopes.

The Supreme Court, however, reduced the amount of the sanction, setting aside from the criterion of the National Competition Authority, which applied Article 23 of Regulation 1/2003, saying that, as the European Commission itself admits, the legislation of the European Union in this matter does not impose a uniform model for the design of the national implementation of the rules on competition regimes because it gives freedom to Member States to determine in their territory their own sanctions which are to be applied.

The sanction on one of the members of the cartel was partially reduced by collaborating on the instruction of the sanction procedure, which provided crucial information that allows the scope and the illegal nature of the infringement to be checked, and the necessary measures being investigated to be adopted.

III.- Ruling of the Court

The TS appreciated the wrongfulness of the conduct that was imputed to Hispapel, S.A. and its partner companies, have proven that leading companies operating in the market of manufacture, distribution and marketing of envelopes in Spain had formed, in 1981, a holding company (Hispapel, S.A.), in order to apparently promote the export of the surplus production of envelopes to non-EU markets, but that, in the development of the activities of the commercialization of such products, they acted as a cartel, coordinating the actions of the partners in order to share the market and to set prices, which evidenced an anti-competitive behavior.

IV.-Personal comment

This case raises the difference in approach of the two Courts, specialized in the matter, on what type of consideration it deserves, in the light of the rules on competition and, in particular, of Article 101 of the TFEU, the agreement for the export of envelopes, which was adopted by the main undertakings in that sector, concerning the production, distribution and pricing, taking into account that they covered almost all of the total market and that exports were involved in extra-EU trade.

3. Procedural aspects of competition law enforcement

3.1. Maria Constantinou (Cyprus Supreme Court)

Cyprus Telecommunications Authority vs. Commission for the Protection of Competition

Recourse No. 2004/2012, Judgment delivered on 29.9.2015

The facts of the dispute

The case concerns a recourse in the Supreme Court of Cyprus that was filed by the Cyprus Telecommunications Authority, hereinafter referred to as “CYTA”, which sought to annul the decision of the Cyprus Commission for the Protection of Competition (hereinafter referred to as “the Commission”) taken on 8th October 2012, to impose a fine of €960.000 on CYTA.

CYTA is a legal person, governed by public law, and is responsible for supplying the whole of Cyprus with public networks and electronic communication services.

Thunderworx Ltd, a telecommunication services provider, aimed to expand its business to the service of Premium SMS – Mobile Termination. For this to become possible it was necessary to gain access to CYTA’s mobile telephony network and, more specifically, its SMS Centre, in conjunction with certain easements by CYTA. Thunderworx therefore applied to CYTA to request access to its infrastructure and its SMS Centre. CYTA refused to satisfy the request with the following justification: the whole matter is under study as it is possible that supply of the said service could create problems in the handling of customers, especially in cases where there are challenged charges. It was therefore not anticipated that the supply of the service would be possible in the near future. It is worth noting that, five years later, on the 15th April 2010, Thunderworx was notified that the technical problems were solved, and the supply of the required service was now possible.

This initial refusal led Thunderworx to the filing of a complaint to the Commission for abuse of CYTA’s dominant position. The complaint was based on the provisions of S. 6(1) (b) (that is, the restriction of the disposal of technological means to the detriment of the consumers) and S. 6(1) (c) (that is, the application of discriminatory practices to the detriment of the undertaking) of the national Protection of Competition Law 13(I)/2008, (hereinafter referred to as “the Law”).

The Commission was guided in its decision by Cases C-7/97 Oscar Bronner, Series 1998, p. I-7791, and C- 82/01 Aéroports de Paris v. European Commission, Series 2002 p. I-9297, and decided that the refusal of CYTA, which was in a dominant position to supply a rival undertaking with services that were indispensable in carrying on its business, and this amounted to an abuse of its dominant position.

The case goes back to 2005 when the complaint was filed. In the meantime, the Supreme Court, in another case, ruled that the Commission was wrongly constituted -- which meant that any decision already taken was void. The procedure in the present case was therefore revoked, and the newly constituted Commission issued its decision in October 2010, imposing an administrative fine on CYTA. In 2011, CYTA filed a recourse to the Supreme Court requesting the annulment of the Commission’s decision.

The scenario was the same in 2011 when, following an appeal, it was found that the President of the Commission was wrongly appointed, the composition of the Commission was, as a result, illegal, and therefore the Commission itself consented to the annulment of its decision.

Again, a new Commission was appointed, and in 2012 it revoked all of its previous decisions that were relevant to the case and decided to examine the case *ab initio*. Both parties submitted their remarks and the Commission ultimately imposed an administrative fine of €960.000 on CYTA.

The judicial proceedings

CYTA argued, among other factors, that the Commission did not have the power to re-examine an annulled decision on the basis that CYTA had already been “convicted” and could not be “prosecuted” and “convicted” twice for the same offence, which was contrary to Art. 12.2 of the Constitution. The view was supported that the procedure was quasi criminal. Furthermore, it was alleged that the Commission had exceeded its statutory powers because a fine was imposed regardless of the lapse of five years since the day the complaint was filed, contrary to S. 41 of the Law. More specifically, it took the Commission seven years to examine the complaint. It is interesting to observe that the Commission noted that S. 41 does not provide for cases in which decisions of the Commission are annulled by the Supreme Court and must be re-examined. The Commission therefore turned to S.50 of the Law, according to which, in such cases, the Commission or, indeed, the Court, may apply, *mutatis mutandis*, the relevant clauses of community competition law, in this case, Regulation 1 of 2003, under which the limitation period is suspended for whatever time the case lies before the Court.

In addition, it was claimed that the Commission was barred from re-examining the case as the fine that had been illegally imposed was not returned to the applicants.

Further arguments included that the Commission had wrongly defined the relevant market, that there was an objective justification of the refusal of access to the infrastructure which would enable the service of Premium SMS, and that attention was not paid to the fact that CYTA was not active in the retail market. Furthermore, it was argued that CYTA was not in a dominant position in the relevant market and, moreover, that there was an alternative way for Thunderworx to have access to the required service through another of CYTA’s services. In any case, it was technically impossible for CYTA to formulate a control system which would verify which users had consented to the receipt of messages. Such a system was not available anywhere in the market. Finally, it was argued that the infrastructure was not governed by international standards and it therefore required special planning.

On the other hand, the Commission suggested, among other things, that the Court does not have the jurisdiction to adjudicate upon technical matters, such as the definition of the relevant market, and rejected all of CYTA’s.

Ruling of the Court

With regard to the argument that the Commission is barred from re-examining the case, the Court ruled that, despite the time that had elapsed, the circumstances of the case made it necessary that it be re-examined. The Court noted that both the revocation and the annulment were not related to the facts of the complaint. Instead, they concerned the appointment of the President of the Commission. Applying S. 41 of the Law, with regard to the time limit within which the Commission may exercise its power to impose fines for breaches of the law, the Court stressed that due to the fact that the violation of the law was ongoing, it was the time of the termination of the violation that should be taken into account, that is, the 15th April, 2010, when CYTA informed Thunderworx that it had finally found the technical means for the termination of short messages. As the administrative decision was taken on 8th October 2012, there had been no lapse of time that was greater than the time provided for by the law. The Court added that, in any case, under S. 17(1) of the relevant legislation, the time limit was interrupted from the moment that the Commission decided on the existence of a *prima facie* case against an undertaking. The Court noted the Commission’s indication that CYTA had started working towards the “solution” of the problem only in 2009, a solution having been found within a year. The Court went on to rule that the fact that the annulled fine was not returned to the undertaking did not constitute a barrier of any kind.

The Court further pointed out that it does not intervene where, from the facts before it, as in the present case, it appears that the administrative act was reasonably open to the Commission. The Court maintained that there was no doubt that the Commission exercised its discretionary powers and set down its findings in a justified manner that was reasonably open to it.

As a result, the recourse was rejected, and the decision confirmed with costs against the applicant.

Comment

The Court, albeit that it found in favour of the Commission, did not share the Commission's view that the matter of whether the limitation period could be suspended, or not, for the imposition of a fine, was unregulated by national law. In fact, it resorted to S. 41 of the national law, which is similar to Article 25(2) of Regulation 1/2003, whilst the Commission applied, *mutatis mutandis*, Article 25(6) of the Regulation instead, deciding that the limitation period was suspended because the case still lay before the Court, while the Court ruled that time began to run on the day on which the infringement ceased. Both views lead to the same result, that the fine was imposed within the appropriate time, but for different reasons.

It is worth noting that S. 41 of the national law has since been amended so as to include the suspension of the limitation period in cases when, and for such time as the decision of the Commission lies before the Court, thus bringing S. 41, in line with Art. 25(6) of the Council Regulation. S. 50 of the Law has also been amended to provide for the *mutatis mutandis* application of European Union competition law in matters that are not governed by national law.

An appeal has been lodged and it is therefore yet to be seen whether the Court of Appeal will, or will not, confirm the judgment.

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

Judgment number: 138/2016

Parties: Public Prosecutor Office (Appellant) and NOS Comunicações, S. A. (Respondent)

Court: Constitutional Court of Portugal

Facts

In this case, which is pending before the First Instance Court, that is, the Portuguese Court for Competition, Regulation and Supervision, the decision was built around the fact of the non-payment between electronic communication operators of compensation that is granted by the Phone Number Portability Regulation in disrespect of the time delay that is defined for the sending of documents between undertakings in the portability process.

The imposition of sanctions, due to that fact and under this Regulation, was analysed at the light of two Articles of the Portuguese Constitution that assure that nobody can be criminally sentenced unless a previous law declares punishable the action or omission, and it further states that, in the procedures for administrative offences and in any sanctions procedure, the rights to audience and defence are granted to the Defendant.

Arguments of the Appellant

The Public Prosecutor's Office presented the following arguments against the decision of the Court that declared that the imposition of those sanctions violated the national Constitution:

1. The Portuguese National Regulatory Authority (ANACOM) has, among its responsibilities, the obligation to promote and preserve competition in the offer of networks, services and resources for electronic communications, in order to contribute to the European Union Internal Market and to defend the interests of citizens;

2. It is thus one of its tasks to assure that the consumers can gain the most benefit in terms of choice, price and quality, suppressing the obstacles to the offers of such networks, services and resources at a European level;

3. In such a context, it does not act alone, but in concert with the European Commission and other NRAs, aiming to grant a common regulatory practice and the coherent application of a joint regulatory framework for the networks and services of electronic communications, being that its obligation is to execute policies similar to those of other European countries;

4. Such policies aim to grant the existence of an internal electronic communications market that can be transparent, effective and without distortions, namely, in the matter of tariffs and the imposition of penalties on an undertaking that is operating in such a market;

5. This determines that the NRA cannot act outside the parameters imposed on similar authorities in other countries since, if it does, it is the internal market that feels the consequences resulting from the use of the different electronic communications services that are accessible to the public;

6. The judicial decision under appeal introduces a private insight in terms of penalties, with negative consequences for national users, especially in relation to being able to distort the competition between undertakings operating in the sector, creating different functioning and sanctioning conditions for those that follow the rules established by the NRA in the face of those that do not respect it;

7. We are in the domain of a legal framework for administrative offences, conceived as a tool for administrative intervention with a sanction's nature, with a view to giving more effectiveness to such intervention;

8. That legal framework for administrative offences appears as a different branch, autonomous from the Criminal Law but retaining deep connections with it;

9. However, the application of the Criminal Law, as a subsidiary Law, has as its limits the safeguarding of the regime of the administrative offences' procedure;

10. The autonomy of the administrative penalties' ruling determines that the administrative offences procedure is not entirely applicable to the principles that guide the Criminal Procedure Law, varying the degree of attachment to those principles according to the nature of the process.

11. The national law on electronic communications (Law no. 5/2004 of 10th February) expressly gives the NRA the competence to perform sanctioning functions.

Arguments of the Respondent(s):

1. The NRA doesn't have the legal qualification to sanction as an administrative offence the omission of the payment of compensation between operators in the electronic communications' market;

2. In the present case, the lack of constitutionality emerges from the fact that a sanction ruling could only have been created through a legislative act that assures the rights to defence and audience, and not through an act with a merely regulatory nature;

3. To give such regulatory power to the NRA, an express and specific law that contemplates that power in situations where it would be necessary and indispensable for the exercise of the tasks of the NRA, would have to be mandatory;

4. The competences given to the NRA for the execution of the portability of phone numbers comprehend the technical, digital and administrative procedures that are needed and that are suited to such a goal, but not the assignment of compensation between operators where there has been an undue portability or where the time delays for the sending of documents between undertakings have not been respected;

5. The undue portability and the disrespect of the time delays for the sending of those documents are not connected with a requisite for the implementation of portability, an absence in the regulation of which might have the effect or consequence of limiting or endangering such implementation.

6. The rights to defence and audience can only be ruled by law created by the Parliament;

7. The consumers, and not the operators, are the addressees of the protection that is granted by the Portability Regulation;

8. The lack of payment between operators doesn't imply any violation of the rights of the subscribers to the services to the portability of their numbers;

9. The compensation between operators is not necessary in order to assure and expedite the technical procedure of portability, and they are not indicated in the legal rule that allegedly sanctions its omission of payment;

10. The Law on Electronic Communications, interpreted either alone or in combination with the Regulation of Portability, does not contain the essential definition of the lack of payment between operators as an administrative offence.

Ruling of the Court:

The Constitutional Court decided that the rules referred by the First Instance Court were not unconstitutional and declared that the administrative offences established through Regulation by the NRA can be punished with a fine for non-compliance with the obligation to pay compensation between operators for disrespect of the rules on the portability of phone numbers.

To justify its decision, the Court presented the following reasoning:

1. The obligation to provide information and to deliver documents to the regulatory body is a condition of the effective safeguarding of the need for the regulation and supervision of the economic activity, in an area where the cooperation between the economic agents becomes essential for the exercise of such functions that are of exceptional public relevance;

2. If it is necessary to ensure the effective fulfilment of this typical obligation of the Administration, the sanctioning of its non-compliance as an administrative offence is, as an alternative to criminal law, the appropriate and proportionate coercive means to meet that need;

3. In a business world, patrimonial sanctions are indicated in order to compel the various actors to comply with the public rules on economic activity;

4. The constitutional guarantee of the double degree of jurisdiction that constitutional jurisprudence has recognized for the accused in criminal proceedings in hard core cases, such as their conviction and the decisions that can affect their freedom, does not apply to this specific sanctioning domain for reasons which make it a branch of law that is substantially different from criminal law;

5. The evoked rule of the Constitution does not give the accused in cases of administrative offences the right to see a review by a higher court of a decision on facts;

6. The isolated circumstance that the sanctioning law remit part of its ruling to a lower regulatory source (in this case, the Portability Regulation) does not deserve any constitutional censure and it does not appear that the adoption of such a technique compromises the principles of legal certainty and the protection of trust;

7. The portability process is a true process, not just a proceeding; it contains not only a simple succession of facts and formalities, but also a true conflict of interests between operators: the interest of the donor provider or that the holder does to win a new client, and the interest of the recipient provider in not losing such client;

8. The law considered – and well, since this is the only way to defend and promote competition – that the duty should be imposed on the recipient provider to facilitate competition, in some way acting against its interests, knowing that it will benefit from the same rule in any future reverse situation;

9. The imposition of this duty is only effective in so far as a failure to comply could result in a disadvantageous economic consequence for the relapsed operator. Hence, the mechanism of compensation between operators;

10. It is not at all indifferent to the consumers' rights as regards whether the operators pay compensation to other operators, or not. If they do not do so, the recipient providers may not comply with their portability obligations without facing unfavourable consequences. In other words, compliance with such compensations is an indispensable instrument in order to ensure portability, which is a benefit to consumers.

Final comment:

In Portugal, appeal against the NRAs decisions on administrative offences is granted to a First Instance specialized Court – the Court for Competition, Regulation and Supervision. Since Portugal has a

separate administrative jurisdiction, the appeals against all the other acts of the NRAs are presented before the Administrative Courts. In addition, when interpretation of the Constitution is required, the Constitutional Court can be called upon to decide on questions of constitutionality that are raised in cases of appeals against decisions of the NRA, as happened in the present case, which has the relevance of showing a different level of control of such decisions and the wider objectives involved, which are essentially focused on the Constitution, but never lose the notion of the interests at stake in the field of intervention by the Regulatory Authority.

3.3. Inese Belicka (Regional Court of Aizkraukle)

K.V., I.V., K.V., A. V. and I.V. v. "ADENTA" Ltd. and P.A. on compensation for damages caused by unfair competition

Facts of the Case

SIA "ARK Dental Clinic" (hereinafter also referred to as ARK Dental Clinic) was registered in the Register of Enterprises of the Republic of Latvia on September 2nd, 1998. The ARK Dental Clinic was focused on providing high quality dental services. In 2005, the Company worked with a profit of LVL 149,487, and the turnover continued to grow in 2006, while large amounts of money were directed towards the development of the clinic; and it was therefore operating at a loss in 2006. The company's net turnover in 2007 and 2008 showed a tendency to increasing.

From 23rd December 1999, Dr. Z. V. was a member of ARK Dental Clinic and owned 50% of the company's shares. Dr.Z.V. died on 26th May 2006, and after receiving the inheritance, his heirs K.V., I.V., K.V., A. V. and I.V. owned 50% of the total number of shares of the company. Dr. P.A., who had been a member of the company since 2nd September 1998, owned 18,060 shares in the company, which was 50% of the total number of shares. At the same time, Dr.P.A., from 2nd September 1998, until 28th March 2002, was also the Chairperson of the company's board, but from 24th May 2004, he was the only member of the board of the company.

Z.V.'s heirs have not worked in dentistry, but Dr.P.A. was an experienced doctor, as well as a member of the company from its foundation and a long-term member of the board of the company, and therefore the company's management was entirely entrusted to Dr.P.A.

At the end of 2006, the parties engaged in negotiations on the sale of the shares owned by the Claimants, but the negotiations did not lead to agreement on sales and they were therefore terminated.

Shortly afterwards, the Claimants learned that the dental services were provided by another dental clinic - ADENTA, whose sole member and board member was Dr.V.A., while the ARK Dental Clinic had suspended its business on September 4th, 2008.

ARK Dental Clinic's website www.ark.lv was closed, and the information specified therein was not available to the clients, but the website's maintainer forwarded all visitors to the ADENTA website.

ADENTA had used the ARK Dental Clinic's premises and the company's logo. The premises' lease contract with the ARK Dental Clinic had expired, and a new lease contract was concluded with "ADENTA" on September 4th, 2008, for use of the same premises at 13 Skanstes Street, Riga.

The logo sign "ARK Dental Clinic" was still on the wall of the building at 13 Skanstes Street, in Riga. The ARK Dental Clinic sign was on the front page of ADENTA's website, and ADENTA received calls from the clients of the ARK Dental Clinic at the same phone number as of that of the ARK Dental Clinic. Receptionists informed clients that only the company's name had changed, from ARK Dental Clinic to ADENTA, but nothing else had changed. In addition, the ADENTA website's design was identical to the ARK Dental Clinic website's design. This information in mutual connection undoubtedly gave the website's visitors a misleading notion that ADENTA was simply a new name for the ARK Dental Clinic.

Most of the former employees of the ARK Dental Clinic were working at ADENTA. The leading physician of the clinic was Prof. Dr. P.A.

With the decision of the 4th September 2008, by the Board of Directors of the ARK Dental Clinic, the company's economic activities were suspended. The term of the lease agreement for the premises expired on 4th September 2008, and the company's board member, P.A., did not extend the term of the contract.

ADENTA had bought all the medical equipment belonging to the ARK Dental Clinic for its book value on instalment payment terms and there was no additional remuneration for the deferred payment.

The decisions to suspend the economic activity of the company, the non-renewal of the lease of premises, the release of the employees, the sale of all the medical equipment and the referral of the website were taken secretly without informing the Claimants.

Claimants stated that ADENTA acquired the premises that were necessary in order to provide dental services, ARK Dental Clinic's equipment, hired doctors and other specialists, who had previously worked at the ARK Dental Clinic, copied the company's customer database, obtained the company's telephone number, and used that to provide its own services. ADENTA thus had to be considered to be the continuer of a business of the ARK Dental Clinic, as it started its active business immediately after the ARK Dental Clinic suspended its operations with the decision of its board member, Dr.P.A. This takeover of business took place without respecting the principles of fair business practice. There was no preparation time for the launch of ADENTA, since ADENTA received a fully operational dental care company from the company, with its board member, Dr.P.A. At the commencement of its business ADENTA had not invested any of the financial and other resources that were necessary for the start-up of a new market participant and had benefited from unfair practices in the market in question, which was an objective basis for the recognition of those activities as being aimed at the restriction or deformation of the competition.

ARK Dental Clinic continued developing in 2006, 2007, 2008. There were no objective reasons preventing the company from continuing its commercial activity on the relevant market, therefore, the board's decision to discontinue the company's business was inappropriate, and it was knowingly contrary to its interests.

First Instance Court's judgment

Vidzeme District Court of Riga satisfied claim partially. The court found the violation of the prohibitions set forth in Section 18, Paragraph 3, Clauses 1 and 3 of the Competition Law in the activities of ADENTA and awarded Claimants of the compensation of damages from ADENTA in amount of 141,462 EUR. The claim was rejected against the Defendant Dr.P.A.

Appeal Court's judgment

Having examined the case in connection with the appeal of "ADENTA", the Riga Regional Court's Civil Department dismissed the claim.

The Appeal Court noted that in assessing whether ADENTA's actions were to be considered unlawful and as infringing on Competition Law in relation to the ARK Dental Clinic, it is necessary to distinguish unfair commercial practices from unfair competition by assessing the consequences of ADENTA's actions, and whether its actions had delayed, restricted or distorted competition.

Pursuant to Clause 9, 6 and 7 of Article 1 of the Competition Law, it was recognized that ARK Dental Clinic and ADENTA were not competitors within the meaning of the Competition Law.

The Court concluded that ADENTA was registered at the Commercial Register on July 22nd, 2008; ADENTA acquired the assets necessary for its business on August 31st, 2008; ADENTA concluded a lease agreement with SIA SWH Group on September 4th, 2008; ADENTA recruited 31 employees for business activity on September 4th, 2008; Both the ARK Dental Clinic and ADENTA were providing their services in the market for dental services.

The ARK Dental Clinic was operating on the market for dental services until September 4, 2008, but ADENTA started its activities on September 4th, 2008, and thus it was concluded that the both

companies did not operate at the same time in the dental services market. Consequently, the Court concluded that, according to the Competition Law, there was no actual competition between these two companies.

The ARK Dental Clinic was not a market participant after September 4th, 2008, because it had no premises, no assets, no employees, and its economic activity had been suspended and ADENTA had completely replaced it in the dental services market.

The Court stated that the Claimants had not provided evidence that these events had, in some way, delayed, restricted or distorted the competition existing in the market for dental services. The Claimants specifically stated in their claim petition that "ADENTA continued the ARK Dental Clinic's business [...], the takeover of the business had taken place contrary to the principles of fair business practice."

The Court found that there was no real competition between the ARK Dental Clinic and ADENTA; there was there for no reason to believe that ADENTA had committed unfair competition actions within the meaning of the Competition Law.

Supreme Court's judgment

The Supreme Court overturned the judgment of the Appeal Court and pointed at the incorrect interpretation of Section 1, Clauses 6 and 9, and Article 3 of the Competition Law, and to the fact that the Appeal Court did not assess the circumstances specified in the claim regarding the activities of ADENTA, since the registration of the company on the Commercial Register on 22nd July 2008, and until 4 September 2008.

According to Article 1, Paragraph 6 of the Competition Law, competition is an existing or potential economic rivalry between two or more market participants in the relevant market. Article 1, Paragraph 9 states that a market participant is any person who performs, or is preparing to perform, economic activity in the territory of Latvia, or whose activity will influence competition in the territory of Latvia.

The Supreme Court stated that the Appeal Court had to determine whether the ARK Dental Clinic and ADENTA were competitors in the market for dental services at the time when ADENTA was about to embark on an economic activity, and whether the activities of ADENTA were recognizable as being the activities of a competitor.

The Appeal Court also had to clarify the concepts of competition and the relevant market, *inter alia* by assessing the range of services provided by both companies and the geographical area in which the services were provided, since these considerations played an important role in detecting unfair competition.

The Supreme Court stated that the opinion of the Appeal Court on the absence of real competition between the ADENTA and the ARK Dental Clinic was based on an incorrect interpretation of Section 1, Clauses 6 and 9 of the Competition Law, and contradicts the evidence of the case.

The conclusion of the absence of competition was based on the fact that the ARK Dental Clinic operated until 4th September 2008, but ADENTA started its operations on 4th September 2008. However, it was not taken into consideration that the activities of ADENTA in the dental market started following its foundation, and even before 4th September 2008.

The Supreme Court pointed out that, in this context, the correct interpretation of the term "competition", according to Article 1, Paragraph 6 of the Competition Law is essential. The Regional Court wrongly assumed that the provision applies only to the existing competition, although the norm expressly states that competition may also be potential. The Supreme Court acknowledged that it was important to assess the probability of potential competition, namely, whether there would be competition between the two companies in the relevant market if the ARK Dental Clinic had not been deprived of this opportunity by transferring its assets to the Defendant.

The Supreme Court also pointed out that the Appeal Court, when examining the existence of a breach of the Competition Law, had to consider that, under Section 9, Paragraph 9 of the Competition Law, ADENTA's status as a market participant might have been acquired not by the actual commencement of commercial activities, but at the moment the company was actually founded. As indicated in the applicable provision: "which [...] intends to carry on an economic activity"

The Supreme Court also stated that the Appeal Court had to consider the case law of the Administrative Court on the application of Clause 9 of the Competition Law in similar cases.

The Supreme Court noted that the Appeal Court had not justified why the method for determining the value of the shares could not be used as a method for determining losses. In the opinion of the Supreme Court, this may be one of the methods by which the amount of the material loss of a member of a limited company can be justified within the meaning of Article 1770 of the Civil Law.

Appeal Court's judgment 2

The Appeal Court acknowledged that the activities of ADENTA were manifested as being unfair competition within the meaning of Section 18, Paragraph 3 of the Competition Law.

When assessing the range of services that was provided by both companies, and the geographical area in which the services were provided, the Appeal Court recognized that, within the meaning of Section 1, Clause 9 of the Competition Law, at the time when ADENTA was preparing to start an economic activity, the ARK Dental Clinic and ADENTA were already competitors in the dental services market. If the ARK Dental Clinic had not been deprived of the opportunity, there would have been competition between the two companies in the relevant market.

It was apparent that the actual reason why the ARK Dental Clinic suspended its commercial activities was a result of the disagreement between the board member, P.A., and the Claimants, on the purchase and the price of the shares. There was no evidence in the case that the ARK Dental Clinic had financial problems or other objective reasons for terminating its operations.

The Court used the interpretation of Competition Law expressed in the judgment of the Administrative Regional Court of 16th November, 2009, in case NoAA430436-09/13, noting that all the possible activities that could impede fair and free competition in the sense of Article 18 of the Competition Law, were not stated, nor is the content of the concept of "fair business practice" fulfilled, so the list of indications of unfair competition contained in the said norm cannot be considered to be exhaustive.

For the purposes of the Competition Law, the acquisition of the ARK Dental Clinic's assets, and the lease agreement as such, did not play an important role, but the whole set of operations and their results did.

From the evidence of the case, the court established that the ARK Dental Clinic's assessment on 30th June 2007, showed a market value of 205 540 LVL (€292,457). In turn, the market value on 30th November 2008, which was determined by the liquidation value method, was LVL 6700 (€9533).

The Court decided to recover, in favour of the Claimants, the compensation for damages from ADENTA in the amount of €141,462. The said amount was calculated as 50% (the number of shares owned by the Claimants of the ARK Dental Clinic) of the difference between the market value of the ARK Dental Clinic on 30th June 2007, and its market value on 30th November 2008.

Supreme Court's decision

The Defendant submitted the cassation complaint, but the Supreme Court refused to initiate cassation court proceedings.

Comment

According to Article 21 of the Competition Law, a person who has incurred losses due to a violation of this law is entitled to seek compensation for those losses from the violator and from the interest due, which is set by law. Upon a request by the Claimant, a Court may, at its discretion, set the amount of the compensation. The claims regarding the damages are adjudicated according to the Civil Procedural Law. Article 5 Clause 6 of the Civil Procedural Law states that, in applying legal norms, the Court shall consider case law.

In this case, it was the first time that the Supreme Court had clearly stated that the Civil Court should have applied the case law and the interpretation of the law that had been done by the Administrative Courts in similar cases. In case the Civil Court decided not to consider the interpretation made by the Administrative Court, the Civil Courts give the reasons why this interpretation of the law is not applicable.

The Supreme Court gave an interpretation of the term "competition" according to Article 1, Paragraph 6 of the Competition Law, explicitly stating that the potential competition should also be considered.

The approach to the determination of the material losses by assessing the value of the company both before and after the activities of unfair competition carried out by the competitor could be useful in assessing material damages in similar cases.

4. Horizontal agreements

4.1. Martin Dekleva (Administrative Court of Ljubljana)

MLADINSKA KNJIGA Trgovina Ltd (office supplies company) as Plaintiff v. SLOVENIAN COMPETITION PROTECTION AGENCY (hereinafter “the Agency”) as Defendant.

Case No. I U 1823/2014, decided before the Administrative Court of the Republic of Slovenia (hereinafter “the Court”) on the 15th of September 2015

Facts of the case:

The Agency adopted (1) the disputed decision on the investigation, on which the Agency carried out an investigation against the Plaintiff (and two other undertakings) in the proceedings initiated for investigating the breach of the Article 6 of the Prevention of Restriction of Competition Act (hereinafter “the National Competition Act”) regarding the prohibition of restrictive agreements, and (2) the disputed decision finding that the Plaintiff and two other undertakings made discussions with each other and/or conduct concertedly when selling office supplies to public authorities at least from 5th of June 2007 to 26th of November 2012.

The infringing conduct – a restriction of competition by object, was about the sharing of public procurement.

Judicial proceedings:

Under the Article 6 (1) of the National Competition Act “agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings with the aim or effect to prevent, restrict or distort competition in the territory of the Republic of Slovenia are prohibited and null and void.”

The Agency based its decision on Article 6 (1) of the National Competition Act, claiming that the Plaintiff has been involved in the restrictive agreement and concerted practice, which was a restriction of competition by object. The issue was the consortium agreement – the joint contract of 17 August 2007, which was related to the submission of a joint offer in two public procurements “JN ODPISMAT – 9/2007” and “JN ODPISMAT – 28/2009”. The Agency cited a number of facts (e.g., method of sharing the public procurement to thirds, according to the value of supplies in year 2006) from which it follows according to its findings that the aim of the joint offer was to restrict a competition. The conclusion of the agreement on the submission of a joint offer was also not necessary due to the potential complexity of the public procurement. The purpose of the undertakings involved was to offer prices higher than the market prices. Although the Public Procurement Act allows joint offers under certain conditions, in the concrete case there was no need for one joint offer. The Agency argued the Plaintiff also restricted the competition in submitting a single offer in two other public procurements “JN MNZ” and “JN ODGAL-24/2010”; following the Agency's argumentation in these cases a concerted practice has been based on the continuation of the parties' agreement on the sharing of the procurement to thirds. In an administrative dispute, the Agency insisted on its views and proposed the dismissal of the action.

On the other hand, the Plaintiff claimed errors of law (both procedural rules and substantive law) and facts, stated that he had not acted in concert with other two undertakings. He claimed the likelihood of the infringement did not arise even from the reasoning of the decision to initiate the procedure and that the description of the infringement in the contested final decision was not identical to the description in the (previous) decision to initiate the procedure. Also, the decision on the investigation has been issued without a court order, which is contrary to the Constitution. The Plaintiff adduced evidence in his favor but the Agency did not produce them without proper explanation, which constitutes an infringement of the adversarial principle. The Plaintiff stated that the submission of a single offer, without making an

agreement with two other undertakings, would not be possible due to business risk (i.e., financial reasons) and a large number of locations to deliver goods (i.e., technical reasons), that is to say, the Plaintiff himself would not be able to fulfill all the conditions of the public procurement. He argued that even in the case of a standalone offer, he could not offer lower prices. The Plaintiff also argued that he did not have the opportunity to prepare a proper defence because the Agency had exceeded instructional deadlines. He proposed the Court to uphold the action, set aside a contested decision and refer the case back to the Agency.

Ruling of the Court

The Court first held that the existence of certain circumstances indicating the likelihood of a relevant violation of the National Competition Act was sufficient to initiate the procedure, that is to say that the Agency had sufficient evidence on the basis of documents for this decision (in the first stage of procedure).

Regarding the Plaintiff's claims about the unlawfully extended procedure before the Agency the Court found that according to the contested final decision, the description of acts by which the Plaintiff (an two other undertakings) committed the alleged infringement is not identical with the description in the decision to initiate the procedure, which does not mention the submission of two offers in public procurements "ODGAL- 24/2010" and "MNZ" in 2009. So, the key question is whether the Agency was allowed to issue the contested final decision (finding an infringement of Article 6 (1) of the National Competition Act) without having previously issued an extension of the decision to initiate the procedure. The Court held that such extension was not necessary since the summary of the relevant facts contained also findings concerning the submission of standalone offers in cases "ODGAL-24/2010" and "MNZ". Moreover, the complaint – sharing of market of office supplies, remained the same.

Regarding the Agency's decision on the investigation, the Court found it was legitimate and justified. It is true that the decision was not based on the prior court order, which would be in accordance with the Constitutional requirements, but this was not required by the National Competition Act then in force. The Constitutional Court ruled that such rules of National Competition Act were unconstitutional, but that they could still be a valid legal basis for Agency's investigations until the National Assembly changes the law. The Court made ex post control of the legality of the decision; necessity – proportionality of the unannounced investigation.

Regarding the Agency's decision finding an infringement of Article 6 (1) of the National Competition Act, the Court first noted that the existence of the consortium agreement between the Plaintiff and other two undertakings is not disputed. This agreement was about the submitting the joint offer in public procurements "JN ODPISMAT - 9/2007" and "JN ODPISMAT – 28/2009". What was disputed was whether this consortium arrangement constituted "a sufficient degree of harm to competition", which is an essential legal criterion in CJEU case-law (see in particular case C-67/13 P – *Groupement des cartes bancaires v European Commission*). Considering the aforementioned CJEU judgment (and some other case-law), the Court assessed to ensure the correct application of the substantive law: (1) content of the provisions of the agreement, (2) objectives of the agreement and (3) economic and legal context of which it forms a part.

With regard to (1) content of the agreement, it was found that the contracting parties agreed to carry out the order to the extent that each contracting party would get 1/3, according to the distributor which was annex to the agreement. The content of the agreement was not disputed.

With regard to (2) objectives of the agreement, the Plaintiff stated that the purpose of the parties was to meet the demanding requirements of the public procurement due to its nature, extent and number of delivery locations. For the same purpose, the possibility of submitting a joint offer is enacted by Public Procurement Act. Even if the conclusion of the joint offer follows a legitimate aim to satisfy the conditions of the public procurement, this does not exclude that the aim of the parties was to restrict

competition, but such aim should be sufficiently proven. The Court held that the Agency failed to prove that the number of delivery locations was not the reason for the conclusion of an agreement on the submission of a joint offer (split per third in relation to the number of delivery locations). The Agency concluded that the requirements of the public procurements could be satisfied by two undertakings (not just one), but this finding could not be a legally relevant proof that the objective of the joint offer was to restrict a competition. Namely, this argument followed the Plaintiff's claim that it was not possible to submit a standalone offer. Evidence that the objective of the agreement was to restrict a competition could only be an indisputable finding that the terms of the public procurement could be satisfied by each party in the standalone offer, so the Plaintiff's claims about the business risks relating to the unpredictable raw materials market had to be dismissed. However, the Agency did not completely disprove the Plaintiff's defence that the joint offer was submitted in order to satisfy the conditions of the complex public procurement and the dispersion of business risks. The Agency further argued that the purpose of the parties to the procedure was to offer prices higher than the market prices. The Court agreed with the Agency that, in so far as the price in the joint offer was higher than the market price, under the given circumstances, when all major suppliers of the office supplies submitted the joint offer, this could be considered as the evidence that the aim of the joint offer was to restrict a competition. The Plaintiff adduced different evidence before the Agency, challenging its claims that the prices in the offers were higher than the market prices. However, the Agency did not produce the evidence which the Plaintiff has adduced.

Regarding the price level, the Agency only summarized the conclusions of the customer which considered the first offers as inappropriate because the prices were higher than the market prices. The Court held that the Agency would have to prove the Plaintiff's aim to restrict a competition; it is not enough to summarize the conclusions of the customer. The fact that the customer lowered the prices in negotiation procedures is also, in itself, not enough to prove that the prices in a joint offer were higher than the market prices. In support of his claims, the Plaintiff adduced evidence to defend himself from the Agency's claims that the agreement on joint offer has been concluded with the aim of restricting a competition, and the Agency should have produced the evidence which represented the Plaintiff's defence thesis. By not doing so, the establishment by the Agency of the relevant facts was incomplete. In addition, the Court found an infringement of the principle of the right to a fair hearing.

With regard to (3) the economic and legal contexts of which the agreement forms a part, the Court examined whether the national legal order allows the parties to submit a joint offer in public procurement. The answer is yes: the Public Procurement Act regulates a joint offer as a legally valid offer with the purpose to satisfy the conditions of complex public procurements (i.e., disadvantage linked to economic/financial capacity or technical and/or personnel competence). Regarding such reasons for cooperating in the joint offer, pointed out by the Plaintiff and not satisfactorily rejected by the Agency, the Court concluded that the Agency did not properly evaluate the legal and economic framework which nevertheless allowed the Plaintiff and other parties to the agreement to act as joint providers in a particular public procurement. The established factual situation was thus not sufficient to conclude that the agreement of the parties with regard to joint offer constitutes a sufficient degree of harm to competition, that is to say, restriction of competition by object.

The Agency also complained that the Plaintiff has been involved in a concerted practice with regard to single offers in two other public procurements "JN MNZ" and "JN ODGAL-24/2010". This complaint based on the continuation of the parties' agreement on sharing of the procurement to thirds. More specifically, the Agency based its arguments on the value of the offers (prices) and the conduct of the Plaintiff and another undertaking that were not selected in the tender but did not request insight into the competitive offer and did not file audits, as well as on communication between companies. The Court followed the practice of the Supreme Court and the CJEU, which states that the parallelism of a conduct is or could be regarded as evidence of a concerted practice if this is the only likely interpretation for the parallel conduct. On the one hand, the Court confirmed the existence of indications of concerted practice, yet, on the other, the Court found that the Agency did not correctly apply the Article 6 (1) of the National

Competition Act. Namely, the Agency failed to assess and/or clearly explain how alleged infringement – concerted practice restricts a competition by object.

Apart from violations of the principle of adversariality (see above), the Court did not find other procedural law violations. The Court did not follow the Plaintiff's claim that he did not have the possibility of the effective defence due to exceeded instructional deadlines. The Plaintiff was acquainted with the procedure and had 6 months for access to written, documentary material and other records. The deadline of 45 days for a statement on the summary of relevant facts is laid down by the law and the Constitutional Court has already considered this deadline as appropriate. In the context of infringement of an essential procedural requirement the Plaintiff also objected the lawfulness of the rejection of the proposed commitments by the Agency (the Plaintiff proposed the adoption of a special rulebook). However, it should be taken into account that the Agency exercises its powers of discretion in assessment with regard to the proposed commitments and the Agency explained the reasons on which such decision is justified.

Conclusion (personal comment)

The case presented is important from the point of view of referring the Court in particular to the CJEU case *Cartes Bancaires* regarding the restriction of competition by object and illustrating some boundaries of this type of restriction. The Court incorporated CJEU views in case *Cartes Bancaires* into a national context, into the application of national provisions prohibiting restrictive agreements. The Court pointed out that a restriction by object must show a sufficient degree of harm to competition and should be interpreted narrowly. This standard is (in most cases) relatively high. The present case also clearly illustrates how important it is for the competition authority to correctly identify all legally relevant facts regarding context and objectives of the contested agreement or decision or concerted practice. Evidence adduced by the party may be refused only for well-founded reasons which the competition authority must explain in its decision. Thus, all relevant claims of the parties have to be properly assessed. The Agency freely evaluate evidence, but this must still be done carefully and convincingly. All evidence must be taken into account as a whole. If the party rebuts findings (facts and circumstances) on a restriction of competition by object, this may indicate that “de facto” effects should be assessed. Which is, of course, often more difficult, but this cannot be the criterion for choosing one or the other assessment. These are two separate concepts. Nevertheless, concrete application of the legal criterion for ascertaining a restriction of competition by object depends on the circumstances of individual case.

4.2. Cristian Daniel Oana (Romanian High Court of Cassation and Justice)

Name of the Court of Last Resort: High Court of Cassation and Justice (Romanian Supreme Court).

Name of the parties: OMV Petrom v. Competition Council.

Case no. 1604/2/2012, decision no. 1343

Date of the judgment: 21.04.2016.

Preamble

The Claimant, OMV Petrom, is the largest oil and gas group in South-Eastern Europe while the respondent, Competition Council, is an independent administrative body that aims to protect and to stimulate competition.

Following investigations carried out during the period of 2005 – 2011, the Competition Council noted the violation by many companies, among which the Claimant, OMV Petrom, of the provisions of article 5 paragraph (1) letter b) of Competition Law no. 21/1996 and Article 101 Paragraph (1) of Treaty for functioning of European Union (TFEU), by violation meaning a horizontal anti-competition agreement under the form of sale limitation (comment: the national law prohibits anti-competition agreements in the Romanian market in the same conditions as the European law).

Therefore, the Competition Council proceeded to sanction all companies in violation with the aforementioned provisions with fines consisting of 2.6% and 3.2% of turnover; the Claimant, OMV Petrom, having been sanctioned with 3.2% due to its quality of initiator.

The companies have contested by separate paths (distinctive disputes) both in terms of deeds as well as their method of application of the law by the Competition Council before the contentious court and requested full annulment of the sanctioning acts. Consequently, these actions have been partly admitted and the fines reduced conform with national provisions that oblige – in case of changing the sanctioning law in time, as it was this case – the application of a more favourable contravention law.

We illustrate below, in essence, the deeds, defences of the Claimant and the reasoning of the High Court of Cassation and Justice (briefly referred to as the ‘High Court’) in the case concerning the Claimant OMV Petrom.

Case summary

a) Deeds

The anti-competition agreement consisted of simultaneous removal from the market by many traders of a special type of petrol without lead designed for vehicles without catalyser. Given that the number of these vehicles had been decreasing, the profitability of the product was reduced accordingly. The reasoning of the anti-competition agreement was to prevent the loss of customers who, at a unilateral withdrawal of the product (or the withdrawal only by some traders) would have migrated to a trader that continued to deliver this type of petrol.

In other words, the idea was that for these customers – whose number was decreasing but remained significant - to replace the petrol without lead designed for cars without catalyser, with a similar type of petrol, but designed for cars with catalyser (the cars could have functioned with this inadequate type of petrol, but the technical consequences would have been unpredictable). In such a situation, leaving no alternative, it was expected the migration of customers not to occur.

b) OMV Petrom's argumentation

The strategy of the Claimant was to show that:

- the investigation procedure was carried out in violation of legal provisions;
- the understanding did not exist: the decision for the product's sale cessation occurring independently from one company to another;
- even if it had existed, the agreement was not anti-competition by its object (agreement 'by object' in the meaning of Art. 101 Paragraph 1 TFEU), as the Competition Council considered, but more 'by effect'; or, the respondent authority did not prove the anti-competition effects; in other words, the simple proof of anti-competition deed is insufficient as long as the anti-competition effects prohibited by law has not been proven;
- assuming that it had existed, the agreement 'by object' does not violate legal provisions as the product in question (petrol without lead designed for cars without catalyser) was substituted with other products; it had been claimed that, from an objective, scientific point of view as well as from a consumer's point of view, this type of petrol is substituted with other types of petrol without lead, which means that the relevant market of the product has been extended even more (includes all types of petrol without lead, both for cars equipped with catalyser and without catalyser) than the one envisaged by the summoned respondent Competition Council;
- the sanction was wrongly individualized as the Claimant, OMV Petrom, did not have the quality of initiator of this agreement, the deeds are not so serious, and the Competition Council did not consider the contravention law the most favourable to the Claimant in the individualization of the sanction applied.

During the judgment, the Claimant also requested the notification of Court of Justice of European Union (CJEU) for pronouncement of a preliminary decision regarding several issues among which: the distinction criteria between the restrictions of competition 'by object' and 'by effect' and limits of data and documents collection during on-site inspection.

Ruling of the High Court of Cassation and Justice (Romanian Supreme Court)

The notification claim of CJEU for pronouncement of a preliminary decision was rejected with the motivation that, *inter alia*, the judicial practice of European court is sufficiently relevant and does not require supplementary clarifications (in particular, the Decision pronounced in the case *Groupements de cartes bancaires*, C-67/13 P, significant for the distinction criteria between the restrictions of competition 'by object' and 'by effect' and the Decision of *Deutsche Bahn AG et alii*, C-583/13 P, significant for the limits of data and documents collection during on-site inspection).

With reference to the investigation procedure, the Court ruled that the investigation was carried out in compliance with legal provisions. Thus, it was shown that the protection against an abusive investigation has been made by limiting the investigation to the anti-competition deeds for which there were clues. If the limits of the investigation (including the inspection) were observed, the evidences are legally produced even if they prove an anti-competition deed in another variant than the one for which there were initially clues.

Regarding the deeds, the Court concluded that the anti-competition agreement was proven and presented the sufficiently large severity to the extent of being considered 'by object'.

On the notion of 'relevant market', the Court referenced the 'Communication of Commission regarding the definition of relevant market in the meaning of community competition law' published in the Official Gazette of the European Union series C no. 372 of December 9, 1997, indicating Article 101 of Treaty for the functioning of the European Union (TFEU; former Art. 81 of TCE), and then laid down an analysis on several levels.

At the claim level, the Court thus retained that the petrol object of the agreement cannot be substituted by any other type of petrol sold on the market because, unlike any other type of petrol, this petrol had been designed exclusively for cars equipped with engines without catalyser. The functional substitution of products (insistently alleged by the Claimant) does not represent a sufficient *de facto* element for introducing all types of petrol in the same category and extending the relevant market of the product to all types of petrol without lead (especially since the long-term effects of substitution have not been tested).

For as long as the products had been simultaneously on the market (2005-2008), the petrol object of the agreement and the other types of petrol without lead did not substitute in consumers preferences as they oriented to that type of petrol compatible with the corresponding type of engine, according to public communications made by traders. Therefore, the Court hold that there was no data regarding the substitution in the near past of petrol sale cessation.

Also, after the withdrawal of the petrol from the market, at least a part of owners of vehicles equipped with engines without catalyser used the additives sold separately by OMV Petrom in order to be introduced (by consumers) in the petrol without lead in order to render it compatible with engines without catalyser.

All these show that the consumer's opinion (quite relevant for the definition of product market) was that the product in question could not be substituted by petrol without lead designed for engines with catalyser.

Final comment

Globally, the case is important as it highlights the particular complexity competition law disputes can reach. Beyond the *de facto* matters, the case raises many new legal issues for companies, lawyers, legal counsellors and, last but not least, judges of countries from Eastern Europe where competition law represents a new law institution (in Romania, for about 20 years).

In particular, the case may be significant for the way in which the Court figured out some very technical matters, such as those related to protection against abusive investigation, or the notion of 'relevant market'.

5. Decisions of Associations of Undertakings

5.1. Beatrix Crnogorac (Commercial Court of Zagreb)

High Administrative Court of the Republic of Croatia, Ref. No. Us II-70/14-6 of March 5th, 2015.

Case name: *Croatian Society of Orthodontics (Hrvatsko društvo ortodonata) vs. Croatian Competition Agency*

Case n.: CCA UP/I-034-03/13-01/034

Summary of facts

The Croatian Competition Agency, in its decision of 12th June, 2014, established that the association of entrepreneurs, the Croatian Society of Orthodontics, in the period from 1st October to 9th October, 2013, with the document „Minimum Price List for Orthodontic Services“, established the minimum prices for orthodontic services whereby it concluded a prohibited agreement in terms of Article 8 Paragraph 1 of the Competition Act (hereinafter: the CA) whose goal or consequence was to prevent, restrict or distort market competition. Moreover, it was established that the prohibited agreement is *ex lege* null and void, in terms of Article 8, Paragraph 4 of the Competition Act, and that also the said association of entrepreneurs was given a symbolic administrative and penal measure in the amount of HRK 150,000.00.

The Croatian Society of Orthodontics is entered in the Register of Associations of the Republic of Croatia and membership is voluntary. A dental practitioner, who is a specialist in orthodontics and a citizen of the Republic of Croatia, can become a regular member, while dental practitioners outside of the sphere of orthodontics can become associate members. Its task is the professional and scientific advancement of its own members. The Agency considered the position of the Croatian Society of Orthodontics with regard to the features of performing the activities of that legal entity on the market, whereby it considered Article 8 of the CA in which, amongst others, the decisions and allegations of entrepreneurial associations are considered to be prohibited agreements. The Agency took the position that the Croatian Society of Orthodontics represents one of the forms of professional associations and that its members are entrepreneurs who provide orthodontic services and participate in the trading of goods and services so that the provisions of the CA, in this particular case, apply also to the Croatian Society of Orthodontics.

Since the association of the Croatian Society of Orthodontics also has, among its membership, orthodontic practitioners performing dental activities in the territory of the Republic of Croatia, the Agency, in terms of Article 6 of the Regulation on the relevant market, the relevant market, in the geographical sense, is established as the territory of the Republic of Croatia, pursuant to Article 5 of the Regulation on the relevant market, the relevant market was established, in terms of production, as the market for the provision of orthodontic services.

Moreover, in its decision, the Agency states that, with regard to the fact that in this particular case it is a horizontal agreement containing limitations that are considered to be severe market competition limitations, it is not necessary to establish in detail the market forces for entrepreneurs, since their market shares do not have any impact on the fact relating to whether, in this particular case, there has been a violation of the provisions of the CA.

In this particular case, this is thus about the creation of a Minimum Price List for the provision of orthodontic services by the Croatian Society of Orthodontics which, among its voluntary members, assembles dental practitioners who are specialised in orthodontics.

The Croatian Society of Orthodontics stated that the document entitled „The Minimum Price List for Services“ was adopted as a proposal and, as such, was sent to the Chamber to be established and, immediately upon initiating the process by the Agency, it was removed from the pages of the Croatian Society of Orthodontics.

In their statement to the Agency, they stated that the orthodontic practitioners were obliged to abide by the minimum prices that are prescribed by the Dental Chamber, so that the Croatian Society of Orthodontics was obliged to submit to the Chamber a price list of services. It emphasizes that by proposing a minimum price to the Chamber the list established that its goal was not to disrupt market competition, nor has there been any consequence on the relevant market since the same presents only a proposal, and the said price list was published on the website for the sake of transparency.

Croatian Competition Agency

The Agency established that, in this particular case, the prohibited agreement referred to in Article 8 of the CA represents a cartel agreement, which is visible in the form of the adoption of the Minimum Price List, and this undoubtedly presents an agreement on the minimum prices for the orthodontic services that orthodontic practitioners provide on the free market, that is, outside of the network of the public health service.

Having insight into the rule regulating the dental medicine activities, the Agency established that the Dental Chamber was awarded the right to establish the lowest price for dental services for doctors of dental medicine outside of the public health service network, as well as the lowest labour price of a dental technicians.

At the same time, the Agency considers that the Act does not provide such authority to other entities and, bearing in mind that the Croatian Society of Orthodontics is an association of entrepreneurs whose voluntary membership assembles members performing an entrepreneurial activity, it is obvious that, as such, the „Minimum Price List“ was adopted without any legal background, i.e., contrary to the market competition regulations. Having had an insight into the provisions of the Act on Dental Practice and the provisions of the Articles of Association of the Chamber, the Agency established that the Chamber had adopted a unified price list for dental medicine services, defining the lowest dental service price, and that a dental practitioner must present the price list of its dental services in an accessible place where it is visible to patients. The Agency therefore emphasizes, in its decision, that the said provisions refer to individual dental practitioners and orthodontists when they perform their activities, but also to the Croatian Society of Orthodontics, which is an independent economic entity, comprised of members whose membership in the said association is voluntary.

In this particular case, the Agency Council established that the Croatian Society of Orthodontics created a Minimum Price List without having had a legal basis to do so, because the Chamber is solely authorised to act in this way pursuant to its legal and statutory authority, but not the association of entrepreneurs, in this case, the Croatian Society of Orthodontics. The Agency is of the opinion that the fact that the Dental Chamber did not establish the lowest prices for orthodontic services in a separate price list does not authorise the Croatian Society of Orthodontics, either directly or indirectly, to create the Minimum Price List.

The Agency is of the opinion that it is indisputable that the creation of the Minimum Price List is the consequence of an agreement on the price between persons competing amongst each other on the same relevant market, and that the same was published on the website of the Croatian Society of Orthodontics for three years. The Council emphasizes that agreements on prices, market division and similar activities by entrepreneurs operating in the same market make the competitors oppose the very nature and purpose of a market economy. Such agreements prevent the optimal allocation of resources and abolish competition among entrepreneurs. In cases where such agreements exist, there is no motivation, i.e., no need for the participants in the agreement to compete in terms of the quality of service and to introduce innovation. In this way, the participants in the agreement are ensured of survival on the market as long as they abide by the agreed price list. The entrepreneurs who could not survive on the market under efficient market competition conditions will therefore also survive.

The Agency is of the opinion that the Croatian Society of Orthodontics, by creating such a document and publishing it on its own website in order to also make it available to other members, who were not present while the aforementioned was being adopted, digressed from common and permitted market behaviour at the expense of efficient market competition. The Council emphasized that this was an agreement that was prohibited in regard to its aim, so that its effect did not need to be proven. In other words, since such agreements, per their nature, have the aim to distort competition, so, in this particular case, it is not necessary to prove the anti-competitive effects of such behaviour in that very market. The Agency did not therefore analyse it in detail, nor did it establish any concrete consequences for the market, i.e., in relation to the interests of the consumers that were created by the conclusion of the said agreement.

Pursuant to Item 20 of the Guidelines, once it is established the agreement has as its goal to prevent, limit or distort market competition, there is no need to also consider its concrete effects. This means that such agreements are prohibited *per se*, regardless of whether their particular effects on market competition have occurred, or not.

They also state that the provisions of the Act on the Collective Exclusion of Individual agreements cannot apply to the said agreement, because the provisions of collective exemption can in no way apply to the agreements of entrepreneurs containing such severe market competition limitations. Since the said agreement is precisely a type of an agreement on prices, i.e., it contains severe market competition limitations, the agreement does not fulfil the conditions for collective exclusion.

Ruling of the High Administrative Court of the Republic of Croatia

Against the decision of the Agency, the Croatian Society of Orthodontics filed a claim and the High Administrative Court of the Republic of Croatia adopted the plea and annulled the decision of the Croatian Competition Agency of 12th June 2014, UP/I-034-03/13-01/034

(The Croatian Society of Orthodontics filed a claim against the decision of the Croatian Competition Agency and the High Administrative Court of the Republic of Croatia (Ref. No. Us II-70/14-6 of March 5th, 2015) ... (adopted the claim)

The High Administrative Court of the Republic of Croatia stated in its decision that it was disputable whether the document entitled „Minimum Price List“ represented an agreement as envisaged by the provision of Article 8 Paragraph 2 of the Competition Act (hereinafter: the CA).

Namely, Article 8 Paragraph 1 of the CA prescribes that all agreements between two or more independent entrepreneurs are prohibited, as well as decisions of entrepreneurs' associations and aligned action that, as a goal or consequence, has the distortion of market competition in the relevant market, in particular those that directly or indirectly establish the purchase or sales prices, i.e., other trade terms. Paragraph 2 of the quoted legal provision considers as legal provisions of agreements, in terms of Paragraph 1, in particular agreements, individual provisions of the agreements, and verbal or written agreements among entrepreneurs and the aligned practice that is the consequence of such agreements, the decisions of entrepreneurs or associations of entrepreneurs, the general terms and conditions, and other entrepreneurial acts that are, or could be, an integral part of the agreements, etc., regardless of whether such agreements were concluded between entrepreneurs acting on the level of production, i.e., distribution (horizontal agreement), or among entrepreneurs who do not act on the same level of production, i.e., distribution (vertical agreements).

The Court states that this is the area of dental medicine, which is regulated by a special law, i.e., the Act on Dental Practice, which regulates the organisation and conditions for dental medicine's practice as a service that ensures the provision of dental assistance to persons when they exercise their rights and protect their oral health. Provision of Article 34 of the said Act stipulates that the Chamber adopts a unified Price List for dental medicine's services, which defines the lowest price for dental services, and

the Chamber defines the lowest price for the work of dental practitioners outside of the network of the public health service.

The High Administrative Court is therefore of the opinion that the document „Minimum Price List of Services” does not represent a prohibited agreement, as established in Article 8 of the CA, because the terms and conditions of dental medicine’s practice are regulated by a special law, from which it follows that it is the Chamber that is solely authorised to establish the lowest possible prices for the work of a medical doctor outside of the network of the public health service.

The Court found that the conclusion of the Agency was inaccurate, i.e., that this is a prohibited agreement which is manifested in the agreement on the prices, and this agreement represents the limitations of market competition, because the agreement of the entrepreneurs on the prices must have as a goal or consequence for the application of such agreed prices in the market, which was not the case here because the Minimum Price List was not applied, nor could it be with regard to the legal regulations from the sphere of dental medicine, according to which only the Chamber can define the lowest prices for the dental services, whereby the account below the minimum prescribed price is subject to sanctions pursuant on special regulations. In this particular case, the prices of services that are prescribed by the „Minimum Price List“ are above the minimum prices stated in the Nomenclature, which follows the regulations of the Chamber.

The Court concluded that the document „Minimum Price List“ does not represent a prohibited agreement, especially because it does not, directly or indirectly, establish the lowest price for dental services, since the definition of the same is under the exclusive jurisdiction of the Chamber, and not of the Croatian Association of Orthodontics. Such a document, not by its content or by its legal nature, is not of a binding character, nor can it be applied in reality, as doctors of dental medicine, in establishing the lowest prices for their services, are obliged to abide by the Price List adopted by the Chamber under the threat of sanctions in cases where they are acting to the contrary.

Comment

It should be noted that the goal of associations and professional associations is to promote the interests of their members, and any agreement on the prices, especially the prescribing of minimum prices and sanctions for their non-abidance, if not permitted by a special law, is considered impermissible. If they do not clearly distance themselves from such agreements, both associations and their members are concluding a prohibited agreement.

It is, therefore, particularly important to take into consideration the decision of the High Administrative Court of the Republic of Croatia, which annulled the decision of the Agency because the Court is of the opinion that the document regulating the prices does not represent a prohibited agreement, because the definition of the prices is under the exclusive competence of another body, pursuant to law, and not of an association of entrepreneurs.

I am of the opinion that the Competition Act, in accordance with the *acquis communautaire* of the EU, clearly defines that the decisions of the associations of entrepreneurs, establishing minimum or unique prices, are considered to be prohibited agreements, regardless of whether such associations are, or are not, authorised to adopt such decisions based on a special regulation. The participants in such agreements, especially associations of entrepreneurs, are subject to sanctions in the form of administrative penal measures, which are based on the very fact that there is evidence on the existence of the agreement, entirely independent of the fact of whether the agreement was applied in practice or not.

5.2. Jovita Einikiene (Circuit Court of Vilnius)

Applicant – The Lithuanian Chamber of Auditors (LCA) is a public legal entity unifying all of certified auditors of Lithuania. The primary activities of the LCA are as follows: supervision of auditors and audit companies' activities in Lithuania; the organization of qualification examinations in Lithuania; the organization of auditors and auditors' assistants continuing professional development, in accordance with International Education standards; the submission of proposals for legal acts that regulate audit and accounting to the State authorities; the *developing of audit methodology and recommendations for Lithuanian auditors*, etc.

Defendant – the Competition Council of the Republic of Lithuania (hereinafter referred to as “the Council”)

Summary of the facts

The object for judicial review is Resolution No. 2S-15 "On the Compliance of the Lithuanian Chamber of Auditors with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania (hereinafter called “Law”), adopted on 21st June 2007. By this resolution, a fine of LTL 30,000 (the former currency) was imposed on the LCA for violation of Article 5, Paragraph 1 of the Law. The LCA submitted a complaint to the Court with a request to annul Resolution No. S-15 of the Council.

The main statements of the claim were the following: the Council unlawfully reopened the investigation, terminated by Resolution No. S-107 of 22nd September 2005, and added the material of this terminated investigation to the new one, thus violating Article 30 Paragraph 4 of the Law under which the Council is entitled to reopen the terminated investigation only if new circumstances arise. The fact that the LCA Praesidium meeting, held on 26th January 2006, approved the recommended Standards of Working Hours for Carrying Out Audits on Projects Financed by Implementing the Lithuanian Programme Single Programming Document (hereinafter called – “SPD”) for 2004-2006 is not the basis for reopening an investigation that was terminated in 2005. The approval of these standards is not to be considered a newly revealed circumstance, but a newly arisen circumstance, and therefore the Council's resolution was adopted unlawfully.

In the resolution, the Council spoke on the unlawfulness of the actions of LCA, although the investigation with regard to the actions of LCA has neither been initiated nor carried out. The activity of LCA was not a subject of the investigation. The Council violated the right of LCA to be informed about the investigation being conducted against it, and to take timely and appropriate remedies (Article 34 of the Law).

LCA could not be punished for violations of Article 5 of the Law, as the provision contained in this Article prohibits the creation of agreements restricting competition, which are understood as agreements between two or more economic entities, combinations of entities, or their representatives, and the LCA cannot be regarded as a combination of economic entities. LCA members are auditors who are employees or owners of the entities. Auditors themselves cannot be regarded as entities because they themselves do not sell audit services and cannot sell them. This is done, and can only be done, by audit firms. LCA is an association whose members are natural persons who are not personally engaged in economic activity and are most frequently in labour relations with audit firms, and therefore LCA cannot be considered a combination of economic entities and is not subject to the provisions of Article 5 of the Law. According to the applicant, the fact that the LCA carries out the functions of supervision and control of the activities of audit companies and therefore may influence the economic activity in the market for audit services, is not the basis from which to regard LCA as a combination of economic entities.

The LCA's actions, which aimed to restrict competition, were named in the Resolution of the Council – and the results of the round-table meeting "On the Audit of the EU Structural Funds" were prepared

in September 2004. Guidelines on the minimum audit fees for EU structural assistance funds were published on the website of LCA. These LCA actions did not limit, and could not restrict, competition, because the LCA is not the right entity to be held liable for carrying out such actions. The "Round Table" is not an LCA body or unit, and its decisions are not LCA's actions or decisions. Other actions of the LCA were approved by the Praesidium of the LCA at a meeting on 26th January 2006, by Protocol No.2: The Recommended Cost Plan of Minimum Working Time for Carrying Audits on Projects Financed by Implementation SRL measures in Lithuania between 2004 and 2006, were approved. The applicant believes that the approval of the aforementioned document, and the sending of these documents to the audit companies, could not have any effect on competition, since it was only for the purpose of guidance. Since the audit type for the support received from the EU Structural Funds is a relatively new service in Lithuania, the methodological assistance of LCA for auditors, expressed in the recommendations adopted by the LCA, is objectively justified and necessary, as the LCA is an institution providing audit quality and thus fulfilled the functions entrusted to them by the law. The petitioner believes that the LCA requirement that the audit company justifies the established price and, if necessary, proves that the service provided for such a price is of a high quality, is the fulfilment and management of the duties and functions established by the Law on Audit and guided by EC Commission Recommendation of 16th May 2002, on statutory Auditors' independence in the EU: a set of fundamental principles".

The Council did not consider the fact that the LCA did not receive any income from the activities that related to the subject-matter of the investigation: LCA did not act in the market of audit services and it did not receive any income from the provision of audit services, and therefore a monetary fine could not be imposed on LCA.

Vilnius Regional Administrative Court announced a decision on 14th February 2008, (Administrative Case No. I-14-561/2008) on the dismissal of the complaint as it was considered to be unfounded.

The Supreme Administrative Court of Lithuania announced a decision on 25th November, 2008 (Administrative file no. A39-1939-08), and in part upheld the appeal of the applicant and changed the decision of the Vilnius Regional Administrative Court: it annulled the part of the Council's Resolution No. 2S-15, which re-assesses the actions of the LCA in 2004, the investigation of which was terminated by the Council in 2005, and reduced the fine imposed on the applicant to LTL 27,500.

The Supreme Court explained that the decision to terminate the investigation should assess the actions performed during the investigation in order to determine that an offence was not found. However, later, after the termination of the investigation, it may have become apparent that the previous conduct of the entity had to be regarded as being a violation of the Law on Competition. The possibility of renewal of the terminated investigation in accordance with Article 30 Paragraph 4 of the Law is thus related to the circumstances, enabling a decision on the actions of an economic entity to be performed before the termination of the investigation. Those circumstances which are associated with violations committed before the discontinuance of the investigation, but which were, at that time, not known, and could not have been known, to the Council, which carried out the investigation, are considered to be new circumstances. The circumstances that appeared only after the termination of the investigation, cannot be considered to be newly discovered circumstances (Latin *factum superveniens*) for the re-starting of the investigation. This can be considered, since new breaches of competition law appeared after the termination of the investigation. Such new violations are the basis for launching a new investigation. The circumstances for the renewal of the investigation should be directly linked to the anti-competitive behaviour that the Council has already assessed. On the contrary, the new and independent violations of the Law on Competition, which were committed after the decision to terminate the investigation was taken, do not justify the restarting of this investigation.

Having assessed the minimum audit prices of the recommended EU structural funds that were adopted in 2004, and the Time-cost Rules and the Plan of Costs of Working Time adopted in 2006, and the nature of these actions, the judicial panel determined that the reasons given by the Council relating

to the nature of the continuing infringement are abstract considerations that are based on assumptions and unfounded evidence. Despite the fact that both proceedings of the LCA carried out in 2004 and 2006, might have had the same objective (as the Council states, restricting competition), these actions were clearly defined in time, had their beginning and end, and, even if they were similar Actions, they could be classified as being separate infringements and not as a continuous one. Article 3, Paragraph 3 of the Law presents the concept of an economic entity. Economic entities are companies, associations (associations, unions, consortia, etc.), institutions or organizations, or other legal or natural persons who carry out, or who may carry out, economic activity in the Republic of Lithuania, or whose actions influence, or may influence, economic activity in the Republic of Lithuania, if implemented. Article 10, Paragraph 3 of the Law defines an agreement as being any contract concluded by two or more economic entities in any form (written or verbal), or by the concerted actions of economic entities, including a decision taken by the combination of any economic entity (association, unification, consortium, etc.). Article 5 of the Law provides for the prohibition of restrictive competition agreements. All agreements that are aimed at restricting competition, or that restrict, or may restrict, competition, are prohibited and invalid from the moment they are concluded.

By the Court, the systematic assessment of these provisions leads to the conclusion that the Law on Competition, in addition to prohibited agreements concluded by two or more economic entities, also prohibits the decisions of associations of economic entities which violate competition law. The Audit Chamber is a public legal entity (Article 56 Part 1 of the Audit Law), and all Physical Persons - Auditors are members of the Chamber of Auditors; the Auditor may perform the audit only as the owner of the Auditing legal entity, no matter what the legal form, or by being employed in an auditing company (Audit Law Article 27 Paragraph 1). The rights and duties of the Chamber of Auditors are governed by Articles 60 and 61 of the Audit Law. These rights do not include the right to provide audit services to the Chamber of Auditors. The Chamber of Auditors themselves thus do not work on the audit services market. However, the Audit Chamber brings together auditors who can carry out audits as the owners of an audit entity, a real member of the audit firm, or a member of the audit firm, or one who is working in an audit firm. Auditors provide audit services in return for payment, and therefore they are to be regarded as economic entities within the meaning of Article 3, Paragraph 4 of the Law. Despite the fact that the LCA does not directly engage in economic activity within the meaning of Article 3 Part 1 of the Law, they undoubtedly connect (combine) such activities (providing audit services) of the entities - the auditors. The Supreme Court referred to the ruling of the Court of Justice of the European Communities (see Judgment of 19th February 2002, in Case C-309/99 *JC W. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*) to supporting arguments qualifying the LCA as the entity that is responsible according to the Law.

Moreover, the decisions of the LCA, as well as the decisions of other similar associations of economic entities, regardless of their binding or purely indicative nature, may enter into the scope of economic activities and, therefore, fall into the scope of the Law on Competition, if they are intended to restrict competition or if they directly or indirectly restrict (may limit) competition. Moreover, the LCA may be considered to be an economic entity because its actions can influence, or its intentions may have an impact on economic activity in the Republic of Lithuania, if implemented. The recommendations of the LCA were, by their very nature, aimed to fix the prices of audit services by co-ordinating the relevant conduct of the auditors in the market for audit services. The Court established that there were investigations that were initiated on the quality of the performance of audit services, in accordance with the firms offering the lowest audit costs. So why was the clear intention of the LCA to consider the recommendations as binding and, moreover, to implement them in real terms. Why were the recommendations of LCA regarded as being an agreement that aimed to restrict competition within the meaning of Article 5 of the Law on Competition? The Court stressed that supervision could not be carried out while violating the rules of competition law. Neither the Audit Law, nor any other legislation, regulates the LCA's function in influencing the prices of audit services, or any other terms of this service, in such a way as to limit the competition between operators providing audit services.

The LCA, as an association of economic entities, can be punished under the Competition Law. Article 81 of the EC Treaty, which expressly provides that, as it is incompatible with the common market, all decisions of associations of undertakings which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the common market, are, *inter alia*, prohibited. In the EC Commission and case-law, there are cases where infringements of Article 81 of the EC treaty are penalized, not by individual undertakings but by their associations (see, *inter alia*, the *Stichting Certificatie Kraanverhuurbedrijf* and the *Federatie van Nederlandse Kraanverhuurbedrijven*, No 94/272/EC, Essentially confirmed by the judgment of the Court of First Instance in *Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission*, Joined Cases T-213/95 and T-18/96; Judgment of the Court of Justice in Case 246/88 *Belasco v Commission*, Para. 7). The Regulation (EC) of Council No 1/2003 on the implementation of the competition rules, which is laid down in Articles 81 and 82 of the Treaty, also provides the possibility of imposing fines, not only on undertakings, but also on their Associations. Article 23, Para. 4 of that regulation provides the subsidiary liability of members of the association for the payment of the fines imposed on the Association. So, the concept of an Association (a union of entities) falls within the concept of an economic entity within the meaning of Article 3 Paragraph 4 of the Law on Competition.

Article 41, Paragraph 1 of the Law on Competition stipulates that "For prohibited agreements <...> a fine of up to 10 percent of the total annual income in the previous financial year shall be imposed on economic entities." The amount of the fine is not related to the income received during or from the violation, but it is calculated from the general years' income. Similarly, the amount of fines from the Association's turnover is calculated also in European Union law (see Article 23 of the Council Regulation (EC) No 1/2003), mentioned above. Taking into account the fact that the Competition Council assessed the actions that the LCA carried out in 2004, although the investigation regarding these violations was unjustifiably renewed, the Supreme Court partially complied with the appeal and reduced the amount of the fine imposed.

Although the decision of the Court is not the hottest one, the statements and the Court's argumentation are still in use, both in later Court decisions and in decisions of the lower Courts. The Court referred to the ECJ case law and EU legislation as the definition of entity (a subject liable under competition law) in the national Law on Competition was narrower and was unclear. At the present time, the Law on Competition is laid down in a new version.

5.3. Maria de Fátima Galante (Court of Appeal of Lisbon)

Name of the parties: *Portuguese Competition Authority v. Professional Association of Chartered Accountants (OTOC)*

Case No. 938/10.7TYLSB.L1-5

Date of the judgment by the Court of Appeal: 19th May, 2015.

Object

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

Background information

The Order of Chartered Accountants is a public legal person and is organized to include a professional membership, which is responsible, on the basis of mandatory registration, for representing the professional interests of chartered accountants and for overseeing all matters relating to the exercise of their functions.

According to Article 3, n.º 1, al. b) of the Training Credits Regulation, Diário da República, 2nd series, N.º 133, Series II, of 12th July, 2007, OTOC promotes institutional training, which consists of events organized by OTOC for its members, of a maximum duration of 16 hours. This aim, in particular, to make the professionals aware of legislative initiatives and amendments and of questions of ethical and professional conduct, and only OTOC can promote institutional training (Article 5 of that Regulation).

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

Ruling of the Court

1. By a decision of 7th May, 2010, the Portuguese Competition Authority held that the Training Credits Regulation had distorted competition in the market for compulsory training for chartered accountants throughout the national territory, and this was in breach of EU law.

A fine was, for that reason, imposed on the OTOC. That market, it was found, had been artificially segmented, a third of it being reserved for the OTOC (12 credits from a total of 35), and, in the other segment of that market, discriminatory conditions were imposed that were to the detriment of competitors to that professional association.

2. The OTOC sought the annulment of that decision before the Portuguese courts, but the Lisbon Commercial Court confirmed that OTOC had breached Article 4 of the Portuguese Competition Act (Law 18/2003, dated 16-11) and Articles 81 and 101 TFEU, and imposed on OTOC a fine of €90.000. The Court also maintained an order requiring the publication of an extract of the decision.

The OTOC appealed the decision of the Lisbon Commercial Court.

3. Lisbon Court of Appeal had sought Court of Justice clarification concerning the interpretation of Articles 56 TFEU, 101 TFEU, 102 TFEU and 106 TFEU, about whether EU competition law applies to professional associations, and reported the main arguments in the order of referral.

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

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

4. The Lisbon Court of Appeal, bound by the interpretation given, decided that by adopting the regulation for remunerated mandatory continued training for chartered accountants, the OTOC had violated both Portuguese and European competition law, upholding the Lisbon Commercial Court Judgment, which confirmed the Competition Authority's decision.

In the view of the Court, the Regulation on the Formation of Credits that was adopted by the OTOC, constitutes a restriction of competition that is prohibited by Art. 101 TFEU, in so far as it eliminates competition in a substantial part of the relevant market to the advantage of the applicant, and it imposes discriminatory conditions on the other part of that market, to the detriment of the competitors of the said professional order.

As regards the measure of the fine, which the applicant considers to be manifestly excessive, account must be taken not only of the criteria set out in Article 44 of Law 18/2003, dated 11-6, as well as those established in Art. 18, 1, of DL 433/82, of 27-10.

It is therefore necessary to consider the high objective and ethic-subjective depreciation of conduct, and that it calls into question fundamental values for the structure and functioning of the economy, namely, the values of freedom to form, supply and demand, and of market access, on the one hand, and the safeguarding of the interests of consumers, on the other, and the economic importance of TOCs at the enterprise and general economic levels is evident. Consequently, in view of the criteria and circumstances set, the Court of Appeal decided that it was appropriate to impose on the applicant the fine imposed by the Lisbon Commercial Court.

Comment

This decision clearly reinforces the understanding of the CJEU in the context of competition law. For the Court of Justice, in the context of competition law, the concept of an undertaking includes any entity engaged in any economic activity, irrespective of the legal status of that entity and its mode of financing, and any activity which consists of proposing goods or services in a given market.

This is why the Regulation of Credit Formation that was adopted by the Order of Chartered Accountants should be considered to be a decision taken by an association of companies within the meaning of Art. 101 of the TFEU.

A regulation establishing a system of compulsory training for accountants in order to guarantee the quality of the services provided by the latter, such as the Regulation of Credit Training, which is adopted by a professional order, such as the Order of Official Accountants, etc., constitutes a restriction of competition that is prohibited by Article 101 TFEU, in so far as it eliminates competition in a substantial

part of the relevant market for the benefit of that trade, and it imposes discriminatory conditions on the other part of that market, to the detriment of competitors in that professional order.

5.4. Ana Paula Lobo (Portugal Supreme Administrative Court)

Decision of the Court of Commerce which was confirmed by the Court of Appeal following referral to the Court of Justice for a preliminary ruling

Subject

Within the scope of the Appeal of Administrative Offence, which was heard at the Court of Commerce of Lisbon, the accused Order of Technical Officers of Accounts, was condemned for the practice of an infraction that was planned and punished by Article 4 (1) of Law No 18/03, Article 81 (1) of the Treaty and Article 43 (1) A) of Law no. 18/03, of 11/6, with a fine of € 90,000.00 (ninety thousand euros). In accordance with the provisions of Arts. 4 n ° 2 of Law n ° 18/2003 of 11/6 and 81 ° n ° 2 of the UE Treaty provisions of the Regulation on Credit Training published in *Diário da República* n. ° 133, Series II, dated July 12, 2007, and attached to Notice n. ° 4539/2007 of the Chamber of Accountants, were declared null and void. It was also decided to publish, at the expense of the Defendant, the decision, by extract, in the III series of the *Diário da República*, and in a daily newspaper of national circulation, within 20 days which were to be counted from the passing of the decision. In disagreement with the content of such a decision, the Defendant filed the present appeal requesting the revocation of that decision and its replacement by another that would acquit them.

1. All the material in the file is related to the approval of the Credit Training Regulation 1, which is approved by the *Direcção da Câmara dos Técnicos Oficiais de Contas* and was published in DR N.º 113, Series II, of July 12, 2007, which regulates the compulsory training of Accountants, provided for in Decree- Law n.º 452/99 of 5th November, and, at present in al. S) of Article 3 (1) of the Statute of the Order of Official Accountants, approved by Law-Decree N.º 310/2009 of 26th October. The judgment under appeal, in the main proceedings, considered that recourse to the compulsory training of TOCs, in the manner in which it was made in the Credit Regulation, infringed Article 4 of Law N.º 18/03 of 11th June and Article 81 (1) of the UE Treaty As an aggravating factor, it considered that it was a decision of an association of undertakings in a relevant market, whose purpose was to prevent, distort or restrict competition in all or part of the defined market, and that this has happened in a noticeable way.

2. It therefore maintained the decision in the part in which it considered the administrative infraction - violation of Article 4 (1) of that Law – had been verified but reduced the amount of the fine imposed in this regard from €114 654.10 to €90 000.00. The "*a quo*" Court also declared the provisions of the Regulation on the Formation of Credits, published in DR N° 113, Series II, 3 of 12th July, 2007, to be null and void, and ordered the publication of the decision at the expense of the accused, in the III Series of the DR and in a national newspaper, to be published within 20 days of its final *res judicata*.

Allegations of the applicant

Proven facts

1. The Law-Decree n. ° 265/95, of 17th October, regulated the profession of official accountant, and it created the Association of Technical Officials of Accounts and the system of compulsory registration.

2. The Law-Decree n. ° 452/99, of 5th November, changed the designation of the former Association of Technical Officials of Accounts to the Chamber of Accountants, and it revoked Decree-Law No 265/95 of 17th October.

3. One of the objectives of the approval of the Statute of the Order of Chartered Accountants was to "strengthen (...) the credibility of statutory auditors as privileged interlocutors with the tax

administration", determining, for this purpose, "a (...) professional training [through] quality control mechanisms supported, *inter alia*, in a system of compulsory permanent training ".

4. The Law-Decree n. ° 310/2009, of 26th October, revised the Statute of the Chamber of Official Accountants, approved by Decree-Law No 452/99, of 5th November, changing the name of this association of professionals to the Order of Chartered Accountants.

5. In accordance with Article 1 of the Statute, "The Order of Chartered Accountants (...) is a public legal person of an associative nature who is obliged to represent, by compulsory registration, the professional interests of statutory auditors and to superintend in all aspects related to the exercise of their functions ".

6. The Office of Official Accountants has the following duties, which are, among others:

- a. To admit the registration of the Official Chartered Accountants, as well as to grant the respective professional license;
- b. To defend the dignity and prestige of the profession, to promote respect for ethical and deontological principles and to defend the interests, rights and prerogatives of its members;
- c. To promote and contribute to the improvement and professional training of its members, in particular, through the organization of courses and seminars;
- d. To define standards and technical schemes for professional action, taking into account the guidelines issued by the Accounting Standards Committee and other international bodies;
- e. To represent the Chartered Accountants before any public or private entity;
- f. To organize and keep up-to-date the Official Accountants' Register;
- g. To certify, whenever requested, that the Official Auditors are in full exercise of their functional capacity;
- h. To organize and regulate traineeships;
- i. To promote and regulate the examinations of candidates for Official Accountants;
- j. To promote the publication of a bulletin or magazine, with the aim of providing updated information in the technical, scientific and cultural areas;
- k. To collaborate with any entities, national or foreign, in the promotion and execution of studies, research and work that are aimed at improving matters of accounting and a fiscal nature. To propose to the legally competent entities the measures needed to defend the functions of Chartered Accountants and their professional and moral interests, and to pronounce on legislation relating to them;
- l. To exercise disciplinary jurisdiction over the Official Auditors;
- m. To establish the principles and norms of ethics and professional deontology.

7. In order to pursue its purposes, the Order of Chartered Accountants exercises its action through:

- a. The General Meeting;
- b. The 'Bastonary';
- c. The Board of Governors;
- d. The Governing Board;
- e. The Fiscal Council; and
- f. The Disciplinary Council.

8. In accordance with Article 35 of the Statute of the Order of Chartered Accountants, it is the responsibility of the Governing Board, amongst others:

- a. "To resolve on the institution and regulation of quality control mechanisms for the services rendered by members of the Order"; (...)
- b. "To deliberate on the institution and regulation of vocational training systems".

9. In accordance with Article 6 (1) of the Statute of the Order of Chartered Accountants, in the version of the Law-Decree n. ° 310/2009, of 26th October, "The following duties are assigned to the Official Accountant":

- a. To plan, organize and coordinate the accounting procedures of those entities which have, or need to have, regularly organized accounts in accordance with the officially applicable accounts or the accounting standardization system, as the case may be, in compliance with legal requirements, accounting principles Guidelines of entities with competence in accounting standardization;
- b. To assume responsibility for technical regularity in the accounting and tax areas, of the aforementioned entities;
- c. To sign, together with the legal representative of the above entities, their financial statements and tax returns, proving their quality, under the terms and conditions defined by the Order, without prejudice to the competence and responsibilities of the respective commercial and tax law;
- d. On the basis of the elements made available by the taxpayers responsible for accounting, they take responsibility for the supervision of declaratory acts for social security and for tax purposes that are related to the processing of wages. "

10. In accordance with Paragraph 2 of the same article, "It is also incumbent upon the Official Accountant to:

- a. Perform advisory functions in the areas of accounting, taxation and social security;
- b. Intervene, on behalf of taxable persons for whose accounts are responsible, during the grace period of the tax procedure, in matters related to their specific competences;
- c. Perform any other functions defined by law, suitable for the performance of their duties, namely those of an expert appointed by the Courts, or by other public or private entities. "

11. Article 15 (1) of the Statute of the Order of Chartered Accountants specifies that: "The following are conditions for registering as Official Accountant:

- a. They must be of Portuguese nationality, or nationals of any of the Member States of the European Union;
- b. Be suitable for the exercise of the profession;
- c. Must not be inhibited or barred from the exercise of the profession;
- d. Have not been convicted of the commission of an intentional crime, in particular one of a fiscal, economic or financial nature, unless rehabilitation is granted, or it has been declared forbidden or disabled;
- e. Must have the qualifications required by the Statute;
- f. Must carry out professional or curricular internship;
- g. Must have passed the professional examination. Pursuant to Article 57 (1) (a) of the Statute of the Order of Chartered Accountants, it is the duty of the Official Chartered Accountants to comply with all the regulations and resolutions of the Order.

13. Article 59 (2) of the Statute Order of Chartered Accountants, says that it constitutes a "disciplinary offence, [by]the violation by the official accountant of an act or omission of any of the general or special duties entered in the [...] Statute [...], or other norms or resolutions adopted by the Order, albeit by way of negligence".

14. Pursuant to Article 63 of the same statute, disciplinary penalties applicable to statutory auditors for the offences they commit are: a warning, a fine, suspension for up to three years, and expulsion.

15. Pursuant to Article 1 of the Code of Ethics of Accountants, this applies to all those "in force and who are working in a system of dependent or independent work, whether or not they are part of professional societies or accounting societies".

16. In accordance with Article 2 of the Code of Ethics for Accountants, "in the performance of their duties, statutory auditors must comply with generally accepted legal rules and accounting principles, adapting their application to the specific situation of entities. Those who provide services, avoiding any diminution of their independence in the interests of personal interests or external pressures, striving for accounting and fiscal truth."

17. Article 3 (1) of the Code of Ethics for Accountants prescribes that accountants are required to "act on the principles of integrity, suitability, independence, responsibility, competence, confidentiality, fairness and professional loyalty".

18. The Regulation on Quality Control was published in the Annex to Notice 131/2004 of the Order of Official Auditors, in the Official Gazette of the Republic, No 175, Series II, dated July 27th, 2004.

19. Pursuant to Article 1 of the Regulation on Quality Control "This Regulation shall apply to statutory auditors who are registered in the Chamber of Chartered Accountants who are (...) in the full exercise of their duties".

20. Pursuant to Article 2 thereof, the Quality Assurance Regulation for Chartered Accountants aims to:

- a. Ensure that the Chartered Accountants present their work with the highest level of quality;
- b. Maintain public confidence in the profession, showing concern for maintaining high quality standards in the work performed;
- c. Ensure the dignity of interprofessional relations, ensuring compliance with ethical and deontological standards;
- d. Encourage and support the Official Accountants in order to achieve the highest standards of quality in the work that is consistently developed in the exercise of the profession;
- e. Avoid the adverse consequences of substandard work and unfair competition.

21. It is stated in Article 4 (1) of the Regulation on Quality Control that the quality control of the activity of Chartered Accountants will be measured by:

- a. The relationship between the number of clients and their size, the fees charged, the number and qualification of employees;
- b. The complexity of the work to be carried out and the training and professional competence of the Official Accountant;
- c. the premises where it operates, in relation to the number of persons working in it;
- d. the available material means, namely, equipment and software, library and archive;
- e. the obtaining of an annual average of 35 credits, in the previous two years, in training that is promoted by the Chamber of Accountants or approved by it;
- f. training activity, in training courses promoted or approved for the purpose of granting credits by the Chamber of Accountants, or by teaching in higher education in the areas of accounting or taxation, that are exercised in the relevant year or the previous year. This is a condition sufficient to comply with Paragraph e) of this Paragraph.

22. Article 4 (5) of the Regulation on Quality Control provides that "if there are any impediments to the verification [of the documents subject to quality control of the official's account] it is obliged to obtain,

through formation, the number of credits referred to in Paragraph e) of Paragraph 1 of this Article, plus 50%, in the year in which the impediment occurs and in the following year,” stipulating Paragraph 6 that, in the event that the official accountant does not comply with this procedure, he will be subject "to providing proof of examination .. "on a subject of his choice and also on matters of ethics and professional deontology ".

23. The Regulation of Credit Training was published in the Official Gazette n. ° 133, Series II, dated July 12, 2007, attached to Notice no. 4539/2007 of the Chamber of Accountants.

24. A preamble to the notice (extract) n. ° 4539/2007 states: "Institutional reasons advise that a specific and unique area of intervention be set up by the Chamber of Auditors to enable it not only to transmit its Institutional message, but also for the mobilization of professionals to the great challenges and goals that only the Chamber of Chartered Accountants is responsible for defining and executing”.

25. Article 2 (2) of the Regulation on Credit Training sets out, among other things, the objectives of Quality Control of Chartered Accountants:

- a. The promotion of the updating of the knowledge of Accounts Receivers, namely, the acquisition and settlement of knowledge, monitoring, understanding and the full knowledge of legislative changes and initiatives; and
- b. The promotion of the constant updating of the dense, complex and constantly evolving normative framework (with special emphasis on accounting and taxation) that governs the practice of the Official Accountant.

26. In accordance with Article 3 of the Regulation on Credit Training:

- a. "1-The Chamber of Chartered Accountants promotes the following types of training:
 - i. Institutional formation;
 - ii. Professional qualification.
- b. 2-The institutional formation consists of communications carried out by the Chamber of Accountants to its members, lasting up to 16 hours, whose objective is (...), the awareness of professionals for initiatives and legislative changes, as well as issues of an Ethical and deontological nature.
- c. 3-The professional training consists of sessions of study and the deepening of the themes that are inherent to the profession, with a minimum duration of more than 16 hours.

27. Pursuant to Article 5 (2) of the Credit Training Regulation, institutional training can only be provided by the Chamber of Chartered Accountants.

28. Pursuant to Article 6 of the Credit Training Regulation, vocational training may be provided by the Chamber of Accountants, by higher education institutions and by entities that are authorized by Law to provide training, as well as by other entities that are registered for the purpose of training. Professional training with the Order of Chartered Accountants is also possible.

29. In accordance with Article 15 (1) (a) and (2) and Article 15 (2) of the Regulation on Training for Credits, the presence in any training action - institutional or professional is ,5 credits per hour, and these are required in order to obtain 12 annual credits in institutional formation.

30. Under the Credit Training Regulations, the Order of Chartered Accountants:

- a. Determines the criteria for admissibility of other entities as trainers of statutory auditors (pursuant to Articles 8 and 9);
- b. Lays down the conditions for the assimilation, for the purpose of crediting, of courses which grant academic and postgraduate degrees (in accordance with Article 10), and of training provided by other bodies (in accordance with Article 12);

- c. Lays down the conditions governing the monitoring of trainees' attendance and quality, and the quality of training (in accordance with Articles 13 and 14);
- d. Lays down the conditions for the allocation of credits (in accordance with Article 15);
- e. Determines the compensatory amount for respective registration and/or approval and supervision of the quality of training (in accordance with Articles 16 and 17).
- f. has a period of three months to decide on the admissibility of enrollment of the training entities, as well as on the training actions they intend to give (in terms of Articles 9, 10 and 11),

31. In accordance with Article 16 of the Credit Formation Regulation, other training entities must pay the Order of Chartered Accountants a fixed fee, either for the application for registration as a training entity, or for the request for approval of each of the training courses they intend to administer.

32. A FDF - Serviços de Contabilidade e Formação Profissional, Lda^a is a company, whose main activity is the administration of training courses and, as a secondary activity, the provision of an accounting service.

33. The FDF requested its registration as a training entity by the Order of Accountants on January 30th, 2008 and received a favorable response to this request on March 12th, 2008.

34. The FDF paid the sum of €200.00 for its registration with the Order of Chartered Accountants, as a training entity.

35. Up to 24th April, 2008, the FDF had not yet applied to the Order of Chartered Accountants for the equalization of any training action it had undertaken.

36. GEST H - Consultores de Recursos Humanos, Lda (GEST H) is a company dedicated, amongst other activities, to the training of professionals in the accounting and fiscal areas.

37. GEST H requested it be registered as a training entity, with the Order of Official Accountants, on October 12th, 2007, and it was resolved at a meeting of the Board of Directors of the Technical Officers of Accounts on December 15th, 2007, with a favorable response to that request.

38. GEST H paid the sum of € 200.00 for its registration as a training entity with the Order of Chartered Accountants.

39. On 27th November, 2007, GEST H applied for the matching of four training courses it intended to administer, and, at least until the end of April, 2008, it had received no response from the Order of Chartered Accountants.

40. GEST H was informed by the Order of Chartered Accountants, by e-mail, on 15th November, 2007, that the matching of each of the training actions would cost € 100.00.

41. Sagabi - Cooperativa de Formação e Consultoria em Gestão, CRL (Sagabi), applied for registration with the 'Order of Chartered Accountants' on 26th September, 2007, and received a favorable reply to that request on 20th December, 2007.

42. On 20th February, 2008, Sagabi applied to the Order of Chartered Accountants to compare two training courses which it intended to administer and, at the latest by the end of April 2008, it had not yet received any response from the Order of Chartered Accountants.

43. Sagabi paid the sum of €200.00 for its registration as a training entity, with the Order of Chartered Accountants.

44. The Citeforma - Centro de Formação Profissional dos Trabalhadores de Escritório, Comércio, Serviços e Novas Tecnologias (Citeforma) is a Professional Training Center for Participatory Management, created by a Protocol granted by SITESE – the Union of Workers and Technical Services and I.E.F.P. – the Institute of Employment and Training.

45. It has as its main activity the promotion of professional training for the valorization of human resources, in the sector that constitutes the scope of action of the granting union.

46. Citeforma requested registration as a training entity with the Order of Accountants, on October 3rd, 2007, and received a favorable response to this request on December 20th, 2007.

47. Citeforma requested, on March 4th, 2008, from the Order of Chartered Accountants, the matching of a set of training actions that it intended to administer.

48. The Order of Account Technical Officers only replied on 23.4.2008 but did not accept the request due to an alleged lack of framing of the subject matter of the same for the purpose of assigning credits to Official Technicians of Accounts.

49. The Order of Chartered Accountants required the payment of €100.00 to certify the equivalence of each of the training services provided by others.

50. The AEP is an association of public interest, whose purpose, amongst others, is to provide services to the business community in the fields of fairs, exhibitions, congresses, information, and support to companies, in relation to consulting and training.

51. AEP requested its registration as a training entity from the Order of Chartered Accountants on 15th October, 2007 and received a favorable reply to that request on 20th December, 2007.

52. In March, 2008, AEP requested from the Order of Chartered Accountants the acceptance of training courses that it intended to administer in partnership with the Angra do Heroísmo Order of Commerce, which was granted by telephone contact with the Order of Official Account Technicians during that month.

53. AEP paid the sum of €200.00 for its registration as a training entity with the Order of Chartered Accountants.

54. The GTI - Technical Support to Investment, SA (GTI) is a company that is dedicated, amongst other activities, to the training and qualification of people in different areas of activity, and to supporting companies in the provision of consultation services unfunctional areas. The GTI requested its registration as a training entity from the Order of Accountants on January 11th, 2008 and received a favorable response to this request on February 26th, 2008.

55. GTI paid the sum of €200.00 for its registration with the Order of Chartered Accountants.

56. Certform - Formação e Consultadoria, Lda. (Certform) is a company dedicated, amongst other activities, to the development of training services, and to supporting companies in terms of professional performance.

57. Certform applied for registration as a training entity with the Order of Accountants on September 4th, 2007 and received a favorable response to this request on December 4th, 2007.

58. This company paid the sum of €200.00 for its registration as a training entity with the Order of Chartered Accountants.

59. In February, 2008, Certform asked the Order of Accountants to match five training courses it intended to administer, with a workload of 18, 24, 36 and 48 hours, of which only a legal action was approved together with some administrative practices in human resources.

60. Certform paid the Official Chartered Accountant €100.00 for each approved training course.

61. The CEI - Centro de Educação Integral (CEI) is a private educational institution with the support of the Ministry of Education whose main objective is the integral formation of its students in order to prepare them to participate actively and fully in society, through the implementation of a school

programme in accordance with official standards that are defined by the Ministry of Education, and with competence and efficiency at all levels of education.

62. The CEI requested its registration as a training entity from the Order of Accountants on October 26th, 2007 and received a favorable response to this request on December 20th, 2007.

63. This Centre paid the sum of €200.00 for its registration as a training entity with the Order of Chartered Accountants.

64. In a letter of January 17th, 2007, the CEI asked the Order of Chartered Accountants to compare the four training courses it intended to administer – in regard to tax updates on IRC; VAT updates; fiscal amendments in property, general tax law and the tax procedure code and Updates in Labor

Law and Commercial Law - which were approved by the Order of Official Chartered Accountants.

65. The CEI paid the Order of Chartered Accountants €100.00 for approval of each of the training actions.

66. Ciclorama - Estudos, Projectos e Produções, Lda. On November 7th, 2007, applied to the Order of Chartered Accountants as a training entity and received a favorable response to this request on November 21st, 2007.

67. Ciclorama paid the sum of € 200.00 for its registration as a training entity with the Order of Chartered Accountants.

68. The Companhia Própria – Formação e Consultadoria, Lda. is a company dedicated, amongst other activities, to the formation of small and medium enterprises of executed and technological companies.

69. The Companhia Própria – Formação e Consultadoria, Lda. requested its registration as a training entity with the Order of Technical Officers of Accounts, on October 29th, 2007, and received a favorable response to this request on December 20th, 2007.

70. The Companhia Própria paid the sum of € 200.00 for its registration as a training entity with the Order of Chartered Accountants.

71. IATOC is a private legal entity, whose main objective is to ensure the practical application of the legal regulations governing the activity of Chartered Accountants.

72. The IATOC did not require its registration as a training entity, because it considered that "the Regulation [of Credit Training] limits the freedom to choose the subjects of the training actions, besides being the Order of Account Technical Officers 'To judge for its own benefit' the 'suitability' of training activities to be carried out by other bodies'.

73. APECA - Associação Portuguesa das Empresas de Contabilidade e Administração (APECA) is a non-profit business association, whose purpose is to promote studies and training activities, in particular, professional ones, with a view to the technical improvement of associated companies.

74. APECA applied for registration with the Order of Chartered Accountants on 27 February 2008 and received a favorable reply to that request on 12 March 2008.

75. APECA paid the sum of €200.00 for its registration as a training entity with the Order of Chartered Accountants.

76. The APPC (Associação Portuguesa dos Peritos Contabilistas) (APPC) is a private association, whose objectives are to intervene in the development of accounting education in Portugal and to promote ongoing training for its members.

77. In a letter of September 17th, 2007, APPC applied to the Order of Chartered Accountants for approval of its new training course - New Accounting System - which it intended to administer.

78. In a letter of 2nd October, 2008, the Association of Chartered Accountants replied that only training activities with a workload of more than 16 hours could be treated as being equivalent for the purposes of granting credits, and that the equalization of training could only occur at a time subsequent to the application for registration of the entity concerned as a training entity. For that purpose, the respective fees will be paid.

79. The APPC requested its registration as a training entity with the Order of Chartered Accountants, on February 16th, 2009, and received a favorable response to this request on May 20th, 2009.

80. APOTEC - Associação Portuguesa de Técnicos de Contabilidade (APOTEC) is a non-profit association of public interest, whose objectives are the cohesion of all professionals covered by its scope, which are respectively valuation and professional training, the defence and promotion of the respective interests, and the study and deepening of the sciences and techniques related to accounting and taxation.

81. APOTEC did not require its registration as a training entity with the Order of Chartered Accountants, because it disagreed with the current system of quality control of the activity of Chartered Accountants by the Order of Chartered Accountants.

82. According to this Association, "more than 90% of the training [by itself] is designed for actions lasting 6 to 8 hours (...) because these actions are most appropriate to the needs of the recipients, allowing them to update their knowledge without departing for more than one day from their job. Since almost all of the training done by APOTEC is less than 16 hours, this Association is prevented from carrying out training that is approved by the Order of Official Technicians Of Accounts, due to not fulfilling the requirement for training of 16 hours of duration or more."

83. APOTEC received a letter from one of its associates, stating that "I hereby request that the resignation of a member of this Association be done on my personal behalf (...) and that of my daughter. This decision is made by virtue of being statutorily obliged to be members of the Order of Chartered Accountants, and, at the same time, that the training that we attend at your Association does not count towards the credits that must be obtained for the Chamber's quality control."

84. The Order of Chartered Accountants sent the Official Accountant, Silvino FG, a letter dated August 16th, 2007, through which it also transmitted to it that non-compliance with the provision of the Regulation of Credit Training that requires the 70 credits in training, in a period of two years "is subject to disciplinary procedure".

85. In October, 2008, APECA provided a training course on the "Revision of tax matters", in two modules, lasting two days, from 9:30 a.m. to 6:00 p.m., in which a daily workload of eight and a half hours is mentioned.

86. In December, 2008, APECA gave a training session on the new Labor and Social Security Code, which lasted two days and offered the following hours: 9.30 am/10.45 am - training; 10h45/11h00 - coffee break; 11h00/12h30 - training; 12:30 a.m./2:30 p.m. - lunch break; 2:30 p.m./4 p.m. - training; 16h00/16h15 - coffee break; 16h15- 18h00 - training; In the announcement for this session a daily workload of eight and a half hours is mentioned.

87. Amongst others, the following subjects are taught within the scope of the training of the Official Auditors:

- a. "Consolidation of Accounts", with a duration of 16h;
- b. "Public Accounting", with a duration of 16h and 32h;
- c. "The National Accounting Standards, with a duration of 16 hours;
- d. "Analysis of Balance Sheets and Economic and Financial Indicators", with a duration of 16h and 32h;
- e. "The Ethics and Deontology of the Official Accountant", lasting 8 hours;

f. "A New Model of Accounting Normalization", with a duration of eight hours and seven and a half hours.

88. On 17th June, 2010, those that were included on the list were registered as training entities are included on the list that is attached to the records on pages 2024 to 2027, the content of which is reproduced here, with a total of 77.

89. The Order of Official Accountants conducts training courses in the districts of Aveiro, Beja, Braga, Bragança, Castelo Branco, Coimbra, Évora, Faro, Guarda, Leiria, Lisbon, Portalegre, Porto, Santarém, Setúbal, Viana do Castelo, Vila Real And Viseu and in the Autonomous Regions, covering the Municipalities of Angra do Heroísmo, Funchal, Horta and Ponta Delgada.

90. APELA carries out training activities in Lisbon, Porto and Vilamoura.

91. APOTEC carries out training in Lisbon, the Azores, Faro, Torres Vedras, Madeira, Guarda, Braga and Leiria.

92. Free Meetings, totally free.

93. In the districts of Angra do Heroísmo, Aveiro, Beja, Bragança, Castelo Branco, Évora, Faro, Funchal, Guarda, Horta, Ponta Delgada and Vila Real, expenses for training paid in 2009 were higher than earnings.

94. The amounts collected for the assimilation of entities and the equalization of training actions are not advertised on the official website of the Order of Chartered Accountants.

95. By a letter sent to the Order of Accountants on 4.12.2006, under reference I-DPR-OF/634/2006/DPR, the Competition Authority requested clarification regarding the implementation of the "quality control service" of the Official Accountants and, in particular:

- a. the basis for the non-approval/disclosure of other public or private entities qualified and recognized as providing the training services in question;
- b. the justification for the absence of the setting of the criteria or standards regulating a standard programme, with subjects and time duration, in order to be able to define equivalences;
- c. the criteria for choosing the subjects selected for compulsory training;
- d. the criteria for defining the duration of each module; and (v) the reasonability of the amounts charged for the courses, in particular for those of short duration, that are provided for the segmented and permanent formation of Official Accountants.

96. Once this letter was received, a meeting with the Competition Authority was requested in order to discuss the matter, and this took place on 12.12.2006.

97. It was agreed at that meeting that the Order of Chartered Accountants would draw up a Regulation for the Formation of Credits, and that, before approving it at a meeting of the Board of Directors, it would discuss it with the Competition Authority.

98. The meeting was attended by Dr. M.M.S., the Competition Authority, the current member of the Order of Official Accountants, D.A., and the lawyer of the Order of Chartered Accountants, Dr. D.A.

99. A meeting was held between the Competition Authority and the Order of Official Accountants on January 16th, at which the issues of professional and institutional training segmentation were discussed, and the latter (compulsory training for a duration of less than 16 hours) would be the exclusive responsibility of the then Chamber of Accountants, and the need for accreditation would be the responsibility of the Chamber of Accountants of the training entities.

100. All of these meetings were held at the premises of the Competition Authority.

101. The M.M.S. participated in these meetings, on the part of the Competition Authority, the present official of the Order of Official Accountants, D.A., and the lawyers of the Order of Official Accountants, D.A. and R.L.V.

102. The Order of Chartered Accountants responded to the letter of 4.12.2006, with the reference I-DPR-OF/634/2006/DPR, on 6/19/07, penalizing the late reply, which was justified by the "need to conceive and carry out a set of documents ... which, because of its complexity and scope, could not be carried out in a shorter time" and which was aimed at "answering the questions ... formulated ", the Order of Chartered Accountants states that "It has drawn up ... a regulation that fits in and defines the way the various players intervene in the administration of training for Official Auditors. "

103. On 6th November, 2007, the Order of Chartered Accountants received a request for further clarification from the Competition Authority.

104. The Order of Chartered Accountants replied in a letter dated 3.4.2008, constant of fls. 112 a fls. 122 of the case-file, the content of which is reproduced hereunder for all legal purposes, with a view to "presenting ... clarification of elements" and "responding to the comments made regarding the Regulations for the Formation of Credits ".

105. The Competition Authority sent a request for information to the Order of Chartered Accountants on 15th April, 2008, to which the Order of Chartered Accountants replied on 3rd June, 2008.

106. On 10th November, 2008, the Order of Chartered Accountants sent a draft of amendments for the Regulation of Credit Formation, to the Competition Authority, and this includes:

- Regarding the amount of financial compensation, the Order of Chartered Accountants proposed to amend Articles 16 and 17 of the Credit Formation Regulation in order to establish that the amounts of the said compensation be published on its website, and they affirm that they reflect the costs actually incurred by the Order of Chartered Accountants for their enrollment and/or the approval and inspection of the quality of the training provided. As regards the need for the transparency of the requirements on which the registration of other entities depends for the purpose of carrying out equivalent training, the Order of Accountants proposed the simplification and implementation of the requirements that are set out in Paragraph 1 of Article 8 of the Credit Training Regulation, which would read as follows:

“The registration of other entities with the Order of Chartered Accountants, for the purpose of carrying out similar training courses, depends on the demonstration of the following conditions:

- * A proven ability to carry out training actions;
- * The stopping of the necessary means to ensure the quality of the training actions;
- * The proficiency of the holders of the management bodies of the respective entity and those responsible for the organization of the training ".

- With regard to institutional training, the Order of Chartered Accountants states that "the duration of up to 16 hours for institutional training, and the consequent need for vocational training lasting more than 16 hours, is perfectly reasonable, justified, and is even in the public interest, given the important public function of the Official Accountants, inasmuch as no professional training lasting up to 16 hours would meet the necessary quality requirements for training." He also says that "institutional training is not confused with vocational training, the first being essentially directed to the learning of professional ethics and to communication, in a merely informative way, of initiatives and legislative and administrative changes."

- As for the deadlines for deciding on the enrollment of other entities and the equivalence of these courses, for the purpose of obtaining credits, the Order of the Official Accountants accepts the reduction to a month of the term for a decision on the registration of other entities, for the purpose of carrying out equivalent training, and proposes that the duration of the approval of the training measures be increased from three to two months for the purpose of obtaining credits.

- As regards the obligations of other similar entities in relation to the control of the attendance of trainees, the Association of Chartered Accountants considers that there is a disparity between the obligations for frequency control in the case of training actions that are provided by higher education institutions and by qualified entities, or by training that is provided by other entities, which is why it maintains the discrepancy between the two types of entities, in regard to frequency control in relation to the respective actions.

107. The Order of Official Chartered Accountants requested that a meeting be held so that the draft of the amendments to the Credit Formation Regulation could be discussed with the Competition Authority's technicians.

108. Such a meeting, despite having been noted, was later cancelled by the Competition Authority and was not rescheduled.

109. Case 3/9 was filed/assessed on 19th February, 2009.

110. Until the receipt of information on the opening of the investigation on 12th March, 2009, the Order of Chartered Accountants had not received any reaction from the Competition Authority regarding its proposal to amend the Regulation on Credit Training.

111. The Order of Chartered Accountants, following a meeting held between the Competition Authority and the representatives of the Order of Chartered Accountants in August, 2008, made itself available to make certain changes.

112. The interlocutor of the Order of Chartered Accountants at this meeting with the Competition Authority was no longer Dr. M.M.S., but instead there were two technicians from the Restrictive Practices Department of the Competition Authority and Dr. L. V .

113. To date, the Order of Chartered Accountants has not amended any provision of the Credit Formation Regulations.

114. In 2009, the Order of Chartered Accountants declared a turnover of €15,287,213.62.

115. The Order of Chartered Accountants acted freely, consciously and voluntarily when approving and publishing the Regulations on Credit Training.

116. It put forward that it was possible that this could cause restrictions in the competition and thus conformation to this consequence.

117. It knew that practices restricting competition are punishable by law.

118. There was no not of prior illegal practices against the Defendant.

Issues to be decided

The accused was charged with committing an offence against the provisions of Article 4, Paragraph 1, and a breach of the provisions of Article 6, Paragraph 1, both under Law No. 18/03, dated 11/6, which is based on the approval and publication of the Regulation on Credit Training, through which the Order of Accountants, as a professional order, created the market for the training of accountants for the purpose of the quality control of their activity and also defined the rules of that market and, as a formative entity, it competes in that market with other entities.

The defence of competition, is, together with private property and free enterprise, one of the Institutions upon which the system of the free market economy, its assumption and the conditions of its operation, rests. Hence, its dedication at the level of Basic Law, both in the Constitution of the Portuguese Republic (Articles 80(a) and 81(e)) and in the Treaty establishing the European Community (Articles 3(1)(g) and 4(1), which relates to competition as an instrument of European integration itself.

Applicable laws and principles

Law n. ° 18/03, of 11/6, which is currently in force, has, in turn, repealed Decree-Law No 371/93, within the framework of an overall reform of competition law, both national and (Decree- Law No 10/03 of 18/01) and taking into account the so-called modernization package and Regulation (EC) No 1/2003 of 16/12/02.

The touchstone of the competition system is, in the wake of Article 85 of the Treaty (now Article 81), the prohibition of the anti-competitive practices that are provided for in Article 4 of Law N. ° 18/03. In accordance with Article 4 – Law 18/03:

1. Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings will be prohibited, in any form whatsoever, which have as their object or effect the prevention, distortion or appreciable restriction of competition, in whole or in part, of the national market, in particular those which result in:

(A) to fix, directly or indirectly, the purchase or sale prices or to interfere in its determination by the free play of the market, artificially inducing both their registration and their write-off. (..). "Article 6 (1) of Law N. 18/03 provides: "The abuse by one or more undertakings of a dominant position on the national market or in a substantial part thereof, for the prevention, distortion or restriction of competition.

Article 81 of the Treaty provides that:

All agreements between undertakings, decisions by associations of undertakings and concerted practices which are capable of affecting trade between Member States, and which have as their object or effect the prevention, or restriction of trade between Member States are prohibited, or that distort competition within the common market, in particular those consisting of:

(A) fixing, directly or indirectly, the purchase or sale prices, or any other trading conditions.

The legal good, which is protected by these standards, is the functioning of the free market. The legislator has chosen not to specify and implement agreements, concerted practices or decisions by associations whose object or effect is to prevent, distort or restrict competition. Pursuant to the provisions of Article 32 of Law Decree n.º. 433/82 of 27/10, updated by Decree-Law no. 244/95 of 14/09, to the type of illegality being analyzed, the rules of criminal law are subsidiarily applicable.

The blank rule will be one that has the peculiarity of incompletely describing the assumptions of punishment for a crime by referring part of its implementation to other normative sources, naming both the first sanctioning norm and the secondary supplementary, or integrating, norms.

There is also a need to prevent a specific infringement of the law - it is not necessary to verify the result (to prevent, distort or restrict competition), which is patent in the legal expression "having as its object or effect", but the capacity to produce such an outcome.

The source of this provision is clearly, and almost repetitively, the aforementioned Article 85 (now Article 81) of the Treaty, which has been the subject of intensive work by the Commission of the 1PI and the TJC, which will, of course, have to be considered in the interpretation and application of Article 2. It can safely be said that, with due adaptations, it is, in this case, through the Commission's guidelines and its decisions and the Community Courts that the integration of the rule should be sought. The concepts are the same, and they have been intensively worked out and studied, and they are valid in our domestic law as well as in Community law.

It should be borne in mind, however, that in domestic law we must also consider such basic principles as *in dubio pro reo*, and all its procedural and substantive consequences when, as in this case, we consider the application of a fine to the Defendant who is Imputed in the practice of the facts that are subject to this provision and that are punishable under Article 43 (1) (A) of Law No 18/03.

Objective type

In order to fulfill the objective type, it is necessary to analyze in turn:

- A. Whether the Defendant constitutes an association of undertakings, as provided for in the precept, and is thus subject to competition law;
- B. Whether the approval of the Regulation of the Formation of Credits configures a decision relating to the association of companies;
- C. What the relevant market is.
- D. Whether the decision taken has, as its object or effect, the prevention, distortion or restriction of competition, in whole or in part, of the defined market, and whether this is an appreciable distortion.

A - Association of subject to competition law

The professional practice of the activity of an official accountant in Portuguese territory is subject to registration with the Order of Official Accountants, and both Portuguese and nationals of Member States of the European Union may exercise activity as an official accountant in Portugal, provided that the conditions for registration that are provided for in Article 15 of the Staff Regulations are verified.

Statutory auditors provide a service, one that is essentially intellectual, both autonomously and cost wise in a market, for remuneration. In view of this situation, it can be concluded that the technical accountants, registered with the Order of Chartered Accountants, are economic operators who provide their services, in a dependent or independent way, perceiving by the same a remuneration as professionals.

The Order of Chartered Accountants is a company, in the definition of company/enterprise that is provided in Article 2 n.º 1 of Law n.º 18/03 of 11/6.

The Order of Chartered Accountants is presented as an association of companies to which, pursuant to Articles 2 and 3, the legal regime of competition applies.

B - Decision on the association of companies

The approval, by the Board of Directors of the Order of Chartered Accountants, of the Credit Regulation is, in this context, the decision of an association of companies.

C - Relevant market

It is through the market definition that the boundaries of competition are identified and defined.

The market, as Prof. Fernando Araújo says, is "... the interaction of the set of sellers and buyers, current and potential, who are interested in the transaction of a given product or factor of production" (*Introduction to Economics*, Almedina, p. 144).

"The main objective of 'market definition' is to systematically identify the competitive constraints facing the companies concerned. The aim of defining a market, both in terms of its product and its geographic dimension, is to identify all relevant competitors. Competitors of the undertakings concerned who are likely to restrict their conduct and prevent them from acting independently of effective competitive pressure. "

The product market identifies the good or service in question and consists of the set of interchangeable products, both in terms of demand and supply. From the point of view of demand, the market is identified by the existence of a set of products, goods or services that are interchangeable, i.e., that consumers see

as being similar, in order to satisfy a given need. Here, you have to consider factors such as price, product characteristics and how to use them.

In turn, the geographical market is established, by taking into account the territorial area in which the producers or sellers of a given good or service compete under uniform conditions. From a demand point of view, if there is an increase in the price of a product at one location and demand moves significantly to another location, these two locations will be considered the same geographical market for that product

2 52, Introduction, Commission notice on the definition of the relevant market for the purposes of Community competition law - 97/C 372/03.

The Competition Authority has argued that the relevant market is that of training for certified accountants for the purposes of quality control, on the demand side of which are the officially registered accounts technicians and, on the supply side, the Order of Chartered Accountants, educational establishments, and other entities that are authorized to provide training in accordance with the law and those inscribed with the Order.

The Defendant does not accept this definition of the market, because she understands that the training she teaches is linked to her duties and should not be considered in that sphere of economic exchanges.

We understand that the market to be considered in these proceedings is that of training for accountants who work in the national territory as liberal professionals, who are compulsorily enrolled in the Order of Chartered Accountants, and all those who seek such training.

The special competencies and attributions of the Order of Chartered Accountants do not leave it outside this market, since it interacts with it as a training entity that is qualified to provide institutional and professional training, along with other entities.

In geographical terms, the market to be considered is the national territory, insofar as the Order of Chartered Accountants carries out its duties and competencies throughout the national territory, and any official Portuguese or foreign accountant, in order to be able to exercise his profession in Portugal, must be registered in the Order, to comply with deontological standards and, in particular, to comply with the Regulation of Quality Control of Technical Account Officers, in the section where it stipulates the need to obtain an annual average of 35 credits. In the last two years, in training that is promoted by the Chamber of Official Accountants or approved by it takes place in the national territory.

Decision having as its object or effect the prevention, distortion or restriction of competition.

D - Limitation of the functioning of the market

The Order of Chartered Accountants stipulates that all Accounts Receivable Technicians must obtain an annual average of 35 credits through training that it has promoted or approved, of which 12 annual credits are from training exclusively provided by itself, and she herself decides who the entities that can administer the training are, and which of the training programmes for credits are obviously interfering with the regular functioning of the market, thus influencing the formation of supply and demand, (the "credit allocation" factor being decisive in this supply/demand binomial), that is:, is engaging in the market distorting behavior. Why this happens is very well understood. The definition of those who can, *a priori*, enter the market, and on what terms they can act on it constitutes, firstly, a limitation on the functioning of the market, binding the economic agents to request prior approval by the Order of Chartered Accountants, and thus not allowing the free play of supply and demand.

The limitation introduced by the Credit Training Regulation allows the obstacles to the entry of new competitors into the market to be reinforced, since they can only compete after being approved by the

Order of Chartered Accountants, and in that market they can only give training that is approved by it that has a duration of more than 16 hours, and a market share that corresponds to training of lesser duration is forbidden.

Firstly, the absence of a time limitation for training measures would allow agents to compete with complete freedom, and consumers could choose the agent who proposed the product (the training action) that is best suited to their needs, in terms of thematic area, duration, price, etc. By means of the approval of the Credit Training Regulation, the contractual freedom of the service provider and the respective client is influenced, on the supply side, by previously obtaining accreditation from the Order of Account Technical Officers and by approval of the training actions to be administered, On the demand side, it is influenced by the frequency of the training through which credits are assigned.

In addition, the Order of Chartered Accountants is in the market, along with the entities that it has decided are able to give training to accountants, offering training that is identical to that of those entities (see the fact proven in 91 .) and of equal or lesser duration (in particular, of less than 16 hours), and, for that reason (if appropriate), they are more suitable for the needs and the availability of official accountants and the attendants are guaranteed to be awarded the credits determined by the Order.

In view of the above, it is clear that the approval of the Credit Training Regulation has the effect of restricting competition in the national market, a conclusion which may be reached without the need to assess whether any entity is no longer in the training market after approval since, we are dealing with an unlawful act in which the risk of harm to competition suffices to establish an infringement.

D.1 - Appreciable limitation

The Defendant contends that, in accepting such a limitation, it would never be appreciable, given the number of entities registered as trainers.

Firstly, let us say that the concept of something being "sensitive" is not given to us by the Law and must therefore be analyzed casuistically.

It is true that it was shown that on 17th June, 2010, that the list included in the case file had a total of 77 training entities registered, and this is shown on pages 20-24 to 2027.

This does not mean, as the Defendant claims, that there is no appreciable limitation, since all training measures of less than 16 hours are barred from being offered by entities other than the Defendant.

D.2 - Proportionality judgment - the interests of consumers and the tax administration

The Defendant also argues that the Regulation of Credit Training was not only intended to pursue objectives that are inherent to the profession, but also to protect the interests of consumers and the tax administration and, to that extent, the proportionality judgment, for the interpretation of Articles 4 Of Law No 18/03 and Article 101 of the Treaty, is fulfilled. The truth, however, is that, in order to guarantee the interests of consumers and the administration, the limitations, particularly in terms of time, which were introduced by the professional and institutional training figures that are included in the Regulation, were unnecessary, hence the argument is unfounded.

D.3 - Justification - Article 5, Law N. ° 18/03 and Article 101 (3) of the Treaty

The Defendant also claims that the Regulation on Credit Training is justified in the light of Article 5, Law N. ° 18/03 and Article 101 (3) of the Treaty, by fulfilling the four cumulative conditions that are laid down in those rules, in particular:

- (a) it contributes to improving the production, distribution or promotion of technical or economic progress;

- (B) reserves for the consumers a fair share of the profits;
- (C) that all the alleged restrictions are indispensable to the achievement of the proposed objectives; and
- (d) that it does not give the Order of Chartered Accountants the possibility to eliminate competition in respect of a substantial part of the products concerned. The requirement in (b) was not demonstrated by the Defendant. As regards the above, it is clear that the conditions set out in (c) and (d) do not exist, since it has not been established that the restrictions are indispensable, and the Order of Chartered Accountants has eliminated competition in regard to training lasting less than 16 hours.

D.4 - Deontological point of view and technical-professional knowledge

The Defendant also argues that several reasons contribute to the continuation of institutional training within its exclusive forum, since it is necessary to provide for the proper training of official accountants from a deontological point of view, and to ensure that they are well equipped with technical/professional knowledge, taking the distinction between the two types of training into account is justified, based on its content, institutional training being merely informative (sensitizing the Official Accountant to changes) and a more in-depth professional and developed specialist.

We understand, however, that the need to guarantee the technical training of accountants is not ensured by obtaining the 12 annual credits of institutional training, because, as mentioned by the Defendant, in this training, deontological and informative content is given, and nothing prevents an Accountant Technician from completing all these credits only with the first type of training.

In addition, if an hour of institutional training allows for 1.5 credits (Article 15 (1) (a) of the Regulation), 8 hours of training with the Order of Chartered Accountants allows this requirement to be met, without the quality (Which will have to be assessed in the light of his mastery of all the subjects necessary for the exercise of his profession) being even minimally guaranteed.

In fact, and contradictorily, this also seems to be the understanding of the Defendant, who states that professional training should last longer than 16 hours, in order to guarantee a minimum duration, since it seeks to deepen matters. However, the Defendant does not explain the reason for the training taking 16 hours, rather than 10 hours, or 8 hours, it being certain that it seems to us that depending on the materials and their novelty the time required will differ.

D.5 - Training throughout the country

The Defendant also advocates the need to be exclusively assigned part of the training, because the other entities that operate in the market do not guarantee the needs of professionals throughout the national territory.

Having analyzed the elements provided by the Order of Official Accountants, these results show that they were carried out by such entities in the districts of Aveiro, Beja, Braga, Castelo Branco, Coimbra, Évora, Faro, Leiria, Lisbon, Portalegre, Porto, Santarém, Setúbal, Viana do Castelo, Viseu, and in the Autonomous Regions, in the municipalities of Angra do Heroísmo, Funchal and Ponta Delgada, and it was not proven, as the Defendant had argued, that the training entities registered for this purpose with the Order of Official Technicians of Accounts, had carried out, or would carry out, in 2009 and 2010, and primarily, the training in the following districts: Lisbon, Porto, Viseu, Coimbra, Aveiro and Braga, which are districts with a higher population density.

It is clear from the foregoing that there is no need to remedy the gaps in the geographical training of official accountants, as alleged.

In view of the above, we understand that it is sufficiently demonstrated that, in approving and enforcing the rules of the Credit Formation Regulation, the Order of Chartered Accountants has taken a

decision that has the effect of appreciably restricting its nature and representation in the market being considered - the Portuguese training market for accountants – and thus the competition in that market.

The mere existence of the rules contained therein limits, in the abovementioned terms, the restriction of free competition between the various agents operating on the market, which appears to be a factor that inhibits the free play of supply and demand.

One cannot argue, as does the Defendant, that there are identical situations, concerning the Order of Chartered Accountants, the Bar Association, the Order of Engineers, or the Order of Dentists.

This is not the subject of our records. It is not the fact that, downstream, another entity, by legal or conventional means, practices similar acts, which are considered to be unlawful, without suffering, whether justifiably or not, (identical) persecution that precludes the responsibility of the Defendant.

Finally, it must be said that an infringement is not an act of harm, but one of danger: if the legal right is endangered, that is to say, to establish an infringement it suffices to show the possibility of injury which, *in casu*, is verified.

This offence was maintained as long as the rules in question were in force, since the Defendant took a decision and maintained it, unchanged. This is, moreover, an unlawful act of a permanent nature, since its execution and consummation endure in time, comprising, at a first stage, the whole conduct of the agent until the event, followed by a second phase that lasts until the Agent fulfills their duty to cease the unlawful conduct. The violation of the legal good is prolonged while the criminal resolution lasts, that is, the execution persists in time because the agent voluntarily maintains the illegal situation.

In conclusion, the objective element of the type under analysis is fulfilled.

Subjective type

As for the subjective element of this type, acts with intent (if any), under the terms established in Article 14 of the Criminal Code, that fulfill a type of wrongful act that is a possible consequence of their conduct, and act in accordance with that achievement.

Arguments have been adduced by the Defendant to exclude deceit. It claims to have established prior contacts with the Competition Authority and to have approved the Regulation only after receiving an express expression of non-opposition to its content on the part of the Competition Authority, which is why it considers that fraud is excluded.

It should be recalled here that this factuality was not established, but only that meetings were held between the Defendant and the Competition Authority in which the content of the Regulation was addressed. This does not, therefore, exclude deceit as being conscious and with the will to practice the act.

Having determined that the Defendant wanted to approve and maintain the Regulation of the Formation of Credits in force with the mentioned dispositions, representing, as a consequence, the possibility to cause restrictions in competition and to conform with this consequence, it is concluded that it acted with possible deceit - Article 8 of the RJCOC.

Having concluded that the conduct of the Defendant violates the provisions of Article 4 (1) (A) of Law N. ° 18/03 of 11th June, it is now necessary to ascertain whether it is also in breach of Article 81 of the EC Treaty.

The decision infringing the competition rules affects trade between Member States

As is clear from the abovementioned rule, it is the precondition for its application that the decision infringing the competition rules affects trade between Member States.

In order to help define and standardize the interpretation and scope to be given to this notion, the Commission issued a communication entitled "Guidelines on the concept of the effect on trade between Member States provided for in Articles 81 and 82 of the Treaty" (OJ No C 101 of 27th April, 2004). Since this communication is very clear, part of its content is transcribed.

The effect on trade criterion circumscribes the scope of Articles 81 and 82 to agreements and abusive practices likely to have a minimum level of cross-border effects in the Community. According to the Court, the possibility of the agreement or practice affecting trade between Member States must be 'appreciable'.

It should be noted at the outset that, throughout the territory of a Member State, the Regulation is liable to affect trade between Member States within the meaning of Article 81 of the Treaty, since it makes it difficult for other providers to gain access to the market. It not been shown that the restrictions contained in the Regulation are necessary for the proper pursuit of the interests of accountants or the proper exercise of their profession (See, to that effect, *Wouters* of the Court of Justice of the European Communities, cited above, and Commission Decision of 24 June 2004, Case COMP/38.549 - OP).

In view of all of the foregoing, the court considers that the Defendant's conduct is also in violation of Article 81 (1) (A) of the EC Treaty.

Court of Appeal of Lisbon - Proc. 938/10.7TYLSB.L1-5, 19-05-2015

Decision1 First Instance- Court of Commerce

To order the accused, the Order of Technical Officers of Accounts, to pay a fine (for an administrative offence established and punished by Articles 4 (1) of Law N.º 18/03, Article 81 (1) and Article 43 (1), Al. A) of Law n.º. 18/03, of 11/6) of €90,000.00 (ninety thousand Euros).

In accordance with the provisions of Arts. 4 (2) of Law N.º 18/2003 of 11/6 and 81 (2) of the EC Treaty the provisions of the Regulation on Credit Training published in the Official Gazette No 133, II Series of 12 July 2007, annexed to the Notice n.º. 4539/2007 of the Chamber of Accountants, is declared null and void.

Determining the publication, at the expense of the Defendant, of this decision, by extract, in the III series of the *Diário da República*, and in a daily newspaper of national circulation, within a period of 20 days counted from the publication of the decision.

The Appeal Court decided:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on the interpretation of the Treaties and on the validity and interpretation of acts adopted by the institutions, bodies, offices and agencies of the Union - Article 267 TFEU. In the present case, the interpretation of Article 101 (1) of the TFEU is at issue, that is to say, it is necessary to assess, in the light of Union competition law, whether a Profession, a certain formation that only she administers.

Pursuant to Article 267 (3) TFEU, where a question of that kind is raised in proceedings that are pending before a national court whose decisions are not open to judicial review under national law, the Court must submit the matter to the Court. Since the decision of the Lisbon Court of Appeal is not subject to appeal in Portuguese domestic law, the questions raised by the Order of Chartered Accountants fall within the so-called mandatory return.

Questions before the Court of Justice of the European Union.

1. If an entity such as OTOC is to be considered as an association of undertakings for the purposes of applying Community rules on competition (the training market)? In that case, the existing Article 101 (2) TFEU must be interpreted as meaning that an entity which, like the OTOC, adopts binding rules for general application, and in the development of legal requirements, concerning the compulsory training of TOCs, with the aim of ensuring to citizens that training is credible and of a sufficient quality?

2. If an entity, such as OTOC, is legally required to implement a system of compulsory training for its members, the present Article 101 TFEU can be interpreted as allowing the calling into question the training that is legally required by the OTOC and the implementing Regulation, in so far as it is limited to giving translation that is strictly linked to the legal requirement? Or, on the contrary, such a matter falls outside the scope of Article 101 (0), and must be assessed under the current Articles 56 et seq. of the TFEU?

3. Given that *Wouters*, and similar judgments, were concerned with legislation affecting the economic activity of members of the trade professions in question, the present Articles 101 and 102 TFEU can be considered to refer to a regulation on TOCs' training which does not directly influence the economic activity of those professionals?

4. In the light of competition law (on the training market) of the Union, can a Professional Order require, for the exercise of that profession, a form of certain training that it alone oversees? The submission of the questions referred for a preliminary ruling lead to the suspension of the present case until the decision of the Court of Justice of the European Union. It is therefore clear that, as far as the dispute in the main proceedings is concerned, the requested interpretation of Article 56 TFEU and onwards, as well as Article 102 TFEU, bears no relation to the subject matter of this case litigation and is therefore not relevant to its solution.

Firstly, the compatibility of the contested regulation with Article 56 TFEU et seq. is not the subject-matter of the contested decision and, on the other hand, the partial annulment of that regulation by the Lisbon Commercial Court, in so far as it finds an infringement of Article 102 TFEU, was not contested before the national court. It must therefore be held that the first to third questions concern only the interpretation of Article 11 (1) TFEU.

The questions referred.

By its first and third questions, which must be examined together within the limits that are set out in Paragraph 32 of this judgment, the national court asks, in essence, whether a regulation such as that at issue in the main proceedings from a professional order, such as the OTOC, must be regarded as a decision that is taken by an association of undertakings, within the meaning of Article 101 (1) TFEU.

In particular, it seeks to ascertain whether the fact that, on the one hand, the OTOC, by virtue of the law, has to adopt binding rules for general application that aim to establish a system of compulsory training for its members, in order to guarantee citizens the provision of a credible and high-quality service and, secondly, that those rules do not directly influence the economic activity of statutory auditors has an impact on the application of Article 101 TFEU.

1- In those circumstances, accountants, in view of the way in which their profession is regulated in Portugal, are engaged in economic activity and they therefore constitute undertakings within the meaning of Article 101 TFEU, without the complex and technical nature of the services that they provide and that the exercise of his/her profession is regulated, is such as to alter that conclusion (see, by analogy, *Wouters and Others*, Paragraph 49).

2- Second, it should be examined whether OTOC should be considered an association of undertakings when it adopts a regulation like that under dispute or whether it is acting as a public authority.

Even assuming that the regulation does not have a direct influence on the economic activity of the accountants themselves, as the national court seems to suggest in its third question, that circumstance is not in itself capable of subtracting the decisions of an Association.

On the scope of Article 11 TFEU.

In the light of the foregoing, the answer to the first and third questions must be that:

- A regulation such as the contested regulation, that is adopted by a professional association, such as OTOC, must be regarded as a decision taken by an association of undertakings within the meaning of Article 101 (1) TFEU.
- The fact that a professional order, such as OTOC, is legally obliged to introduce a system of compulsory training for its members is not such that it excludes from the scope of application of Article 101 TFEU the rules that are approved by that professional association, provided that they are attributable exclusively to the latter.
- The fact that those rules do not have a direct influence on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, since the infringement imputed to the same professional order concerns a market in which it itself exercises an economic activity.

The fourth question.

By its fourth question, the national court essentially asks whether the Union's competition law precludes a trade order from requiring its members to follow a course of study which it has exclusively pursued under conditions such as those which are at issue in the main proceedings.

The answer to the fourth question must be that a regulation introducing a system of compulsory training for statutory auditors, in order to guarantee the quality of the services provided by the latter, such as the contested regulation, that are adopted by an order such as the OTOC, constitutes a restriction on competition that is prohibited by Article 101 TFEU, which is for the national court to determine whether it eliminates competition in a substantial part of the relevant market for the benefit of that trade, and imposes on the other part of that market discriminatory conditions that are to the detriment of the competitors of that professional order.

The Court of Appeal decided :

As stated in the ECJ judgment, the restrictions of competition imposed by the contested Regulation thus go beyond what is necessary in order to ensure compliance with the task that is entrusted to the OTOC.

In addition, as the Court of Justice and the national court have already concluded, the ECJ also takes the view that the control exercised by OTOC in relation to the bodies applying for training, and the actions proposed by those bodies, are not organized on the basis of clearly defined criteria that are transparent, non-discriminatory, verifiable and capable of guaranteeing equal access to the relevant market for training bodies. In other words, in addition to competing in the training market (in which the exclusive market of about 1/3 is attributed), OTOC decides discretionally who can compete with it, takes advance knowledge of the offerings of others, can prevent current training by requiring a submission for approval of new courses at least 3 months in advance, and, as a rule, the duration of the training is differentiated. It must therefore be concluded that the contested regulation constitutes a breach of

competition that is prohibited by Art. 101 of the TFEU, in so far as, for the reasons set out above, it eliminates competition in a substantial part of the relevant market to the benefit of the OTOC and imposes discriminatory conditions on the other side of that market, to the detriment of their competitors in that business order.

It should also be borne in mind that, as is apparent from both the Court of Commerce and the CJEU, the relevant market is the entire national territory and Art. 101 (1) TFEU covers both the present and the potential effects of the decision under consideration, and it is therefore necessary to consider not only the past or present product of the Regulation which have adverse effects on competition in the internal market, but also the possibility that such a risk to competition (It is necessary to remember that the breach of Article 4, 1 of Law 18/2003, of 11-6 requires only the concrete danger and not the result). Moreover, since it applies throughout the territory of the Member State concerned, a regulation such as the contested regulation is liable to affect trade between Member States, within the meaning of Article 101 TFEU. The conditions governing access to the market for the compulsory training of TOCs that are imposed by the contested regulation, are likely to be of minor importance in the choice of the undertakings that are established in Member States other than the Portuguese Republic in order to carry on their activities in the latter Member State (Paragraphs 65 to 67 of the ECJ judgment).

The Court of Appeal of Lisbon, in dismissing the appeal, fully upheld the contested decision.

Personal comment

I think that the case in question is particularly relevant, not only for the situation in itself, which examines the breach of competition rules by a statute that is drawn up by a professional order – the Order of Accountants – and which is probably replicable in most EU countries, but also because the decision required the intervention of the TJEU, where one can collect important data on how a professional should perform in order to comply with Community law, and particularly with competition law.

5.5. Vanya Valkadinova (Administrative Court of Blagoevgrad)

Price Fixing by the Bulgarian Construction Chamber

I. Summary of the facts

The “Bulgarian Construction Chamber” (hereinafter referred to as BCC) is a legal entity, a non-governmental organization that is established under the Construction Chamber Act (promulgated in State Gazette No. 108 of December 29th, 2006). BCC is an independent, voluntary, professional organization in the construction industry. It is the nationally representative organization in this sector of the industry. The Chamber is comprised of 2297 members in 27 regional offices in the country. A major part of its members is made up of builders, both Bulgarian and foreign natural and legal persons, who are registered as traders under the national legislation and whose branches carry out construction on the territory of the Republic of Bulgaria. The Chamber does not carry out independent economic activity in the provision of construction services, and it does not distribute profit. Its main activities are connected with the representation of its members, both within the country and abroad.

At the end of 2007, the BCC launched an independent initiative to draw up recommended building prices by regions and types of construction, based on a survey that was conducted through the regional offices of the Chamber within the country. The initiative finds expression in the guide prices that were adopted in the field of high-level construction at a session of the Executive Bureau of the Bulgarian Construction Chamber on 05.06.2008 and by the Board of Directors of the BCC on 26.06.2008, and by the General Meeting of the BCC on 26.06.2008. In the field of hydro-technical construction, the guide prices were approved at a meeting of the Executive Bureau of the BCC on 31.07.2008 and on 12.08.2008, and the prices of the services for road construction were adopted at a meeting of the Bureau on 19.12.2008. The guide prices are in the field of high road and hydro technical construction and were published on the official website of the BCC, and they are part of its unprotected content, as free access to them was possible from the beginning of March 2010.

On 26.06.2008, the General Annual Report of the Bulgarian Construction Chamber adopted a professional Ethics Code for the Constructor, the rules of which are obligatory for each builder (all Bulgarian and foreign natural and legal persons who are registered as traders under their national legislation). In a separate section, “Recommended Prices” (Article 25), in an imperative form, there is a regulated obligation for the constructor to seek to negotiate, with the contracting authority, the prices under the construction contract which are not below those that are average for this branch of business in the region. In violation of these rules, the imposition of disciplinary sanctions on the accused builder by a specially created body of the BCC - the Commission on Professional Ethics, is envisaged.

II. Judicial proceedings

On 15th June 2009, the Commission for the Protection of Competition (hereinafter referred to as the Commission) initiated, on its own initiative, on the basis of a signal that the BCC had imposed a certain price impact on the construction services market, proceedings for a possible violation of Art. 15, Para. 1 of the Law on the Protection of Competition (hereinafter referred to as the LPC), expressed in the decision of an association of enterprises, which aims to prevent, restrict and distort competition in the relevant market.

The norm of Art. 15, Para. 1 of the LPC contains a general prohibition of any kind of agreement between enterprises, decisions by associations of enterprises and concerted practices between two or more enterprises which have, as their aim or result: the prevention, restriction or distortion of competition in the relevant market. The application of this prohibition requires the cumulative presence of the following elements in its actual composition:

- A participant in the relevant market who has the characteristics of an “enterprise” or “association of enterprises”;
- An agreement or concerted practice between enterprises, or a decision by an association of enterprises;
- The agreement, decision or practice must give rise to a specific anti-competitive effect, having as its object or effect the prevention, restriction or distortion of competition.

For the purposes of the proceeding, the Commission defines the following affected product market: a market for the provision of construction services on the territory of the Republic of Bulgaria, as on the basis of the facts of the survey carried out it accepts that under:

1. The first of the elements of Art. 15, Para. 1 LPC would point to the BCC bearing the marks of an association of enterprises within the meaning of the LPC - an independent, voluntary, professional association in the construction industry, which does not actually carry out an economic activity, but which brings together independent economic entities - natural and legal persons who are registered as traders under the national legislation (The legal form and the existence of legal personality are irrelevant - Case 96/82 IAZ International BV [1983]).

The Commission submits that, although the activity of the builders is subject to regulation because of the technical nature of the services provided and their importance to society, it is economic in character. Builders carry out construction and assembly work in order to receive remuneration from the contracting authorities and they represent enterprises within the meaning of § 1, Item 7 of the AR of the LPC, and the BCC, as their association falls within the scope of the provision of Art. 15 of the LPC.

2. The second of the elements of Art. 15, Para. 1 LPC -- that from the point of view of competition law, any statement and/or action that derives from an association of enterprises, regardless of its legal nature, and in which it is reflected, or with which the policy of the association is implemented, is a decision which is within the scope of the prohibition under Art. 15, Para. 1 LPC. The activities of the BCC include a series of measures that have led to the setting of guide prices (recommended/exemplary) in the markets of hydro technical services and road construction, which are published on its official internet website. The fact that these documents are not mandatory, nor that the prices are recommended/a guide is irrelevant to their classification as decisions by associations of enterprises. It is enough that they are brought to the attention of members and society as a whole, as an act through which the Chamber's policy is implemented.

3. The third component of the prohibition under Art. 15, Para. (1) of the LPC, the Commission underlines that the provision involves any conduct which, either directly or indirectly, leads to the fixing of prices, and the decision of the BCC is one of the types of infringements which have as their object the direct or indirect fixing of prices, which are the most serious infringements, illegal in their nature, even when they have not yet had a real effect on the market (Case C-49/92 P Anic Partecipazioni [1999] ECR I-4125, Para 99; Judgment of the Court in Joined Cases Consten and Grundig v Commission (56 & amp; 58/64) [1966] ECR 299). The very subject-matter of the decision in this case - fixing prices, is in itself decisive for the existence of an anti-competitive effect. Even in the form of recommended prices, the decision has an anti-competitive effect, because it allows market participants to make reasoned conclusions about the pricing policy that is pursued by their competitors on the relevant market, thus creating a real likelihood of replacing the independent market behaviour of the participants in the relevant market with coordination between them, which distorts the normal market environment and adversely affects consumer welfare. Prices are thus artificially maintained at levels which are not established on the market through the action of natural self-regulation mechanisms (the fixing of minimum prices within an association was established by the European Commission as being anti-competitive in the case of AROW v BNIC OJ [1982] L379/1).

4. The existence of an anti-competitive purpose in the behavior of the BCC is also confirmed by the rule set out in the Moral Code of the Builder, which is that: the builder seeks to negotiate with the

assignor prices under the construction contract which are not below the average for the sector in the region. The Commission underlines that, although the content of the decision of the branch organization in question does not contain a specific pattern of conduct, inasmuch as those prices are not fixed, it establishes a pattern and a direction for economic behavior and, in essence, is a recommendation to the representatives of the sector that brings their activity into accord with the price parameters that are established therein (85/75/EEC: Commission Decision of 5 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.307 - Fire insurance (D))).

In conclusion, with Decision № AKT-496-04.05.2010, published on 10.05.2010, the Commission has decided that, both on its own and in its totality, the actions and decisions of the BCC for the setting of guide prices, in this respect, the inclusion within the Ethics Code of the Constructor of a section entitled “Recommended Prices,” are a decision of an association of enterprises that aims to prevent, restrict and distort competition in the market for the provision of construction services, in breach of the general prohibition of Art. 15, Para. 1 of the LPC, imposed a proprietary sanction on the BCC and ordered the suspension of all actions that are aimed at defining fixed, guide or recommended prices that are related to the provision of construction services, and they change of the Code of Ethics by abolishing the provision of Art. 25 from it.

III. Ruling of the Court

The Commission's decision was appealed by the BCC through court proceedings, and it was confirmed by Decision No. 4091 of 22nd March, 2011, of the Supreme Administrative Court under Administrative Case No. 7721/2010, a three-member panel, the latter being confirmed by Decision No. 13124 of 17th October, 2011, of the Supreme Administrative Court under Administrative Case No. 8051/2011, a five-member panel.

The Supreme Administrative Court has added that the optional form of the adoption of guide prices is not the definition of such in the strict sense of the law, but it creates sufficient preconditions and encourages the coordinated behavior of the enterprises on the relevant market, as it refers to a sensitive element of the economic behavior of companies, namely pricing. From the point of view of protecting this essential element of the economic activity of the enterprises, which is initially a trade secret, and in view of the interests of the consumers and the contracting parties (the assignor and the sub-assignor) from price formation on a purely market-based basis, the BCC decision reveals a potential to deepen the anti-competitive effect. It not only assumes a coordinated behavior among the market participants, but it can be considered, hypothetically, to be the first step towards a process of hidden price fixing that is binding, and to eliminate effective competition principles in the sector.

IV. Comment

The case presented is a typical example of a banned decision of an association of enterprises which seeks to impose the pursuit of a particular economic behavior, thereby replacing effective competition between independent business entities that are in cooperation with each other. The decision regulates the price behavior of the members of the Chamber and limits an essential element of the competitive environment of a substantial part of the relevant geographical and product market in Bulgaria and therefore does not benefit from the protective action of Art. 101, Para. 3 of the Treaty on the Functioning of the European Union. This case also shows that, in practice, both the national competition authorities and the national courts strictly apply EU competition law - Art. 101 TFEU, while adhering to its interpretation in the practice of the EC and the CJEU on decisions that are related to fixing prices, both directly and indirectly, in the form of pricing mechanisms that harm consumers' interests, which is the main motivation behind the ban on any kind of coordinated behavior among the participants in a given market. This practice is followed in all other cases of decisions of professional organizations which are likely to influence the individual pricing behavior of participants in the market for goods and services in Bulgaria.

6. Vertical Agreements

6.1. Dimitrina Petrova (Administrative Court of Sofia)

References

Administrative Case No 14837/2013 of the Supreme Administrative Court of Bulgaria, Trial Panel; Decision No 765/25.01.2016.

Case No 461/2013 of the Commission for the Protection of Competition; Decision No 1261/25.09.2013.

Applicable Law and Decisions: Case T-7/89 - Hercules Chemicals v Commission [ECLI:EU:T:1991:75]; T-41/96 - Bayer v Commission, [ECLI:EU:T:2000:242]; Case 246/86 Belasco v. Commission; C-199/1992; C-199/92, P - Hüls v. Commission [ECLI:EU:C:1999:358].

Parties involved:

A producer of refined oil in the market of Bulgaria - "Biser Oliva" AD, hereafter called "The Producer".

The main distributors of the company - "Familex" OOD, "MA Malashkov" EOOD, "Zagora" 2000 OOD, "Velizara 2000" EOOD, hereafter called "The Distributors".

Commission for the Protection of Competition - The Commission is the Bulgarian Administrative Authority, which is established by Law and which is considered to be an autonomous and independent organization, whose public authorisations and competencies are determined by the Law on the Protection of Competition.

Facts

1. The Commission for the Protection of Competition (CPC) on the grounds of Art. 91, Para. 5, Item 1 of the Law on the Protection of Competition (CPC), initiated, for the establishment of violations under Art. 15 of the LPC, by the Producer and the Distributors, based on agreements for trading. The proceedings were initiated on the occasion of a sector analysis of the competitive environment of the two interconnected markets for the production and trade in sunflower oil in the market. In the sector analysis, the CPC found stipulations in the contracts between the Producer of refined oil and the main Distributors of the company, the application of which are liable to restrict competition in the wholesale market for refined bottled oil, which are declared as being horizontal agreements.

2. In its sector analysis, the CPC declared the geographical market for bottled sunflower oil to be one that is primarily intended to meet final consumption. The established practice for the commercialisation of the product to the end customer is through the use of the different distributors who sell on the wholesale market. The geographical coverage of the distribution network depends mainly on the capacity of the manufacturer and on its adaptation to the specific competitive conditions on the ground. The product is a traditional product in the Bulgarian market, and this fact alone is sufficient for the successful entry of the product into various territorial regions in the country. In addition, it should be pointed out that the marketing strategies of the product concerned are national, rather than local. No territorial restrictions on distributors have been established, which implies that the territory in which the undertakings compete are to be defined as national. The market share of the Producer was recognized as being 5% of the national market for the product.

3. In accordance with Art. 3, Para. 1 of Council Regulation No. 1/2003, the CPC, as a national competition authority, has the obligation to apply Art. 101 and/or Art. 102, of the Treaty on the Functioning of the European Union (TFEU) whenever anti-competitive behaviour (by prohibited agreements or the abuse of a dominant market position) affects, or is likely to affect, trade between the Member States of the EU. In its Decision, the CPC, applied the criterion that had been established by

the Community Law, assessed on a case-by-case basis, and declared that EU law is not applicable to agreements and practices which cannot significantly affect trade between Member States. According to the application of the effect on trade criterion, the CPC assessed the three criteria requirements for the application of the EU law, in the current case: 1) the notion of "trade between Member States"; 2) the notion "can affect," and 3) the notion of "significance." The CPC declared that agreements involving RPMs can affect the pattern of trade in the same way as horizontal agreements. For the sake of completeness, the CPC analyses whether the effect on trade between Member States may be "significant." The CPC decided that, in the present case, the market position expressed by the Producer's market share and the turnover of the company in the conversion of refined sunflower oil through distribution contracts does not imply such a likelihood and is not indicative of the ability of the agreement to affect trade between Member States. Based on this principle, the CPC decided that the specific case at issue, cannot have any effect on trade between EU Member States, and thus Art. 101 and/or Art. 102 of TFEU are not applicable.

4. The violation of competition that was declared by the CPC, was declared under the breach of the rules, established by Art. 15, Para. 1 (1) of the LPC. The legal norm provides for the general prohibition of any kind of agreement between undertakings, decisions by associations of undertakings and concerted practices of two or more undertakings which have, as their object or effect, the prevention, restriction or distortion of competition in the relevant market, such as direct or indirect pricing, or other trading conditions. The Distributors have been declared independent entities that, according to the conditions of the contracts, assume the financial and commercial risk that arise from the agreement, and its conduct on the market is characterised as being part of the undertaking. In view of this and based on the application of the settled EU case law, the CPC concluded that the Distributors' conduct falls within the scope of the prohibition under Art. 15 Para. 1 of the LPC, which applies to any form of regulation of business relations between independent undertakings through which an agreement is reached, and which restricts, or is likely to restrict, their freedom to determine their own and independent conduct on the market. The contracts signed between the Producer and the Distributors have been declared to be formal vertical agreements within the meaning of Art. 15 Para. 1 of the LPC, as the agreements, by their very nature, are intended to prevent, restrict or distort competition, and are thus agreements which have as their object the fixing of prices. Under vertical agreements, the resale pricing has been determined by the agreement of the parties to fix the resale prices for which the distributor offers certain goods or services on the market.

The effectiveness of this resale pricing mechanism has also been strengthened by providing a monitoring system for the fulfilment of the distributor's obligations, and by providing for sanctions in various forms to ensure that the products will be marketed in the way that is stated by the Producer. Based on this, the CPC declared a breach of the LPC guarantee which establishes the economic freedom of enterprises in relation to their market behaviour.

5. In its Decision No 1261/25.09.2013 in Case No 461/2013, the Commission for the Protection of Competition (CPC), based on the a.m. facts and legal analysis, established that the Producer and the Distributors have committed a violation of Art. 15, Para. 1, Item 1 of the LPC, consisting of a prohibited vertical agreement which, by its purpose, prevents, restricts or distorts competition in the market for bottled sunflower oil by means of the direct or indirect pricing of the resale price for the oil. Monetary sanctions were imposed by the CPC on all parties for violation under Item 1 of the Decision.

6. Decision No 1261/25.09.2013 of CPC, has been appealed in front of the Supreme Administrative Court of Bulgaria, which issued a final Decision No 765/25.01.2016 in Administrative Case No 14837/2013, and revoked the Decision of the CPC, as issued in breach of the LPC and Community Case Law. The main allegations of the parties before the Court were based on their statements, that the CPC did not correctly apply the material law, in its assessment of the aims and purposes of the trade agreements between the Producer and the Distributors, and in regard to their anti-competitive effect.

7. The Supreme Administrative Court, declared that the provision contains a general prohibition of any kind of anti-competitive agreements, such as items 1 to 5 of Art. 15 of the LPC, and lists specific legal forms of prohibited behaviours. The Supreme Administrative Court analyses the existence of the cumulative presence of the elements of the factual composition of the provision in the current case, as follows: (1) that the parties to the proceedings should have the status of 'undertakings'; (2) that there was the existence of an agreement and/or concerted practice between the parties; and (3) there was an anti-competitive effect, having, as its object or effect, the prevention, restriction or distortion of competition. Based on factual grounds and the assessment of certain clauses of the agreements, between the Producer and the Distributors, and by correctly applying the national law, in compliance with the established community case law (Case T-7/89 - *Hercules Chemicals v Commission*; T-41/96 - *Bayer v. Commission*, Case 246/86 *Belasco v. Commission*; C-199/1992; C-199/92 P - *Hüls v. Commission*), the Court comes to the conclusion that the third element - an anti-competitive effect, having as its object or effect the prevention, restriction or distortion of competition, is not approved and established in the case at hand, and therefore the Parties did not commit, through their trade agreements a violation of Art. 15, Para 1, Item 1 of the LPC, that was expressed in a prohibited vertical agreement that in its purpose prevents, restrict or distorts competition.

8. The Court clearly stated in its Decision, that the anti-competitive effect, as an element of the norm of Art. 15 Para. 1, occurs when the very purpose of the agreement is to prevent, restrict or distort competition in the relevant market. Alternatively, where such an objective cannot be established immediately, the anti-competitive effect will be present when the outcome of the agreement/practice in question actually leads, or may lead, to the prevention, restriction or distortion of competition in the relevant market. In that sense, the definition of an agreement between undertakings, as a restriction of competition by object, precludes the need to analyse its specific, real or potential result in the market. The anti-competitive purpose is one of two alternatives, the consequences of which are insufficient to prove the breach of the general prohibition without the proof of an anti-competitive outcome. It must be emphasised that it is not necessary for that anti-competitive object to be specifically expressed or formulated by the undertakings concerned, but it may be inferred from the interpretation of the content of the agreement, or of the conduct of the parties in the light of the particular market situation. For an anti-competitive purpose, within the meaning of the general prohibition, it is not even necessary for undertakings that are involved in the prohibited agreement to be aware of a breach of the general prohibition and in its practice. In this sense, even in the absence of a subjective intention on the part of the undertaking or association of undertakings that are concerned to achieve an anti-competitive effect, merely the objective ability of its conduct to lead to that result is sufficient for the anti-competitive object, within the meaning of the general prohibition, to exist. In order to assess whether there is a sufficient degree of harm to certain types of concerted action between undertakings in order to be regarded as being a restriction to competition 'in the light of the objective', account should be taken, in particular, of the objectives that are pursued by it, and of the economic and legal context into which it fits. According to Art. 20 of the Law on Obligations and Contracts for the Interpretation of Treaties, the true common will of the parties must be sought. The individual clauses should be interpreted in relation to each other, and each should be understood in a sense that derives from the whole contract, in view of the purpose of the contract, the customs that are in practice, and good faith. The Court declared that the Commission did not systematically analyse all the provisions and did not take into account the fact that the price list set in the contracts is only applicable to the relations between the Producer and the Distributors, and this should be the basis on which distributors will receive stipulated discounts. In order to determine whether distributors have undertaken to apply the price in relation to third parties (sub-distributors or end-users), the nature of the goods that are subject to the contracts, the structure of the relevant market and the behaviour of the companies should be analysed. In that sense, the Court considers that sunflower vegetable oil is a major food product that is used by Bulgarian consumers on a daily basis. Sunflower oil is dominant in the Bulgarian market, and consumers would hardly substitute it with another product. It is not interchangeable with animal fats, nor with other vegetable fats, as it has its own specific characteristics and purpose. As can be seen from the facts that are established in the

proceedings before the Court, the market share in this case does not exceed 5%, which is why the producer does not have the market power to be able to impose a vertical restraint on distributors, in terms of pricing. Setting a fixed resale price for distributors is therefore contrary to the economic logic that, in a highly competitive environment, requires a flexible change in the price of the merchandise that is sold by the distributors. Those conclusions are also fully supported by the forensic economic expert's report, in which the expert took into account, following a comparison of the unit sales prices on the invoices of the four distributors during the period in question, and that each of them sold for different distributors' prices, each of which has also applied different prices to different customers in the same period.

Comment

The case shows a very good legal analysis of the status of horizontal trade agreements, on a specific market (without substitute goods), and the compulsory elements that are needed to assess and prove the anti-competitive effect, as an element of the general prohibition of any kind of agreements between undertakings, decisions by associations of undertakings and concerted practices, expressed in a prohibited vertical agreement, which, in its purpose, prevents, restricts or distorts competition, such as direct or indirect pricing.

6.2. Monika Dominiak (Regional Court of Warsaw)

Asseco Business Solutions Spółka Akcyjna w Lublinie v. the President of the Office of Competition and Consumer Protection

Abuse of dominant position

Asseco Business Solutions S.A. (Company Limited by Shares) in Lublin was the producer of computer software that is used in corporate management, i.e., to keep tax books, to manage corporate finance and human resources. The company signed commercial cooperation agreements with its dealers, who sold the computer software that was produced by this company. The provisions of these agreements contained the minimum, fixed retail price. The agreement stated that the Asseco Business Solutions S.A., in Lublin, reserves its right to lower the dealers' discounts with immediate effect in relation to dealers who violated the provisions of the agreement.

The agreements, signed by Asseco Business Solutions with its business partners from 2001-2010, (which were modified several times during this period), always contained provisions which imposed on the dealers the obligation to sell its products to purchasers for the retail prices that were indicated in the contract.

The Company concluded 1106 such agreements, in total.

The retail prices of the Asseco products that should be used in direct sales to final consumers were published on the company's website.

The dealers were informed about the price change 30 days in advance, by e-mail, and the prices were also published on each occasion on the company's website.

The dealers fixed the retail prices, regardless of the pricing at which they received the goods. The Asseco Company did not take any repressive measures in order to reduce the discounts for dealers who did not comply with the provisions of its agreements.

On the 24th December, 2013, the President of the Office of Competition and Consumer Protection adopted a decision, concluding that the agreements between Asseco and their business partners constituted an infringement of the conditions of fair competition and violated the Art. 6 Paragraph 1 Point 1 of the Act on Competition and Consumer Protection (the national competition law). This act introduces the prohibition of agreements which have the purpose or effect to eliminate, restrict or violate the conditions of fair competition in the relevant market, including *inter alia*, the direct or indirect setting of prices or other conditions for the purchase or sales of goods.

The President of the Office of Competition and Consumer Protection said that the failure of this practice was found by the Authority to be a restriction of competition.

The President of the Office of Competition and Consumer Protection imposed on Asseco a penalty payment of 373 548 PLN (about €93,387). The Competition Authority alleged that the Asseco signing the agreements presented anti-competitive behavior.

Asseco Business Solutions brought an appeal against the decision of the national competition authority, claiming that it had neither violated the public interest, nor had it undertaken any actions that resulted in the restriction or breach of competition rules. Asseco denied that the contract signed by the Company with its dealers constituted an anti-competitive act.

Imposing penalties on the Company was therefore unjust and grossly excessive. The Company, in its appeal, claimed that the retail prices of the software were suggested prices, and they were not obligatory for its dealers.

The Court of Competition and Consumer Protection in Warsaw (the Competition Court) dismissed the company's appeal, claiming that the prices specified in the agreement were fixed prices, not suggested ones. The agreements clearly stated that Asseco reserved its right to lower the dealers' discounts with immediate effect in relation to dealers who violated the provisions of their agreements.

Company agreements showed, however, that the Company had a direct or indirect influence on fixing prices, so the prices became fixed prices, or minimal ones, and they were not suggested ones.

The fact that the company's agreements did not contain suggested prices does not indicate that Asseco did not impose penalties on the dealers who were violating the provisions of the agreement. This does not really mean that prices were suggested, rather than being fixed.

The Court of Competition claimed that such provisions of the agreement constitute an anti-competitive agreement, since the current legal regulations prohibit the setting of retail prices for products by producers. Such practice, according to the Court of Competition, causes a limitation of competition, and it is legally banned.

Asseco brought an appeal against the judgment of the Competition Court claiming that the Competition Court had violated Art.1 Paragraph 1 of the Act on Competition and Consumer Protection in the contested verdict, in which it recognized that Asseco had breached the public interest. It also claimed that the intervention of the President of the Office of Competition and Consumer Protection was unjustified.

The Company pointed out that the Competition Court had violated Article 6 Paragraph 1 of the Act on Competition and Consumer Protection, claiming that the Company had undertaken actions which later resulted in the limiting or violating of the anti-competitive regulations in the market. The agreements signed by the Company with its dealers constituted anti-competitive agreements.

Penalty payments imposed by the Competitive Authority penalty were unjustified and grossly excessive.

On 25th November, 2016, the Court of Appeal in Warsaw overruled the decision of the President of the Office of Competition and Consumer Protection.

The Court of Appeal claimed that it was crucial to examine the position of the Company in the relevant market. The Court also pointed out that it was necessary to check whether the same software was offered by other, foreign, companies. In addition, the Court should examine whether the raising of the prices by the Polish Company had caused foreign companies to enter the Polish software market. The Competition Authority did not examine the real or potential influence of the agreements on the wholesale market in Poland, which was the subject of the contested decision.

The Competition Authority claimed that the agreements stated that "they already influenced Polish retail market," not that they "may have influenced the retail market". However, the Competition Authority did not demonstrate the influence of the agreements on the Polish retail market. The Court of Appeal claimed that the Competition Authority did not identify the markets that are the subjects of the contested agreements, and it did not establish Asecco's position in the market. The Court of Appeal also pointed out that the Competition authority did not take into consideration European Union Competition Law, which should have been applied in this case. The Competition Authority did not examine the influence of these agreements on trade between European countries.

The Court of Appeal stated that the European Court of Justice had made a lot of judgments in relation to that matter. The Court of Justice, in its judgments, claimed that if the agreement sets the trade rules in just one country, this does not mean that it does not influence the trade between European countries (A. Jones, B. Surfin, *EC Competition Law*, New York 2008, s. 197).

The Court of Appeal pointed out that the European Competition Law should be applied in this case, which may directly influence the interpretation of Polish Law. To justify its view, the Court of Appeal

quoted D. Vaughan, S. Lee, B. Kennelly and P. Riches, who claimed that the question of whether an agreement has the object of preventing, restricting or distorting competition is a question of the foreseeable effects of an agreement, not of the subjective intentions of the parties – EU Competition Law: General Principles, Oxford University Press 2006, s.75).

The Court of Appeal claimed that it should be pointed out that, according to Art. 3 Sec. 1 of Regulation 1/2003, the application of national competition law cannot lead to the prohibition of agreements which may affect trade between EU Member States, but it does not restrict competition within the meaning of Article 101 Sec. 1 of the Treaty, nor fulfill the conditions of Art. 101 Sec. 3 of the Treaty, nor do they fall under the Regulation for the application of Article 101 Sec. 3 of the Treaty.

The European doctrine says that it is now clear that, in order to appraise the economic context of an agreement, it is necessary to analyze the market and, therefore, to define it – (An Introductory Guide to EC Competition Law and Practice, Oxford, Portland 2007, s.79). This quotation is relevant in this case.

The Court of Appeal claimed that the Competition Authority had completely failed to establish the position of the participants in the contested agreements in the relevant markets, and it had committed serious misconduct in defining the relevant markets. It cannot therefore be considered that the Competition Authority has shown that the purpose of the agreement contested by them was anti-competitive.

The lack of analysis of the relevant markets, and the position of the participants in the agreements to them, is contrary to the line of the EU judiciary. In the judgment in Case C 5/69 *Franz Völk v Établissements J. Vervaecke* ([1969] ECR - 295), the Court of Justice held that the prohibition in Article 85(1) is applicable only if the agreement in question also has, as its object or effect, the prevention, restriction or distortion of competition within the Common Market. Those conditions must be understood with reference to the actual circumstances of the agreement. Consequently, an agreement falls outside the prohibition in Article 85, in which it has only an insignificant effect on the markets, taking into account the weak position that the persons concerned have in the market for the product in question. An exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, thus escape the prohibition that is laid down in Article 85(1)).

Analyzing the line of the EU judiciary, the Advocate General J. Kokott, in her Opinion in C 226/11 *Expedia Inc.*, stated that "the requirement of perceptivity is the rule both in the case of intentional and actual restriction of competition" (47), and argued that if "the agreement is intended to infringe the competition rules it is sufficient to demonstrate that the agreement is specifically capable of preventing, restricting or distorting competition within the internal market."

In the same case, the Court of Justice, on the other hand, was of the opinion that "101 sec. Article 1 TFEU is subject to agreements between undertakings which have as their object or effect the perceived restriction of competition in the internal market and which may affect trade between Member States (Case C 70/93 *Bayerische Motorenwerke* [1995] I 3439, Paragraph 18; Case C 306/96 *Javico* [1998] ECR I 1983, Paragraph 12, and Case C 260/07 *Pedro IV Servicios* [2009] See p. 2437, point 68). "

By presenting the line of the EU judiciary in the present case, it should be noted that the lack of an identification of the relevant markets, and the position of the parties of agreements on them, make it impossible to determine whether the agreements in question were "able to prevent, reduce or distort competition." Had it turned out that the parties to the agreements in question had only trace shares in the relevant markets, it would have been impossible for them to have a noticeable effect on competition.

The Competition Authority lodged a cassation appeal to the Supreme Court. The Supreme Court has not yet appointed a time for the trial, so, unfortunately, we do not know the final judgment.

Comment

In my personal opinion, the approach chosen by the Court of Appeal is more suitable, because the Court of Appeal gave a wider and less formal perspective on the issue.

The Court of Appeal took into consideration many other factors, not just analyzing the contract clause.

The arguments given by the Court of Appeal in its decision are more convincing for me.

6.3. Dzintra Amerika (Latvia Supreme Court)

FMS Software and FMS v. Competition Council

Judgment of the Supreme Court (Department of the Administrative Cases), 16th June 2017, Case No. SKA-61/2017

Facts of the Case

FMS Software produces accounting software. FMS Software concluded product distribution contracts with several dealers. One of the provisions of the said contracts required dealers to register their potential deals in a database that was developed by FMS Software at the beginning of the sales process (in practice, the dealers fulfilled this condition by sending FMS Software an e-mail, informing it about the potential customer). A priority to run the sales process of the potential deal with the concrete customer is assigned to the dealer who has first registered the potential deal in the database, as long as the customer does not oppose it. This advantage lasts for six months from the moment of the registration of the potential deal. The aforementioned conditions were in force for more than five years.

The Findings and the Decision of the Competition Council

The Competition Council, in its decision of 9th December 2013, found the contracts concluded between FMS Software and its dealers to be prohibited by competition law, since the said agreements provided certain dealers with an advantage, and, as a result, they – restricted competition between dealers.

In the decision, it was found that the product – accounting software – is distributed through a network of dealers that are located throughout Latvia. However, in this decision how the dealers perform their sales activities (with active or passive sales), was not analysed.

In analysing the provisions in question, the Competition Council acknowledged that the use of the database, and the process of the informing itself, are not aimed at restricting competition, and therefore are not prohibited by competition law. However, as a consequence that arises from logging potential clients into the database, certain dealers were given an advantage in the sales process. This advantage points to the regulation of the relationships between dealers, and the only dealer who can advance the sales process is the one who first informed the manufacturer. This procedure is aimed at reducing competition between dealers in the field of accounting software sales. Since the registration process is applied to potential customers who have not yet bought the product, it is impossible for dealers to compete with the dealer, who has the advantage, by offering the customer more favourable terms of sale. As a result, the client cannot benefit from competition between dealers. The Competition Council examined, whether the intention to restrict competition between dealers manifests itself in the behaviour of market participants. By the checking of electronic correspondence between FMS Software and dealers, it was established that the disputable provision of the contract was realised in practice by client reservation.

The Competition Council also concluded that the exemption stated, in Cabinet Regulation No.797, “Regulations Regarding Non-subjection of Certain Vertical Agreements to the Prohibition of the Agreement Specified in Section 11, Paragraph One of the Competition Law”, adopted on 29th September, 2008, (*similar to Commission Regulation (EU) No.330/2010 of 20 April, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices Article 4, (b), (i), namely, the exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:*

(i) *the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer*) can't be applied to the vertical agreement in question, because it restricts the circle of customers within which the dealer is entitled to sell contract goods.

Taking into account that FMS Software and FMS were closely linked and formed an economic unit, both companies were recognised as being one market participant. The fine was therefore calculated from the turnover of these two companies during the last financial year.

The fine imposed by the Competition Council were €64,000, while the case against the dealers was closed, because the dealers were not active in the agreement and their transactions' power against the power of FMS Software was insignificant.

During the inspection of the Competition Council. FMS Software argued that FMS Software had never informed the other dealers of competing dealer's plans. Such evidence was not found in the relevant electronic correspondence. FMS Software had not threatened and applied sanctions against those dealers who had made the deal with the customer, which was registered by another dealer. The dealer's communication with FMS Software did not guarantee that the dealer would run the sales process of the potential deal with the concrete customer, the dealer was dependent on customer's choice. The Competition Council has not responded to this argument.

The Appeal

FMS Software and FMS (after a merger – Visma Enterprise Ltd.) appealed the decision to the Administrative Regional Court (the First Instance Court for decisions of the Competition Council). The Administrative Regional Court rejected the appeal (judgment of 8th May 2015). The argumentation of the Administrative Regional Court was generally based on reasons that are shown in the Competition Council's decision (except the reasoning on how the fines were calculated).

The Administrative Regional Court's judgment was appealed by FMS Software, FMS and the Competition Council to the Supreme Court.

FMS Software and FMS argued (in relation to the main argument) that the Competition Council and the Court has never substantiated why FMS Software's relations with its dealers do not match the exemption which follows from the provisions of the regulations for Latvia (*which are similar to the provisions of Commission Regulation (EU) No.330/2010 of 20th April 2010, which are mentioned above*). The only exception, which excludes the application of the mentioned rules, is a restriction on passive sales. The Competition Council has never proved that the object of the provisions of contract between FMS Software and its dealers was to restrict the passive sales. The passive sales were fully respected, if the customer turned to another dealer.

The argument of the Competition Council's appeal concerned the fines.

The Judgment of the Supreme Court

The Supreme Court concluded that, to be caught by the prohibition laid down in Article 11 (1) of Competition Law (which is similar to Article 101 (1) TFEU), an agreement must have, as its object or effect, the hindrance, restriction or distortion of competition within the internal market. When assessing the possible restriction of competition "by object", it is necessary to examine the content of the provisions of the agreement, its objectives and its economic context. During such examination, the Court must be convinced that an agreement by its very nature can be considered to be harmful to the proper functioning of normal competition.

The Supreme Court pointed out that, according to the content of the agreement, the dealer has the advantage in the sales process only in that case, where the customer does not oppose it, but the Regional Court did not pay attention to this part of the agreement, and didn't evaluate the impact of such a provision on competition, although this part of the content of the agreement indicates that the dealer's advantage depends on customer's behavior or choice, and this could compensate for a deficit in competition.

The Supreme Court emphasized that, in this case, it is important to understand whether the dealers perform their sales activities in an active or a passive form. The Supreme Court also drew attention to the fact that, at the moment, when the customer has once chosen the dealer, the competition has already decreased, which, of course, doesn't exclude further competition between dealers. However, it is a reason to look differently at the following conditions of the competition. It must be taken into account that the customer has already chosen the dealer, and the dealer, under normal circumstances, has the right to do everything possible to hold the customer and to make the deal with him/her. It is important, in this case, that the product needs to be adapted to the necessities of the customer, and that this customization process requires a significant period of time, which could affect the customer's decision to contact another dealer. Accordingly, it is important to ascertain whether the competition over that period is not reduced or limited for natural and legitimate reasons, and the role the disputed clauses of the agreement play in the mentioned circumstances must be verified.

Taking into account what has been previously mentioned, the Supreme Court set aside the judgment of the Administrative Regional Court, and it forwarded the matter to be adjudicated upon *de novo* in a Court of Appellate Instance.

Personal comment

The case law of the Courts of Latvia in the field of the restriction of competition "by object" isn't developed; there are only a few judgments in this field. Additionally, after the preliminary ruling of the Court of Justice of the European Union (*see the Judgment of 26th November 2015, Maxima Latvia v. Competition Council, C-345/14*) an understanding of how deeply the assessment of the restriction of competition should be developed in decisions and judgments has changed. This judgment of the Supreme Court strengthens the changes in the previous case law, since it is only the second judgment after the mentioned preliminary ruling. Namely, the economic context in which the agreement has to be applied is essential in order to conclude that the agreement restricts the competition "by object".

6.4. Daniel Panocha (District Court of Tarnow)

Decision of the Polish Competition Authority: 29th December 2011 (DOK 13/2011)

Final judgment: 16th June 2016 - Court of Appeal in Warsaw (VI ACa 215/15)

Case: *Roland Polska sp. z o.o. (private limited company) in Warsaw v. the President of the Office of Competition and Consumer Protection*

National law

Art.6 of the Act of 16th February 2007, on Competition and Consumer Protection, states that they are prohibited agreements, whose purpose or effect is to eliminate, limit, or otherwise distort, competition in the relevant market, and agreements may, in particular, specify the determination, either directly or indirectly, of prices and other conditions for the purchase or sale of goods.

Facts

Roland Polska sp. z o.o. in Warsaw is, on the basis of an agreement concluded with Roland Eastern European Ltd. (registered in Hungary), the official distributor for this company in Poland. Roland Eastern European Ltd. Is, in Central and Eastern Europe, a distributor of all the products manufactured by Roland Corporation in Japan. These products include a wide range of Roland, Boss, Rodgers and Cakewalk musical equipment and music accessories.

Roland Polska sp. z o.o. in Warsaw works on the basis of a selective distribution agreement with entrepreneurs that creates a retail distribution network for hardware and music accessories, which are distributed at the wholesale level by Roland. Roland Polska sent to these entrepreneurs the prices for the resale of products, which are referred to as the "suggested online prices" and the "dealer prices".

Decision

On 29th December, 2011 (DOK 13/2011), the President of the Office of Competition and Consumer Protection adopted a decision and recognised as a practice that restricts competition and violates the prohibition referred to in Art. 6 Sec. 1 Point 1 of the Act of 16th February, 2007, on competition and consumer protection which is included in the wholesale market for the sale of equipment and musical accessories by Roland Polska sp. z o.o. in Warsaw, with distributors having an agreement restricting competition on the domestic retail market for the sale of musical equipment and accessories *by setting minimum retail resale prices* for these products on the Internet by the distributors, and ordered the retailers to refrain from using them.

The Polish Competition Authority fined Roland Polska sp. z o.o. in Warsaw in the amount of PLN 216.380 PLN (about €49,089).

In the Polish Competition Authority's view, the "suggested online prices" that are placed on Roland's retail price lists - even though they were on the price lists under the official title "retail price" or "suggested online price" – were, in fact, the *minimum retail resale prices* that they agreed to use. In the light of the findings set out below, the relationship between Roland Polska and the distributors included permanent control of prices and the reception of signals from other distributors about distributors not using the agreed *minimum prices*. As a result, Roland Polska urged entrepreneurs who were creating Roland's retail distribution network to raise prices to a level that corresponds to at least a *fixed minimum price*. As has been shown in the proceedings, Roland's influence on the level of resale prices was real, as did the negative consequences that were encountered by those distributors who tried to sell products below the minimal price.

That mechanism which is used to keep prices at a minimum has been functioning since at least May 2008, but evidence may show that even earlier prices were set at a minimum level, and pressure was put on distributors who did not maintain those prices. For example, distributors who did not use the fixed minimum prices were threatened with non-renewal of the distribution contract with Roland and difficulties in relation to ordering goods, or even the loss of profits.

The President of the Office considered that the condition of the violation of the public interest was fulfilled in the factual situation that was discussed in the present case. In the light of the foregoing, it is appropriate to point out that the conclusion by a sole wholesale distributor of certain products, from entrepreneurs, to resell these products under a resale price agreement, is in the nature of such competition. At the same time, it must be emphasized that price agreements between competitors (horizontal) and between counterparties at different levels of trading (vertical) are among the most serious distortions of competition, and they undermine the market, distort it, and limit or eliminate competition on it. These actions therefore infringe on the public interest, irrespective of the size of the market shares of the undertakings participating in the agreement. Moreover, in the light of the evidence gathered, the President of the Office considered that the agreement in question was actually implemented, and it thus had a real and direct impact on the economic interests of a broad spectrum of market participants - not only on the parties themselves, but also on their competitors, and, as a result, on a wide range of final recipients.

Restrictive practices reveal themselves in a specific market. The product market encompasses all of the goods that serve the same needs of buyers, that have similar properties, and similar prices, and that represent a similar level of quality. An essential element of the relevant market is also its geographical dimension, indicating the need to designate an area where the conditions of competition that are applicable to certain goods are the same for all competitors. To determine the relevant market, therefore, specific activity is analysed, both from the product's and from the geographical point of view.

In the opinion of the President of the Office, the market in which the transaction took place is, in the present case, the national wholesale market for hardware and musical accessories. In turn, the market in which the agreement is affected is the domestic market for the retail sale of musical equipment and accessories.

What is important, the President of the Office stated in the light of the evidence, is that this was not due to the existence of a separate resale market for music equipment and accessories on the Internet. Such an arrangement for the agreement was rather to facilitate the possibility of Roland's monitoring of observable pricing. It was possible only through the creation of a system by Roland that allowed the company to systematically control distributors' use of fixed retail resale prices - which distributors agreed to follow as part of the rules of the system. The effective and systematic control of a large number of retail distributors who were selling Roland's various forms of equipment was possible through Roland's monitoring of resale prices by distributors on the Internet. However, setting prices on the Internet, had, for the above reasons, an influence on prices throughout the retail market for sales of musical equipment and accessories in Poland.

Consequently, the President of the Office stated that Roland Polska sp. z o.o. in Warsaw had entered into agreements with its distributors within the meaning of the Law on Competition and Consumer Protection. It follows from the above-mentioned circumstances that specific business activities may also be treated as a restrictive agreement if, despite the absence of a formal distribution agreement, the other circumstances of the case indicate that such an obligation actually existed. The circumstance above, in the present case, occurred. Entrepreneurs who joined the distribution agreement and who did not apply for a minimum resale price, were threatened with a number of consequences, such as the loss of rebates, a reduction in supplies, and even the termination of their contract. In practice, the obligation to adjust distributors to the minimum price level that was determined by Roland Polska is, in fact, equivalent to the obligation that would result from the conclusion of a formal contractual agreement.

Court

Roland Polska sp. z o.o. in Warsaw lodged an appeal with the Competition Court in Warsaw.

On 8th December 2014, the Regional Court in Warsaw - the Court of Competition and Consumer Protection (1st Instance) dismissed the appeal (XVII AmA 94/12).

Art. 6 Sec. 1 Point 1 of the Act on Competition and Consumer Protection (national competition law) prohibits agreements whose purpose or effect is to eliminate, restrict, or otherwise distort, competition in the relevant market, consisting, in particular, of determining, either directly or indirectly, prices and other conditions for the purchase or sale of goods. It is clear from the wording of the above that it is not necessary for an anti-competitive object to be achieved (either wholly or in part). The application of this provision is not dependent on whether the agreement was only concluded by the entrepreneurs (or their unions), or whether the parties actually implemented them in practice. For the qualification of the agreement as being illegal, it is sufficient to demonstrate that the purpose of the undertakings' actions was to undermine the competition rules in the market, and there is no doubt that the pricing provisions are in contradiction to the competition rules.

According to the Regional Court in Warsaw, all the above-mentioned contractual provisions regarding fixed minimum prices deprived distributors of the freedom to set prices for the products. The logical consequence of the above was the lack of price competition in the relevant market.

Art. 106 of the Act on Competition and Consumer Protection provides that the Antitrust Authority may impose on the enterprise, by way of a decision, a penalty of no more than 10% of the revenue earned in the accounting year preceding the year of the imposition of the penalty, if the entrepreneur, even if not negligent, breaches the prohibition that is specified in Art. 6 of this law. In determining the amounts of penalties, the period, grade and circumstances of the breach of the provisions of the Act must be taken into account, as well as prior violations of the provisions of the Act.

In the Court's view, the financial penalty imposed by the decision of the Polish Competition Authority was set at an appropriate level, considering the degree of the violation.

On 16th June 2016, the Court of Appeal in Warsaw (2nd Instance) dismissed the Appeal.

Comment

The decision of the President of the Office of Competition and Consumer Protection, issued in December 2011 (DOK 13/2011), was important, because how the relevant market (product, geographical point of view) is determined in a case in which products are offered and sold on the Internet, is meticulously presented. It was also highlighted that to recognise an agreement as violating the prohibition, it is sufficient only to demonstrate that the parties to the agreement were setting a goal to restrict competition, and it does not matter whether that objective was achieved.

6.5. Stefan Schlotter (German Ministry of Justice and Consumer Protection)

Court: Oberlandesgericht (Regional Court of Appeal)

Date: December 22nd, 2015

File number: 11 U 84/14

Type of decision: Appeal judgment (revision pending)

1st. instance: LG (Regional Court) Frankfurt, June 8th, 2014, 2-3 O 158/13.

Next instance: BGH (Federal Civil Court), KZR 3/16

The Regional Court of Appeal (“OLG”) had to decide as to whether, the Defendant, Deuter, a manufacturer of high-quality functional backpacks, was allowed to prohibit online sales via market places by the Claimant, an authorized dealer.

The Court of First Instance held, that such prohibition had no lawful qualitative selection criteria and hence was a hard-core restraint (Art. 4 lit. c Vertical Block Exemption Regulation) that was not covered by the exemption of Art. 101 (3) TFEU. This opinion of the First Instance was shared by the Federal Cartel Office, which also acted as *amicus curiae* before the OLG.

The OLG, nevertheless, overruled the decision by the Landgericht. According to the OLG, the market place ban does not infringe competition law. The Court emphasized the Defendant’s wide discretion to organize its distribution system. It applied the conditions formulated in “Metro I” (ECJ, Judgment of October 25th, 1977, C-26/76) to the selection criteria used by Deuter and saw them fulfilled: The quality of sales and services required by the high quality of Defendant’s products could not be guaranteed in the case of sales via a market place. Furthermore, given that consumers, according to the Court’s view, tend to mistake the platform (Amazon) for the authorized dealer as the seller, Deuter would, without the platform ban, in the general perception of the public, be connected to amazon.de, without having a contractual relationship with them.

This decision enhances the possibilities to implement online restrictions in (selective) distribution agreements. Its interest derives from its combination with the Coty case (C 230/06 – submitted by the same court to the ECJ, which is still pending, and which deals, *inter alia*, with the question of whether an online platform ban constitutes a restriction to competition “by object,” in the sense of Art. 101 (1) TFEU.

6.6. Agostinho Soares Torres (Court of Appeal of Lisbon)

Case 102/15.9YUSTR.

Tribunal da Relação de Lisboa (TRL)

Court of Appeal of Lisbon (2nd Instance) (CAL);

Tribunal da Concorrência, Regulação e Supervisão de Santarém- TCRS (1st Instance);

Autoridade de Concorrência (AdC- National Competition Authority)

A) Facts

1- Petrogal is a wholly-owned company that is owned by Galp Energia, and it is active in the area of crude oil and its by-products, at the level of: (...) (ii) the transportation, distribution and commercialization of oil, crude oil, its byproducts and natural gas; (iii) the exploration and exploitation of crude oil and natural gas; and, (iv) any other related industrial, commercial and research activities and services.

2 - Galp Açores and Galp Madeira undertakings are 100% owned by Petrogal and they are active in the area of distribution and storage, transportation and sale of liquid and gaseous fuels, lubricants and other petroleum products, respectively in the Autonomous Regions of the Azores and the Madeira islands.

3 –Written agreements (contracts) between the above-mentioned undertakings and their first line distributors (in the first stage of the chain, i.e., at the wholesale level) say that the latter are assigned a sale limited territory and the sale of LOG (liquid oil gas) in compressed bottles by each distributor outside its territory is forbidden.

4- In September/October, 2015, as part of a process to update the bottled gas distribution network, the Defendant (Petrogal, Galp Açores and Galp Madeira) began the reviewing of all contracts signed since 2000 with first-line distributors, natural and legal persons, that referred only to active sales in the clause prohibiting sales outside the assigned territorial area.

5 It has been proven that for (i) Petrogal, in a universe of 240 contracts, passive sales outside the contractual area are prohibited in 199 of the contracts that are in force; (ii) for Galp Açores, in a universe of 9 contracts, passive sales outside the contractual area are prohibited in all of the contracts that are in force; (iii) for Galp Madeira, in a universe of 3 contracts, passive sales outside the contractual area are prohibited in all of the contracts that are in force.

6 - It was proven, in the Decision of the Adc (Competition Authority), and confirmed by the First Instance Court Judgment, that, by preventing a distributor from competing freely in different territories, and by artificially maintaining a single distributor in each territory, and not allowing him to implement passive sales to customers from, or placed outside, its territory, the freedom of choice of customers and consumers, such as competition between so-called intra-brand competition, is limited.

7 – It was also proven that the three Defendants were not careful enough, or at least had not been since January 1st, 2000, to promote the amendment of the existing written contracts, excluding the prohibition of sales clauses outside the assigned area, or at least limiting the prohibition, in the wording of the clause, only to those relating to active sales, and, in the new written contracts that were concluded after January 1st, 2000, to continue to proceed in the same careful way.

8 - According to the wording of the clauses, and considering the commercial context in which they were in force, it emerged that the prohibition clauses must be regarded *per se* as being restrictions to competition by object, since they are liable to prevent, in fact, distributors from responding to requests

from clients who are located in territories assigned to the other distributors for the Defendants, and thus from being able to compete with them.

9 - The applicants have never clearly stated, or acted, in order that that such limiting clauses should be understood or be applicable, in the sense of having the effect of preventing only active sales.

B) The Case-Law (Administrative and Court File decisions)

1) By the Administrative Decision of the Competition Authority of January 29th, 2015 (i) it was declared that the 3 Defendants, in these written bottle distribution agreements (Vertical trade agreements), which include clauses restricting passive sales outside the territory established in the contract, have committed intentional infringements of Article 9 (1) (c) of Law No 19/2012 and Article 101 TFEU, and (ii) the Decision imposed a total administrative fine of €9,290,000. 00.

2) These undertakings (the 3 Defendants) appealed to the Court of Competition, Regulation and Supervision of Santarém (1st Instance), and this Court, by a judgment of January 4th, 2016, decided partially in favor of them, but convicted them for the practice, in material co-authorship by negligence, under the infringement of Articles 9.º, §§ 1 and Artº68º, § 1, a) and 3, both of Law no. 19/2012 (LdC), with the following fines:

- a) Petrogal, S.A., €3,000,900;
- b) Galp Azores, €150,000.00;
- c) Galp Madeira - €40,000.00

The above-mentioned Competition Court ruled that Article 101 of the TFEU was not infringed.

3) The Public Prosecutor's Office, the Competition Authority and the companies concerned then appealed to the Court of Appeal of Lisbon (Tribunal da relação de Lisboa) which decided, on 10th January, 2017, to confirm the 1st Instance Court.

II- The Legal Framework

2.1- Portuguese Law no. 19/2012, of 18.05 (LdC- Competition Law) provides:

Article 9: Agreements, concerted practices and decisions of associations of undertakings

1. Agreements between undertakings, concerted practices between undertakings and decisions by associations of undertakings which have as their object or effect to prevent, distort or cause an appreciable restriction of competition, in whole or in part of the national market, consisting of:

(...) (c) Sharing markets or sources of supply;
are prohibited.

Article 68:

1 - It constitutes of an administrative infringement punishable with a fine:

a) The infringement of the provisions of Articles 9, 11 and 12; (...)

3 - Negligence is punishable.

2.2.- Under the current legislation that is in force in relation to sales outside the territory, active sales (active sales promotion through, e.g., sales or marketing forces) may be restricted in certain circumstances, while passive sales (the mere response of a distributor to a spontaneous request for supply from outside its territory) cannot be prohibited, such as forming a breakdown of territory (sharing the market) and this is considered a serious (hardcore) infringement, prohibited by its object, regardless of the actual effects or consequences for competition.

III- The case law (decision and jurisprudence)

3.1 The judgment of the Portuguese Competition Court (1st Instance Court) did not recognize as proven that the infringement was committed intentionally, but, rather, it concluded that there was negligence. It also considered that there was an infringement in Portugal, in the light of national rules, but did not accept the infringement of Article 101 (1) (c) of the TFEU, since there was no susceptibility to affect trade among Member States.

3.2- This decision was criticized for recognizing that the offence on national territory would require a demonstration of "effective disruption" of trade between Member States with the view that "(...) what matters, for the assertion of the existence of an agreement, is not to ascertain whether or not it influenced the behavior of the interveners (effects of the agreement) but their susceptibility to influence their behavior" (see p. 159 of the sentence). Under the case-law of the European Union courts (JCB judgment-General Court of the ECJ) it was examined that it was insufficient for an agreement to have established (proven) that the supplier had recommended prices to its distributors and that the prices charged to them were likely to influence the prices of retailers.

3.3- Other problems that came out continually during the appeal was the meaning of the expression "susceptible (or likely) to affect the trade among Member States" and the concept of "agreement". It was discussed whether the object and anti-competitive effects of an agreement that was covered by Article 9. of the LdC and Article 101 TFEU should not be considered as cumulative conditions, but as alternative conditions. The same matter had already been analyzed in the Judgment of the Court of Appeal of Lisbon of January 7th, 2014 (Case No. 938/10.7PYLSB.L1), concerning a regulation from the Order of Official Accountants, but which had been considered to be an infringement of both the national competition law and the TFEU, with arguments similar to those followed by the Competition Authority in this Petrogal/Galp case: seeking to determine the likelihood of affecting trade relations in comparison to the position adopted in the judgment that required effective influencing. It was mentioned that the decision was in contradiction to the ECJ's Bayer judgment, which would give special emphasis to the contractors' real determination (will) to figure out to what the concurrence of wishes corresponds.

3.4- The judgment under consideration (*a quo*. 1st Instance) analyzed the position of the European Commission on the serious distortions of competition that are mentioned in Article 4 of the Block Exemption Regulation on Vertical Restraints (VBER), which are, in general, restrictions of competition by object,⁴ and it is settled case-law of the European Union that passive sales prohibitions are, by their nature, contrary to Article 101 TFEU, whose objects are to limit supplies and allocate (share) markets, and to constitute a "hardcore" restriction on competition (Article 4 (b) of the VBER).

3.5 - It considered that the fulfilment of the objective worded legal provision in question is independent of the implementation of the agreement by the contractors concerned, and is not decisive for the purposes of filling the typicity that is provided for in Article 9 (1) (c) (1) of the Competition Law and Article 101 of the TFEU, the greater or lesser extent of the impact (implementation) of the restriction of passive sales, existing and continuing the infringement while the clause prohibiting passive sales is in force between the contractors and is not revoked. The 1st Instance Court further decided that the prohibition of passive sales "corresponds literally to common understanding and therefore the meaning of clauses which, by not making any distinction as to the type of sales, necessarily include all" (see p. 162 for the verdict). "

3.6 – In relating to the interpretation given to the concept of "agreement", the applicants refer to the European case-law established in Bayer AG v. Commission, Case T-41/96V of the Court of First Instance of October 26th, 2000, with a different interpretation being followed by the national court; "... the form of expressing the will of the contractors, in particular when it is a declared will, does not

⁴ Guidelines, 2010, § 23 and 50, and *de Minimis* communication, Pt. 13

overlap with that which may be determined to be the real and effective will of them. What matters is that the faithful expression of the will of them, which corresponds, for sure, to their real will is ascertained."

3.7 The Court of Appeal found that:

(A) On the basis of the European case-law relied upon by the applicants, the Bayer v. Commission Case T-41/96: "in order to the existence of an agreement within the meaning of Article 85 (1) of the Treaty, it is sufficient that the undertakings concerned have expressed their joint intention to behave on the market in a certain way " [Citing the judgments of the Court of Justice in Case 41/69 ACF Chemiefarma v Commission [July 15,1970] olct, 1969-1970, p. 447, n.º 112, and Van Landewyck and Others v Commission [October 29th, 1980] 209/78 to 215/78, 218/78 [1980] 3125, no. 86, Recueil, p.3125, nº 86 ; Judgment of the Court of First Instance in December 17th, 1991, in Case T-7/89 Hercules Chemicals v Commission [1991] p. II - 1711, Para. 256], as follows: "[related to the wording of expressing that common intention, it is sufficient that the clause is an expression of the willingness of the interveners to behave on the market in accordance with it (see, namely, ACF Chemiefarma v Commission, Paragraph 112, and Van Landewyck v Commission, cited above), without it being necessary for it to constitute a binding and valid contract under the law (Sandoz, Paragraph 13).

This interpretation has already been adopted in national case law, namely, in the judgment of the 2nd Section of the Lisbon Commercial Court in February 15th, 2007, Case no. 766/06.4 TYLSB (Baxter and Glinntt), p. 59:

(B) The interpretation of the judgment of the Court of First Instance in Bayer AG v. Commission T-41/96 and Sandoz v. Commission must be moderated and cautious, if once the cases which were the basis for discussion in those decisions there were no contractual written clauses between suppliers and distributors in force, unlike, in the present case, when they are therefore always capable of influencing the behavior of undertakings on the market itself, as they express the wishes of the applicants and distributors to prohibit the sales of the latter from outside the territory that is contracted in them. These clauses appeared in 199 out of the 240 Petrogal contracts, and in all of the written contracts in force with Galp Açores and Galp Madeira, which have never been changed or which are left in force. They should, in and of themselves, be regarded as restrictions to competition by object, since they are, in fact, capable of impeding distributors from responding to requests from customers who are located in territories/areas that are allocated to other distributors of the Defendants, and thus competing with them.

(C) As to the non-application et al. (c) of Article 101 TFEU refers to the judgment under appeal as follows:

"It is settled case-law that for an agreement between undertakings to be capable of affecting trade between Member States, it must be possible to predict with a sufficient degree of probability, on the basis of a set of objective legal or factual elements which have a direct or indirect, actual or potential influence on trade flows between Member States in order to jeopardize the achievement of the objectives of a single market between Member States (5.)

Furthermore:

"it is necessary to note that this influence should not be insignificant (6) and that the influence which an agreement may have on trade between Member States is assessed in particular by taking account of the position and importance of quotas on the market for the products in question. (7)

⁵ AEPI a. Comission, C-425/07 P, § 51,

⁶ Javico, cit, § 16.

⁷ Javico, cit, § 17.

Community case law has also taken the view, since the judgment in *Remia and Others v. Commission*, Case 42/84, that an agreement extending to the whole territory of a Member State is by its very nature to consolidate national barriers, thus hindering the economic interpenetration sought by the Treaty.

The *European Commission Guidelines on the concept of effect on trade between Member States* which is provided for in Articles 81 and 82 of the Treaty, published in OJ 2004/C 101/07, are not binding, but it follows from them that the concept of susceptibility to influencing/ jeopardizing trade between Member States is divided into three concepts: (i) the concept of 'trade between Member States'; (ii) the notion of "likely to affect/ influencing"; (iii) and the concept of 'sensitive character'.

(D) The Portuguese Court of First Instance (on Competition and Regulation) sought to ascertain whether there was a "sufficient likelihood," in the Commission Guidelines and in the European case-law, from which it stated and concluded that the agreements at issue in the case-file are not liable to affect or influence trade between Member States and proof of a genuine "*demonstration of effective effect on trade between Member States*" was not required, stating that, in this respect alone, there was no sufficient likelihood of such a finding.

In the light of Para. 21 of the Guidelines on the concept of an effect on trade between Member States, which is provided for in Articles 81 and 82 of the Treaty, in the *Official Journal of the European Union* C 101/81 of 27.4.2004 (...) the factual situation brought to the Court's attention may be characterized as being typically referred to therein in the last two sub-paragraphs, and it would, as a minimum, require proof that it is '*making it difficult for undertakings in other Member States to penetrate the national market concerned either through exports or through establishment* (Closure effect)," which was not proven.

7. Enforcement of State Aid Law

7.1. Marie Baker (Irish High Court)

Dellway Investments Limited & Ors v. NAMA & Ors

Judgment of the Irish Supreme Court delivered on 3rd February, 2011.

1. The principle of sincere cooperation that is contained in Article 40.3 of the Treaty informs the approach of the Irish courts when dealing with complaints of alleged illegal State aid. It is well established as a matter of Irish and European Law that the domestic court may make a determination that a particular payment, allowance, or tax provision constitutes State aid, but the domestic court may not make a determination that aid is incompatible with the internal market of the EU. That competence is vested in the Commission or the ECJ.
2. Questions of whether State aid has been afforded to a party have arisen in domestic cases, although the statistics would suggest that there are relatively few such cases. Ireland is regarded as having a good, but not perfect, record of compliance with EU State aid law and the Irish courts are willing and able to enforce the repayment of State aid when it has been declared to be incompatible. Domestic law, of course, governs the mode by which illegal State aid is to be repaid.
3. The judgment I wish to address is probably one of the most influential judgments of the Irish Supreme Court in the last ten years, and it arose in the context of the financial crisis. The Irish banking sector was probably the first to suffer a catastrophic collapse, and between 2009 and 2011 the Irish Government “bailed out” various commercial banks, some of which were nationalised, and also established a so called “Bad Bank” to deal with the non-performing loans of the nationalised commercial banks. The Bad Bank, the National Asset Management Agency, or NAMA, was established to acquire from identified banks certain eligible assets consisting of substantial loans made by commercial banks and the security for those loans. NAMA then proceeded to sell, usually in bundles, these bad loans. The aim of the legislative scheme was to dispose of all of the loans and security in an orderly fashion, taking account of the likely impact on the market of the sale of large numbers of properties, and, in some cases, to make a decision to hold back on certain sales in order not to distort the market. The ultimate aim is that NAMA will be wound down when all of the loans and securities have been disposed of. That process, it seems, is almost complete.
4. The Act establishing NAMA came into force on 21st December 2009, and NAMA was established the following day, 22nd December 2009.
5. The appellants were fifteen companies and partnerships incorporated in Ireland, the United Kingdom and France, and Patrick McKillen, one of the applicants, had either the entire beneficial ownership or 50% of the beneficial ownership in those entities. Mr. McKillen was a businessman and property developer and he and his companies and entities had extensive loan credit facilities with Anglo Irish Bank and the Bank of Ireland.
6. The commercial entities had significant loans with Anglo, a large player in Irish commercial lending, which had become insolvent. The government became aware in September 2008, of the extent and scale of the insolvency of Anglo, and the State guaranteed the loans of that and other commercial banks. Anglo was ultimately put into liquidation and wound down.
7. The McKillen entities owed approximately €2.1b to commercial Irish banks, which were compelled to participate in the scheme that was established under the NAMA legislation. The assets securing these loans were valued at between €1.7b and €2.28b and generated an annual income in the order of €150m.
8. There was a dispute as to whether the McKillen loans could be regarded as being “impaired,” as there had been no breach of the loan facilities. Indeed, the McKillen portfolio was unusual in that 96% of the properties were let, the majority to blue chip tenants on long leases. The income stream was between 1.7 and 1.8 times that payable at the loans’ current interest rates, and the interest was being kept up to date. The loans were of a short-term duration, although they had been successfully negotiated from time to time. NAMA took the general approach to the loans that because the

borrower was, to an extent, at the mercy of its banks in renegotiating the terms of the short-term facility, that the McKillen entities were exposed to the market and that the loan facilities were therefore somewhat vulnerable to market forces.

9. Proceedings were commenced by the applicants against NAMA, and the Attorney General, as representative of the State, sought to quash the decision by NAMA to acquire the loans.
10. The primary argument of the applicants was the contention that there had been a breach of their constitutional right to fair procedure by reason of the failure and express refusal of NAMA to receive submissions made on their behalf prior to taking a decision to acquire the bank loans as eligible assets.
11. The litigation had an unusual history, in that the application came to be heard first by a divisional court of the High Court, which rejected all claims of the applicants. On appeal to a seven judge Supreme Court, the decision of the divisional High Court was set aside and, ultimately, a determination was made in a lengthy, and often quoted, judgment, that NAMA's decision to acquire the McKillen loans was not one that could be made without affording those entities the opportunity to be heard, and that the attempt to do so was a breach of constitutional and natural procedural rights. Ultimately, the business entities acquired the loans directly from NAMA, and the matter was thereby concluded.
12. The case is relevant to the approach of the Irish courts to State aid, since one argument raised by the appellants concerning the NAMA Act scheme generally related to the scope of NAMA to acquire assets, and whether the decision to acquire the McKillen loans was in breach of a Decision of the European Commission by which the NAMA legislation, and the scheme by which assets were acquired, was deemed not to be an unlawful State measure and not to be incompatible with European law.

The Commission Decision

13. It was common case that the NAMA scheme did entail the grant of State aid, within the meanings of Articles 107 and 108, and, in that context, the State notified the Commission. The Commission gave a decision on 26th February 2010 (Case N 725/2009) and determined that the NAMA scheme would constitute aid provided from State resources within the meaning of Article 107(1).
14. Article 107(1) provides as follows:

"Save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings over the production of certain goods shall, insofar as it affects trade between Member States, but that is incompatible with the internal market."
15. The Commission considered that while the NAMA scheme did constitute State aid, in that it envisaged the use of State resources to prop up insolvent banks, it was still compatible with the internal market, since it fell within Article 102(3)(b):

"Aid to prompt the execution of an important project of common European interest social remedy is serious disturbance in the economy of a Member State."
16. The Commission determined that the notified measures would, if implemented, constitute aid by reason of the fact that, through the NAMA scheme, the State provides State guaranteed bonds that are designed to help NAMA to finance an asset release scheme by the purchase of assets from financial institutions at a price that is above market value, and that this distorts competition by conferring benefits on the participating financial institutions.
17. The Commission, however, was satisfied that the scheme was designed to remedy a serious disturbance in the Irish economy and that it therefore had no objection to NAMA, as a scheme.
18. Later, the Commission gave its interpretation of this decision, in a letter to a member of Seanad Éireann of 8th September 2010.

The arguments of Mr. McKillen

19. The argument of the McKillen entities was that the Decision of the Commission was given in the context of a description of the NAMA scheme as restricting it solely to the acquiring of “impaired loans”.
20. The McKillen entities sought a declaration that NAMA had failed to exercise its powers, in accordance with the Commission’s Decision, by purporting to acquire credit facilities when the borrowers were not impaired.
21. The High Court determined, following an analysis of the Commission’s Decision, that the Commission did not confine its approval of the NAMA scheme to the acquisition of impaired assets.
22. The Supreme Court noted the separate role of the Commission, which has the exclusive function of ruling on the compatibility of aid, whether existing or new, with the internal market, but noted that the courts of the Member States are obliged to support the Commission in the exercise of its functions. In that context it is imperative that the national courts would:

“... give effect to the standstill provision of Article 108(3), and are obliged to make orders, where appropriate, restraining the State from implementing any to where the State in question has failed to notify the Commission or, where notice has been given, without awaiting the Commission decision on compatibility.”

The court went on to point out that:

“The National Court may also be obliged to make orders for the recovery of unlawful aid.”

23. It was noted, by the Supreme Court, that the powers of NAMA included the power to acquire from participating institutions performing or non-performing eligible bank assets, and nothing in the Act could therefore be said to restrict NAMA only to the acquisition of impaired and non-performing loans or credit facilities.
24. The High Court considered that impairment, either at borrower or asset level, was not made a condition for eligibility under the Act, nor was it made so by the Decision of the Commission, and that the Commission understood that the category of eligible bank assets comprised loans in the land and development category.

The Commission letter

25. The Commission letter, sent in reply to a query that was raised by a member of Seanad Éireann, was to the effect that the expectation of the Irish government was that loans transferred to NAMA would be concentrated on a small number of very large real estate developers, whose loans were either impaired at asset level or were otherwise impaired.
26. The High Court determined that it would not, and could not as a matter of law, take into account the contents of the letter, and that:

“The Decision has to be construed by reference to itself and cannot be amended or altered save by a subsequent decision of the Commission. Neither can subsequent correspondence emanating from a Commission official, regardless of status or distinction, be utilised to construe the terms of the Decision itself.”
27. It was argued in the Supreme Court, by the McKillen entities, that the principle of sincere cooperation, and the fact that the Court of Justice frequently referred to external material and *travaux préparatoires* in the course of its decision making, meant that this was not the correct interpretive approach.
28. The Supreme Court considered that the letter from the Commission was not admissible, insofar as it “might be used” in order to make a key and important change or addition to the Commission’s Decision itself. (Para. 48). The letter was therefore not admitted for the purpose of interpretation.

Direct effect

29. A matter that was for decision in the Supreme Court was whether the Commission's Decision had a direct effect, and whether the Court could grant an injunction restraining NAMA from acquiring the loans.
30. The Supreme Court considered that decisions of the institutions of the EU were capable of having direct effect and of being invoked by individuals before the courts of the Member States, and that this is long since established, in, e.g., the *Grad v. Finanzamt Traunstein* Case C-9/70, [1970] ECR 825. The High Court did not consider the question in any great detail, and it proceeded on the hypothesis that the Commission's Decision did have direct effect.
31. The Supreme Court did, however, consider the question of whether the Commission's Decision did have, or was capable of having, direct effect. It came to its determination in the context of fundamental principles. The first of these is that the national court has no power to pronounce on the compatibility of state aid with treaty obligations: *Costa v. ENEL* Case 6/64, [1964] ECR 585. Second, the question of an application to enforce the standstill provision, in Article 108(3), did not arise, as the NAMA scheme had been fully notified to the Commission, and the Commission had delivered its Decision. Third, the Commission did not open the formal investigation procedure under Article 108(2), but made a decision not to raise objections, which meant that the state aid would be implemented. Fourth, as a result of the process engaged by the Commission, it was clear that the Commission had no power to impose conditions on the State and did not purport to do so.
32. The view of the Supreme Court was that the State proposed to implement a state aid scheme which, as a matter of European law, was permissible. It was true that the Decision could have been challenged in the General Court, but this had not happened. It was also the case that, as no conditions had been imposed by the Commission, there could be no argument made by the applicant that, while the Commission's Decision meant that the state aid was permissible, certain conditions had not been met in this individual case.
33. The Court then went on to find that the Decision was not one which was unconditional and precise, in regard to the test that was necessary for it to have direct effect. It came to this decision as the Commission's conclusions were open to several different interpretations, and that direct effect was therefore not possible. It also took the view that the Decision was not one which was unconditional, clear and precise.
34. Ultimately, the Supreme Court took the view that the Decision of the Commission did not confine NAMA to acquiring impaired credit facilities, and that, accordingly, the McKillen entities were not entitled to any declaration to the effect that NAMA was attempting to exercise its powers in breach of Articles 107 and 108, or of the Decision of the Commission.

7.2. Maria Gkana (Greek Council of State)

Judgment 533/2016 of the Council of State (extended composition)

1. According to EU legislation and the EU courts' settled case-law, the Commission has the power to declare certain state aid either compatible or incompatible with the internal market. If the latter is the case, any aid that is declared unlawful and incompatible must be recovered by the Member States, so that a level-playing field for competition is restituted in full. Although it seems that, after the Commission has done all the dirty work, the Member States' job is easy, experience and extensive case-law have proven otherwise. In the judgment upon which we are commenting, the issue raised during the recovery of state aid only seemingly refers to the choice between simple or compound interest; in reality, it touches upon the extent of the binding effect of the Commission's actions on national courts.

2. Turning to the background of the case, back in the 1980's, the Greek cement market was essentially ruled by four large companies with equally important names: Heracles (Hercules), Titan, Halkis and Halyps (Steel). As often happens with powerful competitors, their legal battles were soon transferred to the European law field, in what could, somewhat freely, be described as a "clash of the Titans". A competitive advantage worth €86.2 million (DR 27,755 million), in the form of the converting into capital of Heracles's debts to Greek institutions, as part of several structural measures that were designed to remedy serious disturbances in the country's economy, which triggered a Commission decision declaring the aid compatible.

3. This decision was challenged by competitors in the UK, Italy and Greece before the Court of First Instance (CFI). On 6th July, 1995, the CFI held that the Commission had failed to fully assess the effects of the aid on trade and competition, as laid down in Article 92 of the Treaty, and annulled the Commission's decision. Having carried out a full examination, as required by the Court, the Commission decided, on 17.3.1999, that the conversion of Heracles' debt into capital in the amount of €86.2 million (DR 27,755 million) is aid, in the sense that it distorted competition and affected trade between Member States. Part of the aid, amounting to €78.5 million (DR 25,267 million), was considered compatible with the common market under Article 92(3)(b) of the Treaty, in the sense that it was intended to remedy a serious disturbance in the Greek economy. The remaining part of the aid, amounting to €7.7 million (DR 2,488 million), was not limited to the minimum necessary, it unduly placed the company in a more favorable position *vis-à-vis* its competitors, and had to be recovered in order to establish the *status quo* of competition. It was further stated, in the Commission's decision, that the sum to be recovered should bear interest from the date on which it was made available to Heracles until the date of its actual recovery.

4. According to the judgment that is commented upon, the recovery decision followed a letter from the Commission (dated 2.5.1999) in which the interest reference rate was set at 18%, and the total amount to be recovered was calculated using the compound interest method. The competent tax authority issued a payment order, calculating the amount in the same way as the Commission had in its letter. Heracles paid the sum, but, nonetheless, contested the legality of the order before the Athens Administrative Court of First Instance. The motion was partially accepted. More specifically, the First Instance Court found that the method used for the calculation of the fine (compound interest) was illegal. Both Heracles and the tax authority appealed. After some back-and-forth for procedural reasons, the Court of Appeal ruled that, in view of the fact that the national courts are bound by the Commission's decision regarding the recovery of unlawful aid, and given that the latter had not been contested before the competent court, the Court of First Instance had no power to examine the legality of the Commission's decision of 17.3.1999, nor the legality of the calculation of the amount to be recovered, nor the interest rate and the method used. It subsequently quashed the appealed judgment and dismissed the original motion. Heracles brought an appeal on points of law before the Council of State (CoS), i.e., the Supreme Administrative Court of Greece.

5. In the judgment that is being commented upon, the CoS, in an extended composition (7 judges instead of the standard composition of 5), quoted the relevant law governing the dispute. In short, before Regulation 794/2004, it was rather unclear whether the amount to be recovered should be calculated on a simple or compound interest basis. The Commission and the Member States' practices varied. It must be noted, at this point, that the choice between one of these methods is extremely important, because, according to the method of compound interest, the interest is calculated on the initial capital amount and also on the accumulated interest from previous periods. This means that the total amount to be recovered ends up being significantly higher than the amount calculated on a simple interest basis. In the case commented upon, the difference is striking: €69.7 million (DR 23,771 million) instead of €25.6 million (DR 8,731 million).

6. In 2003, the Commission issued a Communication on the interest rates to be applied when aid granted unlawfully is being recovered (2003/C 110/08), taking the view that the effects of unlawful aid are to provide funding to the beneficiary on similar conditions to a medium-term non-interest-bearing loan. It therefore concluded that the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralized. Accordingly, the Commission informed the Member States, and interested parties, that in any future decisions it may adopt the ordering of the recovery of aid that is unlawfully granted, and it will apply the reference rate that is used for calculating the net grant equivalent of regional aids on a compound basis. In accordance with normal market practice, compounding should take place on an annual basis. Likewise, according to the said Communication, the Commission expected the Member States to apply compound interest in the execution of pending recovery decisions, unless this would be contrary to a general principle of Community law. The method of compound interest was eventually made compulsory, pursuant to Article 11 of R. 794/2004, which applies in relation to any recovery decision notified after the date of the entry into force of the Regulation (Article 13).

7. As a bridge between the law and the case-law, CoS, in its judgment, also referred to Communication 2007/C 272/05 of the Commission, in order to reiterate the purpose of recovery as the re-establishment of the situation that existed on the market prior to the granting of the aid, so that the maintenance of a level-playing field in the internal market is ensured, and to underline the nature of recovery as being the logical consequence of the finding that certain state aid is unlawful, and not as a penalty. Furthermore, citing the said Communication, as well as the relevant case-law, the CoS pointed out that the amount to be recovered should reflect any financial advantages that are incidental to unlawful aid and, thus, the interest - equivalent to the financial advantage arising from the availability of the funds in question - is to be recovered.

8. Subsequently, the CoS referred extensively to the Département du Loiret case (T-369/00 and C-295/07), in which the issue of the appropriate method of calculating interest in state-aid cases before 2003 was dealt with. According to this case-law, an obligation is imposed upon the Commission to justify the use of the compound interest method for the recovery of any aid declared incompatible with the common market before the 2003 Communication. In that point, reference is made to an internal manual of procedures, issued by DG Competition, regarding the application of Art. 107-108 TFEU (Edition 2013), in which it is stated that the simple interest method is acceptable under three cumulative conditions: a. the decision was adopted before the 2003 Communication; b. the decision does not explicitly impose the calculation of recovery interests on a compound basis; and, c. the Member State shows that, in similar situations, the calculation of interest is done in a simple manner.

9. Furthermore, in the judgment commented upon, the CoS also referred extensively to the Mediaset case (C-69/13) and the case-law cited therein, regarding the binding effect of letters sent by the Commission to the Member States as part of the exchanges to ensure the immediate and effective execution of recovery decisions. According to that case-law, such letters do not constitute decisions within the meaning of the fourth paragraph of Art. 288 TFEU, and therefore cannot be regarded as being binding on the national court. However, under the principle of cooperation in good faith that is laid down in Art. 4(3) TEU, the national court must take the Commission's statements of position into account as

a factor in the assessment of the dispute before it. The nature of these statements of position is confirmed by settled case-law, which is also cited in the judgment which is commented upon here.

10. Turning to the case at hand, the CoS held that the Court of Appeal erred in concluding that, just because the Court of First Instance was bound by the recovery decision, it followed that it had no power to examine the legality of the method used by the Greek tax authority to calculate the interest. More specifically, the CoS held that the Court of Appeal failed to ascertain: 1) whether the recovery decision of 17.3.1999 explicitly imposed the calculation of recovery interests on a compound basis, justifying it according to the *Département du Loiret* case, or that it followed indirectly from the Commission's letter of 2.5.1999 that such a calculation was imposed by the recovery decision and, in that case, the letter was considered to be complementary to the decision, constituting a whole with it, and therefore was binding on the national court, or, 2) whether it constituted a separate act, in which case the legality of the calculation could be examined. Furthermore, the CoS held that the Court of Appeal should have examined whether, under Greek law (at the time of the facts of the case), a legal basis existed for applying the method of compound interest, as well as whether the tax authority had justified the method used with reference to the restitution of a level-playing field of competition by neutralizing any financial advantages that are/were incidental to unlawful aid and, thus, interest equivalent to the financial advantage arising from the availability of the funds in question. Finally, the CoS held that, as far as the binding effect of the Commission's letter was concerned, the relevant EU courts' case-law was clear enough, so there was no need to refer a question to the Court of Justice of the EU (CJEU) for a preliminary ruling.

11. Consequently, and given that, pursuant to the Greek rules of procedure, the CoS exercises a review on points of law and cannot itself assess original documents, the Supreme Administrative Court set aside the judgment of the Court of Appeal and ordered the latter to re-examine the case accordingly.

Comment

12. The judgment that is commented upon may not seem to solve the dispute in a straightforward manner, but this is merely because of procedural law restraints. However, the CoS fulfills its mission as a Supreme Court, giving the Court of Appeal very detailed guidance on how it should assess the case. Beside the fact that the Court extensively refers to previous EU courts' case-law, and it does so in a comprehensive way, what is particularly interesting in this case is actually the reference made to Communication 2007/C 272/05 and the internal manual of procedures issued by DG Competition regarding the application of Art. 107-108 TFEU (Edition 2013). Indeed, CoS, on not one but two occasions, took into consideration, posterior-to-the-facts-of-the-case, non-binding Commission documents, acknowledging them as such, in order to put both law and case-law into context. What is more, it used them as a yardstick for dictating to the Court of Appeal which elements should be examined when revisiting the case. Whether such documents must, or even may, serve as interpretative tools, is open to discussion. Is there an inherent obligation for the national judge, under the principle of cooperation in good faith, which is enshrined in Art. 4(3) TEU, to take into account any document issued by the Commission, even those summarizing case-law or those that are intended for internal use? On the other hand, is the judge allowed to bypass a personal interpretation of both the law and the case-law in favor of the Commission, or does that mean that he/she waives his/her authority and independence?

7.3. Merit Helm (County Court of Harju)

Tallinn Circuit Court Civil Chamber. Decision no 3-13-1497 of 26. August 2014

Facts of the case

On 24.03.2010 Hansa Biodisel OÜ (HB) applied for state aid. On 13.07.2010 the Estonian state aid authority (EAS) made a decision to grant HB state aid in the sum of €971,648. The purpose of the aid was to subsidise HB's project, the aim of which was to recycle old car tires into fuel by pyrolysis.

The Estonian State Aid Authority (EAS) performed a follow up inspection on the project in 2012 and discovered that HB had started the project before applying for state aid. EAS concluded that the rules of Commission Regulation (EC) No 800/2008 of 06.08.2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) were thus violated. Specifically, Article 8 Section 2 - because the aid did not have an incentive effect on the project.

On 12.04.2013, EAS made a decision with which it nullified its former decision to grant aid retroactively (*ex tunc*), claiming back the aid that had already been paid to HB (in the sum on €240,099.18). HB submitted an appeal.

The Ministry of Economic Affairs and Communications, Courts of the First and Second Instance, all found that EAS's decision to nullify its former decision and to claim the aid back was both lawful and valid.

Tallinn Circuit Court Civil Chamber decision

The main question of the dispute lay in establishing whether, on 19.11.2009 (i.e., before the aid was granted), HB had concluded a binding or non-binding contract with the Jinan Eco-Energy Technology Co., Ltd., to buy pyrolysis equipment to carry out the project.

Both Instances of the Courts concluded that the contract had been concluded as a binding contract (and not as a preliminary contract). The Court of Second Instance explained that evaluation of whether state aid is in compliance with the common market is regulated by European Commission, which is the sole authority able to make such rules. EC Regulation 800/2008 Article 8 Section 2 and European Commission "Guidelines on National Regional Aid for 2007-2013" (2006/C 4/08) Section 38 must be applied.

EC Regulation 800/2008 Article 8 Section 2 provides that aid granted to small and medium-sized enterprises (SMEs), which is covered by this Regulation, shall be considered to have an incentive effect if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned. EC „Guidelines on National Regional Aid for 2007-2013" (2006/C 54/08) section 38 and its Footnote no 40 also provide unequivocally, that an application for the aid must be submitted before start of work on the project. 'Start of work' means either the start of construction work or the first firm commitment to order equipment, excluding preliminary feasibility studies.

It was proven, in this case, that HB had started work before applying for the aid and thus it did not have the mandatory incentive effect. As a result of the above, the aid was granted unlawfully and must be recovered from the beneficiary as unlawful aid. The Court explained that the member state is obliged to recover unlawful state aid from the beneficiary according to both – domestic and EC law. The Court also referred to European Court of Justice (ECJ) decisions in similar matters and explained that in accordance with ECJ decisions - revocation of unlawful state aid must be dealt with by recovering it from the beneficiary (ECJ 21.03.1990 Decision C-142/87: Belgium vs Commission, Section 66;

08.12.2011 Decision C-275/10: Residex Capital IV, Section 29; 24.01.2013 Decision C-529/09: Commission vs Spain, Section 90).

The Court found that the fact that the beneficiary did not conceal (lie) to the authority that it had concluded the contract on 19.11.2009, when applying for the state aid, did not give the beneficiary legitimate expectation that the aid would not be recovered from the beneficiary. A beneficiary can only rely on legitimate expectation of keeping the aid, if that beneficiary has, with due diligence, audited that while deciding upon granting state aid, and the state has met the requirements set forth in the Treaty on the Functioning of the European Union. The court referred to ECJ case law: (20.09.1990 Decision C-5/89: Commission vs Germany, Section 14; 08.12.2011 Decision C-81/10 P: France Télécom vs Commission, Section 59) in which similar views were expressed.

HB found that the case should not be decided without having turned to the ECJ or the European Commission for a preliminary ruling. The Court denied the application and explained to the ECJ cannot evaluate the factual circumstances and evidence submitted to the National Court but can only interpret EC law or decide upon its validity. The Court found that European law is univocal and clear in the matters that are relevant to the case, and there is enough ECJ case law on similar disputes. There the court thus found that there are no grounds for turning to the ECJ or the European Commission for a preliminary ruling.

Significance of the case

The significances of the case lies mainly in two things.

The first is that, besides domestic law, the Court applied several EC legal acts in order to substantiate its decision. The Court also referred to several ECJ cases relating to similar disputes (usually the Court only refers to domestic case law).

The second important point is that the Court explained the beneficiary's duties in the procedure of granting state aid. The Court established that the beneficiary itself is also responsible for auditing if the procedure of granting state aid has been duly carried out and is in accordance with the provision set out by EC law. The Court also established that once it is proven that the aid was granted unlawfully, the aid must be recovered, and there is no other appropriate remedy in such circumstances.

7.4. Seamus Noonan (Irish High Court)

Dun Laoghaire-Rathdown County Council v. West Wood Club Limited [2105] IEHC 800

Introduction

1. The Plaintiff was a local authority tasked with collecting local property taxes known as commercial rates. Rates were levied on business premises within its functional area. The claim was brought in the Circuit Court, a Court of local and limited jurisdiction.
2. The factual background in these proceedings arose from a claim by the Plaintiff for arrears of commercial rates in respect of leisure premises that are operated by the Defendant. In response to the claim, the Defendant pleaded in their defence and counterclaimed, *inter alia*, that as the Plaintiff was operating similar leisure facilities in competition with it, funding received from commercial rates and other State sources would amount to unlawful State aid. Therefore, it was argued that the rates were unenforceable where the funds raised by these rates were being used by the Plaintiff to fund its own competing leisure facilities. The Defendant also suggested that the exemption granted by the Plaintiff to its own leisure centre from rates, when they were in competition with the Defendant's leisure centres, was a breach of the competition rules of the Treaties under Article 4(3) of the Treaty on the Functioning of the European Union (TFEU). The Defendant also pleaded that the collection of the rates breached Articles 102, 106, 107-109 TFEU.
3. In their counterclaim, the Defendant sought damages in the same amount as the rates levied.
4. Before the Circuit Court, the Plaintiff was successful in raising a preliminary objection on the basis that the Circuit Court did not have jurisdiction to consider the issues raised in relation to State aid by the Defendant's defence. The Defendant appealed to the High Court.
5. Judgment was delivered by O'Malley, J. in the High Court on 17th December 2015.

Submission of the parties in the High Court

6. The Defendant's submissions are set out in the judgment of O'Malley, J. between Paragraphs 27 – 42. She notes that they set out the principles that the Circuit Court is obliged to give effect to EU law and that Articles 107 and 108 have direct effect. The Defendant submitted that National Courts are under an obligation to provide remedies for breaches of EU rules, and that national laws must be set aside should they prevent the awarding of such remedies. The Defendant relied on the decisions of the Court of Justice in *Case C-213/89 R v. Secretary of State for Transport, ex. parte Factortame Limited (Factortame I)* [1990] ECR 2433, *Case C-6/90* and *Case C-9/90 Francovich v. Italian Republic* [1991] ECR I-5357 and passages from Bellamy & Child, *European Community Law of Competition*, at pages 1589-1591, to demonstrate the development of this principle and the scope of its application.
7. At Paragraph 37 of her judgment, O'Malley, J. notes:

“[37.] The defendant accepts that if the national court is satisfied that the aid in question is a State aid, it has no jurisdiction to decide whether or not the aid is compatible with the Treaty. That is the exclusive function of the European Commission. However, if the aid has not been notified to the Commission, the court must, it is submitted, devise whatever remedy is necessary to nullify the effect of the breach.”
8. The Defendant submitted that the correct remedy would be an order of the Court for restitution of the rates levied on the Defendant and relies on *Case C-53/00 Ferring v. ACOSS* [2001] ECR I-9067 and the approach of Advocate General Jacobs in *Case C-126/01 Ministre de l'économie, des finances et de l'industrie v. Gemo*, 30th April 2002, in support of this position.

9. O'Malley, J. summarises the submissions of the Plaintiff between Paragraphs 43-55. The Plaintiff submitted that the Defendant should have sought a ruling from the Commission in relation to whether the rates amounted to State aid, since they asserted that the Commission has the exclusive power to determine what amounts to State aid. They relied on a passage from *Dunleavy's Competition Law: A Practitioner's Guide* (Bloomsbury, 2010), at p.773 of that publication, in support of this proposition. The Plaintiff also suggested that the correct method of challenging the lawfulness of the rates would be by judicial review and relied on the decision of Charleton J. in *The Minister for Justice, Equality and Law Reform & Anor v The Director of the Equality Tribunal* [2009] IEHC 72 in support of their position that claims made under EU law must be made in the appropriate forum under national law.
10. In relation to the Defendant's counterclaim, the Plaintiff submitted that as Article 108(3) does create obligations for recipients of State aid, no right could arise under EU law for damages against a recipient. The Plaintiff relied on the findings of the Court of Justice in *Case C-39/94 SFEI v. La Poste* [1996] ECR I-3547 in this respect.

Decision of O'Malley J.

11. In analysing the principles applicable in the determination of the issues in this case, O'Malley J. considers in detail the guidance set out in the handbook on the enforcement of EU State aid law by National Courts, published by the European Commission in 2010. This supports the view that National Courts have the power to interpret issues relating to State aid. At Paragraph 58 she quotes the following passage from the judgment of the Court of Justice in *C-368/04 Transalpine Ölleitung in Österreich* [2006] ECR I-9957:

"37. It is common ground that, as regards the supervision of Member States' compliance with their obligations under Articles 87 EC and 88 EC [Now Articles 107 and 108], the national courts and the Commission fulfil complementary and separate roles (see *Case C-39/94 SFEI and Others* [1996] ECR I-3547, Paragraph 41, and *van Calster and Others*, cited above, Paragraph 74).

38. Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88(3) [Now Article 108(3)] of the Treaty is infringed (*van Calster and Others*, Paragraph 75).

39. A national court may have cause to interpret the concept of aid contained in Article 87(1) [Now Article 107(1)] of the Treaty in order to determine whether a State measure has been introduced in disregard of Article 88(3) [Now Article 108(3)] (*Case C-345/02 Pearle and Others* [2004] ECR I-7139, Paragraph 31). Thus, it is for that court to verify, *inter alia*, whether the measure at issue constitutes an advantage and whether it is selective, that is to say, whether it favours certain undertakings or certain producers within the meaning of Article 87(1) EC [Now Article 107(1)].

40. Secondly, it must be pointed out that an aid measure within the meaning of Article 87(1) EC [Now Article 107(1)] which is put into effect in infringement of the obligations arising from Article 88(3) EC [Now Article 108(3)] is unlawful (see *Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French State* [1991] ECR I-5505, Paragraph 17, and *Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Distribution Casino France and Others* [2005] ECR I-9481, Paragraph 30. See also the definition of unlawful aid in Article 1(f) of Regulation No 659/1999...

45. In that regard, and since there is no Community legislation on the subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness) (see *Case C-300/04 Eman and*

Sevinger [2006] ECR I-8055, Paragraph 67, and Joined Cases C-392/04 and C-422/04 i-21 Germany and Arcor [2006] ECR I-8559, Paragraph 57)...

51. *In addition, it should be noted that, in the cases in the main proceedings, the applications for grant of the unlawful aid measure, namely the partial rebate on energy taxes, may be likened to applications for partial exemption from those taxes. As is clear from case-law, businesses liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that contribution (see Case C-390/98 Banks [2001] ECR I-6117, paragraph 80; Joined Cases C-430/99 and C-431/99 Sea-Land Service and Nedlloyd Lijnen [2002] ECR I-5235, paragraph 47; Distribution Casino France and Others, paragraph 42, and Air Liquide Industries Belgium, paragraph 43).*

52. *Having been called upon to analyse the disputed measure in order to ascertain whether it corresponded to the definition of aid referred to in Article 87(1) EC [Now Article 107(1)], the national court should, in principle, have available to it all the facts enabling it to assess whether the measure which it proposes to adopt ensures that the rights of individuals are safeguarded by neutralising the effects of the aid on competitors of the recipient undertakings, while taking Community law fully into consideration and avoiding adoption of a measure which would have the sole effect of extending the circle of recipients of that aid."*

12. She goes on to note that the handbook provides that National Courts may request an opinion from the Commission if in doubt as to the qualification of State aid. She also considers the position of the handbook in respect of the application of national procedure in cases where the National Courts are obliged to enforce State aid rules, and in relation to standing issues in tax cases.

13. In determining the issue, O'Malley, J. notes, at Paragraph 65, that, in general, any party defending a civil claim is entitled to challenge the lawfulness of the Plaintiff's claim. While this is subject to limitations, she notes "a Defendant who says that the specific claim brought against them amounts to a breach of their rights must be entitled to make that case." Accordingly, she dismisses the Plaintiff's suggestion that there is an issue as to whether this is the correct forum to bring proceedings and notes at Paragraph 67:

"A Defendant would be entitled to rely upon Constitutional principles or upon national legislation, if applicable, to defeat a claim of any nature made against it in any forum. Having regard to the authorities, the right to invoke the protection of EU law cannot be made subject to more restrictive rules, and the Defendant cannot be compelled to institute separate proceedings to vindicate any applicable rights. The Defendant is, therefore, entitled to make the argument that the rates sought to be collected from it are a species of unlawful State aid which affects its interests."

14. In conclusion, O'Malley sets out the following principles from the authorities:

- "a. The Circuit Court has jurisdiction to determine whether the rates amount to State aid.
- b. The Circuit Court does not, however, have jurisdiction to determine the compatibility of the aid (if it is found to be such) with the internal market.
- c. As a matter of fact, it seems to be common case that if it is State aid, it has not been notified to the Commission and, to that extent, a finding of a breach of Article 108(3) of the Treaty would follow.
- d. However, the Court must bear in mind that where the issue relates to the payment of a tax, the obligation to notify the Commission can only be relied upon by the taxpayer if their own tax payment forms an integral part of the unlawful aid.
- e. If the exemption of the Plaintiff's own enterprises is established, and was unlawful, it is not a remedy for that particular illegality to grant exemption to the Defendant - that would only compound the breach of the rules.
- f. Separate considerations seem to apply to the counterclaim, as framed in these proceedings. EU law does not require that damages be available against the recipient of unlawful State aid. The question of damages is therefore governed by national law, including national rules, as to the monetary jurisdiction of different courts. It may be that the counterclaim could, at least to some extent, be described as being against the Plaintiff in its capacity as collector of the rates, rather than

as recipient, but the Defendant has not particularised its general claim that the rates, combined with other State funding, amount to State aid. The obligation on National Courts to provide a remedy for a breach of EU law does not, it seems to me, extend to breaching national procedural rules (here, rules relating to jurisdiction) where that is not necessary under the principles of equivalence and effectiveness.

g. The Defendant's claim exceeds the jurisdiction of the Circuit Court in relation to damages. While an argument may be open that, under national rules, the monetary limit does not apply to a counterclaim, this issue was not addressed before me and I am proceeding on the basis that, in the normal course of events, the limit does apply. My view, therefore, would be that the Circuit Court does not have jurisdiction to entertain the counterclaim."

The Court allowed the appeal on the basis that the Circuit Court had incorrectly reached the conclusion that it did not have jurisdiction to entertain the defence raised by the Defendant and remitted the case to that Court for further consideration in the light of the judgment of the High Court.

Postscript

Since the above was written, the Court of Appeal delivered judgment, on the 25th July 2017, on a case, and O'Malley J. stated that, on the issues before her. The judgment of the Court delivered by Hogan, J., essentially agreed with the views of the High Court, and she held that it was clear that the Circuit Court did not have jurisdiction to pronounce on the validity of the rate, since it had no judicial review jurisdiction.

The Circuit Court could, however, rule on the issue raised by way of defence between the parties to the proceedings, but only on the basis that such determination would have no general *erga omnes* effect, and it would thus not bind anyone outside the proceedings. The Court also rules that the defence could only be availed of where there was a clear error on the face of proceedings, or where there no doubt about the illegality of the decision that was sought to be enforced. The Circuit Court thus had jurisdiction to decide if there had been illegal state aid, but only where this was manifest and clear.

8. State aid law in the energy sector

8.1. Arunas Dirvonas (Lithuania Supreme Administrative Court)

Lithuania aims to reduce its dependence on its sole gas supplier Gazprom and to create a competitive gas market by connecting Lithuania to the EU gas market, thereby increasing the security of its energy supply. It therefore seeks the construction and operation of a liquefied natural gas terminal (hereinafter, the “LNG Terminal”) and its connection to the natural gas transmission system of Lithuania. The start of operation of the LNG Terminal was planned for 3rd December 2014.

On 21st July 2010, the Lithuanian Government appointed by decree AB Klaipėdos Nafta (hereinafter “KN”) as the project development company for the LNG terminal. KN is a state-owned company with the Lithuanian State holding 72.3% of the shares. The remainder of the shares are owned by private investors. KN will not be engaged in the trade in, and supply of, gas. UAB LITGAS, initially a 100% subsidiary of KN, but since 15th October 2013, under the control of Lietuvos Energija, UAB (which holds 2/3 of the shares), will engage in the supply of liquefied natural gas through the LNG Terminal. KN is thus in charge of implementing the development and construction of the LNG Terminal infrastructure until the LNG Terminal is connected to the natural gas transmission system and its operation starts. For reasons of security of supply, Lithuania also intends to designate KN as the operator of the terminal.

On 15th February 2012, the Government of the Republic of Lithuania adopted Resolution No 199 whereby it requested from (i) KN that it develop the LNG Terminal, and (ii) that the Ministry of Energy adopt all decisions to ensure that KN shall be provided with all securities necessary to the financing of the project, including, *inter alia*, a state guarantee.

In order to secure the development of the LNG Terminal, as well as its prospective functioning, Lithuania enacted the LNG Terminal Law on 22nd June 2012. Article 5(2) of the LNG Terminal Law institutes the “LNG Supplement”, a special levy that will be imposed on users of the transmission system. It will be collected by the transmission system operator for natural gas (“TSO”) and transferred to KN after the approval of the regulator, i.e., the National Control Commission for Prices and Energy (hereinafter the “NRA”), in order to finance part of the costs of constructing and operating the terminal and the related infrastructure. Article 11 of the LNG Terminal Law stipulates an obligation on certain energy producers (electricity or heat producers who have been assigned public service obligations, or whose price for produced energy is regulated) for each to buy minimal allocated quantities of natural gas imported through the LNG Terminal (hereinafter the “Purchase obligation”).

Based on the calculations and justifications provided by KN, the NRA approved investment costs into the LNG Terminal amounting to 113.8 m LTL (€33 million) on 19th October 2012. Those investment costs were therefore used as a basis for the LNG Supplement of 2013.

On 28th October 2013, Lithuania notified aid measures related to the construction and operation of the LNG Terminal to the European Commission.

Prior to this notification, the Lithuanian Gas Association filed a complaint on 28th November 2012, arguing that the LNG Terminal would be receiving illegal and incompatible State aid. In its complaint, the Lithuanian Gas Association objects to the LNG Supplement, the State guarantee, and the possible use of the land and port facilities of the Klaipėda State Seaport without paying a market-based price, as constituting illegal and incompatible aid. The complainant argues, in particular, that those various advantages that have been granted, without notification to the Commission, cannot be viewed as fulfilling the Altmark conditions established by the Court of Justice, and it seems difficult to justify them under Article 107(3)(c) of the Treaty on the Functioning of the European Union (hereinafter TFEU).

Lithuania admits that, in any event, even if the LNG Supplement and the purchase obligation had to be regarded as State aid, it would have been compatible under Article 107(3)(c) TFEU or, alternatively,

would comply with the Service of General Economic Interest (hereinafter SGEI) rules that are laid down in the SGEI Framework.

On the basis of the examined elements, the Commission, in the Decision of 20th November 2013, in case State Aid SA.36740 (2013/NN), concludes that the state guarantees, the disbursement of the LNG Supplement, and the revenues resulting from the purchase obligation, constitute State aid within the meaning of Article 107(1) TFEU.

The Commission has decided to consider the aid to be compatible with the internal market, pursuant to Articles 107(3) (c) as regards the investment aid, and pursuant to 106(2) TFEU as regards the operating aid.

However, The Commission regretted that Lithuania has put the section of the aid measures related to the investment (i.e., the LNG Supplement for 2013-2014) into effect, which is in breach of Article 108(3) TFEU.

The Commission has noted that Article 5(2) of the LNG Terminal Law that establishes the possibility for the LNG Terminal developer to obtain the LNG Supplement to cover investment costs, which cannot be financed by other resources that are available, is already in force and provides KN with enforceable rights, given that KN has already been designated as the project developer. This part of the aid measures has thus been granted in breach of the standstill obligation that are enshrined in Article 108 TFEU.

AB Achema is one of the producers assigned with public service obligations. AB Achema has approached the Vilnius Regional Administrative Court with a complaint concerning the compensation for damage, in which it has indicated that the Lithuanian State has, by also infringing the European Union law, *inter alia* Article 108(3) TFEU, applied State aid for the financing of the project of the LNG Terminal in the period 1st January, 2013, to 20th November, 2013, without notification to the Commission, thus causing financial damage of €15,329,728.69 to the applicant. State aid was provided on the basis of the LNG Terminal Law of 12th June 2012, according to which the applicant was obliged to pay the LNG Supplement from 1st January 2013, whose amount for 2013 was calculated by the NRA by Decision No. 03-317 of 19th October 2012, and by Decision No 03-330 of 26th October 2012. In the applicant's opinion, the LNG Supplement determined by the LNG Terminal Law could only be calculated following the Decision of the Commission of 20th November 2013, in case State Aid SA.36740 (2013/NN), in which it was stated that such State aid is justifiable and may be applied. The total amount of the LNG Supplement (€15,329,728.69) paid by the applicant for the overall period in dispute shall be considered material damage, which shall be awarded to the applicant from the Lithuanian State.

The representative of the Defendant Lithuanian State asked for the application of the limitation period in the response, and for the rejection of the complaint. It is indicated that the potential infringement of its rights became apparent to the applicant on 19th November, 2012, at the latest, when the Vilnius Regional Administrative Court received a complaint, thus asking to recognise its obligation to pay the LNG Supplement as being unlawful by, *inter alia*, basing its argument on the infringement of Article 108(3) TFEU; therefore, the limitation period of 3 years, in order to compensate for damages, was due on 19th November, 2015, at the latest. The Court of Appeal and the Court of Cassation have commented in their Ruling of 5th February, 2016, and the Ruling of 8th June, 2016, on whether the infringement of Article 108(3) TFEU determined by the Commission by the Decision of 20th November, 2013, for the period in dispute, by obliging the applicant to pay the LNG Supplement, is sufficiently significant in order for the applicant to be deprived of the obligation that is imposed by the LNG Terminal Law, as well as by the Decision of 19th October, 2012, and the Decision of 26th October, 2012, by the NRA. It was therefore confirmed by the final decisions from the Courts that, regardless of the infringement of EU law determined by the Commission by the Decision of 20th November 2013, the applicant shall pay the LNG Supplement calculated for the period in dispute.

Third parties concerned who were supporting the position set out in the Defendant's statement in their responses have requested the application of the limitation period and the rejection of the complaint.

The Vilnius Regional Administrative Court has rejected the complaint by its Decision of 15th March, 2017, by also specifying that the applicant associates the infringement of its rights, from which the requested compensation of damage is derived, with the moment when the Lithuanian State (institutions) obliged the applicant to pay the LNG Supplement: from 1st January, 2013, by the LNG Terminal Law that was adopted on 12th June, 2012, as well as the Decision of 19th October, 2012, and the Decision of 26th October, 2012, without notification to the Commission, thus infringing EU law (Article 108(3) TFEU). The written evidence contained in the case proves that the applicant became familiar with the said obligation and interpreted it as an infringement of its rights on 19th November 2012, at the latest, following the complaint submitted by the Vilnius Regional Administrative Court. In its complaint of 19th November, 2012, the applicant requested the annulment of the Decision of 19th October, 2012, and the Decision of 26th October, 2012, by the NRA, and it clearly stated that, in its opinion, upon the establishment of the LNG Supplement, EU law (*inter alia* Article 108(3) TFEU) was infringed, because State aid to AB Klaipėdos Nafta is hereby provided without prior reconciliation of such aid with the Commission. On this basis, it has been stated that the complaint concerning the compensation for damage, which the applicant derives from the potential infringement by the Lithuanian State (institutions), which occurred as a result of the LNG Terminal Law of 12th June, 2012, as well as the Decision of 19th October, 2012, and the Decision of 26th October, 2012, by the NRA, in the present case, by obliging it to pay the LNG Supplement from 1st January, 2013, could have been submitted by the applicant on 19th November, 2015, at the latest. The complaint was submitted to the Court by the applicant on 6th October 2016, i.e., upon an obvious failure to consider the limitation period that is determined in Article 1.125(8) CC for such complaints to be submitted.

Comment:

This is basically the first case in Lithuania where the occurrence of damage that it is requested be covered is associated with the submission of State aid which was not notified to the EC before it was granted. It should be noted that part of the LNG Supplement amount (€5,329,728.69) which is referred to by AB Achema as its damages, is awarded by a final court Decision. The Court of Cassation based its Decision to retain the Decisions of the Court of First Instance and the Court of Appeal, by which the amount of the LNG Supplement was awarded on, *inter alia*, the Judgment of the Court (Grand Chamber) of 12th February, 2008, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, C-199/06, where the ECJ has, by interpreting Article 88(3) EC, clarified that the "last sentence of Article 88(3) EC is to be interpreted as meaning that the national court is not bound to order the recovery of aid implemented contrary to the provision where the Commission has adopted a final decision declaring that aid to be compatible with the common market, within the meaning of Article 87 EC. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently". On the other hand, it is also important, in the context of the case for the compensation for damages, which has not yet been examined by the Court of Appeal, that "It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid", and this was noted by the ECJ in the above-mentioned Decision.

8.2. Visan Doina (Court of Appeal of Bucharest)

State aid scheme for partial exemption of electro-intensive industrial consumers from the payment for green certificates related to the mandatory quota, according to Law no. 220/2008, as amended and supplemented

European Commission Decision C (2014) 7287 of October 15th, 2014.

1. PROCEDURE

(1) By an electronic notification validated on 2nd July 2014, registered at the Commission on the same date, the Romanian authorities notified the Commission of planned aid, in the form of reduced funding of support for electricity from renewable sources for energy-intensive users (EIUs).

(2) Further to requests from the Commission, the Romanian authorities provided additional information on 14th August 2014, and 24th September 2014.

DETAILED DESCRIPTION OF THE MEASURES CONCERNED

The support system for promoting the production of electricity from renewable sources

Law 220/2008 established a system for promoting the production of electricity from renewable energy sources (RES), and this was approved by the Commission's decision on 13th July 2011, in Case SA.33134 (2011/N) (the "RES support scheme")¹. The RES support scheme is a green certificate support system, under which eligible producers of electricity from RES (E-RES producers) receive a specific number of green certificates, depending on the technology used, for each MWh that is produced and delivered to the grid. An obligation is imposed on the electricity suppliers to purchase a mandatory quota of green certificates.

Green certificates are granted monthly to E-RES producers by the Transmission System Operator (TSO). They can be traded on the green certificates market, and the validity of the green certificates granted to the producers is 12 months. The trading value of green certificates is determined by competitive mechanisms and can vary between the limits set out by the law: a) a minimum trading value of €27 per green certificate, and b) a maximum trading value of €55 per green certificate, which has been indexed annually since 2011.

The Romanian Authority of Regulation in the field of Energy ("ANRE") issued the *Methodology for the setting of the annual quota for green certificates acquisition* (approved by ANRE Order No 45/2011) in accordance with Article 8(8) of Law 220/2008 republished. According to this methodology, the estimated annual mandatory green certificate quota represents the number of green certificates that a supplier is required to purchase for each MWh of electricity that he sells to end consumers (including that used for their own final consumption beyond their own technological consumption), and this is determined as the ratio between the total number of green certificates issued and the final electricity consumption in the year of analysis.

Businesses wishing to receive the aid must submit an application for exemption approval for the aid scheme to the authority responsible (the Ministry of the Economy). The application must be accompanied by the documents on the basis of which it can be proved that all eligibility conditions are met, in accordance with the Annexe to the Government Decision.

After evaluating the applications, which is to be completed within 30 working days from the date of filing the application, the Ministry of the Economy sends the applicants either the approval of the

exemption, or a notification stating that the application for exemption is incomplete, or else a letter rejecting the application.

The Government of Romania issued Government Decision no. 495/2014 ("the Government Decision") for the establishment of a state aid scheme for the exemption of certain categories of final consumers from the application of Law no. 220/2008, thus establishing the system for the promotion of energy from renewable energy sources (the "notified measure").

Subject to judgment

The complainant has sued the national authority in the field, namely, the Romanian Authority of Regulation for Energy (ANRE), for the annulment of ANRE Order no. 5 of February 26th, 2016, regarding the establishment of the mandatory quota for the acquisition of green certificates for the year 2015, the obligation of the Defendant to pay damages (2,246,905.43 Lei) for non-payment of the state aid for January 2015, - May 2015.

ANRE Order no. 5 of February 26th, 2016, was issued based on Government Decision no. 495/2014, subsequently amended by Government Decision no. 113/2016.

The Claims of the complainant:

The complainant is the beneficiary of Exemption Agreement no. 4 of June 3rd, 2015.

According to this exemption agreement, the applicant is exempted from paying 85% of the number of green certificates that are related to the mandatory quota.

Since the agreement was issued in early June 2015, between January and May 2015, the complainant paid the full amount for the green certificates.

In relation to the provisions of Art. 8 Par. 6 of Law no. 220/2008, corroborated with the provisions of Government Decision no. 495/2014, /in the form approved prior to the amendment by Government Decision no. 113/2016, and the applicant was to regularize the value of the green certificates for 2015 under this exemption until September 1st, 2016.

Following the approval of Government Decision no. 113/2016 and the issuance of Order Authority of Regulation in the field of Energy (ANRE) no. 5/2016, the complainant was unable to carry out this adjustment. In this context, the material damages are in the amount of 2,246,905.43 Li. e

Grounds of law:

- The complainant sustains that the Order Authority for Regulation in the field of Energy No. 5/2016 violates the rules of the domestic law: the Romanian Constitution of 2003.

According to Art. 15 Par. 2 of the Romanian Constitution "The law only provides for the future, with the exception of the more favourable criminal or contravention law".

It is obvious that any report/legal act born on the basis of the legal provisions that were in force in 2015 cannot be subject to the new legal regulations that were adopted in 2016. In the present case, the Authority of Regulation in the field of Energy (ANRE) applied to legal relations that came into force in 2015.

- Applying the measures by a date other than December 1st, 2014, is contrary to Commission Decision C (2014) 7287 of October 15th, 2014:

On July 2nd, 2014, the Romanian authorities notified the European Commission that the state aid scheme for the partial exemption of electro-intensive industrial consumers from the green certificates related to the mandatory quota. As stated in the notification, the Romanian State mentions that it had planned the implementation of the measure as of August 1st, 2014 but confirmed that the measure would not be implemented before it was approved by the European Commission.

Furthermore, the European Commission's decision expressly states that the draft Government Decision, transmitted on 24th September 2014, indicates that the measure would be implemented from December 1st, 2014.

As early as 2014, the Romanian authorities were thus aware that the measure would be applied as from December 2014, and all the statistical calculations were submitted to the European Commission with a deadline of December 2014. Moreover, the European Commission's decision aims to approve the scheme for 10 years application, until December 3, 2024, which argues that the Romanian authorities were aware of the application of the aid scheme throughout 2015, and not from June 2015, when the first exemption agreements were issued.

Against this background, the complainant considers that ANRE, in bad faith, did not take into account the estimated mandatory quota for the acquisition of green certificates for 2015, the aid scheme notified by the Romanian authorities and approved by the European Commission Decision C (2014) 7287 of October 15, 2014, in their calculations.

The amendment approved by GD no. 113/2016 obviously contradicts the Decision of the European Commission - which is directly and immediately applicable on the territory of Romania and it is not necessary to implement it), the state aid scheme being applicable for a period of 10 years starting on January 1st, 2015, and no later than this date.

Claims of the Defendant:

The state aid scheme that was approved by the European Commission, European Commission Decision C (2014) 7287 final of 15.10.2014, was drawn up in accordance with the criteria set out in the European Commission Guidelines on State Aid for Environmental Protection and Energy for the Period 2014-2020 (EEAG).

In accordance with Art. 2 Par 1 of the Annexe to Government Decision no. 495/2014, in order to obtain the exemption agreement, the state aid applicant sends to the Ministry of the Economy a request for the issuing of the exemption agreement, together with a series of supporting documents. After obtaining the exemption agreement, according to Art. 3 Par. 2 of Government Decision no. 494/2014, the beneficiary of the state aid shall notify the exemption agreement to ANRE, as well as to its electricity supplier, with which it has concluded, or concludes, a sale purchase contract for electricity.

Under the exemption agreement received from its client, the supplier is also exempt from the obligation to purchase a number of green certificates that is related to the amount of electricity delivered to its customers. who are the beneficiaries of the aid scheme covered by the government decision?

Article 3, Par. 1 of Government Decision no. 495/2014, in its original form, provided that "the exemption provided for in Art. 1 Par. 1 of the Decision shall apply to the mandatory quota of green certificates that apply to energy suppliers notified by ANRE starting with the year in which the exemption agreement was obtained."

As this provision leaves room for interpretation as to the moment when excuse arrangements begin to take effect, Art. 3 Par. 1 of Government Decision no. 495/2014 was modified by Government Decision no. 113/2016, for the purpose of deleting the phrase "from the year in which the exemption agreement was obtained," and the introduction of a clarification that the exemption measure provided

for in Art. 8 par. 2 of Law no. 220/2008, shall apply from the date of issue of the exemption agreement obtained by the beneficiaries of the state aid.”

This amendment gives further clarification on the application of the state aid scheme that was established by Government Decision no. 495/2014, does not contravene State aid rules and does not alter the Commission's decision.

In support of this statement, it is stated GEO no. 77/2014 that the date of granting of State aid is the date on which the statutory right to receive State aid is conferred on the beneficiary in accordance with the applicable national legal system, irrespective of the date on which the aid is paid to that company. Under a State aid scheme that is in force on a given date, aid applicants will be selected to benefit from State aid only after verification by the supplier authority of the fulfilment of all the eligibility conditions that are required by the scheme and certified/confirmed by the financing agreement (in the case under consideration, the exemption agreement). The financing agreement is the act that confers on the beneficiary the legal right to receive state aid and this can be invoked before the National Courts.

Conclusions:

The Romanian authorities have known since 2014 the measure that was to be applied, beginning in December, 2014, as all the statistical calculations submitted to the European Commission had, as their deadline for beginning the month of December, 2014. Moreover, the decision of the European Commission aims to approve the plan with an application for 10 years, until December 31st, 2024, which indicates that the Romanian authorities knew about the application of the aid plan throughout 2015, and not only from June, 2015, when the first exception agreements were issued.

In this context, ANRE (the Romanian Energy Regulatory Authority) considered, in the calculation of the mandatory estimated share of the purchase of green certificates for 2015, the aid plan notified by the Romanian authorities, and approved by Decision of the European Commission C (2014) 7287 of October 15th, 2014.

According to the Decision of the European Commission C (2014) 7287 of October 15th, 2014, in the draft government's decision submitted by Romania on September 24th, 2014, it was stated that the measure would be applied from December 1st, 2014. Romania thus bound itself before the European Commission to apply the measures that the Romanian state itself notified.

Following the decision of the European Commission not to raise any objections concerning the aid, considering that it is compatible with, and justified in, the domestic market, and on December 1st, 2014, Government Decision no. 495/2014 entered into force, instituting a State aid plan concerning the exception of certain categories of final consumers from applying the Law no. 220/2008, establishing the system that promotes the generation of energy from renewable sources. According to the provisions of this decision, the exception applies from January 1st of the year when the exception agreement was issued.

Immediately after adopting Government Decision 495/2014, on December 3rd, 2014, the Plaintiff TMK-RESITA filed the petition of exception.

In reference to the provisions of Art. 3 Para. (5) of the Procedure for the issuance of the exception agreement of June 11th, 2014, annexed to Government Decision no. 495/2014, the unit implementing the State aid plan had the obligation to complete the process of evaluation of the exception petition within a maximum of 30 working days after its registration. This obligation has not been observed by the implementation unit which is constituted at the level of the Ministry of Economy, Trade and Tourism. The exception agreement of the Plaintiff, TMK-Resita no. 4, was issued on June 3rd, 2015, approximately 5 months after the date when it was supposed to be issued (namely, January 3rd, 2015), failing to satisfy the 30-days deadline, which is stipulated in the Decision of the European Commission, the Plaintiff could thus not be held liable.

The exception agreement was issued to the Plaintiff on June 3rd, 2015, when Government Decision no. 495/2014 was in force.

According to the legal provisions that were in force on that date, respectively, the provisions of Art. 3 of Government Decision no. 495/2014 (in the previous form, before the amendment that was approved by Government Decision no. 113/2016):

“The exception stipulated in Art. 1 Para. (1) applies to the mandatory purchase share of green certificates that applies to energy providers, communicated by The Romanian Authority of Regulation in the field of Energy (ANRE), beginning from the year when the exception agreement was obtained. The said exception does not affect the calculation relating to the satisfaction of the national goal stipulated in Art. 5 Para. (1) of Law no. 220/2008, republished, with the subsequent amendments and additions, for the gross final consumption of energy in the year 2020.”

The exception thus had to be applied from January 1, 2015, (when the agreement should have been issued anyway, the date when we consider it to have been issued following the application of the tacit approval procedure) and not from the date when the exception agreement was obtained.

However, on February 24th, 2016, the Government of Romania approved Government Decision no. 113/2016, modifying paragraph (1) of Art. 3 of Government Decision no. 495/2014, as follows:

“The exception from the provisions of Art. 8 Para. (2) of Law no. 220/2008, republished, with the subsequent amendments and additions, applies from the issuance date of the exception agreement obtained by State aid beneficiaries. The said exception does not affect the calculation related to the reaching of the national goal that is stipulated in Art. 5 Para. (1) of Law no. 220/2008, republished, with the subsequent amendments and additions, in the final gross consumption of energy in 2020.”

In reference to the principles of law established and approved by the Constitution of Romania, and by the Civil Code, this amendment must not apply retroactively to exception agreements that were issued before the publishing and enforcement of this amendment.

By the Civil Decision no. 2558/23.06.2017 of the Bucharest Court of Appeal, the action was admitted, the cancellation of ANRE Order no. 5, of February 26th, 2016, was admitted, concerning the determination of the mandatory share of green certificate purchasing, relative to 2015, issued based on Government Decision no. 495/2014, as amended by Government Decision 113/2015); the respondent was ordered to pay material damages of 2,246,905.43 Lei. The decision is subject to appeal at the High Court of Cassation and Justice.

Considerations:

- The principle of the non-retroactivity of the law was breached.

Order 5 breaches the provisions of the 2003 Constitution of Romania.

Article 15 Para. (2) of the 2003 Constitution of Romania orders, without any doubt, that:

“The law orders only for the future, except in relation to the more favourable criminal or contravention law.”

These provisions represent the principle of the non-retroactivity of the law, which is essential to protect the citizens/taxpayers’ rights before the law, and any potential abuses of the lawmaker. There would be no security if, as long as a law is in force, and they comply with its provisions, the acts concluded in compliance with the legal provisions may be discussed after its repealing.

The Plaintiff should have been subject to the application of the provisions of GD no. 495/2014, unchanged, which was in force on the issuance of the exception agreement, namely, that the exception should have been granted beginning from the year when the exception agreement was obtained, and not from the provisions of Government Decision no. 495/2014, amended by Government Decision no.

113/2016, upon which the Order of the Respondent, The Romanian Authority of Regulation in the field of Energy (ANRE), no. 5/26.02.2016 was issued, stipulating that the granting of the exception applies beginning from the issuing of the exception agreement obtained by State aid beneficiaries, respectively, June 3rd, 2015, as regards the Plaintiff.

- The application of measures beginning with another date, and not with December 1st, 2014, breaches the decision of the European Commission C (2014) 7287 of October 15th, 2014:

On July 2nd, 2014, the Romanian authorities notified the European Commission about the State aid plan relating to the partial exception of electrically-intensive industrial consumers from the payment for green certificates related to the mandatory share. According to the specifications in this notice, the Romanian state mentions having planned to apply the measure beginning from August 1st, 2014, but it confirmed that the measure would not be applied before being approved by the European Commission. Moreover, the decision of the European Commission expressly stipulates that the draft government's decision, sent on September 24th, 2014, indicates the measure that should be applied starting from December 1st, 2014.

The Romanian authorities had thus known since 2014 the measure that was to be applied starting from December, 2014, as all the statistical calculations submitted to the European Commission had as their starting date the month of December, 2014. Moreover, the decision of the European Commission aims to approve the plan with application for 10 years, until December 31st, 2024, which indicates that the Romanian authorities knew about the application of the aid plan throughout 2015, and not starting from June, 2015, when the first exception agreements were issued.

As regards the Decisions ordering the member States to grant certain rights to their citizens, the CJEU admits, with direct effects, that: "it would be incompatible with the mandatory effect given to decisions, according to Art. 189 TCEE, to be excluded – in principle – that the affected persons may claim the obligation set by the Decision. Particularly, in the events when, for instance, the community authorities – by decision – order a member state, or all member states, to have a certain behaviour, the useful effect of such a measure would be reduced if members of that State could not claim it before the Court and if the State Courts could not consider them part of the community law".

9. State Aid law in the Transport Sector

9.1. Stefania Grasselli (Court of Cremona)

AIR COMPETITION

A) JURISPRUDENCE

Regional Administrative Court of Lazio, Decrees 2009, n. 223, 224 e 225;

Constitutional Court, judgment 22nd July 2010, n. 270

Commission Decision 2009/155/EC of 12th November 2008, No C 26/08

C-287/12 P - Judgment of the General Court (Fifth Chamber) 28th March 2012 - Case T-123/09

B) THE FACTS OF THE DISPUTE AND THE JUDICIAL PROCEEDINGS

By three 2009 decrees the Regional Administrative Court of Lazio raised the question of constitutional legitimacy in relation to Art. 4, Par. 4 *quinquies* of the decree-law 23rd December, 2003, n. 347, which was converted by the law of the 18th February, 2004, n. 39, which was introduced by Art. 1, Par. 10, of the decree-law of the 28th August, 2008, n. 134 (“*Urgent measures for the restructuring of large undertakings in crisis*”), according to Arts. 3 and 41 of the Italian Constitution.

According to Art. 4, Para. 4 *quinquies*, the procedures of business concentration in the field of essential public services, made before 30th July, 2009, that are connected or concomitant, or that are planned in the programme authorized by the Art. 2, Par. 2, legislative decree n. 347/2003, or in the authorization by Art. 5, Par. 1, of the same legislative decree, pursuing the prevalent general interests, don’t need authorization by the law of the 10th October, 1990, n. 287. Furthermore, the parties must notify the National Competition Authority which business concentrations fall within their competence, together with the proposed measures of appropriate conduct to prevent the risk of price imposition or of other unjustifiable burdensome conditions for consumers. The Authority, acting on its own motion, within 30 days of the communication, shall prescribe the abovementioned measures, with the modifications and additions deemed necessary, establishing a term, not less than three years, within which any monopoly positions, which may have been determined, must cease.

Actually, the rule is applicable only to the case of the Alitalia - Air One concentration, which is provided for by a derogation from the rules contained in Arts. 6 and 16 of Law no. 287 of 1990 on business concentrations. According to this rule, if the concentration operation is higher than certain thresholds, then this must be notified in advance to that Authority; the Authority has the power to prohibit them (or to authorize them by imposing the requisite provisions) if their effect is creating or strengthening a dominant position on the national market.

In application of this regulation, following the notification by Alitalia concerning the acquisition of certain branches of Alitalia and Air One, the Competition Authority adopted measures to prevent the imposition of price rises or of other unjustifiable burdensome conditions for consumers, and fixed for 3rd December 2011, the deadline within which any monopoly positions that are possibly determined would have to cease.

This measure was challenged before the Regional Administrative Court (T.A.R.) of Lazio by two airline companies (Eurofly s.p.a. and Meridiana s.p.a.), as well as by the Federconsumatori-National Federation of Consumers and Users, who had pleaded, *inter alia*, for its unlawfulness, which resulted from the constitutional illegitimacy of the aforementioned Art. 4, Paragraph 4-*quinquies*, which, in their view, conflicted with Arts. 3 and 41 Cost.

The T.A.R. of Lazio had raised the question of legality, first of all indicating that it is a “*normative measure*”, since it has limited scope and was issued with reference to the Alitalia case, so that the decree containing the rule is commonly known as the “Alitalia decree”.

The Court considered the issue to be unfounded.

C) THE RULING OF THE COURT

C.1 By Judgment no. 270/2010, the Constitutional Court argues that the regulation censured is a “*normative measure*”, because it regulates only the main proceedings, as evidenced by both the temporal limit and the conditions of its applicability, and the time coincidence between its approval and its entry into force. The Court has therefore recalled its case-law, according to which the nature of a “*normative measure*” does not affect the legitimacy of the rule in itself, since ordinary law may attract into its sphere of discipline objects or subjects that/who are normally entrusted to the administrative authority, but it implies that the rule is subject to a close scrutiny of constitutionality, with particular reference to respect for the principles of reasonability and non-arbitrariness.

The Court then reiterated its guidelines on the freedom of competition, recalling that it was regarded as a manifestation of the freedom of the private economic initiative - which, according to the second and third paragraphs of Article 41 Cost, is susceptible to limitations that are justified for reasons of “social utility” and “social ends”. Freedom of the economic initiative and competition do not receive “absolute” protection from Art. 41 Cost, subject to the limitations that are necessary to allow the contextual satisfaction of other constitutionally relevant interests. More specifically, it stated that Art. 41 Cost,

“by stating that private economic initiative cannot contradict the “social utility” and lead to harm to human security, freedom and dignity, and foresee that public and private economic activity can be addressed and coordinated to “social ends”, it allows for instrumental regulation to ensure the protection of interests other than those related to the competitive position of the guaranteed market.”

Although that regulation is derogatory and exceptional in relation to the rule laid down by the fundamental Community principles, so that ‘the internal market within the meaning of Article 3 of the Treaty of the European Union includes a system ensuring that competition is not distorted’ (Protocol No 27 on the internal market and competition annexed to the Lisbon Treaty, which entered into force on 1st December, 2009, confirming the (3) (g) of the EC Treaty).

According to those principles and to the relevant regulatory framework, the Court held that Article 4, Paragraph 4-*quinquies* is constitutionally legitimate.

The Court stated, in that regard, that the rules of concentration control established by Law no. 287 of 1990 constitutes the application of Art. 41 Cost but is not constitutionally constrained and the legislator can provide for the possibility of authorizing business concentration operations to be reconciled with other constitutionally relevant interests, other than those relating to the competitive position of the market.

In the present case, the legislature intervened with a measure of law, but, in the Court's view, there are identifiable pre-eminent interests that are capable of justifying it and that express a proportionate and appropriate choice. In fact, the legislature intended to cope with the crisis in a company with an essential public service whose continuity, in the air transport sector, was of strategic importance for the national economy. It is therefore justified in the interests of the protection of pre-eminent general interests such as the need to ensure the continuity of the air transport service on all national routes (including those which are not economically feasible) and the need to avoid the dissolution of an undertaking of significant size and the dispersal of business value, with a risk of a serious employment crisis.

Having thus identified the general interests arising from the broad spectrum of clauses on "social utility" and "social ends" of Art. 41 Costs, which justify the legislative choice, the Court noted that the solution that was designed to guarantee them was proportionate. In particular, it found it particularly significant that the aforementioned Art. 4, Para. 4-*quinquies* has kept the Arts. 2 and 3 of the Antitrust Law and, hence, the Authority's power to strike, *ex post*, the possible abuse of a dominant position following concentration. Above all – according to the guidelines of the European Commission – the Court considered the attention of the legislator to the interest of consumers extremely important, while maintaining the power of the Authority to establish the appropriate behavioral measures to guarantee it, exercising continuous control, adopting them at different times, modulating them in a variety of ways, even temporarily, and taking into account the evolution of the market and its impact on consumer interests. Finally, the Court pointed out that Art. 4, Para. 4-*quinquies*, has attributed to the Authority the power to define "the term, however not less than three years, within which any monopoly positions which may have been determined must cease" and that the transitional nature of the derogation from the power of the authority to imposing certain measures is to exclude the unreasonability of the rule and the breach of Arts. 3 and 41, Cost.

C.2 The European Commission also dealt with the issue of State aid to Alitalia before, and by, the CGUE, then, with regard to the funding granted by the Italian Republic of € 300,000.000 to ensure that the public service element of air transport continues.

On 29th April 2008, the applicant, Ryanair Ltd., lodged a complaint with the Commission under Article 20(2) of Regulation No 659/1999, concerning the existence of state aid for Alitalia in the form of a loan granted by the Italian authorities to the latter.

By the Commission Decision 2009/155/EC of 12th November, 2008, on the loan of €300 million granted by Italy to Alitalia, No C 26/08 (ex NN 31/08) (OJ 2009 L 52, p. 3: 'the first contested decision'), which was adopted at the conclusion of the formal investigation procedure under Article 88(2) EC, the Commission stated that the said loan, the amount of which could be counted as Alitalia's own capital, constituted unlawful state aid that was incompatible with the Common Market, and ordered its recovery from the beneficiary.

By Decision C(2008) 6745 final, of 12th November, 2008, concerning state aid N 510/2008 — Italy — the sale of assets of the airline Alitalia ('the second contested decision'), was adopted at the conclusion of a preliminary examination phase, and, pursuant to Article 88(3) EC, the Commission stated that the notified measure, as amended by the undertakings given by the Italian authorities and defined in that decision, did not involve the granting of state aid to the buyers, subject to full compliance with those undertakings by the Italian Republic, according to which the sale of the assets of the Alitalia group would be carried out at their market value.

Finally, the Commission decided that the notified measure, as amended by the undertakings given by the Italian authorities, did not constitute aid, to the extent that those undertakings were complied with in full.

By application lodged at the Registry of the General Court on 28th March, 2009, the applicant, Ryanair Ltd., brought the action against the judgment of the General Court (Fifth Chamber) of 28th March, 2012, in Case T-123/09 Ryanair v Commission, by which the General Court dismissed an action seeking, first, the annulment in part of Commission Decision C(2008) 6743 of 12th November, 2008, on the loan of €300 million granted by Italy to Alitalia (Aid No C 26/08) (ex NN 31/08) (OJ 2009 L 52, p. 3), in so far as that decision did not order the recovery of the aid from Alitalia's successors, and, second, the annulment of Commission Decision C(2008) 6745 final of 12th November, 2008, declaring that the procedure for selling off the assets of the Alitalia airline company, in the context of the extraordinary administrative procedure that was set up to lead to the liquidation of that airline, did not constitute State aid, provided that the Italian authorities respected their commitments to ensure that the transactions would be carried out at the market price (Aid N 510/2008).

D) COMMENT

In my opinion, the most important aspect of the Alitalia-case is that even though there is a regulation, either national or European, which seems to be very restrictive of competition freedom, it has to apply to the specific case-law, according to the general clauses of social utility and social ends.

The preeminent general interests have to guide the specific choice of the national legislator, under the major rules established by the European Union.

9.2. Josef Franz Weinzierl (District Court of Regensburg)

District Court Kiel – Partial Judgment of 28th July, 2006 - 14 O Kart 176/04

Higher Regional Court Schleswig - Judgment of 20th May, 2008 - 6 U 54/06

Federal Court of Justice - Judgment of 10th February, 2011 - I ZR 213/08

ECJ – Order of 4th April, 2014 - C-27/13

Higher Regional Court Schleswig – Judgment of 8th April, 2015 - 6 U 54/06

Federal Court of Justice – Judgment of 9th February, 2017 – I ZR 91/15 – Airport Lübeck

Background

A long judicial battle in a state aid case involving the German regional airport at Lübeck found an – albeit preliminary – end in the highlighted judgment by the Federal Court of Justice (BGH), dating from 9th February, 2017. A brief glance at the above list of the individual procedural stages in this case would suffice to cause us to guess the complexity surrounding this dispute. However, one has to add that, in parallel, the European Commission has been investigating this case since July, 2007, as well, failing to arrive at a decision to close the formal investigation procedure according to Art. 9 Regulation (EU) 2015/1589 (final decision) until the very week in which the judgment was handed down (in a press release from 7th February, 2017, the European Commission stated that the measures concerned did not constitute state aid). This combination of national and European procedures is responsible for the importance of the case at hand, since it adds yet another layer to the interplay between the European and the national regulatory level, which the specific structure of Art. 107 *et seqq.* TFEU exemplifies in so many ways. Furthermore, due to the involvement of the European Court of Justice (ECJ) via the preliminary reference procedure, according to Art. 267 TFEU, this case serves as an illuminating example of how national courts can deal with answers from Luxembourg, and thus enable a fruitful judicial dialogue.

From a factual point of view, the present proceedings do not constitute an isolated case. On the contrary, the present dispute, in which an airline sued the regional airport of Lübeck for violating state aid rules by favoring a competing airline through offering benefits to attract the airline to its airport, has been a prominent scenario in recent years (see, for example, ECJ, C-284/12, EU:C:2013:755, Lufthansa/Ryanair, or, in another interesting scenario, ECJ, C-164/15 P, EU:C:2016:990, European Commission/AerLingus). The economic reason for this is that most of the small regional airports can only be sustained with considerable financial support from local state governments, who see them as a prestige project and, more importantly, as a valuable employer in traditionally less prosperous areas. Both airports and the respective local state governments therefore have an incentive to attract important airlines.

The facts of the dispute

The core substantive issue in these proceedings is whether the regional airport of Lübeck, Northern Germany, granted illegal state aid to Ryanair. According to the Plaintiff, the German airline, Air Berlin, the airport entered into an agreement with Ryanair, dating from 29th May, 2000, which included state aid measures through payments, discounts, and other benefits, in order to attract the airline to the regional airport. The airport was operated by the private company "Flughafen Lübeck GmbH" which, in fact, was fully controlled by the City of Lübeck at the time. Hence, the alleged benefits would constitute state resources. The Plaintiff sought information about the concrete benefits, as well as their recovery and future refraining from such benefits, once their scope was known.

Summary of the Judicial Proceedings

The Plaintiff was granted the right to information by the Regional Court Kiel in 2006, which was followed by the initiation of a formal state aid procedure by the European Commission in 2007. The Higher Regional Court Schleswig subsequently annulled the First instance Judgment, arguing that there was no legal basis for such a claim to information. Following the appeal, the BGH, in 2011, annulled the judgment and referred the case back. The Higher Regional Court Schleswig subsequently decided to ask the European Commission for a statement under what would now be Art. 29 Para. 1 Reg. (EU) 2015/1589, regarding its decision to initiate the formal investigation procedure (initial decision), where the European Commission held that – *prima facie* – the agreement at hand contained state aid elements. The Higher Regional Court Schleswig, in 2013, stayed its proceedings and asked the ECJ for guidance via the preliminary reference procedure under Art. 267 TFEU. The ECJ's answer came by way of an order in 2014 and, consequently, in 2015, the Higher Regional Court Schleswig rejected the Defendant's appeal. The present judgment, prompted by the intervenor's (Ryanair) appeal, was issued on 9th February, 2017, and referred the case back to the Regional Court Kiel, however, not without giving interesting and important guidance with regard to the procedural state aid issues at stake.

Ruling of the BGH

As indicated above, the relevant point to be drawn from this BGH judgment, from a state aid law perspective, does not stem from a final substantive decision on the legality of the alleged aid, or the possible private enforcement measures granted to the competitor, but from the Court's comments on the interplay between national and European procedural law.

The following answers were given by the ECJ to the Higher Regional Court Schleswig with regard to the procedural questions, and it seems necessary, for a sound understanding of the BGH's comments, to highlight them here:

“Where, by application of Article 108(3) TFEU, the European Commission has opened the formal investigation procedure provided for in Article 108(2) TFEU with regard to a non-notified measure currently being implemented, a national court, hearing an application for the cessation of the implementation of that measure and the recovery of the sums already paid, is required to adopt all the measures necessary to draw the appropriate conclusions from any breach of the obligation to suspend the implementation of that measure.

To that end, the national court may decide either to suspend the implementation of the measure at issue and order the recovery of the sums already paid or to order interim measures in order to safeguard, firstly, the interests of the parties concerned and, secondly, the effectiveness of the Commission's decision to open the formal investigation procedure.

A national court cannot, in a situation such as that at issue in the main proceedings, stay the proceedings until the closure of the formal investigation procedure.”

Reacting to this, the BGH stated that according to the ECJ, the National Court would not be allowed to take the view that a measure does not constitute state aid once the European Commission, in its initial decision, has come to the conclusion that the measure contained state aid elements. Based on this, the BGH then clarified its previous case law, ruling that National Courts are bound by the initial decision of the European Commission and are not free to interpret the state aid rules themselves until a final decision is reached by the European Commission (Para. 40 of the judgment).

However, contrary to the Higher Regional Court Schleswig, the BGH did not accept this outcome unconditionally – arguably deviating from the ECJ's ruling – but reasoned:

- It would presumably be contrary to the judicial independence of the national judge to hold that he or she is bound by a preliminary decision by an administrative authority like the European Commission (Paras. 38, 41)

- The national court may ask the European Commission for further clarification (Art. 29 (1) Reg. (EU) 2015/1589) or file a preliminary reference to the ECJ under Art. 267 TFEU (para. 40)
- There can be changes to the situation in the national proceedings after the European Commission's initial decision, for example, caused by new submissions by the parties which have to be taken into account due to the guarantees of *inter alia* Art. 47 of the Charter of Fundamental Rights (Para. 42)
- The ordering of a recovery has to be in accordance with the principle of proportionality, Art. 5 TEU (Para. 50), which would be doubtful in a case where the national judge orders recovery of the alleged aid with nothing but an initial European Commission decision being available (Paras. 50-55).

Comment

The relevance of the case is obvious if one draws attention to the BGH's struggles to comply with the requirements set by the ECJ, on the one hand, and not to give up the judicial independence of the national judge, on the other. It thus serves as yet another example of the vast implications of a European Commission decision to initiate state aid proceedings (without yet having any substantive assessment) for National Courts which might even cause friction with vital principles such as judicial independence.

The ECJ's reasoning is rather straight forward and follows a logic like that of the seminal Foto-Frost case (ECJ, C-314/85, ECLI: EU: C:1987:452): once a National Court doubts the compatibility of a national measure with EU law – in our case, the state aid rules – it is bound by virtue of EU law and especially the duty of sincere cooperation that is now enshrined in Art. 4 (3) TEU, to do anything in order to ensure compliance with EU law, especially to ask the competent EU bodies, like the European Commission and the ECJ, for guidance. Furthermore, it must not allow an infringement of EU law to materialize, let alone to be perpetuated.

The BGH, however, sees the practical difficulties with such an abstract statement from Luxembourg. The Court reasons that the duty of sincere cooperation is mutual (Art. 4 (3) TEU: “...*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*”) and cannot hide its irritation about the length of the European Commission's state aid procedure, where no final decision has been reached after almost ten years. It made quite clear that a National Court must be allowed some leeway to deal with unusual cases, in order not to violate fundamental principles of law, such as proportionality (although, in my opinion, wrongly quoting Art. 5 TEU, which is only relevant to vertical competence delimitation) for example, if the only measure available to the national judge were immediate recovery of the aid. The Court rightly notes that, under certain circumstances, such a recovery may lead to nothing other than the insolvency of the undertaking concerned. It has also to be noted again that, at this stage, as opposed to the situation after the European Commission's final decision on the aid measure, it is not clear whether the measure constitutes state aid at all. From a pragmatic perspective, the BGH's reasoning is convincing, as the Court pointed out in great detail the conditions under which deviations from an initial assessment by the European Commission might occur at later stages and provided some options for National Courts who might be confronted with such a scenario in future state aid cases. The judgment should thus neither be seen as an attack on the ECJ's position, nor on the uniform application of EU law, but, rather, as an argumentative approach that is keen to reconcile all the legal requirements and principals involved.

Overall, this judgment shows the intricacies and procedural difficulties of the seemingly clear separation of tasks between the European Commission and the National Courts when it comes to implementing the European state aid law regime. The preliminary reference procedure to the ECJ, according to Art. 267 TFEU, once more in the European integration, seems to be a useful tool to help in organizing smooth cooperation between the European and the national judiciary, and to further develop this sensitive area of law.

9.3. Gianmario Palligiano (Regional Administrative Court of Campania)

Introduction

The case concerns the matter of state aid law. The issue was addressed by the Regional Administrative Court of Lazio, Rome, with Judgment no. 4442 of April 11th, 2017 (Lgv S.r.l vs Ministero delle Infrastrutture e dei Trasporti)

The case

1.- The Ministry of Infrastructure and Transport (Decree no. 307 of July, 2014) provided a substantial sum of money to the car industry. The purpose was to encourage the modernization of the fleet of road haulage companies in accordance with the requirements for registration with the National Electronic Register and the Carrier Roads Act on behalf of third parties according to the regulations in force.

2.- On February 2nd, 2014, the Claimant, L.G.V. Company, asked the Italian Ministry of Infrastructure and Transport for admission to the incentives referred to in the D.M. 3rd July, 2014, n. 307, with the relevant documentation, for the purchase of 12 semitrailers.

On 15th July, 2015, the Department of Transport observed that L.G.V. had initiated the investment prior to the publication of the notice, as a result of the "purchase order containing binding commitments for the seller and buyer no. 4 of 4th September, 2014".

This circumstance seemed to contradict Article 2, Paragraph 4, D.M. 307/2014, according to which: "investments may be funded as long as they are launched from the date of publication of this decree (D. 307/2014 was published in the Official Journal - General Series 218 of 19th September, 2014)."

On 16th July, 2015, L.G.V. Company, by certified mail, replied that the investment would take place on 18th November, 2014, with the subscription of the leasing contracts that were necessary for the purchase of the 12 semi-trailers.

The LGV Issue

Against the decision of the Ministry, LGV appealed to the Administrative Court of First Instance in Rome.

The company argued that the Ministry was wrong to hold that document n. 4 of 4th September, 2014, was a purchase order, as it would be a quotation, which would have no legal value.

The estimated cost was insufficient to force the client, as in the contract proposals, to be legally effective and binding it, must be accepted by the customer who requested it. Only after acceptance of the contract proposal by the customer can the contract be concluded between the parties

The quote attached to the application for admission will indicate the subscription only of the seller and not also that of the buyer, so the start of the investment will coincide with subscription to the individual leasing contracts on 18th November, 2014, subsequent to the publication of the notice.

The department issue

The Ministry replied that the D.M. was published on 19th September, 2014, and the applicant's investment was launched on 4th September, 2014, as can be seen from the document annexed by the Administration.

This act constitutes a real contract and not merely a proposal, as the applicant claims, by presenting all the criteria of a sales contract:

- the contract must be signed by both the seller and the buyer.
- the subject matter is explicitly referred to as a sales contract, the same has a certain date and describes the goods that are being traded (semi-trailers) as well as the purchase price.

The decision of the Administrative Court

The subsequent payment by means of a financial lease (contrary to the applicant's claim) is irrelevant, since the investment had already been agreed upon in all its essential elements before the expiration of the ministerial decree in question.

The leasing contract is an instrument for the execution of contractual commitments as an alternative to direct payment by the buyer, as such, it is a non-incident on the determination of the investment by the company. At the time of the submission of the application for the contribution, the Ministerial decree requires a simple indication of payment methods (direct acquisition or financial leasing).

European Union reference framework

Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU- ex Art. 87 TCE) lays down conditions in order to permit state aid in the sense given by European Union law at that time.

The four required conditions are as follows:

- State aid origin (state aid or state resources);
- The existence of an advantage in favor of certain undertakings or productions;
- The existence of an impact on competition;
- The ability to affect trade between Member States.

Relationship between entrepreneurial initiative and state aid

According to the European Union state aid rules, the Member States of the Union have to first check the existence of the **INCENTIVE EFFECT**.

Economic operators must therefore be required to make the investments themselves in order to obtain the financial benefits provided for in the Decree, without which they would not have decided to carry out the investments themselves.

In order to verify the incentive effect, the date on which the aid scheme was published becomes relevant, so that only in relation to the publication date is it possible to verify that the interested parties are aware of the existence of the incentive measure. The date on which the economic operation was carried out, and hence whether the investment would be made irrespective of the possibility of receiving a financial contribution.

If the decision to make a particular investment were taken before the measure was made known (in this case, before the publication of the Minister's Decree in the Official Journal), the prospect of receiving a contribution cannot be considered to be a decisive factor in the entrepreneurial initiative, which therefore does not seem deserving of being promoted from the Community perspective.

10. State Aid law and Fiscal Aid

10.1. Guido Federico (Italian Supreme Court)

Cass. civile 10.8.2016 n.16871, Marras v. Regione Sardegna.

I. The facts of the dispute

Saverio Marras was an “agricultural entrepreneur” and in this quality he took out a mortgage with an Italian bank, the Banco di Sardegna. The mortgage’s interest rate was partly subsidized by the Regione Sardegna.

The European Commission found that these kinds of mortgages, with cut rates granted by Regione Sardegna breached Art. 107, 108 TFEU.

The Regione Sardegna, giving effect to the Commission’s decision, suspended the subsidy *pro futuro* and ordered the recovery of the grant aid already given.

As a consequence, Mr. Marras had to renegotiate the debt with the bank and they stipulated a new mortgage to return the capital and the interest paid.

II. The judicial proceedings

Mr. Marras sued the Regione Sardegna before the Italian judiciary for non-contractual liability.

Allegedly, he had relied on the lawfulness of the Regione Sardegna’s behaviour. He added that he would have not taken on the mortgage without the possibility of relying on the subsidized interest rate.

The Court of First Instance and the Court of Appeal rejected Marras’ claim.

He turned to the Supreme Court of Italy, presenting his appeal on points of law only. The Court confirmed the upholding of the Lower Courts’ findings.

III. Ruling of the Court

The two grounds for the appeal are 1) the liability of the Member State under the *Francovich/Brasserie du Pecheur* Doctrine and 2) Art. 2043

1) The Supreme Court started by recalling that it is well established in the case law of the European Court of Justice that the breach of European law by a Member State may entail liability in the domestic legal system.

The National Court must check that:

There is a breach of a European law provision, the latter being established to protect the rights of the party claiming compensation;

That the breach is evident and serious;

That there is a direct causal link between the breach and the damage.

The Supreme Court ruled that, in the case at hand, the condition under a) was missing.

Arts. 107 and 108 TFEU are consistently interpreted as means to protect the competitive conditions in the market, and not those of the beneficiaries.

It is abstractly possible to identify a damaged third party, but this could be the competitor of the beneficiary, and not the beneficiary themselves.

2) As far as Art. 2043 c.c. is concerned, the provision which governs tort liability under Italian law (the principle of “*neminem laedere*”), the claim was not upheld.

The claim was based on the breach of the beneficiary’s legitimate interests because he had relied on lawful state conduct.

The Court rejected the Claimant’s appeal on two grounds.

First, the principle of legitimate expectations lies in the procedural part of the state aid control regime and not in the substantive one. This entails that the undertaking cannot generally rely on a Member State’s lawful conduct, rather, it can rely on the respect of the procedure ex Art. 108 TFEU and, in particular, the duty to notify The Commission.

Secondly, the doctrine of contributory negligence was recalled.

The diligent economic operator is bound to self-assess that Arts. 107/108 TFEU are not breached when conducting business.

IV. Comment

I think that The Court’s holding is legally sound and compatible, both when it is applied to European law and the Italian one, since:

- a) As far as the Francovich doctrine is concerned, it is hard to see how Arts. 107 and 108 could be interpreted as means of protection for the beneficiary. It is the market and the competitors which are relevant.
- b) As far as Art. 2043 c.c. is concerned, it is necessary that the damage is “unjust”, meaning that there must be a right, in relation to the damaged party, that has been violated.
- c) Clearly, in this case, there was no right that could be relied upon by the beneficiary.

Finally, the undertaking cannot overlook its duty to self-assess its behaviour in light of all the applicable legislation, including European law. It is reasonable to ask businesses to act in an informed way.

10.2. Sarolta Huszárné Czap (Hungarian National Office of the Judiciary)

Case note on judgment of the Hungarian Curia (Supreme Court) No. Kfv.III.37.202/2013/10.

Subject: qualification of the “marketing authorization contribution” on wine distribution – application of the case law of CJEU relating to Arts. 107, 108 and 110 TFEU

Parties:

Claimant	a Hungarian Company for wine distribution (Company)
Defendant	National Food Safety Authority (Authority)

Facts and dispute:

The Authority obliged the Company to pay HUF 5.583.252 (€18.000) as a marketing authorization contribution and the same amount as a default penalty, since there was a difference between the data of the customs authority and the amount of wine distributed by the Company between 01.08.2008 and 31.07.2009.

The Company turned to the Court and asked the Court to lay down that the payment of the marketing authorization contribution do not conform to Arts. 28, 30, 107, 108 and 110 TFEU.

Legal background:

Hungarian Act No. XVIII. of 2004 defines the “marketing authorization contribution” (the Wine Act)

§ 24/A (3) “On the territory of Hungary the producer shall be obliged to pay a marketing authorization contribution for each litre of wine distributed for public consumption. [...]”

According to Art. § 24/A (7)-(8) 60% of the income shall be expended in development and the fulfilment of Community wine marketing programs and the national co-financing of EU wine commercial wine marketing programs. The other 40% shall be used for financing quality control inspections and other consumer protection actions.

Regulation No. 70/2007 (VII.27) FVM (the Regulation) regulates in detail the process of payment and the usage of the contribution.

The Company argumentation:

- the contribution serves only for the improvement of the position of the Hungarian grape and wine sector, and the contribution will be used only for that purpose
- The Wine Act and the Regulation do not conform with Arts. 107 (1), 108 (3), and they conflict with decisions C-17/91, C-144/91, C-2061/2001 and C-192/95 CJEU
- The Hungarian legal regulation is **selective**. The using of the contribution for financing wine marketing programmes in EU (for Hungarian wines) and consumer protection examinations of wines, serves only the interests of the Hungarian producers and not those of every market operator. The Hungarian producers are released from payment of the contribution, but, on the other hand, for other market operators this means the contribution is a clear financial load.

- The contribution is incompatible state aid according to Art. 107 TFEU, and it means that there is an advantage for a special group of market operators.
- Hungary did not perform its obligation according to Art. 108 (3) TFEU and did not notify that the contribution was notified aid. In this way it is not enforceable.

Procedure before the Hungarian courts:

The Company asked the First Instance Administrative Court to review the decision of the Authority regarding the payment obligation for the marketing authorization contribution that the Company should have been paid. The Company asked for an initiation of the preliminary ruling by the CJEU about the compatibility of the Hungarian regulation relating to the market authorization contribution.

The judgment of the First Instance Court rejected the request of the Company, the judgment was final. According to Hungarian procedural law, a motion for the review of a final judgment – judicial review - may be submitted to the Curia (the Supreme Court) on the grounds of infringement.

A judicial review was initiated by the Company at the Curia based on the above argumentation and it again requested the initiation of the preliminary ruling of the CJEU.

Decision and ruling of the Curia (the Supreme Court) - 2015

The Curia extensively referred to the previous case law of the CJEU and explained the change of approach in the ruling of the CJEU in recent years.

1. The Curia laid down that the Hungarian “marketing authorization contribution” may not be defined as a tax but only as a **parafiscal charge**, according to the case law of CJEU. “Parafiscal” charges are charges levied by public or private agencies on the production or marketing of agricultural products, with a view to financing activities for the benefit of the sector as a whole. Its aims will be determined, but the aims have to be objective and they may not be discriminatory.

The CJEU has changed its approach regarding parafiscal charges since the decisions referred to by the Company. In its latest case law, the CJEU applies the principle of “hypothecation”.

In case No. C-174/02 Section 26, the CJEU said:

“For a tax, or part of a tax, to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the common market.”

In Joint Case Nos. C-393/04 and C-41/05, the CJEU summarizes its recent case law. Section 46-47 says:

“It would be otherwise if the tax and the envisaged exemption were an integral part of an aid measure. For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount thereof and, consequently, on the assessment of the compatibility of that aid with the common market. However, a tax cannot be hypothecated to an exemption from payment of that same tax for a category of businesses. Application of a tax exemption and its extent do not depend on the tax revenue. It is common ground that, in the main proceedings, it has not been established that the tax on motive force is hypothecated to the envisaged exemptions therefrom.”

Besides the above, the CJEU maintained, in its case law, the examination of other elements relating to state aid. In a case where the determination of the subject of the contribution is selective, the exemption

of certain operators from a charge itself amounted to an aid measure, against competing operators who are obliged to make payments. [C-526/04 Section 32-35.]

In its judgment, the Curia concluded that the jurisdiction of the CJEU, in the case of a parafiscal charge, evolves differently in regard to the aim of the usage of the income. Besides, and instead of, the examination of the aim for the usage, the CJEU has started to determine the objective criteria.

In Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, the CJEU appointed that if the usage of the aid is within the discretionary power of a minister, hypothecation cannot be established in any way. [Section 55]

The Curia concluded that the establishment of hypothecation is questionable in cases where the usage of the income from the charge falls within the discretion of a minister or an authority; or the aim is only partly financed from the charge; or the income is not only used for the aid to a certain market sector.

The Curia concluded that, in the case of the usage of the “market authorization contribution”, the hypothecation was missing.

According to the Regulation, 60% of the income from the contribution shall be used for a wine marketing strategy. The “Agricultural Marketing Centrum” gives recommendations for tenders and projects yearly. The recommendations of the Centrum will be signed by the competent minister. The decision does not directly influence the amount of the aid, but it determines its frames. The other 40% of the income will be used for consumer protection administrative procedures. The CJEU, in its case law, acknowledged consumer protection as being an acceptable aim of the restriction of fundamental rights. The income from the contribution serves the interests of every operator in the market – including the Company - with usage for consumer protection actions and wine marketing financing.

The Curia concluded that selectivity cannot be established between the Hungarian and non-Hungarian distributors. The related rules neutrally regulate the aims of the usage of the contribution. The wine marketing program serves the whole Hungarian wine distribution sector, in which the Company also operates.

The Curia also ignored the request of the Company to turn to the CJEU for a preliminary ruling, since the interpretation of the extensive relevant case law of the CJEU raised no doubts.

Based on the above circumstances, the Curia rejected the application of the Company. Its payment obligation was maintained.

Personal comments:

The Hungarian wine sector appears several times in the procedures of the CJEU and the Commission. In its ruling, the Curia analyses a special compatible form of state aid, the parafiscal charge. The ruling gives an extensive summary of the recent case law of the CJEU and of the change in approach in its decisions.

This case demonstrates that Arts. 107 and 108 have close connections to Art. 110. The extensive case law of the CJEU gave a clear guideline to the National Court for their decision. In my opinion, the Curia properly interpreted the case law of the CJEU. The procedure shows the importance of an awareness of the up to date case law of the CJEU. For a national judge, it is very important to recognize the validity of a request for a preliminary ruling. At the same time, based on the previous case law, the national judge should be able to take a grounded decision on questions that have already been answered by the CJEU and also in the absence of a preliminary ruling in the ongoing case.

10.3. Sofia Maravelaki (Athens Administrative Court)

Decision no. 433/2017 of the Greek Council of State (CoS) -Department B.

Preamble

The television stations who were licensed before Law 2328/1995- and according to the yearly extension of their operation's license, which is administered by this law, they -are subject to a payment of duties for the use of radio channels. The same applies to further indefinite extensions of these licenses, which are granted by Article 17 Para.3 of Law 2644/1998.

The exemption from the disputed duties for state television does not violate the principle of equality and/or of Community Law.

The radio spectrum is a public good, and the duties for its use considers no tax or administrative charges. The imposition of the obligation to pay such duties is a legitimate restriction of economic freedom, while the determination of the amount at 2% of gross revenue is not contrary to the principle of proportionality.

The Directive 97/13/EC is not applicable in this case.

The application before the Council of State was rejected and Decision no. 2993/2008 of the Administrative Court of Appeal of Athens was validated.

Facts

The applicant is a company that is the owner of a television station, requested the cassation of Decision no.2993/2008 of the Administrative Court of Appeal of Athens, which dismissed its appeal against Decision no. 2133/2007 of the Administrative Court of the First Instance of Athens. This latter Decision had rejected its application against Act no. 21078/ E1/4222/19-09- 2002 of the Minister for Media and Communications, which imposed - with reference to Article 17 Para. 3 of Law 2644/1998, - the payment of the amount of €2.494.310,40, as duties for the state, in order to use the radio channels from its TV station, during the period from 01-01-2002 to 31-12-2002.

The yearly extension of the validity of the licenses of the television stations, which were granted under the previous legal regime, was granted under the conditions and criteria of Articles 1 and 2 of Law 2328/1995, i.e., the payment of 2% of duties per year on the gross revenue of the television station. The further, indefinite extension of these licenses, which was granted by Article 17, Para.3 of Law 2644/1998, is under the same conditions of payment as the said annual duties, in order to use the channel radio frequencies.

In this case, the applicant owned and operated a private television station, for the establishment and operation of which a license was granted in 1993, by joint decision from the Ministers of the Interior, Finance and Communications, subject to the provisions of Article 4, Para. 1 of Law 1866/1989. The license remained in effect until, in the present case, the critical time under the provisions of Articles 5, Para. 1 of Law 2328/1995, Para. 4 of Law 2438/1996, 17 Para. 3 of Law 2644/1998 and 7 of Law 3021/2002.

According to Act 21078/E1/4222/19-09-2002 of the Minister for Media and Communications (by invoking the provisions of Articles 1 of Law 2328/1995 and 17 Para. 3 of Law 2644/1998), an amount of €2,494,310.40, equivalent to 2% of the gross income for the year 2001, was imposed on the applicant, as duties, i.e., as an annual return for the use of the radio channels relating to the applicant's television station, in the period from 01-01-2002 to 31-12-2002. Against this measure, the applicant brought an

action before the Administrative Court of First Instance of Athens, but the action was dismissed by Decision no. 2133/2007 of that Court.

The applicant lodged an appeal against the above Decision, which was again dismissed by the already contested Decision no.2993/2008 of the Administrative Court of Appeal of Athens.

After that, there was an application for the cassation of the latter Decision before the Council of State.

The application was again rejected as being unfounded, with the following reasoning.

1. The radio spectrum is a scarce resource (Article 2 of Law 2867/ 2000), the management of which constitutes a sovereign right of the State (Article 3, Para.8 of Law 2246/1994).It is therefore a public good and has considerable economic value, since the granting of a license gives the holder thereof the ability to reap significant economic benefits and provides advantages over other operators who would also like to use and exploit this resource. This justifies the imposition of duties which reflect, *inter alia*, the value of the use of that scarce resource. The duties in question therefore constitute, as is explicitly predicted by law, duties in exchange for the use of a public good, namely, the radio channels, for the broadcasting of television programmes to a wide number of recipients-viewers and has neither a tax character nor a contribution fee character, imposed to cover costs for the public service that is specifically rendered (see CoS 2594/2015, 2595/2015). The pleas of the applicant, in reliance on Article 4 Para. 5 and Article 78 of the Constitution, which affected thoughts on the contested judgment, which were based on the incorrect assumption that the above-mentioned duties are a tax or administrative charge, so they were rejected as being unfounded in law.

2. The activity of television stations is indeed a manifestation of economic freedom and of the right to broadcast information and ideas. However, the exercise of these rights is linked to the use of a public good (an asset), and of a scarce resource. The imposition of the payment of duties on the broadcasters of radio frequencies, in order to ensure the optimal use of this scarce resource, namely, to serve a public purpose, is legitimate in principle, as far as economic freedom is concerned, in view of Article 106, Para. 1, of the Constitution, which provides, *inter alia*, that the State ‘shall take the necessary measures for the exploitation of sources of national wealth, from the atmosphere to the underground water’.

3. The provision of Article 4 of Law 2438/1996 develops the previous provision of Article 1 para. 21 of Law 2328/1995 and explicitly and clearly states that the gross income of the last fiscal year of every television station is taken into account, as the basis for calculating the duties for that television station (2%), and they include all the station's revenue which comes, directly or indirectly, from its operation (see CoS 2594/2015, 2595/2015).

In the present case, the duties have therefore been legally calculated on the gross income of the applicant, namely, on the income that is derived from the disposal of audiovisual and film material at home and abroad, from the exploitation of production facilities (studios) and from various related activities associated with television programmes, ,as well as from advertising revenues and the amounts paid to reward advertisers .This is not contrary to the entrepreneurial freedom guaranteed by Article 5 Para. 1 of the Constitution, since it is within the limits set by the constitutional principle of proportionality.

The applicant argued that the Decision of the Court of Appeal was incorrect, because it rejected its argument that the imposition of the disputed duties, which are placed only on private television stations, with an exemption for state television, is contrary to the provisions of the EEC Treaty (Articles 85 and 86),namely, Articles 101 and 102 TFEU (formerly 81 and 82 TEU), as well as to the provisions for fair competition favoring public sector enterprises to the detriment of private sector entrepreneurs, namely, Article 107 TFEU (formerly 92 TEU).

The above arguments were rejected as being unfounded for the following reasons:

1. The violation of the provisions of TFEU are not applied in this case, given its facts.

- a. The provisions of Article 101 TFEU (formerly 81 TEU) concern agreements between enterprises, which is not the case here.
- b. The provisions of Article 102 TFEU (formerly 82 TEU) declare as incompatible with the Common Market the abuse of a dominant position within this Market, when it is able to affect the trade among Member States, which is also not the case here (see CoS 2594/2015), and,
- c. The present dispute has nothing to do with the concession of exclusive rights of television broadcasting, which would be contrary to the provisions of Article 106 TFEU (formerly 86 TEU).

2. The argument of the applicant that the imposition of the disputed duties is forbidden by the primary EU law (Article 87 of the EEC Treaty, later Article 92 TEU, now 107 TFEU) consisting of state aid, since it is imposed only on private television enterprises and does not concern the public television station, was rejected for the following reasons: Enterprises like the the applicant's , which are subject to an obligatory economic burden, cannot argue in front of their National Courts that the exemption from this burden for other enterprises consists of state aid, so that they can also be exempted. This can be done only if the said burden consists inevitably of part of a state aid measure, in the sense that the outcome of the imposition of this economic burden is necessarily destined to finance this Aid and affects its amount (see CJEU of 15-06-2006, C-393/04, C-41/05 *Air Liquide*, Paras.43-48, of 27-10-2005, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Casino France* , Para.40,of 20-09-2001, C-390/98 *Banks*, Para.80), which is not the case here.

So, even if the exemption of the public television station consists of state aid, the applicant is not entitled to invoke the possible illegality of the said exemption, in order to also be able to be exempted from the imposition of the disputed duties (see CoS 2594/2015).

Comments

The possible state aid to rivals should not only be detected by the enterprise concerned, but it should also be possible to legally invoke, according to CJEU case- law.

10.4. Fernando Tainhas (Commerce Court of Lisbon)

Court: Supreme Administrative Court of Portugal

Court Case: 029/13

Date of the Judgment: 23rd April 2013

Brief summary of the facts in dispute

Since 1995, in Portugal, a parafiscal charge has been, and continues to be, imposed on wine producers⁸ by the “Instituto do Vinho e da Vinha, IP”⁹ (Vine and Wine Institute, hereinafter “IVV”).

The proceeds of this charge, which is designed to promote wine, represents over 62% of the IVV's operational budget. The charge is imposed not only on wine products that are produced and marketed in Portugal, but also on products from Portugal that are marketed either in other Member States or in third countries, and on wine products originating in other Member States or third countries that are marketed in Portugal.

A Portuguese wine undertaking claimed for the refund or annulment of the charge, stating that it is an illegal state aid, essentially saying that this was as a result of the lack of prior notification of the European Commission contrary to Article 108, n. ° 3 TFEU.

The judicial proceedings

2. “A..., Lda.”, a Portuguese company, presented to a First Instance Administrative Court a judicial appeal against the administrative rejection of an application for the reimbursement or annulment of a parafiscal charge to promote wine, relating to September 2007, in the amount of €10 401,95. This parafiscal charge was collected by IVV.

A judgment was given which dismissed the action.

Disagreeing, the petitioner entered an appeal, asking to see the judgment repealed.

In support of its application the appellant put forward the following pleas in law:

- The parafiscal charge is illegal as a result of the lack of prior notification of the European Commission, contrary to Article 108, n. ° 3 TFEU;
- Regardless of a judgment of compatibility or incompatibility with the common market, the Portuguese State could not have implemented the charge, given the lack of prior notification and the effect of suspension that is provided for in Paragraph 3 of Article 108. of the EC Treaty;

⁸ Charge established by Decree-Law 137/95 of 14th June, 1995 (DR 136 I-A of 14/6/95) and amended by Decree-Law 119/97 of 15th May, 1997 (DR 112 I-A of 15/5/97).

⁹ Part of the IVV's work is to manage the general coordination of the wine producing sector, including the development of the following activities: those relating mainly to wines and wine products produced in Portugal, i.e., wine registration and heritage, auditing the control and certification systems for quality wines produced in specified regions (Quality Wines PSR) and regional wines; activities relating, in general terms, to wine and wine products originating in Portugal and those originating in other Member States and/or third countries and marketed in Portugal, i.e., the management and coordination of the wine market, control and monitoring of the wine producing sector in line with national and community legislation (these activities command almost the entire IVV budget). The IVV also provides certain services to third parties in areas such as: the storage of wine and wine products; laboratory services, and training its own staff and other specialists who are working in the viticulture sector (financed to a large extent by Community and national support programmes).

- The reimbursement or annulment of the charge does not derive from its adoption by the Commission for recovery measures, it derives only, and directly, from the violation of the obligation of prior notification and the prohibition of the implementation of the charge;
- The State could not collect the parafiscal charge without having previously notified the Commission of the same, and until the Commission gave a final decision about the compatibility of such a fee with European Law;
- It is irrelevant whether the measure at issue is, or is not, compatible with European law, or if it is just partially compatible, or which aspects of it are under investigation by the Commission by raising doubts as to its compatibility with the Common Market, because the charge is the sole source of financing for aid in the promotion and publicity of IVV;
- The product of this charge, as a consequence, thus influences directly the importance of the aid, so that a reduction in the revenue from the levy implies a reduction in the resources for financing the measures for the promotion of, and training by, IVV.
- In addition, the appellant asked for a stay of proceedings and for referral of the case to the European Court of Justice, requesting answers to the following questions:
- Whether the implementation of a charge, which represents the only source of funding for state aid that is not notified, must be notified to the Commission, pursuant to the terms of Article 108. TFEU?
- Is the answer to the previous question affected in some measure by the fact that the product of this fee is financed equally, the percentage remaining, another set of services and activities (which may have, therefore, perhaps, a protective effect that goes beyond the aid itself which finances)?
- Did Article 108., n. ° 3 TFEU allow a Member State to collect such a charge, which represents the only source of funding for state aid that is not notified, before the decision of the Commission regarding compatibility with the Common Market became *res judicata*?
- If not, can a national undertaking, citing the violation of the obligation for prior notification and the prohibition of the implementation of such a measure, petition in the National Courts for the refund or cancellation of the charge collected in violation of that provision?

3. The Defendant – IVV – responded to the appeal, sustaining their previous positions and opposing the arguments put forward by the appellant.

In short, the Defendant stated that it has not yet been decided, with *res judicata*, if the IVV charge is state aid that is incompatible with the Common Market, and thus the adoption of that charge does not need to be notified to the European Commission, as provisioned in Article 108, n° 2 TFEU.

Notwithstanding this, the Defendant argued that the Commission had already decided – in a Decision of 4th April, 2012 – that only the measures for the promotion and advertising of Portuguese wine in the markets of other Member States and third countries, and measures relating to its financing scheme, may constitute state aid within the meaning of Article 107 of the TFEU, but not the measures relating to the financing of training, which does not constitute state aid, but which needs no prior notification in accordance with Article 108, n° 3 TFEU.

Within the framework of the implementation of the Decision of 2010, as amended by a Council Decision of 2012, the Commission therefore expressed openness to Portugal demonstrating that support considered to be state aid within the procedural conclusions, in respect of the up to *de minimis* thresholds that apply, in which case, the Commission would consider the decision to be as executed.

After confirming that the thresholds as *de minimis* rules have not been exceeded by any of the economic agents in the wine sector in Portugal, the IVV sent a letter to the Commission stating that the aid met the up to *de minimis* thresholds that were applicable, and that, for this reason, the state considers the Decision of 2010 to have been fully executed, without the need for any refund, which was accepted by the Commission.

In conclusion, the Defendant stated that the measures investigated by the Commission do not pose any problems of compatibility with Community Law with regard to the duty of prior notification imposed in Article 108, n° 3 TFEU, since they do not constitute state aid within the meaning of Article 107 of the TFEU.

Facts of the dispute

4. The following facts were considered to have been proven by the First Instance Court:

- i. On 30th October 2007, the Appellant paid IVV €10,401.95, regarding the promotion charge for September 2007;
- ii. On 22nd December 2008, the Appellant asked IVV for the refund or annulment of the parafiscal charge to promote wine, which was rejected on 12th January 2009;
- iii. On 9th February 2009, the company presented to a First Instance Administrative Court a judicial appeal against the administrative rejection.
- iv. On 1st December 2004, the European Commission notified the Portuguese Government of its decision to start the procedure that was provisioned in Article 108, n° 2 TFEU, in order to examine the compatibility of the mentioned fee with the Treaty's rules on state aid.
- v. The European Commission closed the procedure through a Decision issued on 20-07-2010, establishing that:
 - a) State aid for the generic promotion of wine and wine products in Portuguese territory, illegally executed by Portugal in violation of Article 108(3) TFEU by means of a levy established by Decree Law no. 137/95 of 14th June, are state aid that is compatible with the internal market within the meaning of Article 107. no.3(c) of the TFEU in relation to the period between its entry into force, and 31st December 2006;
 - b) State aid for the promotion and advertising of wine and wine products of Portuguese origin in the territory of other Member States and of third countries, performed illegally by Portugal in violation of Article 108(3) of the TFEU, by means of a parafiscal charge established by Decree-Law no. 137/95 of 14th June, are, without prejudice to the application of Article 2, state aid that is compatible with the internal market for Article 107 (3) (c) TFEU for the period between its entry into force and 31st December, 2006.
- vi. Portugal appealed to the General Court of the European Union.

Ruling of the Court

5. The Supreme Administrative Court of Portugal held in favor of the Defendant and dismissed the suit, essentially basing its arguments on the *de minimis* rules.

Firstly, the Court stated that, as a principle, the charge to promote wine was illegal because of the lack of notification of the Commission during the legislative procedure which culminated in the issuing of that decision.

The judgment clearly establishes that if, during the procedure for the formation of a legislative act, its notification to the Commission has not taken place, or if the legislative act enters into force before the Commission has definitively and positively delivered a decision by means of a compatibility decision, this will be the verification of formal illegality, due to a procedural flaw.

Nonetheless, evoking the CJEU Steinike and Saumon cases, the Court ruled, as the Commission also accepted, that, in this case, there was no obligation to give prior notification of the fee in question because it is a *de minimis* aid, which, according to Art. 2 of Regulation (EC) n° 1998/2006, is exempted from notification, and no approval or confirmation by the Commission is therefore required.

Hence, the Court concluded that the Commission proceeded automatically to the investigation procedure without first examining whether the alleged aid was below the thresholds defined as *de minimis* aid and which was therefore outside its scope for intervention, since its control falls under the responsibility of Member States. The judgment also stated that since it has been concluded that there is no obligation to notify in the present case, this does necessarily mean that there is no obligation to suspend the charge in question.

Even if that were not the case, the Court claimed that the annulment of the whole of the promotion fee, as the appellant claims, by a formal procedural defect, which is the only defect alleged by it in the circumstances of the case, would be contrary to the principle of proportionality.

Moreover, the Court pointed out the appellant's burden of proof failed, because the assessment of the legality of the aid cannot fail to take account of the consequences which the applicant intends to draw from the alleged formal infringement of the 'standstill' rule, without having shown, or even argued, that, in this case it exceeded the *de minimis* thresholds, or that the levy applies to products imported from other Member States or third countries.

Personal Comment

6. From the research I undertook in Portugal not many judgments regarding state aid have been published, especially those that apply EU law.

However, this case is a great example of the role of National Courts in assessing the existence of aid, and in checking compliance with the compatibility conditions.

As the Commission pointed out in its Decision of 20th July 2010, "*It is settled case-law that fees do not fall within the scope of the Treaty provisions relating to State aid unless they constitute the financing of an aid measure in such a way as to form an integral part of this measure*". This is the case only where there is a binding relationship between the rate and the aid, in the sense that the proceeds of the tax are necessarily intended to finance the aid.

In the present case, its relevance derives from the conclusion that the wine promotion charge was an integral part of the aid for promotion only because a percentage of the proceeds of the promotion fees, which will never be less than 25%, will be used for measures to promote wine and wine products in general. The judgment therefore has a profusion of pertinent Court of Justice cases [v.g. CJEU STEINIKE of 1997/03/22, C-345/02 of 2004/07/15, C-126/01 of 2003/11/20] and doctrine citations, it makes also an adequate affirmation of the primacy of EU Law, without critically analyzing the role of the Commission's Decisions regarding the case, especially the opening of an investigative procedure without first examining whether the alleged aid was below the thresholds that are defined as *de minimis* aid.

11. Unfair competition law

11.1. Nikolay Angelov (Administrative Court of Sofia)

Tuna Fish Cans imitation case

Bolton Alimentari PLC, Chermenate (Italy) v. Solid Co BG LTD Varna, Bulgaria

Decision 12162/10.11.2016 /final Decision 3938/30.03.2017/ Supreme Administrative Court of Bulgaria

Facts of the case:

Bolton Alimentari PLC, Chermenate, Italy filled a petition to the Bulgarian Commission on the Protection of Competition on 31.03.2014 to determine, eventually, the violation of Art. 35 Para 1 of the Law on the Protection of Competition, made by Solid Co BG LTD Varna. The Italian company states that their commercial activities include the manufacturing, packing, import and export, selling and distribution of foodstuffs, mainly cans of tuna fish that have been well known for several decades on the European market as “RIO Mare”. It states also that, since 1998, the company imports into Bulgaria tuna fish cans using the distribution of another Bulgarian company- EOS-LD LTD. These tuna fish cans are put in very original and attractive packages. The fish is in an oval metal can, which is placed into a cardboard wrapper, the last are parallelepiped boxes, without two side parts, which helps the oval metal cans to be stable in the cardboard package, and these have specific images on them. The statement is that, since 1998, this type of cans, within a cardboard package, have become very popular on the Bulgarian market, and they are very well known and preferred by customers. On the other hand, Solid Co BG LTD., since January 2014, has put onto the Bulgarian market tuna fish cans that feature identical, or very similar, packages, as described above. These actions of the Defendant are anti-competitive, because the packages of the Defendant have such a visual effect, that some of the elements of the cardboard are the same, some are similar, and this thus leads to such a resemblance that the customer is easily misled about which is the original product. It is possible that the customer will buy the Defendant’s product thinking that it is somehow new, or that the design is pointing to a new production of the well-known cans. The Italian company also states that the quality of the tuna fish in the Defendant’s cans is lower than that in the original ones.

The Defendant doesn’t reject the above-mentioned facts, but states in his defense, that in the Patent Office of Bulgaria on 20.11.2006 an application for the registration of the trade mark RIO Mare was pending – a combined application for Classes 29 and 30, and the registration was agreed in February 2013. The other points are that the tuna fish cans are only distributed on the territory of Bulgaria, and also that the design of the cans contains the image of a tuna fish fillet in its natural color, placed on a green leaf salad.

Upon these facts the Commission on Protection of Competition gave Decision 1239/18.09.2014, which states that Solid Co BG LTD. has violated Art.35 Para 1 of the Law on the Protection of Competition and issued a penalty of 3% of the net incomes of the company for the previous (2013) fiscal year. Solid Co BG LTD appealed the decision in front of the Supreme Administrative Court, in which Decision 12162/10.11.2016/became final with Decision 3938/30.03.2017/, confirming the violation of Art.35 Para 1 of the Law on the Protection of Competition.

Comment

The two companies in the proceedings are undertakings under Bulgarian Law, which deal with the production and distribution of tuna fish cans. The two companies are independent, so the Defendant is not in a partnership with the Plaintiff on the Bulgarian market for tuna fish cans. In Art.35 Para 1 of the Law on the Protection of Competition it is forbidden to offer or advertise goods or services with a design, packages, marks, names, or other signs, which mislead, or may lead to mislead customers in regard to

the origin of the goods, the manufacturer, seller, method and place of production, the source or way of acquiring the goods, or the use, quantity, quality, the real nature, or the customer effects and other essential characteristics of the goods or services. All forms of imitation, that are mentioned above are related to any unfair attack on the customers, when the original product has proven its quality and attractiveness to the customers, and its characteristics make, in the customer's consciousness, positive associations, which make him/her prefer this product rather than other alternative products, and this is why it is obligatory to ascertain the first to date offering of the product on the market. The parties do not argue that the Italian product, RIO Mare tuna fish cans, has been on the Bulgarian market since 1998, and that the Defendant's product has been on the market since December 2013. It is of primary importance to prove the real opportunity to mislead the customers by mistaking a product with another similar product, manufacturer or seller, so the aim of such a violation is to gain the use of an already well known and established product's reputation on the market. In this case, the two competitive companies offer their tuna fish in oval metal cans, put into cardboard packages, which excludes the opportunity that the customer can see the product/tuna fish. He/she can only see the package. In ascertaining the violation, it needs to be mentioned that the tuna fish sold by the two companies is put into an oval, metal can, placed in a cardboard wrapper, the last are parallelepiped boxes, without two side parts, which helps the oval metal cans to be stable in the cardboard package, which has specific images. There is also the identity of the name that is used by Solid Co BG LTD on the tuna fish cans- RIO Mare, which is used by the Plaintiff. On the cans similar specific letters are used, positioned in the same place on the boxes, which inevitably could risk misleading the customer about the two products, in particular in relation to the origin and manufacturer of the fish. The existence of small and insignificant differences in the design of the imitating product does not exclude the liability given in Art. 35 Para 1 of the Law on the Protection of Competition, when, in their entirety, the single parts of the packaging of the goods have such a similarity to those of the products of their well-known and market established competitor, which offers a real opportunity for misleading the customers as to the goods or the manufacturer. The use of the similar packages by Solid Co BG LTD could lead to the stimulation of the customers to buy this kind of products, thinking that they are produced by a well-known and market established manufacturer, and that this can lead to a real danger of abusing the interests of the competitors. This is why the liability of the Defendant of the imitation of the design of the tuna fish cans has been rightly established.

As to the defence of the registered trade mark at the Patent Office of Bulgaria, it must be pointed out that the pending cases between the parties in the Sofia City Administrative Court about the validity of the registration of the trade mark RIO Mare are not in connection with the liability of Art.35 Para 1 of the Law on the Protection of Competition. There is no argument that the two parties have not registered an industrial design for the packages of the tuna fish cans discussed above. In the case between the parties now, the importance is to establish an unlawful use of the imitation of a design, package, mark, etc., but not of a registered trade mark which is a violation of Art.35 Para 2 of the Law on the Protection of Competition. Solid Co BG LTD does not independently use on its packages its registered trade mark, but uses a combination with images that are specific, and primarily, those of Bolton Alimentari PLC, by which the Italian company has been well known on the Bulgarian market since 1998, and that is how the Defendant does not present itself as independent and bona fide distributor of the tuna fish cans. So, the Defendant had violated the rule of Art.35 Para 1 of the Law on the Protection of Competition.

11.2. Aleksandra Janas (Court of Appeal of Katowice)

Początek formularza

**Resolution of the Supreme Court of 18th November 2015, III CZP 73/15
Answer to the legal question of the Appeal Court in Katowice**

Facts

The Claimant's company, which is a producer of furnishing products (curtain rails, blinds and shutters), filed a lawsuit in which he requested that the Defendant, who owns the international DIY hypermarket chain, pay the amount of PLN 1,800,000 (€450,000) as the difference between the sum due on what was sold and what was actually paid. The difference was due to the fact that the Defendant charged an after-sales discount (about PLN 1,700,000, i.e., about €400,000), and reduced its price commitment. The Defendant also charged for advertising the goods purchased from the Plaintiff, which were then sold in its chain stores (about PLN 100,000, i.e., €25,000). The advertising consisted of publishing advertisements in leaflets and catalogues available in stores and delivered to the local residents.

The Claimant argued that both the accrued rebate, the amount of which increased with the increase in sales volume, as well as the advertising fees for the goods which were already the property of the Defendant, were so-called shelf charges ("other than merchant margin"), whose collection was banned by Article 15 (1) (4) of the Act of 16th April 1993, on Combatting Unfair Competition. It claimed that the discount was not associated with any equivalent service and did not bring any benefit to him. As for the advertising fee, the Claimant emphasized that other manufacturers' goods were also advertised in the same publications, and the amounts paid were not equivalent, and it was obliged to bear the cost of advertising the goods that were previously sold to the Defendant.

The Defendant company demanded the dismissal of the claim and argued that the post-sale discount is an acceptable instrument that does not violate fair competition. The company claimed that its use is beneficial to both parties – since, with the increase in sales, the Claimant (seller) gains more profits but, at the same time, the unit price of the goods sold decreases, which, in turn, benefits the buyer (the Defendant) and motivates it to increase the scope of cooperation. On the cost of advertising, the Defendant, on the other hand, argued that the placement of the goods in the advertising leaflets and catalogues was beneficial to the seller, and, in addition, the amounts collected from all suppliers did not cover the costs of publishing advertising materials in any case.

Początek formularza

The District Court in Katowice upheld the claim in its entirety and the Defendant appealed against the verdict. The Court of Appeal in Katowice decided to apply to the Supreme Court with a juridical question regarding the nature of the post-sale discount, because the judgments of the Common Courts and the Supreme Court itself concerning this issue were completely divergent and contradictory.

Content of the resolution:

Commercial relationships between the buyer who runs the store chain and the supplier are not excluded from the recognition of a post-sales discount for a discount that does not constitute a charge that is provided for in Art. 15 Sec. 1 Pt. 4 of the Act of 16th April, 1993, on Combatting Unfair Competition (text: *Journal of Laws* 2003, No.153, item 1503, as amended, hereinafter: u.z.n.k.).

The content of the resolution means that, in general, the monetary premium in the supplier-to-network relationship should not be qualified as a fee beyond the commercial margin, because it shapes

the price at which the supplier sells the goods. However, it is not possible to exclude its apparent nature and the possibility of qualifying the after-sales discount paid to the buyer by the seller when a specific sales volume is reached for the fee that is provided for in Article. 15 Sec. 1 Pt. 4 u.z.n.k. It is then reasonable to investigate whether a margin lies within a hidden charge. There may be indications that the permitted discount can be distinguished from the situation where its reservation was merely apparent:

- 1) Where there is a significant or gross disproportion between the discount and typical margins,
- 2) Where there is a lack of conditions for granting a rebate or its amount - the parties in the agreement do not determine the amount or conditions of price reduction, leaving it to the unilateral buyer's decision,
- 3) Where the content of the contract - from the terms of the contract and the terms of its performance, may result in the rebate being a hidden shelf fee,
- 4) Where there is a breach in the equality of the contractual parties – e.g., obvious misconduct of one of the contracting parties due to the use of an economic advantage by the contracting party.

In the resolution adopted, the Supreme Court emphasized that the qualification of after-sales discounts as part of the price excludes the possibility of including, apart from the commercial margin, the charges for accepting the goods for sale. However, in the event of a dispute over the nature of the fee, other than the margin, the adjudicating tribunal must make an *ad casu* review, taking into consideration the circumstances of the conclusion of a specific agreement between the parties and the source of coverage of the reserved premium. The discount may, in specific circumstances, prove to be an illegal charge within the meaning of Art. 15 Sec. 1 Pt 4 u.z.n.k. which was "hidden" in the form of a margin.

The conclusion of the resolution in question is that a monetary premium may be classified as a post-sales discount (retroactive), or it may be in the form of an illicit shelf fee. The rebate must always be based on the circumstances of the case.

My personal comment

The resolution is a very important step towards understanding the nature of the post-sales discount and the resolution of disputes that arise. Especially important is the new, flexible approach to the problem, which allows the judge to evaluate the case individually. Previous case law lines did not meet this requirement, presuming in advance that either charging a rebate is, by its nature, an act of unfair competition, or perceiving the rebate, without any reservations, to be a market instrument which allows the optimization of the profits of both contractual parties. The first view is too radical and does not consider the principles of the free market, especially of economic freedom. On the other hand, the opposite stance does not prevent the risk of providing legal protection for conduct constituting an abuse of a dominant position and the acceptance of seemingly legitimate acts, thus, in fact, violating the principles of fair competition.

Post Scriptum

When settling the case, the Court of Appeal was bound by the aforementioned resolution. Having investigated the circumstances in which the rebate was accrued, by a judgment of 7th April, 2016, V ACa 814/14, the Court changed the judgment of the Court of First Instance in such a way as to award the Defendant only the costs incurred in connection with advertising. As for the rebate, the Court considered that there were no grounds for considering it to be unfair and therefore a forbidden shelf fee. Following this judgment, both parties filed a cassation complaint. The case is now awaiting resolution in the Supreme Court.

11.3. Kameliya Stoyanova (Administrative Court of Sofia)

Judgment of the Supreme Administrative Court (examined by a three-judge panel) 8844/18.06.2013 in Case 15320/2012

Ordinance of the Supreme Administrative Court from 09.04.2014 in Case 14402/2013

Judgment of the Court (Second Chamber) in Case C-185/14 (the request was made in proceedings between EasyPay AD and Finance Engineering AD and Council of Ministers of the Republic of Bulgaria and the National Social Security Institute, seeking the annulment or repeal of certain articles of the Order on pensions and periods of insurance. This reference for a preliminary ruling concerns the interpretation of Directive 97/67/EC of the European Parliament and of the Council of 15th December, 1997, on common rules for the development of the internal market of Community postal services and the improvement of the quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20th February, 2008, and of Articles 106 TFEU and 107 TFEU.

Ordinance of the Supreme Administrative Court of 17.05.2016

Facts

Ruling of the Supreme Administrative Court, examined by a three-judge panel

The Court of First Instance (the Supreme Administrative Court), in the Judgment of the Supreme Administrative Court 8844/18.06.2013 in case 15320/2012, held that Article 106 of the Social Security Code allowed the Council of Ministers the discretion to select the company which best meets the public needs, and the Supreme Administrative Court deduced therefrom that the action brought by EasyPay AD and Finance Engineering AD must be dismissed as being unfounded.

The parties then brought an appeal in cassation before the Court of Cassation (the Supreme Administrative Court, presented by a five-judge panel)

Ordinance of the Supreme Administrative Court (presented by a five-judge panel) of 17.05.2016

With the Ordinance of 17.05.2016, the Supreme Administrative Court demanded that the Bulgarian Council of Ministries, the National Social Security Institute and the Minister of Transport, Information Technology and Communications clarify some of the circumstances that are written in that ordinance, as follows:

- whether the money order operations carried out by Bulgarian Post (EAD), that effect the payment of retirement pensions is involved in the functioning of the public social security service and, accordingly, whether it must, or must not, be regarded as an economic activity falling within the scope of Article 107(1) TFEU.
- whether the parameters, on the basis of which the compensation to Bulgarian Post (EAD) is calculated, were established in advance in an objective and transparent manner.
- whether the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, one that is well run and adequately equipped, would have incurred in discharging those obligations, considering the relevant receipts and a reasonable profit for discharging the obligations.

The court hearing is scheduled for October 2nd, 2017.

Decision of the European Commission to launch a formal investigation against the Republic of Bulgaria in relation to alleged state aid granted by the government to Bulgarian Post (EAD).

According to an official letter from the Ministry of Transport, Information Technologies and Communication (on my request), in 2015 the European Commission decided to launch a formal investigation against Bulgaria. The number of the case is SA.39043 (Alleged state aid procedure pending to the Commission services).

I have also made a request before the Ministry of Transport, Information Technologies and Communication to provide me with the official correspondence between the Ministry of Transport, Information Technologies and Communication and the Commission regarding the case. The Ministry of Transport, Information Technologies and Communication has requested the special permission of the Commission, and when this permission is granted, I will bring the content of the correspondence to your attention.

Notes

1. Bulgarian Post (EAD) considers the obligation imposed by the state to be a long-term, sustainable activity. Although there is no formal rule for reinvesting any surpluses arising from it, the operator is obliged to do this in order to provide a better service and to compensate for the initial-year losses from the performance of this obligation.

2. Compensation for BP - the amount of the compensation is determined by the State Budget Law for the relevant year.

3. Banks and payment of pensions: In fact, banks do not provide the same service for the payment of pensions that Bulgarian Post (EAD) does. The pensioners have the right to choose how they want to receive their pensions. Banks handle the payment of pensions as a non-cash standard bank service. The National Social Security Institute transfers the amounts to the already existing accounts of the pensioners, whose service at a flat rate is paid by the retired person. The rightful Claimant has at their disposal the amounts in the accounts and may use them to make transactions or can withdraw the amounts at the cash desk or with their bank cards. The expenses on servicing the debit cards (issuing, reissuing in case of loss) are also paid by the end users on general terms. Banks do not conduct additional handling of information, differently to the usual bank operations, they are not obliged to organize cash payments differently to the payments of their other clients, and they do not pay pensions to the homes of the pensioners. Pensioners can use their debit cards only in settlements with bank branches and ATMs, which are predominantly placed in bigger settlements. Banks and other commercial operators, as a whole, do not maintain such infrastructure in regions where they do not have economic interests, unlike the Bulgarian Post (EAD). Banks have at their disposal, and operate with, the amount in the accounts as stipulated by the regulations for banking activity. There are no special state regulations to determine the fees for bank services for the accounts of retired people, or about pension payments. Bulgarian Post (EAD) makes cash payments together with the other additional accompanying administrative expenses, transport and security to over 5000 settlements. Bulgarian Post (EAD) restores the amounts of the unpaid pensions back to the National Social Security Institute, which, again, is connected to the expenses named above. Bulgarian Post (EAD) does not burden the pensioners with any additional expenses and does not charge any fees to the persons for this service. Bulgarian Post (EAD) provides the payment of pensions on the territory of the whole country, including the most distant and smallest settlements where there are neither bank branches/ATMs nor commercial operators. Unlike the banks, Bulgarian Post (EAD) carries out the activity directly at the homes of the pensioners after they reach a certain age or have certain health conditions. Banks are not subject to compensation from the state, because it is a prerogative that every retired person may choose either to use a bank service, under the general conditions of the banks for receiving their pensions, or not. The choice of a payment method for the pension, either by post offices or by bank, pertains to every pensioner.

11.4. Veronika Antal (Hungarian National Office of the Judiciary)

Gfv.VII.30.192/2015/11. Curia

15.G.41.248/2006. Capital Regional Court

14.Gf.40.025/2009/6. Court of Appeal of Budapest

Gfv.X.30.284/2009/7. Supreme Court

15.G.41.499/2010. Capital Regional Court

14.Gf.40.487/2014/14/III. Court of Appeal of Budapest

Final judgment: 9th February 2016.

I. Brief summary of the facts of the dispute:

In the invitation to tender that was launched by AVOP (Operative Program for Agricultural and Rural Development) for EU funding (SAPARD), the department of the Defendant ministry set the precondition that the applicants must compile a detailed budget for the construction works based on the construction standard corpus (CSC) that was developed by the non-litigant T-Ltd.

The plaintiff also engages in the development of the construction standard corpus. In addition, no tender process was concluded before the use of the software was prescribed.

II. Summary of the judicial proceedings:

In its petition, the Plaintiff requested that it be established that, upon determination of the tendering conditions, the Defendant infringed the provisions of the Act on the Prohibition of Unfair Market Practices, and the Act on Equal Treatment, and gave the impression that the Plaintiff company's software is inappropriate.

The Plaintiff initiated a preliminary ruling procedure at the EU Court referencing Article 267 TFEU. The following question arises: "Is state aid to be deemed a state aid that is prohibited by Article 107 TFEU where a company that is independent from the state, without a prior tendering process, is being favored in such a way that participation in a tendering process for funding is dependent on purchasing the given company's product?"

The Court of First Instance denied the petition. The court pointed out that the practice of a state agency prescribed by the law cannot be considered a market practice; even where such practice influences the market, as such state agency activities do not fall within the scope of the Act on the Prohibition of Unfair Market Practices. Infringement of the principle of equal treatment can only be cited by natural persons. No ruling was made regarding the petition for a preliminary ruling procedure.

The Plaintiff's appeal included the plea that, previously, the Plaintiff company and T-Ltd. The company that developed CSC, had practically equal market shares, but the tendering practice that served as the cause of the action created a distortion of the market shares to the Plaintiff's disadvantage.

The Appeal Court partially changed the ruling of the Court of First Instance. It ruled that the Defendant engaged in an unfair market practice when it required the use of CSC as a compulsory condition for the application for EU funding. The Appeal Court also found that the state, as party to property law relationships, can indeed apply practices that fall under Competition Law. By prescribing the application of T-Ltd.'s software for applicants who are involved in the tender procedures, who are

without experience of a prior tendering process, to ensure equal opportunities, the Defendant greatly influenced the positions of market participants, and infringed the rules of competition.

With regard to indemnification, the Appeal Court ordered a new procedure.

Upon the Plaintiff's review request, the Supreme Court repealed the decision made by the Court of Appeal and ordered the Court of First Instance to conduct a new procedure regarding the claim for indemnification. According to the Curia's ruling, the practices of state agencies can by no means be deemed market practices, even when such practices affect the market. These practices do not fall within the scope of the Act on the Prohibition of Unfair Market Practices.

During the repeated trial, the Plaintiff claimed that the Defendant's conduct was sufficient to distort competition and constituted prohibited state aid, in accordance with Article 107. The legal basis indicated regarding indemnification as damage inflicted was within the scope of public administration.

The Plaintiff initiated a preliminary ruling procedure at the EU Court about the meaning of the state aid. The Plaintiff also claimed that the Defendant is an independent, public budgetary entity, and the advantage granted by it is to be considered an advantage granted by a Member State. The Member State involvement can be established on the grounds of influencing the free movement of services. The Court of First Appeal denied the petition. According to the Court's decision, T-Ltd. was not granted state funding; as such, state funding would mean funding granted from state funds that distorts competition and relates to funding related to trade between Member States. The decision also concluded that all Member States are entitled to interpret the concept of state aid independently (Commission Notice on the enforcement of state aid law by National Courts 2009/C 85/01) The purchasing cost of CSC was not an eligible expenditure in the tender procedure, and therefore the funding from state resources was not grounded. With the absence of the above condition, the Court of First Instance found the petition –on the basis of Article 107 – to be unsubstantiated.

The appellant also claimed that there were all the conditions for the state aid that is covered by Article 107 TFEU. In his appeal, the Plaintiff referred to Case no. C-41/90.

The Appeal Court, acting due to the Plaintiff's appeal, upheld the ruling of the Court of First Instance with reference to Case no. C-92/11 and C-379/98. The petition for a preliminary ruling procedure was denied, as the EU provision was not applicable, and therefore its interpretation was not raised.

The review request of the Plaintiff was aimed at the repeal of the ruling, and it set forth a claim for indemnification. The Plaintiff maintained that it suffered significant damage due to the Defendant's intentional practice, which ultimately led to the Plaintiff being forced out of the market as a database creator.

The Curia was required to take a standpoint regarding whether or not the Defendant granted prohibited funding to T-Ltd., and consequently caused damage to the Plaintiff.

The Curia referred to the principle that, in accordance with Article 107, the state intervention must be sufficient to affect trade between Member States. The Plaintiff did not refer to any kind of practice that would affect trade between EU Member states, and therefore the petition for a preliminary ruling procedure was denied. The Curia found that, for the reason stated above, the prohibited state aid did not occur for reasons referred to by the Court of First Instance, and therefore no damage was incurred by the Plaintiff in connection therewith.

The ruling regarding the denial of a preliminary ruling procedure was sustained with reference to the judgment of the Court of Justice in Case no.C-210/06 (Cartesio).

According to this ruling, the Appeal Court is not to be deemed a forum that is obligated to refer the case to the EU Court; moreover, a higher court forum cannot order a regional court to change its decision regarding a case that is at the discretion of the regional court.

III. Comment:

In the light of the above case, it is apparent that the law of a Member State and the EU Court's case law complement one another, even when the actual case does not justify the initiation of a preliminary ruling procedure.

The National Court referred to the previous case law of the CJEU.

The Member State's judge interpreted the notion of state aid in accordance with Hungarian law and supported its arguments with EU law cases. Due process – the principle of having a lawful judge – is not deemed to be impaired only because the Hungarian Court does not refer to the EU Court regarding interpretation of the law. At the same time, knowledge of the EU Court's legal practices is vital when making Member State Court rulings, and in the justification of rulings, and appears to be more and more important in everyday court rulings.

12. List of judges participating in ENTraNCE for Judges 2017

- Dzintra Amerika, Latvia Supreme Court
- Nikolay Angelov, Administrative Court of Sofia
- Veronika Antal, Hungary National Office of the Judiciary
- Marie Baker, Ireland High Court
- Inese Belicka, Regional Court of Aizkraukle
- Maria Constantinou, Cyprus Supreme Court
- Beatrix Crnogorac, Commercial Court of Zagreb
- Martin Dekleva, Administrative Court of Ljubljana
- Arunas Dirvonas, Lithuania Supreme Administrative Court
- Doina Visan, Court of Appeal of Bucharest
- Monika Dominiak, Regional Court of Warsaw
- Guido Federico, Italian Supreme Court
- Fátima Galante, Court of Appeal of Lisbon
- Davidoiu Georgian, Court of Appeal of Bucharest
- Maria Gkana, Greece Council of State
- Marcel Goessen, District Court of Limburg
- Carlos Manuel Gonçalves de Melo Marinho, Court of Appeal of Lisbon
- Stefania Grasselli, Court of Cremona
- Jeannette Hajdinova, Regional Court of Bratislava
- Merit Helm, Hariju County Court
- Sarolta Huszárné Czap, Hungarian National Office of the Judiciary
- Laura Ivanovici, Romania High Court of Cassation and Justice
- Aleksandra Janas, Court of Appeal of Katowice
- Polona Kukovec, Slovenia Supreme Court
- Ana Paula Fonseca Lobo, Portugal Supreme Administrative Court
- Colm Mac Eochaidh, Ireland High Court
- Sofia Maravelaki, Administrative Court of Appeal of Athens
- Andreea Marchidan, Court of Appeal of Bucharest
- Seamus Noonan, Ireland High Court
- Cristian Daniel Oana, Romania High Court of Cassation and Justice
- Gianmario Palliggiano, Administrative Regional Court of Naples
- Daniel Panocha, Tarnow District Court
- Jacinto-José Pérez-Benítez, Court of Appeal of Pontevedra
- Dimitrina Petrova, Administrative Court of Sofia
- Mirella Rodin, Municipal Court of Rijeka
- Aleksandra Rutkowska, Wroclaw District Court
- Nienke Saanen, Amsterdam District Court
- Consuelo Scerri Herrera, Malta Court of Justice
- Stefan Schlotter, Germany Ministry of Justice and for Consumer Protection
- Jelena Šiškina, Vilnius Regional Court
- Agostinho Soares Torres, Court of Appeal of Lisbon
- Ewa Stefanska, Court of Appeal of Warsaw
- Kameliya Stoyanova, Administrative Court of Sofia
- Natalie Swalens, Commercial Court of Brussels
- Fernando Tainhas, Commercial Court of Lisbon
- Luis Manuel Ugarte Oterino, Central Court of Madrid
- Vanya Valkadinova, Blagoevgrad Administrative Court
- Rudite Vidusa, Lithuania Supreme Court
- Josef Franz Weinzierl, Regensburg District Court
- Gorana Aralica, High Commercial Court of Zagreb
- Jovita Einekiene, Vilnius City Circuit Court

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