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# WORKING PAPERS

RSCAS 2019/64  
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 2018  
Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti



European University Institute

**Robert Schuman Centre for Advanced Studies**

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(ENTraNCE)

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

This series of working papers is published in the context of ENTraNCE for Judges, a training programme for national judges involved in EU competition law. The training is organised by the RSCAS, with the financial support of the 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 judiciaries.

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 to comment on a national judgment that is related to the field of competition law. The working paper thus aims to increase the understanding of the challenges faced by the national judiciaries in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement, which was introduced by Reg. 1/2003.





## **Abstract**

This working paper includes a collection of case notes written by those national judges who attended the European Networking and Training for National Competition Enforcers (ENTraNCE Judges 2018). The training programme was organised by RSCAS between November 2017 and October 2018, with the financial contribution of the DG Competition of the European Commission. The case notes included in the working paper summarise judgments from different EU Member States that relate to diverse aspects of competition law enforcement. The working paper thus aims to increase the understanding of the challenges that are faced by the national judiciaries 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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## Introduction

In this working paper the reader will find the summaries of significant antitrust cases from a range of EU Member States. These cases were discussed by the judges participating in the 2018 edition of ENTraNCE for Judges which is run by the Florence Competition Programme (FCP) at the European University Institute (EUI) and financially supported by the European Commission.

This year a number of judges have brought to our attention cases that were referred to the ECJ on a preliminary ruling, for instance *Coty* and *AKKA/LAA*. Learning how these cases ended allows us to see the influence of the Court of Justice in aligning national and EU competition laws. Indeed, in *Allianz Hungaria* (also discussed in this working paper) the ECJ even agreed to interpret national competition law on the grounds that it was worded in a manner similar to EU competition law thus intimating that convergence is also expected between national and EU competition law.

Below we provide a brief summary of each judgment that was discussed. We close with some remarks of the overall trends we observe.

## Procedures

Judge Gavriel's summary and discussion of *Pfizer Hellas – Cyprus Branch and Phadisco Ltd v. Commission for the Protection of Competition* is interesting because it the arguments of the parties on procedural matters largely mirror those that have been made for decades against Commission decision: demanding stricter judicial oversight over the conduct of National Competition Authorities.

Instead, Judge Stefanska Powszechny reports on a case which raises procedural issues that stem directly from the decentralized application of EU competition law. In *Zakład Ubezpieczeń na Życie S.A. w Warszawie v President of the Competition and the Consumer Protection Office* the question was whether, in finding that there has been an abuse of a dominant position that infringed both national competition law and EU competition law, the national competition authority was empowered to impose a fine for the breach of national law and an additional fine for the infringement of Article 102 TFEU or whether this duplicate fine was contrary to the principle of *ne bis in idem*. The Supreme Court sought the assistance of the ECJ, which has recently considered this matter and has ruled that it is appropriate to impose a fine for both infringements, provided that the fine is proportionate.<sup>1</sup> This is helpful as it recognizes that national authorities have a duty to apply national and EU competition law in parallel.<sup>2</sup> What remains to be worked out is a method for calculating fines that allows a competition agency to work out how to impose a fine for domestic effects and how to impose a fine for cross-border effects. This is a project that would be suitable for the European Competition Network.

Judge Bosmans discusses the so-called *Triple-Karmeleit* case. This dispute is about whether InBev's merger with a small Belgian brewery (which makes a famous Beer, the Triple-Karmeleit) could be blocked by applying the prohibition against an abuse of a dominant position. This legal issue arose because the acquired entity was so small that the merger fell beneath the turnover thresholds for applying Belgian merger law. InBev's major competitor (who had also wanted to buy the small Belgian brewery) asked the Belgian NCA to issue an interim order prohibiting the merger. This gave the Belgian NCA and subsequently the recently-created Market Court an opportunity to revisit the *Continental Can* jurisprudence as to whether an acquisition by a dominant firm could constitute an abuse of dominance.<sup>3</sup> The NCA found that while InBev was dominant in the market for beer, the mere acquisition of another

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<sup>1</sup> Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-617/17, ECLI:EU:C:2019:283.

<sup>2</sup> Article 3(1), Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

<sup>3</sup> Europemballage Corporation and Continental Can Company Inc. v Commission, Case 6-72, ECLI:EU:C:1973:22

brewery was not sufficient to find an abuse of a dominant position absent further evidence to explain how this merger would harm competition – for example by making InBev such a strong player on the Belgian market at the expense of its rivals. As the learned judge notes in his comments, the case also serves to highlight that it is for the NCA to set out a competition policy, and the role of the Courts on appeal is merely to check on the legality of the policy choices set out by the NCA. In other words, if the NCA chooses to apply abuse of dominance provisions to mergers, then it is the choice of the agency, the court is merely asked to test if this policy choice is within the boundaries of the law. It was important for the Market Court to give a clear signal about its role in one of its early judgments.

### **Collusion and the scope of application of competition law**

Judge Rop considers a case where the Dutch National Competition Authority investigated a bid-rigging scheme in the market for real property auctions. These auctions take place when banks repossess properties after the owner fails to make mortgage repayments. Auctions are thus designed to allow the bank to recoup some of the losses it incurs through mortgage defaults. The bank's interest is that the auction generates the highest prices. On the other side, a number of professional traders who attend auctions regularly, have the opposite incentive: to buy the properties as cheaply as possible. The Dutch NCA considered that a number of traders that had participated in auctions had committed a single, continuous infringement as they were aware of the anticompetitive nature of the practices, even if they did not participate in all the 2328 auctions during the infringement period. The case is important for illustrating the difficulty of establishing participation in a complex cartel. Indeed, in the Court of Appeal the NCA lost the case for failing to show convincingly that there had been collusion in all auctions. As the learned judge notes, it seems like the Court's more demanding approach to cases where a single complex infringement is found mirrors a similar development within the jurisprudence of the CJEU.

Judge Mille discusses a judgment where the Belgian NCA investigated whether the participation of cement companies in a standardization procedure was contrary to competition law. The issue arose because a new entrant in the Belgian market sought approval of a new product and the standard-setting bodies empowered to approve this took very long. He complained suspecting an infringement of competition law. However, the Court of Appeal held that the participation of rival cement companies in the standard-setting procedure could not yield any harm because the companies were in a minority, and their role in the procedure was advisory and thus not market-related. Judge Mille rightly questions whether this approach might be too formalistic in that the cement firms might have de facto sufficient power to influence the decision or to delay approval, suggesting a more in-depth look at the conduct of the standard-setting process might be necessary. At the same time, a clear line has to be drawn to allow standard-setting bodies to operate aided by industry participants. It might be that some Type 2 errors (i.e. some under-enforcement) could be tolerated if this is necessary to help the standard-setting procedure to work smoothly.

Judge Čuveljak reports on yet another controversial finding of collusion that was overturned on appeal. The Croatian NCA considered that the betting shops had colluded to fix the service fees that they would charge to those who collected a winning bet. Originally the fee was based on a percentage of the amount of the bet, but after a meeting of the association of betting shops this was based on a percentage of the amount of the winnings, a significant reduction in the size of the winnings. However, on appeal the Court found that there was insufficient evidence to show that this change resulted from an agreement or a concerted practice. The betting shop firms had met to clarify how to interpret the tax rules on handling charges – by coincidence they had agreed that the handling charge was best calculated as a percentage of the winnings and not as a percentage of the bet. Inevitably, this change in their tax liability made it rational for the betting shops to raise their fees vis-à-vis consumers. As the ECJ in judgments like *CRAM* and *Woodpulp* teaches, if there is no clear evidence of agreement then one may

infer collusion only if the facts reveal no alternative reasonable explanation for parallel conduct.<sup>4</sup> Here such facts were found that made one doubt that there was a concerted practice.

Judge Virtanen reports on a case similar to that of Judge Mille in that it explores the borderline between lobbying and collusion. In this instance incumbent bus companies were concerned that new rules opening up the bus transport market for competition would invite new entrants and undercut the monopoly profits that were made under the old system. The dispute arose because there was a difference of opinion between the incumbent operators and the legislator about the law on liberalization of the services. The incumbents lobbied, and obtained, a transitional period before full competition was going to be introduced, allowing them to adjust. However, in the eyes of the legislator this transitional period meant that some, limited competition could be introduced while the bus companies had expected that there would be no competition. At one point the lobbying mutated into collusion when the incumbents agreed, via the industry association, to take steps to make entry of new players more difficult (e.g. not allowing them to carry freight). As judge Virtanen notes in his comments this case raises the question of why we immunize lobbying which can have similar anticompetitive effects as collusion and the borderline that exists between lobbying and collusion. This is a helpful judgment to discuss this distinction and reveals how at times respecting freedom of expression might lead to restrictions of competition.

Judge Viegas takes us through a cartel facilitated by the association of undertakings in the market for parking services. What is interesting in this respect is that the decision is addressed to the association for leading the cartel, and while it is good law that the cartel ringmaster may infringe competition laws even if it does not gain directly from the higher prices, the court saw fit to reduce the fine given that the association received no benefit from the infringement. This raises a number of interesting questions about how to calculate the fine for ringmasters who are not involved in the sale of the goods or services in question. It is another kind of common issue that national competition authorities could usefully discuss within the European Competition Network.

## Vertical Restraints

Judge Galco Peco reports on an important judgment in the long running saga between petrol stations and oil suppliers. *Gasorba v Repsol* concerns a claim by Gasorba that the exclusive purchasing agreement it entered with Repsol was contrary to Article 101 TFEU (because of its duration and for the power it gave to Repsol to control the retail price) and was thus void. The tricky issue in this case is that Repsol's exclusivity agreements had been the subject of an investigation by the European Commission, which ended in a commitment decision by which Repsol had agreed to amend its contracts to eliminate the Commission's concerns. The question thus arose whether in a subsequent dispute concerning the same facts the national court should have regard to the commitment decision – should it rule in any case that the commitments remove the competition concerns so that there is no longer an infringement of Article 101? Does the commitment decision mean that the original agreement infringed Article 101? The Spanish Supreme Court asked the ECJ for clarification. That court replied that while commitment decision merit careful attention, they do not bind the national court: commitment decisions are strong evidence that the agreement before the commitments infringes Article 101, but they do not require national courts to reach such a conclusion. Nor do the commitments entered into mean that the parties can feel safe that their agreements does not infringe EU competition law.<sup>5</sup> Accordingly the Supreme Court felt free to declare that the duration of the contracts was excessive contrary to Article 101, thereby rendering the agreements void. As the learned judge discusses, this case is also important for working

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<sup>4</sup> *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, Joined cases 29/83 and 30/83, ECLI:EU:C:1984:130; *A. Ahlström Osakeyhtiö and others v Commission*, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECLI:EU:C:1993:120

<sup>5</sup> *Gasorba v Repsol*, Case C-547/16, ECLI:EU:C:2017:891

out the date from which these contracts become void, further clarifying issues for the next spate of cases to emerge from these agreements.

Judge Surány reports on the *Allianz Hungaria* judgment. It will be recalled that this is one of the many puzzling cases the ECJ has rendered recently that makes it quite unclear what the borderline between restrictions by object and effect is.<sup>6</sup> As the learned judge remarks, the national court rather than focusing on the vertical relations between insurers and car dealers, preferred to confirm those aspects of the Hungarian NCA that found a horizontal agreement between insurance firms. This is sound policy: arguably the vertical restraints could be linked to the horizontal agreement if they facilitated the insurance cartel, but this is not quite how the Hungarian NCA constructed the case.

Focusing on the horizontal effects of vertical restraints is good economics, and Judge Mockel brings us further reflections on the application of Article 101 to vertical restraints by focusing on the German Higher Regional Court in Frankfurt's judgment in *Coty v Akzente*. It will be recalled that the ECJ rendered a judgment that largely clarified the case law, confirming that a seller could utilize a system of selective distribution to preserve the luxury image of its products and that this therefore could justify a ban on sales via certain types of outlet that do not preserve the image of the product.<sup>7</sup> Judge Mockel's discussion reveals that the national court retains some doubts as to whether the approach suggested by the ECJ in *Coty* offers comprehensive and clear guidance to national courts. Luckily for *Coty* the national court found that the agreement was consistent with the Block Exemption for Vertical Restraints and thus allowed to stand. This is one of those puzzling moments where the secondary law offers greater legal security (and, it is submitted, a preferable economic framework) than the interpretation of Article 101 given by the ECJ down the years. It is clear from the learned judge's annotation that many doubts remain on the proper application of competition law to cases involving vertical restraints in digital markets. In fact, with the rapid development of e-commerce as a primary form of distribution, this theme is bound to become always more important and require a general clarification from the EU Commission or the ECJ.

## Abuse of Dominance

Judge Dzintra takes us through how the Latvian Supreme Court applied the judgement in *AKKA/LAA*, one of the most significant judgments clarifying the way to test whether prices are excessive.<sup>8</sup> In response to the ECJ's judgment urging caution before establishing that prices are excessive the Supreme Court sent the case back to the first instance court, indicating that the evidence brought by the Latvian NCA to show that the Latvian collecting society's prices was excessive needed further refinement. The lower court now has the chance to receive more evidence to test whether the finding of excessive prices can stand. Another issue that this case raised is the calculation of the turnover and whether the licensing fees that the collecting society receives from licensees are part of the turnover. The Supreme Court answered that this depended on the kinds of link that there are between the performers and the collecting society.

Judge Perna also comments on a case about excessive pricing, this time in the market for pharmaceutical products. This is an appeal against a decision of the Italian NCA, which had found that Aspen's prices to the Italian medicines agency were excessive. The judgment is interesting for it considers closely the approach of the Italian NCA on how excessive prices are to be determined and it shows the importance of a close assessment of the facts to determine that prices are unfair. The judgment is also valuable in shedding light on the relationship between competition law and regulation: in this

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<sup>6</sup> *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, Case C-32/11, ECLI:EU:C:2012:663

<sup>7</sup> *Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16, ECLI:EU:C:2017:941

<sup>8</sup> *Autortiesību un komunikāciju konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome*, Case C-177/16, ECLI:EU:C:2017:689

instance the undertaking had not infringed any of the regulatory norms, but this does not prevent the possibility of challenging the prices agreed between the pharmaceutical company and the medicines regulator using competition law.

Judges Severnison and Edwardsson both give us their perspective on the Swedish ‘Suns’ (in English, snuff) case brought by the Swedish Competition Authority against Swedish Match. The allegation was that the dominant manufacturer of Snus was trying to exclude rivals. Suns is a kind of tobacco that is chewed. It is stored in coolers. In the 1990s Swedish Match introduced coolers as a way of storing Snus which proved popular. It agreed to allow rivals to store their Snus in its freezers. In so doing the firm was probably aware that otherwise it would infringe EU competition law.<sup>9</sup> Nevertheless the new entrants complained when Swedish Match proposed a new arrangement for labelling Snus which the Swedish NCA considered put new entrants at a competitive disadvantage. The Swedish NCA is a prosecutor and so it brought a case against Swedish Match to the Market Court, seeking a finding of abuse. The Market Court agreed that there was an abuse as labels provided one of the few means of advertising while the Market Court of Appeal overturned this finding considering that Swedish Match had an objective justification for regulating labels: ensuring compliance with national laws to limit advertising of tobacco products. This intriguing difference between the two courts shows that even when the case law of the CJEU is reasonably clear and well-known by both sides, there can remain legitimate disagreement on how this case law is to be interpreted. The leading case is *Hilti*: a refusal to deal where the dominant firm pleaded that it refused to deal in order to protect the health and safety of consumers but the Court of First Instance (now known as the General Court) held that it was not for the dominant undertaking to regulate health and safety and that if it had any such concerns it should notify the appropriate authorities.<sup>10</sup> The Swedish Market Court of Appeal however distinguished this precedent because here Swedish Match appeared to be responding to actual infringements of national legislation taking place in coolers it owned.

Judge Moravcikova presents a margin squeeze case where the major point at issue appears to be the competence of the Slovak competition authority to apply competition law in a regulated sector (electronic communications). The case shows how closely the national court follows the ECJ’s guidance on this point,<sup>11</sup> as well as on issues pertaining to the identification of a margin squeeze.<sup>12</sup>

Judge Dekleva also considers a case about abuses in the market for electronic communications, where the incumbent was accused both of exploiting its dominant position by tying services to consumers and excluding rivals by denying access to wholesale markets. An interesting aspect of the judgment of the Administrative Court concerns the role of consumer harm in cases of exploitative abuse. The court appears to require that if the competition authority claims that tying of internet access to leasing a telephone line is harmful to consumers then it has to provide evidence of the kind of harm that results. This contrasts with the looser notion of competitive harm that we find in cases of exclusionary conduct.

Judge Ratti discusses *Nippon Cargo Airlines v Società per azioni Esercizi Aeroportuali (SEA)*. This is a follow-on damage claim after the Italian NCA found that SEA had abused its dominant position by imposing unfair airport charges for office space. The judgment is particularly noteworthy because under Italian Law at the time the limitation period began to run when the plaintiff could be said to be aware of the infringement. Given the length of time it takes for a competition authority to run a case this would jeopardise many follow-on claims where the plaintiff was the one to complain to the NCA. In this case the five year limitation period had expired but the claim proceeded anyway for breach of contract and it

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<sup>9</sup> See e.g. *Van den Bergh Foods Ltd v Commission*, Case T-65/98, ECLI:EU:T:2003:281

<sup>10</sup> *Hilti AG v Commission*, Case T-30/89, ECLI:EU:T:1991:70. This judgment was upheld by the ECJ but the General Court’s judgment has a more extensive consideration of the issues.

<sup>11</sup> *Deutsche Telekom v Commission*, Case C-280/08 P, ECLI:EU:C:2010:603.

<sup>12</sup> *Telefónica SA and Telefónica de España SAU v European Commission* Case C-295/12P, ECLI:EU:C:2014:2062.

was successful. Now the Damages Directive provides that limitation periods are suspended during the time the NCA acts and until the NCA's decision becomes final.<sup>13</sup>

Judge Vaňkátová reports on an ongoing price discrimination case against the railway incumbent. Of particular note is the careful manner in which the Regional Court in Brno explores the changing attitude of the ECJ to exclusionary abuses. As the learned judge indicates the national court observes a shift from per se classification of abusive conduct (e.g. the *Akzo* test) to a rule of reason approach exemplified in *Post Danmark I*.<sup>14</sup> What is remarkable is that the court appears to be prepared to require the application of the as efficient competitor test even when prices are above average variable cost, while it seems from the Court's case law that such prices are sufficient to indicate that an equally efficient competitor would likely be excluded.<sup>15</sup> However the Brno court's re-interpretation of *Akzo* fits nicely with the modern approach to abuse of dominance.

Judge Goehre presents a fascinating factual matrix where one would not have expected an argument about abuse of dominance. The plaintiff in this case claimed to be the owner of a domain name but wanted to have this confirmed by the agency in Germany that assigns domain names (DENIC). The latter holds a dominant position as it is the sole entity to manage the ".de" domains. DENIC refused to commence the procedure for establishing that the plaintiff is the owner of the domain name because it considered that the plaintiff had no right to insist upon it based on DENIC's internal rules of procedure. The plaintiff argued that this denial amounted to an abuse of dominance. The Frankfurt Court of Appeal found no abuse on the facts because DENIC's modest means meant that it was entitled to restrict access to its internal dispute resolution processes in a reasonable manner (i.e. when a third party brings good evidence that it and not the alleged owner is the one to whom the domain name belongs). The plaintiff's claim is best satisfied by litigation between the parties, which as the learned judge notes is ongoing.

## State Aid Law

Judge Oana brings up a fascinating state aid case: would-be beneficiaries of a state aid scheme wished to receive the compensation promised but it appeared that while the Commission had approved the scheme, the Member State in question (Romania) had not carried out necessary implementing measures to disburse the aid. The puzzle this case raises is whether, should the would-be beneficiaries establish a right to receive the compensation anyway (based on some sort of legitimate expectation) whether this compensation is to be treated as a form of state aid or whether it may be awarded without further notification to the Commission. This is a matter that awaits resolution and it looks like an ideal case study for cooperation between national courts and the Commission to explore a practical pathway to ensure that the rights of the claimants are protected effectively.

## Conclusion

There are a number of patterns that emerge from this selective overview of national competition cases. The European Commission will be pleased to observe the careful attention that national judges pay to the case law of the ECJ – reading this jurisprudence in a subtle and constructive manner. On the other hand, the cases also reveal the limitations of the preliminary reference procedure in competition cases. As many of the learned judges report in their comments, the final solution of many cases unavoidably hinge on a careful assessment of the facts. In other words the legal principles are generally well-

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<sup>13</sup> Article 10(4), Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

<sup>14</sup> *AKZO Chemie BV v Commission*, Case C-62/86, ECLI:EU:C:1991:286 and *Post Danmark A/S v Konkurrencerådet*, Case C-209/10, ECLI:EU:C:2012:172

<sup>15</sup> See *Akzo Chemie* (ibid) paragraph 72.

established and the issue is how far one can take very diverse factual settings and apply these principles in a cohesive manner: such a task is well-nigh impossible given the possibilities for reasonable disagreement even within a single jurisdiction as the Swedish Snus case reveals. The lesson is that we can achieve alignment in the application of the law by shaping a shared judicial culture, but it is unreasonable to expect any automatic convergence. What we can see from the case-law is judges eager to ensure markets are open and competitive, this should be sufficient reason to celebrate.

A second issue that comes up is that more work is needed to draft fining guidelines for matters that are atypical. We have seen for example that sometimes fines are set for breaches of EU and national competition law, or instances where the fine is imposed on the ringmaster who is not present commercially in the market where the cartel sets prices.<sup>16</sup> Moreover, *AKKA/LAA* in the Latvian court raises questions about the appropriate notion of turnover. These are matters best left to national competition agencies and the hope is that the European Competition Network can gather up further issues related to fining and help devise guidelines.

Finally, a good number of cases deal with overlapping legal fields. In some cases, like the *Nippon Air* case, the ability of the plaintiff to base their claim under the rubric of contract law was helpful in allowing the claim to continue as the tort-based claim was time-barred. In others, like *Aspen* or *Legend v DENIC*, we see that the antitrust rules apply alongside a regulatory framework which at times proves insufficient to protect competition, while at times, like in *Legend*, the framework helps explain why competition law is not applicable.

Looking back from the first edition of *ENTraNCE for Judges*, that we organized in 2011, what we can observe with this sample of competition cases is a much deeper engagement with competition law, a closer appreciation of the relevant economic, legal and policy principles that underpin the law, as well as a richer use of the case law of the ECJ. We hope that one day we will also see more judges to refer to national case-law from other jurisdictions.

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<sup>16</sup> *AC-Treuhand AG v European Commission*, Case C-194/14P, ECLI:EU:C:2015:717

## **Procedural Aspects of EU Competition Law**



Elita Gavriel, Administrative Court of Cyprus

**Pfizer Hellas – Cyprus Branch and Phadisco Ltd v. Commission for the Protection of Competition.**

**Recourses Nos. 5669/2013 and 5670/2013**

**Judgment delivered on 12.9.2016**

**Court: Administrative Court of Cyprus (First Instance Court)**

**The facts of the dispute**

In this case, which was filed before the First Instance Administrative Court of Cyprus, the Applicant companies were requesting from the Court the annulment of the decision of the Commission for the Protection of Competition of Cyprus (hereinafter “the Commission”), through which ) an administrative fine of €8.234,00 was imposed on the Applicant (Pfizer Hellas and on the Applicant (Phadisco Ltd) an administrative fine of €206.168,00 was imposed relating to an infringement of Article 6 (1)(d) of the Protection of Competition Law of 2008, N. 13(I)/2008 (hereinafter “national legislation”).

The case goes back to 2005, when the company, Akis Panayiotou & Son Ltd (hereinafter “the complainant”), submitted, on 7.10.2005, to the Commission a complaint against the company Wyeth Hellas.

The complaint was that Cyprus Branch (which was later merged with Applicant Pfizer Hellas) engaged in the unfair promotion of a specific vaccine against meningitis, named “Meningitec”.

It also submitted a supplementary complaint against the Applicant, Phadisco Ltd, which was the company that distributed Wyeth Hellas’ – Cyprus Branch products in Cyprus. While the complaint’s investigation procedure by the Commission was pending, the latter cut off the investigation and revoked the decisions it had issued up to that point, because the Supreme Court in another case ruled that the composition of the Commission was unlawful (CYTA v. Republic (2007) 3 CLR 560). Any decision already taken was therefore void. The result of this was that, with a new composition of the Commission, there was a reinvestigation of the submitted complaints from the beginning.

With its decision on 11.5.2009, the Commission found that there had been a violation of Article 6 (1) of the national legislation by the Applicants, Wyeth Hellas and Phadisco Ltd., and imposed an administrative fine on them.

Against the decision of the Commission on the imposition of the administrative fine, the Applicants (Wyeth Hellas and Phadisco Ltd.) filed recourses, with which the decision of the Commission for an administrative fine was annulled, because it was found again by the Supreme Court that the composition of the Commission had been wrongly constituted (EXXON MOBIL CYPRUS LTD v. Commission for the Protection of Competition).

The imposition of the administrative fines was revoked again, and with a new composition of the Commission, the Commission carried out a new investigation against the two companies and, after the hearing process, the Commission concluded that the Applicants had abused their dominant position that they had in the market for the vaccine against pneumococcus, in violation of Article 6 (1)(d) of the national legislation, because they were trying, in an unfair way, to penetrate the market for vaccines against meningococcus, and again imposed an administrative fine on them.

## The judicial proceedings

The Applicants claimed that the Commission did not have the power to impose the administrative fine, because the 5-year deadline for imposing such a fine had lapsed, according to Article 41(1)(b) of the national legislation (implementation of Regulation (EC) No. 1/2013).

The second claim of the Applicants, was about the fact that the Commission had not correctly defined the relevant market, since evidence regarding the market share that the state itself possesses in the field of pharmaceuticals was not taken into consideration, as well as evidence from other competitors in the relevant market.

The third claim of the Applicants, was that the revocation of the previous decisions of the Commission had not led to the “disappearance” of its decisions, resulting in a violation of the legal principle *ne bis in idem*, because they had already been under trial three times for the same offence.

The fourth claim of the Applicants, was about the violation of the right to a fair trial (Article 30(2) of the Constitution of Cyprus and Article 6(1) of the European Convention of Human Rights), because the Commission acts as an examiner, a prosecutor and as a judge. An additional claim was also made that, due to the revision and sole jurisdiction of the Administrative Court, based on Article 146 of the Constitution, which only exercises control of legality, and thus, on the grounds that the administrative fine in competition law is a criminal sanction and the process of imposing a fine is a quasi criminal case for the purposes of the European Convention, it is disputed that the jurisdiction of the Administrative Court is complete.

## Ruling of the Court

### Relevant market

The Court having as reference the recent decision of the Supreme Court (Photos Karseras Manhattan Properties and Developers and Investments Ltd., and Others., Appeal No. 24/2011, 18.7.2016) ruled that the definition of relevant market is a technical matter and does not fall under the control of the Administrative Court, except when there has been no proper enquiry, or when there is a lack of due reasoning, or if the decision has been reached on the basis of a misconception of fact or law, but neither reassesses facts (Article 41 (1) (b) national legislation).

The Court decided that, since the limitation period for as long as a case is pending before the Commission is not clearly defined by the national legislation, it applied *mutatis mutandis* Article 25(5) of Regulation (EC) No. 1/2003, which clearly states that the limitation that applies for the imposition of administrative fines is suspended for as long as the decision of the Commission is subject to proceedings pending before the Court (Limburgse Vinyl Maatschappij (LVM) and Others v. Commission, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, 15.10.2002). The Court, therefore, decided that the Commission correctly did not take into consideration, in the calculation of the limitation, the period of 2 years and 3 months that the litigation was pending before the Supreme Court, and decided that the fine from the Commission was within the 5-year deadline.

### *Ne bis idem*

The Court mentioned that the administrative fines that were imposed on the Applicants with the previous decision of the Commission, which was later revoked due to the incorrect composition of the Commission, were returned to them. Having as reference the principle of *ne bis in idem* in cases of competition and imposition of administrative sanctions on undertakings, the Court mentioned that a distinction is made by European Union Courts among the cases where the decision has been revoked for procedural reasons and those that were revoked due to lack of sufficient evidence.

It was held that, on this second occasion, the implementation of the principle *ne bis in idem* forbids the new substantive assessment of the reality of a violation that will have, as a consequence, the imposition of either a second, or a new, sanction. The Court decided that the principle of *ne bis in idem* is not applicable.

### **Fair trial and the nature of the sanctions imposed by the Commission.**

The Court decided that the Commission, as an administrative organ, functions within the limits of its jurisdiction in a similar manner to the corresponding operating framework of the European Commission, and it fulfills the criteria of independence and impartiality and its decisions can be examined within the recourse framework before the Administrative Court, thus evoking the decision of ECHR on Sigma Radio Television Ltd v. Cyprus, Appl. No. 32181/04 and 35122/05, 21.7.2011.

The Court also decided that the national law (Article 41), as well as the case-law of the Supreme Court, characterize the sanctions that are imposed by the Commission as “administrative fines”, and they are not part of criminal law, but are administrative fines that fall under its administrative jurisdiction..

### **Comment**

In Cyprus, the decisions of the Commission are enforceable administrative decisions and are examined by the Administrative Court, which has the authority to exercise control over the legality of the decision over the strict outer characteristics. The Court has no authority to substitute the decision of the Commission, based on Article 146 of the Constitution. The Court has the authority to annul the decision on a number of grounds, including if the decision has been reached on the basis of a misconception of fact or law, if there has been no proper enquiry, or if there is a lack of due reasoning, or on procedural grounds.

Recently, a final decision has been upheld by the Supreme Court (Jupiwind Ltd and Others v. the Governor of the Central Bank, dated 18.1.18) on the matter of the decision of ECHR on Sigma Radio Television Ltd v. Cyprus (dated 21.7.2011). In its judgment (Sigma Radio Television Ltd) the ECHR ruled that the jurisdiction of the Supreme Court, in its role as the Administrative Court, in the judicial review proceedings, was sufficient to comply with Article 6 of the Convention. In the above decision, ECHR reaffirmed that an administrative organ is not, *stricto sensu*, a Court, and therefore there is no violation of Article 30.2 of the Constitution and Article 6.1 of the European Convention, always bearing in mind that the operation of the administrative organ provides all means of impartiality and independence.

Based on the case-law of the Supreme Court of Cyprus, the administrative fine cannot be considered to be a “penalty” in the context of criminal liability, in order to require filing charges, the examination and cross-examination of witnesses, but it is imperative due to non-compliance with the administrative law.

However, based on the Engel criteria, on *Société Stenuit v. France*, ECHR, 27.2.1992, it was decided that the sanctions imposed by the Commission for the Protection of Competition, were of criminal liability, because it was taken into consideration that those fines were significant in size (5% of the company’s turnover) and had as their purpose the punishment of the accused undertaking, but also the prevention of a repetition of such behaviour in the future.

Ewa Stefanska, Court of Appeal of Warsaw

**Name of the parties:**

Plaintiff: Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie

Defendant: President of the Competition and Consumer Protection Office

**Name of the court:** The Court of Appeal in Warsaw

**Date of the judgment:** 17<sup>th</sup> September, 2015.

**Type of proceedings:** Review of the Decision of the National Competition Authority

**Reference:** VI ACa 1262/14

**Note on the case:**

1. In the decision issued on 25<sup>th</sup> October, 2007, the President of the Competition and Consumer Protection Office considered as an abuse of a dominant position, prohibited by Article 9 of the Act of 15<sup>th</sup> December, 2000, on competition and consumer protection, the abuse by Powszechny Zakład Ubezpieczeń na Życie S.A. of its dominant position in the domestic market for group employee insurance by: (A) the introduction and maintenance of „The General Conditions for Group Employee Insurance” that created difficulties in changing the insurer by the insurers (employers), as a result of: (1) introduction of the requirement for employees’ consent to terminate the group employee insurance, although the employees are not parties to the contract, (2) extension of insurance protection to the period after withdrawing from the insurance, and charging the employer with contributions for employees in the period of notice, (B) transferring to the employer the financial risk of terminating the group insurance for employees (the first point of the decision).
2. In the same decision, the President of the Competition and Consumer Protection Office considered an abuse of a dominant position, prohibited by Article 3 of Council Regulation (EC) No 1/2003 of 16<sup>th</sup> December, 2002, as well as by Article 9 of the Act of 15<sup>th</sup> December, 2000, on competition and consumer protection, the abuse by Powszechny Zakład Ubezpieczeń na Życie S.A. of a dominant position in the domestic market for group employee insurance, that affects trade between Member States, by: (A) introduction and maintenance ”The General Conditions for Group Employee Insurance” which created difficulties in changing the insurer by the insurers (employers), as the result of: (1) the introduction of the requirement for the employees’ consent to terminate the group employee insurance, although the employees are not parties to the contract, (2) the extension of insurance protection on the period after withdrawing from an insurance and charging the employer with contributions for their employees in the period of notice, (B) transferring to the employer the financial risk relating to the termination of the group insurance by employees (the second point of the decision).
3. The President of the Competition and Consumer Protection Office prohibited these practices and imposed on the entrepreneur a fine of about PLN50 millions (about €12 millions). Justifying the dimension of the imposed penalty, the President of the Competition and Consumer Protection Office clarified that: (1) the fine of about PLN33 millions was the penalty for a violation of the national law and concerned the duration of the practice before Poland’s accession to the EU, as well as the period after 1<sup>st</sup> May, 2004, (2) the fine of about PLN17 millions concerned the practice, after 1<sup>st</sup> May, 2004, (Poland’s accession to the EU) and until 2007, so the penalty was based on Article 102 TFEU.
4. The entrepreneur appealed the decision to the Competition and Consumer Protection Court, claiming that the authority had violated numerous provisions of procedural and material law. The Appeal was finally dismissed on the First Instance Court’s judgment, issued on 28<sup>th</sup> March, 2014,

(Case Reference: XVII AmA 131/13). The First Instance Court pointed out that, in their decision, the authority had correctly determined: the relevant market as the domestic market for group employee insurance, and the existence of the entrepreneur's dominant position on this market. It also clarified that the imposed fine was proportional to the violation of the law.

5. The entrepreneur appealed the judgment to the Second Instance Court, raising the same complaints as in the previous appeal. The entrepreneur's Appeal was dismissed on the judgment of the Court of Appeal in Warsaw, issued on 17<sup>th</sup> September, 2015, (Case Reference: VI ACa 1262/14). The Second Instance Court accepted the First Instance Court's assessment of the plaintiff's behaviour, which was enclosed in the contested judgment.
6. The entrepreneur appealed the judgment to the Supreme Court, which, in a decision of 26<sup>th</sup> September, 2017, made a reference to a preliminary ruling in a case involving a double fine for the same anti-competitive conduct: first fine - for the violation of Polish competition law, and the second fine - for the violation of Article 102 TFEU. The Court asked whether the identity of the interest protected can be considered a separate condition in the context of *ne bis in idem* analysis, and whether the national competition law, where applied in parallel with Article 101-102 TFEU, can be said to protect different legal interests (Case Reference: III SK 9/16).
7. Questions referred to in Case C-617/17 are:

1) Can Article 50 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the application of the *ne bis in idem* principle presupposes not only that the offender and the facts are the same, but also that the legal interest protected is the same?

2) Is Article 3 of Council Regulation (EC) No 1/2003 of 16<sup>th</sup> December, 2002, on the implementation of the rules on competition that are laid down in Articles 81 and 82 of the Treaty, (1) in conjunction with Article 50 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that the rules of EU competition law and of national competition law, which are applied in parallel by the competition authority of a Member State, protect the same legal interest?

### **Conclusion:**

The Supreme Court doubted if the authority's imposition of a fine of about PLN17 millions, based on Article 102 TFEU, had not imposed the second (additional) penalty for the same behaviour by the entrepreneur. It noticed that, in competition case law, the ECJ assumes that the *ne bis in idem* principle is based on three conditions: (1) the same factual circumstances, (2) the same infringer, and (3) the same protected legal interest (Toshiba Corporation, Case C-17/10, 14<sup>th</sup> February, 2012, EU C 2012, 72 p. 97). Meanwhile, in case law, the ECHR takes into account only the first two conditions, so when referring to the infringement of that principle (regulated in Article 4 of Protocol 7) it is not necessary to indicate the legal interest that is being protected. In the opinion of the Supreme Court, in the analyzed case, the identity of the subject and the factual circumstances had occurred. So it asked the question: if it is acceptable to make use of Article 50 of the Charter of Fundamental Rights of the European Union (regulating the *ne bis in idem* principle), depending not only on the identity of the subject and the factual circumstances, but also on the identity of the protected legal interest? If the answer is affirmative, then the question that follows is: does parallel application of national and EC competition law protect the same legal interest?

Marc Bosmans, Brussels Court of Appeal

**“The Tripel Karmeliet case” - Market Court (Belgium) June 28th, 2017, verdict.**

1. ANHEUSER-BUSH INBEV (“AB InBev”) <sup>17</sup> announced in September, 2016, that it would acquire a smaller brewer, BREWERY BOSTEELS <sup>18</sup>. Since the target’s turnover was below the country’s merger notification thresholds, there was no spontaneous examination by the competition authority.

HEINEKEN’s subsidiary -- BREWERY ALKEN-MAES <sup>19</sup> – which was the only other bidder for BOSTEELS in the run-up to the acquisition – on September 22, 2016, introduced a complaint against AB INBEV at the Auditor General of the Belgian Competition Authority (BCA), arguing that the takeover constituted an abuse of dominance because it reinforced AB INBEV’s position and removed far smaller rivals’ ability to compete.

The brewer, ALKEN-MAES, also requested interim measures to prohibit AB INBEV from making any significant changes to BOSTEELS pending an investigation, which the ABC rejected in November, 2016.

The purpose was to suspend the acquisition of BOSTEELS by AB INBEV.

2. According to the WER (CEL)<sup>20</sup>, the BCA can adopt interim measures if it finds a *prima facie* infringement of Articles 101 and 102 TFEU and/or their national equivalents, and if it is necessary to urgently avoid a situation that can lead to serious, immediate, and almost irreparable, damage to the undertakings affected, or in the general economic interest. There also needs to be a direct link between the practices and the harm, and between the harm and the interim measures.

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<sup>17</sup> AB InBev was formed following the acquisition of the American brewer, Anheuser-Busch, by the Belgian-Brazilian brewer InBev, which is a merger of AmBev and Interbrew.

Interbrew was formed in 1987 from a merger of the two largest breweries in Belgium: Artois and Piedboeuf. The Artois brewery, previously known as Den Hoorn, was established in 1366. In 1995, Interbrew expanded by acquiring the Labatt Brewing Company (founded 1847), the largest brewer in Canada. In 2002, it acquired Beck's (founded 1873), the maker of the world's top selling German beer.

AmBev was created in 1999 with the merger of the two biggest Brazilian brewers, Antarctica (founded in 1880) and Brahma (founded in 1886).

Anheuser-Busch was established in 1852 in St. Louis, Missouri, as Anheuser & Co

In 2004, Interbrew and AmBev merged, creating the world's largest brewer, InBev. The deal was valued at \$11.5 billion and combined the 3rd largest (Interbrew) and 5th largest (Ambev) brewers to form the world's No.1 beermaker. The deal consolidated the top brands from Belgium, Canada, Germany and Brazil.

<sup>18</sup> Bosteels Brewery stands in the small village of Buggenhout. The brewery has been in the hands of the Bosteels family for over 200 years and seven generations. Their forefather, Evarist Bosteels, established the brewery in 1791.

<sup>19</sup> “NV BROUWERIJEN ALKEN-MAES” is the second brewer on the Belgian beer market, against ANHEUSER-BUSCH INBEV, the number one player, and (according to the provisional decision) the dominant player.

<sup>20</sup> WER = the Belgian *Code of Economic Law*. Entered into force on December 12th, 2013. The idea of modernising Belgian Economic Law began in 2006, after a so-called “round table meeting” that was organised by the FPS Economy, where both academics (economists as well as legal experts) and social partners were present. The modernisation movement gained momentum with the idea of codifying all existing economic law into one national Code of Economic Law, rather than having a dispersed set of rules, spread over numerous laws and royal decrees.

In its 18 Books, the new Economic Code now bundles a substantial number of the provisions of Belgian Economic Law into one document. At the same time, the Belgian Parliament has taken the opportunity to make some legislative amendments.

3. The BOSTEELS brewery holds a number of important connoisseur beers ('degustation beers') in its portfolio – chiefly the 'Karmeliet' brand<sup>21</sup>.

On September 23, 2016, ALKEN-MAES, on the basis of article 64 § 1 WER (CEL), introduced a request for provisional measures to the BMA. The object of the request was described as follows:

"The object of the request is the suspension of the effects of the acquisition of Brewery Bosteels by AB INBEV by analogy with article IV. 10, § 5 WER and this until the time that the College will have rendered a judgment on the basis of article IV.2 WER and Article 102 TFEU".<sup>1</sup>

ALKEN-MAES asked, more particularly, for, among others, the following measures:

- Replacement on the Board of Directors of the AB INBEV's proposal on the recommendation or designated administrator, as well as every other administrator who, after the closure of the transaction is appointed and the abstinence of the designation of any new administrator (unless an objectively justified reason exists, such as in the event of the death or disease);
- Ban for AB INBEV, employees of AB INBEV and persons with AB INBEV with any management or consultancy contract or any involvement in the formatting or execution of strategic or marketing plans and any aspect of the operational management or operation by Brewery Bosteels;
- Prohibition of any contact between employees of AB INBEV and employees of Brewery Bosteels, other than the contact that competition law allows between employees of competing undertakings;
- Ban on AB INBEV for one or more brands of Brewery Bosteels through the on-trade and off-trade channel, along with the proprietary marks of AB INBEV;
- Ban on AB INBEV, in publicity, public communications or presentations, to refer to the fact that Brewery Bosteels is part of the AB INBEV group."

On 21st November, 2016, the Competition College of the Belgian Competition Authority ("BCA")<sup>22</sup> rejected the ALKEN-MAES request in the following terms:

"The Competition College decided that the request for provisional measures of Alken-Maes against AB INBEV (based on Article IV. 64, § 1 WER) is admissible but unfounded."

AB INBEV's takeover of BOSTEELS was not subject to prior notification to, and approval by, the BCA, since BOSTEELS is a small independent brewery with a turnover, in Belgium, well below the pertinent notification threshold of €40 million.

ALKEN-MAES still requested the suspension of the acquisition and argued before the BCA that, even if this acquisition was not caught by merger control rules, it had to be reviewed under Article IV.2 of the CEL and Article 102 of the TFEU, which both prohibit the *abuse of a dominant position*.

ALKEN-MAES contended that the acquisition constituted an abuse of AB INBEV's dominant position as it would enable AB INBEV to acquire the brand "*Triple Karmeliet*", thus significantly strengthening its dominant position.

4. The BCA held that an acquisition that is not subject to merger control can only be assessed, *prima facie*, under the rules prohibiting the abuse of a dominant position if there are possible restrictions on competition that can be distinguished from the mere effect of the concentration and might by themselves be qualified, *prima facie*, as an abuse of a dominant position.

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<sup>21</sup> The famous special degustation beers produced by BOSTEELS are "Kwak", "Tripel Karmeliet" and "DeuS".

<sup>22</sup> The Belgian competition authority (BCA) is an independent administrative authority that contributes to defining and applying competition policy in Belgium. Concretely, the BCA prosecutes anti-competitive practices, such as cartels and abuses of dominant position, and it oversees the main mergers and acquisitions. The BCA works together with the competition authorities of the Member States and the European Commission within the European competition network (ECN).

<https://www.bma-abc.be/sites/default/files/content/download/files/2016vm36.pdf>

The BCA held that the request for provisional measures was admissible, yet unfounded. Referring to the Court of Justice's Continental Can judgment, the BCA acknowledged that mergers can, in principle, give rise to an abuse of a dominant position.

It stressed that the review of such operations is primarily governed by the merger control regime (with its clear timetables), but warned of the possible harmful effects of imposing provisional measures in such a context. In the light of this, the BCA held that there should be 'strong indications' when reaching a conclusion that an acquisition could amount to an abuse of a dominant position, and that this presupposes specific adverse competition consequences other than the merger effect itself.

Upon closer scrutiny, the BCA found no such *prima facie* indications. While recognizing the dominant position of AB INBEV on the Belgian on-trade and off-trade beer markets, it noted that the acquisition results in only a very limited increase in AB INBEV's market share, and only a limited increase in the segment for connoisseur beers.

The BCA further examined the arguments of ALKEN-MAES that the acquisition would, nonetheless, amount to an abuse of a dominant position, since it would (i) make AB INBEV the only brewer with a complete portfolio of significant brands, (ii) prevent competitors from strengthening their position in the connoisseur beer segment, (iii) rob competitors of an 'infiltration' weapon, (iv) reinforce the negotiating position of AB INBEV, and (v) result in an increased dependence of (small) brewers in the connoisseur segment on AB INBEV.

On the basis of an analysis of various facts, the BCA dismissed each of ALKEN-MAES's arguments. In the end, the BCA concluded that there was insufficient evidence of a *prima facie* breach, or of serious and irreparable harm.

At the same time, the BCA warned that if AB INBEV were to prevent the sale of competing connoisseur beers by catering businesses that were linked to AB INBEV, such conduct could, at a later stage, be tested against Articles 101 and 102 TFEU, also having regard to the binding commitments entered into by AB INBEV *vis-à-vis* the European Commission.

The BCA found that ALKEN-MAES had not sufficiently proven that the concentration restricted competition in a way that was distinguishable from the mere effect of the concentration, and there was no behaviour which could, as such, be considered, *prima facie*, as an abuse of AB INBEV's dominant position thus requiring the adoption of interim measures.

In fact, the BCA confirms that the acquisition by a dominant player of a small competitor is not automatically an *abuse* of a dominant position.

5. The case on the merits pursuant to the complaint of ALKEN-MAES demanding the annulment of the takeover remains pending, although it was introduced on September 22nd, 2016.

It is not known whether the BCA will ever proceed to an effective prosecution against AB INBEV.

However, several years after the effective takeover, a decision by the BCA - that can be appealed before the Market Court - wouldn't be very effective economically.

The takeover has been realised in the meantime, and the economic consequences for ALKEN-MAES, the point that the beers produced by BOSTEELS, and especially the degustation beer "*Tripel Karmeliet*", are part of the spectrum of products offered exclusively in the packages of AB INBEV's products, and this has had economic effects...

6. The Belgian Market Court was established by the Law of December 25th, 2016, and it effected various changes to Belgium's judicial system (the "Law Pot-Pourri IV").



The Market Court can hear cases in relation to specific regulated markets which previously fell under the jurisdiction of the Brussels Court of Appeal<sup>23</sup>.

A sitting of the Market Court always consists of three judges, for two reasons: the Market Court decides, both in the First and Last Instance, and the cases are often very technical and usually have a multiple character. The Market Court provides a one-degree jurisdictional control on economic administrative decisions at the Last Instance.

The sitting can (partly) be composed of Judges who are appointed on the basis of their professional experience, which must be at least 15 years of useful professional experience and specialized knowledge of economic, financial or market law.

All of the Judges who sit in the Market Court must be at least functionally bilingual.

7. ALKEN-MAES introduced an Appeal before the Market Court, by request, of December 27th, 2017<sup>24</sup>.

The case was introduced, and the hearings were held on May 31st, 2017.

By a verdict on June 28th, 2017, the Belgian Market Court confirmed the decision of the Belgian Competition Authority (BCA), which had rejected the interim measures that ALKEN-MAES requested against the acquisition of BOSTEELS Brewery by AB INBEV.

According to the CEL (Article IV. 79, § 2), the Appeal does not suspend the contested decision. However, at the request of the person concerned, and if it is necessary to do justice to that person, the Market Court may suspend, in whole or in part, the implementation of the decision of the College of the Competition Authority until the day of the delivery of the verdict.

*The suspension of enforcement may only be ordered when severe means that are developed to justify the annulment of the appealed decision are provided, and on condition that the immediate enforcement of the decision can have serious consequences for the person concerned.*

8. The advocate pleading for ALKEN-MAES, argued that the BCA should have decided that the merger could amount to a *prima facie* abuse of dominance in the country's "on-trade" beer market, which is comprised of sales to restaurants and bars.

ALKEN-MAES claimed that the judges should use their *unlimited jurisdiction* and adopt the interim measures in their judgment.

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<sup>23</sup> These are appeals against decisions of the Belgian Competition Authority (Belgische Mededingingsautoriteit/Autorité belge de la Concurrence), the Financial Services and Markets Authority (Autoriteit voor Financiële Diensten en Markten/Autorité des services et marchés financiers), the Belgian Institute for Postal Services and Telecommunications (Belgisch Instituut voor Postdiensten en Telecommunicatie/Institut belge des Services Postaux et des Télécommunications), and the Commission for the Regulation of Electricity and Gas (Commissie voor de Regulering van de Elektriciteit en het Gas/Commission de Régulation de l'Électricité et du Gaz). The internal rules of the Brussels Court of Appeal (the "Rules") have been updated in order to reflect the creation of the Market Court. The Rules provide that the Market Court will be constituted of two chambers within the Brussels Court of Appeal: Chamber 19A and Chamber 19B. Only Chamber 19A is in charge, Chamber 19B will only be handling cases for which Chamber 19A is unable to sit (such as cases in which Chamber 19A adopted a verdict which was later annulled by the Belgian Supreme Court, and which must therefore be referred back to the Market Court). The Belgian Supreme Court, which is called the "Court of Cassation", can only confirm the judgment, or annul them ("cassation", from the French "casser", to break). It cannot examine the case and make a new judgment. The Court can annul the entire judgment, or just part of it. If the court annuls a judgment, the case is remitted to a court at the same level as the one which judgment was overturned. Courts of cassation do not re-examine the facts of a case, they only interpret the relevant law.

<sup>24</sup> The case is 2016/MR/2 before the Market Court (Brussels – Belgium).

There was a huge discussion on the economic bases. ALKEN-MAES argued that the on-trade beer market should be divided into six “segments”, including one for specialist quality beer. The BOSTEELS’ brand *Tripel Karmeliet* can be placed in this segment, and it is a “must have” for any beer firm that supplies bars and restaurants.

ALKEN-MAES argued that it is not manifestly unreasonable that AB INBEV’s acquisition may lead to an abuse, since the firm has had no presence in the specialist beer segment prior to the takeover, despite its 50% to 60% market share in the overall market.

A presentation from AB INBEV found that *Tripel Karmeliet* was a threat to its *Leffe* brand, so one reason for the acquisition was to remove that competitive pressure, adding that AB INBEV would also be able to “infiltrate” ALKEN-MAES’ network of bars, thanks to the ‘must have’ character of the *Karmeliet* brand, which is especially requested by café owners.

ALKEN-MAES also argued that if it were decided that the deal were not an abuse, an already dominant company would be able to buy for itself up to 70% of the market share without facing merger control, and this was due to the existence of many small breweries.

The advocate pleading for AB INBEV, countered these arguments, reasoning that the reason for the deal was BOSTEELS’ “export potential”, rather than the national market. ALKEN-MAES’ theory only hinged on the notion of segmentation in the market, while the defined relevant market was the one for “on-trade” beer.

ALKEN-MAES contradicted itself by arguing that AB INBEV’s *Leffe* brand was not in the specialist beer segment, claiming that one reason for the deal was to remove competitive pressure from the *Karmeliet* brand.

It would not be possible for AB INBEV to foreclose any other brewers from its distribution channels as it is still subject to being bound to the European Commission’s commitments.

9. In its judgment, the Court first noted that the parties’ submissions did not contain a listing of their pleas in law for Appeal, but that it would still issue a judgment based on the arguments raised.

During the hearing, the BCA and AB INBEV argued that the Court had no power to exercise its full jurisdiction over the issue, and it was therefore only able to annul the decision, not to modify it, since it concerned a merger.

However, the Court dismissed this claim, holding that the case concerned a potential abuse of dominance, over which it has full jurisdiction.

10. On the substance, the Court held that there was no dispute that AB INBEV was dominant in the relevant national market for the supply of beer to restaurants and cafes (on-trade).

The Court held that a concentration could constitute an abuse of dominance, but not “*by itself*” and without “*accompanying yet determining behaviour*”.

The activity flagged to the authority needs to be *prima facie* abusive, the Court held. The fact that behaviour could “*possibly*” be an abuse is insufficient to grant interim measures.

The Market Court found that the BCA had rightly concluded that the mere fact that a concentration arose, and the fact that it was likely to have consequences, was insufficient to find an abuse of dominance.

ALKEN-MAES did not make a plausible case that the takeover would lead to AB INBEV strengthening its position in such a way that it restricts competition, to the extent that it leaves other companies' activities dependent on the dominant firm.

11. The complainant had also asked the Court to put preliminary questions to the Court of Cassation or the European Court of Justice, but the Market Court rejected the request, since it found that the proposed questions did not relate to an *interpretation* of the Code of Economic Law, but only to its *application*.

12. In summary, the Market Court confirmed the reasoning of the BCA. The Court held that an acquisition that creates a concentration which falls outside the scope of the merger control rules does not "*as such*" amount to an abuse of a dominant position from which was absent "*accompanying but decisive conduct*".

The Court went on to say that such conduct must qualify as a *prima facie* abuse of a dominant position, rather than "*being capable of being abusive*". Additionally, the alleged abuse must be distinguishable from the actual effect of the concentration.

In response to the objections raised by ALKEN-MAES, the Court specified that the reasoning of the BCA is not a "*test*" which is more stringent than the test habitually used for determining an infringement of Article IV.2 of the CEL and Article 102 TFEU.

Lastly, the Court made it clear that the BCA had some space for manoeuvre, in that it is allowed to make policy choices that fall outside the scrutiny of the Court.

13. A few paragraphs of the motivation of the Market Court:

"The fact that an undertaking is in a dominant position on the market is not in itself illegal. A violation of Article 102 TFEU requires the abuse of the dominant position, and that this abuse is felt on the internal market or in a substantial part thereof."

"The merger regulation is not applicable to this matter on the grounds that the threshold is not exceeded. For the same reason is also the internal rules governing concentrations are also not applicable. This is not contested by ALKEN-MAES".

"The Court has not to decide in the place of the BCA, the Court can only control if – when taking the contested decision by the Competition Board of the BCA - a legal rule was violated, or whether the Competition college of the BCA made an apparently evaluation, so, for example, to the extent that the motives led are not of a nature to fund the decision, as it was taken, and to rightly justify it".

"As the merger regulation and Chapter 2 of Title I of Book IV Code of Economic Law are inappropriate (for the reason that the threshold is not reached) to test the abuse of a dominant position as a criterion, the BCA (which has possibly changed or modified its policy, which is not prevented by any rule) didn't violate the legal rules and didn't commit any manifest error of assessment."

"The case-law indicates a generic (and very large) definition of 'abuse', being "an objective understanding, including the behaviour of an undertaking in a dominant position, which can influence the structure of the market where, precisely by the presence of the said undertaking, competition has already been granted, and that result in the maintenance, or the development, of the still existing market competition by means other than on the basis of performance-based entrepreneurs normal competition – with goods or services – is countered "

"The justification used by the Competition Board of the BCA is conclusive – and contains no manifest error of assessment – and permits the BCA to decide that there are no *prima facie* grounds for suspending restrictive practices, which are the object of the examination."

“With regard to the application of Article IV.2 CEL, in conjunction with Article 102 TFEU, the Court decides that ALKEN-MAES does not adequately establish that AB INBEV abused its dominant position. The motives used in the contested decision can motivate the conclusion of the decision. The Court notes that ALKEN-MAES does not adequately establish that the contested takeover would lead to strengthening the dominant position of AB INBEV to such a degree of dominance that only enterprises depending on their behaviour on the dominant enterprise, can survive.”

14. In the Belgian doctrine, the verdict was commented upon (see: *Competitio* 2018, Volume 13/1, 80-85, with note by Jan Blockx – *ibidem* 85-89).

The criticism comes primarily down to the fact that the Market Court, in the name of legal certainty, creates a safe haven for acquisitions under the threshold.

In fact, the critiques concern the question as to whether the Market Court shall play any economic political role or not.

In the actual opinion of the Market Court, the Court has jurisdictional control on the respect of the law by the administrative authorities, which means that the Market Court will try – as far as possible – not to interfere in any way in the economic decision making of the administrative authority. The authority takes the responsibility for the decision making, and that same administrative authority (here, the BCA) decides whether a behaviour is an abuse or not. As far as the laws and interpretations of it are respected by the administrative authority, then the Market Court respects that decision.

## **Cartels and the Scope of Application of EU Competition Law**

Arco Rop, Amsterdam Commercial Court

**Ruling of the Dutch Administrative High Court for Trade and Industry of 3 July, 2017, (ECLI:NL:CBB:2017:204) in a case between 61 natural and legal persons and the Dutch Market and Consumers' Authority (ACM).**

**Facts**

When the owner of the structure of a property fails to pay the mortgage, the bank has the right to auction the property and to recover its loan from the proceeds of the auction. ACM started an investigation after receiving signals from the tax authorities that there was a ring of bid-riggers who were active in property auctions.

These auctions take place in two phases. In the first phase, bidding is aimed at setting a minimum price for the property. The price interval between the bids are equal in this phase of the auction. Once the minimum price of the property is set, the second phase starts. The auctioneer will call out a price higher than the minimum price set in the first phase and will slowly decrease that price until one of the traders calls 'mine' (the so called 'mining' of the property). The property is, in principle, sold for the price that was called 'mine'. That price can never be lower than the minimum price that was set in the first phase. When there is no one interested in the property in the second phase of the auction, the property is sold for the minimum price that was set in the first phase. Since the price of the property is determined in the second phase of the auction, bidders do not have any stimulus to bid in the first phase. They are therefore stimulated to bid in the first phase of the auction by a premium of 1% of the price that is set in this phase of the auction. This premium is paid, or deducted, from the sale price of the property. The bank can join the bidding process in the first phase of the auction in order to drive up the price, but also has a veto after the second phase when it believes that the price is too low. After the auction, the traders can declare that a bid in the first or second phase was made on behalf of one or more others.

During their investigation the ACM found that there was a practice in which the traders in the auction declared after the first phase that they were joining the trader who had 'won' the first phase. By doing so, they could obtain a share of the bidding premium in the first phase. If there was no interest in the property in the next phase, the 'group' would obtain the property and then sell it within the group. Traders that often took part in these kinds of agreements were also persuading other participants in the auction, the so called 'outsiders', to join in. This could be interesting for the outsiders, as they would obtain a share of the premium. On the other hand, they were expected to let the group join in at the next auction when this trader was winning the first phase. These kinds of practices took place at more than 2.000 auctions in the period from 13th June, 2000, until 15th December, 2009. From this ring of traders there was an *ad-hoc* group present at almost every single auction who would try to share the premium. If a member of the group were to 'mine' a property in the second phase of the auction, he was expected to let the other members of the group join in his bid. After the official auction, a second informal auction was held within the group. The difference between the price in the official auction and the price in the informal auction was split between the members of the group.

ACM found that the bidding strategy of the group that would take part in an auction was largely dependent on the number of outsiders at the auction. If there were no outsiders, the group would agree on the 'mine' price before the second phase of the auction started. If there were only a few outsiders, the group could take the risk to 'mine' the property as late as possible, in order to obtain it for as low a price as possible. In the informal auction, the group could share the profit. If the property was obtained by an outsider, the group would only share the premium. If there were a lot of outsiders interested in the property, the price would be formed in a competitive process. In that case, the group wouldn't hold an

informal auction afterwards, and thus would only share the premium. If a member of the group wasn't 'playing by the rules' in the first phase, s/he would be disciplined by not letting him share in the premium, or by not letting him take part in the informal auction. The way this practice took place was largely based on trust between the traders: if a trader were to let others join in on his bid, and by doing so would let them share in his premium, he expected that the members of the group would return this favour by letting him join in on a bid at another auction. Furthermore, the group had a great interest in the participation of as many outsiders as possible, since that would increase their profit in the informal auction afterwards.

ACM was of the opinion that this collusive practice constituted a single continuous infringement. ACM found evidence that the group had a sort of credit system wherein amounts to be paid and amounts to be received were booked and netted over time. The group used pre-printed documents on which the participants would fill in their names, addresses and banking information, on which the traders who were taking part in the bidding for a particular property were noted. ACM stated that all this was aimed at a common goal: excluding risks and setting the price as low as possible. This was anti-competitive behaviour from a group that was big enough to restrain competition in a significant way, according to ACM. ACM decided to fine all of the natural and legal persons that took part in the bidding ring. The fines ranged from €8,000- to €383,000.

## **Proceedings**

The First Instance District Court of Rotterdam ruled that ACM had proven the facts that lead to the conclusion that there was a single continuous infringement. There was sufficient evidence that the traders were connected to the informal auctions afterwards, which clearly had an anti-competitive goal. The actions brought before the District Court were largely dismissed. The District Court reduced the fines by 10%, because the traders faced considerable damages as banks refused to do business with them anymore. Furthermore, parts of the fines were reduced because the proceedings, in total, were too lengthy and thus infringed on Article 6 ECHR.

All the fined traders appealed against the First Instance Court's decision. In the Appeal proceedings, the debate focused on the question as to whether there was enough evidence to prove a single continuous infringement. The Appeals Court (CBb) starts by setting out the framework for the assessment of evidence in cartel cases in general. It quotes several judgments of the Court of Justice of the European Union, *inter alia* the Siemens, Sumitomo Metal Industries and Nippon Steel/Commission judgments. Having done that, the CBb continues by stressing that a great part of the alleged infringement of the traders, namely, that traders would join a certain bid in the first phase of the auction to be able to join in the premium (so called premium hunters), was a common, long-lasting and widely known practice among traders at a property auction. However, this practice has an anti-competitive nature. Traders are not really competing in the first phase of the auction, in order to keep the price as low as possible. However, that collusion in the first phase of the auction does not necessarily lead to collusion in the second phase of the auction when the selling price of the property is set.

The CBb judges that, in cases where there is an informal post-auction within the colluding group of traders, the goal of the traders must have been to keep the selling price of the property as low as possible. However, only in 215 of a total 2.328 auctions had the ACM found evidence that there was an informal auction held after the official auction. ACM had based the fines on all 2.328 auctions, and its opinion that there was a single continuous infringement was also based at the total sum of auctions investigated. The CBb rules that, since only 215 auctions were really 'infected', the conclusion of the ACM fails due to lack of evidence. The CBb continues by considering that the 215 infected auctions may also constitute a single continuous infringement, but that requires further analysis that falls outside the scope of the evidence adduced by ACM. As a result of this 'fundamental' lack of evidence, the First Instance judgments are quashed, and the fines annulled.

## Comment

The concept of the single continuous infringement (SCI) had already been applied by the European Commission as early as 1984 (Case IV/31.149 *Polypropylene*). The Dutch competition authority was, apparently, quite reluctant to apply it, because it was only in 2012 that ACM, for the first time, based a fine on the concept of SCI. Subsequently, it was applied more often and in a number of cases. In all those cases, the First Instance Court and the Appeals Court upheld the decision of ACM. So, this property auction case was the first wherein the Appeals Court had annulled the decision of ACM, which was based on SCI, and by doing so it also quashed the decision of the First Instance Court. That fact alone already makes this decision noteworthy.

In my opinion, the key to understanding the judgment of the CBb is the distinction that is made between the collusion in the first phase, and collusion in the second phase, of the property auction. Only in those cases could collusion in the second phase of the auction be proved, and the CBb accepted that the traders operated for a common goal, namely, to keep the selling price of the property as low as possible. It is important to note that the selling price was ultimately set in the second phase of the auction, although the first phase-price might have a great influence on that price. In theory, however, it could also be possible that collusion in the first phase was followed by free competition for the property in the second phase. In those cases, the selling price of the property was formed under normal competitive conditions. Collusion in the second phase of the auction was only sufficiently proved when an informal post-auction was held. Since only 215 of those secretly held auctions could be proven by ACM, the evidence was ruled to be insufficient for the application of SCI.

After reading the judgment of the Appeals Court it is (as in most other cases) easy to say that the ruling of the First Instance Court was evidently wrong. However, since I work for the First Instance Court (but was not sitting in the chamber that ruled over the case) I feel obliged to say something in defence of the decision that was given by my Court. It was decisive for the First Instance Court that every single trader who was fined was taking part in at least one of the 215 secretly held auctions. This fact is not mentioned in the ruling of the CBb but, in my opinion, sheds a different light on the case. When every colluding member of the group took part in the collusion and was aware of the fact that this practice was also taking place in other auctions, it could be said that the group, as a whole, had the common goal of keeping prices as low as possible. It could be argued that the fact that there were also auctions that were not ‘infected’, does not mean that there was not enough evidence to prove an SCI. The CBb, however, ruled otherwise, and that ruling could be said to fit into the recent case law of the CJEU, which is more precise in the scrutiny of SCI-evidence.<sup>25</sup>

Maybe it is a coincidence, but in a recent judgment of the First Instance Court (judgment of 12th April, 2018, ECLI:NL:RBROT:2018:2787) that court, for the first time, has also annulled fines because the ACM-alleged SCI was not sufficiently proven. So, maybe the judgment of the CBb has acted as a wake-up call for the First Instance Court to give closer scrutiny of the evidence adduced by ACM for the existence of an SCI.

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<sup>25</sup> P. Alexiadis, D.G. Swanson, A. Guerrero, “Raising the EU evidentiary bar for the “single and continuous infringement” doctrine”, *Concurrences* N° 4-2016.



Eric Mille, Brussels Court of Appeal

**Holcim (a Belgian cement company), CCB (a Belgian cement company), CBR (a Belgian cement company), FeBelCem (Belgian Federation of the Cement Industry), CRIC (National Scientific and Technical Research Centre for the Cement Industry) vs. Belgian Competition Authority, ORCEM (a Dutch slag production company)**

**Appeal against a Decision of the Belgian competition authority dated 30th August 2013, in a case opposing ORCEM (a Dutch cement company) to the above parties.**

**Ruling of the Brussels Court of Appeal on 30<sup>th</sup> June 2016.**

### **Summary of the Facts of the Dispute**

Until 2004, ready-to-use concrete sold in Belgium was essentially comprised of so-called CEM III cement (15%), granules (85%) and water. CEM III is comprised of a major proportion of so-called clinker, and a minor proportion of so-called slag (font production by-product).

According to a European standard, EN 197-1, cements are classified into 5 categories CEM I to CEM V, according to the proportion of slag in them. CEM I is substantially pure clinker (so-called Portland Cement), whereas CEM III incorporates the largest proportion of slag (35-95%).

In March 2000, ORCEM, a Dutch company specialised in the production of LMA (ground slag) for concrete, decided to start selling LMA in Belgium. Indeed, ready-to use concrete can, alternatively to the formulation usually sold in this country, be obtained by replacing a certain proportion of CEM III with a mixture of CEM I and LMA.

At that time, neither the Belgian nor the European Standard regarding the use of LMA in the manufacturing of ready-to-use concrete had been issued. In May 2000, a new European Standard, EN 206-1, was adopted. This deals with concrete compositions, but it does not refer to LMA as a possible component. This standard entered into force in June 2004. In Belgium, it was implemented in a National Standard, NBN EN 2006-1, in February 2001, and a second Standard, called the NAD (National Application Document) was elaborated in order to specify in which proportions LMA can be used in concrete. After discussions and a public enquiry, this NAD was finally adopted in August 2004. The authorities deciding on the Belgian Standards are the so-called Concrete Commission, and the NBN EN 206-1 Working Group, on which representatives of HOLCIM, CBR and FeBelCem sit.

In the meantime, in order to promote the use of LMA in concrete manufacturing, ORCEM requested a certified technical agreement (a so-called ATG, which acknowledges the conformity of a product to certain technical specifications), from the so-called UBAtc, a semi-public organization depending on the Ministry of the Economy, which is in charge of delivering technical agreements to construction materials, products and systems, and which, notably, incorporates CRIC. Such an agreement provides a favourable opinion on the use of new products for which no standardization yet exists.

To receive this agreement, a technical report describing the candidate product must be filed by the claimant, a guiding manual (a so-called AT Guide) must be drafted, it must receive the favourable opinion of a specialized entity of the UBAtc (the so-called GS binders, on which representatives of the cement industry sit), and must be approved by the Executive Committee of this authority (the so-called GE binders, which is not comprised of representatives of the cement industry), and a certification process confirming that the actual product complies with the guiding manual must also be completed.

Accordingly, ORCEM filed the required technical report for its LMA in May 2001 and elaborated a project for the guidance manual with the assistance of an officer of CRIC. This project was examined

by the above specialized entity, the latter being comprised of representatives of several Belgian cement companies (CBR, HOLCIM, CCB) and of FeBelCem. FeBelCem objected to the project and it was rejected in November 2001. A revised project was filed, and it was finally adopted in May 2002. However, ORCEM'S LMA product DID not comply with the requirement of this guidance manual and is therefore not certified. Nevertheless, from September 2002, provisional certified technical agreements (valid for a couple of months) were granted to ORCEM. In view of the obtainment of a definitive agreement (valid for 3 years), ORCEM filed an amended guidance manual project in March 2003, which was examined during the Summer of 2003, but this was again objected to by FeBelCem, so this version was suspended in October 2003. In February 2004, the said version was, however, approved, together with a project of agreement, but for 13 different concrete compositions incorporating LMA instead of the 42 requested by ORCEM. A further version of the guidance manual was then adopted in July 2004, and a definitive agreement was finally delivered to ORCEM in September 2004, for 45 concrete compositions incorporating LMA. The agreement process thus took, in total, about three and a half years, which is unusually long.

In parallel, in December, 2002, The BENOR marking<sup>26</sup> committee (on which a representative of FeBelCem sits) requested that CRIC file, with the concrete certification authority (so-called CDBD, on which representatives of CCB, CBR and HOLCIM sit), a project of memorandum revising the concrete certification rules, in order that CRIC could authorise the use of the BENOR marking for concrete, which is comprised of LMA and which complies with the above granted provisional agreements. FeBelCem again objected to this memorandum, so that it was suspended by the above authority in February 2003, and a revised memorandum which doesn't allow the use of LMA in BENOR concrete was adopted. ORCEM appealed against this adoption and the authority decided that a technical prescription (the so-called PTV) must be drafted by CRIC, and this would allow the use of the BENOR marking for concretes containing LMA. In August 2003, the draft prescription was approved by the authority. However, the BENOR marking committee suspended the publication of this prescription till the adoption of the above-mentioned NAD. The latter is adopted in August 2004 and a new version of the prescription complying with the NAD was finally published by the BENOR marking committee in September 2004. The prescription process thus took, in total, about three and a half years, which is unusually long.

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

In December 2005, ORCEM filed a complaint with the EU commission, claiming that HOLCIM, CCB, CBR, FeBelCem and CRIC had violated Art. 101.1 TFEU during the above agreement and prescription processes.

The prosecutor of the Belgian competition authority (the so-called Competition Council, at that time) was informed of this complaint and started investigations against HOLCIM, CCB, CBR, FeBelCem and CRIC, and in April, 2010, filed a report with the competition authority, recommending that from early 2000 until September, 2004, agreements or concerted practices took place among the above undertakings in infringement of Art. 101.1 TFEU (and of the corresponding provisions of the Belgian national law). Parties were heard by the competition authority in February, 2012, and in August, 2013, the authority issued a decision in which it considered that the incriminated parties had developed contacts since 2002, with a view to slowing down the adoption of the NAD referred to above, the adoption of the guidance manual required for the grant of the above mentioned agreement to ORCEM and, in order to delay the entrance of LMA to the Belgian market in ready-to-use concrete, and that the first version of the technical prescription authorizing the use of the BENOR mark for concrete including LMA should have been published without awaiting the adoption of the aforementioned NAD. The

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<sup>26</sup> BENOR marking indicates that a product complies with the technical requirements of one or more Belgian standards, or that is of specific technical prescriptions

authority therefore considers that the above undertakings, which sat on the authorities which had the power of decision in the standardization and certification processes of LMA in ready-to-use concrete, controlled and vitiated these decisions. The authority therefore ruled that an infringement of Art. 101.1 TFEU, by the above undertakings, took place, and thus sentenced them to fines amounting, in total, to about €15 million.

The sentenced parties filed appeals before the Brussels Court of Appeal against this ruling in September and October, 2013, and the competition authority intervened voluntarily in this proceeding in October, 2013, and, after several procedural developments, the case was pleaded in May, 2016, and a ruling issued by the Court on 30th June, 2016.

## **Ruling of the Court**

In its decision, the Brussels Court of Appeal firstly underlined that, according to Council Regulation (EC) n° 1/2003 of 16th December, 2002, regarding the implementation of the rules on competition that are laid down in Articles 81 (presently 101) and 82 (presently 102) of the Treaty (presently the TFEU), and the burden of proof of an infringement of Arts. 101 and 102 TFEU is on the party or authority alleging such an infringement, i.e., in the case at hand, the Belgian competition authority, and that the presumption of innocence is recognized by the CJEU as being a general principle of law (CJEU C-74/15, *Eturas UAB*, § 38).

The Court then stated that, since the competition authority did not find any agreement between the incriminated undertaking, it is possible that only concerted practices took place between them.

Regarding the concept of concerted practices, the Court refers to the EU Court of First Instance decision, dated 8th October, 2008 (T. 2008/415, § 118), according to which this concept requires (i) a concertation between undertakings, (ii) a behaviour of the latter in the market following this concertation, and (iii) a causal link between (i) and (ii). The Court further underlined that, according to CJUE (C-8/08, *T Mobile Netherlands BV*, §5), this causality is presumed, but this presumption can be reversed by the incriminated undertakings.

The Court then summarized the positions of the parties. The incriminated parties hold the view that the competition authority took no account of the fact that contacts between the considered undertakings took place in the context of the standardisation and certification processes of LMA, in the course of which their representatives were called to sit on the authorities which had the power of decision in these processes, that the concertation of these undertakings in this context was restricted to off-market lobbying activities. On the contrary, the competition authority holds the view that these activities have exceeded simple lobbying activities, since their purpose was to slow down the standardization and certification processes of LMA in ready-to-use concrete. The authority does not address the argument of the incriminated parties, according to which the considered activities took place off-market.

The Court underlined that (i) competition law does not address the sharing of information and the concertation of undertakings off-market, (ii) according to the EU Commission's Green Book on transparency (COM(2006) 194 (final)), lobbying is defined as an activity aimed at influencing politics and decision processes, and (iii) according to scholars, such an activity is, *prima facie*, an off-market activity since, in the context of lobbying, undertakings cannot by themselves determine their behaviours to be on market, but can only try to influence a process in which they do not hold the power of decision.

The Court held the view that, in the case at hand, the elements taken into account by the competition authority against the incriminated parties, refer to the activities of undertakings which take place in the sole context of the standardisation and certification processes of LMA, and that, according to the Guidelines of the EU Commission (§ 281-283), open, transparent and non-discriminatory standardisation processes, in principle, do not restrict competition. The Court further considered that the participation of undertakings in the standardization and certification processes of activities in their

market field is valuable, since they possess technical skills that are useful in such processes, provided that they hold no power of decision (cf. publication issued by the French competition authority “*Standardization and certification activities, pro or anti competition?*”).

The Court further held the view that, in the case at hand, the incriminated parties had no majority in the authorities that had decided on the standardization and certification of LMA in ready-to-use concrete, and that they held no power of decision in these authorities, since their presence was compensated for by the representatives of entities with different interests.

The Court therefore stated that the competition authority was wrong to consider that by sitting on the authorities which decided on the standardization and certification processes of LMA, the incriminated parties controlled and vitiated these decisions. On the contrary, since the incriminated parties were invited to sit on the authorities that are referred to within a framework that is defined by the latter, the lobbying activities of the considered undertakings had taken place in an open, transparent and non-discriminatory context. The Court referred to a similar case in the EU General Court (T-432/05 of 12.05.2010, *EMC Development AB*), in which it was decided that the participation of CemBureau (the EU equivalent of FeBelCem) in a standardization process relating to the cement industry, was not illegal, since, even though CemBureau defended the interests of its members (cement companies), it was not to such an extent that the decisional process was controlled or vitiated. The same applies to the case at hand, according to the Court.

Consequently, the Court ruled that the incriminating activities were not conducted in the market, and they were restricted to the standardization and certification processes, thus complying with the EU requirements on transparency, objectivity and non-discrimination, so that no anticompetitive activities can be found.

The decision of the competition authority is therefore nullified.

## **Personal Comment**

The Court of Appeal, in its ruling, basically applied EU law and case-law, and it observed that the Belgian national provisions actually comply with the latter.

The Court considered that since the incriminating undertakings were not represented in all the authorities that had decided, during the LMA standardization and certification processes, and that they had no majority within these authorities when they were represented, they could not control and vitiate these decisions. It does not appear that the Court factually examined whether or not such a control could possibly take place, independently of the number of representatives of the said undertakings within the considered authorities. Indeed, one might imagine that one, or several, specific representative(s) could possibly control the decision process by bypassing the frameworks of these authorities, thanks to their actual level of influence on the decision makers.

Neither does it appear that the question of the status of the EU Commission Guidelines was addressed by the parties and the Court in the context of the assessment of a possible infringement of Art. 101.1 TFUE. Indeed, one could possibly argue that these Guidelines are only indicative and cannot prevail over a wider analysis that is carried out in accordance with Art. 101.1 TFUE.

The questions of a possible non-compliance by the considered NAD standard with Directive 89/106, and of the influence of the possibly binding nature of this standard on competition within the relevant market, does not appear to be addressed during the proceedings before the Court.

Finally, it does not appear that the openness of the standardization and certification processes was challenged, based on the argument that ORCEM was possibly not sufficiently involved in these processes in which decisions were made relating to the product (LMA) that ORSEM intended to sell in Belgium.

Jelena Čuveljak, High Commercial Court of Croatia

**Ruling of the High Administrative Court of the Republic of Croatia.**

**Ref. No UsII--22/16-11 of Jun 8th, 2016.**

**Super Sport d.o.o., Hattrick d.o.o., and Germania Sport d.o.o. vs CCA**

**Croatian Competition Agency (CCA)**

**Class: UP/I 034-03/2015-01/010**

**Reg. no: 580-09/64-2015-093**

**Date: Zagreb, 22nd December, 2015.**

**Case: CCA v Bolus d.o.o., Zagreb, Favorit sportska kladionica d.o.o., Zagreb, Germania Sport d.o.o., Zagreb, Hattrick d.o.o., Dugopolje, Prva sportska kladionica d.o.o., Zagreb and Super Sport d.o.o., Zagreb**

**Type of decision:**

**CCA - Decision on a prohibited agreement,**

**The High Administrative Court of the Republic of Croatia annuls a decision of the National Competition Authority**

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

The Croatian Competition Agency established that the betting shops: Bolus, Favorit sportska kladionica, Germania Sport, Prva sportska kladionica and Super Sport, which are active in the gaming and betting sector, had entered into a cartel, but the High Administrative Court of the Republic of Croatia annulled a decision of the Croatian Competition Agency. The Court found that the content of the agreement must be unambiguous and clear, and it must be such as to leave no room for different interpretations. Furthermore, the Court found that parallel behaviour after 1st April, 2014, when the Law modifying the Gaming Law came into force, cannot be proof of the alignment of the entrepreneurs, whose parallel behaviour is a consequence of the adoption of the amendment of the Act which entered into force on the 1st April, 2014.

### **Summary of the judicial proceedings**

On 22<sup>nd</sup> December, 2015, the Croatian Competition Agency (CCA) established that the betting shops: Bolus, Favorit sportska kladionica, Germania Sport, Prva sportska kladionica and Super Sport, which are active in the gaming and betting sector, entered into a cartel (a prohibited agreement) and fined them a total of Kuna 9.7 million for this hardcore infringement.

In an *ex officio* proceeding, and based on direct evidence, the CCA established beyond any doubt that the above-mentioned undertakings had fixed the level of the bookmakers' commission fee in the Republic of Croatia at a meeting of the Association of Pool Betting Shops on 26th March 2014.

The direct physical evidence for the existence of collusive conduct was the Minutes from the extraordinary meeting of the Assembly of the Association of Pool Betting Shops, as well as the Notice on the change in the calculation method of 28th March, 2014, that was communicated by the Association to other betting shops in the market. The agreement started to apply on 1st April 2014.

This agreement constituted a prohibited agreement under the competition rules, and was an infringement of the competition rules that lasted from March 2014 to November 2015.

The commission, or handling fee, or so called “vigorish”, represents a constituent part of the price of the product, and, in this concrete case, in the price of betting, whose level depends on the method by which it is calculated. This deduction from the bet as a processing fee depends exclusively on the betting business’s owner when s/he takes a bet from the gambler, when the bettor alone decides on the calculation method and the level of this cut, or even whether to charge this amount or not.

The facts that vigorish is not regulated and that it is optional were confirmed in the statements made by the betting shops, and this opens the possibility for them to decide on their own commission and to compete in the market through different commission fee levels, a possibility that was excluded on the basis of this agreement.

Besides, given that, here, the undertakings agreed on the constituent element of the price, the agreement constitutes a hardcore restriction. What is more, a new method was agreed for the calculation of the handling fee that was less favourable to the consumers than the one that was in force before 1st April, 2014. Namely, the commission fee had been calculated as a bet percentage, while, after the agreement at issue entered into force, it was calculated as a percentage of the possible winnings.

Given the fact that the gamblers use the service of sports bettors, the cut in the stake that is the result of the change in the vigorish calculation method also leads to cuts in possible winnings. At the same time, based on the new calculation method, the bettors’ revenues increased on the basis of the wager cuts that were based on the new bookmaker’s commission fee calculation method.

Taking into account the gravity of the infringement, and having weighed the aggravating and mitigating factors in this particular case, the CCA assessed that the level of the fine imposed on the members of this cartel would, at the same time, produce a preventitive effect on the participating undertakings, and also a deterrent effect that would keep other undertakings from any infringements of competition law.

### **Ruling of the High Administrative Court of the Republic of Croatia**

Against the decision of the Croatian Competition Agency, the undertakings Super sport d.o.o., Hattrick-PAK d.o.o. and i Germania sport d.o.o., filed a claim, and the High Administrative Court of the Republic of Croatia (Ref. No UsII-22/13 of Jun 8th, 2016.) annulled a decision of the Croatian Competition Agency

The Court found that the meeting of the Association of Pool Betting Shops on 26th March 2014. was held due to the agreement on the beginning of the Law modifying the Gambling Act, which was to enter into force on April 1st, 2014, as doubts had arisen about tax calculation, i.e., what the basis for tax calculation was, was controversial. Furthermore, at that meeting, all members adopted a proposal for a new calculation of the handling costs, which would be calculated according to the same principle as the tax administration, which calculates a monthly fee of 5%, i.e., the handling costs would be calculated in such a way that the basis of the calculation was the stake itself (5% of the stake). The Court found that these were two different methods of calculation. Namely, 5%, which the Ministry uses to calculate the monthly fee, is not the same as 5% of the stake. In a simple example of the payment of kn. 100,00, it is apparent that, when handling cost is charged from the stake, then the handling cost of 5% of the stake amounts to kn.4.76, and when the handling cost is 5% of the payment, it is 5,00 kn. According to the Court's view, in order to be able to work on the conclusion of an agreement, including working on a prohibited agreement, the content of the agreement must be unambiguous and clear, and it must be such as to leave no room for different interpretations. Furthermore, the Court found that parallel behaviour after 1st April, 2014, when the Law modifying the Gaming Law came into force, cannot be a proof of the alignment of the entrepreneurs, whose parallel behaviour is a consequence of the adoption of the

amendment of the Act, which entered into force on 1st April, 2014, and which is not forbidden by the alignment of entrepreneurs.

### **Personal comment**

Perhaps the most important aspect of this entire case is the different interpretations arrived at by the Croatian Competition Agency and the High Administrative Court of the Republic of Croatia. In this case, the Court provided significant guidance for the interpretation of cases in which an agreement can be considered to be a prohibited agreement, as well as stating that the parallel behaviour resulting from the application of new legal rules cannot be considered as evidence of an unlawful agreement.

Pertti Virtanen, Finnish Market Court

## **Facts and Economic Background**

This case concerns the new EU legislation for bus services (Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23rd October 2007, on public passenger transport services by rail and by road, and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (hereinafter, the Regulation). This legislation meant opening up the bus services markets to all bus companies. The regulation gave the national legislator several options, such as using public procurement for procuring bus services. For other bus lines, the regulation demanded free competition, which meant that anybody could start bus services and could compete with existing services.

Finnish national legislation was changed due to this Regulation. This legislation came into force in December 2009. In Finland, this meant that those bus lines that were already run by the municipal authorities (such as bus services in bigger cities – Helsinki and Tampere, for example) remained closed to competition and were organized by local contracting authorities. What were opened to competition was the bus services between the major cities, as these had been the most profitable ones and it is possible to have the infrastructure in place for several competing bus companies.

Under the older Finnish legislation for bus transport, free competition was not possible. If a company wanted to open a new bus service between, for example, Helsinki and Tampere, it needed to have authorization by a public authority (there were several of these). This would only be granted after a study on the necessity of the service and on whether it might hurt those companies that already ran services on the route between Helsinki and Tampere. The older service providers could state their opinions about the need for a new service. This was done through a local branch of the Finnish Bus Companies Association (Linja-autoliitto – later LAL).

A change without any time for adjustment might have been very upsetting for the market, and even for the consumers, for bus services. In Article 8 of the regulation, there are rules for the transition from the old system to the new one. According to these rules, the regulation should be in full force by 3.12.2019.

The bus companies wanted the change to the new, more competitive system to be gradual, with as long a transition period as possible. They lobbied the Finnish authorities and legislators, and even contacted the Commission, to learn more about the new regulation through LAL. The lobbying process included meetings between representatives of the bus companies on several occasions, which were arranged by LAL (board meetings, seminars, etc.). This lobbying continued even after the new legislation came into force, since the interpretation by the relevant authorities was different to what the bus companies had expected. They had thought that the existing bus services would be safe from competition, as the relevant paragraphs of the Finnish Law on Mass Transit stated that the agreements between bus companies and municipal authorities for the transition period in question (it could, and in most cases did, end before 2019) should be “safe” from competition. The relevant authorities, and later the Administrative Courts and the Finnish Supreme Administrative Court, held that this “safety” did not mean a total ban on competition, and thus new companies could obtain the authorization to start new services.

After the new legislation came into force, and after a company had applied for an authorization (which was basically automatic if the standards of the company were acceptable – whether there was “room” for the company in the market was not an issue about which the relevant authorities had to decide) to run a bus service in southern Finland, there were some reactions by the established bus companies. The first authorization was given in May 2011. The other bus companies were astounded that someone had had the guts to apply for an authorization, as most of those applying were themselves also established bus companies and members of LAL.



During the Summer of 2011, Matkahuolto terminated the old agreements between it and the bus companies that covered services for bus companies, including bus terminal services (such as ticketing and information – starting and stopping platforms were available to every member of Matkahuolto). New agreements – which bus companies practically had to sign – came into force on 1.1.2011. These agreements included a clause that Matkahuolto had the rights not to provide services, and to give the right to carry freight to every bus company, if there were no need for a new service.

A big player – called Onnibussi (translated “Lucky Bus”) – started to expand its services of very cheap bus lines. As the old bus companies couldn’t stop these new lines, the cartel eventually collapsed in September 2012.

The economic background to this case is that most Finnish bus companies are very small. There are, however, some bigger companies, which don’t have a dominant position in the market. They are mostly regional operators, but some – the biggest companies – operate almost everywhere in Finland (with the exception of the Åland Islands, and some of the less populated areas, such as Lapland). These companies had had a monopoly, or almost a monopoly, position in relation to bus lines between the cities to which they operated for years. The ticket prices were high – and they have fallen about 75 – 90 percent with the new competition. It is only natural that the bus companies in question had a keen interest in keeping their monopolies as long as possible. There is thus an economic reason for a cartel agreement, if there were the means to “lock up” the market, or at least to reduce the new competition.

### **The Views of the Parties:**

The Finnish Competition Authority (later FCA) demanded that:

As there had been a cartel agreement 9 bus companies (including some concerns which incorporated several daughter companies), The Finnish Bus Companies Association (Linja-autoliitto – later LAL) and a Finnish Company which controls most of the bus traffic’s infrastructure, such as bus stations, which was called Oy Matkahuolto Ab (later Matkahuolto), should all pay a fine for an alleged cartel. The fines demanded varied from €129.000 (LAL) to €10.820.000 (Matkahuolto)

According to the FCA, there had been a cartel from Autumn, 2008, to Autumn, 2012, which had included all alleged cartel members. This part of the cartel concerned services for bus companies that related to passengers (such as timetables, the use of the Matkahuolto ticketing system, etc.). Matkahuolto’s agreements with the bus companies were changed in 2011, but only to restrict competition, and the board members of Matkahuolto had agreed to this.

According to the FCA, there had been -- and still was (in Spring, 2016, when the case was brought to the Market Court) -- a cartel in relation to freight services for bus companies. This cartel had been agreed at the same time with the first part of the cartel, and the only difference was that it was still ongoing.

The FCA stated that some of the bus companies (those that were board members of Matkahuolto and also a board member of LAL) had already, in 2008, reached an agreement on a comprehensive plan about how to restrict competition. There had been a “masterplan” in relation to how to act and how to restrict competition in case lobbying failed. This had been done by discussions in seminars, board meetings and e-mail exchanges between the CEO’s and the Chairpersons of the bus companies, LAL and Matkahuolto.

The accused companies, and LAL, naturally stated that it was all just lobbying, and was thus not restrictive of competition. There had been no direct agreements between the companies. The entire situation had come into being as local Finnish authorities had interpreted Finnish legislation in a way that was contrary to what the legislator had intended, according to the accused companies.

The board members of Matkahuolto and LAL only wanted to safeguard the transitional period (which is also mentioned in Article 8 of the Regulation). There had been no intention to restrict competition. And the FCA had not proven that competition had been restricted.

On this issue the FCA naturally stated that the agreement meant a partition of the relevant market, so it was intended to restrict competition and thus no evidence of actual restrictive effects was needed.

It was quite common that the accused companies stated that the FCA had not respected the parties' rights to defence. The FCA had changed its reasoning for sanctions without allowing the parties the possibility to give their views about the "latest version". Matkahuolto stated that the privilege between a law firm and its client had been breached by the FCA. These administrative errors should mean that the case should be dismissed, or should be returned to the FCA (both propositions would have meant that no fines for any breach of competition law could be laid down).

### **The Market Court's Decision**

There had been no such administrative errors such that the case should be returned to the FCA, since the documents given to the parties by the Market Court included the latest version. The parties could argue the facts given in the latest version before the Market Court. In Finnish Administrative Law, this is allowable. This interpretation had been given in a competition law case by the Finnish Supreme Administrative Court.

The lawyer client-privilege had not been breached, since the paper in question was an interpretation of a document drafted by a law firm. This interpretation was carried out by Matkahuolto's Chief Executive. These kinds of interpretations, etc., are no longer covered by this privilege, as the original document would have been.

Everybody – including the FCA – had agreed that lobbying, as such, is not a restriction of competition. The Market Court thus only had to decide whether the contacts and the decisions about how to lobby were simply lobbying or were they part of a "master plan".

The view of the Court was that it was just lobbying. Before 2009 (when the national legislation came into force), there had been some individual statements that the bus companies should be ready to stop new competition from getting the best routes, and thus the big earnings, while the old companies still had to run even the rural – and thus not so profitable -- services. There had even been some discussion on "nokkavuoro" (literally "beak line" – meaning a new bus service that would start just minutes before an old one would start) which might rob the old service providers of their best bus routes. There was no evidence, however, that these statements formed a coherent plan of action or, indeed, a contract between the bus companies. Some of the statements were even made by companies that were not involved in the court case, because the FCA had not asked the Market Court to fine these companies.

The lobbying even included some meetings, etc., which had taken place after the national law on bus transport had come to force in December 2009. This was basically because the interpretation was different to that which the bus companies expected, and they – naturally – tried to get it changed. This included contacts with authorities, the legislator, and also appeals to Courts.

The fact that Matkahuolto had changed its agreements was not a direct indication of a cartel, as this had been an ongoing process, and every company has a right to change its agreements. Even the new clauses about restricting Matkahuolto's services and not giving freight automatically to every bus company, were not, as such, restrictions on competition.

As lobbying was not a restriction on competition, the Court decided that there had been no breach of competition before 1<sup>st</sup> January 2011.

The Market Court, however, decided that the parties had agreed on a cartel, which started from 1.1.2011. This was based on e-mail exchange between the parties, and on the board meetings of

Matkahuolto and LAL in January 2011. In these e-mail exchanges the parties had stated that the companies with new bus routes should not be provided with full services and should not be given freight on their new routes. The Court held that this interpretation of Matkahuolto's agreement with the bus companies, and what had been done, could only have been undertaken in order to restrict competition. The e-mails were evidence of a clear intent to try to keep new bus routes out. It was a question of market sharing, as the cartel members tried to keep the old markets (old routes) to themselves.

Everyone was fined €100.000. As the decision has been appealed to the Supreme Administrative Court, it is possible that it will be overturned or changed. The decision is expected next year.

### **Interesting questions:**

I will not answer these questions in depth, I will only give some viewpoints. Firstly, can lobbying be a restriction on competition? There are no clear-cut rulings on the possible limits by the ECJ, but as lobbying is a form of freedom of expression it cannot be totally forbidden as a restriction on competition. What about cases where the lobbying companies are able to influence a public authority to make a decision that restricts competition? This happens – in my opinion -- very rarely and could perhaps be a cartel type restriction (if lobbying is undertaken by several parties together, or by their organisation). Lobbying the legislator? Hardly, as the parliaments have the sole right to form legislation, and, even if the new law in question were to be in breach of Articles 101 or 102, the lobbying companies could hardly be said to have restricted competition themselves.

When does a cartel really come into being, or start? How much evidence, and what kind of evidence, is needed? In my opinion, a cartel must start with contacts between the future cartel members. Only when it is clear from the evidence that some kind of agreement or plan of action has been made can it be seen as a cartel.

Cartel by intermediary? Helping companies to run a cartel is clearly prohibited – so other intermediaries should be guilty also. In this case, this note says that Matkahuolto did not profit from the restriction – it actually lost customers and money. It was, however, a necessary tool (or intermediary) for the bus companies, which could not have formed the cartel without it.

Eleonora Viegas, Portugal Market Court

**Court: Appeal Court of Lisbon**

**Court case: 349/11.7/TYLSB**

**Date of the Judgment: 4/04/2013**

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

By a decision of 31st December, 2010, the Portuguese Competition Authority condemned A.... (an association of companies for the management and exploitation of car parks) to pay €1,971,397,17 to develop a strategy for a collective reaction to the entry into force of a new legal regime on the prices for the use of car parks, having recommended the increase in prices for the car parks that were managed, or operated, by their associates, by fixing a “ticket price” or by increasing the prices by 15%, in order to eliminate the pressure in the negotiations for price changes between the concessionaires and grantors ... thus practicing a *decision of an association of companies which has as its object or effect to prevent, restrict or to distort competition*, and so infringing the provisions of Article 4 of Law no. 18/2003 of June 2011 (legal regime of competition).

The new legal regime for prices for the use of car parks (Decree Law n.º 81/2006), established that in short-term car parks, up to 24 hours, the price to be paid by the users of the car parks is divided into a maximum of fifteen minutes, and the user only has to pay the fraction, or the fraction of the parking time, that s/he has used, even though s/he has not used them to their exhaustion, and that, in the long-term parking lots where a stay with a duration of more than twenty-four hours is possible, the rate corresponding to the parking time period may be set for the time, day, week or month.

A. represented almost 130.000 parking places, and its board of directors included some of the largest car park companies.

**The judicial proceedings**

Notified of the decision of the Competition Authority, A.... contested it, and the case was decided by the Commerce Court of Lisbon. The Court maintained the decision, reducing the fine, and this was confirmed by the Court of Appeal.

A. imputed to the decision of the Competition Authority several procedural defects and a violation of constitutional rights. Regarding the merit of the conviction decision, they argued that the Association did not make a decision restricting competition, and that they were just giving its opinion to the government, when asked for it, and were just exercising its function as an association of car park companies.

**The Ruling of the Court**

The Court found that:

- A ... was an association of companies, and it was therefore subject to the application of the competition rules;
- the recommendations to its members constituted a decision of an association of companies;
- the relevant product market was the management and operation of paid car parks and parking areas in public places; covering the relevant geographical market throughout the national territory;
- the decision was likely, by its very nature, to appreciably restrict competition in the relevant market.

- decreasing uncertainty about the way in which its associated car park operators would adjust their prices to the entering into force of the new legal statute, as well as making concessionaires aware of the need to change the price lists agreed upon.
- A... acted with deceit, knowing that its communications, sent to its associates, would be interpreted as a recommendation to increase prices, and they wanted it to be so, knowing that its conduct was punishable by law.
- considering A ... 's cooperation in the proceedings, that it was a single infringement and did not establish that A ... or its associates, benefitted from advantages as a result of the infringement, the fine was reduced to €969.000,00.

The Appeal against the First Instance sentence was dismissed.

### **Brief personal comment**

This decision analyses Art. 4 of Law no. 18/2003, which is similar to Art. 101 of the Treaty on the Functioning of the European Union, and to the case law on the exchange of information between competitors in order to reduce uncertainty about the functioning of the market, and, therefore, the restriction of competition.

## **Vertical Agreements**

Angel Galco Peco, Commercial Court of Madrid

**GASORBA, S.L. AND OTHERS v REPSOL COMERCIAL DE PRODUCTOS  
PETROLÍFEROS, S.A.**

**Judgment of the Supreme Court of 7th February 2018.**

**Brief Summary of the Facts**

In 1994, a company named GASORBA, S.L. took over the rights of X1 and X2 that arose from two contracts that the two latter had concluded in 1993 with REPSOL COMERCIAL DE PRODUCTOS PETROLÍFEROS, S.A. (Spain's leading oil company, with a market share of more than 30%).

In the first contract, entitled "the usufruct agreement", X1 and X2 granted REPSOL a right to the usufruct of a plot of land and the service station built on it, and of the administrative concession for the operation of the station, for a term of 25 years. In the second contract, REPSOL leased to X1 and X2 both the land and the service station for a term of 25 years at a very low monthly rent (€60 today).

Under the lease agreement, the lessees were required to use REPSOL as their sole supplier throughout the term of the contract. REPSOL periodically communicated the maximum retail selling prices of fuel and permitted the lessees to apply discounts that were to be covered by their commission, without reducing the supplier's revenue.

In 2008, GASORBA, X1 and X2 brought an action against REPSOL for the annulment of the whole of the contractual relationship (including both the usufruct and the lease agreements) on the ground that it was contrary to Article 81 EC Treaty. The applicants alleged that the retail price was fixed by REPSOL and the term of the exclusive purchasing covenant exceeded the maximum duration allowed by Regulation No. 1984/83 and Regulation No. 2790/99. The Claimants also pursued compensation for the harm arising from the application of the exclusive supply agreement.

**Summary of the Judicial Proceedings**

The First Instance Court dismissed the case. The claimants appealed.

Before the Audiencia Provincial of Madrid (Court of Appeal), the appellants reproduced their pleas, except for that relating to the annulment based on the infringement of the provisions on duration that are laid down in Regulation No. 1984/83. The Court of Appeal upheld the decision of the Court of First Instance. The Court justified its decision as follows:

(i) With regard to price fixing: (i-i) Regulation No. 2790/99 does not preclude that the supplier imposes a maximum resale price or recommends a resale price, provided that they do not amount to a fixed or minimum resale price; (i-ii) the Court of Justice made it clear in cases C-279/06 CEPSA and C-260/07 Pedro IV Servicios, that the same goes for Regulation No. 1984/83; (i-iii) it is not established that GASORBA fell victim to anti-competitive conduct; (i-iv) it was not pleaded in the suit that the application of discounts on the prices recommended by REPSOL would be uneconomical for the lessees.

(ii) In relation to the term of the exclusive supply agreement, the Court of Appeal ruled that, in the light of the commitments that were made binding on REPSOL by Commission Decision 2006/44/EC of 12th April, 2006, relating to a proceeding pursuant to Article 101 TFEU (COMP/B-1/38.348 – REPSOL CPP), at the time that the action was brought, it could not be argued that the contract adversely affected competition, as there already existed a way of release from it that the Commission had considered satisfied the Competition Law requirements.

The claimants took the case to the Tribunal Supremo (Supreme Court).

The Supreme Court found that the first question to solve was whether the Commission Decision excluded that the contracts in question might be regarded as invalid due to an infringement of Article 101 TFEU, because of the duration of the exclusive supply agreement, once REPSOL had offered the lessees the possibility to be released from the contract. Since the Supreme Court had doubts as to the extent and possible consequences of Articles 9 and 16 of Regulation No. 1/2003, in this respect, it decided to stay the proceedings and refer the question to the Court of Justice for a preliminary ruling.

Based on the judgment given by the Court of Justice on 23rd November, 2017, C-547/16 Gasorba y otros, the Supreme Court set aside the judgment of the Court of Appeal and ruled that the contractual relationship between the parties should be considered ineffective, as from 1<sup>st</sup> January, 2012, dismissing the remainder of the claims in the action.

### **Summary of the Grounds for the Ruling of the Supreme Court**

The Supreme Court notes that, according to the judgment of the Court of Justice, a decision taken on the basis of Article 9(1) of Regulation No. 1/2003 does not certify that the practice that was the subject of concern complies with Article 101 TFEU. In addition, it cannot be precluded that a national court may conclude that the practice that is the subject of the commitment decision infringes on Article 101 TFEU, since the commitment decision cannot retroactively legalise unlawful conduct.

The Supreme Court draws attention to Paragraph 29 of the ruling of the Court of Justice, where it is emphasised that national courts cannot overlook that type of decision. Quite the contrary, national courts are required *“to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU”*.

The Court refers, further, to the preliminary assessment of the Commission, pointing out that, according to the established case law, agreements like those concluded by REPSOL with service station operators in Spain, can, because they apply over the whole territory of a Member State, have, by their nature, the effect of reinforcing the partitioning of markets on a national basis, all the more if, as is the case here, the possible restrictions of competition that would create a barrier to entry.

Consequently, noting that (i) the Court of Appeal had considered that the Commission decision set aside the possibility of declaring the contract at issue null and void; and (ii) the Commission decision did not certify that the practice relating to the duration of the exclusive purchasing agreement complied with Competition law, the Supreme Court resolved to set aside the judgment delivered by the Court of Appeal and to give a new decision on the merits of the case.

In relation to the allegations of price fixing, the decision of the Supreme Court concurred with that of the Appeal Court.

As regards the plea of nullity based on the duration of the exclusive supply agreement, the Supreme Court ruled in accordance with its own case law, following the Order of the Court of Justice of 27th March, 2014, C-142/13, Bright Service. Under this case law, an agreement that fulfils the conditions for exemption laid down in Regulation No. 1984/83, but not those set out in Regulation No. 2790/99, should be considered to be excluded from the scope of Article 101(1) TFEU until 31st December, 2001, in accordance with Article 12 of the second of the aforementioned Regulations.

The Supreme Court considers that the invalidity of the clause on the duration of the exclusive supply arrangement affects one of the structural elements, and the economics itself, of the contractual relationship, which could not therefore be maintained in force thereafter. In this respect, it is underlined that (i) the usufruct contract would not have been signed had the lease and the exclusive supply agreement not been signed simultaneously, (ii) there is a functional link between the two contracts that



is determined by an overall purpose, and (iii) the equilibrium of the contract is broken when the exclusive supply arrangement is declared invalid before the agreed term is due, since such a term was set with a view to allowing REPSOL to amortize its investment.

Having said that, the Supreme Court establishes that the claimants are not entitled to damages. On the contrary, the dispute should be resolved through settlement of the contract, bearing in mind the investment made by REPSOL, on the one hand, and the over-price paid by the claimants if compared to the average prices in the same area, on the other hand.

## **Comment**

This judgment meant a radical shift in the case law of the Supreme Court. Previously, the Court considered, in view of the Commission Decision 2006/44/EC of 12th April, 2006, that those contractual relationships similar to that which is subject to scrutiny in the present case, did not become automatically invalid on 1st January, 2002, in accordance with Article 12(2) of Regulation No. 2790/99. In addition, the judgment reflects another important change in the Supreme Court's case law brought about not so long ago, as a result of the Court of Justice's decision in case C-142/13. Prior to the order rendered in that case by the Court of Justice, contracts that fulfilled the conditions for exemption that are laid down in Regulation No. 1984/83, but not those of Regulation No. 2790/99, were regarded as being excluded from the scope of Article 101(1) TFEU until 31st December, 2006 (i.e., at the end of the period, resulting from adding the maximum term envisaged in the above-mentioned Regulation for a non-competition clause to the transitional period that is laid down in Article 12(2) thereof).

There are quite a good number of cases like this pending before the Audiencia Provincial de Madrid. Nonetheless, in relation to the ruling of the Supreme Court, there is some uncertainty regarding the question of whether, assuming that the commitment decision does not prevent examination of whether or not the contractual relationship complies with Competition Law, National Courts may decide contrarily to such a decision on the grounds already covered by the latter. The Audiencia Provincial will discuss this issue on 20th September 2018.

Katalin Surányi, Budapest Administrative and Labour Court

**Kfv.II.37.268/2013/8., Judgment of the Curia (former Legfelsőbb Bíróság; Hungarian Supreme Court)**

**Allianz, Generali, Gépjármű Márkakereskedők Országos Szövetsége (the national association of authorised dealers; hereinafter: GÉMOSZ), Magyar Peugeot Márkakereskedők Biztosítási Alkusz Kft (Peugeot car dealers), Paragon-Alkusz Zrt., the legal successor of the Magyar Opelkereskedők Bróker Kft (Opel car dealers) v Gazdasági Versenyhivatal (the national competition authority; hereinafter: GVH)**

**C-32/11, request for a preliminary ruling from the Legfelsőbb Bíróság [Hungary]**

### **Brief summary**

1. Once a year, the Hungarian insurers, and in particular Allianz and Generali, agree with the repair shops' conditions and the rates applicable to the repair services that are payable by the insurer in the case of accidents involving insured vehicles. Those shops are thus able to carry out repairs immediately according to the conditions and rates agreed with the insurer.

2. Since the end of 2002, many authorised dealers which also operate as repair shops, have requested that GÉMOSZ, the national association of authorised dealers, negotiate on their behalf annual framework agreements with the insurers concerning the hourly charges for the repair of damaged cars.

Those dealers are connected with the insurers in two ways. First, they repair, in the event of accidents, cars that are insured by the insurers and, secondly, they act as intermediaries for the insurers by offering, as agents of their own insurance brokers or associated brokers, car insurance to their customers on the occasion of the sale or repair of vehicles.

3. During 2004 and 2005, framework agreements were concluded between GÉMOSZ and Allianz. Allianz later concluded individual agreements with those dealers on the basis of the framework agreements. Those agreements provided that the dealers would receive higher remuneration for car repairs when Allianz car insurance made up a certain percentage of the insurance sold by the dealer.

4. During that time, Generali did not conclude any framework agreements with GÉMOSZ, but, rather, individual agreements with those dealers. While those agreements did not contain a written clause concerning increased remuneration, like those included in the Allianz agreements, the GVH nevertheless found that, in practice, Generali provided similar commercial incentives.

5. By the contested decision, the GVH found that those agreements and other agreements concluded by the five applicants in the main proceedings, and by Porsche Biztosítási, were incompatible with Paragraph 11 of the Tpv. Those agreements can be summarised as follows:

- horizontal agreements consisting of three decisions taken by GÉMOSZ between 2003 and 2005, which set out 'recommended prices' to the authorised dealers for car repairs, which were applicable to the insurers;
- framework agreements concluded in 2004 and 2005 between GÉMOSZ and Allianz and individual agreements concluded at the same time between certain authorised dealers and Allianz and Generali respectively, which made the hourly repair charge dependent on the number of insurance policies signed;
- various agreements concluded between 2000 and 2005, respectively between Allianz and Generali, on the one part, and Peugeot Márkakereskedők, Opelkereskedők and Porsche Biztosítási, as

insurance brokers, on the other, seeking to influence their practices by specifying a minimum number or percentage of car insurance policies that were to be obtained by the broker over a given period of time, and by providing that the broker's remuneration be fixed according to the number of policies taken out with the insurer.

6. The GVH found that that bundle of agreements, considered both together and individually, had as its object the restriction of competition in the car insurance contracts' market and the car repair services' market. The GVH held that, as there was no impact on intra-Community trade, Article 101 TFEU was not applicable to those agreements, and their unlawfulness derived solely from domestic competition law. On the basis of that unlawfulness, it prohibited the continuation of the practices in question and imposed fines in the following amounts: HUF5.319.000.000 on Allianz, HUF1.046.000.000 on Generali, HUF360.000.000 on GÉMOSZ, HUF13.600.000 on Peugeot Car Dealers, and HUF45.000.000 on Opel Car Dealers.

### **Summary of the judicial proceeding:**

7. Following the action for annulment brought by the applicants in the main proceedings, the Fővárosi Bíróság (Budapest Municipal Court) partially reversed the contested decision.

8. The decision was restored, on appeal, by the decision of the Fővárosi Ítéltábla (Regional Court of Appeal, Budapest).

9. The applicants in the main proceedings appealed against that judgment before the Hungarian Supreme Court, claiming, in particular, that the agreements in question did not have as their object the restriction of competition.

10. The Hungarian Supreme Court noted that the European Court of Justice (hereinafter: ECJ) has not yet given judgment with regard to whether agreements, such as those at issue in the main proceedings, can be treated as 'agreements which, by their nature, are restrictive of competition by reason of their object'.

Accordingly, the Supreme Court decided to stay proceedings and to refer a question to the ECJ for a preliminary ruling.

11. The ECJ (First Chamber) ruled that Article 101(1) TFEU must be interpreted as meaning that agreements whereby car insurance companies come to bilateral arrangements, either with car dealers acting as car repair shops, or with an association representing those dealers, concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depends, *inter alia*, on the number and percentage of insurance contracts that the dealer has sold while being an intermediary for that company, can be considered to be a restriction of competition 'by object', within the meaning of that provision, where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.

### **Ruling of the Court:**

12. The Curia annulled the final judgment and upheld the decision of the First Instance.

So, the Curia fully rejected the claim of Allianz, partly annulled the decisions concerning Generali and GÉMOSZ, and dismissed the provisions on the fines imposed on the car dealers.

It decided that the GVH's definition of the relevant market was correct. It stated, however, that it was incorrect of the authority to consider the arrangements as part of a network of agreements which, together and with each other, served the purpose of restricting competition.

It considered that a classical horizontal price cartel was created, which was against the competition law.

It stated that Allianz decided on the recommended prices and they were included in the agreements written by Generali and GÉMOSZ.

The Court decided that Allianz not only negotiated prices, but also recommended an unlawful vertical agreement to the market's players.

**Comment:**

13. The wording of Paragraph 1(1) of Law No LVII of 1996 on the prohibition of unfair market practices and the restriction of competition (a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény; hereinafter: Tpv), is almost identical to that of Article 101(1) TFEU, and that the interpretation of Paragraph 11 of the Tpv, which will ultimately be adopted with respect to the agreements at issue, will, in the future, also have an impact on the interpretation of Article 101 TFEU in that Member State. There is a clear interest in having a uniform interpretation of the provisions and concepts of European Union law.

Ute Mockel, Frankfurt Higher Regional Court

**Judgment of the Oberlandesgericht (Higher Regional Court) Frankfurt am Main of**

**12th July, 2018, 11 U 96/14 (Kart)**

**(Follow-Up of the Judgment of the ECJ of 6th December 2017, C-230/16- *Coty./ Akzente*)**

**Facts**

The Plaintiff, Coty Germany GmbH (“Coty”), sells branded cosmetic products in Germany via a selective distribution system network (“SDS”), which it justifies by stating that “the character of Coty Prestige’s brands requires selective distribution in order to support the luxury image of these brands”.

The Defendant, Parfümerie Akzente GmbH (“Akzente”), has been an authorised distributor for many years, selling Coty’s products both at its bricks-and-mortar locations and over the internet. Internet sales are carried out partly through its own online store, and partly via the platform Amazon.de.

In this respect, as regards bricks-and-mortar retail, the selective distribution contract provides that each of the distributor’s sales locations must be approved by Coty Germany, which implies compliance with a number of requirements, relating to their environment, décor and furnishing. Furthermore, the contractual framework linking the parties includes a supplemental agreement on internet sales which provides, in Article 1(3), that “the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorized”.

Following the entry into force of Regulation No 330/2010, in 2012 Coty revised the selective distribution network contracts, as well as that supplemental agreement (“Annexe”). Clause 1.1. of that Annexe provides that the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an “electronic shop window” of the authorised store, and that the luxury character of the products is preserved. In addition, Clause 1.1. Sub-Paragraph 3 expressly prohibits the use of a different business name, as well as the recognisable engagement of a third-party undertaking which is not a retailer authorized by Coty Prestige.

Akzente refused to sign the revised contract. In 2013, Coty brought an action, seeking an order prohibiting Akzente from distributing products bearing the brand at issue via the platform ‘Amazon.de’.

The Court of First Instance (Landgericht Frankfurt am Main) dismissed that action on the ground that the contractual clause at issue was contrary to § 1 GWB (the German Law against the restriction of Competition), or Article 101(1) TFEU. It found that the objective of maintaining the prestigious image of the mark could not, in accordance with the judgment of the ECJ of 13th October, 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09), justify the introduction of a selective distribution system which, by definition, restricted competition. That clause also constituted, in the view of that Court, a hardcore restriction under Article 4(c) of Regulation No 330/2010.

Upon Coty’s appeal, the case came to our Court.

We decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling:

1. Do selective distribution systems that have as their aim the distribution of luxury goods, and that primarily serve to ensure a “luxury image” for those goods, constitute an aspect of competition that is compatible with Article 101(1) TFEU?
2. Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings that are discernible to the public, to handle

internet sales, irrespective of whether the manufacturer's legitimate quality standards are contravened in the specific case?

3. Is Article 4(b) of Regulation No 330/2010 to be interpreted as meaning that a prohibition of engaging third-party undertakings that are discernible to the public, to handle internet sales, that is imposed on the members of a selective distribution system operating at the retail level of trade, constitute a restriction of the retailer's customer group "by object"?

4. Is Article 4(c) of Regulation No 330/2010 to be interpreted as meaning that the prohibition of engaging third-party undertakings that are discernible to the public, to handle internet sales, that is imposed on the members of a selective distribution system operating at the retail level of trade, constitute a restriction of passive sales to end users "by object"?

By Judgment of 6.12.2017 (C-230/16), the ECJ answered those questions as follows:

1. Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods, complies with that provision to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers, and that are applied in a non-discriminatory fashion, and that the criteria laid down do not go beyond what is necessary.

2. Article 101(1) TFEU must be interpreted as not precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and is not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court.

3. Article 4 of Commission Regulation (EU) No 330/2010 of 20th 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 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the prohibition imposed on the members of a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales, does not constitute a restriction of customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation.

Following this decision by the ECJ, we reversed the judgment of the First Instance by a judgment of 12.7.2018, and granted an order prohibiting Akzente from selling the goods at issue via the platform Amazon.de.

## **Legal considerations**

I. The first difficulty for us was to determine which contractual clause we had to apply. As the claim was based on the (old) contract that was at that time in force between Coty and Akzente, the crucial question was whether the clause used in that contract was valid.

To the extent that Akzente argued that the clause (respectively, the whole SDS established by Coty) violated Art. 101 TFEU, we found that the contract signed by Akzente could no longer affect competition within the internal market, as this old version was only in force between Coty and Akzente. The contract which might have relevance for the internal market could only be the revised version of 2012, featuring less prohibitive clauses concerning internet sales, which Coty used with respect to all other distributors within its SDS, and which Coty was willing to apply also with respect to Akzente.

So, we had to decide whether:

1. the SDS, and, *in concreto*, clause 1.1. of the Annexe, in its current version, was in accordance with Art. 101 (1) TFEU, and if not so,
2. whether it could benefit from Block Exemption Regulation 330/2010 on Vertical Restraints.

II. As to the first question, the ECJ referred to its former rulings, stating that “the organisation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary” (24).

1) Concerning the question about whether the nature of the product necessitates an SDS, the Court confirmed that an SDS may also be considered necessary in respect of luxury goods, the quality of such goods being “not just the result of their material characteristics, but also of the allure and prestigious image, which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods” (25). It made clear that its former judgment in the *Pierre Fabre* case, in which it stated:

“The aim of maintaining a prestigious image is not a legitimate aim for restricting competition, and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Art. 101 Paragraph 1 TFEU”

had to be interpreted in the context of that case, where the goods in question were not luxury goods, and where the clause at issue contained an absolute prohibition of all internet sales.

In its briefs after the decision of the ECJ, Akzente massively challenged the assertion of Coty that the products in question had such an “aura of luxury”. It claimed that consumers actually considered them to be “mass products”, their price being not substantially higher than that of other comparable products, and asked us to order an opinion poll to prove this.

We found that, following the decision of the Court of First Instance of 12.12.1996, T-88/92 - *Givenchy*-, Akzente was right in claiming that, for the question about whether a good has a “luxury image” which had to be protected by an SDS, the perception of the consumer was relevant. On the other hand, however, we acknowledged that the emergence of a luxury image widely depends on the efforts of the manufacturer, who promotes such an image by corresponding marketing strategies. In this context, we stressed the fact that Coty has established two different marketing and sales channels: one for mass cosmetics, and one for luxury or “prestige” cosmetics, and that the same seems to be the case for most of Coty’s competitors. In German Practice (including the BKartA (Federal Cartel Authority) and the BGH (Federal Court)) it is also widely accepted that there is a special market for luxury cosmetics. According to the findings of the BKartA in a former merger case, the consumer buys luxury cosmetics for their prestige and does not consider mass cosmetics to be an equivalent. We found, therefore, that it would have been up to Akzente to produce clear indications that, despite the classification of the products in question by Coty, the consumer actually did not honour its marketing efforts, and considered them to be ordinary cosmetic products.

2) Second, we had to consider whether Coty was handling its SDS in a non-discriminatory way. Akzente claimed, *inter alia*, that Coty did not do enough to prevent other distributors / third parties from selling via Amazon, and that it allowed sales in airplanes and on airports in an environment which did not meet the quality criteria for bricks and mortar shops (especially when low cost carriers were involved), thus also endangering the luxury image of the goods.

We dismissed those arguments. Concerning online sales on Amazon, we cited ECJ rulings that the validity of an SDS does not require imperviousness (Judgment of 13.1.1994, C-376/92 - *Cartier*; Judgment of 5.6.1997 – C-41/96 – *VAG Händlerbeirat*). Following other German Courts, we found it sufficient that Coty’s policy concerning those sales was fair and comprehensible. To that extent, we had

(already before submitting the case to the ECJ) heard two employees of Coty as witnesses, and they testified in relation to Coty's delivery practice and about their system of tracing and preventing grey market sales.

Concerning Airline and Airport sales, we followed Coty's argument that those sales historically derived from the Duty-free-business, and they still require proof supplied by a flight ticket, thus not being comparable to other bricks-and-mortar sales.

3) The crucial point, in our view, was whether the contractual clause prohibiting the distributor from using any discernable third-party platform, regardless of whether that platform actually contravened Coty's quality standards, was necessary and proportionate to the aim of maintaining the luxury image of the goods.

a) The ECJ has stated that the clause was appropriate for ensuring that the goods were exclusively associated with the authorized distributors, thus being a coherent limitation in the light of the specific characteristics of the selective distribution system, with the effect of preserving the quality and luxury image of those goods.

b) At this point, we wondered to what extent the reasoning of the ECJ was binding for us. We questioned this reasoning from two aspects:

Firstly, even Coty admitted that - at least in theory - there might be third-party platforms who meet all the quality requirements of Coty, and who left no doubt to the customers that - similar, e.g., to a bricks and mortar shopping mall - the goods were actually sold by the authorized distributor. So, even if Amazon did not meet the legitimate criteria, the clause itself might be more restrictive than necessary.

Second, when looking at proportionality, in our view, the judgment did not take into account that the E-commerce Sector Inquiry of the Commission - cited both by the Advocate General in his opinion and by the Court - showed not only that the main distribution channel in online distribution is the distributor's own online shop, but that in Germany the relevance of third-party platforms within online commerce is substantially higher than in any other country of the EU.

However, as the reasoning of the ECJ was based on the facts of this individual case, which we had presented to the ECJ, we felt uncertain whether we were allowed to replace this reasoning by our own - even though the ECJ formally stated "these being matters to be determined by the referring court."

III. But we could leave this question open, as we found that even if the clause did not meet all the necessary criteria in order to be outside Art. 101 (1) TFEU, it fell within the scope of application of the Block Exemption Regulation 330/2010.

We found that, as a matter of fact, the market share of both parties was below the 30 % - threshold of Art. 3 (1) of the regulation.

So, the only question was whether the clause contained a hardcore restriction, in the sense of Art. 4. The ECJ had answered our respective questions that, in the circumstances of the case at issue, the prohibition in the clause at issue does not amount to a restriction of customers within the meaning of Art. 4(b), nor to a restriction of passive sales to end users within the meaning of Art. 4 (c).

This ruling was based on three assumptions:

First, that - differently to the Pierre Fabre case - the clause did not prohibit the use of the internet in total as a means of marketing the goods. (65)

Second, it does not appear possible to circumscribe, within the group of online purchasers, third-party platform customers. (66)

Third, the SDS at issue allows authorized customers to advertise via internet on third-party platforms and to use online search engines, so that they are able to find the online offer of an authorized distributor by using such engines (67).



We found that, as a matter of fact, the first and the third assumption actually were fulfilled in the case. As for the second assumption, this one seemed not to be based on the individual case at issue, but rather on abstract and general findings. So here again we wondered to what extent we were bound by the reasoning of the ECJ - there were also good arguments in German legal writings (and also in Court decisions) supporting the view that the customers of platforms are a separate group within the group of online purchasers, particularly if they are used to purchasing via a “shopping app”. Nevertheless, in the end, we considered the assumption of the ECJ to be justified, because someone who wants to buy a certain product via the internet will find this product also at the distributor’s own online shop, as long as the distributor is not prevented from marketing via search engines.

So, we decided that the current SDS established by Coty, including the relevant clause on third-party-platforms, could benefit from the bloc exemption.

IV We still had to deal with Akzente’s allegation that the old contract, still in force between itself and Coty, violated German anti-monopoly law. This view was supported by the fact that the old contract did not feature clauses allowing online advertising with third parties and using (price) search engines. However, we found that Akzente was banned by the principle of good face from claiming the invalidity of the old contract, while refusing to sign the new one, which fell under the Block Exemption in Regulation 330/2010.

**Abuse of Dominance – Exploitative Practices**

Amerika Dzintra, Latvia Supreme Court

**Latvian Authors' Association (hereinafter – the AKKA/LAA) v. Competition Council  
Judgment of the Supreme Court (Department of the Administrative Cases), 6th February, 2018,  
case No.SKA-7/2018).**

**Facts of the Case**

The AKKA/LAA, a collective management organisation handling copyright for musical works, is the only entity authorised in Latvia to issue, for consideration, licences for the public performance of musical works in respect of which it manages the copyright. It collects the fees from which Latvian copyright holders are remunerated as well as, through contracts concluded with foreign collecting societies, those from which foreign copyright holders are remunerated. Holders of its licences include shops and service centres, as the users of works protected by copyright and related rights.

By a decision of 1st December 2008, the Competition Council imposed a fine on the AKKA/LAA for abuse of a dominant position, as a result of the application of excessively high rates. The AKKA/LAA subsequently adopted new rates that were applicable from 2011. On 31st May 2012, the Competition Council opened a procedure to examine those new rates.

**The Findings and the Decision of the Competition Council**

In the context of the procedure, the Competition Council first compared the rates applied in Latvia for the use of musical works in shops and service centres with those applied in Lithuania and Estonia, as neighbouring Member States and markets. The Competition Council found that the rates applied in Latvia were higher than those applied in Estonia and, in most cases, were higher than those charged in Lithuania. Although, in those three Member States, rates are set according to the surface area of the shop or service centre concerned, the Competition Council observed that, for surface areas of between 81 m<sup>2</sup> and 201-300 m<sup>2</sup>, the rates applied in Latvia were two to three times higher than those applied in the other two Baltic States.

Secondly, the Competition Council, having recourse to the purchasing power parity index (“PPP index”), compared the fees in force in approximately 20 other Member States, and they found in this regard that the rates payable in Latvia exceeded the average level of those charged in those other Member States by 50% to 100%. More specifically, in the case of shops or service centres with surface areas of between 85.5 m<sup>2</sup> and approximately 140 m<sup>2</sup>, only the rates applied in Romania were higher.

The Competition Council admitted that the AKKA/LAA failed to objectively justify why its fees are higher than in the other Baltic States.

By a decision of 2nd April, 2013, the Competition Council found that the AKKA/LAA had violated the prohibition set out in Section 13, Paragraph one, Clause 4 of the Competition Law, and in Article 102 (a) of the Treaty on the Functioning of the European Union (abuse of a dominant position), and imposed a fine of LVL45 645,83.

When calculating the turnover of the last fiscal year for the imposition of a fine, the Competition Council also included the collected remuneration of the authors, indicating that, according to competition law, the net turnover of the associations should be calculated on the basis of similar principles to that of capital companies, providing that the calculation of the fine is not applied differently depending on the legal form of market participant.

## **The Appeal**

The applicant filed an application requesting the annulment of the Competition Council's decision.

By a judgment of the Administrative Regional Court of 9th February 2015, the application was partially satisfied. The Court acknowledged that the Competition Council was right to find unfounded the application of unreasonably high rates for the use of authors' musical works in shops and service centres. At the same time, the Court annulled the decision of the Competition Council regarding the fine imposed on the applicant, and imposed on the Competition Council the need to issue a new administrative act within two months from the entry into force of the judgment, obliging the applicant to recalculate the fine, observing the factual findings and legal considerations that had been established by the judgment.

The Administrative Regional Court's judgment was appealed by the AKKA/LAA and the Competition Council to the Supreme Court.

The AKKA/LAA argued that the Court had chosen comparable countries, taking into account non-economic criteria (cultural and historical situation; border with Latvia; other countries are too far away, etc.) and the comparison with only two other countries is unreasonably narrow.

The argumentation of the Competition Council's Appeal concerned the fines. The Competition Council argued that the turnover in competition law is understood as the sum of the total revenue arising from their economic activity. The AKKA/LAA activity does not indicate that the basic principles of its operation would be different to those established in another legal form (capital companies). The legal form of AKKA/LAA activity cannot be a reason for the specific calculation of turnover.

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

On 6th February 2018, the Department of Administrative Cases of the Supreme Court annulled the judgment of the Administrative Regional Court, and it referred the case for re-examination in the Administrative Regional Court as a Court of First Instance. The Supreme Court, in this judgment, stated that, when re-examining the case, the Court should firstly verify the validity of the institution's decision regarding the choice of markets that are used for the comparison of rates. Secondly, it is necessary to reassess whether royalties payable to authors should be taken into account when calculating the fine.

In the view of the Supreme Court, the institution has not sufficiently substantiated the similarity of the compared markets. The Supreme Court also pointed out that the lack of such substantiation can be remedied in court proceedings, presenting detailed information by the institution and, if necessary, providing evidence of comparable markets. This complies with the principles of the Administrative Procedure Law, which allows any party to proceedings to submit additional evidence of his/her allegations, in so far as the substantive statement of the institution's decision has not been changed. Representatives of the Competition Council at the court sitting of the Supreme Court explained in more detail the similarities between the Latvian, Lithuanian and Estonian markets. An explanation of this kind must be submitted to the Regional Court, which examines the case on its merits.

Regarding the amount of the fine, in its judgment, the Supreme Court stated that it is necessary to assess whether it is fair to calculate the fine from the value of the service provided by the AKKA/LAA. If, in the light of the interdependence between the AKKA/LAA and the authors, it is more likely to believe that they are a single economic unit, and not merely acting as mediation between other entities, then there are no grounds for not taking this fact into account when determining the fine. In this respect, taking into account the general objectives of the fine, it would also be necessary to assess the relationship between the object of the offence itself (the unfair price) and the person or organisation who gains benefit.

### **Personal comment**

The judgment of the Supreme Court follows a preliminary ruling request to the Court of Justice of the European Union (CJEU) (see the judgment of 14th September, 2017, *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v. Konkurences padome*, C-177/16). The answers given by the CJEU were broad, and therefore the National Court itself must recognize, for example, whether the criteria applied by the Competition Council for the choice of the comparable countries justifies this choice.

In my opinion, the judgment of the Supreme Court is thus relevant, not only because it has been adopted in accordance with the judgment of the CJEU, but also because the Supreme Court outlines more specific elements which should be taken into account in the examination of the decision of the Competition Council.

Rosa Perna, Administrative Tribunal of Latium

**Italian Competition Authority (ICA) Decision 29th September 2016, no. 26185**

**Latium Administrative Tribunal (TAR Lazio) Decision 26th July 2017, n. 8945**

## **Introduction**

This ruling is of particular interest, since it concerns an abuse of dominance in the form of excessive pricing under Art. 102(a) TFEU, which has rarely been detected at either EU level or national level. The Italian Competition Authority (“ICA”) found that the Aspen Group (“Aspen”) abused its dominant position in the market for Cosmos drugs (“the Products”) – essential in curing certain forms of leukaemia – by imposing on the Agenzia Italiana del Farmaco (AIFA) excessive prices for these drugs, by means of an unfair and aggressive negotiation strategy.

Consequently, the ICA ordered Aspen to discontinue its conduct, and imposed a fine of €5.225.317.

The Tar Lazio upheld the ICA’s decision after restating a number of antitrust principles, which are consolidated at EU level as far as an abuse of a dominant position is concerned, and this is worth mentioning. Apart from this, the case at stake is relevant in itself, because it involves sensitive interests, if we consider that since pharmaceuticals are primary goods that require protection, but are, nevertheless, left to the initiative of private undertakings, which may try to exploit their essential nature.

The case is framed in the Italian context, but its relevance transcends the local dimension. Not only because, generally speaking, large multinational groups are likely to adopt the very same commercial practice that is contested by the ICA in this decision, but also because, with specific regard to the Aspen Group, after the ICA’s decision, identical proceedings against Aspen were opened by the European Commission and by the South African Competition Commission. It is therefore a topical case.

Eventually, this relates to a regulated market, and so it poses questions about the relationship between antitrust and sector regulation, also taking into account that, in the Italian pharmaceutical sector, if the regulation is stringent in respect of many important aspects, it does not cover pricing, which, for the reimbursed pharmaceuticals, is ordinarily left to the negotiation between medicine agencies and pharmaceutical companies.

## **The case**

Aspen is a leading global player in specialty, branded and generic pharmaceuticals. It has been active in Europe since 2009, when it acquired a package of oncology drugs, including the Products.

The Products were authorized for marketing and admitted for reimbursement in Italy.

Focusing on the case, in April, 2013, Aspen requested, the delisting of the Products from the reimbursement regime in Italy; but, on account of the essential nature of the Cosmos drugs, the request was rejected by the AIFA, which instead invited the company to propose a reasonable price increase with a view to maintaining them within the reimbursement regime.

At this point, Aspen insisted on the upward revision of prices; finally, it resorted to the credible threat of interrupting the supply of such drugs to the Italian market, being aware that, in the case of non-agreement, the Products would be placed in Class C, with their cost to be borne by the patient.

In the end, the AIFA agreed to Aspen’s conditions, and granted the Products a very high price increase.

## **The ICA's final decision**

The ICA found that the Aspen Group (“Aspen”) held a dominant position in respect of Cosmos drugs by considering that, although other drugs could be used for the same therapeutic indications as the Products, some of their features made them unsubstitutable for specific groups of patients (i.e., children and the elderly).

As for the conduct of the parties, the ICA found that the Aspen Group had abused its dominant position in the market for Cosmos drugs, by imposing on the AIFA, or Pharma Regulator, excessive prices for these drugs, by means of an unfair and aggressive negotiation strategy.

In order to assess this excessive pricing, the ICA applied the legal tests set forth by the EU case-law on excessive pricing, namely, by the United Brands judgment (case 27/76), and after its completion it concluded that the prices in question had “no reasonable relation to the economic value of the product supplied”.

Such assessment was carried out in two phases: (i) first, the application of two different methodologies (margin analysis, and profitability or “cost plus” analysis) in order to ascertain the excess of prices over costs, (ii) second, the consideration of the specific circumstances of the case, in order to evaluate the unfairness of the imposed prices.

The ICA emphasized that, in general, the Aspen group did not conduct any R&D activity with respect to new products, and, with specific reference to the Products, no “typical expenses for R&D activities, innovation and medical/scientific communication” had still to be considered, since they had already been “widely recovered” and, thus, had already been taken into due account by the AIFA at the time of the first negotiation of their prices.

Besides, the ICA valued the fact that the prices of the Products had been kept low for many decades and had now been considerably increased without a sound reason. For this purpose, it disregarded the aspect raised by Aspen, the need to achieve an alignment of the prices of the Products with the higher prices applied in other EU countries.

Ultimately, the ICA deplored the aggressive negotiation that had been undertaken by Aspen with the AIFA, qualifying it as a “specious exercise of the renegotiation right of prices aimed at obtaining unfair prices”.

## **Aspen's complaints**

Aspen opposed the ICA's Decision and filed a claim before the Latium Administrative Tribunal (“Tar”), making a number of complaints, which were widely and extensively argued.

Apart from many procedural grounds, the claimant disputed at root the existence of an abuse of dominance, and the fact that it could be referred to Aspen.

It firstly put forward that the market definition identified by the ICA's Decision - ATC5 of the Anatomical Therapeutic Chemical classification system - was erroneous, because of the unreasonably restrictive approach followed - contending that the Authority should have stopped at the ATC3 level - and the lack of analysis of the therapeutic and economic substitutability of drugs.

The claimant also contended that the Authority's reconstruction of the actual existence of the dominant position of Aspen in the relevant markets, as it had been affected by the erroneous definition of the market and, in any case, had not been sufficiently proven in regard to: - the competitive pressures due to the presence of alternative drugs used, at least, in some groups of patients; - and the absence of strategic barriers to entry into the identified markets.

Besides, the Authority would have misrepresented the initiatives of Aspen, which, however, had submitted an application for the reclassification of drugs, not abusing its right, but merely exercising a faculty provided by the AIFA Guidelines.

Moreover, Aspen contested the assessment of its conduct as being abusive, and the erroneous application of the two-stage substitutability test, used in the United Brands case, as to the analysis of excessive pricing, and thus the decision would be abnormal and unreasonable.

Ultimately, the claimant contended that, by qualifying unfair prices already contracted and approved by the Regulator, and by judging the documentation produced during the renegotiation procedure to be insufficient, ICA had invaded areas covered by the regulation of the pharmaceutical sector and carried out assessments due to the AIFA.

In the end, Aspen contested the amount of the fine determined by ICA because it was disproportionate and unjust.

### **Tar Lazio judgment**

The Court upheld the decision adopted by the Italian Competition Authority.

First, it laid down a series of basic and sound principles:

1) an infringement of Art. 102 TFEU can flow from several non-typified conducts; the completion of the exegetical activity necessary to identify, in practice, the punishable conduct, is up to the interpreter also in consideration of the clear non-exhaustiveness of the list that is contained in the second paragraph of Art. 102 (Court of Justice, 14th October, 2010, C-280/08 P, *Deutsche Telekom AG v. European Commission*, page 173 and the jurisprudence cited therein, Court of Justice, 17th February, 2011, C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*);

2) a dominant position derives from a combination of numerous factors which, taken separately, are not necessarily decisive; to this end, it is first of all necessary to examine the structure of the market, and then the situation on the market with regard to competition: market shares are used as a preliminary filter to determine whether there is dominance, then additional factors come into consideration, and, among all, the existence of barriers to entry (Court of Justice, C-85/76, *Hoffmann - La Roche v. Commission* and C-27/76, *United brands*; Case AKZO -199; *ASTRAZENECA* 2012);

3) defining a relevant market is an essential prerequisite for establishing dominance.

For the purposes of Art. 102 the appropriate definition of the relevant market is a necessary precondition for any judgment relating to alleged anti-competitive behaviour, since, before ascertaining an abuse of a dominant position, it is necessary to establish the existence of a dominant position in a given market (GC 2000 – *VOLKSWAGEN*);

4) the declining of the punishable conduct, in terms of the abuse of a dominant position, postulates, *ex se*, that the mere detention or acquisition of a dominant role in the relevant market is not, for that reason alone, against the antitrust rules, as long as it does not hinder the development of a healthy competitive environment in the market.

In fact, the finding of the existence of the dominant position does not in itself imply any liability against the undertaking concerned, but it merely means that, irrespective of the causes of that position, the undertaking is required not to jeopardize the development of effective and undistorted competition in the common market by means of its conduct (Court of Justice, 9th November, 1983, Case C-322/81, *Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, Para 57, so-called "Michelin I", leading case in the theory of "special responsibility"); similarly, "... the possession of monopoly power will not be considered illicit unless it is accompanied by the element of anti-



competitive conduct" (Justice Scalia, in *Verizon Communications Inc. v. Law Offices of Curtis, V. Trinko, LLP*, 124 S.Ct 872 (2004)).

So, the logical assumption of Art. 102 is that dominant companies have a "special responsibility" for the correct operation of the market (Michelin I, 1983). It is for this reason that certain behaviours, legitimate if undertaken by companies that are not dominant, are forbidden to the dominant enterprise (case *Atlantic Container*, 1998).

5) the illicit nature of a behaviour in the light of the antitrust discipline does not have a relationship with its compliance or otherwise with different legal rules, which is aimed at regulating the operator's activity in the relevant economic sector.

Abuses of a dominant position consist, in the majority of cases, in behaviours that are legitimate in the light of branches of law other than competition law (Court of First Instance, 1st July, 2010, T-321/05, *Astrazeneca*, on the point confirmed by the Court of Justice, 6th December, 2012, C-457/10 P, page 129 ff; Council of State, Section VI, 12th February, 2014, No. 693).

The powers of Regulatory and Competition Authorities, although differentiated, also due to the different objectives pursued by the respective relevant regulations, therefore coexist in the single regulated sector, placing themselves in a "non-exclusion and overlap" relationship, that is to say, "not of antithesis, but of complementarity", so that "the application of the rules for the protection of competition is not excluded in cases [...] where the regulatory provisions leave the possibility for companies to adopt autonomous acts to hinder (...) competition, thus confirming the existence of a double control, regulatory and antitrust "(Cons. State, Section VI, May 15, 2015, No. 2479, A428 - *Wind-Fastweb / TI Conduct*).

Then, coming to the specific case:

- **On the market definition**, the Court dismissed Aspen's claims concerning the market definition identified by the ICA's Decision, i.e., the market for Cosmos drugs essential for the treatment of certain forms of leukaemia, on account of the lack of substitutes among the other drugs belonging to the same molecular subgroup (ATC4) for the treatment of children and elderly patients.

In particular, the Court recognized that, following the European Commission's guidelines, making reference to ATC3 might be a "good starting point" in defining a relevant market in the pharma sector; However, this does not prevent a competition authority from using a smaller class, such as ATC5, in all cases where circumstances show that the undertaking involved in the assessment is subject to sufficiently strong competitive constraints, located at another level compared to that identified by the ATC level 3.

Where economic-behavioral assessments, or specific competitive constraints on companies involved in the assessment of an antitrust authority so require, the latter shall therefore perform a specific substitutability analysis, either identifying a different and more restricted ATC level for the therapeutic classes of drugs, or identifying the market according to different criteria (*Teva / Barr*, Paragraph 11, *AGCM, Glaxo / Principi Attivi*, Paragraph 29).

Consequently, given the specificities of the pharma markets, the Court considered that, for the assessment of drugs' substitutability, referring to the smallest classes of drugs, such as ATC5, was correct, because it allowed the consideration of specific factors that are relevant to the case at hand (e.g., different tolerability of the drugs and the incidence of side effects to the therapy, the existence of generic drugs, distribution subject to medical prescription).

On the other hand, the Court acknowledged that the ATC classification system is a synthetic grouping methodology that, although useful, has never been codified for antitrust analysis purposes.

Eventually, the Tar Lazio clarified that, once the therapeutic non-substitutability of the Cosmos drugs with specialties based on the same and on different active ingredients (generic) had been identified and proven, the analysis of economic substitutability, which in the pharmaceutical sector has a more

contained relevance, was therefore absorbed; in fact, the price is not the main criterion of preference among comparable medicines, as the choice is further mediated by the activity of the prescriber and the need for therapeutic continuity.

**-On the dominance in the relevant market,** the Court considered that ITA had widely and exhaustively proven that, despite the absence of barriers to entry, in the market for active principles, Cosmos Aspen had an almost total share, and they benefited from the absence of both actual and potential competitive pressures, having become, among the many producers, the only one to whom the purchaser (in this case, the SSN) could apply; adding that, on account of the specific circumstances of the case, both the NHS and the Pharma Regulator could not counterbalance Aspen's market power.

**-On the alleged misrepresentation of Aspen's initiatives** in negotiating prices increase with the AIFA, the Court dismissed the claims, clarifying that the ITA's assessment did not concern the lawfulness of the individual acts of the negotiation but the possible abuse of the claimant's rights, in order to impose on the regulator new and excessive prices for the Cosmos drugs. The fact that these rights were foreseen in the legislation was not relevant to the case, which was marked by the conscious use of the negotiating rights - which are provided by law for the purpose of giving the pharmaceutical company a fair remuneration, while ensuring compliance with the levels of planned expenditure for pharmaceutical assistance - for the purpose - different, further, and contrary to competition law, of obtaining the imposition of excessive prices for the Products.

**-On the unfairness of the prices.** The judgment then confirmed ICA's assessment under Art. 102(a) TFEU of the excessiveness of the new prices imposed by Aspen on the AIFA.

In the Court's view, ICA's margin analysis methodology had correctly proven that Cosmos drugs positively contributed to Aspen's profits before the increase in their prices: hence, the new prices applied by Aspen lead to a proportional increase in profit.

Besides, the ICA had correctly ascertained the unfairness of the prices confronting them with the previous prices, and by assessing the lack of any justification for this increase. To this end, the Court stressed, in particular, the following factors:

- (a) the absence of any qualitative improvement to the Cosmos products or to their related service from Aspen,
- (b) the role of Aspen as a "generic" producer, and the limited cost of R&D,
- (c) the significant economic effect of the price increase on the National Health System.

Finally, the Tar Lazio confirmed the amount of the fine imposed by the ICA in light of the seriousness and duration of the infringement.

## **Final remarks**

The ruling is of particular interest, since the abuse of dominance in the form of excessive pricing under Art. 102(a) TFEU has seldom been found at the EU level.

This category of abusive conduct aims to harm the customer of the dominant undertaking, and the European Commission has so far shown little interest in repressing these abuses, especially because it is difficult to identify the parameters for possible intervention.

Where a company has any market power, prices are higher than the marginal cost; it follows that if the European competition law were to apply to all prices above the marginal cost, virtually all the companies would be subject to investigation by the Authority.

It is evident that only exorbitant prices must require intervention, even though the jurisprudence of the Court of Justice has not so far provided clear indications to discern what constitutes an excessive price.

The Court has suggested that a price is excessive when it does not express any reasonable relation to the economic value of the product in question (*United Brands v. Commission*, 1978); this could be measured by comparing the sales price with the cost of production, stating that, it would be necessary "to establish whether there is an excessive disproportion between the cost actually incurred and the price actually requested and, if so, to ascertain whether an unfair price has been imposed, both in absolute and in respect of competing products "(Para 252).

The application of the *United Brands* test, as operated by *Aspen*, might be particularly worrying for pharmaceutical companies, and the ICA must be careful to apply the correct comparators in order to assess the excessiveness and unfairness of a given pharmaceutical price.

**Abuse of Dominance - Exclusionary Practices**

Daniel Severinsson, Swedish Patent and Market Court

## **The Swedish "snus" case (The Swedish Competition Authority./Swedish Match)**

### **Background**

Snus is a type of oral tobacco which is very popular in Sweden. Swedish Match used to be part of a Swedish tobacco monopoly, which was abandoned in the 1960s. However, there was virtually no competition on the market until the early 2000s. Snus is usually sold from coolers, which the manufacturers provide to retailers without cost. Most of such coolers are provided by Swedish Match. Swedish Match allows, to various extents, competitors to place their products in Swedish Match coolers.

According to the Swedish Tobacco Act, the marketing of snus is very restricted. A common way to market snus has been through various types of shelf labels in the snus' coolers, for example, using strong colours, or large digits that state the price.

### **Alleged abuse of a dominant position**

In 2012, Swedish Match launched a labelling system for their coolers. Swedish Match provided their competitors with a template and gave them a few months to print new labels according to that template. If the competitors didn't comply, then Swedish Match printed grey and white labels for the competitors' products. The multinational tobacco groups, JTI and BAT, and the Swedish snus manufacturer, Skruf, launched a complaint to the Swedish Competition Authority, according to which Swedish Match had abused its dominant position by hindering competitors from marketing their products using the price and the brand.

Following the complaints, the authority started an investigation. About nine months after the investigation had started, Swedish Match decided to abandon the labelling system. The authority continued its investigation anyway, and eventually found that Swedish Match had abused its dominant position on the market for selling snus to retailers in Sweden. Since the authority does not have the power to decide on fines, it took the case to the Patent and Market Court and requested a fine of approximately €3,500,000.

*Patent and Market Court judgment (8th February, 2017, PMT 16822-14)*

### **Dominant position**

The Court agreed with the authority that the relevant market was the market for selling snus to retailers in Sweden. Even though Swedish Match had been losing market shares over the years, in 2012 it maintained a market share of over 80 percent in value, and over 70 percent in volume. The reason for the difference was that Swedish Match's products were particularly popular in the premium segment due to its strong brands, whereas competitors mainly competed with price in the low-price segment. It could also be inferred from various customer surveys that were performed by the snus manufacturers, that customers were loyal to brands. After hearing representatives of the retailers, the Court also found that Swedish Match was an indispensable trading partner and that many of its premium brands were must have products.

Swedish Match's position on the market was also strengthened by the fact that it provided most of the coolers to stores, and routinely reserved the best eye-level shelves and the right to place marketing materials on the coolers for itself. In many cases, Swedish Match also helped the stores in planning their snus purchases.

To sum up, the Court found that Swedish Match had a dominant position at the relevant time.

### **Abuse**

One crucial issue was whether shelf labels really were an important marketing tool for snus. The Court heard several witnesses, representing both the competing snus manufacturers and the retailers, who confirmed this was the case. The authority also put forward internal documents from Swedish Match, according to which one reason for implementing the labelling system was to decrease price competition, and other documents that showed that Swedish Match considered that shelf labels were important. The Court also noted that most types of regular marketing for snus were prohibited by Swedish law. The Court therefore concluded that shelf labels were an important means for marketing snus.

In the next step, the Court tried to discern whether the labelling system restricted competition. The Court found that many retailers had been given the impression that it was mandatory for them to accept the labelling system. According to witnesses, Swedish Match had also, in some cases, implemented the system selectively, by, e.g., keeping shelf labels with large digits for its own low-price brand. The Court also found that Swedish Match internal minutes and presentations from meetings, etc., proved that the labelling system was part of a strategy to reduce price competition, which would favour the profitable premium segment, in which Swedish Match met virtually no competition. Swedish Match's conduct was not seen as normal competition, and due to the specific market conditions Swedish Match's competitors lacked effective counter measures. The Court further stated that it was not for Swedish Match to ensure that its competitors' labels met the requirements of the Tobacco Act, and that it was not for the Court to make the difficult assessment about whether certain shelf labels infringed the Tobacco Act in the case at hand.

Even though there was no proof that the labelling system actually had had restrictive effects on the market, the Court concluded that it tended to restrict price and brand competition, and thus made it more difficult for existing competitors to expand and to take market shares from Swedish Match. Since the evidence supported that the only feasible way for competitors to enter the snus market was through price competition in the low-price segment, the labelling system was also found to, at least potentially, raise the barriers to entry to the market.

### **Objective justification**

Swedish Match mainly held that the reason for implementing the labelling system was to keep their coolers "tidy". However, the Court found that the system was part of an anti-competitive strategy and that Swedish Match could have reached its stated aim by less intrusive means. The Court had already found that it was not for Swedish Match to ensure that its competitors' shelf labels were in accordance with the Tobacco Act.

Swedish Match had thus abused its dominant position, and the Court ruled that the company should pay the fines requested by the authority.

*Patent and Market Court of Appeal judgment (29th June, 2018, PMT 1988-17)*

### **Abuse of a dominant position**

Swedish Match appealed the judgment to the Court of Appeal. The Court of Appeal agreed with the Court that Swedish Match had a dominant position, and that the labelling system tended to restrict competition.

## Objective justification

The Court of Appeal found that Swedish Match's arguments concerning the need to keep the coolers "tidy" should be interpreted as meaning, *inter alia*, that the labelling system was necessary to comply with the strict rules concerning marketing that are set out in the Swedish Tobacco Act. Since Swedish Match owned the coolers it was entitled to stop such marketing on shelf labels that did not comply with the requirements for moderation in the Tobacco Act. Even though the Court of Appeal also found that the labelling system was part of an anti-competitive strategy, it found that the labelling system was objectively justified.

The Court of Appeal also tried whether the labelling system combined with the alleged selective implementation amounted to an abuse of a dominant position. Here the Court found that the authority had not managed to prove that the implementation was selective. The Court of Appeal thus ruled that Swedish Match had not abused its dominant position.

## Comments

An interesting aspect of the case is whether it was for Swedish Match to ensure that the competitors' shelf labels complied with the requirements of the Tobacco Act, or if this was a matter for the relevant Swedish authorities.

The Patent and Market Court found that it was not a matter for Swedish Match, and referred to the judgment in case T-30/89 Hilti. In that case, the Court of First Instance did not accept the nail manufacturer, Hilti's, plea that it had tried to stop the use of competing firms' nails for health and safety reasons. The Court of First Instance specifically noted that Hilti had not made use of the possibilities to contact relevant authorities with its concerns.

The Patent and Market Court of Appeal, however, found that the Hilti case law was not relevant. According to the Court, Swedish Match's measures to stop violations of the Tobacco Act in its own coolers was not comparable to Hilti's conduct.

In my opinion, the Patent and Market Court had good reason for finding that it was not for Swedish Match to ensure that the competitors' shelf labels complied with the requirements of the Tobacco Act. Swedish Match was free to either contact the relevant authorities, or to seek an injunction against its competitors according to both the Tobacco Act and the Marketing Act. One reason why Swedish Match chose not to use any of these possibilities may have been that Swedish Match itself continued to use shelf labels with price splashes and neon colors for its own low-price products, at least in stores where the labelling system was not implemented.

It also seems appropriate that an assessment of whether certain snus' shelf labels infringed the Tobacco Act, should generally not be made in the context of a case concerning the abuse of a dominant position, especially since there are no precedents where snus' shelf labels have been found to infringe the Tobacco Act.

Further, it should be noted that Swedish Match did not claim that it, or the stores to which it provided its coolers, could be held liable if the competitors' shelf labels infringed the Tobacco Act. Even if this were to be theoretically possible under Swedish law, there are no precedents where parties other than the manufacturer whose marketing materials are found to infringe the Tobacco Act, have been subject to an injunction.

Eva Edwardsson, Sweden Patent and Market Court of Appeal

**Judgment of Patent- and Marknadsöverdomstolen, Svea hovrätt, of 29th June 2018.**

***Swedish Match North Europe vs. Konkurrensverket, PMT 1988-17, (the Swedish Match Case)***

### **Summary of the facts of the dispute**

Swedish Match is a Swedish tobacco company that manufactures snuff (in Swedish: snus). The company is the successor to the Swedish Tobacco Monopoly, founded in 1915, which formerly had a monopoly on tobacco production and sales in Sweden. The monopoly was abolished in 1967. Snus is a popular alternative to cigarettes in Sweden. In 2014, 20 percent of Swedish men and 3.5 percent of women aged 20–29 years took snuff daily. Sweden is the only country in the EU where snus can be sold, according to a permanent clause in the accession treaty between Sweden and the EU. In other Member states there is a ban on the marketing of snus.

The Swedish Tobacco Act is very strict. According to the Swedish Tobacco Act, the marketing of tobacco products to consumers is prohibited. However, there are some limited exceptions, and it is permitted to market tobacco products through commercial notices inside outlets. These commercials may not be intrusive and may not encourage the consumers to buy or use tobacco.

Swedish Match began in the 1990s to provide retailers with special refrigerators for snus (snus' coolers). Snus could now be sold cooled, which enhanced the demand for snus. The quality of snus does not deteriorate if stored at room temperature. According to an agreement between Swedish Match and its retailers, the retailers could keep snus from competing manufacturers, such as JTI Sweden AB (JTI) and British American Tobacco AB (BAT), in 20 percent of the space in these refrigerators.

In 2012, Swedish Match introduced a system for uniform shelter labels in the company's refrigerators. The labelling system included a template with instructions for the design of shelf labels. The template was to be used both for snus marketed by Swedish Match, and for snus marketed by the company's competitors. The label template contained instructions for size (40 x 80 mm), fonts, text size, background colours and logo location. If competitors did not produce labels according to Swedish Match's instructions, Swedish Match announced that it would make generic gray-white shelf labels on the competitors' behalf.

Swedish Match's competitors, including BAT and JTI, complained to the Swedish Competition Authority, which launched an investigation in 2012. The investigation, together with the fact that the shelf labelling system became very unpopular among retailers, as it generated a 'shelf label war', in which Swedish Match and its competitors changed shelf labels in retailers' stores on a weekly basis, and it had the effect that Swedish Match abandoned their labelling system in March, 2013.

### **Summary of the judicial proceedings**

In December 2014, the Swedish Competition Authority brought an action due to an alleged abuse of a dominant position. The Patent and Market Court upheld the Competition Authority's action in February, 2017, and ordered Swedish Match to pay a €3.6 million fine.

Swedish Match appealed to the Patent and Market Court of Appeal. In its judgment of 29th June, 2018, the Patent and Market Court of Appeal reversed the judgment, and thus the Competition Authority's plea was unsuccessful.



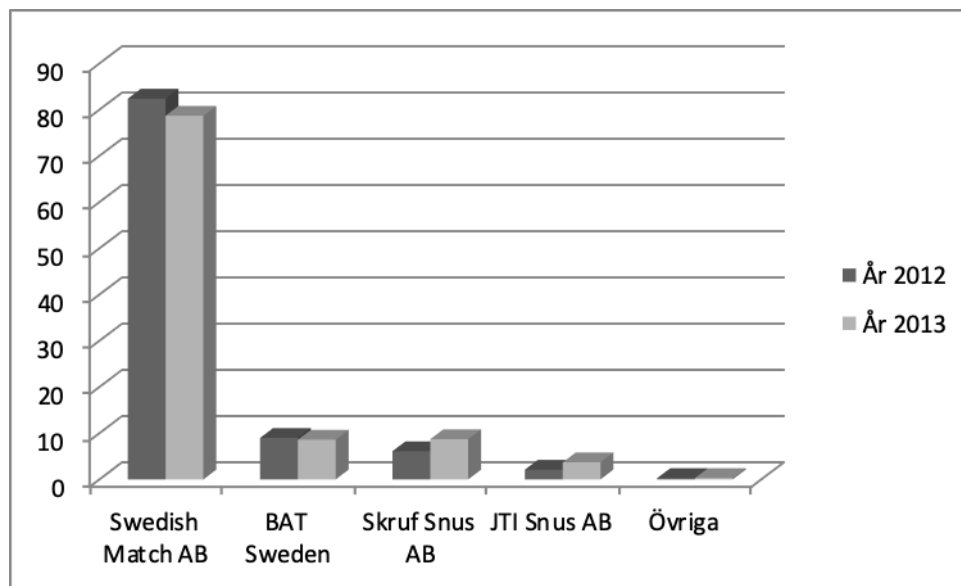
## Ruling of the court

### The relevant market, effect on trade between Member states

The relevant market was the market for the sale of nicotine-containing snus to retailers in Sweden. Swedish Match's competitors were international companies that also operate in other Member States. Even though Sweden is the only EU Member State in which the sale of snus is permitted, both instances found that an alleged abuse in this market could affect the trade between Member States (the Patent and Market Court of Appeal referred to the judgment of the European Court of Justice of 9th November, 1983, Michelin, Case 322/81, EU: C: 1983: 313, Paragraph 103).

### Dominant position

The following graph shows the size of market shares in the relevant market.



The Patent and Market Court of Appeal considered that Swedish Match's market share of more than 70 per cent, in terms of both volume and value, strongly indicated that Swedish Match had a dominant position in both 2012 and 2013.

### Abuse

The first question was whether the shelf labelling system was binding, or not. The First Instance (the Patent and Market Court) had drawn the conclusion that the labelling system was indeed binding for retailers. The Patent and Market Court of Appeal saw the matter differently and concluded that Swedish Match did not enforce the labelling system in such a way that it was binding for retailers. However, the Patent and Market Court of Appeal found that, by introducing a system of shelf labels, Swedish Match had changed its approach to its competitors and had limited their ability to choose how to design shelf labels of their own. A refusal by a dominant undertaking to continue to act according to pre-existing terms towards competitors, can be considered to be an abuse of a dominant position (the Court referred to a judgment of 6th March, 1974, Commercial Solvents, Cases 6/73 and 7/73, EU: C: 1974: 18, Paragraph 25). The Patent and Market Court found that, through the introduction of the labelling system,

Swedish Match's competitors were given poorer prerequisites for price and brand communication. The labelling system was a non-price-based exclusionary conduct, which might restrict competition.

### **Objective justification**

An undertaking that is in a dominant position can justify its actions, which are otherwise covered by the prohibition in Article 102 TFEU, by claiming either that its behaviour is objectively necessary, or that the exclusionary effect caused by its behaviour can be counterbalanced, or even outweighed, by efficiency benefits that also benefit the consumer (see *Post Denmark I*, Paragraphs 40-41 with references.).

Swedish Match claimed that it had objectively justified reasons for introducing the labelling system, i.e., that the labelling system was an appropriate means to achieve a legitimate objective, such as to ensure neatness, easy visibility, and a 'sense of premium', in the company's own cooler. Swedish Match also mentioned that its competitors' use of eye-catching and intrusive labels made it necessary for the company to act to ensure compliance with the Tobacco Act's strict rules.

According to the Patent and Market Court of Appeal, it was clear that when a company refers to compulsory public-law legislation, such as Tobacco law's marketing restrictions, this issue must be considered first, regardless of how the parties have brought their action. Regardless of any purpose on behalf of Swedish Match, the question arose as to whether such a shelf labelling system was called for in order to comply with the Tobacco Act.

The Patent and Market Court of Appeal found that a marketing ban, with a few limited exceptions, as provided for in Section 14 of the Swedish Tobacco Act, was such a stricter but proportionate provision to protect public health, which has been possible for Sweden to keep in accordance with Article 13.2 of Directive 2001/37 / EC of 5th June, 2001. There was no conflict between the Swedish Tobacco Act and EU internal market rules.

The Patent and Market Court of Appeal found that there were many examples of shelf labels that were placed on or in the company's coolers that were not in accordance with the Tobacco Act. This included labels with prominent pricing information, such as 'price splashes', colours that signalled a particularly low-price, as well as different image motifs. The question was, then, whether Swedish Match was entitled to act, e.g., by introducing a shelf labelling system, an option which the Patent and Market Court had rejected.

The Patent and Market Court of Appeal held that Swedish Match, as owner of the refrigerators, had acted on an actual breach of law. This was a different situation as in, e.g., the *Hilti* case, T-30/89, EU:T:1991:70, p. 118, where Hilti had excluded competitors' products from the market for supposed health or safety reasons. It was noted that Swedish Match was the owner of the snus' coolers, and thus to the area of advertising. Swedish Match was in a contractual relationship with the retailers, and, in this context, Swedish Match had both the possibility and a responsibility to provide recommendations on how the refrigerators should be used to prevent dealers from committing legal offences and thus risking sanctions. Again, the Patent and Market Court of Appeal did not find proof supporting the conclusion that the shelf labelling system was compulsory. As the owner of the coolers, Swedish Match was also entitled to demand that the coolers were not exploited in any way that was contrary to the law. Swedish Match was entitled to give clear instructions to dealers, and to demand from competitors that they did not expose snus in the company's coolers in a manner that might be contrary to the Tobacco Act.

The Patent and Market Court of Appeal found that the labelling system was proportionate, as the system was an appropriate measure, since it allowed Swedish Match to counteract the use of unlawful labels in its refrigerators/coolers in stores where dealers accepted the system. Imagining an alternative design for the shelf labels, which would not give rise to a breach of the tobacco law. It was also a

necessary measure, even though alternative shelf labelling system's instructions and measures were imaginable.

However, as a part of its second ground of appeal, the Competition Authority claimed that Swedish Match had introduced the labelling system as part of a strategy to restrict both price and brand competition, i.e., that the company had an anti-competitive object arising from its conduct. The Swedish Competition Authority claimed that Swedish Match had used divergent neon-coloured shelf labels with prominent price information for its own low-price brand, Kaliber. The Patent and Market Court of Appeal considered the same evidence and testimonies as the Patent and Market Court, but made a different evaluation and concluded that the Swedish Competition Authority had failed to prove its allegations.

In summary, the Patent and Market Court of Appeal found that the labelling system was, in itself, anti-competitive, but it was considered to be an objective necessity, and it was therefore objectively justified.

### **Comment**

The first thing to note is that the Swedish Match case differs from the well-known T-65/98 Van den Bergh Foods Ltd. v. European Commission [2003] ECR II-4653 case, as Swedish Match had, in fact, allowed the competitors' snus to be stored in the company's coolers. It was not, therefore, an exclusive agreement. The Patent and Market Court of Appeal found that the very high market shares constituted strong evidence, which was not initially contradicted by other factors. The Patent and Market Court, on the other hand, considered that market shares were merely indications of dominance, but followed a careful review of all factors, reaching the same conclusion as the agreement. Both instances agreed that the shelf labelling system could be regarded as being an abuse. In the case of objectively justified reasons, the Patent and Market Court of Appeal distinguished the Swedish Match case from the Hilti case, mainly because there were noticeable breaches of the law in Swedish Match's coolers.

Andrea Moravcikova, Supreme Court of Slovakia

**Slovak Telekom a.s. vs. the Anti-monopoly Office of the Slovak Republic (Voice case)**

**Defendant:** The Anti-monopoly Office of the Slovak Republic

**Type of proceeding:** Review of the decision of the National Competition Authority

**AMO decision No. 2007/DZ/2/1/111**

**Council (Appeal authority to AMO decisions) decision No. 2009/DZ/R/2/017**

**Court decision: The Regional Court in Bratislava No. 2S/105/2009 from June 21<sup>st</sup> 2017.**

A cassation complaint against the judgment was filed to the Supreme Court of the Slovak Republic, the case is pending

## **Legal framework**

In the Slovak Republic, the national legislation concerning the protection of competition is formed by legal act nr. 136/2001 Coll. on the Protection of Competition (hereafter, CA). The price/margin squeeze as an anti-competitive practice, is not explicitly included in the demonstrative list of prohibited practices under Section 8 Par. 2 of CA<sup>27</sup>. An independent central body for the State administration of the Slovak Republic, for the protection of competition, is the Anti-monopoly Office (AMO). The Office intervenes in cases of cartels, abuses of dominant positions, vertical agreements; it controls mergers that meet the notification criteria; assesses the actions of state and local administration authorities if they restrict competition, and it ensures the protection of competition in the area of state aid.

Under Art. 102 (a) TFEU, any abuse, by one or more undertakings, of a dominant position within the internal market, or in a substantial part of it, shall be prohibited as being incompatible with the internal market in so far as it may affect the trade between Member States. Such abuse may, in particular, consist of directly or indirectly imposing unfair purchases or selling prices or other unfair trading conditions.

## **Proceedings**

The AMO decided, in 2007 (Decision No. 2007/DZ/2/1/111), and 2009 (Decision No. 2009/DZ/R/2/017), that the company Slovak Telekom abused its dominant position in the area of providing telecommunications services through the practices of margin squeeze and tying. The amount of the fine imposed by the Office exceeded €17 million.

On 21st June, 2017, the Regional Court in Bratislava (First Instance Administrative Court) issued a judgment **confirming** the decisions of the Anti-monopoly Office of the Slovak Republic in the matter of an **abuse of a dominant position** by Slovak Telekom. The case was handled by the Regional Court in Bratislava after the Supreme Court of the Slovak Republic annulled the previous decision of the Regional Court and returned the case for new proceedings and decision.

According to these decisions, Slovak Telekom had set its pricing policy on the wholesale and retail markets in such a way that alternative operators were unable to replicate the dominant undertaking's retail products. The unlawful conduct concerned certain calling programmes that were provided in fixed public telecommunications networks, as well as certain programmes under which low-speed Internet services were provided.

Furthermore, the company bound unrelated services, it coupled free minutes and connection to a fixed public telecommunication network in monthly charges for call programmes. It conditioned the

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<sup>27</sup> "Abuse of a dominant position in the relevant market may, in particular, consist of directly or indirectly applying unfair prices or other unfair trading conditions."

connection of customers to the fixed public telecommunication network by purchasing voice services, and it also conditioned the purchase of the Internet service of dial-up and xDSL by purchasing calling programmes.

In the area of voice services, the combination of the above-mentioned behaviours resulted in the creation of barriers to market entry, and after the alternative operators entered the market, conditions were created which prevented competition from developing. By setting such conditions, the company made the entry into, and existence of competitors in the market, more difficult. As for the low-speed and high-speed Internet market, there was no market closure in the area of the Internet, but competition was restricted.

## Margin squeeze

The AMO subsumed the practice of squeeze out under the abuse of a dominant position by Slovak Telekom under the subject matter title: “excessive prices and unfair trade conditions”.

The AMO had to solve several problems to conclude that such a price squeeze had occurred:

1. the dominant position of the undertaking on the wholesale market;
2. that the prices on the retail market are below the prices charged for the wholesale product;

In the AMO’s opinion, Slovak Telekom abused its dominant position in the market through several individual practices. These actions resulted in the restriction of competition and the final effect was the exclusion of competitors that acted as individual operators and that had entered the relevant market after the liberalization. One of the practices mentioned in the decision was connected with the calling programmes of Slovak Telekom, as the unfair conditions in contracts with alternative operators caused their impotence offer same conditions and competitive prices in their contracts on calling programmes with the end-users (consumers).

Slovak Telekom was supposed to sign access contracts with alternative operators. In these contracts, the alternative operators were obliged to pay Slovak Telekom the wholesale access prices. The unfair practice of Slovak Telekom, which was detected by AMO, fell within Telekom’s previous activity (i. e., activity predating the conclusion of the contracts with AOs), as it was running special end-users programmes, individual calling programmes that enabled customers to make time limited calls for a very favoured prices, or enabling them to make free calls at specified times of day. As alternative operators were bound by contract conditions concerning set fees for access, they were not able to give their customers prices at such a low-price level. AMO based the margin squeeze findings on the fact that if Telekom had been obliged to pay the same wholesale prices as another contracting party, it would have been impossible for it to provide its customers with such special programmes and prices. AMO’s defence before the Court referred to applied EU case law for the price squeeze assessment, a regular margin squeeze test under the *Telefonica case*<sup>28</sup>.

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<sup>28</sup> Decision of the Commission COMP/38.784, July 4<sup>th</sup>, 2007, Wanadoo España v. Telefónica. The incumbent, Telefónica, was the only Spanish telecommunications operator that had a nation-wide fixed telephone network, for a long period this was protected by exclusive rights, since it was also uneconomical to duplicate Telefónica's local access network. Alternative network operators wishing to provide retail broadband services thus had to contract wholesale broadband access products, all of which are built on Telefónica's local access network. Commission, in this case, referred to the definition in Case T-5/97 (Industrie des Poudres Sphériques): *Price squeezing may be said to take place when an undertaking which is in a dominant position in the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have sufficient profit margin on the processing to remain competitive on the market for the processed product .... a margin squeeze is a disproportion between an upstream and a downstream price. Contrary to what Telefónica claims, there is no need to demonstrate that either the wholesale price is excessive in itself, or that the retail price is predatory in itself*

The defence of Slovak Telekom was based particularly on objections to the **competence of AMO** in abuse of dominant position cases concerning telecommunications, as they claimed the competence of the Regulatory Authority for Electronic Communications and Postal Services (RA), they objected to the relevant market specifications in the AMO's decision, its methodology and applied tests.

### Competition Authority findings

The AMO made a comparison between the price of wholesale access – the interconnection rate and the price of respective individual retail products. The methodology used compared the wholesale price of the dominant player, i.e., the access price and the retail price, and the respective product tariff. This methodology doesn't take into account the average retail price of the services concerned, as it is presumed that the price squeeze takes place if the dominant undertaking could not provide its services on the retail market at a profit, if it had to take the access price charged to its competitors into consideration. AMO's conclusion was that the access price is higher than the retail price, which leads to an automatic conclusion that a price squeeze exists, as even the dominant subject would not be able to make a profit on the retail market under such conditions. As for the situation, when the retail price of the dominant undertaking is higher than the retail price, it is necessary to review whether the margin is sufficient. The AMO used two tests to verify its conclusions:

1. *The Equally Efficient Competitor Test* (the retail costs of a dominant company are taken into consideration; they are added to the access price, and the result is compared to the retail price; margin squeeze is proven if the retail price is lower than the result),
2. *The Hypothetically Reasonable Efficient Competitor Test* (used under the condition that the first test does not prove the margin squeeze).

As the Court found the AMO's decisions were correct and completely competent, the Court confirmed it.

### Comment

Margin squeeze is an unfair practice, which causes the charging of an inappropriate price for competitors' access to the dominant undertaking's products and determining the retail price of their products by not taking into account the price of access at the wholesale level that is charged to other competitors. The presented case gives extensive arguments about the conflict of regulations and the powers of the AMO (competence concerning regulation that has a thin border with the competence of the Regulatory Authority) and an extensive argument about margin squeeze as an exclusionary practice (the doctrine of an equally efficient undertaking, which was used by the AMO).

The Court also stressed that the question of the competence of AMO in an abuse of dominant position by telecommunications operators was previously solved by the Court of Justice, in Case C-280/08 P - Deutsche Telekom AG, Clair and C-123/83 Clair and Case T-271/03 Deutsche Telekom AG. As it is an *acte clair*, the question which refers for a preliminary ruling in that regard is superfluous. Slovak Telekom made a preliminary reference to the interpretation of the ECHR decision in *Zolotukhin v. Russia* of 10.12.2009, No. 1439/03 by the Court of Justice, and the assessment of the criteria for the application of the *ne bis in idem* principle. The Court concluded that it is not in the Court of Justice of the EU's competence, as defined in Art. 267 TFEU, to give an interpretation of ECHR decisions and to explain their applicability in the law of the Union in connotations with both pre-academic and academic terms.

As this is one of the most discussed cases in Slovakia, I have decided to present it, even though we still don't have the Court of Appeal's decision.

Martin Dekleva, Administrative Court of Slovenia

**TELEKOM SLOVENIJE, d.d. (the Slovenian national telecommunications operator) v. SLOVENIAN COMPETITION PROTECTION AGENCY (hereinafter "the Agency")**  
**Case No. I U 423/2015, decided before the Administrative Court of the Republic of Slovenia (hereinafter, "the Court") on the 9<sup>th</sup> January 2018.**

### **Facts of the case**

The Agency adopted (1) the disputed decision on the investigation, on which the Agency had carried out an investigation against the plaintiff in the proceedings that were initiated to investigate an alleged abuse of a dominant position, and (2), the disputed decision, which found that the plaintiff had abused a dominant position in the wholesale (inter-operator) broadband bit stream access market in the Republic of Slovenia, and in the wholesale (inter-operator) market for access to the physical network infrastructure in the Republic of Slovenia, with a single complex business practice, which lasted from 1. 1. 2005 to (at least) 14. 3. 2014, by refusing alternative operators the access to the infrastructure, which was necessary for equivalent performance on the retail market for broadband services to end users at a fixed location. Due to a reduced choice this resulted in consumer harm, thus restricting competition in the territory of the Republic of Slovenia and in a substantial part of the internal market, which might affect trade between EU Member States, which is a violation of Article 9 of the Prevention of Restriction of Competition Act (hereinafter, "the National Competition Act") and Article 102 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU").

### **Judicial proceedings**

Under Article 9 (1) of the National Competition Act, the abuse by one or more undertakings of a dominant position within the territory of the Republic of Slovenia, or in a substantial part of it, is prohibited. Under Article 102 (1) of the TFEU, any abuse by one or more undertakings of a dominant position within the internal market, or in a substantial part of it, shall be prohibited as being incompatible with the internal market, in so far as it may affect trade between Member States.

The Agency based its decision on Article 9 of the National Competition Act and on Article 102 of the TFEU, claiming that, on the wholesale broadband bit stream access market, the plaintiff denied alternative operators access to DSLAMs (digital subscriber line access multiplexers) and its broadband bit stream wholesale price depended on the leasing of his telephone connection by end users or operators, although it was not needed, and that, on the wholesale market for access to the physical network infrastructure, they restricted access to the physical network infrastructure for alternative operators (they did not, among other things, give other operators the option to sublease his rented land and they delayed the building of collocations), the company did not allow alternative operators to choose the desired type of collocations, and the company provided insufficient information on the availability of the infrastructure to alternative operators. They denied alternative operators the access to an optical local loop, even where access via a copper loop was impossible, and on unbundled loops they did not allow alternative operators to sell their broadband bit stream access services to third-party operators.

In support of this action, the plaintiff claimed errors of law (both procedural rules and substantive law) and facts, insisting that they had not abused a dominant position and that it was wrong to conclude that access to their services for alternative operators was restricted. Amongst other things, they argued that the Agency did not correctly identify the relevant market and/or the existence of a dominant position, that there was no harm to consumers and that the Agency did not correctly identify the existence of an essential facility. The plaintiff also claimed that the Agency has not proved a significant

effect on trade between EU Member States in establishing an infringement of the TFEU. The plaintiff proposed that the Court uphold the action, annul the contested decision on the investigation and the contested decision's finding of an infringement, and stop the procedure against them, or, alternatively, uphold the action, annul the contested decisions and refer the case back to the Agency. The plaintiff also claimed reimbursement of the costs of the proceedings.

## **The Ruling of the Court**

Regarding the Agency's (1) 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 constitutional requirements, but this was not required by the National Competition Act that was then in force. The Constitutional Court ruled that such rules of the National Competition Act were unconstitutional, but that they could still be a valid legal basis for the Agency's investigations until the National Assembly changed the law. The Court made *ex post* control of the legality of the decision. Regarding the content, or the grounds, of the decision on the investigation, the Court stated that it was appropriate and was compliant with the law. The Court did not follow the plaintiff's allegations that the investigation had been carried out illegally and, therefore, it dismissed the action against the disputed decision on the investigation.

Regarding the Agency's (2) decision, which found an infringement of Article 9 of the National Competition Act and Article 102 of the TFEU, the Court firstly dismissed the plaintiff's complaints that the Agency did not properly identify the relevant market and the existence of a dominant position.

The Court assessed the definition of the relevant market (specifically, two relevant wholesale markets), which the Agency stated in the disputed decision was correct. It followed the Agency's conclusions that other networks, such as cable networks, are not substitutes for the nationally branched plaintiff's copper network, because they do not cover the entire territory of the Republic of Slovenia, and because the technical characteristics are different, and that, in terms of price and service, a homogeneous offer from the plaintiff, which corresponds to the demand on the wholesale market, indicates the inadequacy of regional market sharing (a narrower market definition). The aim of alternative operators is to achieve (sufficient) coverage across the entire territory of the country.

The Court also confirmed the Agency's assertions concerning the existence of a dominant position, and held that the Agency correctly considered potential competition, market entry barriers and countervailing buying power, in addition to the finding that the plaintiff was a monopolist in the relevant markets – and, as provided by the National Competition Act, it is considered that the undertaking has a dominant position if its market share in the market of the Republic of Slovenia exceeds 40 percent.

The Court then identified the Agency's findings, that the plaintiff allegedly caused direct damage to consumers due to obligatory leasing, or to the obligatory use of a telephone connection, which was not necessary, to constitute an exploitative abuse. Exploitative abuse is directed directly against consumers, while, on the contrary, exclusionary abuse is directed against competitors of the undertaking concerned and thus indirectly influences the welfare of consumers. However, individual forms of behaviour may also simultaneously have characteristics of exploitative and exclusionary.

The plaintiff contested that the Agency had failed to prove the existence of harm to consumers. The Court confirmed this claim with regard to the Agency's accusation that the plaintiff's broadband bit stream wholesale cost depended on the leasing of his telephone connection by end users, although it was not needed. Namely, in the contested decision, the Agency stated that it had not established the level of damage, and that the demonstration of its potential occurrence is sufficient, because, in its opinion, the objective to impose the use of an unnecessary telephone connection is in itself already restrictive. The Agency, according to the Court's assessment, did not specify sufficiently what it was that constituted consumer damage in this specific case, as an element of the determination of exploitative abuse. If the



Agency finds that the plaintiff's practices have resulted in direct damage to consumers, then this damage must be specifically defined for such an accusation to be justified.

However, as concerns the other abuses of a dominant position, which are alleged against the plaintiff, which, unlike those in relation to the broadband access which is conditional on the lease of a telephone connection, constitutes exclusionary abuse, the Court held that the arguments which pleaded that the Agency should specifically determine consumer damage or its specific amount, are unfounded. According to the established case-law of the CJEU (see, e.g., Cases C-209/10 - Post Danmark and C-280/08 P - Deutsche Telekom v Commission), Article 102 of the TFEU (ex Article 82 TEC) not only applies to practices that can cause immediate harm to consumers, but also to practices that cause consumers harm through their impact on competition and, in this sense, this also involves such practices, which impair an effective competitive structure. Moreover, in *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, the term "anti-competitive foreclosure" is described as a situation in which the effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking, whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence.

The Court has held that the Agency concluded, with a sufficient degree of probability, that there was a detrimental effect on the welfare of consumers due to the plaintiff's exclusionary abuse of his dominant position (e.g., a reduced choice for end users; with those end users who cannot choose between different operators, the plaintiff can compensate for the losses of other end users; limited technological progress due to the reduced differentiation between services, and lower pressure on prices and the quality of services).

The Court rejected the plaintiff's complaints that the infrastructure in question does not constitute an essential facility, that wholesale inputs were not necessary for alternative operators to effectively compete in the downstream market and that there was no risk that the refusal of access to the infrastructure in question would eliminate effective competition. It accepted as being well-founded the conclusions of the Agency that the plaintiff's nationally branched copper network, which is also being upgraded or replaced with the plaintiff's optical network, cannot reasonably be expected to be duplicated for economic and legal reasons (significant investments in the immovable property of others). This means that – in the sense of the CJEU judgment in the Bronner case (C-7/97), there are obstacles that would make the construction of a network, parallel to the plaintiff's infrastructure, unreasonably difficult. At this point, the Court emphasized the importance of the fact that the plaintiff is an incumbent operator, and also that an essential facility has to be assessed in the context of the relevant market.

As regards the plaintiff's statement that, in the context of determining the necessity of an infrastructure, the Agency should specifically determine whether all competition in the downstream market is excluded, the Court took a position (referring to the case-law of the CJEU, e.g., T-201/04 - Microsoft v Commission and T-301/04 - Clearstream v Commission), that it is not necessary to demonstrate the elimination of any competition on the market, but it must be demonstrated that the refusal of the access in question is capable of eliminating competition, or is capable of eliminating any effective competition in the market; such a risk of eliminating any effective competition must be demonstrated.

Lastly, the plaintiff claimed that the Agency has not proven a significant effect on trade between EU Member States in establishing an infringement of the TFEU, and that the argumentation in a contested decision is insufficient. He referred to the Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (hereinafter, "the Guidelines"), where it is stated that an analysis of the effects in the internal market, even if the effect is potential, cannot be based on hypothetical or distant effects.

The Court has held that this plea in law is also unfounded. It has stated that "the concept of appreciability" must be assessed in the context of a concrete case. In the present case, the decisive circumstance was that the abuse of a dominant position which referred to access to the plaintiff's services as a dominant undertaking, operating over the whole territory of the Republic of Slovenia. As a rule, abuse has an effect on trade between EU Member States if an undertaking having a dominant position on the whole territory of one EU Member State commits exclusionary abuse. It is considered that there is a relevant effect on trade in such cases. The Guidelines also provide (Paragraph 93) that exclusionary abuses may, as a rule, affect trade between EU Member States in the case of a dominant undertaking covering the whole of the country, since such abuse, in general, makes it difficult for competitors from other EU Member States to penetrate the market, in which case, patterns of trade are able to be affected. The plaintiff has failed to state any circumstances that would indicate otherwise in the present case.

The Court found no alleged procedural law violations. It held that the actual state had been correctly and fully established in the proceedings before the Agency, and that all of the necessary (decisive) evidence had been produced.

In view of all the above, the Court upheld the action in part regarding the alleged exploitative abuse, annul the decision finding an infringement to this extent, and referred the case, in this respect, back to the Agency. The Court dismissed the action in regard of the remainder of the Case. The Court also orderd each party to bear its own costs.

### **Conclusion (personal comment)**

The case presented is important because, in one of the key parts, the judicial review was based on a distinction between the exploitative and exclusionary abuse of a dominant position. The Court took the view that it is not necessary to determine the (exact) amount of damage to consumers if such damage is not part of the accusation, in the sense of exploitative abuse. The case is also particularly interesting because the Court assessed whether the telecommunications network concerned represents an essential facility, and it indicated, through the essential facilities doctrine, the elements of which should be taken into account in this respect.

Gabriella Ratti, Commercial Court of Turin

**Milan Court:** judgment 6<sup>th</sup> March 2015 n. 3004

**Complainant :** NIPPON CARGO AIRLINES Co. Ltd

**Defendant:** Società per azioni Esercizi Aeroportuali S.E.A.

**Subject:** Abuse of a dominant position – Compensation for damage.

**Action type:** follow-on. Disciplinary proceedings initiated by NCA following a 2004 report. Decision AGCM 8.1.2009: recognized the existence of an abuse of a dominant position by SEA, contrary to Art. 82 of the EC Treaty, "consisting in the application of unfair and overly burdensome fees in the market of goods for the common and unique use of the cargo business".

### **Complainant's position**

In 2011, Nippon Cargo Airlines – a cargo airline -- had a sub-concession from SEA, on local offices within Malpensa Airport in order to carry out its operations and flight assistance tasks.

Nippon Cargo Airlines reports that the SEA have imposed a lease contract with fees that are much higher than those determined by Enac (which applied only to a few privileged handlers).

This conduct constitutes:

- Violation of Art. 16 Paragraph 3 of Directive 96/67/EC, which requires the determination of financial considerations for access to airport facilities, on the basis of relevant, objective, transparent and non-discriminatory criteria;
- Violation of Art. 102 TFEU and Art. 2597 CC due to unjustified discrimination between operators that was implemented by SEA for the use of such infrastructure;
- Breach of contract according to Arts. 1374 and 1339 c.c. (the need to integrate contracts according to the investigations undertaken by Enac concerning the correct determination of the leasing of office spaces).

Nippon Cargo Airlines claimed compensation for damages: the difference between the amount paid in excess of what was deemed reasonable by Enac (taking into account the actual costs of SEA and a reasonable profit margin for the company).

### **Defendant's position**

#### **Plea of a lack of functional jurisdiction**

Jurisdiction of the Court of Appeal on the basis of Art. 33 of 1990 no 287, being non-Community and national antitrust issue. (The lawsuit was introduced before the Legislative Decree 2012 # 1, converted into l. 2012 # 27 that it attributed to the Specialized Section for businesses' functional competence and also national anti-trust).

### **Merits**

SEA is entitled to make their own the revenue resulting from the utilisation of the airport's grounds by third parties.

Those charges are normatively regulated if they are directed to rewarding the use of goods and infrastructure that are used for aviation activities, whether related to flight activities (runways, parking areas for the aircraft, etc.), or to the activity of assistance for passengers and aircrafts (handling), while

their determination is left to the entrepreneurial autonomy of the handler, if they are related to the use of goods and interior spaces at the site, but that are not strictly instrumental to aviation.

In October, 2007, ENAC, as part of its supervisory activity, anticipated corrections to the airport charges – stating that the premises used by airlines for operational activities, and to the extent of what is strictly necessary and functional for the flights' activities were to be assimilated with those that are for the exclusive use of handlers.

In the second half of 2008, SEA applied the prices that were indicated by Enac for each airline, within the limits of what is strictly necessary and functional for the flights' activity, namely, a standard surface office measuring 20 sqm. However, for spaces exceeding these standards, the financial consideration was subject to normal commercial negotiations.

As for NIPPON CARGO AIRLINES, who ran the operations of a freight yard, the last contract signed between the parties established the leasing of 10 offices with a total area of 195 square meters, and 9 parking spaces, and applied a price of EUR 250 m per year, which was limited only to the office space of 20 sqm.

The choice of the Complainant to have their offices within the airport terminal was determined by purely commercial reasons, as evidenced by the fact that, in October, 2009, while continuing to operate its own cargo flights from Malpensa Airport, the Complainant had transferred its offices outside the airport grounds – thus highlighting a situation in which there was a substitutability of goods, which excludes the existence of a position of dominance.

There was also a plea of a partial limitation period for the right of the complainant to receive compensation for damages.

## **The Court**

First, it rejects the plea of a lack of functional jurisdiction by the Court.

Then it identifies the practices that affect trade between EU countries, in accordance with Art. 102 TFEU.

In fact:

- The goods that are part of the airport infrastructure, and of the handling activities, include also the offices that are necessary for the practice of these activities (which cannot be replaced with similar assets that are located outside the airport);
- As these goods are connected to that specific activity, they identify a precise and distinct market, while the geographical dimension of the market for that product coincides with the airport spaces;
- The importance and quality of the volumes of international traffic at Malpensa Airport (the geographical dimension of the relevant market) implies that the airport constitutes a substantial part of the common market;
- SEA's behaviour affects international companies that are operating in several markets, and therefore abuse in a single State may have an impact on the operation of the same companies in different airports.

**The financial consideration is calculated by Enac within the limits of what is strictly necessary for the flights' activities:** SEA's unilateral decision on a 20 sqm office's standard surface, invokes AGCM's pronouncement.

- SEA decided unilaterally the 20 smq. limit, basing the decision on obscure criteria. Avoiding the application of non-regulated remuneration for the larger surfaces that are required by the carrier when, likewise, they are instrumental to flight activities.

- SEA's defence – other airlines don't use spaces in Malpensa Airport for office purposes, and therefore there are available alternatives for all carriers, is unfounded.
- The "substitutability of goods/service" assumes importance only in identifying/determining the relevant market for the purpose of assessing the actual position of the dominance of a firm. SEA originates its position of dominance from the fact that Malpensa Airport is a "natural monopoly"
- The unilateral calculation of the fees – a typical monopolist's conduct – was not in any way affected by the fact that carriers could use offices outside the airport grounds, and by the prices for these spaces.
- Given this background, the fact that individual carriers or minor companies have decided not to use operational areas within the airport (ultimately refusing to perform direct assistance or to maintain direct control over the same, and entrusting the management of these activities to third parties), does not change/justify the conduct of SEA, which conflicts with the community obligations ex 102 TFEU.

### **Assessment of the activities carried out by NIPPON CARGO AIRLINES**

- NIPPON CARGO AIRLINES makes use of "*physical handlers*" for goods handling, and of "*document handling*" for customs formalities. Its employees are involved in the planning of the storage of the goods inside the containers that will be loaded onto the aircraft, and they oversee such operations. They manage and control all of the actions required for the preparation of the load, even before the arrival of the aircraft, and start this preparation as long as 20 hours before the loading of the goods.
- Although part of these activities must necessarily be held in the strictly operational airport areas – it is clear that these same activities must be supported by the intensive organization that inevitably takes place inside the offices (where, for example, the computers utilized for such activities are located, as well as the equipment that allows connections with the external offices of the company, with the other airport offices, with shippers, with customs authorities, etc.).
- However, not all the activities carried out by NIPPON CARGO AIRLINES can be considered to be exclusively addressed to what is "strictly necessary and functional to the flight activities". This is based on a comparison between the office space assigned to the complainant (197 sqm.) and those that are assigned to other companies (TURKISH AIRLINES, 18 sqm., and CAGOLUX, 79 sqm.), the number of flights and their tonnage. This has impacts upon the amount of the refunds/damage compensation (Point 6).

### **Conclusions on the abuse of a dominant position**

The abuse of a dominant position by SEA, both applying unfair and overly burdensome fees in the market of goods for the exclusive use of the business of handling cargo and in breaching the prohibition on applying dissimilar conditions to the contracting parties for equivalent transactions.

### **Plea of the limitation period**

- In the case of anti-trust judgments, the action for damage compensation (follow-on) had expired, in accordance with the combined provisions of Arts. 2935 and 2947 c.c., five years from the day when whoever claims to have suffered damage has had, using ordinary diligence, reasonable and adequate knowledge of the damage and prejudice, while the burden of proving the effective date of the limitation period remains the responsibility of whoever claims the limitation period.
- The beginning of the limitation period cannot be connected to the moment when the assessment of the existence of anti-competitive offences became definitive from the administrative perspective

(AGCM), and not even to the time when the damage was caused, according to the claimant. It must be determined when the injured party has had full knowledge of the damage and its prejudice.

- In this case, for the abuse of a dominant position: the limitation period begins (not from the date of the decision of the AGCM in 2009), from the date of the complaint (2004) about granting overly burdensome fees within Malpensa Airport. The issue was well known to all of the sector's operators and therefore to the complainant, even though they were not a signatory to such reporting.
- The investigation does not involve contractual action (with a ten-year limitation period), and is deemed to have been founded (the system of Directive 96/767/CE, of Legislative Decree 1999 # 18, Cipe resolutions and the decision, Enac introduces specific provisions which leave to the recipient (SEA) the margin of choice, and which may, pursuant to Art. 1339 CC, integrate the content of each individual contract.
- However, the claim was also grounded in breach of contract and in this case there is a ten-year limitation period. As a result the claim could stand.

### **Conclusions on the compensation for damages**

- - The claimant has delimited the scope of the compensation to what was unduly paid to SEA as a result of an undue increase in the costs of leases, compared to the level that was established by ENAC.
- The criteria used to calculate the compensation is, then, the fee that is determined by ENAC, which is based on the examination of the analytical data that was provided by SEA, in 2008 and in previous years (250 m<sup>2</sup>/year).
- Not all of the office spaces that are granted to NIPPON CARGO AIRLINES can be considered to be strictly instrumental to flight activity (see Point 3).
- The Court's fair estimate is that 50% of 197 m<sup>2</sup> is strictly instrumental to flight activity.
- The total compensation/return of the amounts that were unduly paid between 2001 and 2009: €133154,71 (plus interest starting from the date of the claim).

Tereza Vaňkátová, Prague Commercial Court

**Case note on the ruling of the Regional Court in Brno (Czech Republic) dated on 13th April, 2016, no. 62 Af 96/2014-1464**

The plaintiff in this case was Czech Railways (the Czech national railway carrier), which was fined by the Czech Competition Authority for the abuse of a dominant position in the market for railway cargo transportation. The Czech Competition Authority found that the abuse of a dominant position in the behaviour of the plaintiff, which applied from 1st May 2004, to 30th November 2007, without legitimate reason, which dominant position it used against its customers when offering different prices for comparable railway cargo services. The Czech Railways applied, without legitimate reasons, different margins to different customers for comparable services, and thus discriminated against them.

The whole proceedings were very long (and have now lasted for more than 10 years) and are not yet finished. Firstly, the Regional Court in Brno upheld the decision of the Czech Competition Authority, but the ruling was subsequently, upon the Appeal of the plaintiff, repealed by the Supreme Administrative Court. The Regional Court in Brno, in its new judgment, repealed the decision of the Czech Competition Authority, mainly because it was not sufficiently proven that the plaintiff had really abused its dominant position in the first place.

The Regional Court in Brno, bound by the opinion of the Supreme Administrative Court, stated that one of the main circumstances on which the Czech Competition Authority had based its conclusion on the abuse of a dominant position was that some of the prices charged by Czech Railways were “unreasonably low” (so low that it was impossible to compete with them), and such prices were charged to customers who were able to be easily taken over by Czech Railways’ competitors. On the other hand, Czech Railways applied much higher margins to customers who were not likely to be taken over by their competitors. The Czech Competition Authority concluded that such behaviour had the potential to squeeze the competitors out of the market, since they were not able to compete with such low prices.

In this respect, the Regional Court in Brno, using the judgments of the CJEU extensively, analysed what might be considered “unreasonably low” prices in the context of the abuse of a dominant position in the relevant market.

The Regional Court in Brno ruled that for the conclusion that a dominant competitor set prices which, in reaction to the behaviour of its competitors, were “unreasonably low”, the competition authority must apply to the so called “AKZO rules” (see, ruling of the CJEU no. C – 62/86 ”AKZO Chemie,“ 1991, ECR I-3359).

First, the national competition authority must analyse whether the price charged by the dominant undertaking was below average variable costs. If the price is below average variable costs, in the long run, it is a good first indicator for stating that there is an abuse of a dominant position taking place.

Second, in a case where the price is below the total average costs, but above the average variable costs, the clear plan of the dominant to eliminate competition must be proven in order to conclude that the dominant position was abused.

The above stated AKZO rules must not, however, be applied dogmatically. They were subsequently adjusted by the CJEU in Tetra Pack II (C – 395/96 P a C 396/96 P, C – 333/94 P) and Post Danmark (C – 209/10), according to which the effect of squeezing one or more competitors out of the market does not necessarily mean the disruption of competition, since even efficient competition may lead to such a squeeze out of less efficient rivals, and thus less interesting, competitors for consumers. It was pointed out that it is necessary to distinguish between squeeze out and unlawful squeeze out. Only behaviour which leads to the squeezing of the at least as efficient competitor, as the dominant is, out of the market, is prohibited. So in fact, it is necessary to consider whether the pricing policy of the dominant

undertaking led to the real, or at least the probable, exclusion of the competitor to the detriment of competition and consumers.

The Regional Court in Brno thus applied an extensive interpretation of the “as effective competitor” test when a bigger picture of the behaviour of the dominant undertaking must be seen. This means that a mere comparison of prices and costs is no longer sufficient. The previously applied simple “*per se*” approach that was defined by AKZO rules when a price below average variable costs is automatically considered to be an abuse of a dominant position, cannot today be followed without carrying out a deeper analysis of the further circumstances of the dominant’s behaviour.

This new application practice is much more flexible, allowing many exceptions from the rigid AKZO rule. It also, however, means that even a price that is above total average costs is not automatically, and in all cases, safe from a conclusion in relation to an abuse of dominance. This was the case with *Campagne Maritime* (Judgment of the CJEU C – 395/96 P), in which the CJEU stated that the dominant undertaking abused its dominant position, even when the price was set above the total average costs, given the specifics of the case.

The Regional Court in Brno thus repealed the decision of the Czech Competition Authority because

- 1) the real “below costs” price was not yet sufficiently proven, and
- 2) material disruption of competition, in the form of the exclusion of competitors, was not proven.

In the proceedings that follow, the Czech Competition Authority will have to carry out a deep analysis of the costs (average variable costs, total average costs) of the dominant undertaking, but even if it is the case that it is proven that the price was set above those costs, the Czech Competition Authority will need to analyse all of the specifics of the case, the motivation of the dominant undertaking for decreasing the costs, and all other circumstances which might have led to the exclusion of competition.

## Comment

What I find interesting in this case is the clear and visible replacement of the *per se* rule when considering “predatory pricing” by *rule of reason* analysis, which is basically a trend in U.S. (but is coming into EU competition law, too) anti-trust law. I welcome this ruling, even in Czech competition law, since such a more economic approach is more realistic, it allows for exceptions, and enables the Court to consider the specifics of cases, and it will, hopefully, eliminate errors (i.e., a conclusion that there is a breach of competition law when there is, in fact, no breach, and, *vice versa*, a conclusion that there is no breach when there actually is one).



Stefan Goehre, Court of Appeal of Frankfurt

**Legend Corporation v. DENIC eG**

**OLG Frankfurt am Main of 8th May 2018, – 11 U 17/17**

1. The parties of this civil case quarrelled about the obligation of the defendant to place a so-called “dispute entry” concerning the domain [www.onlinecasino.de](http://www.onlinecasino.de), to which the plaintiff and a third-party claim the ownership.
2. The plaintiff, Legend Corp., is a company situated in Dominica, doing business in the entertainment sector on the Internet. The defendant, DENIC eG, is a registered, non-profit co-operative society which holds the sole responsibility for the registration and administration of all second-level-domains (SLD) under the first-level-domain “.de”. DENIC actually registers more than 16 million second-level-domains (SLD) under “.de”. It is accredited at the Internet Corporation for Assigned Names and Numbers (ICANN), which is responsible for the worldwide allocation of names and addresses on the Internet.
3. The registration of a “.de” domain can be arranged through any provider who is either a DENIC member themselves, or who works with a DENIC member. The usual practice is that registration will be offered to a person as part of the package of planning his/her Internet presence, or that it will be an automatic part of an Internet-access package. The registration rules of DENIC follow a “first come – first served” approach, which means that DENIC does not check, during the registration procedure, whether the applicant may conflict with third-parties’ rights. In the case of such a conflict, DENIC offers the possibility of a “dispute entry”.
4. The relevant general provisions of DENIC are as follows:

§ 2 Duties of DENIC

(2) At no time is there any obligation whatsoever on DENIC to verify whether the registration of the domain on behalf of the Domain Holder, or its use by the Domain Holder, infringes the rights of others.

(3) DENIC has the right to place a Dispute entry on the domain if a third-party presents a credible case suggesting that they have a right to the domain, or that their rights are being infringed by the domain, and if such a third-party declares that they are taking steps to enforce their resultant claims against the Domain Holder. The Dispute entry takes effect for one year, but DENIC will extend it, provided that the party in whose name it has been entered requests such an extension and submits evidence that the dispute has still not been resolved. A domain that has had a Dispute entry placed on it can continue to be used by its Domain Holder, but it is not possible to transfer it to anyone else.

§ 6 Transfer of the domain

(1) The domain is transferable, unless it is subject to a Dispute entry (§ 2(3)).

(2) DENIC registers the domain in the name of the future Domain Holder once the Domain Holder to date has terminated their contract, unless, for legal reasons, termination is superfluous, and provided that the future Domain Holder also submits an application to register the domain, presenting documents that clearly identify them.

5. The domain [www.onlinecasino.de](http://www.onlinecasino.de) was first registered in 2008 in favour of a Slovakian private person. In March 2013, it was registered to the company DIRO Ltd., Malta, and later to the company, PTS Privacy & Trustees Service GmbH, Germany. A “dispute entry” application was filed by the German company, Online Casino Deutschland AG, based on a combined word and figurative trademark, holding the word component “online-casino”. PTS Privacy & Trustees agreed to a deletion of its domain so that Online Casino Deutschland AG was registered as the owner of the domain on 2nd July, 2013.

6. Legend Corp. claims to have bought the domain from DIRO Ltd. on 16<sup>th</sup> April 2013, for the price of US\$500,000. Legend Ltd. made the assertion that PTS Privacy Trustees had only been registered as its Trustee and contact person and had therefore not been authorized to agree to the deletion of the domain. Legend therefore filed a lawsuit against Online Casino Deutschland AG before the district Civil Court, Leipzig, arguing that the entry of Online Casino Deutschland AG was illegal. The Civil Court, Leipzig, sentenced Online Casino Deutschland to the deletion of its domain. This decision is not final, because Online Casino Deutschland has filed an Appeal before the Court of Appeal in Dresden.

7. In our case, Legend Corp. claims a “dispute entry” by DENIC in order to safeguard its rights to the domain. DENIC refused to proceed with a “dispute entry” and has argued that, according to its general provisions, a “dispute entry” can only be placed if the (non-registered) third-party can present a document proving that s/he is the owner of an “absolute right” (e.g., a trademark, personal name or firm’s name) that is obviously infringed by the registration of the domain. DENIC underlines its argumentation with its restricted role and duty as being purely a “registration office”, and with its limited personal capacities. The registration procedure before DENIC being mostly automated would not allow detailed legal examination of the ownership of a domain. DENIC therefore feels itself obliged to place a “dispute entry” only in a case in which the infringement of the “absolute” right is of little doubt.

8. Legend then sued DENIC before the Civil Courts in Frankfurt and argued that DENIC had abused its dominance in the market for domain registrations. As DENIC holds the monopoly on the market of registration for second level domains under the top-level domain “de”, this company should treat all claimants equally, and it may not discriminate against an applicant for a “dispute entry” if they can present a jurisdiction – valid or not – stating that the registered person is obliged to transfer the domain to the claimant. Legend refers to Para. 19 Sec. 2 Nr. 1 German Cartel Law (which is similar to Art. 102 lit c. AEUV).

9. The District Court, Frankfurt, sentenced DENIC to register a “dispute entry” in favour of Legend Corp. DENIC filed an Appeal to the Court of Appeal, Frankfurt (11 U 17/17), which revised the decision and dismissed the action. Although the Court of Appeal followed the argumentation of Legend that DENIC, holding that the monopolist, is in principle obliged to treat every applicant asking for a “dispute entry” equally, it assessed that there are reasonable grounds for different treatment for owners holding absolute rights which might be infringed by the registration of the domain, on one side, and parties that claim to be the owner of the domain itself, on the other.

As the owners of absolute rights have no direct relationship to the registered person, only a “dispute entry” by DENIC could safeguard their proper rights (see German Federal Supreme Court, Decision of 22.12.2001 – I ZR 138/99 – “shell.de”). Parties claiming subjective rights on the domain, on the other side, do not necessarily require a “dispute entry” in order to safeguard their rights. Usually, they have direct relations to the registered person (contractual claims, claims based on unjustified enrichment, etc.) and may therefore sue this person directly before the Civil Courts.

The Court of Appeal also pointed out that DENIC provides services that are of public interest with reasonable costs. This can only be maintained if the registration and dispute entry procedure is not “loaded” with substantial legal examinations. In interpleader proceedings, substantial legal examinations, including hearings of evidence, are very often necessary. This examination falls within the competence of the civil courts but would exceed the competence of DENIC. Their “jurisdiction” for a “dispute entry” therefore has to be limited to cases in which the infringement of a third-party’s right has been made obvious. The Court of Appeal therefore ruled that DENIC is in no way obliged to enlarge its “dispute entry procedure” to cases in which the plaintiff relies on a subjective right relating to the domain.

## **Comment**

The decision illustrates the preconditions under which an abuse of dominance has to be examined. If the monopolist can justify his decision by the facts, he may apply a special procedure only to a certain section of the proposers, and he may decline the proposals of other parties. It is therefore very important for the Courts to examine carefully whether the monopolist may present reasonable grounds for his approach.

## **State Aid**

**Cristian Daniel Oana, Romanian High Court of Cassation and Justice**

**Name of the Court of First Instance:** Brasov Court

**Name of the Court of Last Instance:** Brasov Court of Appeal

**Name of the parties / case reference number:** H. M. K. M. I of R. vs. Brasov Forest Guard and others; case no. 3178/62/2014, Decision no. 2157/22.09.2014 (First Instance) and Decision no. 9/12.01.2016 (Last Instance)

**Date of the judgment:** 2016

**The circumstances giving rise to the litigious situation**

The applicant, H. M. K. M. I of R. is the owner of an area of 387.70 ha of forest land that is located in the protected area, Natura 2000, a site that is an integral part of the Natura 2000 European Ecological Network, in Romania.

In this capacity, invoking the provisions of Article 97 Paragraph 1, Letter b of Law no. 46/2008 (Forestry Code), the applicant submitted to the competent public authority an application for the compensation provided for in this legal text for the year 2010, including the related interest.

The public authority denied the payment by stating that the calculation methodology for forests with T1 protection functions (forests with special nature protection functions, due to which, for the purpose of biodiversity conservation, any wood exploitation is prohibited by law), and T2 (forests with special protection functions in which the harvesting of wood is substantially reduced, so that the forest ecosystem is not affected by the imposed restrictions) located in Natura 2000 sites, has not been published in the Official Gazette of Romania, and its publication is deemed to be a necessary condition for the payment of compensation.

Given the circumstances, the applicant decided to submit, to the Brasov Court, a petition for legal action, seeking to oblige the public authority to pay the value of the wood-based products he could not harvest as the owner of the property.

**The decision of the First Instance Court**

By Sentence no. 2157/CA of September 22, 2014, Brasov Court rejected the request.

The Court came to this decision essentially by retaining that the applicant's claims for compensation are subject to the State Aid rules, for the payment of which two conditions had to be fulfilled: a) the notification by the Member State and consent of the European Commission (the Commission); and, b) the publication in the Official Gazette of Romania of the Government Decision containing the aid scheme notified to the Commission and the method of calculation of any compensation.

The first condition is fulfilled by the issuance of the final European Commission Decision C (2012) 5.166 of July 19th, 2012, however, the second has not yet been fulfilled.

**Appeal exerted in the case**

Against the ruling of the Court, the applicant filed an Appeal requesting the annulment of the judgment under Appeal as a result of a misinterpretation of the rules that are applicable to the dispute, by showing that he is entitled to claim and acquire the compensation sought by the action, as long as the single and essential condition for continued payment of the State Aid only resides in issuing a favorable opinion

from the European Commission. It is argued that the methodological norms applicable for obtaining compensation are those stipulated by Government Decision no. 861/2009, however, even in the absence of such a normative act, if the Romanian State had deemed it necessary to issue a new Government Decision to approve new methodological norms, it would have had more than 28 months from the date of the adoption of the European Commission's Decision to the date of the furtherance of the judicial action.

### **The procedural incident and the final ruling in question**

In the course of the appeal, the Court of Appeal of Brasov decided to refer to the High Court of Cassation and Justice on the following question (the procedure is similar to that used by the National Courts in relation to the Court of Justice of the European Union):

The interpretation of the provisions of Article 97 Paragraph (1) Letter b) of Law no. 46/2008 on the Forest Code, as subsequently amended and supplemented (Forest Code), in conjunction with Article 6 Paragraph (2) of the Government Decision no. 861/2009 for the approval of the Methodological Norms for granting, using and controlling the annual amounts for the sustainable management of private property forestry of natural and legal persons and of the public and private property of the administrative-territorial units, and for the approval of the Forest Service Execution Procedure and the carrying out the substantive checks (Government Decision 861/2009) in relation to Article 4 Letter s) Point 4, in conjunction with Article 5 Paragraph (1) of the Government Ordinance no. 14/2010 on financial measures for the regulation of State Aid granted to agricultural producers, starting in 2010, approved with amendments and completions by Law no. 74/2010, as subsequently amended and supplemented (Government Ordinance 14/2010), is that for the granting after 1 January 2010 of the compensation provided for by the Forest Code, the only condition for the granting of the same is the existence of a favourable decision from the European Commission on State Aid or, more specifically, in addition to the opinion of the European Commission, it is necessary to adopt subsequent methodological norms under Article 5 of the Government Ordinance no. 14/2010?

By Decision no. 362015, the High Court of Cassation and Justice - the Formation of the Court on Legal Matters, decided as follows:

In order to grant the compensations (...), there must be a favourable decision of the European Commission on State Aid and the subsequent methodological norms should be adopted, under the conditions of Article 5 of the Government Ordinance no. 14/2010.

By Decision no. 9 of January 12th, 2016, the Court of Appeal of Brasov dismissed the applicant's appeal.

### **Meaning of the present case**

The above-mentioned legal problem is a repetitive one, and it was encountered in dozens of cases registered in the Romanian courts during 2010-2017. The non-unitary judicial practice was ultimately aimed at rejecting actions on the grounds that at least one of the two conditions was not fulfilled, because the methodological norms for establishing and applying the State Aid Scheme approved by the Government Decision are lacking (for periods between 2010 - 2012 and 2014 – 2017, the other condition was also not fulfilled because the Romanian Government did not ask the European Commission for a favourable opinion on the application of the State Aid Scheme).

However, some courts have suggested, while others have explicitly stated, that the claimant's right to compensation exists, and its effectiveness is suspended only when the conditions are not met cumulatively, letting it be understood that the right will enter into effect in the future, at least as long as the European Commission agrees.

In July, 2017, however, it became clear that, for the period January, 2010, - July, 2017, the Government will not issue methodological norms. After the Commission issued a new decision that was

favourable to the scheme, namely, Decision C (2016) 8.769 final of 3.01.2017, the Government therefore issued Decision no. 447/2017, establishing the State Aid Scheme only for the following years, July, 2017, - December, 2020.

In the light of the above, the current state of the problem is as follows:

Forest owners, with T1 and T2 protection functions, whose lands are located in Natura 2000 sites, can claim that their ownership is essentially affected.

This is a valid point, at least up to a certain amount, and the amounts claimed by the owners seem to have the legal nature of compensation/retribution (consideration for a restriction imposed by the property law) and not the nature of State Aid; in this respect, the following are the provisions of the Romanian law, respectively Article 97, Paragraph 2 of the Forestry Code:

The imposition of restrictions on forest owners via forest landscaping, regulation of national parks, natural reserves, biosphere reserves and Natura 2000 sites, or other norms, including those establishing different types of functional groups, can be made either with the consent of the owner, or with the payment of a fair and preliminary compensation, paid annually, to fully offset the non-achieved income of the forest owner, be it a natural or a legal person.

Clarifying the exact legal nature of the amounts of money claimed by the owners (if such amounts are entirely State Aid or are just beyond a certain quantum) is therefore a task for the future, if owners still refer instances, and solving the problem will involve a dialogue between the National Courts, on the one hand, and the Commission, or the Court of Justice of the European Union, on the other.

### **List of Participants in ENTraNCE for Judges 2018**

- Dzintra Amerika, Latvian Supreme Court
- Marc Bosmans, Brussels Court of Appeal
- Danguolė Bubleienė, Supreme Court of Lithuania
- Jelena Čuveljak, High Commercial Court of the Republic of Croatia
- Martin Dekleva, Administrative Court of the Republic of Slovenia
- Eva Edwardsson, Sweden Patent and Market Court of Appeal
- Angel Galco Peco, Commercial Court of Madrid
- Elita Gavriel, Administrative Court of Cyprus
- Stefan Goehre, Court of Appeal of Frankfurt
- Eric Mille, Brussels Court of Appeal
- Ute Mockel, Frankfurt Higher Regional Court
- Andrea Moravcikova, Supreme Court of the Slovak Republic
- Iko Nõmm, Tallinn Court of Appeal
- Cristian Daniel Oana, High Court of Cassation and Justice
- Rosa Perna, Administrative Tribunal of Latium
- Gabriella Ratti, Commercial Court of Turin
- Arco Rop, Rotterdam Commercial Court
- Nikolaos Sekeroglou, Greek Council of State
- Daniel Severinsson, Swedish Patent and Market Court
- Ewa Stefanska, Court of Appeal of Warsaw
- Katalin Surányi, Budapest Administrative and Labour Court
- Tereza Vaňkátová, Commercial Court of Prague
- Eleonora Viegas, Portuguese Market Court
- Pertti Virtanen, Finnish Market Court
- Olli Wikberg, Finnish Market Court
- Pasi Yli-Ikkälä, Finnish Supreme Administrative Court



**Editors:**

**Pier Luigi Parcu**

Robert Schuman Centre for Advanced Studies, EUI

Villa Raimondi

Via Boccaccio 121/111

50133 Firenze

Italy

Email: [pierluigi.parcu@eui.eu](mailto:pierluigi.parcu@eui.eu)

**Giorgio Monti**

Robert Schuman Centre for Advanced Studies, EUI

Villa Schifanoia

Via Boccaccio 121

50133 Firenze

Italy

Email: [Giorgio.monti@eui.eu](mailto:Giorgio.monti@eui.eu)