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

European Networking and Training for National
Competition Enforcers: ENTraNCE for Judges 2020
Selected Case Notes

Edited by Pier Luigi Parcu, Giorgio Monti and Marco Botta

European University Institute

Robert Schuman Centre for Advanced Studies

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

This series of working papers is published in the context of ENTraNCE for Judges, 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 2020). The training programme was organised by RSCAS between November 2019 and October 2020, 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

This working paper includes the case notes written by the participants in the 2020 edition of the European Network and Training of National Competition Enforcers (ENTraNCE for Judges). Since 2011, the training programme has been organized by the Robert Schuman Centre for Advanced Studies (RSCAS) of the European University Institute (EUI) and has been co-funded by the DG Competition of the European Commission.

In this collection of case notes, the following four themes emerge. The first is the scope of the judicial review of the appeal courts and supreme courts. On the one hand, there is an expectation, following the ruling of the European Court of Human Rights (ECtHR) in *Menarini*,¹ that the review of National Competition Authority (NCA) decisions is ‘comprehensive’. On the other hand, there is a concern that appeals further up the judicial hierarchy should not continuously review the factual findings of the NCA and should focus more on developing legal principles. In this respect, States where the NCA is only a prosecutor, so that a finding of infringement is made by a specialized court, may have an advantage. It also emerged that the concrete expertise of national judges is important in ensuring effective judicial review, not least given the highly technical aspects of many competition cases. Second, the case-law reported reveals an attentive use of the EU Court of Justice’s (CJEU) precedents: in one judgment, the national court referred to 60 CJEU judgments and 20 judgments from the European Court of Human Rights! EU Law is now frequently the law of the land. Third, many of the cases raise issues about balancing market opening and public interest considerations. Here, we note different attitudes, some judgments focusing on the importance of keeping markets competitive in order to safeguard consumer interests, others deferring more to the policy choices of the EU Member States. Much of the litigation reported here hinges on whether the defendant is acting as an ‘undertaking’, a term about which a systematic re-statement by the CJEU might be welcomed. Finally, the Dutch amendment to the Competition Act, which empowers the NCA to keep in check certain forms of anti-competitive State action, appears to offer a lesson to other legislators and to the European Commission on how to enhance the NCA’s advocacy powers.

In what follows, we provide a quick overview of the case notes presented in the working paper.

Judge Marc Bosmans discusses a case about interim measures and the scope of judicial review. The Great Circle is an undertaking that is active in the market for marine meteorological forecasting services. In order to provide these services, it needs data supplied by the Royal Meteorological Institute of Belgium. Upon the latter’s refusal to supply data, The Great Circle sought an interim order from the Belgian Competition Authority (BCA). The BCA denied this, as it was not convinced that there was an abuse, and the applicant appealed to the Market Court. The big conceptual issue upon which the court reflected is what the scope of judicial review should be, in order to ensure that this was compatible with the applicant’s rights under Article 6 ECHR, as interpreted by the *Menarini* judgment of the European Court of Human Rights. It will be recalled that, in this case, the ECtHR demanded that appeals against competition decisions by an NCA should be subjected to rigorous review. In *Great Circle*, the Market Court held that it was empowered to review the decisions of the BCA, by checking for any procedural irregularities or manifest errors in the substantive assessment of the facts. If the BCA judgment was found to fail on either procedural or substantive grounds, the Court would be able to quash the decision and also, at times, to correct such errors in its judgment. However, the Court recalled that an aggrieved party was not entitled to have the Market Court carry out a *de novo* review of the decision of the BCA: this would be a breach of the principle of separation of powers. On the facts, the Court found that the

¹ European Court of Human Rights, *A. Menarini Diagnostics S.r.l. v. Italy*. Case no. 43509/08. Judgment ruled on 27.9.2011.

applicant did not put forward any plea to suggest any error on the part of the BCA, so the appeal was not successful. This judgment is significant because it clarifies the role of the Market Court: it does not serve as an ordinary appeal court, where the parties are able to get the issues re-heard. Rather, it is a review court, whose role is to test the validity of the BCA's decision. When quashing a decision, or certain aspects of it, the Court is able to send indications to the BCA on how its decision may be remedied. An example of this so-called 'soft law' approach is found in the judgment annotated by Judge Anne-Marie Witters in this working paper.

Judge Bosmans also presented an ongoing case, *BPost*. BPost's pricing structure was first challenged by the Postal Regulator. On appeal, the Regulator's decision was quashed. In parallel proceedings, the BCA considered the same pricing structure to be an abuse of dominant position – in imposing a fine it reduced the amount, taking into consideration the fine that the Postal Regulator had set. On appeal against the decision of the BCA, the parties argued that the BCA was not entitled to make a challenge because of the principle of *ne bis in idem*: the same facts had already been considered by the postal regulator and this prevented a further case being brought by the BCA. A reference for a preliminary ruling was sent to Luxembourg. This will give the CJEU the opportunity to revisit the *Toshiba* judgment.² In that case, the CJEU held that there were three criteria to consider in determining whether the second prosecution overlapped with the first in such a way as to engage the principle of *ne bis in idem*: the 'facts' must be the same, the 'offender' the same, and the 'legal interest' protected the same. In *BPost*, the legal interests would likely overlap: the regulation of postal services is, in part, designed to secure competitive markets, but it also looks to other public interest issues. On the one hand, it might be argued that in cases of partial overlap, the second authority to move should be entitled to issue a decision but to reduce the fine. On the other hand, it should be recalled that the principle of *ne bis in idem* is about protecting the defendant from a second prosecution, not just from the imposition of two fines for the same conduct.³ From this perspective, it may be argued that if the interests protected by two legal instruments completely overlap, then the sole way to protect the defendant's rights is to prevent the second prosecution completely. However, competition law and sectoral regulation, even in the case of regulations somehow inspired to competition principles, rarely pursue exactly the same public interests.

Judge Enerjeta Shehaj discusses a decision of the Albanian competition authority concerning a finding of abuse of dominance by EKMA Albania. The firm was found to hold a dominant position in the market for renting premises for the storage and trade of Agro-Food products in the city of Tirana. The abuse consisted of the imposition of unfair terms on customers who rented storage space from the dominant firm (e.g., energy bills that were higher than the price set by the energy supplier, a requirement to renegotiate the rent each month, which disadvantaged traders who rented premises long term, and setting prices which were higher than the average for the area). The appeal hinged first on the relevant market definition and, in particular, on the size of the relevant geographical market. Could traders rent premises in other locations? It was held that other storage premises were too far away to be seen as substitutable, and so could not be included in the relevant market. In the relevant product and geographical market, the applicant owned all of the premises and there were no potential competitors in sight.

Of interest in this case is that when looking at price abuse, there was a comparison between the prices it set and the comparative prices set by other firms in other locations, but also the price for the rental of

² C-373/14 P, *Toshiba Corporation v. Commission* (2016) ECLI:EU:C:2016:26.

³ G. Monti (2014), "Managing Decentralized Antitrust Enforcement: *Toshiba*" 51(1) *Common Market Law Review*: 261.

similar premises in Tirana, which were rented for different uses. This multiple use of indicators is in line with the recommendations of the CJEU in *AKKA/LAA*.⁴

Judge Janek Laidvee discusses a case which began with the Estonian competition authority examining the fees set by Notaries Public. To carry out this investigation, the NCA asked two Notaries Public to disclose their costs and incomes. The two Notaries refused to hand this information over. They claimed that their activity did not fall under the scope of competition law. They claimed that national law prevented competition: the number and fees were regulated by the state, Notaries exercised a liberal profession, and they could not refuse clients who came to them. At best, Notaries performed some functions in competition with other legal advisors, but these were only a small part of their business. Even if, in this fractional portion of their activities, they did act as undertakings, they did not act as ‘undertakings’ when exercising the functions assigned to them by the State. The courts agreed with these findings. On the one hand, given the heavy-handed regulatory structure, it seems unusual for a competition authority to step in since Notaries had few parameters on which they could compete. Arguably, they could only compete on quality to attract more clients. However, the major cause for these anti-competitive effects seems to be state regulation. Some fifteen years ago, the Commission had carried out a study on the liberal professions, encouraging Member States to remove barriers to competition.⁵ It seems clear that the services of Notaries Public could, in theory be offered in competitive markets so that they act as ‘undertakings’.⁶ In these circumstances, especially considering the technological evolution of many services related to the profession, it falls to the State to explain whether there are public interests that make it necessary to exclude competition from this market.

Judge Savroula Lampropoulou discusses a judgment of the Greek Council of State that debated the issue of limitation periods in Greek Law. Limitation periods for competition cases were only set by statute in 2011, but the case at hand dealt with a dispute that had begun before that date: the Greek NCA had made an infringement decision in 2009 relating to an agreement that took place in 2000. The question arose as to whether the gap in time between the infringement and the decision was too long. Efforts were made to use Regulation 1/2003 to establish the basis for a limitation period in Greek law, but these were unsuccessful.⁷ The Council of State ruled that the Regulation’s procedural rules applied only to the European Commission, and one could not use them to devise a comparable limitation period for the application of EU competition law by the Greek NCA. However, the Council of State determined that a general principle governing administrative law existed that placed time limits on the NCA’s powers to act after a long period had elapsed. On the basis of considerations of legal certainty and the importance that the party against whom proceedings were brought, is able to gather evidence to defend itself, it was necessary that the NCA exercised its power within a reasonable time. In determining what a ‘reasonable’ time was, one could take Article 25 of Regulation 1/2003 as an indicator. On the facts, it was held that the NCA’s delay in bringing the case was not so different from some European Commission cases, and so the action was found to have been taken in time. A dissenting opinion suggested that this approach did not achieve the required degree of legal certainty and that a fixed time period should be found – and, according to this view, drawing on Regulation 1/2003 made sense. One can see the logic of the dissenting argument, since the agreement in question might be reviewed either by the Commission or the NCA, and it would be convenient to align limitation periods. However, the

⁴ Case C-177/16, *Autortiesību un komunikācijai konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome* (2017) ECLI:EU:C:2017:689.

⁵ https://ec.europa.eu/competition/sectors/professional_services/reports/reports.html (20.11.2020).

⁶ See the definition of ‘undertaking’ provided by the CJEU in Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (1991) ECLI:EU:C:1991:161.

⁷ Council Regulation (EC) No 1/2003 of 16 December, 2002, on the implementation of the rules on competition that are laid down in Articles 81 and 82 of the Treaty. OJ L-1/1, 4.1.2003.

national procedural autonomy militates in favor of giving Member States some flexibility. Indeed, even the recent ECN Plus Directive does not establish a uniform limitation period.⁸

Judge Magda Tepey discussed an appeal against a decision of the Slovenian NCA, imposing penalties for the failure to notify a merger. The Slovenian NCA penalized the undertaking and the President of the Advisory Board of the undertaking, whose duty it was to ensure that the merger was notified. It also issued an order temporarily confiscating the shares of a firm held by the undertaking in order to ensure the fine was paid. On appeal, the fine was reduced significantly (from EUR 53.9 million to EUR 1 million) because there was no intention to circumvent merger control, and the failure to notify was the fault of the external advisor. The District Court, however, did not remove the order suspending the shares. The reasoning of the Court with regard to the suspension of the shares is that the undertaking is registered abroad, where it appeared to be subject to insolvency proceedings. It was thus reasonable to consider that the undertaking would be unlikely to pay the fine, thus justifying a seizure of shares in one of its firms registered in Slovenia. As the learned judge comments, this approach raises questions of proportionality: does a fine for a minor infringement really merit the imposition of a draconian remedy like suspending shares? On the other hand, as the Judge notes, once the payment is made, the shares are returned, and if payment is not made, the fine is settled from the sale of some shares and the rest are returned to the infringer – from this perspective the remedy does not appear to be disproportionate.

Judge Pedro Marques discusses a case relating to a disgruntled bidder in a public procurement procedure relating to the supply of surveillance services at a Portuguese university. The plaintiff claimed that they should have won the tender because they had offered the best price. The plaintiff challenged the validity of the tender issued by the contracting authority because it stipulated minimum costs through reference to a collective agreement for wages entered into by some service providers, which made it difficult for firms to compete on price. The plaintiff was successful in the First Instance, but the Court of Appeal did not consider that the tender infringed competition law. On a further appeal, the Supreme Court confirmed the judgment of the Court of Appeal, but with one dissenting judge, who considered that the fixing of a minimum price distorted competition, a view which appears to be shared by the Portuguese NCA. This is an interesting judgment from a number of angles. The first is that the plaintiff's claim is an indirect challenge to a collective labour agreement which was supported by the State. The Courts were thus asked to use the principle of free competition as an overarching basis for challenging state regulation. The second issue is that while the contracting authority will have excluded the plaintiff from that particular contract, it is not as if the plaintiff would have no other tenders to participate in, unless all contracting authorities were to incorporate the collective agreement in their tenders. The judgment is interesting in that it reveals the limits that competition law has in checking State regulation. This is a setting, which, like the regulation of Notaries in Estonia, noted above, requires the presence of completion advocacy powers, which enable NCAs to challenge anti-competitive state regulation and to explore whether the restriction of competition is justified by other public interest considerations.

Judge Carlos Marinho discusses a dispute relating to the recruitment of employees. The plaintiff sought an injunction against the defendant in order to prohibit the defendant from hiring the plaintiff's employees, thereby securing the plaintiff's trade secrets and diverting customers from the plaintiff to the defendant. The plaintiff also sought damages for losses already suffered as a result of the defendant hiring the plaintiff's employees. The background to this dispute is the following: the defendant had been asked to carry out an audit of the plaintiff; during that audit, the defendant had come to know the plaintiff's business model and personnel, some years later, recruited some of the plaintiff's employees. This disrupted the plaintiff's business, which led to this claim for damages. The plaintiff claimed that

⁸ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. OJ L-11/3, 14.1.2019.

the company's line of business (i.e., clinical trials) made the loss of key personnel significantly more disruptive than would have been the case with personnel in other industries. The Court confirmed that this act of unfair competition may be considered a civil wrong, but only in very limited circumstances. Generally, firms are free to recruit, and employees have a right to change jobs, so it will only be in extreme circumstances that an aggressive recruitment campaign by a competitor amounts to a tort. As the judge remarks in the case note, the approach of the Portuguese court is in alignment with practice elsewhere. A key limiting factor is the intent to damage the rival by a policy of recruiting its employees. Clearly, this is a situation in which the plaintiff should have protected his business with non-competition clauses. It also shows a major difference between competition law civil wrongs and general business torts: the latter often require intent as a basis for liability, while the former focus on the economic effects of anti-competitive conduct.

Judge Maurice Collins discusses the well-known *BIDS* case and takes us through the procedures from start to finish. At the time, this decision was significant because it revealed the tension between competition law and the management of an economic crisis in a particular sector. It was unfortunate that the proceedings ceased before an analysis under Article 101(3) TFEU was again fully explored. As the learned judge notes, the case gave the European Commission the opportunity to issue an *amicus brief*, which rejected the use of Article 101(3) to justify crisis cartels, and this set the tone for Commissioner Kroes' approach to the 2008 financial crisis: "yes" to State aid for undertakings in difficulty, but "no" to crisis cartels! In the immediate aftermath of today's economic crisis, however, the Commission appears to be more willing to tolerate some restrictive practices in the name of the public interest – and it will be interesting to observe how far this extends.⁹ Furthermore, Judge Collins notes how this saga also revealed the independence of the NCA, since it resisted a state-backed scheme to reorganize the market.

Judge Anne Nenonen discusses a bus cartel to divide markets and to make the entry of rivals more difficult. The cartel commenced in the immediate aftermath of the opening of this market to competition. As is usual with cartel litigation, a number of substantive & procedural issues were litigated on appeal, including a discussion about certain documents that were protected by legal and professional privilege. The case is notable for the fact that the Supreme Court increased the fine set by the Market Court significantly. This was done in order to ensure that each party's fine was based on its market size and culpability. This is a healthy development. Often, cartel cases are appealed on several grounds in the hope of some fine reduction: indicating that fines may go up as well as down may act as a deterrent to the more speculative appeals. Perhaps the most notable aspect of this case is that the Supreme Administrative Court relied on 60 judgments of the CJEU and 20 judgments of the European Court of Human Rights!

Judge Imre Robotka discusses an information exchange agreement among banks in Hungary. The Hungarian NCA was concerned that some of the information exchanged would facilitate collusion among banks (information disclosed revealed market strategies, plans for the future and promotion plans). In consultation with the NCA, the kinds of information exchanged were altered, but it appeared that some of the information was exchanged to ensure financial stability. At any rate, the NCA issued a decision, finding an anti-competitive agreement which lasted 12 years. On appeal the Court asked whether the NCA was able to show an effect of this long-running collusion, and the decision was quashed because the NCA had not done enough to show the link between the agreements and any anti-competitive effects. This judgment is a warning to NCAs: if they opt for an effects-based analysis in

⁹ G. Monti, *Business Cooperation in Times of Emergency: The Role of Competition Law*. Published in *Competition Policy International* on 10.5.2020. The text of the article is available at:

<https://www.competitionpolicyinternational.com/business-cooperation-in-times-of-emergency-the-role-of-competition-law/> (20.11.2020).

Article 101 TFEU, the Court is entitled to explore whether there is a proper assessment of the effects, including the construction of a proper counterfactual scenario. However, the National Court might have been too harsh in requiring actual effects to be shown on the market – and since competition law protects the competitive process, it seems that in the case of a restrictive agreement involving major banks with a high market share it should be sufficient to show the likelihood of adverse market effects.¹⁰

Judge Engert Pellumbi discusses a bid-rigging case. Here, it seems that the Administrative Chamber of the Supreme Court, on appeal against the decision of the competition authority, were too demanding. The courts faulted the NCA for not undertaking a fuller market analysis and for focusing on collusion among some members, and only for a limited period of time – however, these flaws go to the level of the fine and not to the finding of an infringement. The facts of the case seem to suggest a clear restriction by object, so that competition law is applied in order to dissuade conduct that is clearly likely to harm competition, as AG Kokott once suggested, in these instances, competition law applies to what may be said to be ‘risk offences.’¹¹ The learned judge also notes how, in his view, the Supreme Court went beyond its function: it is expected to help to interpret the law, but it is not expected to review the correctness of the factual findings that have been established by the lower courts.

Judge Jelena Cuveljack also reports on a case in which the Constitutional Court reviewed the facts of the case. However, this appears to have been the sole instance in which this took place. On the merits, the issue was whether the Croatian NCA had enough evidence to support a finding of collusion in the relevant market. After reviewing the evidence presented, the only valid piece of evidence left standing was a newspaper’s report that there had been an agreement, but this was insufficient for the Constitutional Court to condemn the parties.

Judge Aikaterini Serafeimi talks about a case brought by the Hellenic Competition Commission (HCC) against an agreement to prevent parallel trade in household goods (e.g., detergents) that had been orchestrated by Colgate-Palmolive. An intriguing aspect of the HCC decision is the finding of an infringement of both Articles 101 and 102. However, the key issue on appeal was the liability of the parent company for the infringements carried out by the Greek subsidiary. It is not clear how far parental liability remains a matter for national procedural autonomy after the judgment of the CJEU in *Skanska*, where the Court held that the concept of ‘undertaking’ constitutes an autonomous concept of EU Law.¹² At the time of writing, an appeal is pending which will afford the Supreme Court an opportunity to test how far the parent exercised a decisive influence over the conduct of its subsidiary. No matter how this works out, the case is also interesting for the choice of the Greek NCA to take on a case about parallel trade. One can understand the motivation (prices were higher in Greece than in neighboring Italy, from where the defendant sought to prevent parallel trade) but one wonders if, in these instances, the best placed authority is the Commission, who may be able to secure more evidence from all of the subsidiaries across the EU.

Judge Kristina Maimann discusses an appeal against an NCA decision that found that those organizing waste services (a joint venture of local authorities in one region of Estonia) were charging users excessive prices. The NCA ordered a price cut so that the profits of the dominant actor were no greater than 15 percent. Appeals were unsuccessful at first, but when the case reached the Supreme Court things changed. The Supreme Court held that the appellant was not an undertaking, but it was acting as a public authority. As such, its contracts with consumers fell outside the scope of national and

¹⁰ See, for instance, Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (2006) ECLI:EU:C:2006:73.

¹¹ C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (2009) ECLI:EU:C:2009:343.

¹² Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions Oy e a.* (2019) ECLI:EU:C:2019:204. Para 47.

EU competition law. The Court referred to the key case-law from the CJEU (e.g., Case C-138/11 *Compass-Datebank*), which provides that the exercise of public authority functions required by national law fall outside the scope of EU competition law. As the learned judge rightly states in her note, while there is a restriction of competition, this is a setting in which it is for the state to determine whether there should be competition or whether other public interest should be prioritized. Nonetheless, if competition law is excluded, it is not clear with which other means consumers' legitimate interests can be protected against the inefficient management of the applicant.

Judge Brian Murray also discusses a waste management judgment, *Neurendale Ltd t/a Panda Waste Services v. Dublin City Council*. In brief, the defendant varied its waste collection policy: at first, waste collection was open to competition and a number of providers operated this, including the claimant. Subsequently, the policy was changed: only one entity would collect waste, either the local authority or a single private provider. Panda Waste Services challenged the decision of the Dublin local authorities as being a restriction of competition. The questions for the judge to consider were whether the defendants operated as undertakings, and whether the conduct constituted an infringement of competition law. Justice McKechnie (who had been sympathetic to the crisis cartel in BIDS) took a dim view of this policy. After concluding that the defendants acted as undertakings, since they had just acted to exclude rivals, he held that competition was infringed, and, according to the evidence presented, the most efficient solution was for three firms to provide these services, making the creation of a monopoly waste collector a sub-optimal solution. Evidence also showed that consumers were benefiting from competition on the market. This conduct was both an agreement restrictive of competition and an abuse of collective dominance. The spirit of the judgment here differs from that reported by Judge Maimann (discussed just above): here, the Court places more faith in markets than state regulation.

Judge Nieto Martin discusses the question of the duties that national courts have in cases where there may be state aid. In order to facilitate the transition to digital TV, states granted funds to broadcasters. In this case, the Commission had determined that certain funding schemes were state aid, but this decision was quashed by the CJEU for failure to state the reasons for this determination. While the Commission re-examined the state measure, a question arose about whether the Spanish courts were obliged to recover the funds that had already been transferred. Arguably, the task of a National Court, in these circumstances, is to examine whether the measures in question are state aid and, if so, to recover the funds. This power of the Court is independent of the fact that the Commission's decision has been annulled. The duties of National Courts stem from Article 108 (3), which creates a duty on member States to notify state aid.¹³ An alternative might be for the Court to write to the Commission and put it on notice that the National Court stands ready to order recovery after the Commission decides on the case. While this approach would be useful in putting pressure on the Commission to issues decisions expeditiously, it is not really a necessary step, given the National Court's duty to be proactive in recovering state aid once it has decided that the measures constitute state aid.¹⁴

Mr. Stijnen brings us a judgment about the liberalization of postal services. Under Dutch Law, certain legal documents (i.e., submitting objections or appeals) may be deemed to be submitted to courts on the date of postage if the sender uses the national post office, the universal service provider for postal services. This exception to liberalization is provided for explicitly in Article 8 of the Postal Services

¹³ Case C-284/12, *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH* (2013) ECLI:EU:C:2013:755.

¹⁴ See, generally, F. Pastor Merchante and G. Monti (2020), "The Functions of National Courts in the Private Enforcement of State Aid Law." In P.L. Parcu, G. Monti and M. Botta (eds), *EU State Aid Law. Emerging Trends at the National and EU Level* Edward Elgar Publishing). Chapter 6.

Directive.¹⁵ The practical effect of this is that one part of the postal services market remains reserved for the national post office. However, a judgment of the CJEU with respect to the organization of postal services in Poland read this provision as being restrictive. The CJEU held that the national post office could only retain this exclusive right if it were shown that this was necessary for reasons of public order or public safety.¹⁶ Following the CJEU ruling in *Pawlak*, the Dutch courts, in the case reported here, have re-interpreted national law so that, provided the sender uses any of the registered postal carriers, appeal documents are deemed to have been submitted on the date of posting. One issue that this case-law does not consider is the size of this market: is the prevention of competition in this relatively small market really such a major challenge to market opening?

Judge Emanuela Germano and Andrea Piletta Massaro report on a recent damage claim that was decided upon by the Italian *Corte di Cassazione*, *Uno Communications v. Vodafone*. The judgment raises two procedural issues that are of interest: limitation periods and the effect of NCA decisions on damages claims. As to limitation periods, the Court in the First Instance, took the view that the five-year period began from the moment the NCA began its investigation, as a result of which the damages claim was time-barred. On appeal, the *Corte di Cassazione* examined whether this approach was compliant with EU Law. The Damages Directive, approved only well after the case was on its way, was clearly inapplicable,¹⁷ but the Court inquired as to whether the approach in Italy was consistent with the EU principles of equivalence and effectiveness. However, even when applying these principles, it was found that the plaintiff had waited too long to bring a damages action. Even if time were to run from the date of the NCA decision (i.e., 2007), the lawsuit had been brought more than five years later.¹⁸ The Court then turned to the status of the NCA decision. As a preliminary point it should be noted that ordinary NCA infringement decisions in Italy are treated as having the status of ‘privileged proof’ so as to facilitate follow-on claims like the one here. It may be argued that this status is not quite the one required by the Damages Directive,¹⁹ but the specific issue here is how far a similar status should be conferred on commitment decisions. The Court held that they could not benefit from the same status but, following *Gasorba*, it held that they would provide a rebuttable presumption of competition infringement.²⁰ One unusual aspect of the NCA approach is that, in finding the same infringements by all major telecom providers (i.e., excessive termination fees which served to exclude new entrants), it issued decisions and accepted commitments from some market actors. Given that all the decisions centered on the same conduct, could the plaintiff not rely on the privileged status of the infringement decisions?

Judge Eva Lunenberg discusses a judgment which involves the application of the provisions of the Dutch Competition Act which were inserted in 2014 and came into force in 2016. These provisions are remarkable and are a model for other Member States. In brief, they provide that local authorities may not take steps to harm competition. This is an approach that serves to strengthen the advocacy powers

¹⁵ “The provisions of Article 7 [opening markets to competition] shall be without prejudice to Member States' rights to organise the siting of letter boxes on the public highway, the issue of postage stamps, and the registered mail service used in the course of judicial or administrative procedures in accordance with their national legislation.”

Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997, on common rules for the development of the internal market for Community postal services and the improvement of the quality of service [1998] OJ L15/14. Art. 8.

¹⁶ Case C-545/17, *Mariusz Pawlak v. Prezes Kasy Rolniczego Ubezpieczenia Społecznego* (2019) ECLI:EU:C:2019:260.

¹⁷ Directive 2014/104/EU of the European Parliament and of the Council of 26th November, 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. OJ L-349/1, 5.12.2014.

¹⁸ On this point, the judgment is reminiscent of *Cocego*. C-637/17, *Cogeco Communications Inc v. Sport TV Portugal SA and Others* (2019) ECLI:EU:C:2019:263.

¹⁹ *Supra*, Art. 9 Damages Directive.

²⁰ Case C-547/16, *Gasorba SL and Others v. Repsol Comercial de Productos Petrolíferos SA* (2017) ECLI:EU:C:2017:891.

of NCAs. Such advocacy serves to influence Member States. As a matter of EU Law, Member States would have an obligation to keep under review legislation and regulations whose effect is to damage the functioning of the internal market or that have anti-competitive effects but, often, States fail to do so, making the NCA's advocacy role particularly important. This also underscores the importance of keeping NCAs independent, since they should be a thorn in the side of the State. On the facts, the defendant was accused of setting parking fees for barrier car parks at predatory levels thus threatening the economic equilibrium of competing providers of the same parking services. The defendant responded in two ways: first, that it was not acting as an 'undertaking', and thus competition law was not applicable. Second, in the alternative, that if it were an 'undertaking', the relevant market should also include the operation of street parking, and the cost of running both services (street and barrier parking) should be considered to determine whether the prices were below cost. The Court disagreed. First, it held that in operating the barrier car parks the city was acting as an undertaking, as evidenced by the presence of competing providers. Second, that in regulating on-street parking, this was not the activity of an undertaking, given the legislative framework involved. As a result of this, the parking fees had to be raised so that they were no longer exclusionary. However, subsequently, the defendant (i.e., the city of Veenendal) designated barrier parking to be a public interest service. This would exclude the application of the competition rules. However, the Rotterdam District Court was not convinced that the city had done enough to show that the disapplication of competition law is necessary in order to deliver the public service. This dispute shows how the national legislator has devised, for the purposes of national law, a system for regulating the State which is analogous to that found at EU level: certain forms of anti-competitive action are forbidden, unless the State can justify these by showing that the provision of a service in the general interest requires the disapplication of competition law.²¹ This requires attentive scrutiny so as to test how far States are really safeguarding the public interest, or are simply trying to keep a revenue line by excluding rivals.

Judge Sofia Maravelaki discusses an important decision of the Hellenic Competition Commission: the NCA condemned a price fixing agreement in the fuel sector, relying exclusively on economic evidence. In particular, the NCA showed price parallelism for a period of five months. Such prices could not be explained by anything other than prior collusion by the undertakings: (i) the market was not an oligopoly, so price parallelism could not arise from interdependence; (ii) the undertakings had different costs, so the prices could not be explained by similarities in the business model; (iii) there was no change in costs that might explain the price changes. This is one of the few times that this purely economic approach to condemning collusion has survived on appeal and holds useful lessons for other NCAs.

Judge Andrea Kretschmann discusses a challenge to the procedures that are used to fix the rates for electricity distributors. The applicant considered that the rates should be fixed independently by the National Regulatory Authority (NRA), while the way they were fixed in Germany left some role to the State and this was contrary to the Electricity Directive.²² The Commission has also taken the view that Germany did not transpose the Directive correctly, and an infringement action was pending in front of the CJEU. However, rather than staying proceedings, the National Courts considered the merits of the complaint. The National Court concluded that there might be some tension between German constitutional principles and the Directive, but it considered that the Directive had been transposed correctly by reading the option to retain some role for the State in the regulation of prices that is in the Directive. This raises a wider issue about the frequent attempts of the European Commission to insist on the independence of regulators and the practical absence or limited scope of such independence at the national level.

²¹ See Art. 106(2) TFEU.

²² Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

Judge Anne-Marie Witters brings us a decision in which an old-fashioned business model (i.e., pharmacies licensed by the State) is under challenge by new entrants. A firm entered the market by opening two stores on the same premises: a licensed pharmacy, attached to which is a so-called ‘para-pharmacy’, which sells over the counter goods at prices significantly lower than those found in pharmacies. Pharmacists are members of an association. The association took a number of steps to prevent the new entrant from coming into the market: it brought a court action alleging that the new combined shops were confusing to consumers, and risk are posed to public health. In addition, the Association took other steps (e.g., disciplinary proceedings against pharmacists who collaborated with the new entrant). The NCA found that the steps taken by the Association were a decision of an association of undertakings which restricted competition. The NCA (as well as the Market Court, on appeal) found that there was a string of indicators which all pointed to the showing of an exclusionary strategy. In this framework, even the legitimate bringing of court proceedings was seen as being one of the manifestations of this strategy. The NCA’s theory of harm was that this conduct was likely to have an adverse impact on the price of goods, and to hindering innovation. The public health justifications were not accepted: there was nothing to indicate that this business model effectively harmed public health in any concrete way. This case should be read in the context of several significant challenges to the business model of pharmacies, which are also under pressure from on-line sales. While the NCA won on the infringement, the Market Court corrected the approach the NCA took in imposing the fine, since, as the law stood at the time, the fine on the Association should be based on the Association’s turnover, and not (as the NCA had) be based on the turnover of its members. As a result, the Market Court sent instructions to the NCA to guide it on how to compute the new lower fine. Subsequently, the Belgian legislator amended the law to allow fines to be calculated on the basis of the turnover of members, which is likely to improve the deterrent effect of enforcement actions against associations.

Judge Florian Kalaja discussed *Tirana Lines v Albanian NCA*. Here, the Municipality of Tirana operated a scheme whereby students could receive travel subscriptions at a lower rate than ordinary passengers. The Municipality tasked the Association of Local Transport with distributing these discounted travel subscriptions. All transport companies were members of this association. At one meeting, the association took a vote whose effect was to reduce the number of tickets that Tiarana Lines could obtain. The latter considered this to be an infringement of competition law, and the national competition authority agreed, as did two Appellate Courts. Presently, a further appeal is pending in front of the Supreme Court. This appears to be a classic collective boycott, which amounts to a clear restriction of competition. As with other cases discussed here, questions arise as to the proper role of the Supreme Courts in competition appeals.

Economic Activity and the Scope of the Application of Competition Law

Aikaterini Serafeimi, Athens Administrative Court

Colgate Palmolive v. Greek Competition Authority

Decisions of the Administrative Court of Appeal of Athens No 1626/2019 and 1627/2019

Facts

The case note concerns two relevant decisions from the Administrative Court of Appeal of Athens (No 1626/2019 and 1627/2019), issued on appeals for the annulment of fines imposed by the Hellenic Competition Authority against the US Company "COLGATE PALMOLIVE" (hereafter C-P), based in New York, in full liability and in solidarity with the Greek companies of the same group, namely, "COLGATE PALMOLIVE (HELLAS) S.A." (C-P S.A.) and "Colgate-Palmolive Commercial (Hellas) Single Person Ltd" (C-P Ltd), for violations of Articles 101 and 102 of the TFEU.

The violations were related to: a) their participation in a prohibited agreement for the restriction/obstruction of the parallel imports of products of the COLGATE PALMOLIVE group in Greek territory, in violation of the provisions of national law (Law 703/1977) on free competition and Article 101 TFEU, and b) the abuse of a dominant position, by establishing and maintaining, on their part, the contractual condition of the restriction of parallel imports into contracts with their customers in the relevant cleaning market for glass surfaces (windows) in Greek territory, in violation of the same national law and Article 102 TFEU.

The C-P group manufactures and markets detergent products for clothes and dishes, cosmetics and products for individual oral hygiene. The C-P group distributes and sells its products in retail stores, either directly or indirectly, through a network of special partners-wholesalers and "Cash & Carry" stores (indirect trade).

The case started on the occasion of publications and consumer complaints about the significant price difference between supermarkets in Greece and other EU countries in relation to detergent products. The Hellenic Audit Authority (the General Directorate of Competition) thus conducted an investigation to examine the conditions of competition in the market for detergents and household cleaners. Data were requested from Greek C-P S.A. (the subsidiary of the American company C-P) and the subsidiary of the C-P S.A., a single person company, C-P Ltd.

During the research, the terms of the group's contracts were examined, on the one hand, with companies operating in retail and wholesale for supermarket items and, on the other, with special wholesale partners, who undertook the distribution-resale of their products in retail stores. Documents collected during the investigation of the C-P group showed that the prices of Colgate-Palmolive products in Greece were, during the period 2000-2010, generally higher than those in other European countries. In the analysis of the strong/weak points-opportunities/threats (SWOT Analysis) of C-P S.A., which was described in the company's business plan, the paragraph relating to "threats" referred to the comparison of prices with other countries in Europe, and then the parallel imports ("europricing / parallel imports").

From the comparison of prices among countries, based on the presented price lists, the following conclusions were drawn per country in relation to the number of products that are more expensive in Greece, as well as how much more expensive they are. For prices in Italy, it seems that, for the period 2001-2008, 85% - 95% of "comparable" products were more expensive in Greece, for prices in Spain for the same period, 73% - 85% of "comparable" products were more expensive in Greece, and for prices in France, 54% - 84% of products were more expensive, and in Portugal, in the same period, 55% -66% of "comparable" products were more expensive in Greece. It was also found that the C-P group held a stake in the individual market for glass cleaners which exceeded 64%, in terms of value, during

the same period. In addition, the C-P group had significant shares and strong signals in other individual markets, namely: a) the first place in three additional markets (clothes softeners, liquid soaps, toothpastes) and, b) the second or third place in additional markets in which it operates (dishwashing detergents for hand washing, other large and general cleaning products, toothbrushes, shower gels, and soaps in solid form).

The Audit Authority examined 21 contracts in the C-P group with seven (7) different counterparts, in which there was a term, in different verbal versions, that related to parallel imports, and so it considered that this term, which had the effect of maintaining high prices in the market, if compared to other European countries, was an expression of the practice of the C-P group and its customers in influencing the potential competition, in the sense of discouraging the activity of new importers in the direction of the realization of parallel imports. The maintenance of high prices in Greece, in relation to other European countries, was causally related to the conventional condition of limiting parallel imports, while consumers shouldered the high pricing policy of the C-P group, which was the motivation for the existence of the contractual term for the parallel imports under consideration. In addition, from an examination of the data, the Audit Authority concluded that the issue of parallel imports was of particular concern to the C-P conglomerate. For this reason, the parent US company and the Greek companies (C-P S.A. and Ltd.) systematically, and in detail, monitored the parallel imports and took action to solve what is considered by them to be a problem, both internally, in the Greek group, and in cooperation with other countries (with C-P Italy) and the European Business Division of the group, so as coordinate the necessary actions on the issue of parallel trade.

Furthermore, the Hellenic Competition Authority, in order to determine the limits of the relevant market, took into account that the relevant product market includes the product or products related to the case under consideration, as well as all products that are considered to be interchangeable or that can be substituted for each other, either in terms of demand or supply substitution, due to their properties, price and intended use. Regarding the geographical demarcation of markets, the Authority concluded that the whole of the Greek territory should be considered, and that C-P companies - in terms of market share and subsequent presumptions of national and EU jurisprudence - hold a dominant position in the relevant market.

In view of these findings, the National Competition Authority unanimously ruled that the Greek subsidiaries of the C-P group had committed the above-mentioned infringements, on the one hand, by concluding objectively restrictive competition agreements, in the sense of preventing parallel imports of active imports into Greek territory in the relevant markets, and, on the other, with the abusive imposition and inclusion of the disputed clause in contracts with their customers in the relevant market for glass cleaners (windows), in the context of a comprehensive, central plan to control parallel imports into Greek territory from abroad (in particular, from Italy). Furthermore, the C-P Group has drawn up a comprehensive, centralized plan to reduce the parallel imports of C-P products from other countries (especially Italy) to Greek territory, where higher prices prevailed.

The Competition Authority thus concluded that the ultimate parent US C-P company had a direct involvement and knowledge of the policy of restricting the parallel imports applied by its Greek subsidiaries, namely, active participation in the established violation. For these reasons, the Competition Authority has unanimously decided, in respect of the subsidiaries of the C-P group, and by a majority of the far parent company, to impose full fines on them.

The US C-P Company appealed the above Competition Authority's decision to the Administrative Court of Appeal (of Athens), which is competent for these cases as a Court of First Instance. At the same time, its Greek subsidiaries lodged a separate appeal to the same Court against the same decision.

Before the Court, the Competition Authority argued that all the evidence had led to the design of a central plan by the Greek and Italian C-P subsidiaries under the direct guidance of the parent US Company in order to limit parallel imports. To support this, they pointed out that the organizational

relations between parent and Greek subsidiaries, i.e., top executives (Vice-President or General Manager) of parent companies held positions on the Boards of Greek subsidiaries (Consultant, Manager), while the subject matter of their activities was identical.

After lengthy reasoning, the Administrative Court of Appeal held that the ultimate parent US Company had not had a decisive influence on the commercial conduct and business decisions of its Greek subsidiaries, which, acting independently in the business, had entered into the legal offences in the contracts that had been concluded with some of their customers as part of their effort to curb parallel imports. Hence, in its first judgment, it ruled that the Hellenic Competition Authority incorrectly held the ultimate parent company fully liable for the payment of the fines imposed on its subsidiaries, and that the contested decision must be annulled in its relevant capital. In its second judgment, the Court dismissed the appeal of the subsidiaries on the merits.

Comment

The crucial issue in this decision is the liability of the US parent company, which, in fact, is not just a “parent liability”, but a “grandmother liability”.

In EU law, a parent company is liable for the found breach of competition law when it has violated the relevant rules, developing a corresponding behavior with its subsidiary, or has contributed to the design and implementation of the subsidiary's illegal behavior. However, in any case, the attribution of liability to a parent company lies at the discretion of the national competition authority (see cases C-125/2007, C-133/2007, C-135/2007), while the terms and conditions for the attribution of any liability to the parent company show significant discrepancies in the national law of the Member States, due to the principle of procedural autonomy and the fundamental principle of personal liability for breach of competition law, which is recognized, and in EU law (see cases C-327/2007, C-338/2007).

It must also be noted that the inclusion of two companies in a "single financial entity", within the meaning of competition law, is not sufficient for the attribution of liability to a parent company for a violation found by its subsidiary, but it must be supplemented by a sufficient number of actual conditions which demonstrate the lack of the legal or real possibility of the autonomous decision-making of the subsidiary on the basis of economic/business and organizational criteria, and the assistance of a vested interest in the actual control of the first over the second (decision C-407/2008 *Knauf v. European Commission*).

If it is thus a “grandmother” company, as in this case, the liability for the behaviour of its subsidiaries must be even more substantiated.

Janek Laidvee, Tallinn Administrative Court

A brief summary of the facts of the dispute

The Competition Authority of Estonia (CA) whose tasks are to ensure fair competition and to safeguard the functioning of the market initiated the 07.09.2017 proceedings to analyze the cost orientation of Notary Fees, in order to promote competition among notaries. The CA therefore requested from two randomly selected Notaries (Mr Paavo Uibopuu and Ms Aune Harujõe) information about their annual incomes and the costs of their offices. The legal basis referred to the Competition Act, Arts. 57 and 59.

Mr P. Uibopuu and Ms Aune Harujõe refused to comply with the request, claiming that the CA has no legal right for such a request. They argued that the activities of a Notary do not fall under the scope of the Competition Act, because there is no competition between Notaries, according to the Notaries Act, as a result of which a notary is the holder of an office in public law, an independent official to whom the State has delegated the duty of ensuring the security of legal relationships and the prevention of legal disputes. A Notary executes his/her office as a liberal profession in his/her own name and at his or her own responsibility. An undertaking or a state official cannot be a notary. They argued also that the activities of a Notary are strictly regulated through legal Acts; Notaries can't choose the kinds of services that they provide, and a Notary's fees are also regulated by law.

Summary of the judicial proceedings

On 10th November, 2017, Mr. Paavo Uibopuu and Ms Aune Harujõe filed an action with the Tallinn Administrative Court against the CA.

Tallinn Administrative Court agreed with Mr Paavo Uibopuu and Ms Aune Harujõe, and granted an action for judgment and annulled the CA's request.

The Tallinn Circuit Court agreed with the CA appeal, and on the 29th June, 2018 annulled the judgment of the Tallinn Administrative Court, thus considering the CA request to be lawful and valid.

Riigikohus (the Supreme Court) didn't accept the matter for proceeding, and the Tallinn Circuit Court judgment came into force on 20th December, 2018.

The ruling of the Court

Tallinn Administrative Court findings

The professional activities of a Notary are strictly regulated by the law. In the "market" for Notaries' activities does not represent free competition under the meaning of the Competition Act. The distortion of competition can thus not occur. Considering that a legislator sets the number of Notaries and Notaries' fees, Notaries don't operate in the market for goods under its meaning in the Competition Act. Notaries don't perform economic activities under the meaning of competition law, and one Notary can't be considered to be an undertaking according to the tenets of the Competition Act. A Notary may refuse to perform a notarial act only on the bases that are provided for by law. In practice, there are significant gaps in the incomes among Notaries, which may have been caused by the quality and accessibility of the services, but that's not an issue for competition law. The CA is not entitled to supervise Notaries, which fall under the competence of the Minister of Justice.

The Tallinn Circuit Court's findings

The concepts of “undertaking“ and „“economic activity““ may differ across legal branches. A Notary is not an „undertaking“ under the meaning given in the Commercial Code, but a Notary is an undertaking, for example, in the meaning given in tax law. The Circuit Court referred to EC case law (23.04.1991 Judgment C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH), according to which, in the context of competition law, the concept of an undertaking encompasses every entity that is engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. The Circuit Court also referred to EC judgment C-343/95 Diego Cali & Figli Srl, according to which activities of economic nature are not exercises of powers that are typically exercised by a public authority. The Circuit Court concluded that meanings relating to the concept of an “undertaking“ are broader than those in the Commercial Code (§ 1), and regulations on undertakings may also cover private persons to whom the legislator has delegated public powers.

The activities of the Notary are, by their nature, economical, and Notaries operate in the market for goods. That conclusion will not affect the fact that the number of Notaries' Offices, and their corresponding territorial jurisdiction, notarial acts and Notary's fees are regulated by legal acts. The aim of this regulation is to guarantee access to Notary services and sufficient income for those Notaries, but not to exclude any competition between them. In the Notary market competition between Notaries and some notarial services (for example, legal counselling), where the service fee shall be agreed between a Notary and a client, occur. The fact that competition is limited in the notary market does not mean that there is no competition at all. There are no specific rules in the law which would exclude the applicability of the Competition Act to Notaries.

The Circuit Court pointed out that the goal of the Competition Act is to protect all market participants, among other consumers, from the situation of the lack of, or limited, competition or the dominance of one or of certain undertakings. The generally accepted aim, and the tasks of free competition and competition law is to ensure the quality of goods, fair prices, and a reasonable quantity of goods, through an optimal balance of supply and demand in the market. In order to ensure these objectives in the case of notarial services, the Competition Authority must also have the right to control the competition situation in the market for notarial services.

My personal comment

In such a case, where the two courts had different views, the definition of an undertaking and of economic activity in the context of notarial services was up for debate. The case also has a connection with EU law. Given the context of the case, the Circuit Court's wish to see the case more broadly can be understood. Namely, the CA only planned to carry out a corresponding analysis, and didn't have the intention to interfere in the notaries' activities. The decision of the Tallinn Circuit Court can be criticized in several respects. In particular, the fact that, in my opinion, important questions were not answered. For example, why should the activities of a Notary (at least partially) not be covered by the exception, for the exercise of public authority, by its nature (in the sense of the law, a notary is a legal official who has been entrusted by the public authority with the duty of ensuring the security of legal relationships and the prevention of legal disputes), or by the organisation of the Notary system in Estonia (in Estonia, Notaries are required to act impartially on behalf of all parties to a contract or transaction). Another question is in how competition is expressed when activities are highly standardized, the requirement of Notary impartiality applies, and Notaries cannot select clients and set fees. Legal counselling, where prices are negotiable, is also a marginal part of the activities of Notaries. Furthermore, in this field, it is not possible to talk about the market for Notaries, but other persons (Advocates, Lawyers) also provide a similar

Florian Kalaja, Supreme Court of Albania

Case no. 31003-02953-86-2015 of the Appeal Administrative Court

Judgment no. 86-2017-1531, ruled on 12.04.2017

Tirana Lines (slr) v. Albanian Competition Authority

Facts

The local public transport in Tirana is organized and supervised by the Municipality of Tirana. The Municipality of Tirana has an agreement with different companies that provide the means of local public transport for the city. Some of the private companies which operate in the local transport market in Tirana are “Ferlut”, “Alba Trans”, “Illyrian Trans”, “Ottoal” and “Tirana Lines”.

For students and some specific categories of passengers, the Municipality of Tirana has provided special subscriptions, subscriptions the validity of which is for one month. The production of the subscriptions subscriptions is carried by the General Directory of Taxes. The distribution of the subscriptions subscriptions is carried out by the Society for Local Transportation of Tirana, which is a moral person that includes as members all of those societies which operate in this local area of the market. For the reduced price of the subscriptions subscriptions the Municipality of Tirana reimburses one part of the price to the economic operators.

In 2011, the economic operators requested that the Society for Local Transportation provide subscriptions as many subscriptions as were needed. The operator “Tirana Lines” requested 5500 subscriptions but managed to take only 1200 subscriptions. At the same time, all of the other societies received the number of subscriptions for which subscriptions they had asked, approximately 6000 subscriptions. In 2012, “Tirana Lines” filed a request to the Competition Authority for an administrative inquiry. According to the claimant, the other operators and the Society for Local Transportation of Tirana had concluded an anti-competitive agreement that harmed the economic interests of the applicant; such agreement represented a violation of Law no. 9121/2003 “*On the protection of competition*”.

An administrative inquiry began. The Competition Authority found that in providing 1200 subscriptions to “Tirana Lines” the Society of the Local Transportation had violated the principle of equality between parties that were in the same circumstances. The Authority found that these omissions have constituted a violation of the Article 4, point 1, letter “b” of the Law no. 9121/2003. The Authority found that there has been no reasonable justification to decide not to sell and provide the quantity of subscriptions as required to the applicant. By doing so, the Authority concluded that this action constitutes a violation of competition, because it has violated and restrained the freedom of the market and the selling of goods, by which the space in the local market for transportation became very narrow for the applicant. The Authority concluded that the applicant enjoyed the status of a victim, as prescribed by Law no. 9121/2003 and decided to sanction the Society for Local Transportation by a fine in the amount of Euros 6000. The amount of a Euros 5000 fine was sanctioned for each of the operators that were found to be part of the prohibited agreement, which violated competition and damaged the local market for public transport.

The acts of administrative sanctions were brought to the Court by the subjects who had been punished. They argued that there was no proof to conclude that there was a prohibited agreement among them to exclude from the operator “Tirana Lines” from the market. Another ground for the appeal was that non-governmental organisations are not subject to Law no. 9121/2003, and that the Administrative Act which fined the Society for Local Public Transportation cannot produce legal effects and so it has, from the beginning, been null and void.

The Court Ruling

The Administrative Court of First Instance of Tirana rejected the claim. In its reasoning it offered arguments that the grounds for the appeal were not based on law. It concluded that proofs of the violation of competition can be found even in the evaluation of the facts and the reasoning of the link between the facts, as was the case here. It concluded that all the illicit actions and illicit omissions from the action of the operators in the local market and the Society for Local Public Transportation of Tirana have one thing in common: they were intended to exclude “Tirana Lines” from the local market for public transport, and so they acted against competition law. The Court, in its decision, reasoned that even non-governmental organisations can be subject to the obligations emanating from Law no. 9121/2003 when, between their actions or omissions of the related actions, and according to their competences and the violations of the competition law, a causal link can be found resulting in the consequences of violation of the freedom of the market and also of the freedom of the transactions.

They appealed against the sentence of the First Administrative Instance Court. The Administrative Court of Appeal decided to reject the appeals of the plaintiffs. It confirmed the findings and the reasoning of the First Administrative Instance Court. Against this sentence an appeal on points of law was brought in the Supreme Court. Even though the sentence was appealed on points of law in the Supreme Court, the decision of the Administrative Appeal Court is executable and final. At the moment of writing, the Supreme Court has not yet adjudicated upon this case.

Eva Lunenberg, Rotterdam District Court

Municipality of Veenendaal v. *Autoriteit Consument en Markt* (Authority for Consumers and Markets, ACM)

Decision of the Rotterdam District Court on the 29th August, 2019

(ECLI:NL:RBROT:2019:6805).

Preface

In the Netherlands, regulations apply to prevent unfair competition from State entities when they carry out economic activities. These regulations promote a healthy business climate in the Netherlands. ACM is the national authority that ensures that State entities comply with these regulations. Under these regulations, State entities are allowed to carry out economic activities, provided that they observe four rules of conduct:

Calculating the integral costs: State entities may not offer a product or service below cost (Article 25i of the “Mededingingswet” (Competition Act, from here onwards CA).

State entities may not favour their own public undertakings over competing undertakings, for example, through favourable financing (Article 25j of the CA).

Use of data: State entities receive information that others do not have because of their public duties. This should not lead to an unfair advantage. State entities may therefore only use data for economic activities if other undertakings can also obtain this data under the same conditions (Article 25k of the CA).

Segregation of duties: State entities have an administrative role for the economic activities that they carry out themselves. State entities must ensure a strict separation between such administrative matters and economic activities (Article 25l of the CA).

In 2019, I handled two cases relating to these regulations, which concerned the exploitation of car parks by the municipality of Veenendaal. I will discuss the first case below. The second case was a sequel of the first case, for which I will also provide some brief comments.

The case

Veenendaal (approximately 65,000 inhabitants) is a city in the middle of the Netherlands. The municipality of Veenendaal operates three barrier operating car parks in the city centre (“barrier parking”). In addition, there is the option of parking at the side of the roads in designated parking bays, where the municipality levies a parking tax (“on-street parking”). Q-Park, a private undertaking, operates two car parks in Veenendaal’s city centre, and these are located near the three car parks operated by the municipality.

Q-Park has requested that the ACM take enforcement action against the municipality of Veenendaal. Q-Park argues that the municipality of Veenendaal violates Article 25i of the CA by not passing on at least the integral costs for the parking charges of the municipal car parks. As a result of this, ACM started an investigation, after which ACM decided, on the 26th September, 2017, that the municipality of Veenendaal had violated Article 25i, first paragraph, of the CA, on the operation of municipal car parks. The ACM declared the objection to this decision to be unfounded by its decision on the 26th March, 2018 (the contested decision). My colleagues and I were approached to review this contested decision.

The parties disagree, amongst other factors, about whether barrier parking and on-street parking can be classified as economic activities.

According to the ACM, barrier parking is an economic activity, so that all of the integral costs associated with this must be passed on to the parking charges (this leads to a parking charge in car parks of €5.55 per hour, a charge much higher than the charges of the competitor, Q-Park). On-street parking, on the other hand, cannot be classified as an economic activity, since it takes place in the public space and is not operated by private companies. According to the ACM, on-street parking does not therefore fall under the scope of Article 25i of the CA, so the costs and benefits of this have been correctly disregarded when calculating the integral costs.

The municipality of Veenendaal primarily argues that both barrier parking and street parking fall under its public task, so they cannot be regarded as an economic activity, and Article 25i of the CA does not apply to this. Alternatively, the municipality of Veenendaal argues that the entire parking policy is an economic activity, so that the costs and benefits of both barrier parking and on-street parking must be included in the calculation of the integral costs, and there is no violation of Article 25i of the CA.

The judgment of the Court

According to the history of Article 25i of the CA, the actual scope of the (behavioural) rules for State entities is determined by the concept of an undertaking that is given in Article 1 (f) of the CA. This stipulates that an undertaking means an undertaking within the meaning of Article 101, Paragraph 1, of the Treaty on the Functioning of the European Union.

The State itself, or a State entity, may act as an undertaking. It follows from the case law of the Court of Justice of the European Union (CJEU)²³ that, for the purpose of the application of the provisions of competition law, an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. It is clear from established case-law that any activity that consists of offering goods and services on a given market is an economic activity. By contrast, activities which fall within the exercise of public powers are not of an economic nature, thus justifying the application of the rules of competition. In addition, a legal entity, and, *inter alia*, a public entity, may be regarded as an undertaking in relation to only part of its activities, if the activities which form that part can be classified as economic activities. In so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity, as a whole, remain activities that are connected with the exercise of those public powers. When assessing whether a public entity is acting as an undertaking, the nature and purpose of the activities and the rules to which these activities are subject should be taken into account.

In the light of this case law, the ACM rightly came to the conclusion that on-street parking is an activity which falls within the exercise of public powers and is not an economic activity subject to the competition rules. On-street parking refers to the use of open areas or road sections for public traffic. As a result, the possibility of on-street parking must be weighed against other uses of these areas or road sections, for example, from a road safety perspective. Within the framework of this parking regulation, the municipality can levy tax (Article 225 of the “Gemeentewet” (Municipalities Act)). As the ACM has pointed out, the designation of parking spaces in public spaces, the determination of the amount of

²³ CJEU judgment of 12 July, 2012, Case C 138/11, *Compass -Datenbank GmbH*, paragraphs 35 to 38, ECLI:EU:C:2012:449, and the earlier case-law cited therein, including, in particular, the judgment of 19 January 1994, Case C-364/92, *Eurocontrol*, ECLI:EU:C:1994:7

the parking charges for these parking spaces, and the collection thereof, are all determined within a specific legal framework (including the “Wegenverkeerswet 1994” (Road Traffic Act) and the “Gemeentewet” (Municipalities Act)), which is reserved for municipalities only. The legally established (parking) regulatory task on which on-street parking is based cannot be performed by private entrepreneurs.

The ACM has also rightly concluded that the provision of barrier parking by the municipality is an economic activity that is subject to the competition rules. This relates to the provision of paid parking spaces in an enclosed area, not as open areas or road sections for public traffic, in which objectives other than parking regulations can also play a role, and in the operation of which the municipality of Veenendaal may compete with private undertakings, such as Q-Park. In addition, the ACM has rightly pointed out that the municipality of Veenendaal uses different rates for barrier parking and for on-street parking, and that the municipal car parks are not designated as places where parking is permitted against payment of parking tax (within the meaning of Article 225 of the “Gemeentewet” (Municipalities Act)). The provision of barrier parking in Veenendaal is not linked to on-street parking in such a way that this economic activity could not be separated from the exercise of public powers. The position of the municipality of Veenendaal is that it applies a single parking policy, in which on-street parking and barrier parking serve (partially) the same goals, does not change this. The on-street parking and barrier parking activities are not necessarily in line with each other.

It follows that the municipality of Veenendaal acts as an undertaking with regard to barrier parking, and that the ACM has rightly classified barrier parking as an economic activity within the meaning of Article 25i of the CA, so that the integral costs associated with this must be passed on to the parking charges. Furthermore, ACM has rightly not classified on-street parking as an economic activity, so on-street parking does not fall under the scope of Article 25i of the CA, and the costs and benefits that are related to this have rightly been disregarded when calculating the integral costs of barrier parking.

The fact that the municipality of Veenendaal applies market rates does not mean that there is no violation of Article 25i of the CA, since this Article expressly includes the obligation to charge at least the integral costs. The court also refers to the history of Article 25i of the CA, in which it was considered that a State entity should itself consider the potential disadvantages of “being a State entity” in its considerations about whether or not to carry out certain activities. The law does not focus on removing these potential competitive disadvantages from State entities.

Follow-up case

An exception to the rule that State entities must pass on the integral costs when carrying out economic activities is when these economic activities take place in the public interest.

In January 2018, the city council of Veenendaal decided to designate the operation of car parks against market rates as an activity that takes place in the public interest. Q-Park contested this, after which a procedure between Q-Park and the municipality of Veenendaal took place at the Rotterdam District Court.

In the interim judgment of the 17th October, 2019,²⁴ the Court considered that the municipality of Veenendaal has two general interests to be pursued:

1. the offering of affordable and accessible parking facilities to all target groups, namely, residents, visitors, employees and entrepreneurs;

²⁴ ECLI:NL:RBROT:2019:8068

2. good spatial planning of its city centre, which also includes the prevention of parking nuisance in residential areas around the city centre.

The Court ruled that the municipality of Veenendaal was allowed to take these interests as the starting point for its decisions. However, the municipality of Veenendaal has insufficiently substantiated that a public interest is served by the economic activity, or that the operation of municipal car parks against market rates is necessary to serve both general interests. After all, this necessity is based on the premise that there is insufficient parking capacity in the privately-operated car parks. The municipality of Veenendaal has not acquired sufficient knowledge for this premise. This is why the Court has issued an interim judgment and has given the municipality of Veenendaal the opportunity to repair its lack of decision-making. The outcome of this is not yet known.

Comment

Although these cases do not relate to sector-specific regulation in the telecoms, energy and pharmaceutical markets, I believe they are worth discussing. After all, a State entity, like some (large) telecoms, energy or pharmaceutical undertakings, also has a dominant position. Articles 25i to 25l of the CA will prevent this dominant position from being abused and, in these cases, it even becomes clear that the competition rules can give the State entity a competitive disadvantage (after all, the municipality of Veenendaal has to charge a much higher rate than the privately held undertakings). The first case shows how the case law of the CJEU relating to the definition of “undertaking” impacts upon a national law case. The follow-up case on the general interest decision, despite the fact that national law does not refer to the case law of the CJEU, has some connections with Giorgio Monti’s Article 106 (2) TFEU and, in particular, is a service of general economic interest. After all, it is also not allowed to designate services as being services of general economic interest, when private companies can provide these services under normal market conditions, on conditions (such as price and accessibility) that are consistent with the public interest.

Remedies in EU competition law

Stavroula Lampropoulou, Greece Council of State

Judgment 582/2019 of the Greek Council of State.

A limitation period for the imposition of sanctions by the Competition Commission was for the first time provided in Article 42 of the Greek Law 3959/2011(A' 93). However, a question arose about an incident that preceded the entry into force of this law when, in Greece, Law 703/1977 (A' 278) was still in force, although it was later abolished.

With the decision at hand, the defendant, the owner of supermarkets ("VEROPOULI BROS S.A."), received a fine, on the grounds that the agreement of the 30th June, 2000 between himself and the Company, Unilever Hellas, with a duration of one year, contained a term which was restrictive of competition in object (prohibition of parallel imports), in violation of the law applicable at the time in Greek legislation (Article 1 (1) of Law 703/1977) and Article 101 (1) of the TFEU. The Administrative Court of Appeal accepted that, as long as the agreement being considered has a Community dimension, the statute of limitation period provided for in Article 25 of the Community Regulation 1/2003 shall apply in this case, according to which no administrative sanction may be imposed after the expiry of five years from the date of the infringement. In view of this, the Court held that the decision at issue had been issued by a temporally incompetent authority due to the fact that the infringement was committed in the year 2000, and the contested decision was issued on 27th March, 2009, i.e., it was issued later than five years after the infringement and, in any case, after the expiry of a reasonable time from the commission of the infringement. The Antitrust Commission's special allegation that the five-year period was interrupted by the notification to Unilever Hellas from the General Directorate of Competition of a document, by the year 2005, was considered to be unfounded, because the document had not been sent due to the violation and its inquiry [Article 25 (3) of Regulation 1/2003], but it contained a wide-ranging questionnaire that was not related to the specific infringement, which had been drawn up in the context of the General Survey by the General Directorate of Competition in the household detergent/cleaning industry.

The Competition Commission appealed against the above decision of the Administrative Court of Appeal before the Council of State. It challenged the judgment of the Administrative Court of Appeal, according to which, when a violation of the rules of competition has a Community dimension, the provisions of Article 25 of Regulation 1/2003 also apply to the question of the time competence of the Competition Commission, as well as on its judgment of the conditions of termination of this limitation period.

On the appeal from the Competition Commission, the Council of State ruled that Regulation 1/2003 established a harmonization of the substantive provisions of competition law but, as follows from the history of the establishment of this Regulation, as well as from its structure and its content, this harmonization does not extend to the procedure and the means of enforcement (*inter alia* the sanctions) of competition law, either national or EU law, by the Member States. On the contrary, individual national processes, despite voluntary convergences that are initiated by national legislators, continue to deviate substantially. Among other things, the provisions of the Regulation concerning the decisions of the Commission (finding and termination of infringement, interim measures, undertaking commitments, declaration of inapplicability), the power of inquiry, the power to impose sanctions and their limitation, in their explicit and unequivocal formulation, are addressed exclusively to the EU Commission, and not to the Member States.

The former, in Greek Law 703/1977, followed the model of Regulation 17 of the Council (EEC) (First Regulation on the application of Articles 85 and 86 of the Treaty, EU 13 of the 21st February, 1962) and without the restrictions subsequently enacted through Regulation 2988/74 of the Council on the limitation of the right to prosecute and enforce decisions in the areas of the transport law and competition of the European Economic Community (EU L. 319 / 29.11.1974), did not set an exclusive

deadline within which the Competition Commission was obliged to exercise its competence to ascertain anti-competitive business practices, to impose measures to restore and protect the future of the competitive market, and to impose sanctions for breaches of the rules of free competition. Such an exclusive period was established for the first time by Article 42 of the subsequent Law 3959/2011, adopting the corresponding provisions of Article 25 of Regulation 1/2003 of the Council of 16th December, 2002 about the application of the competition rules that are provided for in Articles 81 and 82 of the Treaty (EU L. 1 / 4.1.2003). This exclusive period, in accordance with the provisions of this Regulation, relate exclusively to the competence to impose sanctions, and not to the competence of the Competition Commission to ascertain anti-competitive behavior or to impose measures. However, the provisions of Article 42 of Law 3959/2011, according to an explicit provision of Article 50 (6) of the same law, do not refer to infringements that were already pending before the Competition Commission at the time of its entry into force. On the other hand, no other general provisions on the limitation of national law may apply in this case. Furthermore, Article 25 of Regulation 1/2003 shall not apply to the domestic legal order, either directly or analogously, nor shall the provisions of the above Article on the statute of limitations for the imposition of sanctions, because neither these provisions of the Regulation nor the specific time limits that they set, result from an interpretation of the substantive provisions of the Treaty, nor does Regulation 1/2003 provide for their application by the national authorities of the Member States (the only reference to national competition authorities is the regulation under which these principles also apply upon the acts of these authorities that terminate the limitation period in favour of the EU Commission)/ There is also no provision of national law that explicitly refers to them, nor can their supplementary application be deduced from a general principle of national competition law.

Despite the fact that the legislator failed to establish, with Law 703/1977, a specific exclusive deadline within which the Competition Commission is obliged to exercise its competence, the principle of legal certainty and the fundamental right of defence, which cannot be effectively exercised when the unjustified expiry of too long a time makes it particularly difficult to gather the evidence that is necessary, or that is essentially useful, for the defence of the defendant, obliges the Competition Commission to exercise its powers within a reasonable time, a fact which is determined according to the nature and severity of the infringement, the difficulty of detecting it, the purpose for which the Commissioner exercises control and the general circumstances of the case, such as the systematic repetition of the same delinquent conduct. In this case, even if the individual acts do not constitute an ongoing violation, as a starting point for calculating the time period within which the Competition Commission may exercise its powers, it is considered the end of the duration of the delinquent behavior. Especially in relation to the imposition of sanctions, the reasonableness of this time is measured against the deadlines that are set out in Article 25 of Regulation 1/2003, in the sense that a ‘reasonable time’ can in no way fall short of the deadlines set out in this provision. However, it cannot be significantly longer than the maximum total time provided for by the Union provisions either (i.e., the decade).

In view of the above, the Council of State ruled that the aforementioned judgment of the Administrative Court of Appeal is legally incorrect, in as far as the provisions of Article 25 of Regulation 1/2003 are concerned, that is, both those relating to the time of limitation, as well as those relating to the conditions of its termination, are not applicable. Otherwise, the starting point for calculating the time within which the Competition Commission had to exercise its responsibilities is not the time of signing the anti-competitive agreement, which is the time of the commencement of the infringement, but the time of the expiry of the infringement (i.e., in principle, the time when this agreement expired, unless it is found that its disputed anti-competitive term continued to apply tacitly). Nor was there any ground for the application of the strict conditions for the termination of the limitation period that is set out in Article 25 (3) of Regulation 1/2003. Furthermore, in the light of the facts brought by the Administrative Court of Appeal, the total time elapsed, not only since the expiry, but also from the commencement of the infringement until the issuance of the judgment of the Commission, was in no way disproportionately or excessively long in relation to EU law provisions for the corresponding powers of the EU Commission. On the contrary, it was shorter than 10 years. However, even if one considers that the time

elapsed until the commencement of the investigation of the infringement should be separately examined, this time was similar and was not explicitly or disproportionately longer than that provided for by EU law. The competences of the Competition Commission were therefore exercised, in this case, within a reasonable time, without even having to consider whether this time was reasonable according to the specific circumstances of the case. Moreover, under the contrary version, the defendant did not put forward any specific and substantial allegations, nor an ineffective defence, so that the Administrative Court of Appeal could be called upon to examine the matter and the Competition Commission to state its views on whether or not a reasonable time had elapsed.

In accordance with the above, the Council of State accepted the grounds of the appeal, according to which Article 25 of Regulation 1/2003 cannot be applied to national law, nor have there been any circumstances of delay or inaction beyond the due time, so that the contested decision of the Competition Commission should be annulled, and the case, which needed clarification as to the facts, was remitted to the same Court for a new trial.

On the contrary, according to the dissenting opinion of one participant judge, given the serious economic implications of the application of competition law to stakeholders, the principle of legal certainty, which is enshrined in primary Community law, requires that an entrepreneur should have no doubt about the consequences that compliance with the rules of competition law will have. In order to impose any adverse measure on the offender, it is therefore necessary, due to the principle of proportionality, to apply a limitation period of reasonable time, which must be set in advance and be sufficiently predictable for the interested entrepreneur. In a case such as this, the rules of the limitation period of Regulation 1/2003 might be considered by analogy to be applicable, and this application could be adequately foreseen by a prudent and diligent entrepreneur.

Marc Bosmans, Brussels Market Court

The Great Circle (2019 MR 1) / BCA (Belgian Competition Authority) – May 8th, 2019.

Facts in a nutshell

The Applicant is a company active in the field of marine meteorological forecasting. It offers meteorological software that is based on raw meteorological data. On 8th January, 2019, the Applicant filed a complaint (hereinafter the "Complaint") with the BCA (Belgian Competition Authority) against (in essence) the Royal Meteorological Institute of Belgium (RMI), alleging that, by refusing to provide certain raw meteorological data to it under normal market conditions, RMI had allegedly abused its dominant position in the market for the supply of raw meteorological data and/or had entered into an anti-competitive agreement with other national meteorological services (in France) and with the intergovernmental organisation ECMWF.

On January 9th, 2019, the Applicant filed an application for interim measures with the BCA, requesting that, pending the BCA's decision on the merits, the RMI be ordered to provide it with the raw meteorological data that the Applicant needed to operate its marine routing software, which is known as "Squid".

The Request for Interim Measures was registered on 10th January, 2019, the Applicant, the RMI and the Auditor's Office held a hearing on 7th February, 2019.

On February 15, 2019, the "Competition Panel" of the BCA (hereinafter the "Panel") adopted the Contested Decision, by which it dismissed the petitioner's request for interim measures as there was no *prima facie* evidence of an infringement of competition law (Belgian or EU rules).

By an application of 22nd March 2019, the Applicant brought the present action before the Market Court (hereinafter the "Application").

Positions of the involved parties

The Great Circle argued:

- a) That the Market Court has unlimited jurisdiction according to Article IV.79, §2 of the Belgian Code of Economic Law that states that the Market Court shall decide, on the merits as well as in summary proceedings, in law and in fact, on the case submitted by the parties, and shall have full jurisdictional review powers, including the power to substitute its own decision for the contested decision.
- b) Even if the Court considers that it has the jurisdiction to annul the contested decision, it also has the power to substitute and replace the contested decision by a new decision if it so wishes. The preparatory works of the law specify in this regard:

"The Court will thus have the necessary powers to meet the requirements of the ECHR judgment of 27 September 2011 in the MENARINI case. Indeed, the Court will be able to assess in fact and in law with full jurisdiction, including the power to substitute its own decision for the contested decision, both as regards the finding of an infringement of Articles IV.1, IV.2, 101 TFEU and 102 TFEU, and as regards the assessment of the penalties imposed. We consider in that regard that the finding of an infringement of Articles IV.1, IV.2, 101 TFEU and 102 TFEU does not require the court to take decisions of a different nature from the decisions which it is called upon to take in the context of the implementation of criminal law or the finding of liability under Article 1382 of the Civil Code. Moreover, the judge has always been competent for the application of Articles 101 and 102 TFEU (and previously Articles 81, §§ 1 and 2, and 82 EC, or Articles 85, §§ 1 and 2, and 86 EEC) in view of the fact that these provisions are directly applicable".

Indeed, the ECHR, in the MENARINI case, had essentially ruled that Article 6.1 of the ECHR does not prohibit an administrative authority from imposing a sanction in criminal matters if a "body with full jurisdictional review" can be seized from the matter on appeal.

One of the characteristics of a judicial body with full jurisdictional review is the power to reform in all respects, in fact as well as in law, the decision taken by the lower body. In the present case, the Belgian Competition Authority is an administrative authority that imposes sanctions in criminal matters. As an appeal body against the decisions of the Belgian Competition Authority, the Market Court must therefore have a full jurisdictional review within the limits of the powers conferred on the BCA, in particular, by Art. IV.64 CDE regarding interim measures.

The BCA argued:

- a) The Market Court has no power to order the interim measures requested by the Applicant. In a case such as the present one, it is up to the Market Court to examine only whether the Contested Decision is illegal or defective in law, or is factually so, and, if so, to decide whether it should be annulled. Insofar as the Applicant does not seek the annulment of the Contested Decision, but merely requests that interim measures be ordered against the RMI, to be sanctioned by a periodic penalty payment, it must be noted that the Market Court has no jurisdiction to hear the Applicant's requests.
- b) In the alternative: in the eventuality that the Market Court nevertheless considers that the Applicant's requests fall within its jurisdiction (*quod non*), the BCA considers that the Application does not set out the grounds directed against the Contested Decision so that it cannot effectively exercise its rights of defence, or the Court's review of legality. Indeed, the BCA believes that the Application does not contain clearly identified means that would enable it to understand the errors of law or fact alleged against it. The Application thus does not satisfy the conditions set out in Article IV.79, Paragraph 4, of the CDE, it must be considered null and void and, therefore, the Application must be dismissed as being manifestly inadmissible.

Points of interest from a legal perspective

This judgment is actually particularly important, because it has given the Market Court the opportunity to further define the content of the concept of full jurisdiction through soft law. There is quite a lot of discussion as to how the Market Court should proceed when it annuls a decision by the regulator, is it free to substitute its own decision, or is it limited to choosing from among the decisions offered by the litigants as possible solutions to the dispute?

The other points dealt with in the judgment concern procedural rules of national law and are not relevant here.

Decision of the Court

The Court holds that the action brought by SPRL THE GREAT CIRCLE is inadmissible.

The reasons for this decision can be summarised as follows.

With regard to procedure, the Market Court limits the review to questions of whether the procedural requirements and the reasoning are complied with, and checks the regularity and legality of the decision, including compliance with the general principles of good administration *sensu lato*.

As to the substance of the case, the Court limits its review to the question of whether the facts are accurately reproduced and whether there is no manifestly incorrect assessment of the facts, and whether the legal characterisation of the facts is correct, full jurisdiction implies the possibility of establishing, reviewing and correcting any errors committed in establishing them.

The Court assesses whether the evidence which is produced constitutes a framework of facts relevant to the assessment of the infringement and can serve as a basis for the conclusions drawn therefrom.

To decide otherwise would be synonymous to conferring on the Market Court the powers of a competition authority, and thus infringe the principle of the separation of powers.

The BCA is an administrative authority forming part of the executive branch. Insofar as administrative authorities are authorised to take decisions, some of which have a scope equivalent to that of the courts and tribunals of the judiciary, it is imperative that a judicial remedy be introduced by the legislator in order to guarantee that individuals have recourse to a court of law that is part of the judiciary.

The Market Court can therefore only substitute its decision for that of the BCA, where the Court finds that the decision of the BCA is unlawful or defective (for example, where any principle of good administration would be infringed by the contested administrative decision).

In the present case, THE GREAT CIRCLE does not put forward any argument alleging any irregularity or illegality in the contested decision.

The appeal criticises the BCA in that it did not follow THE GREAT CIRCLE's reasoning that the conduct of other undertakings constituted infringements and, consequently, did not authorise the interim measures requested by it.

It is therefore - *prima facie* - and in the absence of precision in the applicant's requests to the Market Court, a new and implicit request by the applicant to be granted a "new chance" to make its case, thereby inciting the Market Court to rule as the "appellate competition authority", which is not provided for by Article IV.79 CDE.

Moreover, it is clear from the preparatory work concerning Article IV.64 CDE that the legislator's intent was in no way to allow the Market Court to substitute itself for the Competition Panel, thus disregarding the latter's margin of appreciation, particularly on issues of mere policy or suitability.

Indeed, the Market Court cannot substitute its decision for that of the Competition Panel solely for the sake of expediency, but only in the event of illegality or a lack of proportionality of the measure imposed.

It follows that even supposing that the request - that the Court substitute its decision for the contested decision of the BCA - would tacitly imply an application for an annulment of the contested decision, the Market Court would not have been able to grant THE GREAT CIRCLE the interim measures that it requested, since THE GREAT CIRCLE did not put forward the slightest complaint as to the regularity and/or legality *sensu lato* of the contested decision.

Even, an implied annulment necessarily requires that the objections justifying the annulment of the contested decision be relied upon and be declared well founded by the Market Court.

In the present case, THE GREAT CIRCLE did not put forward any complaint concerning the regularity or legality *sensu lato* of the contested decision.

To conclude, the power - for the Market Court - to order interim measures (Article IV.64 CRC) cannot be exercised independently of the exercise by the Court of its power to annul, which cannot be exercised either in the absence of a request to that effect made by THE GREAT CIRCLE in the context of its action.

It follows that the action is inadmissible on the ground that the annulment of the contested decision is not sought.

The action before the Market Court is inadmissible when it is limited to the request that the Market Court substitute its decision for that of the BCA without successfully criticising the legality and/or regularity of the contested decision.

Pursuant to Article IV.79 § 2 Paragraph 3 CDE, "[i]n cases concerning the admissibility of concentrations or conditions or charges imposed by the Competition Council as well as cases in which the Court finds, contrary to the contested decision, an infringement of Articles 101 or 102 TFEU, the Court shall rule only on the contested decision with jurisdiction to annul".

Finally, the Market Court added that, pursuant to Article IV.90(2)(3) CDE (former Article IV.79(2)(3) CDE), the Court can only annul a decision (not amend it) when the Court finds that, contrary to the contested decision, there is an infringement of competition law. Granting THE GREAT CIRCLE, the interim measures that it requested would have required the Court to find that there was, *prima facie*, an infringement of the competition rules. As a result, the Court could only annul the contested decision (which THE GREAT CIRCLE did not ask the Court to do), not amend it, as THE GREAT CIRCLE wanted.

This decision of the Market Court was not appealed to the Belgian Supreme Court and the judgment was published with an approving comment in the specialised law journal *Competitio*.

The merit of this decision

Even though the Market Court has full jurisdiction, the appeal to the Market Court can never aim to obtain an ordinary reform of an administrative decision of the competent regulator (e.g., the BCA), as this is possible for an ordinary appeal, a Second Instance. In that case, it is an ordinary appeal against a judicial decision and not a redress against an administrative decision.

The full jurisdiction means that the decision of the competent regulator can be annulled if it is defective or illegal *sensu lato*.

The Market Court cannot thus *itself* judge whether, for example, there has been a breach of the rules of competition, the Market Court can only examine whether the BCA has correctly complied with all legal rules, and whether it has made the decision in a legal manner, for example, whether the BCA has correctly applied the rules of Articles 101 and 102 of the TFEU. If this is not the case, the Market Court may annul the BCA's decision and, if necessary - to the extent that the parties to the proceedings have taken a position before the Court - substitute its decision for that of the regulator.

The Market Court can never simply substitute its own decision for that of the regulator, because that would imply a violation of the separation of powers, which is not permitted.

Bpost / BCA (2019 MR 4) – February 19, 2020

Summary of the facts

The Belgian postal service (Bpost) was fined by the NRA (Belgian Institute for Postal services and Telecommunications - BIPT) due to its adoption and implementation, for 2010, of a pricing system - particularly selective discounts - based on an unjustified differential treatment between intermediaries and direct customers.

Bpost contested the decision before the commercial judge and the commercial judge annulled the decision, considering that the pricing practice above was not discriminatory, and the judge set aside the decision of the BIPT.

There was no further appeal against that decision.

The contested decision

In the meantime, the BCA, found that the existence of an abuse of dominant position on the part of Bpost, and hence the infringement of Section 3 of the Act of 15th September, 2006, on the protection of economic competition and 102 TFEU following the adoption and implementation of the new pricing system, called ‘the sender model’, from January 2010 to July 2011. The BCA thus sentenced Bpost to pay a fine of €37,399,786.

The fine above was determined by taking into account the fine already imposed by the NRA (BIPT), the BCA effectively deducted the amount imposed by the NRA (BIPT).

This procedure before the BCA did not pertain to discriminatory practices.

Bpost appealed against this decision, arguing that it could not be condemned twice, invoking the principle “*ne bis in idem*”.

The Brussels Court of Appeal (at that time, the competent court with exclusive jurisdiction for action against the regulators) followed that argument and decided that the second decision was illegal.

On appeal before the Belgian Supreme Court (*Cour de cassation*), the decision of the Brussels Court of Appeal was annulled, and the case was referred to the Market Court (which, in the meantime, received from the Belgian legislator the exclusive jurisdiction to deal with all one degree appeals against the decisions of regulators).

The European Commission intervened as *amicus curiae* before the Market Court, and argued that the principle of *ne bis in idem* cannot be applied and, in the event of any doubt, that the Court should make a reference to the European Court of Justice for a preliminary ruling.

The Market Court’s decision

According to Bpost, the contested decision violates the *ne bis in idem* principle, which states that no person can be prosecuted or punished by the courts of a State because of infringements for which that person has already been acquitted by a final judgment of that State.

In this case, the proceedings before the NRA (BIPT) and the NCA (the BCA) are both of a criminal nature, and the competition authority decision covers identical facts to those which have been ruled on by the NRA (BIPT), against which Bpost has brought an action before the Court which resulted in the final annulment of this decision.

Moreover, the strict requirements for an exception to the prohibition of double jeopardy in relation to criminal penalties are not met.

There is a "material and sufficiently close temporal link" between the procedures of the NRA (BIPT) and the NCA (BCA).

The Market Court decided to refer the case to the European Court of Justice for a preliminary ruling.

The legal principles put forward by the Market Court

It appears *prima facie* to the Market Court that the sanction imposed by the NRA (BIPT) punishes different infringements than the penalty imposed by the NCA (BCA).

There are *prima facie* grounds for the National Court to decide that the *ne bis in idem* principle should not apply where

1. the various sanctions imposed by different authorities were not designed to combat these same facts or effects, and
2. there is a risk of significantly reducing the scope of competition law, since it must put a 'horizontal dimension' on the sectoral regulations and
3. that in case of overlap and prior application of a sectoral regulation, competition law risks being deprived of all, or at least a substantial part of, its effectiveness.

The question is to know whether the *Toshiba* caselaw (with its 3 criteria) of the European Court of Justice still applies, or not. The European Court of Justice, as suggested by the *amicus curiae*, must address this issue in its reply to the requests for preliminary rulings made by the Market Court.

The questions are as follows:

1) "The principle of non bis in idem, as guaranteed by Article 50 of the Charter, must it be interpreted as meaning that it does not prevent the administrative authority of a Member State to impose a fine for infringement of European competition law, in a situation such as that of the case where the same legal person has already been finally acquitted of an administrative fine imposed on him by the national postal regulator for an alleged violation of the postal legislation, given the same facts or similar facts, since the criterion of the unity of the protected legal interest is not fulfilled because the present case involves two different infringements under two separate laws and two separate legal areas?"

2) "The principle of non bis in idem, as guaranteed by Article 50 of the Charter, must it be interpreted as meaning that it does not prevent the administrative authority of a Member State to impose a fine for violation of European competition law, in a situation such as the present case, where the same legal person has already been finally acquitted of an administrative fine imposed on him by the national postal regulator for alleged violations of postal legislation, given the same facts or similar facts, on the grounds that limiting the *ne bis in idem* principle is justified by the fact that the legislation on competition continues an additional objective of general interest, namely safeguarding, and maintaining a system of undistorted competition within the internal market, and does not exceed what is appropriate and necessary to achieve the legitimate aim of that legislation; and/or to protect the right and freedom to undertake such other operators on basis of Article 16 of the Charter?"

The Market Court is awaiting the answers of the CJEU before continuing with the proceedings and assessing whether or not the BCA was entitled to impose a fine on Bpost for the implementation of the new pricing system, called 'the sender model' - not because of a disregard for postal and telecommunications rules - but this time because of an infringement of competition rules.

Magda Teppey, Ljubljana Court of Appeal

Decision of the District of Ljubljana No. ZSV 2879/2019 of 30th December 2019

Facts

In the minor offence proceedings, the Slovenian Competition Protection Agency (Agency) imposed a fine of EUR 53,900,000 on legal entity A, and a fine of EUR 5,000 on the person responsible for the failure to notify the Agency of the merger of AAG and ARG.

The Agency also issued an order for the temporary confiscation of shares in the company M, owned by A, for six months, in order to safeguard the enforcement of the fine. By virtue of a new decision of the Agency, the duration of the seizure was extended by another six months. The value of the shares was approximately EUR 85,000,000.00 at the time of the seizure.

The infringer filed a request for judicial protection against the Agency's decisions. The District Court of Ljubljana reduced the fine on the grounds that the non-notification of the concentration was not attributable to any intention to bypass the control (or assessment) of the concentration of companies, which serves the purpose of preventing the possible adverse effects of the concentration on competition; instead, it was due to the negligence of the responsible person. The Court assessed that a fine of EUR 1,000,000 was an appropriate and fair sanction for the offence in question. The Court dismissed the appeal of A against the decision to confiscate the shares on a temporary basis.

The minor offence decision

Company ARG was established by AP to provide funds for the acquisition of C. ARG acquired 100% of the shares in C and performed a successful financial restructuring of that company. Shortly after acquiring C, AP entered into a Forward Share Purchase Agreement with AAG and sold 100% of the shares in ARG.

By concluding a Forward Share Purchase Agreement dated May 14, 2016 between AAG (which is fully owned by A) and AP, legal entity A incurred the obligation to notify the Agency of the merger because ARG holds a 100 % interest in C. The Agency concluded that it was the responsibility of A to make notification of the concentration of AAG and ARG, which acquired indirect exclusive control over ARG and C, which operates on the Slovenian market. The obligation to notify the Agency of the concentration arose within 30 days of the signing of the Forward Share Purchase Agreement (first paragraph of Article 43 ZPomK).

The Court agreed with the Agency that such an acquisition of control over a company constitutes concentration within the meaning of the second indent of the first paragraph of Article 10 of ZPOMK-1. A company that acquires control of another company is obliged to make a concentration notification. In this context, control of an undertaking, or a part thereof, results from rights, contracts, or any other means that – either separately or together, and subject to circumstances or applicable regulations – create the power to exercise a decisive influence over such an undertaking, or part of an undertaking, in particular, ownership or the right to use any or all of the assets of an undertaking. According to the third paragraph of Article 10 of ZPOMK-1, persons or companies shall be deemed to have acquired control if they either hold rights or are entitled to rights by virtue of contracts, or if they have the actual power to exercise rights by virtue of contracts, even though they are not holders of rights on the basis of these contracts. The Court accepted that it is necessary to follow the doctrine of the "Single Economic Entity" for the purpose of a competitive legal understanding of the concept of a company. According to this concept, 'one company' shall mean all companies, or parts thereof, that are not economically

independent but are subordinated to the ‘one company’, regardless of their formal legal organization. An external subsidiary can be attributed to the parent company, even though it is a separate legal entity. As the parent company and its subsidiary form a single undertaking, the decision to impose the payment of fines may be addressed to the parent company, without the need to prove the latter's personal involvement in that infringement. Control is defined as the possibility to exercise a decisive influence over an undertaking. It is thus not necessary to prove that a decisive influence is, or will in actual fact, be exercised. Supervision is defined as the possibility to exercise a decisive influence over a company, which suffices for the existence of ‘one company’ or a single economic unit. The Court concluded that A is the 100% owner of AAG, and that AAG and C are part of Group A. This understanding ensures effective protection of competition, since infringers cannot bypass liability for the offence simply by pointing out that their legal form is different.

The Court agreed with the Agency that the person responsible for company A had failed to perform his duty as the President of the Management Board, namely, the duty to comply with the applicable legislation in his capacity as the legal representative of the legal entity. The person responsible for the undertaking therefore violated the provision of the first paragraph of Article 43 ZPOmK and committed an offence under the second paragraph of Article 74 of ZPOmK. The responsibilities of the President of the Management Board include the fulfilment of the legal obligations and ensuring the legality of the operations of a legal entity, as well as knowledge of the applicable legislation on concentration. The Agency and the Court concluded that the non-notification of the concentration was attributable to the negligence of the person responsible for legal entity A, who did not provide the timely notification of the concentration. The President of the Management Board should, and could, know the deadlines for notification of the concentration. As he did not do so, the responsible person did not act with the care or diligence necessary for a prudent businessman. In accordance with the rule of accessory liability, the legal person, A, is also responsible for the violation. The minor offence of late or non-notification of a merger is to be punished by imposing a fine on a legal person, which corresponds to up to 10% of the annual turnover of the undertaking involved in a concentration – together with other undertakings in the group – in the preceding business year (first paragraph of Article 74 of ZPOmK-1).

The Agency considered that an untimely notification or non-notification of a concentration violates a fundamental principle of concentration control, i.e., advance control of concentrations, prior to their implementation, and thus prevents the Agency from effectively enforcing the legal provisions on concentration control. The Agency therefore considered the offence to be a serious infringement, as such infringements undermine the effectiveness of ZPOmK-1, limit the effect of the merger provisions and have long-term consequences for competition and the market. It therefore imposed a fine of 0.025% of the annual turnover of the infringing legal entity in 2018, for each month of delay in providing notification of the concentration.

The Court ruled that a fine of EUR 1,000,000 was an appropriate and fair sanction for the offence in question. In this context, the Court pointed out that the violation is the consequence of negligence by the person responsible.

The order for the temporary confiscation of shares

If there are any grounds to suspect that the offender could hide, abscond, leave for an unknown location or leave the country during the minor offence proceedings, or before a decision is enforced, the authorised official of the minor offence authority, or the Court may, for the purposes of ensuring the enforcement of the decision, issue an order ruling the temporary confiscation of his/her travel document, driving licence, vehicle documents, shipping and other goods, accompanying documents, securities, means of transport or other movable assets that he/she carries on him/her, or uses, whether he/she owns them or not. The period of temporary confiscation shall not exceed six months, and it may be extended

by a maximum of another six months by means of an order (5th paragraph of Article 201 of Minor Offences Act, hereinafter ZP-1).

By imposing the temporary measure, the Agency decided to temporarily deprive A of the shares of company M for six months. With this measure, the Agency took into account that company A is established in another EU Member State. However, since insolvency proceedings have been initiated against A in the country in which it is established, there is a high probability that the decision on the minor offence for which A was sanctioned will not be enforced in the country in which company A is domiciled. In view of the above, it is also reasonable to expect that the legal entity will not voluntarily pay the fine imposed on it when the decision becomes final. The aforesaid is further substantiated by the fact that A failed to pay the fine of EUR 40,000.00 in the second administrative procedure, although that fine is significantly lower than the fine imposed in these present proceedings.

From the point of view of the effectiveness of the enforcement of the sanction, the Agency stated that it was unlikely that it would succeed in enforcing the sanction in the country of the offender's registered office. It is therefore necessary to secure the enforcement of the decision in accordance with the provisions of ZP-1. According to the fifth paragraph of Article 201 of ZP-1, the minor offence authority may temporarily seize securities. The Agency, having found that company A owns 69.57% of company M's shares, therefore adopted a decision to seize those shares. The temporary seizure of securities held by a legal entity can be justified on the grounds of the type and severity of the violation, the amount of the fine imposed on the offender, the conduct of the legal entity in the administrative proceedings, and its ability to comply with the sanction. The Agency concluded that the subjective conditions for temporary seizure, according to the fifth paragraph of Article 201 of ZP-1, were also satisfied, because A could potentially evade paying the fine, due to the fact that it has its registered office abroad and that insolvency proceedings have been initiated against it. The chances of successfully recovering the imposed fine and the costs of the proceedings can only be increased by temporarily seizing those securities from the infringer, in order to make sure that the otherwise time-limited measure will achieve its purpose.

Company A filed an appeal against the decision of the Agency. It stated that a temporary seizure under the fifth paragraph of Article 201 of ZP-1 should be imposed primarily if it is suspected that the perpetrator will hide or abscond abroad to an unknown place. It was pointed out that the Agency failed to explain, in the decision, even on an abstract level, how one is to imagine a legal entity hiding and absconding in an unknown place abroad, and why this should be suspected in the present case. It claimed that the Agency completely ignored the prerequisites for the imposition of a precautionary measure and focused exclusively on the legal consequence of the temporary seizure of securities instead. In its view, the provision of the fifth paragraph of Article 201 of ZP-1 cannot extend to legal entities. It argued that a linguistic interpretation of the legal text that is outside the scope of that provision is not admissible. According to it, the Agency did not even try to make the established facts fit within one of the alternative subjective conditions for the imposition of the measure in question, i.e., that the perpetrator will hide or abscond to an unknown place or go abroad. The Agency found only that it was reasonable to expect that A would not voluntarily pay the fine and the Court fees. The subjective elements of the fifth paragraph of Article 201 of ZP-1 quite obviously refer only to the perpetrator, as such, and not to his/her property. A temporary measure can therefore only be imposed if there are grounds to suspect that the perpetrator him/herself will hide, not that s/he will hide his/her property. Property, under the fifth paragraph of Article 201 of ZP-1, is to be understood only as a means of security. It is claimed that the decision has no basis in substantive law.

The Court dismissed the appeal of A against the decision for the seizure of shares.^[11] The Court stated that the provision of the fifth paragraph of Article 201 of ZP-1 makes reference to the perpetrator, which is a general term for the offender, defendant, and a person who has been sanctioned for a minor offence (third indent of the first paragraph of Article 48 of ZP-1). No distinction is made between natural and legal persons. It cannot therefore be limited to natural persons only. As the appellant is a legal entity on

which a sanction for a minor offence has been imposed, it is the perpetrator within the meaning of the fifth paragraph of Article 201 of ZP-1.

In the Court's opinion, if the application of such a measure is justified in cases where it is feared that the perpetrator will go abroad, such a measure is even more justified in cases where the object in question is already abroad, such as in the present case, in which the perpetrator is a legal entity and has its registered office in another country. The contested decision was issued because it is reasonably feared and highly probable that the fine imposed by the decision on the minor offence will not be enforced, which was also duly explained by the Agency in its decision. The Agency explained at length why there was a likelihood that the appellant would not pay the fine. This is because insolvency proceedings have been instituted against the appellant, and its business is regulated by a special law. The law also explicitly identifies securities as assets that are eligible for temporary confiscation from the perpetrator. The shares can therefore be temporarily confiscated, pursuant to the fifth paragraph of Article 201 of ZP-1. The purpose of the provision is to secure the enforcement of a final decision on a minor offence.^[1] According to the Court, the appellant's interpretation, that a temporary measure can be imposed only if it is feared that the perpetrator will abscond, and not that he/she will hide his/her property, is too restrictive, as this measure necessarily relates to the perpetrator's property as a basis for the payment of the fine. The contested decision was issued to ensure the basic purpose of imposing a sanction for a minor offence, which clearly cannot be achieved if the imposed sanctions are not enforced. The sanction is imposed not only with the intention of deterring the direct infringer, against whom it is imposed, from re-committing violations, but also to deter other potential infringers. If the imposed sanction is not enforced, the intended goal is frustrated. In the light of the foregoing, the Court dismissed the appeal.

A filed an appeal before the Constitutional Court of the Republic of Slovenia against the Court's decision on the seizure of shares. The Constitutional Court of the Republic of Slovenia ruled that the conditions for considering a constitutional appeal were not met.

Comment

In my opinion, in the present case, the Court adopted the very strict position that the prerequisites for securing the enforcement of a decision are satisfied, even if the perpetrator is already located abroad, and that the definition of the concept of the perpetrator, in ZP-1, also extends to legal entities. By contrast, the Court judged that the appellant's interpretation – namely, that a temporary confiscation can only be imposed if there is a risk of^[1] the perpetrator absconding – is too narrow, because this measure necessarily also relates to the perpetrator's property as a basis for the payment of the fine. In doing so, the Court took into account the purpose of this provision, which is to secure the enforcement of a final decision on a minor offence. However, in view of the reduced amount of the fine, the question of the proportionality of the imposed measure arises. The seizure of the shares remained in force, and their final fate depends on the final decision in the main proceedings. If the procedure is stopped by a decision, or if the perpetrator pays the fine plus the costs of the procedure, the temporarily seized shares that are referred to in the fifth paragraph of Article 201 ZP-1, shall be returned to the perpetrator. If the perpetrator does not pay the fine plus the costs of the procedure, even after the decision becomes final, the fine and the costs of the procedure shall be settled from the temporarily seized shares, and the remaining shares shall be returned to the perpetrator.

Emanuela Germano & Andrea Piletta Massaro, Turin Court of Appeal

Introduction

A judgment regarding the private enforcement of competition law in the telecommunications field was issued by the Italian *Corte di Cassazione* on 27 February 2020 (I Civil Chamber, *Sentenza* no. 5381). This ruling defines an interesting lawsuit filed by Uno Communications S.p.A. against Vodafone, one of the biggest phone carriers operating in the Italian market. The case, decided upon by the *Corte di Cassazione*, does not analyse in depth the anti-competitive behaviour that was supposedly undertaken by Vodafone, but it is focused on some interesting procedural aspects, such as the limitation period in the context of antitrust private enforcement proceedings, as well as the value that shall be attributed to commitment decisions that are issued by the Italian Competition Authority (AGCM, *Autorità Garante della Concorrenza e del Mercato*) according to Article 14-ter of Law 287/1990 (Italian Competition Act). Indeed, the technical aspects of the case were analysed by the AGCM during the relevant proceedings, which then led to the adoption of the aforementioned commitment decision regarding Vodafone, together with an infringement decision in respect of Telecom and Wind, the other two main Italian phone carriers (now Tim and WindTre). This represents a common case of *follow-on* action, which, unlike *stand-alone* claims, is more focused on procedural and private law matters, due to the fact that the main competition law analysis has been previously carried out by the AGCM and, if challenged, by the Administrative Courts charged with revising the AGCM decision (*TAR Lazio* in the First Instance, and *Consiglio di Stato* for the final review). *Stand-alone* proceedings, consequently, are more focused on competition law issues, but represent a very small percentage of the claims brought in front of Italian Courts.

Apart from the inner relevance of this lawsuit, the interest of this case stems from the issues at stake. Indeed, the value of commitment decisions in private enforcement cases has not been addressed by Directive 104/2014 (transposed into the Italian legal system by Legislative Decree no. 3/2017). In addition, the decision rules on the limitation period, a topic which has recently been analysed by the Court of Justice of the European Union, while deciding the *Cogeco* case (Case C-637/17). In brief, the *Corte di Cassazione* stated that the regime introduced by Directive 104/2014 is not applicable to the present case, because it was filed before the relevant implementation.

The factual background of the case relates to the so-called termination of services and deals, with an abuse of dominant position (contrary to Article 102 TFEU) undertaken by Telecom, Wind and Vodafone. In particular, the AGCM started an investigation (Proceeding A/357) in February 2005. On 24 May 2007, the AGCM and Vodafone agreed upon the mentioned commitment decision, which, it is worth recalling, does not amount to a decision confirming Vodafone's abuse of dominant position. With reference to Telecom and Wind, their abuse of dominant position was ascertained by the AGCM in August 2007.

In February 2012, Uno Communications filed a complaint against Vodafone in front of the Milan Tribunal. The Court (Decision 3 April 2014, no. 4587) qualified the claim as a tort law matter but rejected Uno's action due to the expiry of the relevant limitation period. Indeed, according to the Milan Tribunal, the five-years limitation time lapse should have been calculated starting from the moment when the AGCM investigation started. In fact, at that time, Uno might have had enough knowledge of the possible competition law infringement undertaken by Vodafone. This decision was then confirmed by the Milan Court of Appeal during the Second Instance proceeding (Decision 20 July 2016, no. 3052).

In brief, and for the sake of clarity – before analysing the Supreme Court judgment – the termination of services that are at stake allow phone carriers to interconnect their networks in order to allow customers of different carriers to communicate. The abuse of dominant position which was ascertained with regard to Telecom and Wind, and which was supposed also to apply to Vodafone, amounted to a

price imposed on smaller carriers that was higher than the price carried by Telecom, Wind and Vodafone on their business branches. Consequently, this practice was able to exclude the smaller carriers from the wholesale phone services market, because they cannot compete with the price offered by Telecom, Wind and Vodafone. In particular, the agreement entered into between Vodafone and Uno expressly forbade Uno to use mobile to mobile termination services (more efficient, through GSM boxes) instead of fixed to mobile line ones. Uno's use of mobile-to-mobile termination schemes, according to Vodafone's arguments, triggered the automatic termination clause contained in this agreement. However, according to the Milan Tribunal and the Milan Court of Appeal, Uno's breach was not relevant and, conversely, it was caused by Vodafone's exclusionary practice, which forced Uno to adopt this behaviour in order to remain on the market.

The judgment issued by the *Corte di Cassazione*

After having its claim rejected both by the Milan Tribunal and the Milan Court of Appeal, Uno brought the case for a third and Last Instance revision before the *Corte di Cassazione*. The decision of the Court rules on the following aspects, which will then be analysed:

- a) The application of the limitation regime provided for by Directive 104/2014 to the present case.
- b) The compliance of the Italian limitation regime adopted in the decisions issued by the Milan Tribunal and the Milan Court of Appeal with EU law effectiveness and equivalence principles.
- c) The value of commitment decisions issued by the AGCM in antitrust private enforcement proceedings.
- d) The lawfulness of Vodafone's termination of the agreement entered into with Uno.

Application of the limitation regime provided for by Directive 104/2014 to the present case

The issue regarding the limitation regime in the context of antitrust private enforcement is particularly relevant. Indeed, the complexity of abuse of dominant position, or the secret structure of cartels, often makes it difficult for the victims of an anti-competitive behaviour to understand that they were harmed by such conduct.

Directive 104/2014 tries to harmonize the various systems across Europe, aiming to create a better level playing field in the context of competition damages claims. In particular, the Directive, in Article 10, provides that the limitation period does not start until the conduct has not ceased and the damaged party knows, or can reasonably know: a. that the behaviour amounts to a competition law infringement; b. that such behaviour has harmed him/her, and c. the identity of the infringer.

Moreover, Article 10 of the Directive states that the limitation period must be no lower than five years, and that this term must be suspended while an investigation of a national competition authority is ongoing.

Such provisions were transposed into the Italian legal system by Article 8 of Legislative Decree no. 3/2017, which entered into force on 3 February 2017.

However, Article 22 of the Directive expressly provides that rules having substantial nature (such as those regarding limitation) cannot be applied retroactively. The same is set forth by Article 11 of the preliminary provisions of the Italian Civil Code (the so-called *preleggi*).

Consequently, the *Corte di Cassazione* stated that the Milan Tribunal and the Milan Court of Appeal correctly rejected the application of Legislative Decree no. 3/2017 to this case. The Italian Supreme Court also cited the decision issued by the Court of Justice of the European Union on 28 March 2019,

defining the *Cogeco* case, in which the Luxembourg Court stated that the new limitation regime was not applicable to a Portuguese private enforcement claim that was filed in 2015.

The compliance of the Italian limitation regime adopted in the decisions issued by the Milan Tribunal and the Milan Court of Appeal with EU law, effectiveness and equivalence principles

After having excluded the application of the limitation regime provided for by Directive 104/2014, the *Corte di Cassazione* evaluates whether placing the limitation period's starting moment at the time that the AGCM investigation was commenced is fair and complies with EU effectiveness and equivalence principles.

Previous rulings issued by the Italian Supreme Court argued that the limitation period, if referring to a contract concluded with a consumer, shall start when the damage could reasonably be known by the harmed party by using ordinary due diligence. The *Corte di Cassazione* established that this moment can be matched when the AGCM issues an infringement decision. However, in this case, the victim of the anti-competitive behaviour is a competitor in the same telecommunications market. Hence, according to the Court, Uno had a reasonable knowledge of the competition law infringement and the potential damage suffered may already have been known when the AGCM started the relevant investigation. In fact, this aspect must be evaluated by the judge on a case-by-case basis and, in this case, Uno's market player role is decisive.

Given the inapplicability of Directive 104/2014's limitation regime, national rules shall apply. However, according to the CJEU decision in *Manfredi* (Joint Cases C-295/04 and 298/04, Decision 13 July 2006), in the absence of harmonized provisions regarding limitation in competition in private enforcement cases, national rules shall apply, but on the condition that they are compliant with EU effectiveness and equivalence principles. These principles' *effet utile* is the creation of a level playing field across the EU, where the right to compensation for competition law infringements is not impossible or excessively difficult due to unfavourable national provisions.

The *Corte di Cassazione* ruled that the abovementioned case by case approach is compliant with the *Manfredi* ruling, and that the choice to anticipate the starting moment of limitation is, in this case, correct. The judges also analysed this aspect in the light of the cited *Cogeco* case, where the Portuguese 3-years limitation time, without the possibility of suspension, was declared to be non-compliant with EU law. However, the CJEU refers to a limitation period, which could not be suspended, and which was too short with regard to the time needed for the investigation. In this case, according to the *Corte di Cassazione*, the final decision was issued by the AGCM 2 years after the investigation started, giving Uno enough time to file its lawsuit. Moreover, the Court also pointed out how the action was brought, five years after the commitment decision was issued in 2007.

Finally, the Court argued that Uno was not able to demonstrate the permanent nature of the infringement, which might have extended the limitation period. Hence, according to the *Corte di Cassazione*, the lawsuit was filed by Uno after the expiry of the relevant limitation period.

The value of commitment decisions issued by the AGCM in antitrust private enforcement proceedings

Once having addressed the issue regarding the limitation period, the *Corte di Cassazione* analysed the aspect of the evidentiary value to be attributed to commitment decisions issued by a national competition authority.

Firstly, the Court asks us to remember the general rule, according to which an infringement decision issued by the AGCM has *prova privilegiata* value before a national judge in the context of a claim for damages. The *prova privilegiata* figure was created by the *Corte di Cassazione* and amounts to a

stronger proof of the violation that was ascertained by the competition authority. Such proof is rebuttable, but, according to the *Corte di Cassazione* (Decision 20 June 2011, no. 13486) the profile of the infringement of competition rules cannot be reversed on the basis of evidence that is the same as that provided before the competition authority. It is also worth remembering that Directive 104/2014 (Article 9, as well as Article 7 of the Italian Legislative Decree no. 3/2017) provided that final decisions have been issued by a national competition authority and bind the national judge with regard to the competition law infringement. Moreover, decisions issued by other Member States' competition authorities amount to a *prima facie* evidence of competition law infringement in a private enforcement proceeding (according to some scholars, the *prima facie* value is similar to the *prova privilegiata* figure).

The *prova privilegiata* value is not applicable to commitment decisions issued according to Article 14-ter of Law no. 287/1990. However, especially if such a decision is adopted after the publication of the findings of the preliminary inquiry (*comunicazione delle risultanze istruttorie, CRI*), it may have some evidentiary value in a damage proceeding. Indeed, such a decision takes into account a potential competitive distortion and evaluates whether the commitments undertaken can solve this competition law concern. Moreover, the CJEU, in the *Gasorba/Repsol* Decision (23 November 2017, Case C-547/16) – although it ruled that such decisions can be reformed by the national judiciary – admitted that they have a sort of deciding value, which can be evaluated as circumstantial evidence in the context of a damage action. In conclusion, according to the *Corte di Cassazione*, such decisions can constitute a rebuttable presumption in relation to the competition law infringement in a case where the commitment decision was issued in an advanced phase of the investigation, namely, after the *CRI*'s publication, as in the present case.

The lawfulness of Vodafone's termination of the agreement entered into with Uno

In 2003, Vodafone and Uno entered into an agreement regarding mobile phone services (*i.e.*, sim cards that should have been used by Uno). However, this agreement expressly forbade the possibility that Uno could resell the termination service to other carriers. However, in the *CRI*, the AGCM clearly stated that the mobile-to-mobile use of such sim cards by the smaller phone carriers was a reaction of the latter that they undertook in order to remain in the market, due to the abuse of dominance by Vodafone, Telecom and Wind. Moreover, the AGCM found that this practice was known about by the incumbent carriers and was implicitly accepted. Vodafone argued that the breach should have automatically triggered the automatic termination clause contained in the agreement. Consequently, no judicial review was needed on Uno's behaviour. However, the Court stated that, according to Articles 1218 and 1456 of the Italian Civil Code, the judge shall evaluate the breaching party's conduct. Hence, the *Corte di Cassazione* rejected the termination request issued by Vodafone, because the violation of the contractual terms by Uno was due to Vodafone's anti-competitive behaviour and so does not amount to a relevant breach of contract. Consequently, both Uno's and Vodafone's complaints were rejected and the decision issued by the Milan Court of Appeal was upheld.

Conclusion

The judgment issued by the *Corte di Cassazione* is interesting because it deals with two important aspects of antitrust damages claims. Moreover, both the profiles were also scrutinized by the CJEU, in the mentioned *Cogeco* and *Gasorba/Repsol* cases, respectively. The approach followed by the Italian judges with regard to commitment decisions – if issued after the relevant *CRI*'s publication – shall be deemed to be correct. Indeed, although the new damages directive (not applicable in this case) provides for a stronger regime with regard to infringement decisions' evidentiary value, it does not set forth any rule regarding commitment decisions. One might have argued that a higher value should also have been recognized in such decisions. However, given that they do not explicitly prove any violation of competition law, with all the procedural safeguards needed, their value shall correctly be taken into

account by the judge who has to decide upon the relevant case. In fact, such decisions spot that the competitive process in the relevant market should be affected by some competitive concerns, but the procedural and factual background cannot bind in any way the judge asked to rule on the private enforcement case. In any case, it is worth underlining the particular circumstances of the present case, in which Vodafone agreed on commitments with the AGCM, whilst Wind and Telecom's anti-competitive behaviour was ascertained. In such a case, after the *CRI*'s publication, and with an infringement decision that was adopted with regard to the other infringers, the proof of Vodafone's anti-competitive conduct might have been stronger. However, care is needed before adopting such an approach for commitment decisions without the previous publication of a *CR,I* or in the absence of a parallel infringement decision.

Finally, with regard to limitation, correctly – and in compliance with the CJEU – the Italian Supreme Court found that the new directive is not applicable to the analysed case. However, some doubts can be raised with regard to the compliance of the Italian limitation regime with the EU principles of effectiveness and equivalence, as clarified by the CJEU in *Cogeco*. Of course, the case-by-case approach adopted by the *Corte di Cassazione* is correct. However, due the high reliance of the European competition private enforcement system on *follow-on* actions, a correct criterion should have placed the limitation period's starting point at the date when a decision (infringement decision or a commitment one) was issued by the AGCM. However, the different approaches to competitors and consumers that was adopted by the Court can be justified and deemed correct, since it amounts to a different treatment arising from different situations.

Horizontal v. vertical agreements

Elka Atanasova, Sofia Administrative Court

Facts of the case

Kaliakra is a trademark for Bulgarian sunflower oil, which has been manufactured by the company in Bulgaria since 1973. Until mid-2009, the company's activity was related to buying and processing oil materials, manufacturing edible oils, grain storage, and others. After June, 2009, the sale of bottled sunflower oil with the Kaliakra trademark in Bulgaria was carried out by a Hungarian company, which owned 98.83% of the capital of Kaliakra AD.

Kaliakra AD distributes the bottled sunflower oil in Bulgaria through distributors - wholesalers with whom the company concluded "standard" distribution agreements.

In the period from August to October, 2010, the prices of sunflower and the sunflower oil distilled from them increased sharply in Bulgaria. With this situation the national competition body - The Commission for the Protection of Competition (CPC) - made a sectoral analysis with the goal of determining the market structure, the market conditions for manufacturing, and trade with oilseed sunflower and sunflower oil, to check if the trends in pricing are influenced by objective economic factors or are a result of anti-competitive practices.

As a result of the analysis, the Commission determined that there was pricing instability and big fluctuations in the price of sunflower oil on the Bulgarian market, which fluctuated for a short period and within much wider ranges than those in similar European markets.

Actions taken by the Commission for the Protection of Competition

As a result of the analysis, the CPC initiated proceedings to establish violations by 3 companies, producers and suppliers of oil, including Kaliakra AD, after the sector analysis had clauses in the distribution agreements which contain vertical restrictions of competition. The Commission indicted a total of 8 companies. t

With its decision of 17.07.2013, the Commission determined that 8 companies/suppliers and distributors had committed a violation of Art. 15, Para. 1, Point 1 of the Competition Protection Act ("CPA", the "Act"), which relates to prohibited vertical agreement which, by its purpose, prevents, restricts or distorts competition on the bottled sunflower oil market by directly or indirectly fixing resale prices. The Commission imposed fines of different amounts on the companies for the established violations. These fines ranged from BGN 100,000 to BGN 650,000.

The CPC determined that one of the companies distributes bottled sunflower oil with the trademark Kaliakra through wholesale distributors. The distributor signs "standard" distribution agreements with the main wholesale merchants. The main agreements contain annexes with identical text for all of the distributors, through which specific price values of the resale prices of bottled oil are set. The annexes contain a discount on certain recommended prices, as the company supplier periodically sends letters to its distributors to notify them of the correction in wholesale and retail prices of the products that are subject to the agreement as of that date.

In 2009, there was a change of ownership in one of the supplying companies which was done by formal renewal of the agreements with the distributors, by changing the supplier side. The clauses in the agreements with the distributors remained unchanged.

In May, 2012, the activity related to the trade of sunflower oil was transferred again to a third company, which became a party to the agreements with the distributors. For this purpose, a formal

renewal was executed for the contracts in place with the wholesale merchants, and in these the supplier was changed, but the clauses in the agreements remained unchanged.

With these facts, CPC determined the relevant market to be the market for bottled sunflower oil for end consumption, and the geographical scope as national.

The CPC decided that the 7 companies represent “enterprises”, as the distributors assume the commercial and financial risk relating to the sale of the product, which determines their autonomy and independence as economic entities that are separate from the supplier company.

The CPC decided that the agreements signed between the supplying company and each distributor are “formal agreements”. In its relationships with the distributors, the suppliers deal in the same way with each distributor, through the mechanism of setting resale prices by the suppliers and determining: specific values for the different levels of sales of the products, of incentives for compliance with the set prices in the form of a discount for the distributor, control and sanction (termination of the contract and any additional discounts). The agreements include a specific obligation for distributors to comply with the so-called “recommended sale prices”. This control is achieved in the pricing a long the entire chain of product sales, from the level of the supplier to the end customer, whose goal is to achieve a certain final price per shelf in the store network. In this way, the distributor performs the role of the executor of the supplier’s pricing policy, as the supplier is free from financial and economic risks at the expense of the distributor. Distributors are guaranteed a profit, so that they do not deviate from the agreement, and complied with it for a long time.

The Commission decided that the contractual pricing mechanism constitutes a “breach of purpose in the form of the resale price fixing”.

The decision of the Supreme Administrative Court (SAC)

The Companies appealed the decision of the CPC before the SAC, in view of the established violation, expressed in a prohibited vertical agreement which, in its purpose, prevents, restricts or distorts competition in the bottled sunflower oil market through direct or indirect resale / Case No. 11 530/2013.

With a decision of 28.11.2017, the Court, with a three-member panel, annulled the decision of the CPC. The Court found that the substantive law had been incorrectly applied. In order to annul the decision of the CPC, the Court wrote, in its motivation, that the norm of Art. 15, Para. 1 of the LPC, which literally reproduces Art. 101 of the Treaty on the Functioning of the European Union /TFEU, which determines a general prohibition on any type of agreement between undertakings, decisions of associations of undertakings, as well as concerted practices of two or more undertakings, which have as their object or effect the prevention, restriction or distortion of competition in the relevant market. A general ban on all types of anti-competitive agreements has been introduced, and in order for the ban to apply, the following must be presented simultaneously:

1. The parties to the proceedings can be classified as “undertakings”. The Court accepted that this condition has been met in this case.
2. The existence of an agreement and/or concerted practice between the parties. This element has also been accepted by the court, as the sales agreements between the supplier and the distributors are vertical agreements within the meaning of Regulation 330/2010 of the European Commission on the application of Art. 101 of TFEU on the categories of vertical agreements and concerted practices.
3. Anti-competitive effect, expressed in the purpose or result in the preventing, restricting or distorting of competition.

With regard to the presence of this third element, the Court mentioned, in its motivation, that sunflower vegetable oil is a basic food product, which is consumed daily by Bulgarian customers. Sunflower oil is dominant on the Bulgarian market and consumers would find it difficult to replace it with an alternative product. A large number of participants therefore operate in the market for the production and distribution of sunflower oil, and their market shares are distributed in such a way that none has the necessary market power to be able to unilaterally influence the structure of the market. The Court also made reference to the expertise appointed in the case.

The Court pointed out that in determining a fixed resale price, distributors are not deprived of the opportunity to freely and independently determine the prices of products for their customers under the influence of natural market forces and pressure from competitors. The Court therefore concluded that the distribution agreements lacked an anti-competitive effect.

Final Court decision

The decision of the 3-member panel of the SAC was appealed by the CPC before a 5-member panel of the SAC.

With a decision of 20.08.2018/Case No. 3881/2018/, the Court annulled the decision of the 3-member panel and rejected the appeals against the decision of the CPC. As a reason for the annulment, the Court pointed out that the supplier's vertical relations with the distributors are in geographical regions of the country where refined bottled oil is offered, and each of the distributors operated in a certain region. The supplier has built a network of local distributors, forming a multi-regional distribution network. The Court agreed that the agreements with distributors constitute formal vertical agreements, as defined in Regulation 330/2010 of the European Commission of 20 April, 2010, on the application of Art. 101 of TFEU on the categories of vertical agreements and concerted practices.

However, in view of the content of the distribution agreements, the Court found that there was a direct infringement of competition law because:

- a) the ownership of the products is acquired by the distributors at the moment of receipt of the goods in their warehouses, and the payment of their full value is made in advance;
- b) despite the fact that they have acquired the property, the distributors have undertaken to sell the products at a price recommended by the supplying company;
- c) to comply with the "recommended prices" of the supplier company;
- d) in the case of "deliberate non- performance or negligence" in fulfilling the obligations assumed by the agreement, the distributors applied its unilateral termination "without prior notice", and payment of the "cause losses and lost profits". In strict compliance with the contracts, the distributors receive incentives.

In regard to these conditions in the agreements, the Court found that, in practice: they:

- a) restrict the economic freedom of distributors;
- b) the distributors perform the role of executors of the supplier's pricing policy and the distributor is completely released from the financial and economic risks relating to the sale of its products at the expense of the distributors.
- c) the agreed prices, which are called "recommended", practically become obligatory (fixed) for the distributors;
- d) strict compliance with the agreements guarantees a sufficient amount of profit, which encourages the suppliers to comply with the contract concluded, and the recommended prices for a long period of time;

- e) the company achieves overall control over the pricing along the whole product sales chain from “supplier” to “end user”.

This price-fixing mechanism in contractual relations is a prohibited vertical agreement which, by its purpose, prevents, restricts or distorts competition in the bottled sunflower oil market by directly or indirectly fixing resale prices.

In connection with the existence of an anti-competitive objective, the Court shared the arguments of the CPC, holding that, in the market situation in Bulgaria, the price of the product is crucial and final consumption is directed to lower priced products, and competing products (those with a higher price) would not be attractive to consumers. In this case, the parties voluntarily renounce the risk of effective competition by replacing it with an agreement that they concluded among themselves with regard to the basic element of trade policy, namely pricing.

In its judgment, the Court also referred to Joined Cases 96-102, 104, 105, 108, 110/82, IAZ International Belgium v Commission/1983/ECR 3369, with regard to price-fixing agreements or other commercial terms, as typical competition restriction clauses.

Conclusion

This dispute is an example of the different interpretations among different panels of the Supreme Administrative Court, regarding the assessment of the existence of elements of a violation under Art. 15, Para. 1, Point 1 of the LPC. It shows how a national country can arrive at opposite results, with the same facts and evidence, as a result of their different approaches to competition law, and their different analysis and reasoning, despite applying the same law.

Imre Robotka, Budapest Metropolitan Court

Case No.: Judgment of the *Kúria* No. Kf.VI.38.305/2018/21.

Abstract: restrictive agreement on information sharing on private, confidential and strategic data of the market for all types of financial services, in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU)

Summary of the facts

Between 9th June 2000, and 2nd December, 2012, the *Magyar Bankszövetség* (Hungarian Banking Association, hereinafter: Bankszövetség) operated the so-called BankAdat database, thus making it possible for the members of the database to exchange data that was confidential, strategic, and which could not be obtained from other sources, or which could only be obtained with a substantial delay by analysing market processes. The *Nemzetközi Bankárképző Központ Zrt.* (International Training Centre for Bankers Ltd., hereinafter: Bankárképző) collaborated in the operation of the database.

In 2000, Bankszövetség and Bankárképző brought about an agreement concerning the actuation of the BankAdat database, into which the participating 38 banks sent, on a quarterly basis, approximately 2000 strategic pieces of confidential, present and immediately past, individualised, non-public datum. The data contained in the BankAdat database were both individually and aggregately recognisable by the participant banks between 2000 and 2012.

Even before the establishment of the BankAdat database, there had existed an information system between banks, the so-called *Bankközi Információs Rendszer* (BIR – Inter-Bank Information System, hereinafter: BIR), which aimed to determine the level of risk faced by partners when the banks dealt with each other. The BIR, however, consisted of significantly less information than the later BankAdat database. This system had been in operation since 1993, with the participating banks providing each other with quarterly information.

Supported by an adequate IT background, the aim of the BankAdat database was to improve the existing system and increase efficiency. The first steps in the establishment of the BankAdat database were taken in June 2000. The final concept of the system stipulated that access to the database could only be obtained via the entry of a unique password for each of the participating banks, and that the data had to be voluntarily given. However, the banks could only access the types of information that they had also provided about themselves. The BankAdat database began its operation in November 2000. The first important modification to the system took place in 2004, when the banks undertook to provide their balance sheets and income statements once a year in a format that corresponded to the International Accounting Standard. The next significant step was taken in February 2007, when Bankárképző proposed a thorough review and amendment of the BankAdat database, which eventually resulted in additional types of data being introduced into the system. A working group consisting of experts from several participating banks was also established, with the aim of further developing the database. From 2009, the supervisory entities (the Hungarian National Bank – *MNB* and the former Hungarian Financial Supervisory Authority – *PSZÁF*) also contributed to the database by sending aggregated data to the BankAdat database.

On 11th April, 2012, the *Gazdasági Versenyhivatal* (GVH – the Hungarian Competition Authority, hereinafter: GVH) launched an investigation against Bankszövetség, Bankárképző and 38 banks due to the operation of the BankAdat database. From the data contained in the BankAdat database that were subject to the information exchange, the market strategies, future behaviour, and promotion plans of the parties potentially became foreseeable to all of the other banks. From the standpoint of the GVH, the information exchanged may have influenced the parties' market behaviour from 2000 until the system

was no longer in operation. As the first formal step in the procedure, the GVH held an unannounced inspection on the premises of the above mentioned Bankárképző.

In December 2012, in response to the on-going competition supervision proceedings initiated by the GVH – Bankárképző and Bankszövetség modified their agreements with each other and those with the participating banks in such a way that the other participants could no longer access the data submitted by an individual bank. The undertakings involved expressed their wish to co-operate with the competition supervision proceedings, while maintaining the operation of the BankAdat database, which they deemed to be necessary for financial stability.

Bankszövetség was an active member of the information cartel while Bankárképző played the role of a contributor. The private, confidential and strategic data (e.g., data relating to quantities, costs, demand, profit) which was shared in the database by the members of Bankszövetség, ensured that the banks obtained up-to-date information about the market, market processes, efficiency, business policies and the strategies of competitors. The banks concerned used the available information, particularly for making business plans, creating strategies and for product development.

The GVH established, in its decision, that Bankszövetség – with the collaboration of Bankárképző – had been operating the so called “BankAdat” database for 12 years in a way that was likely to restrict competition, as it had made it possible for the banks to share private, confidential and strategic data with each other. The GVH imposed a total fine of HUF 4.015 billion (approx. EUR 13 million) for the infringement.

The GVH did not establish the direct responsibility of the member banks that provided data, because the decisions on the establishment and operation of the database were made by Bankszövetség itself. In its decision, the GVH specified the financial institutions that bear subsidiary liability responsible, against which the recovery of the fine imposed can be arranged if enforcement against the Bankszövetség cannot be realised.

The relevant product market was identified as the market for financial services. The GVH found that there was no need for a narrower market definition, as the elements of the BankAdat database had direct or indirect effects on all sub-categories of the financial market. The relevant geographical market was identified as being the whole territory of Hungary. The parties to the proceedings are mostly Hungarian subsidiaries of international banks. However, the parent companies are significant market players at EU level, and the subsidiaries have a continual reporting obligation to them.

The proceedings of the acting Competition Council tried to analyse the case, and the behaviour of the undertakings, in accordance with the relevant Hungarian case-law and those of the European Commission and the Court of Justice of the European Union, and in line with the Commission’s Horizontal Guidelines. The decision referred to the fact that the BankAdat database could be a supportive mechanism or tool for another breach of the law (concerted practice of 11 financial institutions aimed at limiting the full prepayment of foreign currency loans).

Court procedure

Acting on the basis of the petitions, by No. 6.K.700.018/2018/36. judgment of the Fővárosi Törvényszék (Budapest-Capital Regional Court, acting as a First Instance Court; hereinafter: First Instance Court) annulled the decision and the GVH and terminated the authority’s procedure.

Assessing the merits of the case, the First Instance Court identified the case’s cornerstone, the question as to whether, in such a case, when a 12-year long period, completed information exchange (running database) had, in the past – with the knowledge and support of the supervisory authority– is it possible to examine potential effects or must the unproven actual effects be assessed in favor of the undertakings concerned.

The GVH did not demonstrate an actual restrictive effect on competition in its decision (e.g., Paragraph 1369 of its decision), and also admitted at the trial that it was not possible to prove the actual impact. In light of this statement, the First Instance Court found controversy, in that the authority, on the one hand, set out the obstacles to the performance of a potential anti-competitive effect among it a counterfactual analysis (in Paragraph 1244 of its decision) but, on the other, attempted a counterfactual analysis of one segment of the financial services market, the credit market, and this market's economic analysis was based on the 'whole' (financial services market). It was assumed by the GVH that the lending market demonstrated the most intense competition among the market actors during the period considered, and therefore the findings in this respect can be extended to the whole financial market.

Decision of the Curia of Hungary

In its judgment, the Curia highlighted that the likely effects of the information exchange on competition must be examined on a case-by-case basis. The anti-competitive effects (in the framework of the so-called counterfactual analysis) compares the likely effects of the information exchange with the competitive situation in the absence of a specific exchange of information. To make an exchange of information restrictive of competition – within the meaning of *tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény* (Tptv. - Hungarian Competition Act) § 11 and Paragraph 101 of the TFEU – it is likely that there will be an appreciable adverse effect on competition and one (or more) indicators, such as price, output, product quality, product range or innovation.

In assessing the anti-competitive effect, the competition authority (GVH) must carry out a specific, evidence-based economic analysis and causation between the exchange of information and the actual anti-competitive effect and must show what the circumstance which precludes the occurrence or justification of the actual effect is.

Only in the case of an existing impediment, a blocking element, is it allowed for the authority to start analysing the potential impacts of a completed action: this is a kind of sequence in the order of proof.

In the reasoning, the Curia pointed out that, as the major rule, conduct completed in the past is considered unlawful if it actually had an anti-competitive effect on the relevant market. In the case of completed conduct in the past, it is possible to assess the potential anti-competitive effect on a limited basis, if there are proven circumstances that preclude the actual effect (e.g., change in market conditions, non-infringement, non-implementation of the agreement). The mere failure of the competition authority's evidentiary procedure cannot provide a basis for examining the potential effect. The definition of the relevant market in the counterfactual analysis is a kind of preliminary question. The definition of the relevant market allows the identification and delimitation of the boundaries of competition between undertakings [e. g., Communication from the Commission on the definition of the relevant market (97/C 372/03)].

The potentially restrictive effects on competition can only be analysed in specific markets in which competitors, competition, anti-competitive or competitive market behavioural concepts can be interpreted. The existence, or non-existence, of restrictive effects on competition as such depends on circumstances (e.g., market transparency, concentration, complexity, stability), which can only be examined in individual markets.

In a counterfactual analysis, it is essential to show what the market would be if the information had not been exchanged. The GVH, in order to prove an infringement, would have had to carry out a detailed impact analysis on the relevant market in which information has been exchanged, and on whether the exchange can be attributed to potential or actual negative effects on competition.

Inasmuch as the counterfactual analysis shows that the particular competitive indicator is no different from the two market conditions (actual and hypothetical), or that it is different, but there could be another reason, it might have been 'likely', instead of proving direct causation. However, as already explained, in this case it would have been necessary to prove that circumstances precluded or hindered the occurrence of the justification of the actual effect.

Personal opinion

In the judgment, the Curia confirmed its approach, as elaborated in Case No. Kfv.II.37.110/2017/13. (see more about this in RSCAS Working Paper ENTRANCE 2019), that was accepted by the First Instance Court in this case.

In Case No. Kfv.II.37.110/2017/13, the Curia analysed the case law of the CJEU relating to the question of the analysis of the potential affect in relation to counterfactual analysis [especially the application of Case C-7/95 John Deere, reviewing C-67/13, C-8/08, C-32/11, C-238/05, C-345/14 cases also). The Curia's opinion was that the analysis of potential anti-competitive effects in the case of completed conduct in the past is possible to assess, but only if a relevant circumstance is proven, which precludes the actual affect.

In this new case, the Curia found the First Instance Court's judgments to be lawful, and also referred to the notion that the stricter approach of sequence in the order of proof derives from the constitutional approach that is required by the *Alkotmánybíróság* (Hungarian Constitutional Court), which analysed the nature and importance of the judicial review of the competition authority's decisions' and constitutional requirements.

It seems that, now, the procedural question that is related to the application of CJEU's case law (specially in the John Deere case) makes it clear how this is to be transposed to practice. The reaffirmation of judgment No. Kfv.II.37.110/2017/13. finally means that there an accepted approach to counterfactual analysis in practice.

Maurice Collins, Court of Appeal of Ireland

The Competition Authority vs. The Beef Industry Development Society ²⁵

Introduction

As the Covid-19 crisis continues to hold EU economies by the throat, it may be timely to recall the approach taken by the EU competition courts to a crisis cartel in the beef industry in Ireland in the 2000s.

Facts

By the early 2000s, it had been the accepted wisdom that there was a significant excess of beef processing capacity in Ireland, and this required a co-ordinated solution. The starting point was the McKinsey Report, published in September, 1998, which recommended “*radical rationalisation*” to avert catastrophe for both processors and producers (farmers). Rationalisation of capacity would, McKinsey suggested, lead to significant cost savings. It recommended the establishment of a buy-out scheme whereby “*stayers*” would fund payments to “*goers*” to compensate them for exiting the market. The beef sector was (and continues to be) of great significance in Ireland, both economically and politically, and the McKinsey Report had been substantially funded by Enterprise Ireland, a statutory agency responsible for promoting Irish exports. Following from the McKinsey Report, the Department of Agriculture established a Beef Task Force, chaired by its most senior Departmental official, which, in 1999, issued a further report endorsing the findings of the Report, and calling on the industry to implement its recommendations. Support for a rationalisation scheme was expressed at the highest levels of Government. It was in these circumstances that the Beef Industry Development Society (“*BIDS*”) was established, in 2002, by a number of meat processing companies. At the time, those companies accounted for 93% of beef processing in Ireland. BIDS’s *raison d’être* was to implement a “*rationalisation*” of the Irish beef processing industry, as recommended by McKinsey and the Beef Task Force, with the active support of the Irish Government. The essential elements of the BIDS “*arrangements*” were as follows:

- 1) “*Decommissioning*” of up to 25% (approx.) of processing capacity, to be achieved by reaching agreement with “*goers*”
- 2) Payments to be made to “*goers*” by way of compensation, to be funded by loans from “*stayers*”, which would then be repaid through a system of levy payments on “*stayers*”. An important aspect of the levy system was that a significantly higher levy (IR£11, rather than IR£2 per head slaughtered) would be payable in respect of cattle killed above the “*traditional*” (%) market share of the stayers.
- 3) “*Goers*” to be required to agree to sterilise their plants for a 5 year period and to agree to a non-competing clause for 2 years.
- 4) Notably, the plant to be decommissioned was self-selecting. There was nothing in the BIDS arrangements that identified the least-efficient plants for exit.

²⁵ [2006] IEHC 294 (Irish High Court); C-209/07 [2008] I ECR 8637 (CJEU); [2009] IESC 72, [2010] 1 IR 767 (Irish Supreme Court)

Proceedings

As the High Court later observed, BIDS acted “*in a manner which was totally the antithesis of how cartels usually operate.*” There were no “*secret meetings*” or “*coded messages*”. Rather, it sought to engage with the Irish NCA, the Competition Authority (“*the Authority*”).²⁶ Undaunted by the Irish Government’s support for the BIDS arrangements, and the broad consensus that such arrangements were essential to sustain the beef sector into the future, the Authority took the view that the arrangements were contrary to Section 4 of the Competition Act 2002²⁷ and/or Article 81 (now Article 101 TFEU)²⁸ and, in June, 2003, commenced an action in the Irish High Court against BIDS, seeking declaratory relief to that effect.²⁹ The action was defended by BIDS.³⁰

The Authority’s action was heard by the High Court (McKechnie J) over 11 days. A number of economic experts gave evidence for each side, and the Court also had the assistance of a very distinguished economist, Jorge Padilla, as a technical assessor.

In his judgment (given on 27th July 2006), McKechnie J rejected the Authority’s claims. In his view, the BIDS arrangements did not have the *object* of preventing, restricting or distorting competition. They did not fix prices, or share customers or markets, or limit output. Stayers would be free to increase production and there was no question of production quotas. While there would be a reduction *per se* in capacity, that was not necessarily to be equated with a limitation on output/production. Once excess capacity was removed, “*ordinary market forces*” would determine where cattle were slaughtered. On “*the balance of probability*”, McKechnie J did not think that the arrangements were “*so objectionable as to restrict competition by object.*”³¹ McKechnie J next concluded that the BIDS arrangements did not have the *effect* of restricting competition either. The Authority had failed to demonstrate by “*credible evidence*” that the arrangements were likely to have appreciable anti-competitive effects.³²

Although not “*strictly necessary*”, McKechnie J also considered the provisions of Article 101(3). The onus of satisfying the cumulative conditions in Article 101(3) was on BIDS. The Court considered that it had (barely) satisfied the first condition, in that the evidence showed that some significant, though unquantified, economic gains would result from the arrangements.³³ However, the very fact that the gains were unquantified meant - so the Judge considered - that the second condition was not satisfied because, without any measurement of the benefits, it was not possible to determine whether a “*fair share*” would flow to consumers.³⁴ The condition of “*indispensability*” was satisfied, and the Judge noted that the fourth and final condition – that the arrangements did not afford undertakings the possibility of “*eliminating competition*”, was not really in controversy.

The Authority appealed to the Supreme Court. BIDS also appealed the High Court’s finding that the second condition in Article 101(3) was not satisfied. On the second day of the appeal hearing, the Court indicated its view that it should make a reference to the CJEU. The Court’s order of reference explicitly recorded that it was satisfied that there was over-capacity in the beef processing industry, to the extent of 34% at peak throughput; that this excess capacity would have “*very serious consequences*” for the

²⁶ Now the Competition and Consumer Protection Commission (“the CCPC”).

²⁷ Which replicates Article 81 EC Treaty (now Article 101 TFEU).

²⁸ And hereafter referred to as such.

²⁹ The Authority did not have the power to prohibit the implementation of the BIDS arrangements.

³⁰ The author acted as counsel for BIDS.

³¹ At Paragraph 98.

³² At Paragraph 117.

³³ Paragraph 127.

³⁴ Paragraph 131.

profitability of the industry in the medium term, and that independent consultants had advised that, in the near term, “*the overcapacity is unlikely to be eliminated by normal market measures.*”³⁵ Against this background, the Court asked the CJEU whether the BIDS arrangements were to be regarded as having as their *object*, as distinct from their *effect*, the restriction of competition.

The Opinion of Advocate General Trstenjak (4 September 2008) and the Judgment of the Court (Third Chamber) (20 November, 2008) provided an emphatic answer to that question: the BIDS arrangements were indeed to be regarded as restrictive of competition by object.

In her Opinion, Advocate General Trstenjak explained that, while the legality and context of an agreement had to be taken into account in assessing whether it had the object of restricting competition, that extended only to the elements of the legal and economic contexts, which could cast doubt on the existence of a restriction on competition: “*context*” was not to be seen as a “*gateway*” for the consideration of factors suggesting that the agreement is compatible with the common market.³⁶ Such factors were matters for Article 101(3), rather than for 101(1).³⁷ The “*general conception*” of Article 101(1) was to ensure “*the optimal supply of consumers*” at “*the lowest possible price*”. Agreements that restricted competition between market participants – elsewhere explained as the freedom of one or more undertakings to determine their policy on the market independently³⁸, - directly affected that aspect of consumer welfare and were therefore prohibited in principle. Other aspects of consumer welfare – such as the reduction in production costs that may result from agreements restricting competition – fell to being assessed under Article 101(3).³⁹ No obvious restriction of competition was required for the existence of a restriction of competition by object, nor was it the case that such restrictions were limited to those referred to specifically in Article 101(1).⁴⁰

That BIDS did not operate as a “*typical cartel*” was not relevant. Further, the fact that the sector was experiencing a cyclical or structural crisis did not exclude the application of Article 101(1), and the fact that BIDS’s members were pursuing a legitimate objective did not rule out the existence of a restriction of competition by object. In the Advocate General’s view, the aim of improving profitability by reducing over-capacity by 25% “*inevitably results in a restriction of competition.*”⁴¹ The reduction of total capacity was in itself a restriction of competition, within the scope of Article 101(1), without having to decide whether it was also a limitation of production (though it was that also). The staging of levies and the restrictions on the use and disposal of the plants of “*goers*”, were also to be regarded as limitations on production.⁴²

The Court’s relatively brief judgment was similarly uncompromising. Even supposing it were to be established that the parties to an agreement acted without any subjective intention of restricting competition, “*but with the object of remedying the effects of a crisis in their sector*”, that was irrelevant to the application of Article 101(1).⁴³ The Court expressly agreed with the Advocate General that the types of agreement identified in Article 101(1) did not constitute “*an exhaustive list of prohibited collusion.*” The object of the BIDS arrangements was to “*change, appreciably, the structure of the*

³⁵ Order of 8th March 2007.

³⁶ Paragraph 50.

³⁷ Paragraph 55.

³⁸ At Paragraph 42.

³⁹ Paragraph 56.

⁴⁰ Paragraph 59. See also Paragraphs 48 & 49.

⁴¹ Paragraph 100.

⁴² Paragraphs 104 and 106.

⁴³ Paragraph 21

market through a mechanism to encourage the withdrawal of competitors.”⁴⁴ That conflicted “patently” with the fundamental concept of competition, namely, the independent determination by economic operators of market policy and the prohibition of any form of co-ordination, substituting co-operation between undertakings for the risks of competition.⁴⁵ The Court also considered that the means put in place to attain the objective of the BIDS arrangements – and, in particular, the levy of IR£11 per head for cattle beyond the baseline volume, and the restrictions on the use of “goers” plant - included restrictions whose object was anti-competitive.⁴⁶

The parties then went back before the Supreme Court to argue the application of Article 101(3). Following a further 2-day hearing, in December 2009, that Court gave judgment, sending the case back to the High Court to conduct a full Article 101(3) analysis. Notably, judgments were given by two members of the Court (with whom the other members of the Court agreed) that appeared to point the High Court in quite different directions as regards the resolution of the remaining issues. In his judgment, Kearns P indicated his view that, for the purposes of the second condition in Article 101(3), it was not necessary that the benefits from the arrangements by way of efficiency gains should be precisely estimated or calculated. It would “*suffice if [BIDS] can demonstrate positive gains or at least a state of neutrality from the point of view of the consumer.*”⁴⁷ As regards the third condition (indispensability) Kearns P indicated his view that the incorporation of restrictive covenants in an agreement that is designed to rationalise an industry by means of a reduction in capacity may be justified as being indispensable “*if the reduction in capacity is a valid objective of the arrangements and if the means of reducing capacity are proportionate to the aims being sought.*” As regards the stage levies, Kearns P emphasised that the Authority did not rely on Article 101(3)(b), and stressed the short term nature of the levy arrangements. In these circumstances, “*the levy may be seen as ensuring that processors will absorb additional costs, given that the levy is short term in nature*”. He also emphasised that “*stayers*” were not restricted from competing with one other, and by the voluntary nature of the scheme itself.⁴⁸

A rather different tone was struck by Fennelly J (a former Advocate General) in his judgment. In his view, the High Court was required to reconsider Article 101(3) *de novo*, having regard, in particular, to the CJEU judgment, and its finding that the “*very object of the BIDS arrangements*” conflicted patently with the Treaty’s concept of competition.⁴⁹ Even though it was agreed that compliance with Article 101(3)(b) was not at issue, it did not follow that the arrangements did not restrict (as distinct from eliminate) competition. As regards the third condition, Fennelly J stated that the High Court Judgment did not address whether the restrictions on the use of land and plant, and the sale of equipment, were indispensable.⁵⁰

In fact, no further hearing in the High Court took place. By 2010, the data collected by McKinsey in 1998 (which had, to a very significant extent, been the basis for the High Court’s earlier analysis) was of very limited relevance and reliability, and economic conditions had also changed. Assembling the evidence necessary for a full Article 101(3) hearing would require very significant funds. In these circumstances, BIDS decided not to pursue the proposed rationalisation arrangements further.

⁴⁴ Paragraph 31. See also Paragraph 33.

⁴⁵ Paragraph 34.

⁴⁶ Paragraphs 37 and 38.

⁴⁷ Paragraph 45.

⁴⁸ Paragraphs 46 & 47.

⁴⁹ Paragraph 52

⁵⁰ Paragraph 56.

Before that decision was taken, however, the European Commission (which had strongly supported the Authority's position before the CJEU) had - unusually – intervened by making written observations under Article 15(3) of Council Regulation No. 1/2003, with a view to providing “*enlightenment with respect to the Commission's view on how Article 101(3) TFEU applies to crisis cartels in general.*”⁵¹ The Commission's Observations – which drew on its submissions to the CJEU on the Article 234 reference - stated that “*so-called 'crisis cartels' which aim to reduce industry capacity cannot be justified by economic downturns and recession-induced falls in demand. As a general rule, in a free market economy, market forces should remove unnecessary capacity from a market.*” However, the Commission allowed that “*there may be situations where problems of overcapacity are not likely to be remedied by market forces alone within a reasonable period of time, which would imply that the overcapacity is of a structural nature (as opposed to the result of a cyclical downturn).*” The observations went on to discuss in more detail the situations in which structural over-capacity cannot be remedied by market forces (where giving up capacity is costly for firms, and/or where there are stable, transparent and symmetrical market structures).

Subsequently, the Commission has made it clear that it will be “*very difficult*” to rely on an Article 101(3) defence in this context.⁵² A detailed discussion of the Commission's position on crisis cartels is beyond the scope of this case-note.

Comments

The BIDS saga prompts several comments:

- The Authority demonstrated its independence in a very concrete manner. The facts that the BIDS arrangements had powerful political and agency support did not deter the Authority from bringing proceedings to prohibit the implementation of the arrangements or appealing the decision of the High Court to the Supreme Court.
- The most striking point, perhaps, is the stark divergence between the approach and conclusions of the Irish High Court on the one hand and that of the Advocate General and the Court on the other. Whereas the High Court rejected the contention that the BIDS arrangements constituted a restriction of competition by object, the Third Chamber considered that those arrangements conflicted “patently” with Article 101(1).
- However, the “competition courts” system worked – the Supreme Court made a reference to the CJEU which resulted in the correction of the High Court's error.
 - The role played by the Commission also warrants mention. As well as participating in the Article 234 reference, it is evident that it liaised very closely with the Authority after the reference and also exercised its entitlement to make Observations to the High Court pursuant to Article 15(3) of Council Regulation No. 1/2003 – a step taken by the Commission relatively rarely.
 - The Opinion of Advocate General Trstenjak and the Judgment of the Third Chamber have been praised for their “*pure*” analysis of Article 101(1).⁵³ Certainly, the Opinion and Judgment

⁵¹ Available on the website of the CCPC.

⁵² The Commission subsequently expanded on these observations in a contribution on *Crisis Cartels* that was submitted to the OECD Global Forum on Competition, held in February, 2011. Paragraph 58 of that document states that “*it is evident from the discussion in this paper that it will be very difficult for parties to succeed with a defence under Article 101(3). There is generally no need for this type of coordinated action between competitors because normally the competitive process alone would remove excess capacity from the market.*”

⁵³ See, for instance, Van der Vijver “Case Comment The Irish Beef Case: Competition Authority v Beef Industry Development Society” [2009] *European Competition Law Review* 198, at 200 Talbot “Finding a Baseline for Competition

attempt to clearly demarcate the factors going to the Article 101(1) assessment and those which properly belong (if relevant at all) to Article 101(3) and indicate that the economic “*context*” does not permit general market conditions, including issues of structural over-capacity, to be taken into account for the purposes of Article 101(1).⁵⁴

- It should be noted, however, that in its subsequent case-law the CJEU has retreated from the more expansive approach to the restriction by object prohibition in Article 101(3), which apparently signposted by the Court in *BIDS*, as is evidenced by its decisions in Case C-67/13P *Cartes Bancaire* and Case C-228/18, the *Hungarian Banks* case.
- Although the *BIDS* litigation did not result in a definitive assessment of whether the *BIDS* arrangements came under the conditions in Article 101(3), the tenor of the Advocate General’s Opinion, the Judgment of the Third Chamber, and the Observations subsequently made by the Commission, all appear to indicate considerable scepticism that such arrangements could comply with the conditions in Article 101(3) and, especially, with the third condition (indispensability). The Commission has since articulated a general position that emphasises the high hurdle that crisis cartels must surmount if they are to come within the scope of Article 101(3) and its strong commitment to market solutions for crises of overcapacity.
- Whether the “*purity*” of the Commission’s approach will survive in the Covid-19 economic world remains to be seen. The Commission has stated that it is aware of “*the exceptional challenges*” that undertakings are facing due to the pandemic, while also emphasising that “*it is more important than ever that undertakings and consumers receiver protection under competition law.*”⁵⁵

Law Enforcement During Crises: Case Study of the Irish Beef Proceedings (2015) 18 *Irish Journal of European Law* 55, 66.

⁵⁴ Though at pages 70-71 Talbot, *op cit*, notes that the CJEU has subsequently distanced itself from the Commission’s expansive interpretation of the notion of ‘*by object*’ restriction, and has “*nuanced*” its decision in *BIDS*. Developments.

⁵⁵ C(2020) 3200, final, Commission Communication *Temporary Framework for assessing antitrust issues related to business cooperation in response to situation of urgency stemming from the current COVID-19 outbreak* (8 April 2020). See also ECN Joint Statement of 23 March 2020.

Abuse of Dominance

Brian Murray, Court of Appeal of Ireland

Neurendale Ltd t/a Panda Waste Services v. Dublin City Council & Ors [2009] IEHC 588

Background

In March, 2008, each of the four respondents (the local authorities for different parts of Dublin City and the greater Dublin area) effected a variation to their Waste Management Plan 2005-2010. That plan was promulgated pursuant to the provisions of the Waste Management Act, 1996, and the variation was authorised by the same legislation. The effect of the variation was to vest all rights to collect waste from certain household dwellings in the greater Dublin area in a single operator who, at the choice of the respondents, would either be local authority itself or, following a public tender process, a nominated private operator. It was made in a context in which the four local authorities in question had jointly adopted a co-ordinated approach to waste management. Their justification for the variation was that it would prevent ‘uncontrolled fracturing’ of the household waste collection market in Dublin and its environs. They also said that such fracturing would make universal service unviable, that without the variation there would be cherry picking of more profitable routes by private companies, and that the variation would obviate the environmental and traffic hazards that would arise from multiple vehicles owned by multiple companies servicing the same domestic waste collection routes.

The applicant (‘Panda’) entered the waste collection market in the Dublin area in November, 2006. It had, to that end, invested heavily in infrastructure and facilities. In these proceedings, it contended, *inter alia*, that the variation amounted to both an agreement between undertakings, which had as its object or effect the restriction of competition, and an abuse of a dominant position in breach, respectively, of ss.4 and 5 of the Competition Act 2002 (“the 2002 Act”). The language of these sections mirrored Articles 81 and 82 of the EC Treaty, with Panda alleging also a violation of these provisions. However, and critically, while ss. 4 and 5 reflect the provisions of Articles 101 and 102 TFEU, domestic competition law does not have a counterpart to Article 106(2). The case, accordingly, presented the issue of how competition law should operate *vis à vis* a regulatory activity undertaken by an authority, which was itself a participant in the relevant market, in circumstances where there was no express legislative qualification of the application of competition law in respect of those activities of a public body that is directed to services of general economic interest.

The proceedings were heard and determined in the High Court (McKechnie J.), and were resolved in favour of Panda. Although the High Court decision was appealed, that appeal was subsequently withdrawn.

Were the respondents ‘undertakings’?

The respondents had contended that they were not ‘undertakings’, within the meaning of the 2002 Act, s.3, which defined the term as “a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.” The respondents argued that in varying the waste management plan they were merely fulfilling the duties and exercising the powers conferred upon them by the Waste Management Acts and that, in consequence, they did not fall within this definition.

McKechnie J. commenced his analysis with a consideration of that claim, focussing on three cases – SAT Fluggesellschaft v. Eurocontrol (Case C-364/92) [1994] ECR I-43, Ryanair v. Commission (Case T-196/04) [2008] ECR II-3642 and MOTOE v. Elliniko Dimosio (Case C-49/07) [2008] ECR I-4863.

From these decisions, and relying in particular on MOTOE, McKechnie J. stressed that the fact that a body has both an administrative and an economic operation will not mean that it cannot be classified as an undertaking, for the purposes of Articles 101 and 102 TFEU, and therefore for ss. 4 and the 2020 Act. This was, he held, particularly the case where a body, which has public powers, operates in the same or in a connected market, and where its actions in that market are sufficient to render it an undertaking.

Here, the Court held that it was clear that the variation was of an economic, rather than of an administrative, nature. Particular reliance was placed on the fact that, by the variation, the respondents sought to substantially reorder the market as it then existed. This was sufficient to render the respondent's undertakings for the purpose of ss. 4 and 5 of the 2002 Act and Articles 101 and 102 of the TFEU. Specifically, McKechnie J. said (Paras. 62 and 64):

“That variation seeks to alter the competitive environment of the household waste collection market. In such circumstances, where the regulatory acts affect the same activity, and impact on private operators on the same market, where the respondents also commercially engage, the regulatory role performed will not preclude them from being found to be undertakings....

...the decision is aimed to directly affect the market for domestic waste collection. In those circumstances, it is clear that the variation is of an economic, rather than of an administrative, nature. It seeks to substantially reorder the market as it currently exists. Were the respondents simply involved in the regulation of the waste market ... they would not be undertakings.”

Three other and related features of the decision should be noted in this regard. First, because each respondent had adopted the variation to its plan individually, it was held that they were not acting as an association of undertakings, which would presuppose a decision made by the association as such. Second, the court rejected the claim of the respondents that the application of domestic competition law would prevent them from fulfilling their statutory duties so as to implicitly oust the former: their duties did not require them to collect waste themselves and to be the only entities so doing. Third, the Court also rejected their invocation of the State Defence Doctrine: the respondents had a ‘margin of manoeuvre’ which precluded the operation of that doctrine.

Section 4

The Court identified the relevant market as the market for the provision of household waste collection services in the greater Dublin area. In reaching its conclusion on the relevant geographical market, the Court framed the question “... within what area are the terms of competition sufficiently homogenous with regards to household waste collection services?” Because the Waste Management Plan applied to all four local authorities, the Court reasoned, “[t]he conditions of competition in these areas are therefore homogenous.”

From there, McKechnie J. proceeded to address the claim that there had been a breach of s.4. There had been, he said, an agreement between undertakings in the form of the decision that each would implement the same variation. Because the purpose of the variation was to remove private operators from the market, it had as its object the prevention, restriction or distortion of competition.

The respondents invoked the objective justification defence expressly provided for in s.4. In order to do so, it was necessary for them to establish that the variation contributed to the improvement of the provision of the service, or the promotion of its technical or economic progress, all while allowing consumers a fair share of the resulting benefits. Further, they could not impose terms which were not indispensable to those objectives and could not eliminate competition in respect of a substantial part of the services in question.

The Court emphasized, in its judgment, that in order to rely upon this defence, it was incumbent on the respondent authorities to prove, on the balance of probabilities, that the variation would improve the

provision of the service to the benefit of the customer. Following an extensive analysis and interrogation of the evidence, McKechnie J. determined that the respondents had not discharged this onus. The evidence adduced by them did not establish that the variation was pro-competition and to the benefit of consumers. In fact, the evidence showed that significant benefits had accrued to the consumer by the entry of private operators to the domestic waste collection market.

McKechnie J. found that the variation would have left the consumer with only one option, namely, to avail of the services of a single operator. This operator would have been free to impose whatever charges and fees it wished. Furthermore, the Court held that there had to be less intrusive methods of achieving the respondents' objectives without the complete removal of private operators from the market, in turn thus eliminating all competition. The judgment of the Court in this connection included the following statements:

“... competition in the market can only provide a reduction in costs to consumers, above and beyond that which is obtainable from either a local authority monopoly or by way of competitive tender ... where there is a public or tendered monopolist, any increase in price will merely be borne by the public, and there will be no constraining force preventing such a situation. Further, it will create a situation involving incumbent providers who will be at a significant advantage upon renewal of any contract. There is also the question of what the other competitors are to do in the meantime, while they do not have the contract.”

On this basis, McKechnie J. held that the respondents could not, in respect of the variation, avail themselves of the defence of objective justification. They were accordingly in breach of s.4 of the 2002 Act in agreeing to introduce, and in introducing, the variation.

Abuse of Dominant Position

The Court applied the standard definition of dominance, citing *Aéroports de Paris v. Commission* [2000] ECR II-3929: that a dominant position relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in the relevant market, giving it power to behave, to an appreciable extent, independently of its competitors, customers and, ultimately, of its consumers. He stressed that the application of the prohibition on abuse of dominance is not precluded by the fact that the absence or restriction of competition is facilitated by laws and regulations. The real question, McKechnie J. said, was whether the undertaking in question is capable of acting independently of its competitors, consumers and customers, by virtue of its economic power and influence.

It was found that each local authority, to a significant extent, was able to act independently of any other competitor in the market for household waste collection. Only they could issue Waste Collection Permits and attach conditions thereto, and unlike their competitors, they were not required to possess a Waste Collection Permit. Their ability to regulate the waste collection was what allowed them to act independently. McKechnie J. summarised the issue by saying (Para. 133):

“That they have considerable power to affect the market is evidenced by the Variation. Were it to be put into practice, it would instantly give the local authorities 100% of the market share. No private undertaking would be able to do such. It is therefore clear that each respondent is dominant in each of their individual areas.”

The respondents were also found to enjoy collective dominance. Their coordination was specifically provided for by the relevant waste management legislation. McKechnie J. said that where there is collaborative action between authorities, and no competition between undertakings, a finding of collective action supported a finding of collective dominance. They acted together and, viewed externally constituted a collective entity. The respondents were thus not only individually dominant, but also collectively dominant. The finding of contemporaneous individual and collective dominance is, perhaps, notable.

The Court determined that the variation amounted to an abuse of that position of dominance. The variation had the potential to influence the market to the point of closing the market to all competition or at least to severely restrict it. Compounding this, it would significantly strengthen the position of the respondents. The only bodies that could have benefited from the variation were the respondents since, in practical terms, it established a monopoly in the relevant market for them.

Comment

The judgment in *Nurendale* presents a comprehensive and impressive analysis of both the evidence before the Court and applicable legal principle. The decision is important at a number of levels, but particularly insofar as it probes the application of competition law at the point of interface between commercial activity and regulatory power. This is, an aspect of the judgment that has thus provoked particular comment and that arises from the conclusion that the adoption of the variation by the four local authorities became construed, and legally analysed, as an economic activity, and therefore susceptible to review and prohibition under Irish competition law. The Court, essentially, adopted a unified approach test to determine when a public body or authority that was exercising regulatory powers constitutes an undertaking. Further, the Court proceeded on the basis that, simply because the variation sought to remove operators from a market in which there was competition and to replace it with a system whereby, at the instance of the local authority, either it, or a successful tenderer, would be the sole collector, the variation should be deemed to be anti-competitive by object. The consequence was that the local authorities' involvement in economic activities in downstream local waste markets operated to convert a policy decision reached in an essentially legislative capacity and directed to the future organization of those markets, into an economic activity. Furthermore, it has been suggested that the judgment reflects the belief that commercial markets are more efficient than markets that are subject to government regulation, with one commentator describing the decision as being animated by the view that 'fully de-regulated, atomistic competition is to be preferred over any form of competitive tendering or other regulated approach to competition' (Andrews 15 Bar Rev. (2010) p.99).

Enerjeta Shehaj, First Instance Administrative Court of Tirana

Plaintiff: Shoqëria "EKMA Albania" sh.p.k.

The Respondent Party: Autoriteti i Konkurrencës.

The object of the lawsuit: Abrogation of the Competition Authority Decision no. 572, dated 22.11.2018 "For imposing fines and obligations on the Undertaking EKMA Albania" sh.p.k, in the market for renting premises for the storage of, and trade in, Agro-Food products in the city of Tirana"

Introduction

It is worth mentioning at the very beginning of this presentation that, in Albania, issues of this nature are extremely rare and that the geographical extent of a dispute is mainly within the territory of Albania.

As a result of what is cited above, and given that Albania is not yet part of the EU, the nature of the dispute and the level of its resolution argumentation by the domestic Court remain within a newly "born" legal framework, whose level is mainly national.

It is also worth highlighting that the current applicable legal framework in Albania is in line with the legal framework applicable in the EU.

The case presented is related to the Abuse of the Company "EKMA Albania" sh.p.k, with its Dominant Position in the market for renting premises for the storage of, and trade in, Agro-Food products in the city of Tirana.

Procedure followed by the CA (Competition Authority)

The Competition Authority conducted a monitoring in the market for the rental of premises for the storage of, and trade in, Agro-Food products in the city of Tirana, in order to identify whether or not there are signs of restriction of competition in this market; - At the end of the monitoring, the CA decided to open a preliminary investigation procedure in the market for renting premises for the storage of, and trade in, Agro-Food products in the city of Tirana; - At the end of the preliminary investigation, CA concluded that: there are facts about the abuse of the dominant position, that have consequences for market competition, in the behavior of the enterprise with a dominant position, "EKMA Albania" sh.p.k, in the market for renting premises for the storage of, and trade in, Agro-Food products in the city of Tirana. - Regarding the above, the CA decided to initiate an in-depth investigation procedure against the company "EKMA Albania" sh.p.k, in this in the city of Tirana; - In order to gather the necessary facts and the data related to the investigation, the CA collected comprehensive evidence in relation to EKMA sh.p.k, the Municipality of Tirana, as well as any testimony or written relevance evidence.

Circumstances of the facts ascertained by the CA and the Court

The company, "EKMA Albania" sh.p.k, operates solely in the market for the renting of premises for the storage of, and trade in, Agro-Food products, in the city of Tirana, so it has a dominant position in terms of market share.

The enterprise sets unfair trading prices and conditions, forcing tenant traders to pay a more expensive price for electricity than they actually have to pay, according to the bills issued by OSHEE and UKT (i.e. energy distributors in Albania).

Through the "type contract" of leases applied to tenants operating in this Agro-Food market, the company "EKMA Albania sh.p.k" imposes discriminatory and unfair trading conditions.

It applies contracts, which contain compulsory conditions only for one party to the contract - the lessee -- thus invalidating the general terms of these contracts, which results in a disproportionate loss or damage to the interests of the contracting party.

It obliges the lessee to negotiate month after month for its prices, inducing financial instability for the lessee, and placing the latter in unfavorable competition conditions, as well as forcing it to pay a guarantee that is validated by a 2-month payment, meanwhile, the lessor does not take on anything at all.

This company applies very high rental prices, if compared to the average for the geographical area. The prices applied enable the company to have a very high-profit rate of 76.1%.

At the end of the administrative investigation, the CA decided that: - they found that there was of a dominant position by the company, EKMA Albania sh.p.k, in the market for renting premises for the storage of, and trade in agro-food products, in the city of Tirana. - That there should be administrative punishment of the EKMA Albania shpk company.

Claims of the plaintiff

EKMA Albania does not hold a dominant position in this market; - the market offered by EKMA Albania cannot be considered irreplaceable; - There are no barriers to entry into the relevant market; - They stated that they had not abused their position, even though it was not a dominant one.

Legal Framework, Reasoning of the Court and Resolution of the Case

In the overall assessment of the case, the Court substantially raised two issues for resolution: - Does the company, "EKMA Albania sh.p.k.", have a dominant position in this market? -If yes, is there abuse of its dominant position in this market?

First, the Court referred to the concept of the law on the relevant market⁵⁶. According to the Court, the relevant market includes the product market and the geographical market. Leasing of premises and places in order to trade Agro-Food products, in the city of Tirana, is exercised by the company "EKMA Albania sh.p.k.", which operates solely in this market. According to the administrative investigation conducted by the Competition Commission, the result has been that, in Albania, there are other wholesale markets for agricultural products, such as in Elbasan, Divjaka, Lushnje and Shkodra. Due to their distance from Tirana, these markets are not an alternative for the consumers of the city of Tirana, as they are not equally accessible to them. In these conditions, we will consider the market for renting premises which aims to store and trade agro-food products, that is geographically in the city of Tirana, the "relevant market".

Article 3/7 of Law No.9121, dated 28.7.2003 "Relevant Market" means the market of those products, which are mutually interchangeable from the point of view of the consumer related to its characteristics, price and their intended use in the area, and which are supplied and demanded by the undertakings concerned in a geographic area where the competition conditions are sufficiently homogenous and which can be clearly distinguished from neighboring areas.

Dominant position⁵⁷ according to the law.

In evaluating these criteria, and regarding the criterion "market share", the Court found that the company "EKMA Albania sh.p.k.", operates solely in the market for renting premises for the storage and trading of agro-food products in the city of Tirana, possessing 100% of this market, thus it has a dominant position in terms of market share.

Regarding the criterion of "potential competition", the company "EKMA Albania sh.p.k.", has no competitors in the relevant market, as the service for renting premises for the storage of, and the wholesale trade in, Agro-Food products in the city of Tirana, is provided only by this enterprise, and currently there is no other enterprise that offers this service according to the conditions set out in the Decision of the Municipal Council of Tirana no.19, dated 09.04.2015. "On the location and other conditions of wholesale markets in the Municipality of Tirana".

With regard to the criterion: "countervailing power of consumers and buyers", in this case, traders, as tenants of premises for trade and storage, do not possess countervailing power in order to be considered, and they do not have the opportunity to move towards other lessors, since there are none in the relevant market.

Regarding the "economic and financial power of the enterprise", referring to the financial statements of the enterprise for 2017, the value of sales in the relevant market, presented as evidence by the respondent party in this trial, the company "EKMA Albania sh.p.k.", results in it having an annual turnover in the amount of 380,589,313 ALL, excluding VAT, with a profit rate of 64.7%, and, for 2016, a profit rate of 64.1%. The high profit rate of this enterprise is an indicator of its economic and financial strength.

Based on these criteria, the Court concluded that the company "EKMA Albania sh.p.k.", has a dominant position in the service market for leasing premises for the storage of, and wholesale trade in, Agro-Food products, in the city of Tirana, as it is the only operator that offers this service in the city of Tirana.

Article 9, Paragraph 2 of Law no. 9121, dated 28.7.2003, "On the protection of competition" as amended⁵⁸, provides for cases which constitute abuse of a dominant position.

According to the administrative investigation carried out by the Competition Commission, and accepted by the Court, this has resulted in the standard price for warehouses that are leased by the company "EKMA Albania sh.p.k.", being too high. In order to evaluate the behavior of the company "EKMA Albania sh.p.k.", regarding the price, the CA and the Court have analyzed practices of the same in other cities.

⁵⁷ Article 8 of Law no.9121, dated 28.7.2003 The dominant position of one or more undertakings shall be appraised notably, particularly by establishing the following: a) the relevant market shares of the investigated undertaking/s and those of the other competitors; b) the barriers to entry to the relevant market; c) the potential competition; d) the economic and financial power of the undertakings; e) the economic dependence of the suppliers and purchasers; f) the countervailing power of buyers/customers; g) the development of the undertaking's distribution network, and access to the sources for the supply of products; h) the undertaking's links with other undertakings; i) other characteristics of the relevant market, such as the homogeneity of the products, the transparency of the market, the undertaking's cost and size symmetries, the stability of the demand or the free production capacities.

⁵⁸ Article 9:1. Any abuse, by one or more undertakings, of a dominant position in the market shall be prohibited. 2. Such abuse may, in particular, consist in: a) directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions; b) limiting production, markets or technical development; c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; d) making the conclusion of contracts subject to acceptance by other parties with supplementary obligations which, by their nature, or according to commercial usage, have no connection with the subject of such contracts.

In order to evaluate the prices of rents in the geographical area in which the Agro-Food market is located, the Competition Commission has also analyzed the rental prices of enterprises operating in the same geographical area as the "EKMA Albania sh.p.k." company, but with a different object of activity.

With reference to the electricity invoices issued by OSHEE, billed to the company "EKMA Albania sh.p.k.", and the analytical invoices that the company "EKMA Albania sh.p.k" billed to the tenants, which were administered as evidence in this trial, it seems that the price of energy billed to the company "EKMA Albania sh.p.k." by OSHEE is imposing, and has been set by it in relation to standard contracts and with a price higher than that in normal conditions.

The administrative investigation, also concluded that the same behavior was noticed in the way water was billed for by the company "EKMA Albania sh.p.k."

Furthermore, tenant traders are not notified for the amount of electricity and water consumed, as the invoice that is issued to them by the company "EKMA Albania sh.p.k.", contains only the total value, in the relevant item of the "environmental lease", and it is not detailed in all of the items of expenditure that it actually carries (i.e., it does not include as special items the expenses for electricity, water and cleaning).

In order to evaluate the behavior of the enterprise "EKMA Albania sh.p.k.", in relation to its dominant position, the Competition Commission also investigated the behavior in the contractual relations that it has had with the lessee entities.

This administrative investigation concluded that the company "EKMA Albania sh.p.k.", does not apply laws and good trade habits, since the lease contracts concluded between it, in the capacity of the lessor, and traders, in the capacity of the tenants, apply and impose unfair trading conditions.

These contracts also significantly reflect its predominant positions regarding the terms of the contract, and the execution and termination of the contract.

The administrative investigation also resulted in the knowledge that the company "EKMA Albania sh.p.k.", due to its dominant position, transfers services, mainly that of cleaning, to the tenants. According to the Decision of the Municipal Council of Tirana no. 19, dated 09.04.2015, these services were to be provided by the enterprise itself.

The standard lease contracts applied by the company "EKMA Albania sh.p.k.", recognize the tenant's right to negotiate with the lessor in relation to the price for the premises every month.

From the above, the Court concluded that this behavior, together with the dominant position of the company "EKMA Albania sh.p.k.", by imposing unfair trade prices and conditions on tenants, as well as by forcing them to accept additional obligations, constitutes an abuse of a dominant position against their tenant traders.

Kristina Maimann, Tallinn Administrative Court

Decision of the Supreme Court of 25 April 2019 (Administrative Case No 3-16-1267)

Complaint against the precept of the Estonian Competition Authority by the non-profit organisation, Jäätmekekeskus

Circumstances and procedure

Local governments in one region of Estonia formed a non-profit organisation (hereinafter referred to as *Jäätmekekeskus*, or the *complainant*), which organised municipal waste transport procurements in the territory of three municipalities, it being the waste management centre of the region.

Jäätmekekeskus was also responsible for keeping records of, and conducting settlements with, waste holders (who were legally deemed to have subscribed to the service for organised waste transport). The provision of the waste transport service was tasked to a separate company that was selected by a procurement process. Jäätmekekeskus was the sole customer of, and payer into, this waste transporting company, itself conducting settlements with consumers for the service. This possibility was provided for by the Waste Act (JäätS, section 66 (1¹)) until 7th January 2015, and onwards until the expiry of the relevant contracts that had been concluded by that time.

In addition, Jäätmekekeskus was entitled to compensation for the reasonable costs of the accounting of, and settlement with, waste holders, on account of the waste transport service fee. All administrative contracts also regulated the setting of the service fee for waste transport, which Jäätmekekeskus had to coordinate with the local authorities before its introduction.

In the case at hand, the disputed issue was the amount of the fee charged by Jäätmekekeskus for the accounting of, and settlement with, the waste holders, which was considered by the Competition Authority to be too high, and therefore the Competition Authority issued the precept to Jäätmekekeskus, obligating it to cease the abuse of its dominant market position. The Competition Authority has ordered Jäätmekekeskus to reduce the prices for the emptying and transporting of waste containers, as set out in the price lists for organised waste transport services in the area under dispute, so that the part of the fees received from the consumers with which Jäätmekekeskus is left, without the revenue from additional services, and after the payment of fees to the waste handler and carrier, does not exceed 15% of the fees received from consumers, without the revenue from additional services, in each individual area.

The complainant challenged the precept before the Administrative Court. Jäätmekekeskus found that the Competition Authority had mistakenly regarded the complainant to be an undertaking, and its activities as participating in the product market. A performer of public duties under an administrative contract with a local authority is not an undertaking within the meaning of the Competition Act. The Competition Authority had misinterpreted the principles of EU competition law and had failed to consider whether the price of the service had a reasonable relation to its economic value. The appellant's data was compared with those of waste handling undertakings whose application had led to the initiation of the supervisory procedure, and who have not concealed their desire to provide the disputed service themselves in the largest municipality.

In the judicial proceeding, the Competition Authority found that it had correctly defined the product market, and that it followed a broad definition of the concept of an undertaking. The Competition Authority found that, in a situation where the municipality provides essentially the same service as the undertakings do under free market conditions, the provision of that service is considered to be part of the product market. The accounting for, and settlement with, waste holders, are not the exercise of public tasks and are, by their nature, the provision of a service. The respondent sought to find out what the cost

level of the hypothetical average undertaking would be in a competitive situation. The Competition Authority found that the higher average costs resulting from the low operating volume of the undertaking were incurred as a result of inefficient management, and it is unfair to require them to be borne by the customers for the services of the dominant undertaking. One of the main objectives of competition law is to increase the well-being of consumers by preventing undertakings from restricting free market competition and to thereby harm consumers.

The issues raised by the parties to the dispute were thus as follows:

- 1) Is the applicant an undertaking, and are its activities an involvement in the product market, or are the accounting for, and settlement with, waste holders, a public task?
- 2) Is the price of the service unfair, and is the appellant thereby abusing its dominant position (Section 16(1) of the Competition Act; Article 101(1)(a) of the Treaty on the Functioning of the European Union (TFEU))?

Rulings of the Courts:

The Court of First Instance denied the appeal, but the District Court annulled the Competition Authority's precept, after which the Competition Authority appealed to the Supreme Court. The Supreme Court upheld the resolution of the District Court's ruling but changed the reasoning of the District Court.

The Court of First Instance held that the case falls within the scope of the Competition Act (acting in a dominant position on the product market, using it to set an unduly high price for the service). The Court referred to the explanatory memorandum on the draft amendment of the applicable provision of law (JäätS, section 66 (1¹)), which states, as a justification for the amendment of the law, that the application of the rule has led to the creation of a new local authority, or a related person, in a monopoly position, whose conduct on the product market must be subject to the rules of competition law. In the case of a service that is organised by a local authority, a monopolistic undertaking cannot impose prices on waste holders (consumers) without control. The Court referred to the case-law of the Court of Justice by stating that the mere fact that a person performs a function of substantial public interest does not preclude him from being regarded as an undertaking in the context of competition law (C-41/90 *Klaus Höfner et al*; C-475/99 *Ambulanz Glöckner*). As regards the question of price and the interpretation of the terms "economic value" and "reasonable relationship", the Court based its judgment on the adjudication of the Court of Justice in Case No. C-27/76, *United Brands*, and Case No. C-26/75, *General Motors Continental NV v the Commission*. The Court found that the price established by an undertaking with a dominant position is unfair where it is not in a reasonable relationship with the economic value of the service.

The Court of Second Instance acknowledged that the waste management carried out in accordance with the contested provision is not open to free competition. The complainant is a dominant undertaking. The respondent has justifiably considered the accounting for, and settlement with, waste holders, to be a service that is offered on the product market, since, unlike other components of the price of the organised waste transport service, which are formed under competitive conditions (within the framework of the procurement), the local government entity, or its authorised non-profit organisation, determines the service fee under the law, and without competitive pressure. The Competition Authority has not intervened in the right to discretion by the local government in regard to waste management but has reasoned the precept with the claim that the way in which the waste management is carried out violates the rights of waste holders with undue intensity. As regards the fairness of the fee, the Court found that, since the appellant's pricing is based on objective circumstances, the price being close to the cost price of the service, it has no anti-competitive effect, and the fee for waste management as a whole is not significantly higher than it is elsewhere in Estonia, therefore it is not an abuse of a dominant

position through unfair pricing. The Court added that the relative expensiveness of the disputed service stems from the choice of the legislator.

The Supreme Court found that the Competition Authority was not competent to exercise supervisory powers.

The activities of Jäätmekeskus, in accounting for, and settlement with, waste holders, are activities that are related to the exercise of public authority, which means that it cannot be considered to be an undertaking's activities, within the meaning of the Competition Act. The activity is carried out on the basis of administrative contracts, and it is not an independent service for which a separate product market exists. It performs only an assistive function. The Supreme Court referred to the case-law of the Court of Justice.⁵⁹ Consequently, the activities of Jäätmekeskus are also not subject to a prohibition of abuse of a dominant position by an undertaking, and the Competition Authority did not have the legal basis for supervision.

At the same time, the State Court noted that the absence of the Competition Authority's supervisory powers does not mean that the level of fees for the waste transport services could not be verified by the Court. Any waste holder shall have the right to apply to an administrative court if he considers that the amount of the obligation imposed on him is disproportionate.

Consequently, there was no need for the Supreme Court to examine the arguments relating to pricing.

As regards competition law in the European Union, the Supreme Court also stated: "In interpreting the Competition Act as an Act being in large part based on the European Union's competition law, it is justified to follow the case-law of the Court of Justice of the European Union also in cases where there is no effect on trade between Member States, in order to avoid two different rules of competition law applying in one country alongside each other. To that end, the interpretation must take account of the case-law of the Court of Justice of the European Union in the application of Articles 101 and 102 of the TFEU and their predecessors."

Comment

I have no objection to the way in which the Supreme Court settled the dispute, since the Court of Justice's observations, which are referred to in the judgment, were relevant and were correctly followed by the Court. The central provision that legalised the local government's "waste monopoly" and that also applied in the case at hand, has now, justifiably, been repealed (by the legislator). However, the provision of the service continues to take place under the administratively limited conditions of competition (through the award of a concession organised by local authorities). The case at hand was another attempt by the Competition Authority to achieve an open market situation in waste management. Although I share the view that the State should not intervene in areas where, in principle, the market

⁵⁹ An undertaking is any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed (Höfner, C-41/90, Clause 21; the merged cases of Poucet and Pistre, C-159/91, and C-160/91, Clause 17; Ambulanz Glöckner, C-475/99, Clause 19; Albany International, C-67/96, Clause 77; MOTOE, C-49/07, Clause 21, etc.). Economic activity is the supply of goods or services in a given market (Pavlov, C-180/98, Clause 75; Wouters etc., C-309/99, Clause 47, etc.). The State itself, or a public body, may also act as an undertaking (Compass-Datenbank, C-138/11, Clause 35). However, activities related to the exercise of public authority by their nature, and the purpose and rules to which they are subject, are not considered to be economic activities (Cali & Figli, C-343/95, Clauses 16 and 23; MOTOE, Clause 24, etc.). In doing so, it has also been considered that the exercise of public authority will involve assistive activities in the exercise of public authority (Eurocontrol, C-113/07, Clauses 72-79). In the event that an economic activity cannot be regarded as being separate from the exercise of public authority, all the activities of that entity shall be deemed to constitute activities that are related to the exercise of public authority (Compass-Datenbank, C-138/11, Clause 38).

could function smoothly without State interference, the right to make that choice belongs to the legislator, as the District Court pointed out in its judgment.

Still, it is doubtful to me whether the consumer (the individual) will be able to effectively stand up for his rights if he finds that the public service fee is unduly high. It is also questionable whether the environmental objectives (with regard to the waste hierarchy) have been sufficiently prioritised for waste management organised by local authorities (if the waste is transported to a waste facility, or places that are designated by the local authority, and in which they have economic interests).

Despite the Supreme Court's finding in 2015 (in a constitutional review case) that the waste management fee is a public financial obligation, and its administration has been delegated by the public authority to one person in a particular territory, the Competition Authority initiated the supervisory procedure. The Lower Instance Courts probably did not correctly understand the position referred to by the Supreme Court and, in addition, they followed the case-law of the Court of Justice, but neglected, in particular, the adjudication of the Court of Justice in Case No. *C-113/07 P Eurocontrol*. In it, the Court of Justice took the view that assistive activities that are deemed to be covered by the exercise of public authority could also be regarded as exercising public authority. In my view, this was not a desire to disregard the case-law of the Court of Justice.

Based on the case analysed, there is no reason to believe that the Estonian courts would not be cooperative and would not follow the views and guidelines of the European Court of Justice. In the present case, there was no need to ask the Court of Justice for a preliminary ruling. In my view, the case shows well how different the views of judges can be, and how important it is to organise such training courses in order to ensure the understanding of complex fields, such as competition law, in the European Union, and to ensure familiarity with the relevant case-law of the Court of Justice.

Pedro Marques, Lisbon Administrative Court

Supreme Administrative Court, Judgment of 12.07.2017; Case number 328/17

Brief summary of the dispute

In this case relating to a public contract, the Plaintiff, a security company and a competitor in a procedure for choosing a company to provide surveillance services at a Portuguese University, believes that the final decision must be annulled, based on a violation of the competition principle.

Public Procurement Law in Portugal is ruled by Decree-Law 18/2008 (the Code of Public Contracts), which establishes the rules applicable to public procurement and the substantive regime governing public contracts that take the form of administrative contracts.

At stake is the determination of the business proposal's price and the alleged impossibility of the proposal of the security company to win the procedure by presenting a lower price per worker, considering the average market price and the values defined in a company agreement (Collective Agreement registered at the Ministry of Labour's Office).

It also alleges that the announcement of the procedure is illegal and violates the competition law, since it establishes minimum values by correspondence for the values per worker that are defined in a Collective Agreement, reduces the autonomy of private companies in choosing the best conditions for presenting a proposal, and does not fulfil the public's best interest.

The plaintiff claimed that his proposal was the one with the lowest price, therefore it was the best proposal. And the fact that the proposal has a price value below the values per worker that are defined by the Collective Agreement, should not be a cause for exclusion from the procedure, and should therefore be the company to win the procedure and sign the contract.

Summary of the judicial proceedings

The Administrative Court of First Instance ruled that the action was well founded and, on that basis, annulled the decision of the procedure. It considered that the inclusion, in the Notice and in the Program of the procedure, of a reference value per hour and per worker, as defined in a Collective Agreement, was mandatory in that the lower value limited the competition principle.

An appeal was made to the Court of Appeal, and it was decided that the inclusion of the clauses referring to the formation of the price by reference to the minimum values contained in a Collective Agreement, did not violate competition law and were at the discretion of the competition jury.

The Court of Appeal overturned the ruling of the Court of First Instance.

An appeal was filed to the Administrative Supreme Court in order to discuss whether those clauses violated competition law, as they limited access and participation in the procedure.

The ruling of the Court

The Supreme Court ruled that it does not violate the competition law. The clauses of the Notice calling for competition, in this specific procedure, include, as an element to be taken into account when considering the abnormally low price, as in the above-mentioned Collective Agreement, because this requirement does not imply, in itself, a limiting and inappropriate attitude to participation in the public procedure.

The Supreme Court ruled that the judgment of the Court of Appeal was correct.

This Supreme Administrative Court decision had a discordant vote. One of the Judges understood that those clauses violated the competition law, which had also been recognized by the National Competition Authority itself, as this might involve public intervention in the definition of the price, with an impact on the competitive market in this area of services.

Comment

This case is interesting because it analyzes the State's intervention (and its limits) in the definition of the rules of the contracting procedure, which may implicitly interfere with private autonomy and limit the participation of companies in these procedures.

The inclusion of clauses in the Notice of a call for competition, and in its program, that contain a minimum price limit by reference to values contained in a companies' agreement (a Collective Agreement), prevents a the participation of some companies which practice lower values.

Implicitly, there might be a public intervention in the definition of the price, which thus influences the market.

Before launching a procurement procedure, contracting entities may, using technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided. However, such advice must not have the effect of precluding competition.

As understood by the case law of the Court of Justice, Article 102 of the Treaty on the Functioning of the European Union covers behaviour which has a competitive purpose or effect (*inter alia*, Case T-203/01; *Manufacture française des pneumatiques Michelin v Commission*, 30.09.2003, 241). It follows that, for the purposes of applying this Article, establishing the anti-competitive object and the anti-competitive effect are one and the same thing. According to this, if it is shown that the object pursued by the conduct of an undertaking that is in a dominant position is to limit competition, that conduct will also be liable to have such an effect. That can also be achieved by a Companies' Agreement (used to limit competition in a specific area of services).

Competition law aims to protect the market itself, together with the competitive dynamics. That's why, in my opinion, these types of clauses may, in fact, be illegal, as they can severely reduce the number of companies who are aiming to be candidates for a contracting procedure. Nevertheless, we can only reach that conclusion if we have enough facts on the case to support the notion that the inclusion of clauses in the Notice of call for a competition that contains a minimum price limit with reference to the values limits fixed in a Companies' Agreement is a limit to the competition in that area of services. Imagine the fact that a Company that did not subscribe to the Agreement is excluded from the procedure on the grounds that the prices per worker are not aligned with it. Overall, as the Supreme Administrative Court ruled, this requirement does not imply, in itself, that there is a limiting and inappropriate attitude to participation in the public procedure.

Competition & regulation in the telecoms and postal sector

Kerstin Jung-Walpert, Regional Court of Cologne

District Court of Cologne, 90 O 86/12

This Case is related to several implications relating to the privatisation and digitalisation of the telecommunications market in Germany. In short (and simplified):

Facts

In the '80s, the broadband cable network was set up by the State-owned Deutsche Bundespost and, after privatisation, it was taken over by Deutsche Telekom AG. Due to a regulation order by the German Telecommunication Office (Bundesnetzagentur), the different telecommunications services had to be unbundled. Kabel Deutschland was founded for broadband services and was split into nine regional corporations which have since been sold.

The broadband grid was, *inter alia*, used by radio- and tv-companies, including the German public service broadcasting corporations (öffentlich-rechtliche Rundfunkanstalten). They, as well as the customers of the broadband cable operators, pay fees for the services. The German public service broadcasters (i.e., ARD, ZDF, DLR and ARTE), were thus compelled to spread their programs all over Germany by law (Rundfunkstaatsvertrag), and contracted with the large broadband undertakings to buy the services they needed, although those operators were compelled to transport the signal by the same law. The fees were dedicated to further developing the broadband network.

In 2008, the German market for broadband services was occupied by several small undertakings of minor scope (for example, NetCologne) and four large regional companies (Regionalgesellschaften), Kabel Deutschland, Kabel BW (Baden Württemberg), Unitymedia NRW and Unitymedia Hessen. Only the four regional cable operators were parties to contracts with the German public service broadcasting entities. Several approaches from smaller broadcasting companies to enter into negotiations were rejected. Before entering into a new contract for broadband services, a dispute arose between the parties about the payment of fees for the transport services, which the broadband companies are obliged to cover anyway. They thus laid down their different opinions in the preamble of the three contracts between the public broadcasters ARD, ZDF, DLR and ARTE, on one hand, and each of the broadband operators: Kabel Deutschland, Kabel BW and Unitymedia, on the other. These should have run until the end of 2012 and would continue beyond that date unless they were terminated by giving half a year's notice.

The uneasiness of the public service broadcasters about paying further fees was triggered by the opinion that support for the expansion of the broadband grid was no longer necessary, especially with regard to the developments in the company's structures. Since 2009, Unitymedia NRW and Hessen have been owned by Liberty Global, a multinational telecommunications company; moreover, in 2011, Liberty Global bought Kabel BW. Since 2014, Vodafone has held the majority of the capital of Kabel Deutschland. In 2018, it overtook Unitymedia and Kabel BW, and now has a monopoly in the German broadband market.

In March 2011, when Liberty Global announced that it was going to take over Kabel BW, the public service broadcasters ARD and ZDF agreed on the termination of the contract with the broadband companies. Thereafter they announced that fees for the services of the transport of radio- and tv-signals would no longer be paid by public broadcasters. This led to an intervention by the German Federal Cartel Office (Bundeskartellamt) in January 2012, which was followed by a discussion with lawyers and a meeting in April 2012. As the broadcasting companies held that there was a contractual need for a combined declaration of notice for termination of the contract, they, together, sent their termination letters to the broadband cable operators in June, 2012.

Claims and rulings

In response, the broadband companies commenced several actions against broadcasters, and these are summarised in the attached table. The chronology of decisions in the First, Second and Third Instance Courts is marked by colours. The very last case to be decided in the First Instance was brought to the 10th Chamber on Commercial Matters at the District Court of Cologne (LG Köln), at which I was presiding. Whilst Kabel Deutschland claimed for an annulment of the termination, Unitymedia sued for the payment of fees, based on the contract, which were in “my“ Case, Euros 17 millions in 2013 alone. At the beginning of this process, Unitymedia, and the defendants, deferred their statements while waiting for the first conclusions in the suits filed by Kabel Deutschland. After the Düsseldorf Higher Regional Court (OLG Düsseldorf) had ruled on Kabel Deutschland's appeal in another case that had been decided very early on by the Cologne District Court (LG Köln), it would be possible for the reasons for the ruling to be applied to the Unitymedia claim.

The attached table shows that the actions brought by Kabel Deutschland were decided in the First Instance by various German courts in quick succession, all of them resulting in the dismissal of the lawsuit. It seems unlikely that the courts had been guided by the conclusions of earlier decisions, the more so as the reasons for the decisions vary in their details. The situation was different in the Appellate Instance, although there, too, all the rulings issued before the first decision of the Federal Court of Justice (BGH) led to the dismissal of the action.

The cases raised a variety of legal problems, not all of which will be discussed here. A large number of the legal issues were confirmed by the Federal Court of Justice (BGH). This applies, in particular, to the question of whether the terminations were to be disregarded, because there was an obligation for the public broadcasters to enter into a contract with the broadband companies anyway. This rationale was rejected on different grounds, due to the special provisions in the “Rundfunkstaatsvertrag”, at least to the extent that the broadcasters cannot be forced to use the services of the plaintiffs on the same terms and conditions as those laid down in the 2008 agreements, nor in a proposal submitted by them as an alternative.

The preliminary decisions were also upheld with regard to the assessment under competition law, taking into account the abuse of a market-dominant position by the defendants. However, the Federal Court of Justice (BGH) refused some of the arguments brought forward from the lower Courts, for example, the assumption (e.g., in the judgment of the Düsseldorf Higher Regional Court of 21st May 2014) that there was neither a market-dominant position of the public broadcasters, nor a demand for broadband cable services. Another aspect worth mentioning at this point is that the Federal Court of Justice (BGH) raised the question as to whether the more recent case law of the European Court of Justice on the definition of an undertaking (CJEU, Judgment of 4th March, 2003, FENIN/Commission, T-319/99, ECLI:EU:T:2003:50; CJEU, Judgment of 11th July, 2006, FENIN/Commission, C-205/03 P, ECLI:EU:C:2006:543; CJEU, Judgment of 26th March, 2009, SELEX/Commission, C-113/07, ECLI:EU:C:2009:191) should be followed, or whether its own case law, which also covers the procurement activities of public authorities, should continue to apply.

The main issue discussed in these cases is, however, the assessment of whether the public service broadcasters were allowed to agree on the termination of the contracts before each of them gave notice of such termination to the broadband cable operators. Until today, there has been a lengthy dispute as to the extent to which the provisions against illegal cartels would apply, or rather affect, the termination itself. In Germany, the key provision is § 1 of the Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), which has taken over, and that has partly extended the scope of the application of Art. 101 TFEU, insofar as agreements and concerted practices which only have a restrictive effect on competition in the national market are concerned.

Taking a look at the development of the rulings shown in the attached table, there has been a clear tendency by the Courts in the First and Second Instance (until the first decision of the Federal Court of

Justice "Einspeiseentgelte") to decide - partly on a limited factual basis - that the requirements of § 1 GWB had not been fulfilled. To this end, they presented different arguments. In particular, they stated that the public broadcasters had been forced by various circumstances to make a prior decision on the termination of the contracts. As such reasons were assigned, the contractual provisions, which only allowed for a joint notice of termination, the necessary cooperation of the broadcasters that are united in the ARD with regard to so-called joint programs (Gemeinschaftsprogramme), as well as the fact that these broadcasters are shareholders in the ARTE channel.

While the last two arguments could not justify the fact that ZDF and DLR were also involved in the pre-termination voting, and therefore had to be rejected, the contractual situation was mostly used to adjust the course of action taken by the broadcasters to be excluded from the cartel ban. Actually, the contract provided for the termination by notice of the public broadcasters altogether, except in the case of termination without notice, which had been granted to each individual broadcaster for defined situations. Moreover, only in the event of such an isolated termination by one broadcaster was it settled that the agreement with the other broadcasters would continue to exist.

In its first decisions from 2015 and 2016, the Federal Court of Justice (BGH) did not specifically comment on the contractual regulation of the right to termination, due to absence of relevant pleading by the defendants (ARD, WDR, SWR and BR). Only in the subsequent decision "Einspeiseentgelt II" of 18th February 2020, was the Court forced to take a position on this issue as the argumentation was increasingly brought forward, especially in the Unitymedia cases. It concluded - as the Düsseldorf Higher Regional Court (OLG Düsseldorf) had previously in its very detailed decision of 12th July 2017, that the contracts could have been terminated separately by each of the defendant broadcasters even if there were no grounds for a termination without notice.

Consequently, all the decisions of the Federal Court of Justice (BGH) focused on the questions to whether there was sufficient evidence of coordination between the public service broadcasters with regard to the termination of the contracts; this had been denied in some of the First and Second Instance decisions.

Furthermore, and significantly more important, the Federal Court of Justice (BGH) elaborated on the consequences which could possibly arise from such an agreement on the termination of the contracts by the public service broadcasters. In this regard, the District Court of Cologne (LG Köln), in its decision of 13th April, 2013, had already taken the view that the invalidity of the agreement on joint termination, pursuant to § 1 GWB, would not lead to the invalidity of the terminations themselves, as this would merely be a matter of implementing the ineffective vote. In the Third Instance, the Federal Court of Justice (BGH "Einspeiseentgelt") stated that this legal question had never been discussed either in case law or in the literature. The Court came to the conclusion that the broadcasters' declarations of termination, although they were unilateral acts of mere implementation, were invalid, just as much as if they were the consequence of the previous agreement about the termination of the contract. This would apply if no independent and autonomous decision had been made in the meantime.

With regard to the requirements for the determination of the autonomous and independent decision of the broadcasters to give notice of termination, the Federal Court of Justice (BGH) took a much stricter position than the previous instances by referring to the case law of the European Court of Justice (CJEU, Judgment of 8th July, 1999, Commission/Anic Partecipazioni, C-49/92 P, ECLI:EU:C:1999:356, Paragraph 121; CJEU, Judgment of 8th July, 1999, Hüls/Commission, C-199/92 P, ECLI:EU:C:1999, 358; Paragraph 158-191; CJEU, Judgment of 4th June, 2009, T-Mobile Netherlands/NMa, C-8/08, ECLI:EU:C:2009:343, Paragraph 51-62). Discussions are ongoing as to whether these conditions have been met by the broadcasters' course of action after the agreement of March 2011. According to the most recent decision of the Düsseldorf Higher Regional Court (OLG Düsseldorf) of 12th July 2017, there is not sufficient evidence for the assumption that the broadcasters have honoured the April 2012 warnings from the Federal Cartel Office (Bundeskartellamt), and therefore acted reasonably and in

conformity with the law. In addition, the Düsseldorf Higher Regional Court (OLG Düsseldorf) also considered the subsequent notices of termination to be invalid, which were issued by the broadcasters immediately after the first ruling of the Federal Court of Justice (BGH) of 16th June 2015, in order to preserve the notice period that was expiring on 30th June, 2015. The Court stated, with respect to the rulings of the CJEU, that the presumption of a continuing effect of the anti-competitive coordination between the broadcasters in 2011 was not refuted by them, not even when considering the fact that the broadcasters were prompted by the BGH's ruling to act independently. They would have had to prove this by submitting internal decisions or general announcements that would have made it clear that they had abandoned their original decision.

Comments

The development of the case law that is shown above indicates that - after all - the legal principles of the CJEU are being applied by German courts, although disputes about the details remain. There is some criticism about the fact that the contracts are still effective, although they are outdated in terms of the recent situation and the broadband market.

It should be emphasized that this also has far-reaching consequences for the parallel claims of those cable operators with whom the broadcasters have refused to contract. They demand fees on the grounds of discrimination for as long as payments to the parties of the contracts continue. This is the subject of the decisions on "NetCologne". After the District Court of Cologne (LG Köln) had admitted NetCologne's claim on the merits in 2013, the Düsseldorf Higher Regional Court (OLG Düsseldorf) dismissed the claim on appeal by the broadcasters, as they are not obliged to pay fees, even if the services provided by the cable network operators were necessary. This decision was overturned by the Federal Court of Justice (BGH "NetCologne") in 2016, because the refusal to pay any fee could be considered misconduct pursuant to § 19 (2) No. 2 GWB. In its ruling of March 2017, the Düsseldorf Higher Regional Court again dismissed the complaint, as no abuse of a dominant position by the broadcasting companies could be established: The economic potential of the plaintiff had not been impaired and was even greater than that of the defendants. The Federal Court of Justice also rejected this argumentation in its decision of 3rd December 2019, and referred the case back to the Düsseldorf Higher Regional Court.

Fernando Nieto Martín, Supreme Court of Spain

Relevant legislation

- State Aid. Art. 108.3 TFUE.
- Decision of the European Commission, 19/06/2013.
- Ruling of the EU General Court, 26/11/2015.
- Order of the “Junta de Andalucía”, 17/03/2016.
- Ruling of the Court of Justice of the EU, 20/12/2017.
- Letter from the Commission to Spain, 06/02/2018.
- Ruling of the Andalusian High Court of Justice, 10/07/2018.
- Order of the Supreme Court, 01/03/2019.
- Ruling of the Supreme Court, 21/01/2020.

Facts

In order to carry out the transit from analogue to digital television, between 2005 and 2009, the Spanish Administration developed a series of proceedings that were aimed at distributing the signals throughout the national territory.

The map of Spain was divided into several zones. Zone II included poorly populated and remote regions. In these areas of low commercial interest, broadcasters avoided investing in the digitization of television signals. Thereafter, the Administrations carried out the implementation of a public financing system.

The State invested EUR 163 million, and Autonomous Communities EUR 60 million.

Following the complaint of Ses Astra Ibérica S.A., in 2010, the European Commission opened an investigation on the grants received to extend the D.T. network in remote areas of “Castilla-La Mancha”.

On the 19th June 2013, the European Commission issued Decision 2014/489/EU, declaring the grants to be illegal and incompatible with the internal market.

The aid allocation did not take into account other signal distribution systems, such as satellite, cable or the Internet, thus violating the principle of technological neutrality, with subsequent discrimination between the various operators:

“... Article 3.1. Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from the Digital Terrestrial Television operators, whether they received the aid directly or indirectly (...) Article 4.1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective” (Decision 2014/489/EU).”

The decision was challenged before the General Court of Spain, Basque Country, Galicia, Catalonia, as well as by several D.T. operators.

The General Court dismissed the claims by sentences on the 26 November 2015. Cases T-461/13 to T-465/13; T-487/13; T-541/13.

The CJEU dismissed all the appeals, except that from the “Junta de Galicia”, C-70/16, on the following grounds:

"... 62. That failure to state reasons constitutes an infringement of essential procedural requirements and therefore impedes judicial review by the EU judiciary".

Between the sentences of the General Court and the Court of Justice, the "Junta de Andalucía" issued an order (on the 17th March 2016), imposing the recovery of Euros 5,079,388.06 from Retevisión I, S.A.U.

The order from the Ministry of Employment, Business and Commerce, was challenged in the High Court of Justice of Andalusia, Sevilla Chamber.

On the 10th July 2018, the TSJA estimated the action brought by Retevisión I, S.A.U.:

"... The judgment of the Court of Justice of the European Union of the 20th December 2017, annulled Decision 2014/489/EU on the grounds (...) The foregoing means that the contested administrative act lacks the legal basis on which it was explicitly based, the only one that motivated and protected its dictation."

Consequently, the resolution of the "Junta de Andalucía" on the 17th March is against the law, because it is based on a decision of the European Union which has been annulled" (ECLI: ES: TSJAND: 2018: 11552).

On the 1st March 2019, the Supreme Court admitted the cassation that had been prepared by the "Junta de Andalucía".

The "cassational interest" of the conflict was linked to the value of initiating new proceedings from the European Commission, which was aimed at recovering the grants:

"Even in the case of judicial annulment, on formal grounds, of a Commission decision declaring the aid incompatible".

"... 2°. To declare that the question raised in the action which presents an objective point of interest for the formation of case-law (...) and, in particular, whether the processing of such proceedings before the Commission enables it to issue acts of recovery of the aid, or to maintain its effectiveness even in the case of judicial annulment, on formal grounds, of a Commission decision declaring the aid incompatible, finding the aid incompatible, followed by a reopening of the procedure in that TFEU Article" (ATS de 01/03/2019. ECLI: ES: TS: 2019: 2226A).

The "Junta de Andalucía" highlighted the fact that there was already a new procedure which had been initiated by the European Commission (*cf.*, Letter sent on 06/02/2018 to the government of Spain), and invoked a CJEU ruling of 21/11/2013, Case C-284/12. The Junta demanded that the Supreme Court refer a request for a preliminary ruling before the CJEU.

The judgment of the Supreme Court 98/2020, of 29th January 2020 (ECLI: ES: TS: 2020: 221) rejects the action.

Its starting points are:

- Supreme Court sentence 1500/2018, 11 October (ECLI: ES: TS: 2018: 3628). Which analyses, in depth, the influence of the CJEU ruling of 20/12/2017, in the event of the application of interim measures on new resolutions requiring the return of aid (in the field of digital terrestrial television also).
- Sentence 1500/2018 provides a summary of the jurisprudence of the Supreme Court in interpretation of Article 108.3 TFEU. Citing Communication 2009/C. 85/01 and CJEU of 14/06/2011, Case C-360/09. Finally, overturned the Court's decision on the need to "... ensure the effective implementation of the treaty rules.
- Council Regulation (EC) 659/1999 of 22nd March.

And its main reasoning is as follows:

It is not apparent from Regulation 659/1999, of the 22nd March, or from the case-law of the Court of Justice, that national judges are bound to ensure the enforcement of orders for the return of public aid (breaching competition rules), where the European Commission's decision has been annulled:

"... the consequence that the obligation of national courts to ensure compliance with a decision, which has been invalidated by finding that there is a substantial procedural defect in the absence of a statement of reasons, persists independently of the obligation of national courts to execute a decision which has been invalidated in the finding that there is a substantial procedural defect consisting in the absence of a statement of reasons".

"... that obligation is not inferred from the content of Article 14 of Regulation (EC) 659/1999 (...) or from the case-law of the Court of Justice on Article 108.3 of the Treaty on the Functioning of the European Union".

Maintaining the legality of the recovery order of the “Junta de Andalucía” of the 17th March, 2016:

"... would support an execution of the Commission decision devoid of the legal backing."

The High Court of Justice of Andalusia:

"...follows the ruling of the Court of Justice of the European Union of 20th December, 2017".

There is no contradiction with the legal solution reached by Supreme Court sentence 1500/2018:

"... *due to the clear divergence in the assumptions analyzed in both processes.*"

The CJEU of 21/11/2013, mentioned, in the appeal lodged by the “Junta de Andalucía”:

"... *it is not decisive in resolving the controversy raised in this case.*" Finally, there is no need to refer a request for a preliminary ruling.

And it summarizes, in two phrases, what the "jurisprudential doctrine" is:

"... As is apparent from the foregoing arguments, we consider that the declaration of invalidity, by the Court of Justice of the European Union, of a Commission's decision declaring State aid unlawful, thus depriving the procedural actions undertaken by the authorities of the Member States of validity and legal effectiveness"; "... the authorities of the Member State concerned cannot take irreversible measures to implement such a European resolution immediately and effectively".

Comment

The reasoning used by the High Court of Justice of Andalusia (Sevilla) are, in my opinion, very limited. Furthermore: - it does not examine the doctrine of the CJEU in the interpretation of Article 108.3 TFEU; - and it does not explain what the consequences of the Letter sent, on 6th February, 2018, by the European Commission, are.

Nor do I find those handled by the Supreme Court convincing, as they set aside the principle of the effectiveness of Union law, placing an excessive focus on the invalidity of the decision of 19/06/2013.

Its lack of a sufficiently in-depth analysis, and the contrast between the position reached by the Court and the rule of the CJEU, cited by the “Junta de Andalucía” (CJEU of 21st November, 2013, Case C-284/12).

From my point of view, the judgment diverges to that of the STS 1500/2018, which was also dictated by the implementation of the grant's recovery from digital terrestrial television (in the field of interim measures that try to suspend the recovery orders):

"... the duty of national courts to ensure the effective application of the Treaty rules (...) to a role more likely to avoid, on an interim basis, the further effects are, in principle, pernicious...".

"... As it satisfies both the principle of the effectiveness of Community law and the assurance that, if their illegality is confirmed, the corresponding funds will be returned to the State or other public administrations by which they benefited from them". (STS 1500/2018, the 18th October).

In contrast, Judgment 98/2020 of the 21st January did not review the consequences that this invalidity has on the effectiveness of measures set out in defence of the internal market.

Under no circumstance does it take into consideration the intrinsic value that ought to be given to the letter of 06/02/2018, the existence of which is implicit and is planned throughout the debate:

"... even in the case of judicial annulment (...) followed by a reopening of the procedure under the mentioned TFEU Article" (ATS 01/03/2019).

"... and, therefore, the national authorities cannot autonomously execute orders for the recovery of the aid on the basis of a hypothetical judgment on what the content of the subsequent decision of the European Commission will be, which concludes the investigation file on the State aid at issue" (STS 98/2020).

From my standpoint, the existing doubts, and the dissonance with STS 1500/2018 called for the referral of a request for a preliminary ruling from the CJEU.

Rogier Stijnen, Rotterdam District Court

Case note on the Pawlak-case and Dutch case law

Introduction

With an eye on the theme of the ENTraNCE programme this year I took the liberty of choosing a case that does not concern hardcore competition law, but that concerns market regulation. Just as the energy market, the telecoms market and the public transport sector have, the postal service has dealt with the question of how to guarantee a certain service level to the users of these common goods and, at the same time, creating a single market. The Pawlak-case and the Dutch case law about universal service are only about this.

The Postal Directive and the liberalisation of the postal market

Directive 97/6, the Postal Directive, was the first step in the direction of a gradual liberalisation of the market for postal services. The Postal Directive established a regulatory framework for the postal sector at Community level, including measures to guarantee a universal service and the setting of maximum limits for the postal services which Member States may reserve for their universal service provider(s), with a view to the maintenance of the universal service, and a timetable for decision-making on the further opening of the market to competition, with the purpose of creating a single market in postal services.

Postal services are services involving the clearance, sorting, transport and delivery of postal items. Clearance means the operation of collecting postal items deposited at access points, which includes letter boxes on the public highway, and postal offices. Member States shall ensure that users enjoy the right to a universal service. Every Member State has to appoint at least one postal company to carry out the universal service obligation. The universal service obligation means that, at least on every working day, there should be one clearance and also one delivery to the home or premises of every natural or legal person throughout the country. This includes the clearance, sorting, transport and distribution of postal packages up to 10 kilograms. To maintain the universal service, the Member States were, in the first instance, allowed to give exclusive or special rights to universal service provider(s) for the reserved postal services.

Directive 2002/39 contained a substantial modification of the Postal Directive. This directive continued the liberalisation of the postal market and established a timeframe for the modified and controlled liberalisation, which should have been completed in the year 2009. With Directive 2008/6 the Postal Directive was again substantially modified to complete the liberalisation of the internal postal market.

Art. 7 of the modified Postal Directive deals with the financing of the universal service obligation. From now on, the Member States are not allowed to grant exclusive or special rights to carry out postal services.

Instead, the Member States are allowed to give compensation if the net-costs are determined and these costs form an unfair financial burden. The compensation must be in accordance with the EU-treaties. One can think of state aid, public procurement and a mechanism for cost sharing.

Art. 8 of the Postal Directive has not been changed. It reads:

“The provisions of Article 7 shall be without prejudice to Member States’ right to organise the siting of letter boxes on the public highway, the issue of postage stamps and the registered mail service

used in the course of judicial or administrative procedures in accordance with their national legislation.”

The *Pawlak* case

The Polish *Pawlak*-case deals with the issue of whether Art. 8 of the Postal Directive allows a Member State to pass a bill in which the issuing of a procedural document at the postal office of the national universal service provider, or at the postal office of the universal service provider of a Member State, equates with the submission of the procedural document at the Court itself. The Polish Code of Civil Procedure (the Code) was thus formulated. The main case law followed the text of the Code. As a result, it was less safe to issue an appeal at the office of an alternative mail carrier, because, in that case, the date for delivering the document at the Court was counted as the day of the filing of the appeal. It was thus more favourable for a litigant to issue his appeal at the office of the universal service provider, than to issue the document at the office of an alternative mail carrier. By issuing it at the office of the universal service provider, there is no risk to the litigant that the appeal is issued too late, in case he is issuing the appeal at the end of the period in which one is allowed to make an appeal at a National Court.

Due to the Code, combined with a limited appeal period, one is discouraged from using the service of an alternative mail carrier. The result of this might be that exclusive or special rights to carry out postal services are granted to the universal service provider. A minority of Polish judges were aware of this problem, and they chose to expand the law so that the issuing at any postal office was equivalent to the submission of a procedural document at the Court.

A Polish judge requested a preliminary ruling from the Court of Justice of the European Union (the Court) in a case in which an administrative authority had filed an appeal that was delivered at the Court by an alternative mail carrier days after the limited period of appeal. The first question was whether the Code falls within the scope of Art. 8 of the Postal Directive, or if the text of the Code was not in accordance with the ban on granting exclusive or special rights.

The Advocate General only noticed one problem in his conclusion: the Code was not only applicable to registered mail, but was also applicable to non-registered mail for a national court. The Code therefore gave the universal service provider a benefit which was not covered by Art. 8 of the Postal Directive. According to the Advocate General there was no problem with Poland using the Code for registered mail. The Court ruled differently in his *Pawlak* -judgment of March 27, 2019, Case C-545/17, ECLI:EU:C:2019:260, (published in the Dutch Administrative law journal *Rechtspraak Bestuursrecht* – AB 2019/349, with annotation by R. Stijnen). Italian, Dutch and other versions of this judgment are available, but, unfortunately, not an English one.

The Court takes the modified Art. 7 of the Postal Directive as a starting point for legal reasoning. Further, it dismisses the idea that the Code is not granting exclusive or special rights to the universal service provider. As a result of this, Art. 8 must be explained in a limited way. This means that, in accordance with Consideration 20 of the Postal Directive, a Member State can only claim the benefit for the universal service provider that the issuing of a registered mail item at the office of that universal service provider counts as the filing of this legal document at the Court if the Member State can prove that this profit for the universal service provider is necessary for reasons of public order and public safety, and this claim can only be made when the authorities have a legitimate interest. Poland could not give this evidence. Poland could thus not claim an exception under Art. 8 of the Postal Directive.

There were two more issues. The second question was whether the point of view of the minority of Polish judges a solution might be because, in that case, the alternative mail carriers would be given the same benefit. The question was whether this interpretation of the Code would fall under the scope of being directive-compliant interpretation, or that this widening of the Code to the offices of alternative

mail carriers would be considered to be *contra legem*. The third question dealt with the issue of whether an administrative authority could benefit from this directive-compliant interpretation.

The Court said that there was no need to answer the second question, because the administrative authority that filed the appeal, which is an emanation of the state, cannot invoke an EU Directive that is not properly converted into national law against a private person, otherwise the Member State would benefit from disregarding EU law. However, the Court still touches on the subject of the limitations of directive-compliant interpretation by saying that a directive-compliant interpretation which is *contra legem*, and which could also interfere with the application of the national rules about the appeal period, rules which were made to ensure legal certainty, limits the obligation to uphold a directive-compliant interpretation.

Dutch cases of administrative law

The Dutch General Administrative Law Act reads:

“Article 3:41

1. Orders which are addressed to one or more interested parties shall be notified by being sent or issued to these, including the applicant.

(...)

Article 6:7

The time limit for submitting a notice of objection or appeal shall be six weeks.

Article 6:8

1. The time limit shall start on the day after that on which the order is notified in the prescribed manner.

(...)

Article 6:9

“1. A notice of objection or appeal shall be deemed to have been submitted in due time if it has been received before the end of the time limit.

2. If it is sent by mail, a notice of objection or appeal shall be deemed to have been submitted in due time if it is posted before the end of the time limit, provided it is received no later than a week after the time limit has expired.”

According to case law, which was formed before the Pawlak- Judgment, it was only possible for a private company to claim the date of posting if the letter has been posted in a letter box, or at the post office of the universal service provider PostNL. This meant that one could only make a claim on the second part of Art. 6:9 of the General Administrative Law Act if one made use of the services of the universal service provider, PostNL. If the notice of objection was delivered at the administrative authority, or if the appeal was delivered at the Court by an alternative courier service, the document had to be received by the authority or Court on the last day of the period in which it is possible to raise an objection or to file an appeal. So, the second part of Art. 6:9 and the Dutch case law were a little similar to that in the Polish case.

Judges can be inclined to believe that the delivery of mail is more secure if the Dutch universal service provider, PostNL, is used, because this provider has the obligation to make at least one clearance and one delivery to the home or premises of every natural or legal person throughout the country on every working day. It has the infrastructure to accomplish this task, and other mail carriers lack this. These alternative mail carriers often make use of the network of the universal service provider to deliver their collected mail. Due to the great importance attached to legal documents and orders being properly cleared and arriving at the place to which it is destined, administrative judges gave the Dutch universal

service provider the benefit of trust above that given to other mail carriers. This was not only the case when Art. 6:9 was at stake, but also when administrative authorities sent orders by unregistered mail to civilians (see Art. 3:41, first part). The Council of State gave PostNL the benefit of the assumption that the post would reach its designated place. If the administrative authorities were to use another mail carrier, the administrative authorities would have to give evidence that the decision was actually received by the addressee (see the judgment of the Administrative Law Department of the Council of State of February 13, 2019, ECLI:NL:RVS:2019:424, AB 2019/210, with annotation by R. Stijnen).

The consequence of having more faith in the 24-hour services of the universal service provider than in the services of other mail carriers was that the agenda of the liberalisation of the postal market was frustrated. This was not in accordance with the Postal Directive and the Dutch Postal Act 2009.

Soon after the Pawlak- Judgment the Dutch judges decided to come to a new interpretation of the second section of Art. 6:9 of the General Administrative Law Act. In a case that was filed to the Rotterdam District Court, the administrative authority claimed that the notice of objection was delivered one day after the time limit. The objection was therefore declared inadmissible. The litigant could, however, show that his letter was delivered at the office of the alternative courier service on the last day of the time limit. The Rotterdam District Court ruled, on March 9th, 2020 (ECLI:NL:RBROT:2020:1982), that it is possible to come to a directive-compliant interpretation because the term “posted” doesn’t have to be narrowed down to putting the document in the letter box or handing it in at the post office of the universal service provider, PostNL. As a result of this, the objections were posted in time. The Central Board of Appeal, which is the highest judge in administrative cases relating to social security, ruled in the same way on June 16, 2020, (ECLI:NL: CRVB:2020:1207). This instance of appeal ruled that, from now on, the second section of Art. 6:9 of the Act applies to every mail carrier which is registered as such by the Consumer and Market Authority.

Personal comment

On the one hand, I can fully understand the trust that the judges have put in the Dutch universal service provider, PostNL. Particularly when there is a limited timeframe in which to make objections, or to file an appeal against a decision of an administrative authority that was sent by unregistered mail, one must be certain that post will arrive at the addressee. On the other hand, however, the opening of the market to competition for the purposes of creating a single market in postal services would be frustrated if case law were to favour the use of services by PostNL above the services of other registered mail carriers. The Pawlak -Judgment shows that Art. 8 of the Postal Directive must be interpreted in a restrictive sense. So, I think it was inevitable that the case law on the second section of Art. 6:9 of the General Administrative Law Act would change in accordance with the Pawlak- Judgment. I also expect that the case law of the Council of State on the sending of unregistered letters by administrative authorities will change accordingly. Just one more remark must be made to put things into perspective. In the Netherlands, the universal service deals with only 15 percent of the total volume of postal mail delivery.

Competition & regulation in the energy sector

Andrea Kretschmann, Court of Appeal of Brandenburg

Bundesgerichtshof (BGH), Beschluss of 08.10.2019 - EnVR 58/18

Oberlandesgericht (OLG) Düsseldorf, Beschluss of 26.04.2018 – VI-5 Kart 2/16 (V)

Facts

The Plaintiff operates an electrical distribution system in Germany. The tariffs that such operators may ask for for the use of the grid are subject to regulation by special authorities. In 2015, the regional regulatory authority fixed the revenue ceiling for the Plaintiff's enterprise at a lower level than requested. It referred, in its decision, to the Law on the Energy Industry (Energiewirtschaftsgesetz, EnWG) and the accompanying Ordinances on Incentive Regulation (Anreizregulierungsverordnung, ARegV) and on Electricity Grid Fees (Stromnetzentgeltverordnung, StromNEV). The Law on the Energy Industry (EnWG) stipulates that the tariffs paid for access to the grid have to be reasonable, transparent and non-discriminatory, and they have to be determined on the basis of efficient and comparable management with regard to incentives for efficient performance. The Ordinance on the electricity grid fee (StromNEV) lays down in detail the methodology used to determine the fee that the operator of the grid can ask for its use. The Ordinance on incentive regulation (ARegV) describes, again in detail, the methodology and the relevant factors that are used to determine the net profit, which is subject to the incentive regulation.

The Plaintiff applied against the decision of the regulatory authority to the Higher Regional Court in Düsseldorf (Oberlandesgericht, OLG) and, in the last instance, to the Federal Court (Bundesgerichtshof, BGH). The plaintiff argued, *inter alia*, that in both the ordinances that the regulatory authority's decision was based upon were void, because they infringed upon the authorities' independence. He claimed that, under EU Law, distribution tariffs and the methodologies to develop them had to be determined by the regulatory authority itself, whereas German statutory law set a framework of rules regarding the content of regulation, and therefore unlawfully limited the authority's discretion.

The background to this argument is to be seen in a proceeding before the European Court. In 2018, the Commission brought an action against Germany, before the European Court, for Breach of Contract (C-718/18), requesting the establishment of a failure to fulfil Germany's obligation under Directive 2009/72/EC of the European Parliament and of the Council of 13th July, 2009, concerning Common Rules for the Internal Market in Electricity, and repealing Directive 2003/54/EC (Directive 2009/72/EC). In these proceedings, the Commission argued that the German Law on the Energy Industry (EnWG) confers unlawful power on the German government to impose regulations by ordinance for the determination of tariffs and methodologies and this therefore infringes upon the exclusive competencies of the national regulatory authorities that are provided for in the Directive. The case is still pending.

Directive 2009/72/EC obliges Member States - *inter alia* - to ensure the implementation of a system of third-party access to the transmission and distribution systems, based on published tariffs, which are applicable to all eligible customers and are applied objectively and without discrimination among system users. These tariffs, or the methodologies underlying their calculation, have to be approved and published prior to their entry into force (Art. 32 Para. 1). Member States are further asked to confer on the regulatory authority the duty to fix or approve, in accordance with transparent criteria, the transmission or distribution tariffs, and their methodologies (Art. 37 Para. 1 lit a, Para. 6). The regulatory authority has to be independent and has to exercise its powers impartially and transparently. For this purpose, Member States shall ensure that the regulatory authority is legally distinct and functionally independent from any other public or private entity, and that it can take autonomous decisions, independently from any political body, and has separate annual budget allocations.

Ruling of the Federal Court of Justice

The Federal Court (BGH) rejected the plaintiff's appeal and held that the regulatory authority had lawfully taken into account the Ordinance on Incentive Regulation (ARegV) and the Ordinance on Electricity Grid Fees (StromNEV) when fixing the plaintiff's tariff.

The Federal Court (BGH) first outlined that both Ordinances complied with the statutory requirements of the national (German) Law on the Energy Industry (EnWG), and the relevant constitutional provisions of German Law. It further explained that, in its opinion, the Ordinances also met the requirements of the relevant Union legislation, namely, Directive 2009/72/EC, even if they contained detailed specifications relating to the content of the regulatory authorities' decision and the methodologies to be applied by them. According to the Federal Court, this limitation of the regulatory authorities' discretionary power had to be accepted and did not infringe upon the obligation of the Member States that was founded in the Directive in order to confer upon the regulatory authority the competence to determine relevant parts of the methodology for the calculation of tariffs. The Court stated that Art. 37 Para. 6 of the Directive did not oblige national legislation to abstain from content specifications relating to the regulation of the access and the use of electrical grids, and to leave all decision to the regulatory authority. Rather, the Directive conferred power on the Member States to form regulations relating to Energy Laws, according to their proper institutional organisation. It thus had to be taken into account that, under German Constitutional law, the administration may not regulate all of the areas of life, but the essential aspects must be determined by legislation. In the Court's opinion, Art 37. Para. 6 of the Directive therefore was to be understood in the sense that the regulatory authorities may only decide upon the application and the details of the normative framework that is set by the authority that is competent under national law. The authority that is competent under German law for the setting up of such a legal framework would be either the Parliament or, in the case of an appropriate enabling act, the Government.

The Court acknowledged, however, that it lacked the competence to come to a definite conclusion on the compatibility of the Ordinances' content with European Law on that point because of the proceedings pending before the European Court. Nevertheless, it granted a judgment in the plaintiff's Case, because it argued that, even in the case that the European Court stated that there had been a breach of European Law by Germany, the regulations of the Law on the Energy Industry (EnWG) and the pertinent ordinances would not automatically be void, because the Directive did not confer individual rights. The Court referred to the European Court's Judgments of 4th December 2018, (C-378/17), *Minister for Justice and Equality*, of 4th July 2006 (C- 212/04), *Andeneler* and of 29th June 2017 (C-579/15), *Poplawski*. In these rulings, the EU Court of Justice pointed out that, in principle, national authorities have to pay attention to the priorities of EU and national law, and this has therefore to be construed in a way that will comply with EU law. If such a construction is not possible, any individual may refer directly to the Directive only if this establishes individual rights. As this was not the case, the Court explained that it would be the Government's, or the Parliament's. task to provide for an appropriate remedy if the European Court should ascertain that there was a breach of contract by Germany in the pending case.

The Plaintiff's Claim was therefore dismissed.

Comment

This Case illustrates the difficulties arising when constructing legal concepts within different legal traditions and against different constitutional backgrounds. This raises the question as to what the notion "Independence" means in the context of regulation, and to how far not only the decision-making process, but also the power to develop the rules and methodologies, may therefore be conferred upon such a body that is distinct from parliament? Furthermore, the case highlights the problems of different levels of judicial control and the impact of proceedings before the European Court for Breach of Contract may, or may not, have on the claims of individuals before national courts.

Rytis Krasauskas, Supreme Administrative Court of Lithuania

On 13th June 2018, the Supreme Administrative Court of Lithuania (hereinafter the Court) delivered its judgment in the administrative case of ‘Vilniaus Energija’, UAB v. Competition Council of the Republic of Lithuania, No eA-507-552/2018 (proceedings No 3-61-3-06003-2015-0).

A brief summary of the facts of the dispute

On 2nd December, 2015, the Competition Council of the Republic of Lithuania (i.e., the national public authority which implements the State competition policy, the supervision of which is entrusted to it in the Republic of Lithuania) (hereinafter referred to as Competition Council), in its decision (hereinafter referred to as the Decision) held that ‘Vilniaus Energija’, UAB and First Opportunity Oü (hereinafter referred to as the Companies), entered into an exclusive biomass purchasing agreement which contained vertical restrictions. As their conduct constituted a restriction of competition by effect, the Competition Council imposed fines that amounted to 10% of the Companies’ gross annual income.

In the Decision contested before the Courts, the Competition Council found that the relevant product market is for crushed biomass, i.e., the crushed non-compressed biomass market, comprising biomass mixtures, sawdust, wood chips, crushed wood and other types of biomass, which possess similar characteristics, are for similar use and fall within a similar price range. The relevant geographical market has been defined as a territory of the Republic of Lithuania within a radius of 100 kms. by road around the biomass boiler operated by ‘Vilniaus Energija’, UAB (the aforementioned boiler is situated at Vilnius Power Plant, Elektrinės street 2, Vilnius). The arrangement concluded between ‘Vilniaus Energija’, UAB and First Opportunity Oü established a commitment to purchase crushed biomass exclusively from one supplier. Within the time frame 2010-2012, First Opportunity Oü had a market share amounting to 60%, which was approximately 9 times bigger than the market share held by its closest competitor. Since ‘Vilniaus Energija’, UAB committed itself to exclusively purchase from one supplier, all the other suppliers of biomass were ineligible for a market share of the biomass purchased by ‘Vilniaus Energija’, UAB (which was more than 50% of the relevant market) and only in the remaining 50% could market competition be carried out freely. ‘Vilniaus Energija’, UAB’s commitment to purchase biomass from First Opportunity Oü exclusively lasted 2 years and 4 months, which was found to be considerably longer than most agreements of similar nature, which had a maximum validity of 1 year or 1 heating season. It has been held that the agreement to purchase from First Opportunity Oü exclusively had, or might have had, a significant negative impact on competition in the crushed biomass market in the Vilnius region. This agreement could also not be deemed to be one of minor importance, due to the fact that both ‘Vilniaus Energija’, UAB and First Opportunity Oü held significantly greater crushed biomass in Vilnius regional market shares (i.e., exceeding 30%) during the whole period of the agreement. It naturally follows that the agreement could not be block exempted, as foreseen in the Commission Regulation (EC) No 2790/1999 of 22nd December, 1999, and its successor, Commission Regulation (EU) No 330/2010 of 20th April, 2010 (hereinafter referred to as the Block Exemption Regulation), regardless of its actual duration. There were also no grounds to apply an exception, as laid out in Article 6(1) of the Law on Competition of the Republic of Lithuania. Companies entering into ny agreement, which restricted, or might have restricted, competition in the crushed biomass market in the Vilnius region and impacted upon the prices paid by users of heating, has been deemed to cause significant damage to fair competition, protection of which is given by law.

Among their other arguments, the Companies claimed that the Competition Council erred in defining the relevant geographical market and presented an unfair assessment of the market shares held by First Opportunity Oü and other suppliers, as well as having misjudged the alleged exclusion of other

competitors from the market. The Companies also argued that both the Competition Council and the Court of First Instance misconceived the nature of the Companies' agreement and drew unfounded conclusions about the alleged existence of an exclusive purchasing commitment, leading to the spurious finding that the Companies' actions amounted to competition infringement as laid out in Article 5(1) of the Law on Competition.

Summary of the judicial proceedings

On 18th October 2016, the Vilnius Regional Administrative Court (a Court of First Instance) ruled in favour of the Competition Council's position, yet lowered the fines imposed by the Competition Council *inter alia*, after taking into consideration that Article 6(1) of the agreement was abolished by the Companies voluntarily, immediately after the Competition Council's investigation was initiated.

On 13th June, 2018, the Supreme Administrative Court of Lithuania satisfied appeals lodged by the Companies, dismissed an appeal lodged by Competition Council, annulled the ruling by the Vilnius Regional Administrative Court, adopted on 18th October, 2016, and adopted a new decision which annulled the Competition Council's Decision (of 2nd December, 2015) and sent the case back to the Competition Council for additional investigation.

The Competition Council requested the renewal of court proceedings. That request was based on two main points: the Competition Council not only believed it had not erred in defining the relevant geographical market, but also claimed that the Court improperly applied Article 3 of the Block Exemption Regulation, since it was allegedly stated that two separate markets (one of a buyer and another of a seller) should have been defined. On 4th June 2019, after hearing the case on the merits of the Competition Council's request, extended the Chamber of Judges of the Supreme Administrative Court of Lithuania, who upheld the decision adopted by the Supreme Administrative Court of Lithuania on 13th June, 2018.

The ruling of the Court

The main focus of the ruling was a definition of the relevant geographical market in the context of the case. The Court has emphasized that, in its settled case-law, the notion of a geographical market is used as a tool with which to establish and define the boundaries between undertakings, and its main goal is to identify restrictions of competition that those undertakings encounter; defining the market is not an end in itself, and therefore, in each and every situation, what the potential competition problem is that is under investigation, and why the relevant market definition is pursued (see, to that effect, 21st January, 2013, decision held by the Supreme Administrative Court of Lithuania in Administrative Case No. A⁵⁰²-801/2013) (Ruling's Para. 36), has to be considered.

The Court recalled that the Law on Competition makes no explicit distinction between the types of so called horizontal and vertical agreements and does not provide their definitions. The definition of a vertical agreement is laid out in Paragraph 2 of the "Requirements and Conditions on Agreements that Cannot Significantly Restrict Competition Due to their Minor Importance" (Competition Council Decision No 1, adopted on 13th January, 2000), Article 2(1) of Commission Regulation (EC) No 2790/1999 of 22nd December, 1999, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, and its successor's Article 4(a) 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. According to these legal acts, vertical agreements are agreements or concerted practices that are entered into between two or more undertakings, each of which operates, for the purposes of the agreement, at a different level in the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. In that connection, the Court has recalled that, according to the settled case-law of the Court of Justice of the European Union, agreements between

traders at different levels in the economic process, namely, ‘vertical agreements’, may constitute agreements within the meaning of Article 101(1) TFEU and be prohibited by that provision (see, to that effect, judgments of 13th July, 1966, *Consten and Grundig v Commission*, 56/64 and 58/64, EU:C:1966:41; of 24th October 1995, *Bundeskartellamt v Volkswagen and VAG Leasing*, C-266/93, EU:C:1995:345, Para. 17; of 14th December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, Para. 37) (Ruling’s Para. 40). The Court has also emphasized that, according to the “Guidelines on Vertical Restraints”, which was adopted through Communication from the Commission (hereinafter referred to as the Guidelines on Vertical Restraints) (2010/C 130/01), an exclusive purchasing agreement is one of the most widespread types of vertical agreements. As regards exclusive purchasing agreements, it should be borne in mind that, according to the settled case-law of the Court of Justice of the European Union, even if those agreements do not have as their object the restriction of competition, within the meaning of Article 101 TFEU, it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition (see judgment of 2nd April 2009, *Pedro IV Servicios*, C-260/07, EU:C:2009:215, Para. 83) (Ruling’s Para. 41).

The Court has explained that both the “Block Exemption Regulation” and the “Guidelines on Vertical Restraints” must be followed in order to assess whether the agreement in question can benefit from a block exemption (Ruling’s Para. 42). It is stated in Article 2(1) of the Block Exemption Regulation that, pursuant to Article 101(3) of the Treaty, and subject to the provisions of this Regulation, Article 101(1) of the Treaty shall not apply to vertical agreements. This exemption shall apply to the extent that such agreements contain vertical restraints. It is further explained, in Paragraph 23 of the Guidelines on Vertical Restraints, that for most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer, or at both levels. Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements, depending on the market shares of the supplier and the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is the supplier’s market share in the market in which it sells the contracted goods or services, and the buyer’s market share in the market in which it purchases the contracted goods or services which determine the applicability of the block exemption (Ruling’s Para. 43).

The Supreme Administrative Court of Lithuania disagreed with the conclusion reached by the Court of First Instance that the relevant geographical market should be defined as territory that is within a radius of 100 kms. by road around the boiler that is operated by ‘Vilniaus Energija’, UAB. On 13th June, 2018, after careful consideration of Article 3(1) of the Block Exemption Regulation and Paragraph 88 of the Guidelines on Vertical Restraints, the Supreme Administrative Court of Lithuania held, in its decision, that in order to determine whether the Companies’ agreement might benefit from the exemption that is laid out in Article 3(1) of the Block Exemption Regulation, account should be taken of the market shares that are held by the Companies, i.e., the market share of First Opportunity Oü in the market in which it sells crushed biomass, and the market share of ‘Vilniaus Energija’, UAB in which it purchases crushed biomass. As follows from Article 3(1) of the Block Exemption Regulation, the agreement could be block exempted only if both ‘Vilniaus Energija’, UAB and First Opportunity Oü held less than 30% of the market shares in the markets for purchasing and selling crushed biomass, respectively (Ruling’s Para. 45). The Court ruled that the Competition Council’s choice to define the market from the buyer’s side was ill-founded (Ruling’s Para. 46) and stated that, even though in such a way it is possible to define ‘Vilniaus Energija’, UAB’s market share in a market in which it purchases crushed biomass, it is still impossible to determine what the market share of First Opportunity Oü in the market in which it sells crushed biomass might be, since it is true that First Opportunity Oü’s market share does not have to coincide with that same radius around that particular biomass buyer’s boiler. It follows that, under these circumstances, it was impossible to assess whether the agreement could benefit from a block exemption, and objectively and fairly estimate the possible market closure, as well as

evaluating all the other relevant factors that have a decisive influence on the possible application of Article 5(1) of the Law on Competition (Ruling's Para. 47).

After finding that there had been a significant procedural breach in regard to defining the relevant geographical market, the Court annulled the contested Decision and ordered the Competition Council to complete its investigation with information regarding the relevant geographical market, to anticipate the possible application of the block exemption that is foreseen in the Block Exemption Regulation, to objectively and fairly assess market closure, to re-estimate the negative impact on competition, which is protected by the Law on Competition, and, lastly, to evaluate the obligations submitted by the Companies.

On 4th June, 2019, the extended Chamber of Judges of the Supreme Administrative Court of Lithuania held by its decision that, even though in the aforementioned ruling of the Court there might have been some possible ambiguities left because of a conceivably flawed choice of wording, all the other circumstances, taken into consideration together with the definition of the geographical market, pointed to the Court's correct assessment of the Competition Council's definition of geographical market as ill-founded. It has been reasonably stated that the methodology stipulated in the Guidelines on Vertical Restraints should be applied every time that the competent supervisory authority assesses the relevant geographical market. From the legal acts that have been relied upon in the Ruling (i.e., 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 the categories of vertical agreements and concerted practices, and the Guidelines on Vertical Restraints) it is obvious that one and the same geographical market should be defined. However, the Court has stated, in its Ruling, that the Competition Council did not sufficiently reason its choice to define the relevant market from the side of the buyer (and not from that of the supplier), because all of the case-law examples from the Court of Justice of the European Union that have been referred to in the contested Decision were adopted in the context of the sectoral, and not the geographical, market. The extended Chamber of Judges decided that the Court did not err in finding the Competition Council's choice of definition of the relevant market unsound, in the sense that it later precludes any chance to objectively and fairly assess possible market closure and consider all the other relevant circumstances that may have an impact on the assessment of the agreement in the light of the Law on Competition. The extended Chamber of Judges held that the possible ambiguity of the wording chosen in the Ruling did not amount to an error of judgment having been made by the Court. After a careful examination of the Ruling on the merits at the renewed proceedings, and duly adjusting, where appropriate, the explanation that is provided in Paragraph 47 of the Ruling, as well as confirming that Competition Council's choice of definition for the relevant geographical market, therefore renders it impossible to objectively and fairly assess all the other relevant circumstances, the extended Chamber of Judges decided that there was no reason to annul the Ruling of the Supreme Administrative Court of Lithuania, adopted on 13th June 2018.

Personal comment

Several aspects of the abovementioned case make it a noteworthy ruling. Firstly, the Court laid down relevant rules that should be followed by authorities in the process of geographical market assessment. Secondly, national legislation that is laid out in the Law on Competition has been interpreted *inter alia* in the light 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. Lastly, the relevant case-law of the Court of Justice of the European Union has also been considered. In this case, the Competition Council's position on the assessment of the relevant market in the context of the alleged agreement on the exclusive purchasing of biomass, which constituted a restriction of competition by effect, was supported by the Court of First Instance, yet it was juxtaposed to, and later denied by, a position that was expressed by the Supreme Administrative Court of Lithuania in its rulings.

Dalia Visinskiene, Supreme Administrative Court of Lithuania

**Case No eA-2330-520/2016 of the Supreme Administrative Court of Lithuania
Gazprom, a public joint-stock company of the Russian Federation (hereinafter –
Gazprom) v. the Competition Council of the Republic of Lithuania (hereinafter – the
CC)**

**Resolution of the CC imposing fine for the violation of the concentration condition
imposed by the resolution of the CC on the authorisation of concentration in 2004**

Facts of the case

In 2002, an international tender for the selection of a gas supplier, which would privatize 34% of the Joint-Stock Company “Lietuvos dujos’s” (hereinafter – Lietuvos dujos) shares, was announced, and this was won by Gazprom. Gazprom submitted their notification of concentration to the CC.

On 18th March 2004, the CC adopted Resolution No 1S-38 “Regarding the authorisation of Gazprom to acquire 34% of Lietuvos dujos and, jointly with SE Valstybės turto fondas, Ruhrgas Energie Beteiligungs AG and E.ON Energie AG, to acquire control over Lietuvos dujos” (hereinafter – Resolution No 1S-38). The CC considering the notification and took into account, *inter alia*, the fact that Lietuvos dujos held a dominant position in the relevant markets for natural gas transmission and distribution, but the networks of Lietuvos dujos were not connected to the gas networks and supply system of any EU member states, and also that Gazprom was the sole supplier of natural gas to Lithuania, with no other alternative suppliers, and although there were other gas extraction companies in the Russian Federation, their ability to export gas depended on the permeability of the gas pipelines, which were controlled by Gazprom, and also on technical capabilities and other conditions.

The CC therefore decided to authorise concentration under the condition that undertakings which participate in that concentration, *would not create obstacles* for the gas supply companies, which have the necessary licenses and contracts with buyers in Lithuania, as well as for consumers in relation to their own needs to conclude natural gas purchase contracts with any of the gas production or supply companies, as well as with other undertakings extracting natural gas, in order to supply gas to buyers in Lithuania. Hence, this was a future-oriented condition requiring certain behaviour by the undertakings participating in the concentration for an unspecified period of time (meaning at least until 2015 – which was the year when a long-term natural gas supply contract should have expired between Lietuvos dujos and Gazprom).

Having received a complaint from the Joint-Stock Company “Lietuvos energijos gamyba” (hereinafter – Lietuvos energijos gamyba), in 2014, the CC opened an investigation. The CC's experts found that Gazprom's refusal to negotiate with Lietuvos energijos gamyba on the natural gas swap agreement for the period 2013-2015 breached the merger condition that had been envisaged in the clearance of 2004. Lietuvos energijos gamyba sought to implement a natural gas swapping agreement, according to which natural gas, acquired more cheaply in Western Europe, would have been imported into Lithuania.

On 10th June, 2014, the CC adopted Resolution No 2S-3/2014 (hereinafter – Resolution No 2S-3/2014) by which it declared that Gazprom, by refusing to negotiate with Lietuvos energijos gamyba regarding the conclusion of the gas swapping agreement for the period 2013-2015, created an obstacle to this undertaking concluding a natural gas purchase contract, for its own needs, with a gas supply company, and, in this way, violated the provisions of Resolution No 1S-38 (by which the said concentration condition was imposed). Regarding the gas swapping agreement, which might seem to be of an unusual nature in this field, the CC found that Gazprom had engaged in such agreements for the supply of natural gas to the USA, and therefore this undertaking was familiar with agreements of such

a nature. It was publicly announced that, in 2009, Gazprom had entered into a gas swap agreement under which it had agreed to swap gas with the USA and the UK.

The CC imposed a fine (123,096,700 litas (approx. EUR 35,651,269)) on Gazprom for their failure to comply with the merger conditions.

Gazprom challenged Resolution No 2S-3/2014 of the CC before the Vilnius District Administrative Court. By its judgment of 9th November, 2015, the First Instance Court found in favour of the Respondent (the CC). The First Instance Court mainly upheld the arguments of the CC. Gazprom lodged an appeal with the Supreme Administrative Court of Lithuania (hereinafter – SAC).

Decision of the Supreme Administrative Court of Lithuania

On 22nd December 2016, the SAC adopted a final procedural decision resolving the dispute over the resolution of the CC to impose a sanction on an undertaking (Gazprom) for the violation of the concentration condition that had been imposed by the CC's resolution on the authorisation of concentration in 2004.

In the case dealt with by the SAC, Gazprom, *inter alia*, claimed that the concentration condition was interpreted in an expanded way by the CC, and the representative of the CC acknowledged that the concentration condition, i.e., the prohibition “not to create obstacles”, was not really a condition, but an obligation to take all of the necessary measures to ensure that Lithuanian consumers purchase gas from other suppliers. From the Gazprom point of view, it was incorrect to assume that the phrase “not to create obstacles” was synonymous with the phrase “take all necessary measures” to ensure that “Lithuanian consumers will buy natural gas from natural gas suppliers other than the applicant”; the analysis of the wording of some of the resolutions of the CC, according to Gazprom, indicated that the concentration condition was a prohibition of certain acts, but in no way was this an obligation to take active action in favour of competitors; finally, the abstractness of the concentration condition testified that this was a "condition" or "prohibition", but not an "obligation" to take active and very concrete actions.

The said arguments of Gazprom were rejected. Since Gazprom, regarding this issue, relied also on the provisions of the European Union (hereinafter – EU) law and on the practice of the European Commission (hereinafter – the Commission) the SAC reviewed not only the CC's discretion under national law, but also the regulation of modifications to concentrations under EU law.

The SAC emphasised that the fact that a violation of condition and a violation of obligation causes different legal consequences under EU law did not apply to the assessment of concentration at the national level, in as far as the Law on Competition No VIII-1099 did not differentiate between the legal consequences in this respect; that is to say, conditions and obligations (qualifying them together and assessing them in the national context) are being understood as the determination of certain forms of behaviour, which will help to ensure that the concentration would not result in the creation or strengthening of a dominant position, and this would help to avoid any harmful effects on competition. According to the SAC, every case is being looked into in relation to the question as to whether a remedy and, more specifically, which type of remedy is suitable in order to solve the identified competition concerns. Assessing the concentration condition in the context of Article 14(1) Paragraph 2 of the Law on Competition No VIII-1099 (which established the discretion of the CC to adopt the Resolution in order to authorise concentration, subject to conditions and obligations), the SAC concluded that the condition under consideration was imposed in order to prevent negative consequences that might arise due to the concentration, taking into account the dominant position of Lietuvos dujos and, most importantly, the dominant position of Gazprom, which, at the time, was the only supplier of gas to Lithuania, and, moreover, it also controlled the trunk pipelines through which gas could enter Lithuania.

In the SAC's opinion, by eliminating the possibility that the undertakings could participate in the concentration in order to cause negative consequences, the CC restricted the abilities of those entities to take advantage of their dominant position, meaning that, to a certain extent, it prevented the strengthening of a dominant position. So, the SAC concluded that by imposing such a condition, the CC sought to counterbalance the opportunity of the parties to the concentration with a dominant position from exercising a decisive influence on the natural gas consumers in Lithuania, and such an aspiration, in its essence, was considered by the SAC to have the aim of preventing the strengthening of a dominant position.

The SAC regarded the concentration condition as being a broad one, but pointed out that the law had not restricted the discretion of the CC in choosing the conditions and obligations which would allow them to achieve specified purposes (to prevent the creation, or strengthening, of a dominant position). It was acknowledged that, when determining the necessary modification to the concentration, the CC did not individually define the condition and did not separately impose obligations. However, in the SAC's view, it had no legal significance in resolving the dispute over the validity of the Resolution. The SAC emphasised that if Gazprom disagreed with the imposed condition and considered that it did not comply with the provisions of the Law on Competition No VIII-1099, or did not understand it, it had the opportunity to appeal against Resolution No 1S-38, in order to demand that such a condition be terminated and/or explained by the CC. Rejecting Gazprom's arguments that the concentration decision was abstract and uncertain, the SAC noted that the said undertaking carried out the concentration and did not apply to the CC for clarification of this condition; the complaint regarding the uncertainty of the condition was raised only when the CC declared that there was a violation of this condition.

Bearing in mind the aim of the concentration condition, which was to prevent Gazprom from using its dominant position and thus restricting the possibilities for Lithuanian natural gas consumers, the requirement "not to create obstacles", in the SAC's opinion, not only obliged Gazprom to refrain from certain actions, but also established an obligation to take all of the measures that might be required for the implementation of the concentration condition. Obstacles can be created even without taking any action, and therefore the requirement "not to create obstacles" had to be understood not only as an inherent passivity of action, but also as a general obligation to act in such a way that the concentration condition that was established by the CC could be implemented.

The SAC concluded that, according to the concentration condition, Gazprom had not only to refrain from certain actions, but also had the obligation to take all the measures that were necessary in order to fulfil the obligations that were set by the concentration condition, and that such an interpretation could not be considered to have been expanded and was consistent with the circumstances and objectives of the concentration condition, i.e., to ensure the possibility for Lithuanian natural gas consumers to purchase natural gas for their own needs from other suppliers.

Comment

The circumstances of the case relating to the determination of the conditions and/or obligations of the concentration demonstrate differences in the regulation of this aspect in both Lithuanian and EU law.

According to Council Regulation (EC) No 139/2004 of 20th January 2004, on the control of concentrations between undertakings (the EC Merger Regulation), and the Commission has to appraise concentrations under the scope of the Merger Regulation, with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Articles 2(2) and (3), whether or not a concentration would significantly impede effective competition, in particular, as a result of the creation or strengthening of a dominant position, in the common market or in a substantial part of it. If the Commission has concerns that the merger may

significantly affect competition, the merging companies may offer remedies ("commitments"), i.e., propose certain modifications to the project, that would guarantee continuing competition in the market.

The Law on Competition No VIII-1099 does not provide the possibility for undertakings who are participating in the concentration to propose specific commitments, which would become a basis for the conditions or obligations of the CC, and did not even differentiate between these remedies through the use of any criteria, and, therefore, the terms "conditions" and "obligations" were generally regarded as being the determination of certain forms of behaviour, which would help to ensure that the concentration would not result in the creation or strengthening of a dominant position, and this would help to avoid any harmful effects on competition. In other words, when it comes to resolving the issue of the legality of a decision of the CC declaring a violation of the remedies for the concentration, it has no legal value, if such a remedy is regarded as being either a condition or an obligation.

The regulation, set in the EC Merger Regulations, under which the Commission is not in a position to unilaterally impose any conditions on an authorisation decision, but only on the basis of the parties' commitments, is to be assessed positively. It produces greater clarity in relation to the conditions and obligations that are being imposed by the Commission. This regulation is likely to reduce the possibility of disputes over the enforcement of such remedies. This is particularly important in cases of non-structural ("conduct" or "behavioural") remedies, which are considered to be ongoing, and that are designed to modify or constrain the *future conduct* of merging firms (which was actually the case with the concentration condition that had been imposed by the CC on Gazprom).

The Gazprom case revealed that all of this might lead to assumptions as a result of which the undertakings can argue about the interpretation of the remedies in various aspects. On the other hand, as constituted by the SAC, higher standards of care and diligence are applied for entrepreneurs, and it has all the necessary means and resources to clarify the content of the concentration conditions and the obligations that are applicable to it if they are somehow uncertain or unclear, and/or to challenge its legality in court. Such higher standards of care and diligence give rise to the obligation of an undertaking to be active and to show the maximum interest in the legal nuances that are relevant to its status and situation, so as to assess its conduct on a case-by-case basis in view of its possible impact on the conditions and obligations that have been established by the CC, and, by all available means, to challenge them within the time limit that is provided in law, and not when a violation of such remedies is being detected.

Competition & regulation in the pharmaceutical sector

Gianmario Palliggiano, Regional Administrative Court of Campania

Introduction

This case concerns the compatibility with the European Union system of the statutory right of pre-emption in favor of employees, to purchase municipal pharmacies, in contrast with the freedom of establishment and the principle of free competition.

Brief summary of the facts of the dispute

The dispute concerned a tender procedure that was launched by a Brianza municipality for the sale of its own municipal pharmacy.

The notice of the tender procedure in question provided that, by the application of Art. 12 of Italian Law no. 362/1991, the transfer of the ownership of the pharmacy to the provisional successful tenderer would have been subject to the non-exercise of the right of pre-emption by the municipal authority for the management of the pharmacies and the pharmacists that are employed by it, indefinitely, in relation to the possession of the legal requirements.

The provisional award was made in favor of the participants who had submitted the most advantageous offer. However, at the end of the tender, an employee of the municipal management body, who had not participated in the tender, exercised the right of first refusal that was provided for in the notice, and obtained the award of the pharmacy.

Believing that this award would run counter to the Euro-unit principles of non-discrimination and free competition, the provisional successful bidders filed an appeal before the Administrative Regional Court for Lombardy, Milan, which, with a decision of the 25th May, 2016, no. 1048, rejected the complaints that were formulated by the Court, declaring them to be without foundation.

An appeal was lodged against the ruling of the Lombard Administrative Judge to the Council of State, which, with the Ordinance of 4th July, 2018, no. 4102, decided to suspend the procedure and to submit the following preliminary question to the EU Court of Justice:

"If the principles of freedom of establishment, non-discrimination, equal treatment, protection of competition and free movement of workers, set out in Articles 45, 49 to 56, and 106 TFEU, as well as Articles 15 and 16 of the [Charter] and the canon of proportionality and reasonableness contained in them, preclude national legislation, such as that referred to in Article 12, Paragraph 2, of Law no. 362/1991 which, in case of transfer of ownership of the municipal pharmacy, assigns the right of first refusal to the employees of the pharmacy itself ."

The regulatory and jurisprudential context.

Before examining the Court's ruling, it seems appropriate to reconstruct the state of the art of legislation and jurisprudence on the provision and ownership of pharmacies.

Art. 9 of Law 2nd April 1968, no. 475 in relation to the pharmaceutical service, provides that "the ownership of the pharmacies that become vacant and those of new institution, following the revision of the organic plant, can be assumed for half by the municipality".

Pursuant to Art. 12 of Law. no. 475/1968, the transfer of the pharmacy is allowed when three years have elapsed since the ownership has been obtained; this transfer can only take place "in favor of a pharmacist who has obtained ownership, or who has been deemed suitable in a previous competition".

With regard to competitions, the reference discipline is largely dictated by Law 8 of November 1991, no. 362 [rubric "Rules for the Reorganization of the Pharmaceutical Sector"], whose Art. 4 (entitled "Insolvency procedures") states that:

"1. The assignment of the vacant or newly established pharmaceutical offices that are available for exercise by private individuals takes place through a provincial competition for qualifications and exams launched by the end of March of each odd year from the regions and autonomous provinces of Trento and Bolzano.

2. Citizens of a member state of the European Economic Community over the age of age, and who are in possession of civil and political rights and registered in the professional register of pharmacists, and who have not reached the age of sixty, are admitted to the competition referred to in Paragraph 1 of the deadline for submitting applications ".

Without prejudice to the case of the taking on of the ownership of the pharmacy (rectius: half of the pharmacy) by the Municipality, the general rule that is foreseen by the law for the assignment of vacant or newly established pharmacies is the experiment of a bankruptcy procedure (see Constitutional Court, Sentence 12, October, 2012, no. 231).

This enhancement of the bankruptcy obligation, in addition to constituting a direct application of the principle of the freedom of economic initiative that is protected by Art. 41 of the Constitution, continues with a regulatory process, which was started with Directive 36/2005/EC, aimed to extend the application of the Community principles of free competition and non-discrimination to the pharmaceutical services sector, together with the expression of the more general principle of freedom of establishment that is provided for by Art. 49 TFEU.

However, in such a regulatory and jurisprudential framework, the provision of Art. 12, Paragraph 2, of Law no. 362/1991, the subject of the judgment under review, according to which: "In case of the transfer of ownership of the municipal pharmacy, employees have the right of pre-emption and the rules of Article 7 apply to them".

This is a rule that contains a noteworthy derogation from the general rule of the competition, providing an unconditional right of pre-emption in favor of the employees of the pharmacy, and this is justified by the ratio of guaranteeing the continuity of the employment relationship of the pharmacists and of enhancing the management experience that has been gained by the latter.

In a regulatory context – the national, and, above all, the community - in which, as mentioned, the competition rule is elevated to a fundamental principle, the Council of State questioned the legitimacy of a provision that sacrifices this principle on the altar of continuity in the employment relationship, and therefore decided to bring the problem to the attention of the EU Court of Justice.

The Decision of European Union Court of Justice

Invested in the issue of the compatibility of Art. 12, Para. 2, Law no. 362/1991 with the Euro-unit law, the Court first clarified that "*the purchase of a pharmacy, insofar as it allows the exercise of an economic activity through a permanent establishment for an indefinite period of time, falls within the scope of application of Art. 49 TFEU*".

The Court therefore limited the scope of the verification within the confines of the principle of the freedom of establishment, and excluded, in the present case, Art. 45 TFEU (free movement of workers), Art. 56 TFEU (free movement of services) or Art. 106 TFEU (companies entrusted with the management of services of general economic interest or having a fiscal monopoly).

The preliminary question raised by the Council of State was therefore reformulated by the Community judge in these terms: "the referring court essentially asks if the Art. 49 TFEU must be understood as meaning that it precludes a national measure that grants an unconditional right of first

refusal in favor of pharmacists employed in a municipal pharmacy in the event of the sale of the latter by tender".

This applies - according to the Court - even more so, in cases where the pharmacist employed by the municipal pharmacy, who has not even participated in the tender procedure, "*can exercise his right of first refusal by aligning himself with the most economically advantageous offer and, in this way, obtain the sale of this pharmacy*".

According to the Court, therefore, there is no doubt that the provision of the aforementioned Art. 12 Para. 2 constitutes, even if only potentially, a restriction on the freedom of establishment that is guaranteed by Art. 49 TFEU.

Having ascertained the "restrictive" scope of the national rule with respect to the Community principle, the Court's examination has moved on to the more complex verification of the existence of imperative reasons of general interest, such as to justify such a restriction on the freedom of establishment.

Personal comment

As a preliminary, the European Court recognized that the objective of the institution of pre-emption is to ensure better management of the pharmaceutical service, on the one hand, by guaranteeing the continuity of the employment relationship of the pharmacists employed, and, on the other, by enhancing the management experience gained by the latter.

Well, according to the Community Judge, such an objective, insofar as it relates to that of health protection (guaranteed both by Art. 32 of the Constitution, and by Art. 52, Para. 1 TFEU), could well justify a restriction on the freedom of establishment.

However, in the Court's opinion, the examination of the existence of imperative reasons that are of public interest cannot be separated from a two-fold assessment: indeed, once the legitimacy of the objective pursued has been ascertained, it is also necessary to verify whether the instrument provided for by Art. 12 Para. 2 Law no. 362/1991 is suitable for achieving this goal and, in any case, if there are no alternative measures that allow the achievement of the goal in question equally effectively through a lower compression of the freedom that is guaranteed by Art. 49 TFEU.

On the first point, the Court first clarified that the pursued "continuity of the employment relationship", which was already guaranteed by the application of Art. 2112 of the Italian Civil Code (which transposed Directive 2001/23), "cannot be considered suitable to guarantee the objective of protecting health".

Not only that, but, according to the Luxembourg courts, the ratio of "enhancing the professional experience gained in order to ensure better management of the pharmaceutical service" cannot be considered suitable to guarantee this objective.

Indeed, "the unconditional right of pre-emption granted to employees of a municipal pharmacy in the event of the sale of the latter through a tender establishes an absolute presumption according to which said employees are the subjects most capable of managing, in the capacity of owners, the aforementioned pharmacy. This pre-emption right is not based on any concrete assessment of the experience actually gained, the quality of the service provided, or the functions actually performed within the municipal pharmacy".

Moreover, in a regulatory system, such as the Italian one, in which being a pharmacist is a regulated profession, and in which the transfer of a pharmacy can only take place in favor of a pharmacist who is registered on the professional register, and who has already obtained the suitability for the ownership of

a pharmacy, or who has at least two years of practice, there are already conditions that offer a certain guarantee as to the professional competence of the potential buyers of a municipal pharmacy.

According to the Judges, this objective of enhancing professional experience: "can be achieved through less restrictive measures, such as the awarding of reward points, in the context of a tender procedure, in favor of participants who provide proof of an experience in pharmacy management".

In light of the above considerations, the Court therefore stated that "the unconditional right of pre-emption granted to pharmacists who are employed by a municipal pharmacy, in the event of the sale of the latter by tender, insofar as it is aimed at ensuring better management of the pharmaceutical service - assuming that it actually pursues an objective concerning the protection of health - is not suitable in guaranteeing the achievement of this objective and, in any case, it goes beyond what is necessary to achieve it".

For these reasons, the EU Court of Justice (Fourth Section) has therefore conclusively ruled that "Article 49 TFEU must be interpreted as meaning that it precludes a national measure granting an unconditional right of pre-emption in favor of pharmacists employed in a pharmacy municipal in the case of the transfer of the latter by tender."

Carlos Manuel Gonçalves De Melo Marinho, Lisbon Court of Appeal

Judgment number: 1886/2010.

Date of delivery: 2019-09-12.

Parties: A [(Applicant...) CIENTÍFICOS, SA], headquartered in Lisbon, a Portuguese company operating essentially in Europe, Latin America and Africa, founded in 1995; B [(Defendant) ... LIMITED (based in the United Kingdom)] and C [(Defendant...) ...LIMITED, Branch of B in Portugal].

Court: Court of Appeal of Lisbon.

Type of Case: ordinary civil declarative action.

Requests presented before the First Instance Court

The Applicant asked the Defendants to be ordered to refrain from committing acts that are contrary to the legal rules and honest uses of economic activity and, in particular, from recruiting the Applicant's employees for the second Defendant, or any other company in the group, in order to access and use secrets and confidential information and to divert the Claimant's customers. Further, it asked the Defendants to pay monetary amounts that refer to property damages (emergent damages and loss of profits) and non-property damages, for losses already suffered as a result of acts of unfair competition, as well as in amounts that will be settled in the context of the enforcement of the judgment to be delivered, all plus interest until there is effective and full payment.

First Instance Court decision

The Court of First Instance dismissed the action as being totally unfounded, absolving both Defendants from the claims.

Requests presented before the Appeal Court

The purpose of the appeal was to activate the review of some of the evidence that was produced and recorded at the hearing, in order to grant the revocation of the First Instance judgment and to obtain the conviction of the Defendants under the terms initially requested.

Facts

The Applicant's commercial object is the provision of services in the area of scientific or pharmacological research, including the discovery and development of products for pharmaceutical and biotechnology companies;

The first Defendant is part of a multinational group of companies that was founded in 1985 in Maryland, in the United States of America, which develops its activity in the same sector of activity as that of the Applicant.

The Defendant, B, is active in Portugal through its branch, the Defendant C;

In 2003, the Applicant contacted B and, following that contact, the latter carried out an Audit on the Applicant. In this context, the Applicant and the first Defendant signed, in that year, a “Confidentiality Agreement” by which the latter committed to keeping confidential the information obtained in the audit process, without any time limit. The commercial relationship between the Applicant and the first Defendant lasted until 2005.

In that context, B had access to information and data relating to the legality and regularity of the Applicant's operations, projects, technologies, organizational and procedural structure, the content of the professional training program that was provided to its clinical trial employees, their individual professional training path, including training records and detailed training content, functions performed, with a comprehensive description of their assessments and training certificates, as well as documentation, information, technology, financial results, work and scientific methods, in addition to other know-how;

The Applicant provides training to its workers and privileges the technical knowledge of its teams by providing them with rigorous and continuous training in the areas of activity it develops. These workers are specialized technicians who form a part of qualified teams, and this characteristic is the Applicant's greatest competitive weapon in the face of competing companies.

The employees indicated in the proceeding, who worked as clinical trial monitors and received training for 2 to 3 years, granted by the Applicant, left it and were recruited by the first Defendant. As a result of the departure of the said workers, the Applicant restructured its teams and recruited new employees, for some of whom it had to provide training.

The duration of the projects in charge of the Applicant vary between 3 and 4 years, which implies the continuous presence of employees during such a period.

The development of the Applicant's activity was affected by the recruitment, in the period from 2006 to 2009, of the employees mentioned in the case; After these workers left, the Applicant suffered a production breakdown, and the workers who left the Applicant were involved in confidential projects and had access to privileged information, know-how and working methods, projects, plans and strategies for action, lists of clients and potential clients; at least two of the Applicant's customers failed to request its services for fear of discontinuity in the teams responsible.

Arguments of the Appellant

1. The actions of the Defendants are acts of unfair competition; they caused damage and generated, for the Defendants, the obligation to indemnify the Applicant.
2. The diversion of the Appellant workers by the Defendants was able to cause disorganization in its activities.
3. Such disorganization took on much greater proportions, if compared to what might happen in other areas of activity in which the workforce is more fungible.
4. In the Appellant's sector of activity – the clinical trial monitoring market – where the same project lasts an average of 3 to 4 years, and where workers are chosen by the client to fully monitor the project, the diversion of workers within the space of three years causes a significant level of disorganization.
5. The Appellant suffered a considerable drop in production after the departure of its workers.
6. That the diversion of workers occurred repeatedly increases the classification of the Defendants' acts as unfair competition.

7. Information on the Applicant's procedures, experience, training capacity, and the training program for clinical trial workers, which the Respondents had access to following the audit carried out in 2003, is a business secret.
8. The information collected by the First Defendant, within the scope of the aforementioned audit, was subsequently used by its human resources department, which carried out the diversion of the applicant's senior monitors.
9. It is not necessary, in the light of the Industrial Property Code, that the agent who practices unfair competition has the intention of causing damage to others, or to achieve, for himself or a third party, an illegitimate benefit.
10. It is enough to have acted with the awareness that the activity was developed over the efforts made by a third party and the know-how belonging to it.
11. The conduct of the Defendants created a parasitic effect in the market, materialized in the appropriation of the training investments that were made by the competitor.
12. The Defendants wanted to become established, and to operate, in Portugal, but they did so by not training their own monitors, but by taking advantage of the Appellant's resources.

Arguments of the Respondents

1. For the reasons stated in the reply, the proven facts must not be changed.
2. There was no demonstration of the fulfillment of the assumptions of contractual civil liability.
3. It is not enough that the employees of the Applicant were hired by the Defendants, thus affecting the activity of the Appellant, for this to substantiate the practice of an act of unfair competition in the form of an act of disorganization.
4. Cumulative verification of these two assumptions is necessary, so that the diversion of workers is considered to constitute an act of unfair competition: (a). objective conduct: inciting the breaking of contractual bonds; and (b). subjective conduct: the intention to disorganize (seriously harm) the competing company (“animus nocendi”).
5. There was no “animus nocendi” by the Defendants in producing any loss or disorganization of the Applicant's activity.
6. The interpretation of Article 317 of the Portuguese Industrial Property Code, in the sense that it is unfair competition to hire workers from another competitor, is unconstitutional due to its violation of the Constitution of the Portuguese Republic, for manifest contradiction of the freedom to choose a profession, the right to work, and the freedom of economic initiative.
7. The only legally possible restriction on the right to choose a profession and the right to work corresponds to the so-called non-competition pact that is provided for in Article 136 of the Labor Code.
8. The Applicant at no time used such a pact when hiring its workers.
9. Article 18t of the Constitution of the Portuguese Republic imposes a restrictive nature on restrictions to rights, freedoms and guarantees.
10. 10 It is not possible to extract from the proven facts that any confidential information belonging to the Applicant, which is able to be considered as a business secret, has been disclosed and, in particular, that it has been unduly appropriated by the Defendants.
11. The so-called moral damages that refer to legal persons are inadmissible in relation to both doctrine and jurisprudence.

12. The Applicant has not demonstrated the existence of any damages or losses that have been suffered by it through the hiring of the workers concerned, or even through the alleged violation of the confidentiality agreement.

Main questions to solve

The issues to be analyzed by the Court of Appeal were those related to the challenging of the facts, the breaching of the confidentiality agreement, the practising of acts of unfair competition, and the fulfillment of the assumptions of non-contractual civil liability.

Ruling of the Court

1. A confidentiality agreement/contract is a legal instrument that aims to protect industrial or commercial secrets, or confidential information, that safeguards the very existence of the company and that are not protected by the legal rules on intellectual property (e.g., when an economic actor, for any reason, has to share the relevant information with another person or company);
2. In the face of the proven facts, we must conclude that the parties signed a written and binding agreement that aimed to define the terms, conditions, sanctions and deadline of a confidentiality obligation, the reason for which, following the provisions of Art. 406 of the Civil Code, we have to conclude that such an agreement must be rigorously fulfilled by the contracting parties (*"pacta sunt servanda"*);
3. The Act of Competition stands on two fundamental notions: (a). the objective of creating and expanding its own clientele, and (b) the ability to reduce, or even eliminate, the effective or potential clientele of the competitors.
4. When this occurs in terms that are contrary to the legal rules or the honest practices of any economic activity, an act of unfair competition occurs; this act is unlawful insofar as it constitutes an abuse of freedom of competition.
5. The repression of unfair competition rejects the means (disloyalty), not the goals (diverting customers), so the illegality is rooted in the lack of due loyalty and not in any specific right.
6. The illegality can result either from the violation of the rights of others, or from the infraction of the law that protects their interests.
7. What is reproached in the conduct of the economic agent are the means that he uses to act in the market, not the concrete results that derive from that action.
8. The typical damage that emerges from the unfair competition is a diversion of demand, that is, a deviation of customers resulting in a decrease in the potential volume of business.
9. This diversion of customers will only be valued as a damage for the purpose of awarding the right to compensation if it is caused by conduct that is contrary to the rules and to honest practices.
10. The Act of Competition that corresponds to the grooming of workers is only atypical and unfair if it is carried out with the intention of disorganizing, or breaking up, the competitor's company (*"animus nocendi"*).
11. It is not an example of unfair competition to hire third-party workers, but it is unfair to hire them without the normal purpose of renewing and improving the staff of the contracting company, but with the aim of seriously harming the competitor, that is, by doing so in such a systematic or intense way that it results in the disorganization of the injured competitor, thus making its regular operation unfeasible.

12. The assessment of the existence of disloyalty is made by taking into account several circumstances, such as the qualifications and number of employees, respective functions and relative importance, consequences for the operation of the company, degree of proximity to the economic activity of the competitor, objective of depriving the competitor of elements key to its business structure and thereby weakening or disorganizing it.
13. The movement of workers occurs, generally, within the same sector of activity, so the new company at which they will perform their professional tasks will often be a competitor of their former employer.
14. Freedom of economic initiative on the part of both the employer and the worker is constitutionally guaranteed, as is the right to work; no one can, in principle, deny the worker the freedom to improve his professional position.
15. In order for unfair competition to arise, there must be a clear intention to disaggregate the competing actor, given the insertion of the concept into the domain of the acts of aggression and, in particular, acts of disorganization.
16. Behind the contractual rupture of the employment of a worker before his employer (either lawful or unlawful), there must always be an act of aggression by a competitor.
17. In order to have unfair competition in this area, it is necessary to be faced with systematic hiring (not an isolated act), which takes place in a short period of time, thus causing an effective and serious disorganization of the competitor (due to the lack of time to recover/reorganize), which is performed with the aim of depriving the “injured” party of key elements of its business structure, thus weakening or disorganizing it.
18. The number of hired workers alone cannot reveal anything in this domain.
19. In this case, it has not been proven that the first Defendant has incurred any contractual offence that is related to the breach of the obligation to which it was bound in the “Confidentiality Agreement” and no facts have been proven that point to the fulfillment of the requirements of unfair competition.

Appeal court decision

The Court of Appeal decided not to make any changes to the factual decision and to uphold the contested judgment with regard to the declaration that the action was unfounded.

Final comment

The decision analyzed contains statements that coincide with those already inserted into previous national laws (e.g., The Judgment of the Oporto Appeal Court of 2018-06-13, Case no 1839/2013) and international jurisprudence and doctrine (v.g., Belgian, Spanish, French and Italian).

The judgment appropriately stresses the indispensability of the subjective element (“*animus nocendi*”) in order to qualify an act as involving unfair competition in the field of recruiting workers from competing companies (within the scope of the theme that is dubbed in the Portuguese case law as “*desvio de trabalhadores*”, in the Italian doctrine as “*storno de dependenti*”, in the French doctrine as “*débauchage*” and, in the American system, as “employee raiding”).

It correctly affirms the rights involved that emerge from the Constitution, but it does not construct the solution as involving a mere choice between rights in collision, considering the intensity and the strong negative dimension of the will to disaggregate or weaken the competitor (which is a separate problem from the area of the mere exercise of rights).

It makes adequate references to the content of the Competition Act, to the abuse of the freedom of competition, to the deep reproach that disloyalty deserves, to the relevance of the means and intention to the detriment of the results, and indicates the relevant criteria for the assessment of the existence of disloyalty. It highlights the verification of the intention to disaggregate the competitor, making the insertion of the act into the domain of acts of aggression and, in particular, of acts of disorganization.

It makes for appropriate treatment of the evidence collected and assumes the right effects for the absence of decisive elements, such as the fulfillment of the assumptions of civil liability (correctly qualified as non-contractual in relation to the diversion of workers)

Anne-Marie Witters, Brussels Market Court

Decision from the Market Court, Brussels, Belgium

Date of the decision: January 8, 2020

Case number: 2019/MR/3

Summary of the facts

The professional association, the Belgian Order of Pharmacists (OP), has existed for many decades and defends the interests of its members, i.e., pharmacists who have a legal monopoly to sell prescription drugs. OP has the power to draw up a code of conduct and to enforce its rules with respect to pharmacists. In order to be able to deliver medicinal products as a pharmacist in Belgium, each pharmacist must be affiliated with the OP.

Medi Market is a new concept that was launched by a Belgian entrepreneur in 2014. It opened its first stores in January 2015. The concept consists of a cooperation between a pharmacy, selling prescription drugs, and a so-called para-pharmacy, selling OTC products and certain foodstuffs, such as dietary products. The two co-operating stores (pharmacy and para-pharmacy) will be located next to each other, but with a wall and a door physically separating them. Consumers can move from one store to the other. In the para-pharmacy, OTC products would be sold at a price that is substantially lower (sometimes 30% less) than the prices charged for the same product that is sold by pharmacists in a traditional Belgian pharmacy.



Since it started, pharmacists have complained to the OP about Medi Market, and have asked them to take action in order to defend their interests and their legal monopoly in the interests of public health and safety.

OP threatened Medi Market with legal action and it actually launched several legal proceedings against Medi Market stores and the pharmacists working in that concept. A cease-and-desist action in Nivelles at the end of 2015; 3 proceedings were related to presumed violations of the ethical code against pharmacists employed by Medi Market. In June 2016, Medi Market complained to the Belgian National Competition Authority (hereafter BCA). BCA launched an investigation, which led to the contested decision, which was adopted on May 28th, 2019. There was an unsuccessful request for interim measures in 2017

The BCA's decision of 28th May 2019, follows a complaint by Medi Market on 2nd June 2016, against the OP, as well as a request of 28th April, 2017, by Medi Market to have interim measures imposed on the OP.

On 19th June 2017, the BCA found, regarding the request for interim measures, that there were *prima facie* indications that the OP may have committed an infringement of the rules of competition by opposing Medi Market's discount policy, its opening hours, and the organisation of its pharmacy and para-pharmacy activities. The BCA, however, ultimately considered that it had not been established that Medi Market had suffered a serious, imminent and difficult to repair prejudice, or that the general economic interest had been harmed, in the sense of the provisions on interim measures, as Medi Market

had been able to continue its commercial policy. Consequently, the BCA rejected the request for interim measures. There was no appeal lodged against the decision to refuse interim measures.

The contested decision taken by the BCA

In its decision of 28th May 2019, the BCA took a decision on the merits of the case. This time, the BCA ruled in favour of Medi Market; it held that the OP had infringed Article IV.1 of the Code of Economic Law and Article 101 TFEU (concerning prohibitions on restrictive agreements) between October 2015, and January 2017, by adopting a strategy and implementing it, in order to defend the economic interests of the majority of the Order's members.

The OP – which is responsible for developing the Code of Ethics and for safeguarding the non-commercial nature of the pharmacy profession – opposed the development of the Medi Market group, in particular, by referring the matter to all of the disciplinary councils who were then concerned as a result of the opening of a Medi Market brand in October, 2015, and, at the same time, applied for a judicial injunction, by essentially alleging the existence of confusion between the Medi Market group's pharmacies and para-pharmacies, particularly where they were physically adjacent.

The BCA considered that the Order's disciplinary and judicial actions were, in fact, intended to hinder the development of the Medi Market group in the market for pharmacists' services, or even to expel such services from this market. Importantly, the BCA stressed that the legal actions brought by the National Council of the Order were not anti-competitive in themselves, but that they were part of a series of measures that aimed to implement an anti-competitive strategy in order to oust Medi Market's model, or to prevent its development and that of comparable business models. This overall strategy was based on a series of actions identified in the competition prosecutor's analysis, including the referral to disciplinary councils, the initiation of a judicial injunction, and the public dissemination of threatening information relating to Medi Market. The BCA considered that these decisions by the Order restricted competition by object, and they were not intended to achieve a legitimate objective or, at the very least, were not necessary and proportionate to the achievement of such an objective. The Order had thus committed a serious infringement of competition law.

The BCA used the relevant turnover achieved by Belgian pharmacies throughout Belgium as the basis for calculating the fine in this case. The BCA considered that a fine of a million euros was sufficient to take into account the seriousness of the infringement that was found and to act as a deterrent, without being excessive. The BCA noted, for the sole purpose of providing perspective, that this amount corresponded to the average annual turnover achieved by one single pharmacy from a total of some 5,000 pharmacies.

The OP appealed this decision before the Market Court.

The Market Court's decision

The Order of Pharmacists appealed against the BCA's decision before the Brussels Market Court (which is a legal section of the Brussels Court of Appeal with exclusive jurisdiction in all cases brought against national regulatory authorities, such as the BCA).

Regarding the facts and the merits of the case, the Market Court, after a thorough review, upheld the BCA's decision, confirming that the series of actions, considered together, of the Order of Pharmacists towards Medi Market restricted competition. However, as to a procedural claim regarding the fine, the Court sided with the Order of Pharmacists. The Court noted that fines imposed by the BCA are of a criminal nature. Those fines must therefore be subject to judicial control, with full jurisdictional review by the Market Court.

Moreover, the BCA should give sufficient reasons before imposing fines, and the fines must be based on a legal provision. The legal provisions that applied at the time of the facts in this case only provided that a fine could be imposed on an undertaking, or an association of undertakings, with a maximum fine of 10% of the undertaking's or association's annual Belgian turnover. At the time of the facts, the Belgian law thus did not allow the BCA to impose a fine on an association of undertakings of a maximum of 10% of the sum of the annual turnover of the association's members.

Consequently, the Court has ordered the BCA to amend the fine, taking into consideration that the maximum for that fine is 10% of the Order's own annual Belgian turnover, and not 10% of the sum of the annual turnover of the Order's members – according to the Order, the maximum fine can therefore be EUR 249.884,79, at most. Following the Court's decision, it is now up to the BCA to amend the fine accordingly. The Court has further ordered that the State organ that is responsible for the receipt of fines, should pay back the difference between the old and the new fine to the Order of Pharmacists. There has been no appeal lodged with the Supreme Court against this decision.

The legal principles put forward by the Market Court

OP has not been hindered by the BCA in its fundamental right to start legal proceedings against third parties, or pharmacists, in order to defend the interests of its members.

Even though there was no hard evidence of a single infringement, BCA established a string of indications and actions evidencing that OP wished to evict Medi Market from the market for OTC products, and wished to stop the concept from developing in Belgium.

The establishment of the maximum amount of the fine was not in line with the guidelines that were applicable at the relevant time. The Market Court determined that the maximum amount was EUR 250.000 and referred the case back to the BCA for the determination of the actual fine.

Developments since the Market Court decision

Change in the law: Today's Belgian Competition Law, in Article IV.84 §3 Para. 3 of the Code of Economic Law, provides that if a fine is imposed on an association of undertakings, then the relevant turnover for calculating the 10% maximum for the fine is the sum of the annual Belgian turnover of all the members of the association that are active in the relevant market.

Change in the calculation of fines and guidelines: On May 25th, 2020, the BCA published guidelines on the calculation of fines in competition law cases in order to "provide for more transparency and security to companies and associations.

Note

The Market Court is satisfied that the BCA considers the soft law established by the Market Court, and that the national regulatory authorities in general adapt their methods when dealing with infringements in accordance with the jurisprudence of the Market Court. Certainly, one of the purposes of the legislator, when creating the Market Court as a single instance appeal, was aimed at realizing a uniform and consistent jurisprudence, and a uniform interpretation of legislation. This is even more the case since the Market Court also ensures consistency between national law and European law.

List of participants – ENTraNCE for Judges 2020

- Nikolay Angelov, Administrative Court Sofia City.
- Elka Atanasova, Administrative Court Sofia City.
- Barbera Bastein, Dutch Administrative High Court for Trade and Industry.
- Marc Bosmans, Brussels Market Court.
- Anu Maria Brenner, Tallinn Administrative Court.
- Maurice Collins, Irish Court of Appeal.
- Jelena Čuveljak, High Commercial Court of Croatia.
- Martin Ebner-Vittinghoff, Munich Court of Appeal.
- Karin Fløistad, Norwegian Competition Tribunal.
- Emanuela Germano, Turin Court of Appeal.
- Carlos Manuel Gonçalves De Melo Marinho, Lisbon Court of Appeal.
- Cristian Ispas, Bucharest Court of Appeal.
- Kerstin Jung Walpert, Cologne Regional Court.
- Florjan Kalaja, Supreme Court of Albania.
- Vasileios Karanastasis, Thessaloniki Court of First Instance.
- Rytis Krasauskas, Supreme Administrative Court of Lithuania.
- Andrea Kretschmann, Brandenburg Court of Appeal.
- Janek Laidvee, Tallinn Administrative Court.
- Stavroula Lampropoulou, Council of State of Greece.
- Eva Lunenberg, Rotterdam District Court.
- Kristina Maimann, Tallinn Administrative Court.
- Sofia Maravelaki, Athens Administrative Court of Appeal.
- Pedro Marques, Lisbon Administrative Court.
- Brian Murray, Court of Appeal of Ireland.
- Anne Nenonen, Supreme Administrative Court of Finland.
- Fernando Nieto Martín, Supreme Court of Spain.
- Gianmario Palliggiano, Administrative Regional Court of Campania.
- Engert Pellumbi, Supreme Court of Albania.
- Andrea Piletta Massaro, Turin Court of Appeal.
- Imre Robotka, Budapest Metropolitan Court.
- Kristina Senjak Krunić, Zagreb Administrative Court.
- Aikaterini Serafeimi, Athens Administrative Court of Appeal.
- Enerjeta Shehaj, Tirana First Instance Administrative Court.
- Ewa Stefanska, Supreme Court of Poland.
- Rogier Stijnen, Rotterdam District Court.
- Magda Teppey, Ljubljana Court of Appeal.
- Dalia Visinskiene, Supreme Administrative Court of Lithuania.
- Anne-Marie Witters, Brussels Market Court.

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